

## APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Mya Bu.

1933

June 20.

A.T.K.P.L.M. MUTHIAH CHETTYAR<sup>6</sup>

vs.

THA ZAN HLA AND OTHERS.\*

*Abatement of Suit—Preliminary decree—Defendant's death after preliminary decree—Civil Procedure Code (Act V of 1908), Order 22, rule 4.*

Where a preliminary decree has been passed and no application has been made within ninety days from the date of the death of a defendant who has died after the passing of the preliminary decree to bring his legal representatives on the record, the suit does not abate as against the deceased defendant. Order 22, rule 4 of the Civil Procedure Code has no application in such a case.

*Nazir Ahammad v. Tamijadi*, I.L.R. 57 Cal. 285; *Perumal Pillay v. Perumal Chetty*, I.L.R. 51 Mad. 701—*followed*.

*Lachmi Narain v. Balmakund*, I.L.R. 4 Pat. 61—*referred to*.

*Anmol Singh v. Hari Shankar*, I.L.R. 52 All. 910—*dissented from*.

*P. K. Basu* for the appellant.

*Sein Tun Aung* for the respondents.

DAS, J.—In this case the appellant Muthiah Chettyar obtained a preliminary mortgage decree against Nga Pein and Messrs. Steel Bros. & Co., Ltd., on the 9th August, 1930. It appears that Nga Pein died on the 23rd November, 1930, and no application was made to add his legal representatives in his place within ninety days after his death.

The question to consider in this appeal is whether Order XXII, rule 4 applies to a case where a preliminary decree has been passed, and whether, when no application has been made to add the legal representatives of a deceased defendant within ninety

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\* Civil Misc. Appeal No. 199 of 1932 from the order of the District Court of Akyab in Civil Execution Case No. 11 of 1931.

days, the suit shall abate as against the deceased defendant.

After a decree has been passed there can be no question, of any right to sue surviving, because the right to sue has already been merged in the decree. I do not think that Order XXII, rule 4 applies where a preliminary decree has been passed, and the suit does not abate as against the deceased defendant. In this connection I may refer to the judgment of their Lordships of the Privy Council in the case of *Lachmi Narain Marwari v. Balmakund Marwari* (1). At page 66 of the judgment their Lordships observed as follows :

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced."

These observations are not in any sense limited and apply to all decrees. When a preliminary decree has been passed it is difficult to see how the death of a party subsequent to the passing of a preliminary decree can wipe out the decree if his legal representatives were not brought on the record within three months, and enable the Court to dismiss the suit. I may also refer here to a Full Bench decision of the Madras High Court, *Perumal Pillay v. Perumal Chetty* (2), where their Lordships held that Order XXII, rules 3 and 4 of the Civil Procedure Code do not apply to cases of the death of parties after the passing of a preliminary decree. A similar decision was passed by the Calcutta High Court in the case of *Nazir*

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(1) (1924) I.L.R. 4 Pat. 61.

(2) (1928) I.L.R. 51 Mad. 701.

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*Ahammad v. Tamijadi Ahammad Howladar* (1), where their Lordships held that

"no abatement of a suit takes place when a plaintiff dies after a preliminary decree is passed in a mortgage suit, and no application for substitution of his heirs is made within the time limited by law."

A contrary view has been taken by the Allahabad High Court in the case of *Anmol Singh v. Hari Shankar* (2). With due respect to the Judges who decided that case I must say that I do not agree with the reasoning of the learned Judges in that suit. I cannot understand how after a decree has been passed the question of the right to sue can arise. The suit has been merged in the decree, and that being so, in my opinion, Order XXII, rule 4 cannot apply to a case where a preliminary decree has been passed, and the suit cannot abate because no application has been made to add the legal representatives of a deceased defendant within time.

The appeal must be allowed and the order of abatement set aside, and the legal representatives of the deceased defendant must be substituted in place of the deceased defendant. The appellants will get their costs. Advocate's fee five gold mohurs.

MYA BU, J.—I concur in the order proposed by my learned brother.

The question for consideration is whether in a mortgage suit for sale the suit abates on account of the omission on the part of the plaintiff to apply to bring on the record the legal representatives of a defendant who dies after the passing of the preliminary decree and before the final decree is passed. It turns upon whether Order XXII, rule 4, of the Civil Procedure Code applies to the case or not.

(1) (1929) I.L.R. 57 Cal. 285.

(2) (1930) I.L.R. 52 All. 910.

In *Perumal Pillay v. Perumal Chetty and another* (1) a Full Bench of the Madras High Court held that Order XXII, rules 3 and 4, Civil Procedure Code, do not apply to cases of the death of parties to a mortgage suit after the passing of the preliminary decree. In arriving at this conclusion the learned Judges adopted the principle underlying the case of *Lachmi Narain Marwari v. Balmakund Marwari* (2) in which their Lordships of the Privy Council held :

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"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

The decree before their Lordships was one for partition passed by the High Court on appeal by consent of the parties, and was in the following terms :

"The whole property will be divided into four equal shares, of which the plaintiff will get one. Shew Narayan Marwari, however, will be entitled to retain the property which is now in his possession on payment in cash of any amount by which his share will be found by the lower Court to exceed the value of one-fourth share of the whole property. In the event of the property now in possession of Shew Narayan being found to be less than the value of one-fourth share of the whole property, he will be entitled to receive an amount by which this property is found less than the value of one-fourth share."

Upon the passing of this decree the suit was remitted to the Subordinate Judge in order that the necessary steps for effecting a partition of the undivided property into fourths, and that the valuation of the eldest brother's share might be taken. The Subordinate Judge then fixed a day for hearing the parties and gave them notice, but as neither the plaintiff nor his pleader appeared on the day fixed the Subordinate Judge dismissed the suit for want of further prosecution.

(1) (1928) I.L.R. 51 Mad. 701.

(2) (1924) I.L.R. 4 Pat. 61.

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A decision similar to that of the Full Bench of the Madras High Court was passed by the Calcutta High Court in *Nazir Ahammad v. Tamijadi Ahammad Howladar* (1). But a Bench of the Allahabad High Court in *Anmol Singh and others v. Hari Shankar* (2) has held that the death of a party after the passing of a preliminary decree may cause an abatement of the suit under Order XXII, rule 4. The learned Judges considered that the principle underlying the decision of the Privy Council in *Lachmi Narain Marwari v. Balmakund Marwari* (3) did not apply to the case before them. With all respect to the learned Judges I am unable to see any distinction in principle between a decree such as the one in *Lachmi Narain Marwari's* case and a preliminary decree for sale in a mortgage suit. In either case—to quote the words of their Lordships of the Privy Council—“The parties have acquired rights and incurred liabilities which are fixed.”

A preliminary decree in a mortgage suit declares the amount due to the plaintiff on account of principal and interest and costs calculated up to the date of the decree, and where interest is payable, declares the rate of interest to be paid until realisation. Then it says that if the defendant pays the amount so decreed into Court on or before a particular date the plaintiff should deliver the documents, and, if required, transfer the property to the defendant, and, if necessary, give possession. It directs that in default of such payment the property be sold and then gives liberty to the plaintiff to apply for a personal decree for the balance, if any. It will, therefore, be seen that by the time of the passing of a preliminary decree in

(1) (1929) I.L.R. 57 Cal. 285. (2) (1930) I.L.R. 52 All. 910.

(3) (1924) I.L.R. 4 Pat. 61.

a mortgage suit all the questions in issue between the parties have been adjudicated upon, and at the time of the plaintiff's application for a final decree, if any, the only question that arises is whether there has been payment as directed by the preliminary decree or not. By a comparison of the terms of an ordinary mortgage decree for sale and those of the decree in *Lachmi Narain Marwari v. Balmakund Marwari* (1) it will be seen that in the former there is much less to be done towards the passing of the final decree than in the latter. The substantive rights and liabilities of the parties are finally determined by the preliminary mortgage decree. The plaintiff's right to sue has accordingly been merged in the preliminary decree, and I fail to see how the question of the survival of the right to sue can arise after the preliminary decree has been passed.

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## CRIMINAL REVISION.

*Before Mr. Justice Mya Bu and Mr. Justice Dunkley.*

### KING-EMPEROR v. V. MOHAMED.\*

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*Criminal Procedure Code (Act V of 1898), s. 388—Sentence of nominal imprisonment with fine—Time given to pay fine—S. 388 (2), applicability of.*

Where a sentence of imprisonment is passed in addition to a sentence of fine, even if the sentence of imprisonment is a nominal sentence only, the provisions of s. 388 of the Criminal Procedure Code have no application, and the Court has no power to grant time to pay the fine and suspend the execution of the sentence of imprisonment in default of payment of fine.

The provisions of s. 388 (2) refer to an order made by a criminal Court for the payment of money, but which is not a punishment inflicted on an offender for an offence.

*Tun Byu* (Assistant Government Advocate) for the Crown.

\* Criminal Revision No. 311A of 1933 from the order of the Second Additional Magistrate of Bogale in Criminal Trial No. 9 of 1933.

(1) (1924) I.L.R. 4 Pat. 61.