

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice West and Mr. Justice Pinhey.

1877.
July 5.

MORESHWAR BA PUJI PHA'TAK (APPLICANT) v KUSHA'BA' SHANK-ROJI AND ANOTHER (OPPONENTS).*

Code of Civil Procedure (Act VIII. of 1859), Section 73—Act XXIII. of 1861, Section 11—Conveyance subsequent to a decree in appeal—Death of the party executing the conveyance—Admissibility of the purchaser to carry on a special appeal.

- A sued B in the Court of first instance, and obtained a decree declaring A's right to a house. The District Court, in appeal, reversed this decree and rejected A's claim. The High Court reversed the decree of the District Court, and remanded the appeal. The District Court, on remand, made a decree confirming the original decree of the Court of first instance in A's favour. Subsequently to the last-mentioned decree of the District Court, B sold the house to C. B then preferred a special appeal to the High Court, but died before it was heard.

Held, under Act VIII. of 1859, that C could not carry on the special appeal after B's death.

THIS was an application made by Moreswar Bápuji Phátak to be admitted as a special appellant in succession to the defendant Pitámbardhári, who died after filing the special appeal in the High Court.

The plaintiffs Kushábá and Rámji sued the defendants Pitámbardhári and Govindráv to establish their proprietary right to a house. The Court of first instance gave a decree in the plaintiffs' favour. The Assistant Judge of Puna, Mr. Ayerst, reversed that decree, and rejected the plaintiffs' claim as being barred by lapse of time. The High Court in special appeal remanded the cause for re-trial on the merits. Mr. Hosking, the then Assistant Judge of Puna, on remand from the High Court, confirmed the decree of the Court of first instance, awarding the plaintiffs' claim on the 13th of April 1875. The original defendant, Pitámbardhári, after the passing of this decree, *i.e.*, on the 30th April 1875, conveyed the house—the subject of the litigation—to the applicant Moreswar. He then filed a special appeal, but, before it came on for hearing, he died.

Moreswar, the purchaser, therefore applied to have his own name substituted in succession to that of Pitámbardhári.

* Civil Application No. 79 of 1877.

The High Court granted a rule *nisi* to show cause why Moreswar's application should not be complied with.

Bahiravnáth Mangesh showed cause:—Persons who are not before the Court can be made parties only under section 73 of Act VIII. of 1859. This section refers to a suit during its pendency. If the only special appellant on the record dies, leaving no heirs, there is an end of the cause, section 102. The provision of the Code in section 208, in respect of transference of a decree by assignment or by operation of the law, refers to decree-holders, not to persons in the position of the defendant Pitámbardhári, against whom a decree has been passed. In *Gajádhár Prasad v. Ganesh Tewari* ⁽¹⁾ Glover and Mookerjee, JJ., held that the purchaser of the right, title, and interest of a defendant had no right, as such, to appeal from a decree passed against the defendant. In *Judooputtee Chatterjee v. Chunder Kánt Bhuttacharjee* ⁽²⁾ Sir Barnes Peacock observed that "he was not aware of any section in Act VIII. of 1859 under which the Court was authorized to substitute Judooputtee's name for that of the original plaintiff;" though he remarked that under the Act the name of Judooputtee might possibly have been allowed to be added as a co-plaintiff. Again, in *Dhunnoo Sowdagur v. Sunnoo Bibeé* ⁽³⁾ it was held that a party who purchased the rights and interests of the plaintiffs after a suit had been dismissed was not entitled to appeal against the order of dismissal without joining the original plaintiffs as appellants. It is, therefore, submitted that the name of Moreswar cannot in this appeal be substituted for that of his deceased vendor Pitámbardhári.

Shántarám Náráyan in reply in support of the rule:—The cases cited are distinguishable from the present case in this, that in them the applicants sought to displace a party on the record, while in this the applicant claims to succeed his vendor.

[WEST, J.:—In *Hooper v. Smart*, ⁽⁴⁾ Vice-Chancellor Hall, speaking of persons taking for value, as purchasers, under residuary legatees, says: "They took only as purchasers and transferees of choses in action, and such purchasers and transferees are always exposed to great risk."]

(1) 7 Beng. L. R. 149.

(2) Calc. W. R. 309 Civ. Rul.

(3) 15 Calc. W. R. 106 Civ. Rul.

(4) L. R. 1 Ch. D. 90; see p. 89.

1877.

MORESHWAR
BA'PUJI
PHA'TAK
v.
KUSHA'BA'
SHANKROJI.

That case differs from the present, as it proceeds on the principle of *pendente lite nihil innovetur*. I mainly rely on the wording of section 11 of Act XXIII. of 1861 as furnishing an analogy. Again, if under section 73 of the Civil Procedure Code a purchaser could be added as a party and allowed to maintain an appeal, there seems to be no reason why the death of his vendor should deprive him of that privilege.

The judgment of the Court was delivered by

WEST, J. :—The question in this case is whether Moreshtar, a purchaser, subsequent to the decree against Pitámbardhári in regular appeal, can now, when Pitámbardhári has died, maintain a special appeal filed by Pitámbardhári for the reversal of the decree. It is contended by Mr. Shántárám that the purchaser under such circumstances is a representative of the deceased, entitled in that character to carry on the litigation through the several stages allowed by the Code of Civil Procedure, and he relies on the cases disposed of under section 11 of Act XXIII. of 1861 as furnishing an analogy by which the Court should be guided in disposing of Moreshtar's application in the present instance. Those cases, however, proceed always on the assumption that the points brought under adjudication in the judgment sought to be executed, have been finally disposed of. It is only questions arising in execution, and not thus previously disposed of, that have been allowed to be contested under section 11 of Act XXIII. of 1861. An objection, however valid, which might have been taken to a decree in regular appeal by means of a special appeal, is not allowed to be raised in the execution of a decree so as, by the introduction of new interests, to deprive the decree of any part of its intended operation between the parties.

The admission of a purchaser of a property in litigation as an additional defendant under section 73 of the Code of Civil Procedure, which has been allowed in several cases, would, no doubt, according to the usual practice, entitle him to maintain an appeal; but this admission itself, after the nature of the litigation and the questions to be disposed of have been settled by the statements of the original parties, must, we think, be looked on as a privilege or indulgence upon which an argument is not to be

founded for an extension of the rule as embodying a general principle to other apparently analogous cases. The suit as brought in the present case did not touch any interest of Moreshwar's, and such an extension as is here proposed has not hitherto been made of the right of appeal on account of newly-constituted interests ; or, if it has, no instance of it has been cited to us.

We are of opinion that the language employed by Sir T. Plumer, M.R., in *Metcalf v. Pulvertoft* ⁽¹⁾ and cited by the Chief Justice of this Court in *Báláji Ganesh v. Khushálji*, ⁽²⁾ though capable of being explained away in a somewhat different sense, may yet be applied, and properly applied, to the particular case now before us. He speaks of the conveyance *pendente lite* "having no effect, with reference to any beneficial result against the plaintiff in that suit;" and it is clear that the purchaser in this case would, as against the plaintiff, derive a "beneficial result" from his purchase if allowed to retain the house awarded to the plaintiff, and to prosecute a special appeal, or force the plaintiff to a compromise in order to save the expense of litigation. At the time of Moreshwar's purchase, Pitámbardhári's alleged right as owner had been pronounced against by a Court of competent jurisdiction. What remained to him was a right to challenge that decision by a special appeal. In purchasing this right, Moreshwar, we think, purchased it, subject to the chance of the plaintiff's title becoming unimpeachable on account of Pitámbardhári's failing through death to make or carry on the possible appeal, not a right after Pitámbardhári's death to continue the litigation on his own account. The property sued for, if it did not become *res litigiosa* in the full sense of the Roman Law so soon as the parties were at issue, was yet, we think, so bound when a decree had awarded it to the plaintiff, that it could not effectively be assigned to a third party so as to give a new term of life to the litigation, which, in the absence of the assignment, would have died with Pitámbardhári. By his purchase, Moreshwar could acquire an equitable right operating against Pitámbardhári's conscience when the means of satisfying it should come into

1877.

MORESHWAR
BA PUJI
PEA'TAK
v.
KUSHA'BA'
SHANKROJI.

(1) 2 V. & B. 200 ; see p. 205.

(2) 11 Bom. H. C. Rep. 24 ; see p. 28.

1877.

MORESHWAR
BA PUJI
PHATAK
v.
KUSHA'BA'
SHANKROJI.

Pitámbardhári's power, but none against the plaintiff, a stranger to the bargain and Pitámbardhári's antagonist. The conclusion we have arrived at is, we think, to some extent at least, supported by the observations of Hall, V.C., in the case of *Hooper v. Smart*, (1) although that case was itself, no doubt, quite different from one now before us.

We, therefore, reject the application with costs.

Application rejected.

(1) L. R. 1 Ch. D. 98.

Note.—Section 372 of the new Civil Procedure Code (Act X. of 1877) seems intended to meet such a case as the above, but would not apply in the case of a suit instituted or appeal presented before 1st October 1877: see Act X. of 1877, sections 1 and 3.

[APPELLATE CIVIL.]

Before Mr. Justice Melwill and Mr. Justice Pinhey.

September 12. JAGJIVAN NANA'BHA'I (APPLICANT) v. SHRIDHAR BALKRISHNA NAGARKAR (OPPONENT).*

Injunction—Mortgage—Power of sale.

When property mortgaged is situated in the mofussal, but the parties to the mortgage are resident in Bombay, and the instrument of mortgage is in the English form, the parties must be held to have contracted according to English law, and to be entitled to enforce their rights according to that law. In such a case the mortgagees can exercise a power of sale contained in the mortgage deed, and cannot be restrained from exercising such power, merely because the mortgagor has filed a suit for redemption. The mortgagor can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage.

THIS was an appeal from an order made by Ráv Báhádur Vishnu M. Bháide, Subordinate Judge of Tháná, at Násik.

The facts of the case, in so far as they are material to this report, are as follows:—

On the 15th of June 1871 one Shridhar Bákrishna Nagarkar, an inhabitant of Bombay, executed in the regular English form a deed of mortgage to Jagjivan Nanábhái, also of Bombay, mortgaging to the latter two salt-pans belonging to him and situated at Bombay, in the Tháná District, for a sum of Rs. 9,000. On the

* Misc. Ap. No. 11 of 1877.