

in favour of the appellants and only three amongst Jats and three amongst other tribes against the appellants, there can be no question but that it has been established on the record that daughters do not succeed to the self-acquired land of their father amongst Jats of Phillaur tahsil of the Jullundur district in preference to second degree collaterals.

For the reasons given I would accept the appeal and decree the plaintiff-appellants' claim with costs of this Court, parties bearing their own costs in the trial Court, and in the lower appellate Court.

ABDUL RASHID J.—I agree.

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ADDISON J.
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Appeal accepted.

REVISIONAL CIVIL.

Before Addison and Abdul Rashid JJ.

HARI CHAND AND ANOTHER (PLAINTIFFS)

Petitioners

versus

DINA NATH (DEFENDANT), Respondent.

1936
April 15.

Civil Revision No. 758 of 1935.

Civil Procedure Code, Act V of 1908, Order XXII, rules 3, 4 — Whether applicable to mortgage suit — where plaintiff dies after preliminary decree, but before final decree—Abatement.

Held, that the provisions of rules 3 and 4 of Order XXII of the Code of Civil Procedure have no applicability to a case where the plaintiff in a mortgage suit dies after securing a preliminary decree, but before the passing of the final decree.

Lachmi Narain Marwari v. Balmukand Marwari (1), relied upon.

Other case-law, discussed.

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Petition for revision of the order of Sardar Har Charan Singh Bhandari, Subordinate Judge, 4th Class, Amritsar, dated 11th July, 1935, holding that the suit abates.

AMAR NATH CHOPRA, for Petitioners.

JHANDA SINGH, for Respondent.

This case came on for hearing in the first instance before Jai Lal, J. who made the following order of reference, dated 19th February, 1936 :—

JAI LAL J. JAI LAL J.—A preliminary decree for sale of mortgaged property was passed in favour of Gian Chand, but before a final decree could be passed Gian Chand died and his legal representative was not brought on the record for about nine months after his death.

The question involved in this petition for revision is whether the legal representative of Gian Chand should have been brought on the record within the time prescribed for substituting legal representatives under Order 22, rules 3 and 4, or whether these rules have no application to cases where the plaintiff dies after the preliminary decree. The decision of this question will probably depend upon whether the proceedings after the preliminary decree till the passing of the final decree are a continuation of the suit. It is contended on behalf of the petitioner that they are not and that an application for bringing on record the legal representative of a deceased plaintiff in such a case is governed by Article 181 of the Indian Limitation Act and that Order 22 has no application to such cases.

The cases discussed before me are those mentioned in the judgment of the learned Subordinate Judge.

It appears from them that there is a sharp conflict of opinion between the various High Courts. The Allahabad High Court supports the view of the learned Subordinate Judge while the majority of the other High Courts have taken the opposite view. No case fully applicable to the facts of the present case decided by this Court has been cited at the bar.

I consider that, under the circumstances, it is desirable that there should be a more authoritative pronouncement on this subject by this Court. I accordingly send this case to a Division Bench for decision.

I may note here that no objection has been raised to the substitution of the legal representatives of Bhagat Ram petitioner who had applied to be substituted in place of Gian Chand and who also has in the meantime died.

The judgment of the Division Bench was delivered by—

ABDUL RASHID J.—On the 10th of May, 1932, a preliminary mortgage decree was passed in favour of Gian Chand, but before a final decree could be passed Gian Chand died and no application to bring his legal representatives on the record was made for about 14 months after his death. On the 9th of January, 1935, an application was made by Bhagat Ram to the effect that he was the adopted son of Gian Chand, and that his name may be brought on the record as the legal representative of the deceased plaintiff. This application was opposed by the defendant. One of the objections of the defendant was, that as no application had been made by the legal representative of Gian Chand deceased within a period of three months the suit had abated. The learned Subordinate Judge held

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that as no application under Order 22, rule 3 of the Code of Civil Procedure was filed within the prescribed period by any of the legal representatives of Gian Chand the suit had abated. Against this decision Bhagat Ram has preferred a petition for revision to this Court.

The main contention urged on behalf of the petitioner was that Order 22, rules 3 and 4, have no application to cases where the plaintiff dies after a preliminary decree in a mortgage suit has been passed in his favour, and that an application for bringing on the record the legal representative of a deceased plaintiff in such a case is governed by Article 181 of the Indian Limitation Act. Reliance was placed in this connection on a ruling of their Lordships of the Privy Council, reported as *Lachmi Narain Marwari v. Balmukand Marwari* (1). In the case referred to above the High Court on appeal had made an order by consent for partition in certain terms and had remitted the suit to the Subordinate Judge for disposal under the decree. Upon the plaintiff failing to appear on the day appointed by the Subordinate Judge for the matter to be proceeded with, he made an order dismissing the suit under Order 17, rule 2 of the Civil Procedure Code. It was observed by their Lordships that 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. It was further held that in dismissing the suit under Order 17, rule 2 of the Code of Civil Procedure the Subordinate Judge passed an order which

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

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he had no jurisdiction to make, and that the High Court was, therefore, justified in the exercise of its powers of revision under section 115 of the Code of Civil Procedure in reversing such an order. A Full Bench of the Madras High Court held in *Perumal Pillai v. Perumal Chetty* (1), that Order 22, rules 3 and 4 of the Civil Procedure Code, do not apply to cases of death of parties after the passing of a preliminary decree in a mortgage suit. It was observed in the judgment that "action" means "right of action" and that if that is the true way of looking at the matter the right of action is determined at the time of the passing of the preliminary decree in a mortgage suit, and that the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree. It was held in *Nazir Ahammad v. Tamijaddi Ahammad Howladar* (2), that no abatement of the suit takes place when a plaintiff dies after the preliminary decree is passed in a mortgage suit and no application for substitution of his heirs is made within the time limited by law. Order 22, rule 3 of the Code of Civil Procedure has no application in such cases. Reliance was placed in the Calcutta case chiefly on the ruling of their Lordships of the Privy Council in *Lachmi Narain Marwari v. Balmukand Marwari* (3). It was pointed out that the observations of their Lordships are applicable in principle to a mortgage suit where the plaintiff dies after securing a preliminary decree in his favour. It was held in *A. T. K. P. L. M. Muthiah Chettyar v. Tha Zan Hla* (4), that where a preliminary decree has been passed and no application has been made within 90 days from the date of the death of a defendant, who

(1) (1928) I.L.R. 51 Mad. 701 (F.B.). (3) (1924) I.L.R. 4 Pat. 61 (P.C.).
(2) (1930) I.L.R. 57 Cal. 285. (4) (1933) I.L.R. 11 Rang. 446.

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had 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 Code of Civil Procedure has no application in such a case. Similar observations were made in *Rahim Bakhsh v. Walaiti Ram* (1), *Bapu v. Gulabchand* (2) and *Kalu Ram v. Gya Din* (3).

A contrary view was expressed by a Division Bench of the Allahabad High Court in *Anmol Singh v. Hari Shankar* (4). It was held in that case that a mortgage suit does not terminate by the passing of a preliminary decree, but continues till it is finally and completely disposed of by the passing of the final decree. It was further observed that in these circumstances the death of a party after the passing of the preliminary decree may cause an abatement of the suit under Order 22, rule 4 of the Code of Civil Procedure. The Privy Council ruling reported as *Lachmi Narain Marwari v. Balmukand Marwari* (5) was distinguished on the ground that it was not absolutely essential in a partition suit to pass a preliminary decree before passing a final decree, and that it was not apparent from the decision of their Lordships whether they regarded the consent decree passed in that case as a preliminary decree or a final decree. With all respect we are of opinion that the Allahabad view is not in accordance with the law as laid down by their Lordships of the Privy Council. The case dealt with by their Lordships was remitted to the Subordinate Judge by the High Court so that necessary steps for effecting the partition be taken. The

(1) 1930 A. I. R. (Lab.) 320.

(3) 1927 A. I. R. (Oudh) 561.

(2) 1929 A. I. R. (Nag.) 142 (F.B.).

(4) (1930) I. L. R. 52 All. 910.

(5) (1924) I. L. R. 4 Pat. 61 (P. C.).

compromise decree was, therefore, undoubtedly a preliminary decree and the partition by metes and bounds was to be carried out before a final decree could be passed. There is no distinction in principle between a decree such as the one in *Lachmi Narain Marwari v. Balmukand Marwari* (1) and a preliminary decree for sale in a mortgage suit. In either case a preliminary decree determines the rights of the parties and the subsequent proceedings are merely of a subsidiary character. The Sind Court has taken the same view as the Allahabad High Court in *Tulsidas Keshowdas v. Ramzan Abdulla* (2) in respect of the point involved in the present petition. The Privy Council case *Lachmi Narain Marwari v. Balmukand Marwari* (1) has not been referred to in the Sind ruling.

We are of opinion that the principle of law enunciated by their Lordships of the Privy Council in *Lachmi Narain Marwari v. Balmukand Marwari* (1) is fully applicable to the facts of the present case and that the provisions of rules 3 and 4 of Order 22 of the Code of Civil Procedure have no applicability to a case where the plaintiff dies after securing a preliminary decree and before the passing of the final decree in a mortgage suit. We respectfully agree with the view expressed by the Calcutta, Madras, Rangoon and the Lahore High Courts and Nagpur and Oudh Courts in this respect, and with all respect dissent from the view expressed by the Allahabad High Court and the Sind Court.

For the reasons given above we accept this petition for revision, set aside the order of the trial Court, dated the 11th July, 1935, to the effect that

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(1) (1924) I. L. R. 4 Pat. 61 (P.C.). (2) 1926 A. I. R. (Sind) 20.

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the suit had abated, and remit the case to the learned Subordinate Judge with the direction that he will proceed to dispose of the application presented by Bhagat Ram, appellant, in the light of the observations made above. Parties will bear their own costs in this Court.

A. N. C.

Revision accepted.

APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

KESAR SINGH (DEFENDANT) Appellant

versus

SANTOKH SINGH AND ANOTHER
 (PLAINTIFFS)
 PARTAP SINGH AND ANOTHER
 (DEFENDANTS)

} Respondents.

1936
 April 21.

Civil Appeal No. 99 of 1936.

Hindu Law—Joint family ancestral business—Mortgage of ancestral immoveable property by the manager—for money required for the business—whether mortgagee bound to make further inquiry into the actual necessity.

Held, that in order to establish a valid necessity for the mortgage of ancestral immoveable property by the manager of a joint Hindu family, it was sufficient for the mortgagee to prove that the mortgagor had been carrying on the ancestral joint family business, and that the loan was advanced on his representation that the money was required for that purpose. It was not necessary for the mortgagee to make any further enquiry regarding the actual necessity for the mortgage debt.

Mussammat Champa v. Official Receiver, Karachi (1), *Ram Nath v. Chiranji Lal* (2), *Ramkrishna Muraji v. Ratan Chand* (3), *Niamat Rai v. Din Dayal* (4), and *Raghunathji Tarachand v. Bank of Bombay* (5), relied upon.

(1) (1934) 149 I. C. 693.

(3) (1931) 132 I. C. 613 (P.C.).

(2) (1935) I.L.R. 57 All. 605 (F.B.). (4) (1927) I.L.R. 8 Lah. 597 (P.C.).

(5) (1909) I. L. R. 34 Bom. 72.