APPELLATE CIVIL

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

1940 *February* 8

ABDUL MAJID AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* SHAMSHERALI FAKRUDDIN AND ANOTHER, OWNERS OF THE FIRM MULLA SARAFALLI MULLA KAMRUDDIN (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Indian Succession Act (XXXIX of 1925), s. 214—Construction—Suit by creditor—Death of plaintiff pending suit—Succession certificate not obtained—Consent decree—Subsequent suit to set aside decree—Decree not a nullity.

A Mahomedan creditor filed against his debtors a suit to recover money on a promissory note. Pending the suit, he died and his widow was brought on the record as his legal representative. The suit ended in a consent decree.

The debtors having brought the present suit to have it declared that the consent decree was not binding on them, *inter alia*, on the ground that no succession certificate was produced in the previous suit:

Held, that the omission of the Court to insist upon proper evidence, that is, the succession certificate, in the previous suit did not render the decree a nullity.

Santaji Khanderao v. *Ravji*,[1] referred to.

Section 214 of the Indian Succession Act, 1925, does not warrant the construction that it applies only when the suit is instituted by a legal representative of a deceased creditor and that it does not apply when it is brought by the creditor and pending the suit the creditor dies.

SECOND APPEAL from the decision of P. M. Lad, District Judge, West Khandesh, Dhulia, confirming the decree passed by H. C. Desai, Subordinate Judge, Nandurbar.

Suit for declaration.

In 1932, one Mahamad Abdulla (father of defendants Nos. 1 to 4 and husband of defendant No. 5) filed against Shamsherali and Fakaruddin (plaintiffs) a suit (No. 579 of 1932) to recover money due on a promissory note. Pending the suit, Mahamad died. On his death defendant No. 5 was brought on the record as his legal representative.

* Second Appeal No. 475 of 1937.

[1] (1890) 15 Bom. 105.

The parties then compromised the suit and a consent decree was passed. Defendant No. 5 did not obtain any succession certificate.

Subsequently defendant No. 5 took out execution when the present plaintiffs contended that the decree could not be executed against them for want of a succession certificate.

The plaintiffs having been referred to a separate suit, they filed the present suit to have it declared that the decree in suit No. 579 of 1932 was obtained by fraud and hence the same was not binding on the plaintiffs, it being alleged that some of the heirs of Mahamad were left out and that no succession certificate was produced.

Defendants contended that the present plaintiffs knew at the time of the passing of the consent decree that the father Mahamad was not alive, that the plaintiffs were estopped from contending that all the legal representatives were not brought on the record, and that the decree was not obtained by fraud.

The trial Judge dismissed the suit, holding that fraud was not proved and that the plaintiffs were estopped from challenging the validity of the decree.

On appeal, the learned District Judge allowed the appeal and decreed the plaintiffs' suit, holding that the decree was a nullity since no succession certificate was produced in the previous suit.

Defendants appealed.

I. I. Chundrigar, for *M. E. Patel*, for the appellants.

M. G. Chitale, for respondent No. 2.

BEAUMONT C. J. This is a second appeal against a decision of the District Judge of West Khandesh.

The plainiffs sued to have it declared that the decree obtained by the defendants in suit No. 579 of 1932 was

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obtained by fraud and was not binding on the plaintiffs. The issue of fraud was decided against the plaintiffs. But a second point was taken in the plaint that the decree should be declared null and void on the ground that no succession certificate was produced. The learned Subordinate Judge dismissed the suit. He was of opinion that although no succession certificate was produced, that was a mere irregularity which did not vitiate the decree, and he also expressed the opinion that the necessity for a succession certificate, being for the benefit of the debtor, could be waived. The decree, which is sought to be set aside, was a decree for money, and was a consent decree. In appeal the learned District Judge reversed the judgment of the trial Court on the ground that the omission to obtain a succession certificate was an illegality which vitiated the judgment, and he made a declaration that the decree was a nullity and was not binding on the defendants.

Section 214 of the Indian Succession Act, 1925, provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, except on the production, by the person so claiming, of, amongst other things, a succession certificate. In this case the suit was started by a creditor who died pending the suit, and his legal representatives were brought on record under O. XXII of the Civil Procedure Code, but a succession certificate was admittedly not obtained.

The first point argued by Mr. Chundrigar for the appellants is that s. 214 of the Indian Succession Act does not apply where the suit was originally instituted by the creditor himself, but only applies where it is instituted by his legal representative. He says that the position of a creditor-plaintiff dying in a pending suit has to be dealt with under O. XXII. In my opinion, there is no substance whatever

in that argument. Where a plaintiff dies, his legal representatives have to be brought on record under the provisions of O. XXII, and if that is not done, the suit abates. But s. 214 of the Succession Act comes into operation only when the Court is called upon to pass a decree; on that date there must be a succession certificate, otherwise the plaintiff is not entitled to judgment, and I can see no force in the argument that that construction of s. 214, which is in accordance with the plain language of the section, is inconsistent with the provisions of O. XXII, r. 5, which enable a Court to decide who are the legal representatives. That has nothing to do with the obtaining of a succession certificate in the particular type of suit which is referred to in s. 214.

The next point taken is that, assuming that there should have been a succession certificate, the omission to obtain one did not affect the jurisdiction of the Court and did not render the decree a nullity. I am not prepared to go as far as the learned trial Judge in saying that the necessity for obtaining a succession certificate can be waived by the parties. The obligation is not merely one in favour of the debtor; it benefits also those interested in the deceased's estate by requiring that moneys forming part of the estate shall only be paid to a person who has been considered suitable for the grant of a succession certificate. But I am not prepared to agree with the learned District Judge's view that the omission to obtain a certificate renders the decree a nullity. In effect s. 214 of the Indian Succession Act requires the Judge to insist upon certain evidence in support of the plaintiff's claim before passing a decree, but the omission to obtain such evidence cannot, in my opinion, affect the jurisdiction of the Court to try the suit. The provisions of s. 214 of the Indian Succession Act are no more peremptory than the provisions of s. 35 of the Indian Stamp Act, or s. 49 of the Indian Registration Act, which forbid the Court to receive certain documents in evidence. If the

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Court does, in breach of those provisions, improperly receive documents in evidence, that is an error which can be corrected in appeal, but it does not render the decree a nullity. In the same way the omission to obtain a succession certificate is good ground of appeal, but if the decree is not appealed from, in my opinion it remains a valid decree and cannot be regarded as a nullity.

In the present case the decree no doubt was a consent decree and therefore not appealable, and the learned Judge ought to have refused to pass a consent decree in the terms asked for unless a succession certificate was produced. That was decided by this Court in *Santaji Khanderao* v. *Ravji*;[1] but I am unable to agree with the learned District Judge that the omission of the learned trial Judge to insist upon proper evidence renders his judgment a nullity. Even if we had been prepared to make a declaration that the decree passed was a nullity, the only result would have been that the case would have had to go back to the original Court which passed the decree in order that it might pass a valid decree, because the suit being before it and the Court having jurisdiction, the Court was bound to pass a decree and not pass something which was a nullity. As the plaintiffs could obtain a succession certificate before the suit reached the trial Court, the appellants would not gain much by a declaration that the decree was a nullity. However, in my opinion, they are not entitled to such a declaration.

The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

SEN J. I agree.

Appeal allowed.

Y. V. D.

[1] (1890) 15 Bom. 105.