Md. Abdur Rohim and Others Vs D. Ezekiel

Court: Calcutta High Court

Date of Decision: July 23, 1935

Judgement

Panckridge, J.
The Plaintiffs are the minor sons and legal representatives of one Massamut Jamila Khatoon deceased. Jamila was the

owner of a 7/80th share in certain immovable properties, some situated within and some outside the jurisdiction of the Court.

2. On August 29th, 1929, Jamila and her co-sharers mortgaged these properties to the first Defendant David Ezekiel.

2. On August 16th, 1930, the first Defendant instituted suit No. 1921 of 1930 in this Court to enforce the mortgage against the mortgagors

including Jamila.

3. On July 22nd, 1931, a preliminary mortgage decree was made.

4. On September 15th, 1982, Jamila died leaving her surviving her two minor sons, the present Plaintiffs, and a minor daughter who has since died.

During Jamila"s life time her husband Khaliloon Nabikhan divorced her.

5. On November 28th, 1982, the first Defendant obtained a final mortgage decree in ignorance of the death of Jamila and without having had her

legal representative brought on the record.

6. On November 15th, 1933, one of the other mortgagors informed the first Defendant"s attorneys of Jamila"s death, and they in January, 1934,

called upon the husband, mother, and sister, of Jamila to take out representation to her estate.

7. No steps were taken by Jamila"s relations, and on January 23rd, 1934, one Rash Behary Pal as nominee of the first Defendant applied under

sec. 251 of the Indian Succession Act, to be appointed Administrator pendente lite of the estate of Jamila. No citation was issued upon the present

Plaintiffs of whose existence the first Defendant was not aware.

8. On January 24th, 1934, the grant was made to Rash Behary Pal who was substituted for Jamila on February 13th, 1934.

9. On May 12th, 1934, the mortgaged properties were sold by the Registrar and purchased by the first Defendant who had obtained leave to bid.

Inasmuch however as the reserve price was not reached, the sanction of the Court was necessary and this was obtained on July 4th, 1934.

10. The present suit was Instituted ton, August 24th, 1934, against the first Defendant as the mortgagee and purchaser of the mortgaged properties

and against Jamila''s co-mortgagors as pro-forma Defendants.

11. The Plaintiffs ask that the final mortgage decree of November 28th, 1932, and the sale of May 12th, 1934 be set aside as against them and

that they be at liberty to redeem the mortgage debt.

12. The facts are not now challenged and the arguments of Counsel have been wholly concerned with the legal validity of the proceedings

subsequent to the death of Jamila.

13. On the Plaintiff''s behalf it is submitted that a decree against a person who is dead at the time of making it is a nullity. As a general proposition

of law this is not disputed. The cases which lay it down are conveniently collected in Jungli Lal v. Laddu Ram Marwari 4 P. L. J. 240 (1919). That

was a decision of a Full Bench of the Patna High Court pronounced in 1919. There also a mortgagor Defendant died after the preliminary decree,

and a final decree for sale was made without making his legal representatives parties to the suit. After the final decree the representatives, were

entered on the record in the execution case as judgment-debtors. When the latter objected to the execution of the decree on the ground that it was

a nullity, at any rate as against their predecessor-in-title, it was urged upon the authority of Kalipada Sarkar v. Hari Mohan Dalal I. L. R. 44 Cal

627 : s. c. 21 C. W. N. 1104 (1916), that the executing Court could not consider this aspect of the matter but was bound to execute the decree as

it stood. The Full Bench declined to accept this contention and emphasized the distinction between decrees that are voidable, that is to say, valid

until set aside, and decrees void ab initio. The Court further held that in a mortgage suit the preliminary decree was not ""the conclusion of the

hearing ""within the meaning of Or. XXII, r. 6, C. P. C., in the sense that when a Defendant dies in the interval between the preliminary and final

decrees, he can properly be said to have died between the conclusion of the hearing and the pronouncing of judgment.

14. I should mention that Jungli Lal v. Laddu Ram Marwari 4 P. L. J. 240 (1919) is the only case to which my attention has been drawn, where,

as in the case before me, a final mortgage decree had been made against a deceased Defendant. The authority of Jungli Lal v. Laddu Ram

Marwari 4 P. L. J. 240 (1919) is said to be weakened by the subsequent judgment of the Judicial Committee in Luchmi Narain v. Balmukund L.

R. 51 I. A. 321 : s. c. I. L. R. 4 Pat. 61 (1925). In that case the High Court on appeal had made an order by consent for a partition on certain

terms and remitted the suit to the Subordinate Judge for disposal under the decree. It was held that the Subordinate Judge had no power to dismiss

the suit under Or. 17, r. 2, C. P. C., on the Plaintiff''s failure to appear on the day appointed by the Court. The passage relied on in the judgment

of the Board delivered by Lord Phillimore is 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 and until the decree is varied or set aside.

15. With great respect to the learned Judges who have been parties to subsequent decisions of Indian Courts, I am quite unable to understand how

this passage logically leads to the conclusions that appear to have been drawn from it.

16. In Perumal Pillay v. Perumal Chetty I. L. R. 51 mad. 701 (F. B.) (1928), the mortgagee Plaintiff died after the passing of the preliminary

decree: after the expiry of the period of limitation for such an application, the Plaintiff''s representative applied to set aside the abatement of the suit.

The Full Bench, overruling a previous decision [Reference is to I. L. R. 45 Mad. 872 (1928).-- Rep.] of the Madras High Court, held there had

been no abatement as Or, 22, r. 3 had no application to the case. Although r. 4 of the same order was referred to, its terms were clearly irrelevant,

as there was no question of the death of a Defendant. Referring to Lachmi Narain v. Balmukund L. R. 61 I. A. 321: s. c. I. L. R. 4. Pat. 61

(1925), Coutts-Trotter, C.J., observes :--

Without discussing that case in detail, it seems clearly to proceed on the basis that a preliminary decree determines the rights of the parties, and that

the rest, whatever it be, assessment of damages, working out of accounts and so forth, is a mere subsequent defining of the effect that is to be

given to the declaration of right which is contained and finally determined (subject of course to appeal) in the preliminary decree.

17. This decision was followed by a Division Bench of this Court, Nazir Mahomed v. Temijaddi Ahammed Howlader I. L. R. 57 Cal. 285 (1929).

That also was a case of a Plaintiff''s death subsequent to preliminary decree. An application by the representative of the deceased Plaintiff for a

final decree after the necessary substitution was held to be in order, inasmuch as the suit had not abated under Or. 22, r. 3, although more than

three months had elapsed from the date of the Plaintiff''s death.

18. I see nothing in either of these cases to compel me to decide that a final decree passed against a Defendant who has died after the passing of

the preliminary decree is valid.

19. Muthiah Chettyar v. Tha Zan Hla I. L. R. 11 Rang. 446 (1933) deals with the case of a deceased Defendant. The report is inadequate since it

contains nothing but the judgments, and the head-note. I think it can be inferred from the judgments, however, that no final decree had been made.

The judgment of Das, J., concludes :--

The appeal must be allowed and the order of abatement set aside and the legal representatives of the deceased Defendant substituted.

20. The decision is admittedly at variance with that of the Allahabad High Court in Anmol Singh v. Hari Sankar I. L. R. 52 All. 910 (1930) and to

my mind the reasoning in the latter case is to be preferred. I think if a final decree is to be held binding on the estate of a dead man, although when

it was passed his representatives had not been brought on the record, it must also be held that anything that is done in the suit subsequent to the

preliminary decree is by way of execution. To regard the application for final decree as a step in execution is in my judgment inconsistent with the

definition of ""decree"" in sec. 2 (2) of CPC and with the explanation thereto.

21. Moreover, to extend Lord Phillimore''s observations to mortgagee suits seems to me to leave out of consideration the fact that it cannot be

decided until the application for a final decree is made whether the mortgagor has effectively exercised his right to redeem, or whether the

mortgaged property is liable to be sold at the mortgagee''s instance.

22. Whatever be the position with regard to abatement, a final decree is in my opinion a decree, and as such subject to the ordinary rule that a

decree, as against a Defendant who was dead at the date it was made, is a nullity.

23. It only remains to consider what is the effect, if any, of the appointment of Rash Behary Pal as administrator pendente lite prior to the sale by

the Registrar. It is suggested that as the estate of Jamila was represented at that stage and as no objection was taken by the administrator in the

execution proceedings the question cannot be raised now. Alternatively it is said that if the Plaintiffs are aggrieved by the sale, their proper course is

to have the appointment of the administrator set aside and themselves substituted. When this has been done, it will be open to them to take steps in

the mortgage suit to have the sale of the mortgaged premises set aside.

24. I do not think that it is enough for the Plaintiffs to reiterate that the final decree was a nullity and of no legal effect. This means no more than that

it is not binding on the Plaintiffs even although it is not set aside or reversed. This however is a question of law and is subject to the general

principle that when a party has had a proper opportunity of raising an issue and has omitted to do so, he is precluded from raising that issue

thereafter.

25. Jungli Lal v. Laddu Ram Marwari 4 P. L. J. 240 (1919) shows that the question is one that can be raised by the legal representatives in the

execution proceedings.

26. On the whole I am of opinion that since the real question at issue is the validity and not the satisfaction of the decree, it can properly be raised

in an independent suit, and that the Plaintiffs should not be prejudiced by the fact that their interests were technically represented by the

administrator in the execution proceedings.

27. In these circumstances the Plaintiffs are entitled to the reliefs claimed and I make a decree in accordance with prayers The prayers in the plaint

were as follows :--

(a) That the final decree made on the 28th November, 1932, be get aside.

(b) The sale held on the 12th May, 1934, be set aside.

(c) Declaration that the decree and the sale in execution of the decree are not binding upon the Plaintiffs.

(d) That the Plaintiffs be given liberty to redeem the said mortgage debt.

(e) Injunction restraining the Defendant David Ezekiel from obtaining the sale certificate or possession of the said properties.

(f) Receiver, if necessary. (a) to (e) of the plaint.

28. Learned Counsel for the Defendants has asked me to fix the time within which the Plaintiffs will be at liberty to redeem. Counsel for the

Plaintiffs does not object to my fixing the time. Though I have some doubt whether such an order really falls within the scope of this suit, I fix the

time at three months from to-day. With regard to the costs, if the property is redeemed, the Plaintiffs will have the costs of the suit. If they fail to

redeem within the time specified, there will be no order as to costs.