

ALLAHABAD HIGH COURT

Ram Ugrah Ojha

Vs.

Ganesh Singh

(Ganga Nath, J.)

29.11.1939

JUDGMENT

Ganga Nath, J.

1. This is an appeal by the objectors and arises out of proceedings for preparation of the final decree under Order 34, Rule 5, Civil Procedure Code On 21st November 1925, a mortgage was executed by Tribhuwan Ojha, since deceased, in favour of Ganesh Singh, respondent. A suit was brought on this mortgage on 12th August 1930, and a preliminary decree was passed on 16th December 1930, on 1st September 1931 Tribhuwan died. On 28th April 1932, an application was made by the plaintiff to bring on the record Ram Ugrah Ojha, appellant 1, a brother of Tribhuwan, and Bhola Nath Ojha, appellant 2, son of Ram Ugrah Ojha, in place of Tribhuwan Ojha and for preparation of the final decree. The final decree was passed ex parte on 11th June 1932. This decree was ultimately set aside on 1st June 1933 on an application of the appellants. The appellants objected to the preparation of the final decree on the grounds that (1) the mortgaged property belonged to the joint family of which they and the deceased (Tribhuwan) were members, (2) that the objectors got the property by right of survivorship, and (3) that the mortgage not being for any legal family necessity was not valid and binding on the property. They also contended that they were not the legal representatives of the deceased. Both the lower Courts have held that the objectors are the legal representatives of the deceased and have brought them on the record; but they have held that it was not open to the objectors to raise these objections in the proceedings for the preparation of the final decree. The appellants relied on *Moti Bala Devi v. Satyanand Tirtha Swami*¹, while the respondent relied on *Kaloo v. Niader Singh*², The case was referred to the Full Bench on account of a conflict in these decisions. Section 2(11), Civil Procedure Code, defines a "legal representative." It lays down:

Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party going or sued.

2. The decree-holder applied to the Court to bring the objectors on the record as the deceased's heirs. It is not denied that the objectors are the legal heirs of the deceased.

¹ AIR 1930 All 348

² AIR 1929 All 252

They as such represent the estate of the deceased, and have consequently been brought on the record. There is no doubt that in a joint family the law of inheritance does not apply to the joint family property, and on the death of a co-parcener the property passes to the remaining co-parceners by right of survivorship, but even in a joint family a co-parcener may be possessed of separate property which will be governed by the law of succession. Learned counsel for the appellants relied on *Dwarka Das v. Krishan Kishore*³, There a suit was brought by two brothers, Jagan Nath and Dwarka Das, as members of an undivided family, in respect of joint family property. During the pendency of the appeal Jagan Nath died, and on his death an application was made under Order 22, Rule 3, Civil Procedure Code, that his brother Dwarka Das and his mother Mt. Puran Devi should be brought on the record as his legal representatives. It was contended that there was no such thing as succession properly so called, in an undivided Hindu family and on no construction of the term 'legal representative' could members of a joint Hindu family be brought within its definition as contained in Section 2(11), Civil Procedure Code This contention was accepted. As would appear from the facts stated above, the suit related to the joint family property and had been brought by two brothers as members of the joint family. It was rightly contended that in an undivided Hindu family the rules of succession did not apply to the property. In the present case the suit was brought against Tribhuwan Ojha not as a member of the joint family, but in his individual capacity. The objectors have been brought on the record not as members of the joint family and, as such, succeeding to the property, but as the legal heirs of the deceased, There is nothing in the case cited by the appellants to suggest that the law of succession does not apply to the separate property of a member of a joint Hindu family. The objectors being the legal heirs of the deceased have been rightly brought on the record as his legal representatives. As regards the defence open to the legal representatives, the law is very clear and is laid down in Order 22, Rule 4, Civil Procedure Code, as follows:

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

3. The objections which are raised by the appellants to the preparation of the final decree are not open to them as legal representatives of the deceased. They are raising these contentions in their personal capacity. The personal rights of the objectors and whatever remedy they may have in exercise thereof are not affected by the present decree. The decree will not bar their personal remedy because the defence which they might wish to raise in exercise of their personal rights is not open to them to raise in the present proceedings under Order 22, Rule 4, Civil Procedure Code In *Moti Bala Devi v. Satyanand Tirtha Swami*⁴, on which reliance is placed by the

appellants, it was observed:

While under ordinary circumstances the provisions of Order 34, Rule 5, Civil Procedure Code, being imperative in their character should be followed but taking them with the provisions of Order 22, Rule 4(2), Civil Procedure Code, it is clear to us that the legal representative is at liberty to take any defence which may be appropriate to his character as the legal representative of the deceased defendant.

³ AIR(1921) Lah 34

⁴ AIR 1930 All 348

Satyanand Swami having been found to be the mahant of the 'math,' to which the mortgaged property appertains, is bound to protect the interest of the 'math' and is entitled to oppose further proceedings being taken for the enforcement of the invalid mortgage deed executed by his predecessor-in-office.

4. There a preliminary decree was passed against Kalkanand Swami, "mahant" of a temple situated in Benares. He died shortly afterwards; Mahant Satyanand was brought on the record as the legal representative of the deceased Kalkanand Swami. The decision proceeds on a wrong assumption that the suit was brought against Kalkanand Swami as the "mahant" of the temple and on his death Satyanand was brought on the record as the legal representative of Kalkanand Swami on account of his having succeeded to the mahantship. It was observed:

Satyanand Swami can be treated as the legal representative of Kalkanand Swami if the mortgaged property is part of the endowed property which was in the management of Kalkanand Swami, who has been succeeded in that management by Satyanand Swami. Under Order 22, Rule 4(2), Civil Procedure Code, a person against whom an application is made for substitution can, if brought on the record, make any defence appropriate to his character as the legal representative of the deceased defendant. If therefore Satyanand Swami be treated as the legal representative of the deceased, it is open to him to contest the plaintiff's claim to obtain a final decree on the ground that the mortgage deed executed by Kalkanand Swami was invalid and that a final decree should now be refused.

5. The fact that Satyanand Swami had been brought on the record not as the "mahant" of the "math" but as an intermeddler with the estate of Kalkanand Swami, as would appear from the following observations, was lost sight of:

We have not been able to discover any definite order of the trial Court directing the name of the respondent being substituted as the legal representative of the deceased mahant, but the trend of the judgment of the learned Subordinate Judge shows that he was inclined to the view that Satyanand Swami having intermeddled with the estate of Kalkanand Swami is his legal representative.

6. Kalkanand Swami not having been sued in a representative character and Satyanand Swami

not having been brought on the record as having succeeded to the mahantship, the defence that was raised by him was not open to him under Order 22, Rule 4, Civil Procedure Code, with all respect to the learned Judges who decided this case we do not therefore agree with the decision. The law has been correctly laid down in *Kaloo v. Niader Singh*⁵, There, subsequent to a preliminary decree obtained by the defendants against the plaintiffs' father alone without impleading the plaintiffs, the father died and the plaintiffs were substituted as his legal representative. A final decree was then passed ex parte. Later on, the plaintiffs unsuccessfully tried to have the ex parte decree set aside, raised objections to the preparation of the final decree and attacked the mortgaged decree on the ground that the mortgage was without legal necessity. It was held:

The question, on its merits, depends upon whether the Court at the time of passing a final decree was entitled to go behind its own findings in passing the preliminary decree. In our opinion, the Court was right in holding that at the time of passing the final decree it had no power to go behind the preliminary decree in which the rights and liabilities of the parties had been determined. At the time of passing the final decree, the Court's powers are limited to acting in accordance with Order 34, Rule 5. Where it is found that payment has not been made of the sum specified then the Court is bound to pass a decree that the mortgaged property or a sufficient part thereof, be sold. We hold that the Court in taking action under this rule is not empowered to reopen the questions which have already been determined by the preliminary decree. As the Court in passing the final decree had no power to decide the questions which were raised by the plaintiffs in the present suit, we hold that the rule of res judicata does not apply.

7. With this exposition of the law we are in agreement. In the result the appeal is dismissed with costs.

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⁵ AIR 1929 All 252