Present: De Sampayo J. and Schneider A.J.

1919.

MUTTU RAMAN CHETTY *et al.* *v.* MOHAMMADU *et al.*

144—D. C. Kurunegala, 1,998.

Subsequent order—Civil Procedure Code, s. 337—Amendment of decree—Mortgage decree is decree for payment of money.

The "subsequent order" contemplated in section 337 (b) of the Civil Procedure Code is one which may be made under the provisions of sections 320, 322, 334, and 335 of the Code for the recovery by execution of a sum of money as damages in default of compliance with the substantial decree either to deliver movable property or to do or abstain from doing some specified act.

A Court has no jurisdiction to amend or alter its decree, except in conformity with section 189, Civil Procedure Code.

A mortgage decree is a decree for the payment of money within the meaning of section 337, Civil Procedure Code.

THE facts appear from the judgment.

A. Drieberg, for defendants, appellants.

Samarawickreme, for plaintiffs, respondents.

Cur. adv. vult.

March 17, 1919. SCHNEIDER A.J.—

In this case, on December 15, 1902, a mortgage decree was entered in favour of the plaintiffs. The decree directed that the defendants should jointly and severally pay a sum of money, and in default of such payment that the mortgaged property should be sold by the Fiscal in satisfaction of the decree, and if the proceeds of such sale should be insufficient, that the balance was to be recovered by execution levied upon any other property of the defendants. This is the usual form of decree, except, perhaps, for the direction that the sale was to be held by the Fiscal. Apparently no steps were taken under the decree till January, 1911, at which date most of the original parties were dead. Application on behalf of the plaintiffs was then made by petition for substitution of parties in place of those deceased. *Inter alia*, the applicants prayed that the second defendant should be substituted as the legal representative of the deceased first defendant, alleging that he was the brother and heir of the deceased, whose share of the property mortgaged was below Rs. 1,000 in value, and that he was in possession of the property of the deceased. They also prayed that execution should issue against the second defendant personally, and also as such legal

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bring a fresh action. To permit the plaintiff to join a puisne incumbrancer at this stage would be to help him to defeat the object of that decision. If plaintiff was negligent and did not register his address he must suffer for it. Section 18 contemplates the adding of parties before judgment. It allows the plaintiff or defendant to apply on or before the hearing "to add a party"; but it says that the Court may "at any time" order any party to be added. This means before final judgment. The words "at any time" occur in other sections of the Code, and contemplate a period of time before the decree. The interpretation suggested by the appellant's counsel is contrary to the whole spirit of the Code. If this application is allowed, fresh pleadings would have to be filed, the decree should be vacated, and a new trial ordered. There is no provision in the Code which permits a decree to be amended or vacated under these circumstances. A decree could be amended under section 189 on the ground of any clerical or arithmetical error. On no other ground can this be done. (*Perera v. Ekanaike*,[1] *Ramasamy Pulle v. De Silva*,[2] *Silva v. Silva*,[3] *Silva v. Silva*.[4]) Sections 18 and 189 should be read together. It will serve no purpose if a party is added, unless a new decree is entered so as to bind him. If applications of this kind are allowed there will be no finality to litigation. Counsel also cited *Oxley v. Link*,[5] *Suppramanian Chetty v. Fernando*,[6] and *Deonis v. Samarasinghe*.[7]

A. St. V. Jayawardene, in reply.

July 14, 1920. BERTRAM C.J.—

This is an attempt to avoid the inconveniences that are said to result from the decision of the Full Bench of this Court in *Suppramaniam Chetty v. Weeresekera*.[8] The plaintiff in a mortgage action discovered, subsequently to the decree, the existence of a puisne incumbrancer in the shape of a donee of the property mortgaged. As a result of the decision to which I have referred, it is now impossible for him to bring a further action against this donee. He, therefore, seeks by an application to Court to be allowed to join this puisne incumbrancer as a party after judgment, and he claims to be entitled to do this under section 18 of the Civil Procedure Code.

Mr. Jayawardene appeals to our sympathy in the matter. He contends that we have a discretion, and urges us to exercise it on behalf of his client. It is unnecessary for us to discuss whether or not the circumstances of the case appeal to our sympathy for the purpose of the exercise of a judicial discretion, because on a very careful consideration of the law we have come to the conclusion that we have no power to accede to the application in any event.

[1] (1897) 3 N. L. R. 21.
[2] (1909) 12 N. L. R. 298.
[3] (1910) 13 N. L. R. 87.
[4] (1912) 15 N. L. R. 146.
[5] (1914) 2 K. B. 734 C. A.
[6] (1917) 4 C. W. R. 33.
[7] (1911) 15 N. L. R. 39.
[8] (1918) 20 N. L. R. 170.

Section 18 is very closely modelled upon a rule of the English practice—order XVI, rule 11—and the various English decisions to which Mr. Jayawardene has drawn our attention, will be found on examination not to support his case. *Campbell v. Holyland* [1] will be found to turn upon a special equitable principle which, under the English law, is applicable to foreclosure decrees, and which permits them to be re-opened if the circumstances justify it for the purpose of allowing redemption. Another case which Mr. Jayawardene strongly pressed upon us, *Keith v. Butcher*,[2] is clearly based upon the circumstance that, though the judgment in that case had been delivered, it had not been drawn up and entered. That was the plea raised in the argument, and to that plea the Court must have assented, as appears by the reference to that case, in a subsequent case, namely, *The Duke of Buccleuch*,[3] to which I will presently refer. There is a further case, namely, *Attorney-General v. Corporation of Birmingham*,[4] in which a very eminent English Judge, Jessel M.R., in commenting on this rule, says: "It was never intended to allow an amendment of the pleadings to introduce fresh parties after final judgment," and again, "a statement of claim or bill cannot be amended after final judgment." There is, finally, the case of *The Duke of Buccleuch*,[3] where an amendment introducing a party was allowed after the decree fixing liability in a collision case, but before the case had been remitted to the merchants for the estimation of the damages. That case will be found to have turned very largely upon the special procedure of the Admiralty Division in matters of that kind. In any case, the Court of Appeal Judges based their judgment upon the fact that there was something still to be done in the case. Lord Esher M.P. said: "The decree fixing the liability in the Admiralty Court is not a final judgment. The proceedings are not over," and Fry L.J. observed, "It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case. In this case there remains the assessment of damages."

It would appear, therefore, that the English cases are against Mr. Jayawardene. But he seeks to distinguish them by reason of the fact that the terms of our section are broader than those of the English rule, and that under our section, which follows the corresponding Indian section, it is declared that the Court may "at any time" make the order asked for, whereas under the English rule the words are "at any stage of the proceedings." Mr. Jayawardene strongly pressed upon us that these words give us an unlimited discretion, and he cited an Indian case in which there is a dictum to the effect that section 32, which is the corresponding Indian section, may very well give a discretionary power to the Court to add a party at any stage of the suit, even after judgment and before

[1] (*1877*) *7 Ch. D. 166.*
[2] (*1884*) *25 Ch. D. 750.*
[3] (*1892*) *Probate D. 201.*
[4] (*1880*) *15 Ch. D. 423.*

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final execution. I do not feel able, even if I wished it, to give to the words relied upon the full interpretation that Mr. Jayawardene contends for.

It appears to me that these words have to be read with the other sections of the Code. If the Court makes an order under section 18, it would follow that under section 21 it would have to direct that the plaint should be amended, unless special direction was otherwise given. This might involve an amendment of the answer, and it appears from section 93 that amendments of the pleadings can only be made after final judgment. It might no doubt be possible to avoid this difficulty with regard to the plaint by alleging that section 21 expressly authorizes an amendment of the plaint. But that cannot authorize any possible consequential amendment of the answer. Further, not only would an amendment of the plaint be necessary, but there would further be required an amendment of the decree, and Mr. Croos-Dabrera has very forcibly pointed out, by a reference to the terms of the Code and the various decisions of our Court, that the only method of altering a decree which our Code recognizes is the method prescribed by section 189. In the circumstances, I have come to the conclusion that the appeal must be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.