1961 *Present :* **Sansoni, J., and Tambiah, J.**

MUTHU RAMAIE *et al.*, Appellants, *and* ATHIMULAM *et al.*, Respondents

S. C. 32/1960 (Inty.)—D. C. Kandy, 4851/P

Mortgage—Hypothecary action against two mortgagors—Death of one mortgagor before the action was filed—Validity of subsequent proceedings in the action—Mortgag Act, No. 6 of 1949, s. 26.

A mortgagee instituted a hypothecary action in respect of a land mortgaged to him by two co-mortgagors A and B. B had died prior to the date of action, but a representative of his estate was appointed in the mortgage action and added as a defendant.

Held, that the death of co-mortgagor B prior to the institution of the mortgage action could not render the action a nullity. Accordingly, the subsequent mortgage decree and execution sale were valid.

APPEAL from an order of the District Court, Kandy.

C. Ranganathan, with *V. K. Palasuntheram*, for the 3rd to 12th Defendants-Appellants.

Vernon Jonklaas, for the 13th Defendant-Respondent.

L. G. Weeramantry, with *N. R. M. Daluwatte*, for the Plaintiff-Respondent.

G. F. Sethukavalar, for the 1st Defendant-Respondent.

Cur. adv. vult

May 10, 1961. SANSONI, J.—

The main question for decison on this appeal is whether a mortgage action filed against two mortgagors, one of whom had died before the action was filed against him, is a nullity, and whether all subsequent proceedings in the action are also null and void. The relevant facts, some of which I have ascertained from an examination of the records of the cases, must be briefly stated.

By mortgage bond No. 4022 dated 21st July, 1955, Muttusamy, Head Kangany, and Ragunathan Servai's daughter, Ramaie, mortgaged a land Mutholiyehena of 26 acres, 1 rood, 14 perches, to Sangili Athimulam's son Athimulam as security for a debt of Rs. 12,000. The mortgagee sued both mortgagors and a puisne encumbrancer on that bond in case No. MB. 2366 of 4th September 1956. On 20th December, 1956, petition and affidavit were filed by the plaintiff in which he stated that since the institution of the action he learnt that Muttusamy had died more than six months prior to its institution. He further stated that Muttusamy's

heirs were his widow Ramaie, his eldest son Periasunderam (they were 1st and 2nd respondents to the petition) and certain other minor children of whose names he was not aware ; that to the best of his knowledge and belief no grant of probate or letters of administration had so far been made ; and that the widow (1st respondent) was a fit and proper person to be appointed representative of the estate of the deceased. He moved that she be appointed to represent the estate for the purpose of the action, and added as a party in that capacity.

Notice of this application was reported served on both respondents, and as no objections were filed the application was allowed. Ramaie was added as 4th defendant. Summons was issued on all the defendants and reported served. The mortgagor Ramaie consented to judgment, and as the other defendants did not appear the case was heard ex parte against them and hypothecary decree was entered against all the defendants on 21st January, 1958. Order to sell the mortgaged property was issued and it was bought at the sale by the mortgagee.

On 16th July 1959, before the sale was confirmed, Periasunderam, already referred to, and one Pakkianathan (who claimed to have leasehold rights in the land) petitioned to have the sale set aside on several grounds, some of them being that the proceedings were bad as the heirs of the deceased mortgagor had not been made parties ; that no notice of the action had been given to Periasundaram or his co-heirs ; and that the mortgage decree was bad. At the inquiry which followed, counsel for the petitioners abandoned these objections to the sale, because the widow had been made a representative. The application was accordingly dismissed on 6th August, 1959.

On 19th September, 1959, another petition was filed by the widow in which she claimed that, as partition action No. P. 4851 was pending, the writ of possession should be stayed till that action was finally determined. This application was dismissed on 22nd September, 1959, on the ground that she was bound by the mortgage decree, and writ of possession had already been issued. It should be noticed that no attack was made by her on the validity of the mortgage decree, and no complaint was made regarding the non-service of summons.

It is now necessary to turn to partition action No. P. 4851. This action had been filed in October, 1955, in respect of the southern specific one-third share in extent 8 acres, 2 roods, out of the land Mutholiya of 24 acres, 3 roods, 37 perches, which is itself part of the mortgaged land. The widow and nine children of the mortgagor Muttusamy were the 3rd to 12th defendants in that action, while his co-mortgagor Ramaie was the 1st defendant, and the mortgagee Athimulam was the 13th defendant. After trial, an interlocutory decree was entered on 21st October, 1958, declaring the 1st defendant entitled to 11/24 of the land, and 3rd to 12th defendants jointly entitled to 6/24, all these shares being subject to the mortgage bond No. 4022. A commission to partition the land was issued and executed.

On 7th July 1959, before the scheme of partition was considered the mortgagee, 13th defendant (who had by then purchased the mortgaged land at the sale in the mortgage action) applied to be substituted in place of the 1st and 3rd to 12th defendants, on the ground that he had become entitled to their interests in the land and they should be allotted to him in the final scheme of partition. Objections by way of affidavit dated 19th December, 1959 were filed by Muttusamy's widow for herself and her children stating :

(1) that the mortgage action was instituted without the appointment of a representative of the estate of her deceased husband having first been made, and

(2) that the notice to appoint her the representative of his estate and the summons in the mortgage action had not been served on her.

She denied that she at any time appeared in Court or retained any proctor. She also stated in her affidavit that the first intimation she had of that mortgage action was when the sale was held.

To deal with the second objection first, I have already referred to her application to stay the writ of possession in the mortgage action. She there acquiesced in the mortgage decree and submitted to the jurisdiction of the Court. It is impossible to reconcile the plea in her affidavit, that she never appeared in Court or retained any proctor, with her attitude in the mortgage action. If there had been any substance in her allegations regarding the non-service of the notice and the summons, she should have applied to have the mortgage decree vacated instead of merely applying to stay the writ of possession on the ground that a partition action was pending : and any such allegation should be made in the mortgage action and not in the partition action. The only possible explanation of her inconsistent pleas is that her lawyers in the partition action were not the lawyers who appeared for her in the mortgage action. The learned Judge who held the inquiry refused to allow evidence of non-service of summons to be led. I think his order was correct though I do not agree with the reasons he gave.

The other objection, that the mortgage action was a nullity because Muttusamy had died before it was filed, must now be considered. The first question that arises is whether an action filed against two or more defendants is bad because one of them was dead at the time of institution. It is clear on the authorities that an action filed against a sole defendant who was dead at the time is a nullity, and any substitution of his legal representative thereafter is also a nullity. The reason is that the action is not merely against a wrong person but against no person at all ; and when substitution of his legal representative is made it is not really a case of substitution but rather the filing of a new action against a new defendant : see *Rampratab v. Gaurishankar* [1].

[1] *A. I. R. (1924) Bom. 109.*

I do not think that the same considerations apply to an action filed against more than one defendant, where some of them were alive and some had died prior to action. We have not been referred to any authority which decides that such an action is a nullity. I can see no reason why it should be a nullity, for it is surely good as against the living defendants. The Court would have to consider whether steps should be taken to bring in the legal representatives of those who were dead, since no action can be defeated by reason of non-joinder of parties. It has in fact been held in the Indian Courts that an action should not be dismissed on the ground that one or more of the defendants had died prior to its institution, and that the Court may allow the action to proceed against the surviving defendant or defendants alone, or bring the legal representative of the deceased defendants on the record before proceeding with the action. Which of these courses should be followed will depend on the nature of the action and the right to sue on the particular cause of action : see *Roop Chand v. Sardar Khan* [1]. Again in *Ghulam Quadir Khan v. Ghulam Hussain* [2] it was held that where two of several co-defendants were dead at the time of the institution of the action, the action is not bad. Their legal representatives may be substituted, although a question of limitation may arise. In the present case, since both mortgagors or their representatives were necessary parties before a hypothecary decree could be entered, I think it was only proper that a representative of the estate of the deceased Muttusamy should have been appointed and added as a defendant.

In passing, I might point out that a smilar distinction has been drawn between the case of a decree against a sole defendant who was dead when the decree was entered, in which case it is a nullity, and a decree against more than one defendant where only some of the defendants had died before decree. The question whether the whole decree in the latter case is a nullity can only be answered after considering the nature of the action : see *Kesho Prasad Singh v. Shamnandan Rai* [3].

In the case now before us, to which the Mortgage Act, No. 6 of 1949, applies, section 26 of the Act is relevant. It provides :

> 26. (1) Where any mortgagor dies before the institution of a hypothecary action in respect of the mortgaged land, or any mortgagor or any person who is or becomes a party to a hypothecary action dies after the institution of the action, and grant of probate of the will or issue of letters of administration to the estate of the deceased has not been made, the Court in which the action is to be or has been instituted may in its discretion, after the service of notice on such persons, if any, and after such inquiry as the Court may consider necessary, make order appointing a

[1] *A. I. R. (1928) Lahore 359.* [2] *A. I. R. (1937) Lahore 794.*
[3] *A. I. R. (1926) Pat. 504*

person to represent the estate of the deceased for the purpose of the hypothecary action, and such person may be made or added as a party to the action :

Provided, however, that such order may be made only if :

(*a*) the value of the mortgaged property does not exceed two thousand five hundred rupees ; or

(*b*) a period of six months has elapsed after the date of the death of the deceased ; or

(*c*) the Court is satisfied that delay in the institution of the action would render the action not maintainable by reason of the provisions of the Prescription Ordinance.

(2) In making any appointment under sub-section (1) the Court shall appoint as representative a person who after summary inquiry appears to the Court to be the person to whom probate of the will or letters of administration to the estate of the deceased would ordinarily be issued :

Provided, however, that in the event of a dispute between persons claiming to be entitled to be so appointed, the Court shall make such an appointment (whether of one of those persons or of any other person) as would in the opinion of the Court be in the interests of the estate of the deceased.

Is the action bad because steps to have a representative of the estate of Muttusamy appointed were not taken before the action was instituted ? I do not think so, for the section does not say that in the case of a mortgagee who had died before the institution of the action the appointment of a representative can be made only prior to the institution of such action. So long as the action was not a nullity, the principles I have already referred to would apply and the procedure prescribed in section 26 may be followed, as it was followed in this case. The affidavit filed by the mortgagee satisfied the Judge that he had the necessary material to assume jurisdiction to make the appointment. The section, I might add, does not require that notice should be given to all the heirs of the deceased mortgagor.

I would therefore hold that the mortgage decree was valid, the sale to the 13th defendant was valid, and his application for substitution in place of 1st and 3rd to 12th defendants was correctly allowed. The appeal is dismissed with costs.

TAMBIAH. J.—I agree.

Appeal dismissed.