

**(1927) 03 MAD CK 0095**  
**In the Madras High Court**

Govindaswami and Others

APPELLANT

Vs

Annamalai Udaiyar and Others

RESPONDENT

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**Date of Decision :** 22-03-1927

**Acts Referred:**

**Citation :** AIR 1927 Mad 1071

**Hon'ble Judges :** Devadoss, J

**Bench :** Division Bench

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### Judgement

Devadoss, J.—Defendants 1 and 2 are the appellants. The suit is on a mortgage against defendants 1 and 2, the mortgagors and other defendants. The Subordinate Judge has given a decree for the full amount in favour of respondents 1 and 2. The mortgagee was the father of plaintiffs 2 and 3 who died pending the suit. Plaintiffs 2 and 3 sought to be made legal representatives on the ground that they and their father were undivided and defendant 5 their brother was divided from his father. Notice of this was given to defendant 5 who was already a party to the suit as he had acquired some right under. Ex. II. He did not contest the application though he appeared by a vakil Plaintiffs 2 and 3 were made legal representatives of plaintiff 1 and they proceeded with the suit. The District Munsif gave a decree for two-thirds of the mortgage amount. On appeal the Subordinate Judge has given a decree for the full amount.

2. Two points are raised before me by Mr. Bhashyam for the appellant. The first point is that the suit has abated as regards the defendant 5's share. It is difficult to appreciate this contention. Under Order 22, R. 3, the legal representatives of a deceased plaintiff or the sole surviving plaintiff should apply to be made parties to the action, and if they did not come in within the time allowed the suit would abate. In this case plaintiffs 2 and 3 did make an application within the time as the legal representatives of plaintiff 1, and defendant 5 who was on the record, was given notice of the application. If one of the legal representatives does not choose to be brought on the record as the representative of a deceased plaintiff his share in the suit does not thereby abate. If no legal representative is brought

on the record no doubt the suit would abate, but where some legal representatives come on the record and they contend that some other persons are not legal representatives, even though their contention may be found to be untrue, that would not make the whole of the suit or any portion of the suit abate in favour of the defendants. This is very clear on principle and I may refer in this connexion to *Kadir Mohideen Maracair v. Muthu Krishna Ayyar* [1903] 26 Mad. 230 where this point was decided.

3. The next point raised is that the suit must be dismissed because plaintiffs 2 and 3 state that defendant 5 was not a legal representative and that the statement is found to be untrue. The Subordinate Judge very properly left the contest between plaintiffs 2 and 3 and defendant 5 to be brought out in a future proceeding. In a mortgage suit it is unnecessary to go into the question which may arise between the legal representatives of a deceased plaintiff as to whether some of them or all of them are entitled to the whole of the interest of the deceased plaintiff. Mr. Bhashyam's argument is that this should not have been done, but on the finding that defendant 5 is also interested in the decree amount, the suit should have been dismissed because he was not brought on the record as plaintiff in time. This argument overlooks the fact that defendant 5 was on record on the date of plaintiff 1's death and he was given notice by plaintiffs 2 and 3 when they made an application to be brought on the record as the legal representatives of their deceased father. The cases in *Sunitibala Debi v. Dharasudari Debi A. I. R. 1919 P. C. 24* and *Sakhiuddin Saha v. Sonaullah Sarkar* [1918] Cri. L. J. 453 have no application to the present case. Where there are two or more mortgagees who are tenants in common, one mortgagee cannot bring a suit without making the other mortgagees parties to the action. If they do not wish to join as plaintiffs they should be made defendants, but if any of the mortgagees have parted with their rights in favour of the mortgagors a decree should be given only in respect of the portion outstanding against the mortgagors. But where as in this case the mortgagee himself brings a suit on the mortgage for the whole amount, the mere fact that one legal representative of the mortgagee is not brought on the record--let us say for argument's sake, within the time prescribed--would not entitle the mortgagors to contend that the suit abates as regards his share and a decree should not be given for the whole of the amount in favour of persons who are brought on the record as legal representatives. This argument seems to me to be on the face of it untenable. The legal representatives who are on record represent all who are entitled to share in the estate of the deceased plaintiff. The Subordinate Judge is perfectly justified in making the order he made and the second appeal fails and is dismissed with costs.