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statements in the affidavit itself free from all inherent weaknesses. We are not satisfied that fuller and sufficient particulars could not have been procured by the deponent of the affidavit, and in this view of the matter we must hold that it has not been shown to us satisfactorily that the status of the prisoner is that of a European British subject.

The result, therefore, is that this application must be dismissed on both the grounds stated above.

E. H. M.

Application refused.

APPELLATE CIVIL.

Before Cuming and Page JJ.

MIDNAPUR ZAMINDARY CO., LTD.

v.

AMULYA NATH ROY CHOWDHURY*

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 March 19.

Substitution—Suit for joint possession—During pendency of second appeal substitution not made in time, if appeal competent to proceed.

Several co plaintiffs sued the defendants for joint possession and obtained a decree. The defendants-appellants failed to substitute in time the legal representative of one of the plaintiffs-respondents who had died during the pendency of the second appeal to the High Court. At the hearing of the second appeal the respondents took a preliminary objection that the appeal could not proceed against the other co-respondents in the absence of the dead co-respondent, or his duly substituted representative:—

Held, that the appeal abated as a whole.

SECOND APPEAL No. 250 of 1924 by the Midnapur Zamindary Co., Ltd., the defendants.

* Appeals from Appellate Decrees Nos. 249 and 250 of 1924, against the decree of Manvi Osman Ali, Subordinate Judge of Nadia, dated June 29, 1923, revising the decree of Pranendra Narayan Chowdhury, Munsif of Kushtia, dated April 19, 1922.

The plaintiffs sued the defendants for a declaration of their title to certain *lakheraj* land, and for recovery of joint possession thereof. The trial Court dismissed the suit, but on appeal the Subordinate Judge decreed it. During the pendency of the second appeal before the High Court, one of the co-respondents died. The appellants did not substitute his legal representative in time.

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Mr. Brajendra Nath Chatterjee (with him *Babu Satindra Nath Chowdhury*), for the respondents, took a preliminary objection, namely, that as one of the co-respondents died during the pendency of the second appeal, and as he was not brought on the record within the time allowed by law, this appeal had abated as a whole, and could not proceed against the remaining respondents: *Manindra Chandra Nandi v. Bhāyabati Devi Chaudhurani* (1).

Mr. U. N. Sen Gupta (with him *Babu Probodh Kumar Das*), for the appellants, contended that on the death of one of the co-respondents the appeal abated as against him only. Referred to Order XXII, rule 4.

CUMING J. In the suits out of which these two appeals Nos. 249 and 250 have arisen the plaintiffs who were some three in number sued the defendants, the Midnapur Zamindary Co., for a declaration of their *lakheraj* title, and for recovery of possession of the disputed lands on the ground that the lands in suit appertained to a certain *Nishkar Mehal* which they held, and that they had been dispossessed by the defendant company who had included some plots of their *lakheraj* lands in the rent lands which the plaintiffs held under the defendants. The defendants

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had sued them for rent both of the rent land and the *lakheraj* land and so dispossessed them; they therefore sued for a declaration of their title and recovery of possession.

The defendant company contested the suit, and their case was that the record-of-rights was in their favour, that the plaintiffs had no *lakheraj* title to the lands in suit, and the case was barred by limitation.

The trial Court decided all the issues against the plaintiffs, and found among other findings that the suits were barred by limitation. On appeal, the judgment of the trial Court was reversed, and the learned Subordinate Judge ordered that the suit be decreed, the plaintiffs' *lakheraj* right to the lands in suit be declared, that they be confirmed in and do get possession of the same, and that they do get their costs from the defendants.

The defendant company preferred appeals to this Court, and on the appeals being called a preliminary objection was raised by the learned advocate for the respondents so far as concerns the Appeal No. 250. The contention of the learned advocate is that one of the respondents in this appeal died during the pendency of the appeal. The appeal so far as he was concerned abated. The appellants applied to set aside the abatement, and this application was rejected by this Court. He then contends that the suit was one for joint possession by the plaintiffs, and that the present appeal is incompetent in the absence of one of the respondents. In support of his contention he refers to the case of *Manindra Chandra Nandi v. Bhagabati Devi Chaudhurani* (1). The facts of that case are practically indistinguishable from the facts of the present case.

The learned counsel who has appeared for the appellants contends that the suit has abated only against one of the respondents, and that it can proceed against the other respondents, and has not abated against them also.

No doubt, in view of Order XXII, rule 4, Civil Procedure Code, it cannot be said that the case has abated as against the remaining respondents. But that is not the point. The point is whether the appeal can proceed in the absence of the dead respondent without the substitution of his heirs. The suit is by a number of co-sharers, and their shares were not defined in the plaint. They sued for joint possession, and have obtained a decree for joint possession from the lower Appellate Court. Supposing for the sake of argument that the appeal succeeds, and we make a decree in favour of the appellants setting aside the decree of the lower Appellate Court so far as concerns the respondents on the record, such a decree would be incapable of execution, because the decree in favour of the heirs of the dead respondent has not been set aside, and under that decree they should be entitled to possession. If, therefore, in such a case we make a decree in favour of the appellants as against the respondents who are on the record, there will be two conflicting decrees in existence. Therefore, clearly the appeal cannot proceed in the absence of the heirs of the dead respondent, and is, therefore, incompetent.

The Appeal No. 250 is, therefore, dismissed with costs.

PAGE J. I agree that each of these appeals should be dismissed. I desire, however, to add a few observations with regard to Appeal No. 250. In that case the lower Appellate Court has found that the plaintiffs are three co-owners of certain *lakheraj* lands. The

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defendants-appellants contend that the lands are held by the plaintiffs as tenants under them. One of the plaintiffs-respondents has died, pending the appeal to this Court, and inasmuch as his legal representatives were not substituted in due time, and an application for leave to substitute his representatives was rejected, the appeal as against that plaintiff has abated. The result is that in respect of one of the three co-owners of this *lakheraj* land the decree of the lower Court stands. The defendants contend, notwithstanding the abatement of the appeal as against the deceased co-plaintiff, that they are entitled to proceed with the appeal as against the other two co-plaintiffs who have duly been made respondents. The learned counsel on behalf of the appellants based his contention upon the terms of Order XXII, rule 4 (3), which provides that "where within the time limited by law no application is made under rule 1, the suit shall abate as against the deceased defendant." This rule applies alike to a defendant and to a respondent (Order XXII, rule 11). The learned counsel contends that on a true construction of sub-rule (3) in circumstances such as those obtaining in these proceedings the appeal abates only as against the deceased respondent. He pointed out that the words "as against the deceased defendant" were not contained in the corresponding section 368 of the Code of 1882. In my opinion, that is not the meaning and effect of this sub-rule. Whether or not the appeal abates as against the deceased respondent only or as a whole must depend upon the particular circumstances of each case, the test to be applied being whether in the absence of the respondent against whom the appeal has abated, the appeal can proceed (*Raj Chunder Sen v. Gangadas Seal*) (1). Now, if the appellants were to succeed

(1) (1904) L. R. 31 I. A. 71.

in this appeal as against the two respondents on the record, the result would be that, whereas the lands in suit must be taken under the decree of the lower Subordinate Court to be *lakheraj* lands belonging to the co-owners in so far as the deceased plaintiff was concerned, under the decree of the High Court the lands would be held not to be *lakheraj* lands as against the other two co-owners who failed in the appeal. The creation of a situation so strange and anomalous ought not to be permitted, and in circumstances such as those which prevail in this case, I am of opinion that the appeal cannot proceed in the absence of the representatives of the deceased plaintiff-respondent; see *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* (1), *Manindra Chandra Nandi v. Bhagabati Devi Chaudhurani* (2). The learned counsel for the appellants further contended that if the appeal was not competent unless the legal representatives of the deceased plaintiff were on the record, the Court was entitled, and in the circumstances ought, to add the legal representative of the deceased plaintiff as a respondent under Order XLI, rule 22. Whether in any particular case the Court will add or refuse to add a party to an appeal under Order XLI, rule 22, is a matter which is left to the discretion of the Court. In this case I am of opinion that the Court would not be justified in exercising its discretion under Order XLI, rule 22, in favour of the appellants for this among other sufficient reasons, that if the Court were to allow the appellants to add the representative of the deceased plaintiff as a party to the appeal the Court would be acting in a manner wholly inconsistent with its own previous order, by which the application of the appellants for the substitution of the representative of the deceased plaintiff as a respondent was

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(1) (1919) 24 C. W. N. 44.

(2) (1925) 30 C. W. N. 45.

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rejected upon the ground that the appellants had neglected to apply for substitution within the time provided in that behalf, and had not been able to satisfy the Court that there was any sufficient ground for an extension of time being granted [see the observations of Mookerjee and Panton JJ., in *Kali Dayal's* case (1)]. In these circumstances, in my opinion, both the appeals must be dismissed.

B. M. S.

Appeals dismissed.

(1) (1919) 24 C. W. N. 44.

APPELLATE CIVIL.

Before Cuming and Page JJ.

RISHIKESH LAHA

v.

MANIK MOLLA AND OTHERS.*

Execution Sale—Auction-purchasers, if entitled to sue for refund of purchase money—Judgment-debtor having no saleable interest, is the auction-purchaser entitled to recover his purchase money—Auction-purchaser, if entitled to receive compensation from execution-creditor—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89 to 93.

The effect of O. XXI, r. 93, is that the only method under the Civil Procedure Code by which an auction-purchaser at a Court sale is entitled to obtain a refund of the purchase money is by applying to set aside the sale as therein provided.

Jurannu Mahamad v. Jathi Mahamad (1) and other cases referred to.

The principle laid down in *Dorab Ally Khan v. Abdool Azeer* (2) followed.

* Appeal from Appellate decree No. 283 of 1924, against the decree of Pasupati Bose, Subordinate Judge of Khulna, dated Sep. 28, 1923, confirming the decree of Ramesh Chandra Sen Gupta, Munsif of Satkhira, dated Dec. 12, 1921.

(1) (1917) 22 C. W. N. 760.

(2) (1878) L. R. 5 I. A. 116.

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