LETTERS PATENT APPEAL.

Before Mitter and McNair JJ.

SATULAL BHATTACHARJYA

v.

ASIRUDDIN SHAIKH.*

1934

March 21, 22.

Appeal—Death of one of the appellants whose heirs are not substituted in the appeal—Right of surviving appellant to prosecute appeal alone—Code of Civil Procedure (Act V of 1908), O.XLI, r. 4.

When a decree of the lower court proceeds on a ground common to all the defendants, any one of the appellants can continue the appeal, which was preferred by him along with the other defendants, even though some of the appellants are dead and their heirs have not been substituted in the appeal. The appellate court may, in such cases, reverse the decree, in so far as it affects the other defendants, though their heirs have not been substituted in the appeal.

Order XLI, rule 4 of the Code of Civil Procedure applies to the case of an appellant whose appeal has abated by his death.

Somasundaram Chettiar v. *Vaithilinga Mudaliar* (1), *Chintaman Nilkant* v. *Gangabai* (2) and *Dhuttaloor Subbayya* v. *Paidigantam Subbayya* (3) referred to.

The view of Cuming J. in *Naimuddin Biswas* v. *Maniraddin Laskar* (4) disapproved and not followed; the remarks of Mallik J. *obiter* approved.

SECOND APPEAL by the defendant.

The facts of the case and the arguments in the appeal are sufficiently set out in the judgment.

Kshiteeshchandra Chakrabarti, *Panchanan Ghosh* and *Durgacharan Ray Chaudhuri* for the appellant.

No one for the respondent.

MITTER J. This is an appeal under section 15 of the Letters Patent from a judgment of my learned brother Mr. Justice Patterson, who modified the decree of the lower appellate court and restored the decree of the Munsif.

* Letters Patent Appeal, No. 23 of 1933, in Appeal from Appellate Decree, No. 626 of 1931.

(1) (1916) I. L. R. 40 Mad. 846.
(2) (1903) I. L. R. 27 Bom. 284.
(3) (1907) I. L. R. 30 Mad. 470.
(4) (1927) 32 C. W. N. 299.

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Two points have been raised before us in respect of the appeal which has been preferred on behalf of the plaintiffs. It is first contended that, by reason of certain events which happened, the appeal before Mr. Justice Patterson should have been dismissed on the preliminary ground that as one of the defendant appellants had died during the pendency of the appeal in this Court and his heirs were not brought on the record and the appeal having abated so far as the said defendant was concerned, the whole appeal had abated. This contention did not prevail with Mr. Justice Patterson and he held that this preliminary objection must be overruled, and we are of opinion that the learned Judge was right in his conclusion on this part of the case for reasons to be detailed presently.

The suit, out of which this appeal arose, was brought by the plaintiffs, now appellants before us, for a declaration of their title to certain lands and for recovery of *khâs* possession in respect of the same. The first court granted a declaration of the plaintiff's title to a fractional share in the lands in suit, but dismissed the plaintiff's suit for *khâs* possession. On appeal to the lower appellate court, it set aside that decision and decreed the plaintiff's suit in full.

It appears that defendant No. 1, Fedu Shaikh, died during the pendency of the appeal in the lower appellate court and his two sons Asiruddin Shaikh and Mobarak Shaikh were substituted as his heirs in the record of the appeal in the court below. The appeal to this Court was filed on behalf of both Asiruddin and Mobarak. Mobarak died during the pendency of the appeal to this Court and his heirs were not brought on the record within the time allowed by law. The result of that was that the appeal abated automatically so far as the appellant Mobarak was concerned. It is stated that the effect of this abatement of the appeal, so far as Mobarak was concerned, is that the whole appeal had abated. The preliminary objection is based on this ground and it is

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said that the appeal to this Court was incompetent and should have been dismissed apart from any question on the merits. Mr. Justice Patterson has negatived this objection and has relied on the provisions of Order XLI, rule 4, of the Code of Civil Procedure. We are of opinion that this case is governed by the provisions of Order XLI, rule 4 which runs as follows :

> Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

The suit of the present plaintiffs for ejectment was resisted by the two sons of the original defendant No. 1, on common grounds, and it seems to us that the present rule enables one of the two heirs of the defendant to maintain the appeal from the whole decree, and it is competent to the appellate court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendant's heirs did not join in the appeal. It is contended that the rule only provides for a case where the appeal has been preferred by one of the defendants, in which case, although the other defendants had not joined in the appeal, he is entitled to get the benefit of the judgment. We are of opinion that that would be putting a limited construction on the provisions of rule 4, Order XLI.

The view we take has been taken by Mr. Justice Mukerji in an unreported decision of this Court. It was cited before the learned Judge of this Court; it is the case of *Karimannessa Bibi* v. *Juran Mandal* (1). This view receives support also of a decision in the case of *Somasundaram Chettiar* v. *Vaithilinga Mudaliar* (2). Sir John Wallis observes as follows :

> The twentieth and the twenty-second defendants died after the appeal had been preferred and their representatives have not been brought on the

(1) (1932) S. A. 1961 of 1930, decided by Mukerji J. on 23rd November.

(2) (1916) I. L. R. 40 Mad. 846, 868.

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record. It has been argued that as the appeal has abated as regards these appellants the decree of the lower court cannot be modified as far as their interests are concerned. The grounds of appeal in which the appellants have succeeded are common to all the appellants and we think the terms of Order XLI, rule 4, of the Code of Civil Procedure are wide enough to cover this case, *Chintaman Nilkant* v. *Gangabai* (1), and enables this Court to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants whose appeals have not abated. Any other conclusion would lead to 'incongruity in judicial decisions on the same facts', vide *Dhuttaloor Subbayya* v. *Paidigantam Subbayya* (2).

Reliance, however, has been placed on a decision of this Court in the case of *Naimuddin Biswas* v. *Maniraddin Laskar* (3). The learned Judges Mr. Justice Cuming and Mr. Justice Mallik delivered separate judgments in that case. It has been pointed out by Mr. Justice Patterson that there are various observations which appear to be in conflict with the observations made by him. Mr. Justice Mallik has laid down that the true test, in a case of this kind, is whether it can be heard in the absence of the appellant who is dead. Whether an appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and the decree made. The present suit is a suit for ejectment and the defendant in appeal can contend, on grounds common to the other defendants, that the whole suit should be dismissed. We do not see any reason to hold why the provisions of Order XLI, rule 4, should not cover a case of this kind. We are in entire agreement with the case of the Madras High Court in which judgment was delivered by Sir John Wallis.

The second ground relates to the merits of the case. Mr. Justice Patterson has agreed with the lower appellate court, so far as the question of plaintiff's title is concerned. He holds that the plaintiffs have established their title to the entire land claimed in the present suit, but he has disagreed with the lower appellate court and has held that, as the plaintiffs were not in possession within twelve years of the date of the institution of the present suit, the suit was barred by limitation in respect to the claim for *khâs* possession.

(1) (1903) I. L. R. 27 Bom. 284. (2) (1907) I. L. R. 30 Mad. 470.
(3) (1927) 32 C. W. N. 299.

It is to be observed that one of the issues in the present suit was issue No. 5, namely,

Has the defendant No. 1 acquired any limited interest by adverse possession for more than twelve years ?

Until that issue is determined in favour of the defendant No. 1 or his heirs, plaintiff's suit for *khâs* possession cannot be dismissed. Therefore, the real question for consideration is whether the possession of defendant No. 1, Fedu Shaikh, was adverse in continuity and extent for more than twelve years. The lower appellate court has come to the conclusion that there has been interruption in that possession by reason of the fact that, on or about the time when section 145 proceedings were started in the year 1922, Arjun Mandal did claim to be the tenant of the plaintiff under a *kabuliyat*, which was executed in the year 1321 corresponding to 1914, and was in possession on behalf of the plaintiff. The lower appellate court has also come to the conclusion that that possession, which continued for a period of nearly two years, namely, 1922 to 1924, was sufficient to destroy the continuity of the adverse possession of the defendant No. 1. What happened was that, in section 145 proceedings, Arjun's possession was affirmed and it was declared that Arjun was in possession of the land at the date of the order under section 145(*1*) of the Code of Criminal Procedure. In order to get rid of the effect of these proceedings, a suit was brought against Arjun by the defendant No. 1 in the civil court and it was held that the possession of the defendant No. 2 was not a rightful possession and that the defendant No. 1 succeeded in the suit and he was able to obtain a decree and to recover possession in 1924. Mr. Justice Patterson has come to the conclusion that the possession of Arjun during the existence of the order under section 145, cannot be regarded as equivalent to the possession of the plaintiffs through their tenants and the reason given by the learned Judge is this :

This contention cannot in my opinion, prevail inasmuch as Arjun, although he had, as far back as 1914, executed a *kabuliyat* in favour of the plaintiffs, had never been inducted into the lands by the plaintiffs, and had only

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succeeded in obtaining possession by reason of an order of the criminal court, which was based on considerations which had nothing to do with any question of title. The section 145 proceedings were merely between Arjun and Fedu Shaikh and the final order, declaring Arjun to be in possession, was based merely on the facts of possession as found by the criminal court and not on any finding on the question of title. These proceedings in the criminal court were moreover followed by proceedings in the civil court, as a result of which defendant No. 1's title was affirmed, and Arjun's title, which was presumably sought to be based on the allegation that he was the plaintiff's tenant, was negatived. In these circumstances, it cannot, in my opinion he held that Arjun's possession during the period in question ought to be regarded as being equivalent to the plaintiff's possession.

It appears, however, from a perusal of the judgment in section 145 case, that Arjun was setting up the title of the plaintiffs and that a reference was made in the judgment, to the *kabuliyat* of 1914. The following passage in section 145 proceedings may be usefully quoted here:

> Satulal states that he then settled the land with Arjun, who executed a *kabuliyat*, Ex. 1, in 1321 B.S. It has been proved that Satulal got a rent decree against Arjun for rent for the year 1326 B.S. The documentary evidence produced by the first party is very satisfactory. The oral evidence produced by the first party consists of the depositions of two witnesses who cultivate two plots contiguous to the land in dispute..... Taken along with the documentary evidence, it must be held to be quite adequate to prove that of Arjun's possession.

Although, in section 145 proceedings, the criminal court should not investigate into the question of title and should base its decision merely on the question of possession, it is clear that Arjun was setting up the title of the plaintiffs and he was claiming that he was possessing the land as a tenant, on behalf of the plaintiffs. The plaintiffs have now been found to be the rightful owners and the possession of the plaintiff's tenants, however wrongful, is, in our opinion, sufficient to destroy the continuity of adverse possession of the defendant No. 1, and the proper issue in this case is to consider whether the defendant No. 1 acquired a limited interest of a tenant by adverse possession. If this period is taken into account, possession of defendant No. 1 falls short of the statutory period.

In our opinion, therefore, it seems to us that the lower appellate court was right in the view which it

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has taken that the plaintiffs were in possession of the suit lands, for at least three years next before the present suit, through their tenant Arjun. This again is a finding of fact arrived at by the lower appellate court, and it is not permissible to this Court to interfere with it in Second Appeal.

For these reasons, we are of opinion that the judgment of Mr. Justice Patterson must be set aside and that of the first appellate court restored.

It is unfortunate that the respondents in this appeal have not appeared before us, but Mr. Ray Chaudhuri and Mr. Chakrabarti have very fairly placed the case before us.

The appellants are entitled to their costs both before us and before Mr. Justice Patterson.

McNAIR J. I agree.

Appeal allowed. Suit decreed.

A. A.