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enforce a substantial right, the former to cancel a mere notice. Neither the notice nor the affixing of an antedated patta amounts to more than a mere assertion on the part of the defendant, and we do not think either would give rise to a cause of action maintainable in an ordinary court of law. There is no infraction of any right.

On this ground, we think the decision of the courts below was right and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

GOVINDA (PLAINTIFF), APPELLANT,

and

PERUMDEVI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888,
August 13.
October 3.

Specific Relief Act, s. 42—Civil Procedure Code, s. 53—Amendment of plaint—Suit to declare alienation by Hindu widow invalid,—Death of widow pending appeal by plaintiff,—Right of appellant to proceed with appeal—Plaint not to be amended by claim for possession.

The proviso to s. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit:

Where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:

Held, (1) that the plaintiff was entitled to proceed with his appeal:

(2) that plaintiff could not be permitted to amend his plaint and claim possession.

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge of Godavari, in suit No. 2 of 1885.

The facts necessary for the purpose of this report appear from the judgment of the Court (Muttusami Ayyar and Wilkinson, JJ.).
Parthasaradhi Ayyangar and Biligiri Ayyangar for appellant.
Subba Rau for respondent.

JUDGMENT.—Defendant No. 1 in this suit was a Hindu widow, and the property in litigation devolved on her on the death of her

only son. The appellant claimed to be the reversionary heir of that son, and instituted the present suit under s. 42 of the Specific Relief Act to have it declared that certain alienations made by her were made in excess of her power as a childless widow, and were, therefore, not binding on the reversion. The Subordinate Judge considered that the right asserted was a contingent, and not a vested interest, and, holding that no declaratory decree could be made in respect of such right, dismissed the suit and directed the plaintiff to pay the costs of defendant No. 4. The decision of the Subordinate Judge proceeded solely on the ground mentioned above, and no finding was recorded on any of the other issues raised for decision. The plaintiff appealed to this Court, but his appeal came on for disposal together with another appeal (Regular Appeal No. 83 of 1886) preferred by one Komandur Vedanta Desikacharlu, who had also claimed a declaratory decree as the real reversioner, and whose suit had also been dismissed by the Subordinate Judge for the like reason. The present appellant was a party, defendant, in that suit, and this Court set aside the decree of the Subordinate Judge passed therein and remanded it for disposal on the merits. With reference to the appeal now before us, this Court then adjourned it, and directed that if appellant in the other case succeeded in the Court below, it should be reported. Whilst the other case was pending on remand in the Subordinate Judge's Court, the widow died, and the reversionary right asserted, in whomsoever it vested, became an estate vested in possession. The Subordinate Judge referred to s. 361 of the Code of Civil Procedure and made an order that the suit abated, and no appeal has been preferred from that order. In this state of facts, this appeal is posted again for disposal. It is urged for the appellant that there is a decree in force against the appellant and that the appeal cannot abate. It is also contended for him that he should be permitted to amend the plaint so as to treat his right as a vested interest and to claim possession as consequential relief.

Our attention is drawn, on the other hand, to s. 42 of the Specific Relief Act and to the decision in *Gosaien Shiva Ram v. Rugho Rai*(1). The proviso to s. 42 of Act I of 1877 directs that "no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title,

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(1) 2 Agra Rep., 44.

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omits to do so." But this direction obviously refers to the position of the plaintiff when he commenced the suit and cannot be treated as taking away a right of suit which had already accrued. We do not consider that the proviso is applicable to this case, for "when the Court once acquires jurisdiction it cannot be divested of it except under some provision of law." The Appellate Court has only to see as a Court of error that the decree under appeal was correct or otherwise when it was passed. Nor is s. 361 applicable to this case, for the appellant may insist on proceeding with the appeal in regard to his liability to pay costs to defendant No. 4 though defendant No. 1 is dead. He may also say that the alienees are the substantial defendants and that they are alive. The decision of the Subordinate Judge on the preliminary ground which is at variance with illustration (c) of s. 42 cannot be supported and must be set aside.

The next question for consideration is whether in the event that has arisen, the original plaint may be amended. The right disclosed by the plaint was a right to sue for a mere declaration of title, and it has now ceased and is replaced by a right to sue for possession by reason of the reversion having become an estate vested in possession. The amendment would substantially alter the original cause of action and rest on an event which did not occur until after the suit had been instituted and been dealt with by the Court of first instance. We are of opinion that the amendment asked for cannot be made at this stage of the suit.

We therefore reverse the decree of the Lower Court and remand the suit for determination on merits. The respondents will pay the appellant's costs in this Court, and the costs in the Lower Court will be provided for in the revised decree.
