

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Justice Seshagiri Ayyar.

1920,
March 15.

AYYA MUDALI VELAN (PETITIONER), APPELLANT AND PETITIONER,

v.

VEERAYEE (RESPONDENT), RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 2 (2)—Decree—Order refusing to recognize a person as legal representative of deceased plaintiff—Appeal from order, maintainability of.

An order rejecting the claim of a person to be the legal representative of a deceased plaintiff and to continue the suit amounts to a decree dismissing the suit and thus gives him a right of appeal from the order.

Rama Rao v. Rajah of Pittapur, (1919) I.L.R., 42 Mad., 219, applied; *Lakshmi Achi v. Subbrama Ayyar*, (1916) I.L.R., 39 Mad., 488, distinguished; *Suppu Nayakan v. Perumal Chetty*, (1916) 30 M.L.J., 486, considered.

CIVIL Miscellaneous Second Appeal and Revision Petition against the order of E. H. WALLACE, District Judge of Tanjore, in Appeal No. 947 of 1917, filed against the order of R. BALASUBRAHMANYA AYYAR, District Munsif of Pattukkottai, in Interlocutory Application No. 1120 of 1917, in Original Suit No. 683 of 1916.

The plaintiff in this suit claimed to be the owner of the plaint mentioned properties which he alleged were purchased out of his funds benami for him in the name of his concubine, Devayanai. First and second defendants are respectively the daughter and son of the deceased Devayanai. As a result of the decision of Second Appeal No. 888 of 1915, to which the defendants herein were parties, the plaint properties were declared to belong to the first defendant herein as heir to her deceased mother. The plaintiff alleged that he was not a party to the above litigation, that the first and second defendants, colluded together and obtained the decree as aforesaid in Second Appeal No. 888 of 1915, and that he came to know of the same in July 1916, after the Second Appeal was disposed of. The plaintiff died on 5th April 1917, and the second defendant

* Appeal against Appellate Order No. 20 of 1919 and Civil Revision Petition No. 145 of 1919.

applied to be made his legal representative and to continue the suit. The District Munsif held that since the plaintiff attacked the conduct of the second defendant, and alleged a cause of action against him, the cause of action did not survive to him, and that he should not be allowed to continue the suit. He accordingly dismissed the application. The second defendant filed an appeal from the said order to the District Court. The District Court dismissed the appeal, holding that no appeal lay from an order under Order XXII, rule 3, Civil Procedure Code. From the order of the District Court the second defendant filed this appeal under sections 2 and 100, Civil Procedure Code, and also filed a Civil Revision Petition.

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K. Rajah Ayyar for appellant.

S. Muthayya Mudaliyar for respondent.

OLDFIELD, J.—This appeal is against the decision of the lower Appellate Court that no appeal lay to it against the District Munsif's order refusing to implead the appellant as legal representative of a deceased plaintiff.

The lower Appellate Court's main ground of decision is that the appeal should be against the order of abatement or dismissal of the suit. It is not possible to understand how appellant could appeal against an order to which he would not be a party, and on this ground without deciding whether under the present Code an order of abatement is in any respect equivalent to or appealable as a decree dismissing the suit and without expressing any opinion as to the propriety of some portions of the language used in the judgments in *Suppu Nayakan v. Perumal Chetty*(1), I must reject this ground of decision.

The correct view of the law is in my opinion that indicated in *Rama Rao v. The Rajah of Pittapur*(2). The order appealed against in the lower Appellate Court was a decree, because it negatived the appellant's right to the relief, which the original plaintiff had sought in the suit, and was an adjudication on appellant's claim within the definition in section 2 (2) of the Civil Procedure Code; and as a decree such an order is appealable. Some argument to the contrary was founded on *Lakshmi Achi v. Subbrama Ayyar*(3), and the *dictum* at page 493 that the

(1) (1916) 80 M.L.J., 488.

(2) (1919) I.L.R., 42 Mad., 219.

(3) (1916) I.L.R., 39 Mad., 488.

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legislature has given no right of appeal against orders under Order XXII, rule 3. I am content to read this as referring only to the fact that no appeal has been given against those orders as such or except in cases in which they also have the character of decrees. That was sufficient for the decision of the case before the learned Judges, one in which no abatement was in question, appeal being against a refusal to make the appellant a plaintiff, when one representative of the deceased plaintiff, who could prosecute the litigation in succession to him was already on the record, and the refusal involved only an adjudication between that representative and appellant, not between appellant and the defendants in the suit.

The order of the lower Appellate Court must be set aside and the appeal remanded for disposal on its merits. Costs to date in the lower Appellate Court and here will be costs in the case and be provided for in the order to be passed.

The Civil Revision Petition is dismissed. No order as to costs.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—I agree. Plaintiff sued for a declaration that the decree obtained in respect of the property in suit by the second defendant is not binding on him. Defendants Nos. 1 and 2 are his illegitimate daughter and son, respectively. The plaintiff died pending the suit. The second defendant applied to be brought on the record as the legal representative of the deceased plaintiff. The District Munsif held that the cause of action did not survive to him, his reason being that there was an attack against the second defendant also by the plaintiff. An appeal was taken to the District Court. The learned Judge rejected it on the ground that no appeal lay.

It seems to me that he is wrong. The order refusing to allow the second defendant to continue the suit on the ground that the cause of action does not survive to him finally deprives him of all his rights in the suit, and has the effect of putting an end to the litigation altogether. It was suggested that notwithstanding the refusal to permit him to prosecute the suit, the second defendant, if he waited till the expiry of six months, might on the abatement of the suit, prefer an appeal, making the refusal a ground of complaint. As at present advised I am unable to agree with this contention. If the Court was right, at

this stage of the suit, in holding that the appellant was not the legal representative and that no cause of action survived to him, it would be anomalous to permit him to file an appeal which can only be done by him in his capacity of legal representative of the deceased plaintiff. In *Suppu Nayakan v. Perumal Ohetty*(1) and in *Subramania Iyer v. Venkatramier*(2), this question did not come up directly for decision. The difference between the old and the new Code of Civil Procedure, on the question of abatement makes it doubtful whether some of the observations of the learned Judges in that case are not too broadly expressed. However that may be, both the above decisions recognize that an order refusing to allow an applicant to continue the suit finally determines his right in the suit, and as such comes within the definition of 'decree' in section 2. *Rama Rao v. The Rajah of Pittapur*(3), although it related to striking out the name of a defendant from the array of parties, is an authority for the proposition that the addition or deletion of a person as a party to a suit is a final adjudication of the applicant's rights on the cause of action put forward.

I think the principle of that decision governs the present case. Mr. Muthyya Mudaliyar relied on *Lakshmi Achi v. Subbrama Ayyar*(4). In that case, there was no question of the suit abating; one of the two rival claimants was allowed to continue the suit and to obtain the preliminary decree. At this stage, the other claimant applied to be brought on the record in the place of the deceased person, and for an order that the name of the party who was brought in should be deleted. It was held that an order dealing with such a claim was not appealable. In the present case there is no question of any other person being permitted to prosecute the suit. The rejection of the applicant's petition entails the refusal of any relief to the party on the cause of action alleged in the suit. I am therefore of opinion that an appeal lay to the District Court. I agree in the order proposed by my learned brother.

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(1) (1916) 30 M.L.J., 486.

(2) (1915) 31 I.C., 4.

(3) (1919) I.L.R., 42 Mad. 219.

(4) (1916) I.L.R., 39 Mad., 488.