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owners of the adjoining lands at a lower level would be prevented from improving their lands; but this is clearly not so as the adjoining owner can improve his lands to any extent he pleases, even to the extent of raising the level of his lands provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramasawmy* v. *Rasi*(1) was referred to by the Privy Council in *Maung Bya* v. *Maung Kyi Nyo*(2) with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Krishnan and Mr. Justice Beasley.*

1925, October 29.

VENKATAKRISHNA REDDI AND TWO OTHERS (DEFENDANTS—RESPONDENTS), APPELLANTS,

v.

KRISHNA REDDI (PETITIONER—PLAINTIFF), RESPONDENT.*

O. XXII. r. 5, Civil Procedure Code (V of 1908)—Order rejecting petition to be brought on record as legal representative—No right of appeal against order even when no rival claimant.

No appeal lies against an order under Order XXII, rule 5, Civil Procedure Code, dismissing, on the objection of the defendant, the application of a person to be brought on record as the legal representative of a deceased plaintiff, even when

(1) (1915) I.L.R., 38 Mad., 149. (2) (1925) 49 M.L.J., 282 (P.C.).

* Appeal against Order No. 346 of 1924.

there is no rival claimant to be brought on the record as the legal representative. *Ayya Mudali Velan* v. *Veerayee* (1920) I.L.R., 43 Mad., 812, overruled.

APPEAL against the order of G. G. SOMAYAJULU SASTRI, District Judge of South Arcot, in Appeal Suit No. 325 of 1923, presented against the order of S. RANGASWAMI AYYANGAR, District Munsif of Villupuram, in I.A. No. 357 of 1923 in O.S. No. 451 of 1922.

The facts are given in the Order of Reference.

This appeal coming on for hearing, the Court (DEVADOSS and WALLER, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

DEVADOSS, J.—The plaintiff, in O.S. No. 451 of 1922, on the file of the District Munsif's Court of Villupuram died pending the suit and the respondent herein applied to be brought on record as the legal representative of the plaintiff. The District Munsif held that the will under which the respondent claimed the property of the deceased plaintiff was not genuine and dismissed his petition. The respondent preferred an appeal to the District Court of South Arcot. A preliminary objection was raised by the appellants herein to the appeal on the ground that no appeal lay against the order of the District Munsif. The District Judge overruled the preliminary objection and held that the will under which the respondent herein claimed was a genuine will, set aside the order of the District Munsif dismissing his application for being added as the second plaintiff and remanded the suit for disposal according to law. Against that order the defendants have preferred this appeal.

It is contended by Mr. Bashyam Ayyangar for the appellants that no appeal lay to the District Court from the order of the District Munsif passed under rule 5 of Order XXII of the Civil Procedure Code. Under Order XXII, rule 3, clause (1) "Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit." Clause (2) is as follows: "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned . . . " Rule 5 provides, "Where a

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question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court." Section 367 of the old Code was "If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." The present rule 5 does not allow a separate suit to be brought for the purpose of determining who the legal representative is, nor does it require that the question should be decided at or before the hearing of the suit as to who shall be admitted to be the legal representative for the purpose of prosecuting the suit. It is therefore the duty of the Court to determine the question whether the person claiming to be the legal representative is the legal representative or not. Where there is a conflict between two or more persons as to who the legal representative is, the Court should determine the question and the person who is found by the Court to be the legal representative should be made a party to the suit.

The question is, does Order XXII contemplate the case of the Court dismissing the application of a person to be brought on record as the legal representative of the deceased plaintiff when there is no conflict between rival claimants. I think, considering the changes made in the new Code, the evident intention of the legislature was to allow the sole applicant to be brought on record as the legal representative. It did not contemplate the dismissal of a petition to be brought on record on the objection of the defendant, for it did not provide for the abatement of the suit in case such an application was dismissed. It has specifically provided for the abatement of the suit when no application is made within the time limited by law. It is open to the defendant to prove in the course of the suit that the right of the deceased plaintiff did not survive to the person brought on record. As that is the course contemplated by Order XXII there is no appeal provided against an order made under rule 5. Under the old Code, section 588 (18), appeals were provided against an order refusing to bring the legal representative on record as well as against an order bringing the legal representative on record. The present Code advisedly has not mentioned orders under rule 5, Order XXII, among the appealable orders in Order XLIII. The question therefore is whether an order refusing to bring a person as the legal representative of the deceased plaintiff, when

he is the only applicant for the purpose, is a decree or only an order. If the Court refuses to bring the sole applicant on record as the legal representative of the deceased plaintiff, the Court has to dismiss the suit as it abates so far as the deceased plaintiff is concerned. The abatement of the suit is a necessary consequence of the refusal of the Court to bring the sole applicant on record. Under rule 9, when a suit abates or is dismissed under Order XXII no fresh suit would lie on the same cause of action. The result is, the applicant, even though he is the real legal representative, has neither an appeal against the order refusing to make him a party nor has the right to bring a separate suit on the same cause of action. He cannot bring a suit for declaration that he is the legal representative of the deceased plaintiff, for such a suit, for obvious reasons, would not lie. Did the legislature intend to lay down in Order XXII that a person who is the real legal representative of deceased plaintiff but who, on the objection of the defendant, is not made a party to the suit in the place of the deceased plaintiff should go without any remedy and lose his right to the property in the suit? I think from the wording of rule 3 it is clear that an order refusing to bring the applicant on record as the legal representative of the deceased plaintiff, when there is no rival claimant to dispute his right is a decree, for it determines final rights between the parties.

It is contended by Mr. Bashyam Ayyangar that the decision of the Court that the applicant was not the legal representative of the deceased plaintiff would not operate as *res judicata* in subsequent proceedings as the order was not made in a suit. Granting, for argument's sake, that such an order is not one which is made in the suit, the principle of *res judicata* would apply, for it determines finally the question whether the applicant is the legal representative of the deceased plaintiff entitled to continue the suit on the cause of action alleged in the plaint or not. It was laid down by their Lordships of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(1) that the principle of *res judicata* would apply to a decision which finally determines the rights of the parties even though the decision was not in a suit. In that case an order made in land acquisition proceedings as regards the title of the parties barred a subsequent suit in respect of the matter which was in dispute in the land acquisition proceedings. It was contended in that case that the order in the land acquisition proceedings was not a decision

(1) (1922) I.L.R., 45 Mad., 320 (P.C.).

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in a former suit. Lord BUCKMASTER, who delivered the judgment of their Lordships, observes at page 331:

"It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *Hook* v. *Administrator-General of Bengal*(1), that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect."

In the light of this decision it is not possible to hold that a decision under Order XXII, rule 5, would not operate as *res judicata* in a subsequent suit.

As there is a conflict of authorities, I proceed to consider the most important cases on the point. In *Rama Rao* v. *The Rajah of Pittapur*(2), it was held by Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J., that an order striking out from the array of parties the defendant as an unnecessary party and dismissing the suit against him was in effect a decree and was appealable as such. In *Ayya Mudali Velan* v. *Veerayee*(3), OLDFIELD and SESHAGIRI AYYAR, JJ., held that an order rejecting the claim of a person to be the legal representative of the deceased plaintiff and to continue the suit amounted to a decree dismissing the suit and gave him the right of appeal from that order. The District Court relied upon these two decisions for overruling the preliminary objection. I am inclined to hold that the decisions in *Rama Rao* v. *The Rajah of Pittapur*(2) and in *Ayya Mudali Velan* v. *Veerayee*(3) are correct.

In *Palkai* v. *Pathumma*(4), it was held by BENSON and SUNDARA AYYAR, JJ., that an order that a person is not the legal representative of a deceased plaintiff did not bar a separate suit. In that case the question whether an appeal lay against the order refusing to make a person the legal representative of the deceased plaintiff was neither raised nor considered; what the learned Judges held was that the decision of the Court refusing to make a person the legal representative of the deceased plaintiff was not a question arising for decision in the suit and therefore the principle of *res judicata* did not apply. But in view of the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao*(5) this decision cannot be said to be good law. Further there is a specific provision in rule 9 against a separate suit on the same cause of action.

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(1) (1921) I.L.R., 48 Calc., 499 (P.C.).
(2) (1919) I.L.R., 42 Mad., 219.
(3) (1920) I.L.R., 43 Mad., 812.
(4) (1913) M.W.N., 673.
(5) (1922) I.L.R., 45 Mad., 320 (P.C.).

Reliance is placed by Mr. Bhashyam Ayyangar on *Subramania Iyer* v. *Vaithilinga Mudaliar*(1) for the position that no appeal lies from an order refusing to make a person the legal representative of a deceased plaintiff. The facts of the case are distinguishable from the facts of the present case. There the Court did make one of the rival claimants a party in the place of the deceased plaintiff, and the suit did not abate in consequence. The Court held that the rival claimants who were not made parties to the action had no right of appeal. The case is different when the sole applicant is not made a party on the ground that he is not the legal representative for the order amounts to a final determination of one of the questions in issue between him and the defendant and that decision finally determines the result of the suit. The case *Venkata Seshamma* v. *Gunneswara Rao*(2) is also distinguishable from the present case. In that case also the suit did not abate as one of the applicants was not made a party to the suit. SPENCER and KUMARASWAMI SASTRI, JJ., held that no appeal lay against an order refusing to make some of the claimants parties to the action and they distinctly say that there was no abatement of the suit. In *Subbayya* v. *Sammadayyar*(3), it was held that an appeal lay against an order dismissing the application of a person to be brought on record as the legal representative of the deceased party. The learned Judges observe at page 497:

"The title to represent being denied, there is in the present case a dispute between the claimant and the defendant. We therefore think the District Judge ought to have entertained the appeal. We also think that the appeal lay against the decree dismissing the suit." This was followed by a Bench of the Allahabad High Court in *Hanwant Singh* v. *Ram Gopal Singh*(4).

In *Ram Sarup* v. *Moti Ram*(5), it was held that no appeal lay from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff and that such an order was not a decree. In *Sital Prosad* v. *Bajrani Sahai*(6), it was held that such an order did not come within the definition of the word "decree" as the question was not in controversy in a suit and as the person seeking to be added as a party was not a party to the suit.

(1) (1918) M.W.N., 198.
(2) (1924) 46 M.L.J., 129.
(3) (1895) I.L.R., 18 Mad., 496.
(4) (1903) I.L.R., 30 All., 348.
(5) (1920) I.L.R., 1 Lah., 493.
(6) (1912) 18 I.C., 70.

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In a recent case, *Ruckmani Ammal* v. *Veerasami Aiyangar*(1), JACKSON, J., held that no appeal lay against an order under rule 5 of Order XXII.

It is unnecessary to deal with the other cases quoted by Mr. Bhashyam Ayyangar. I think the proper course in such cases would be to make the sole applicant a party to the suit and then raise an issue as to whether he is the legal representative or not as a preliminary issue and try the other issues if the preliminary issue is found in favour of the person brought on record. Such a decision would amount to a decree and the person who is brought on record as the legal representative would have a right of appeal against the decree.

As, however, there is a conflict of authorities on this point I would refer for the decision of a Full Bench the question whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on record as his legal representative.

WALLER, J.—I agree that there being a conflict of authority on the question, it should be referred for the decision of a Full Bench. My own view is that no appeal lies. An order of this kind could be appealed against as an order under the old Civil Procedure Code. Under the present Code no appeal lies against it under order XLIII and I do not think that it can be appealed against as a decree. The decision on an application under Order XXII, rule 3 is not a matter that is in controversy in the suit itself. If there is a dispute whether the applicant is or is not the legal representative, it has to be determined under rule 5 before the suit can be proceeded with.

ON THIS REFERENCE—

V. C. Viraraghavan for *K. Bashayam* for appellant.—The order as an order is not appealable ; see section 104 and Order XLIII, Civil Procedure Code. The remedy of the only legal representative is to file a suit against defendant for a declaration that he is the legal representative and if he succeeds in the suit he may revive the suit. He referred to Order XXII, rules 3 and 5, corresponding to sections 365 to 367 of old Civil Procedure Code. Against such an order there was an appeal under old Civil Procedure Code under clause (18) of section 588. The order does not amount to a decree ; see definition of decree and section 2 (2) of Civil Procedure Code. This legal

(1) (1924) 47 M.L.J., 370.

representative petition does not concern 'parties to' or 'matters in' the suit. Hence it is not appealable as a decree, see *Lakshmi Achi* v. *Subarama Ayyar*(1), *Ram Sarup* v. *Moti Ram*(2) *Sital Prosad* v. *Bajrangi Sahai*(3).

[KRISHNAN, J.—It is curious that there is an appeal against abatement and no appeal against dismissal of legal representative petition. The petitioner has only to wait till the Court orders the suit to have abated to have a right of appeal.]

Ayya Mudali Velan v. *Veerayee*(4), is distinguishable; if not, it is incorrect. It was distinguished in *Venkata Sheshamma* v. *Gunneswara Rao*(5), and *Rukmani Ammal* v. *Veerasami Aiyangar*(6). The two proceedings are different; see *Balabai* v. *Ganesh*(7) per CHANDAVARKAR, J. and *Ram Sarup* v. *Moti Ram*(2).

S. Nagaraja Ayyar (with *K. S. Jayarama Ayyar*) for respondent.—In terms, there is no right of appeal against the order under the new Code. But the effect of the order is to make it equivalent to a decree. Hence there is an appeal; *Ayya Mudali Velan* v. *Veerayee*(4). A question as to who is the legal representative is a question in the suit; *Venkata Reddy* v. *Venkata Reddy*(8), and *G.I.P. Railway Co.* v. *Ramachandra Jagannath*(9). Order XXII deals only with cases of rival claimants. Section 146, Civil Procedure Code, gives the right to continue the suit if there is no rival claimant, even if there be no order of the Court bringing the claimant on record. It is only on account of the enactment of section 146 no appeal is provided from the order.

OPINION.

The question referred to us is in the following terms:—

"Whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on the record as his legal representative."

The facts of the case are that on the 14th April 1923 the plaintiff on record died. On the 20th June within the period demarcated by law the petitioner (respondent herein) petitioned to be brought on the record as

(1) (1916) I.L.R., 39 Mad., 488.
(2) (1920) I.L.R., 1 Lah., 493.
(3) (1912) 13 I.C., 70.
(4) (1920) I.L.R., 43 Mad., 812.
(5) (1924) 46 M.L.J., 129.
(6) (1924) 47 M.L.J., 870.
(7) (1903) I.L.R., 27 Bom., 162 at 181.
(8) [1915] 2 L.W., 519.
(9) (1919) I.L.R., 43 Bom., 886.

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the legal representative of the deceased plaintiff. The ground on which he sought to be brought on record was that he was the legatee of the deceased plaintiff and took under her will the properties in suit. The learned District Munsif made an order on the 30th June in the following terms:—

> "Subject to the proof of the genuineness of the will, the petitioner may be brought on record as the operation and validity of the will turns upon the finding of the first issue."

That of course was purely a conditional order. On the 14th August the District Munsif proceeded to inquire into the question outlined in the provisional order, viz., the genuineness of the will and passed the order of that date. He found the will was not genuine and as a consequence, of course, the provisional order as to the appellant being brought on the record fell to the ground.

The material provisions of the Code are parts of Orders XXII and XLIII. By Order XXII, rule 5, where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or a deceased defendant, the said question shall be determined by the Court. By rule 9 (2) the plaintiff or the person claiming to be the legal representative of the deceased plaintiff . . . may apply for an order to set aside the abatement or dismissal; and, in certain circumstances which are set out in the rule, the Court shall set aside the abatement. The question is whether an appeal lies from an order made in pursuance of Order XXII, rule 5, if the determination, to call it by an unequivocal term for a moment, was an order within the meaning of the Code.

If it is, then under Order XLIII, rule 1, such an order does not fall within the list of orders there given from which appeals lie to a higher tribunal. We may notice in passing that the Order does provide for an appeal against an order made under Order XXII, rules 9 and 10 but not

against orders made under any other rules in that Order. It appears to us therefore that, assuming this to be an order, the Code expressly excludes its being appealed against as an order. Whether the respondent in this case would or would not have a remedy by way of appeal against the abatement which follows as a consequence of this order is another matter. But we are not concerned with that, there is nothing about it in this order which was simply one refusing to make him legal representative and was entirely silent as to any question of abatement or dismissal of the suit. But it is sought to say that it is appealable for the reason that it is not in truth an order but a decree. The definition of "decree" is contained in section 2 (2) of the Code and runs as follows:—

> "A decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The line of argument appears to be this—and that is the reason for the appearance of the words in the reference "when there is no rival claimant for being brought on the record as legal representative"—that where there is only one claiming to be the legal representative, the effect of rejecting that person's claim is *ipso facto* to bring the suit to a close and that therefore the order dismissing the claim is a final adjudication as between the only possible parties. It was held in *Ayya Mudali Velan* v. *Veerayee* (1) by OLDFIELD and SESHAGIRI AYYAR, JJ., that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff and continue the suit amounted to a dismissal of the suit and was therefore appealable as a decree.

(1) (1920) I.L.R., 43 Mad., 812.

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The extreme inconvenience of that view would be this: that an order rejecting the claim of a person to be legal representative would be a decree if he were the only available legal representative but would only be an order if there were rivals, any one of whom might have applied to be declared to be the legal representative; for example, on the 20th June it might quite well have been that other claimants would have come forward before the date when the time for applying expired, namely, the 14th July; so that at the time the plaintiff was petitioning there was nothing to show that, even if his petition was rejected, other persons might not come forward to represent the interests of the deceased plaintiff. On that ground we think it impossible to say that a mere refusal *per se* to appoint a person the legal representative of a deceased plaintiff or a deceased defendant can be regarded as a final decree, partly because the Court would have to go into all sorts of inquiries to ascertain what were the surrounding circumstances before it could decide whether such refusal was a decree or an order. It seems to us that the Code cannot have contemplated the institution of such an inquiry as that. For these reasons we are of opinion that we should answer this reference by saying that no appeal lies against the order in this case; but we give no expression of opinion as to what would be the consequence if the petitioner appeals against the actual order of abatement or dismissal.

It follows that in our opinion *Ayya Mudali Velan* v. *Veerayee*(1) was wrongly decided.

N.R.

(1) (1920) I.L.R., 43 Mad., 812.