

and on that question the Court held that she had withdrawn and entered into another contract. The order of the Court was "that the case be struck off; the petitioner is at liberty to bring a maintenance suit on the contract if she wishes to do so." This order was appealed to the Judge, who set it aside, and directed the lower Court to restore the application of the respondent to its file and hear it on its merits. Against this order of the Judge an appeal has been preferred to this Court on the ground that the Judge had no jurisdiction to make it. It appears to me the Judge had jurisdiction, and that the question depends on whether the first Court's order was a decree within the meaning of s. 2 of the Civil Procedure Code, so as to allow of an appeal to the Judge. I think it was. The matter disposed of by the Court was, in fact, whether the plaintiff had a right to institute the suit, and the effect of the order was to negative that right and to strike the case off the file, and I think it was an adjudication in respect of a right within the meaning of s. 2; and I may add that it might also be regarded as analogous to an order rejecting a plaint, the application, by s. 410 of the Code, in the event of its being granted, being to be deemed to be the plaint in the suit.

On these grounds I would affirm the Judge's order and dismiss this appeal with costs.

BRODHURST, J.—I entirely concur.

Appeal dismissed.

FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield,
Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

1886
November 11

MUHAMMAD HUSAIN AND OTHERS (DEFENDANTS) v. KHUSHALO
(PLAINTIFF).*

Appeal—Abatement of suit—Suit to recover share of joint family property sold in execution of decree—Death of plaintiff-respondent—Survival of right to sue.

In a suit for the recovery of a share of ancestral family property which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree in the lower appellate Court, from which

* Second Appeal No. 1800 of 1885, from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June, 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June, 1883.

1886

MUHAMMAD
HUSAIN
v.
KHUSHALO

the defendant appealed to the High Court. While the appeal was pending the plaintiff died, and, on her application, his widow was made respondent in his place. At the hearing of the appeal, the appellant contended that, upon the plaintiff's death, the right to sue did not survive, and the appeal should therefore be decreed by the suit being dismissed.

Held by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment, or the right to sue, would survive to his legal representative, though whether the deceased plaintiff's representative could enforce the whole of the judgment in this case was a different matter. *Phillips v. Homfray* (1) and *Padarath Singh v. Raja Ram* (2) referred to.

When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.

THE plaintiff in this case, Dipchand, a member of a joint Hindu family, claimed a one-sixth share of certain ancestral family property, namely, a three biswas share of a village, which was in possession of the defendants. The defendants had purchased the rights and interests of the plaintiff's grandfather in the property at a sale in execution of a decree. The plaintiff alleged that this decree "was not for a debt contracted for the benefit of the family, and therefore the sons and grandsons were not bound to satisfy it, nor were their shares in the ancestral property transferable in satisfaction thereof." It appeared that this decree, which was dated the 19th March, 1860, was a simple money-decree. The plaintiff was born about three months after the passing of the decree, and the ancestral property was sold about fifteen months after the plaintiff's birth. The Court of first instance (Subordinate Judge of Aligarh), on the 30th June, 1883, dismissed the suit on the ground, among others, that the debt for which the property had been sold was one in respect of which the whole family property was liable. On appeal by the plaintiff, the District Judge of Aligarh, on the 15th June, 1885, held that the plaintiff's interest in the property did not pass by the sale to the defendants, and gave him a decree for possession of the share claimed.

The defendants appealed to the High Court. While the appeal was pending the plaintiff Dipchand died, and his widow Khushalo was, on her application, made respondent in his place.

The appeal came for hearing before Oldfield and Mahmood, J.J., when it was contended for the appellants that the appeal should be

(1) L. R., 24 Ch. D. 439. (2) I. L. R., 4 All. 235.

1886

MUHAMMAD
HUSAIN
K. KHUSHALAO

decreed and the suit dismissed, as on the death of Dipchand the right to sue did not survive. With reference to this contention, the Division Bench referred the case to the Full Bench for the decision of the questions stated in the following order:—

“Dipchand, plaintiff, instituted this suit on the allegation that his grandfather owed money to the defendants, who sued him and obtained a decree against him, and in execution brought to sale joint ancestral property in which plaintiff had an interest, and purchased it themselves, and he sued to recover his share of the property.

“The Court of first instance dismissed the suit; the lower appellate Court decreed it; and the defendant instituted an appeal in this Court. While this appeal was pending, plaintiff Dipchand died, and, on her application, his widow, Musammat Khushalo, was made respondent in his place. On the appeal coming on for hearing, the appellants contended that, on the plaintiff Dipchand's death, the right to sue did not survive, and in consequence their appeal should be decreed by the suit being dismissed; and they refer to a decision of this Court—*Padarath Singh v. Raja Ram* (1) which would appear to support their contention.

“As we are doubtful of the correctness of the ruling referred to, we think it desirable to refer the following questions to the Full Bench:—

“1 Whether the right to sue in this case by Dipchand was a personal right, which could not survive to his legal representative after his death?

“2. If so, whether the suit should be dismissed by reversal of the lower appellate Court's decree, by reason of the death of Dipchand plaintiff?”

The Hon. Pandit *Ajulhia Nath* and Pandit *Sundar Lal*, for the appellants.

Mr. *C. H. Hill*, for the respondent.

The following judgments were delivered by the Full Bench:—

1886
 MUHAMMAD
 HUSAIN
 v.
 SHUBHALO.

EDGE, C. J.—I have always understood the law to be that in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative. Whether the deceased plaintiff's representative can enforce the whole of the judgment in this case is a different matter—see *Phillips v. Homfray* (1). When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.

STRAIGHT, J.—I concur in the view expressed by the learned Chief Justice, and I am not aware that it is at variance with anything said by me in the case mentioned in the referring order.

OLDFIELD, J.—I concur. I think the answer to this reference should be that the right to sue in this case is not a personal right only, but one which would survive to the legal representative of the plaintiff.

BRODHURST, J.—I concur with the learned Chief Justice.

TYRRELL, J.—I concur with the learned Chief Justice.

[See *Chapman v. Day* (49 L. T. 436).—REF.]

1886
 November 25.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

QUEEN-EMPRESS v. BALWANT.

Criminal Procedure Code, ss. 423 (a), 439—Order of acquittal—High Court's powers of revision—Order by High Court for re-trial after acquittal on appeal.

The High Court has power under s. 439 of the Criminal Procedure Code to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction.

In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such order and direct a re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal.

THIS was a reference to the Full Bench by EDGE, C. J., and STRAIGHT, J. of the following questions:—

“1 Has the Court power, under s. 439 of the Criminal Procedure Code, to revise an order of acquittal?”

(1) L. R., 24 Ch. D. 439.