

1888

CHAJMAL
DAS
v.
JAGDAMBA
PRASAD.

the 23rd January, 1888. To the remarks I have made in this last judgment I have nothing to add, though, being bound by the decision of the majority of the Court, I agree in the order which has been made.

1888
April 30.

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

DEBI DIN (PLAINTIFF) v. CHUNNA LAL (DEFENDANT).*

Civil Procedure Code, ss. 3, 368, 582—Act XV of 1877 (Limitation Act.) sch. ii, Nos. 171B, 178—Death of defendant-respondent—Application by plaintiff-appellant to have representative of deceased substituted as respondent.

Held by the Full Bench (MAHMOOD, J. dissenting) that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent.

Narain Das v. Lejja Ram (1) and *Balkrishna Gopal v. Bal Joshi Sadashiv Joshi* (2) referred to.

Baldeo v. Bismillah Begam (3), and *Rameshar Singh v. Bishesar Singh* (4) overruled.

Held by MAHMOOD, J., *contra*, that the word "defendant" in art. 171B includes a defendant-respondent, and, reading art. 171B with clause 2 of s. 3 in conjunction with ss. 368 and 582 of the Civil Procedure Code includes also a plaintiff-respondent; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent's death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement.

Soshi Bhusan Chand v. Grish Chunder Taluqdar (5) referred to.

This was a suit for an account of the profits of certain zamindari property in which the plaintiff claimed a share, and for the recovery of such sum with interest as might be found due on the accounts being taken. The defendant, the uncle of the plaintiff, was the manager of the property. On the 14th June, 1886, the Court of first instance (Subordinate Judge of Cawnpore) decreed the claim in respect of part of the property in suit. On the 13th August, 1886, the plaintiff appealed to the High Court from so much of the lower Court's decree as was adverse to him. On the 4th January,

* First Appeal No. 153 of 1886 from a decree of Munshi Rae Kulwant Prasad, Subordinate Judge of Cawnpore, dated the 14th June, 1886.

(1) I. L. R., 7 All. 693.

(3) I. L. R. 9 All. 118.

(2) I. L. R., 10 Bom. 663.

(4) I. L. R., 7 All. 734.

(5) I. L. R., 11 Calc. 594.

1888, pending the appeal, the defendant-respondent Jia Lal, died, and on the 19th March an application to the Court was made on behalf of the plaintiff-appellant to the effect that the names of the four sons of the deceased respondent might be entered on the record as respondents in his place. On the 27th March, 1888, pending the disposal of this application, another application was made on behalf of the above-mentioned legal representatives to the effect that the application of the 19th of March, 1888, had not been-presented within the period of limitation provided in art. 171B of the second schedule of the Limitation Act, and prayed that the appeal should accordingly be declared to have abated.

1888
 DEBI DIN
 v.
 CHUNNA LAL.

On the 28th April, 1888, the case came for hearing before Edge, C J., and Straight, J., who passed an order referring the applications of the 19th March and the 27th March, 1888, to the Full Bench for disposal together with the other cases raising similar questions of law.

The Hon. *T. Conlan*, Sheikh *Amiruddin*, and Lala *Lalla Prasad*, for the appellant.

Mr. *G. E. A. Ross* and Mr. *E. C. F. Greenwoy*, for the legal representatives of the defendant-respondent.

The Hon. *T. Conlan* for the appellant.—The decision of the Full Bench in *Narain Das v. Lajja Ram* (1) applies to this case in principle. The judgment of Straight, J., in that case was concurred in by Oldfield and Brodhurst, JJ., and it shows that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent. The only article of the Limitation Act applicable to such a case is art. 178, and therefore the application of the 19th March was in time and that of the 27th March premature.

Mr. *G. E. A. Ross* for the legal representatives of the respondent.—In the case of *Baldeo v. Bismillah Begam* (2) Oldfield and Tyrrell, JJ., held that art. 171B of the Limitation Act applies to applications to have the representative of a deceased defendant-respondent made a respondent. That case is exactly in point, and it shows that those learned Judges drew a distinction between the case of a defendant-respondent and that of a plaintiff-respondent dying, and considered that *Narain Das v. Lajja Ram* (1) did not

(1) I. L. R., 7 All. 693. (2) I. L. R., 9 All. 118.

1888
 DEBI DIN
 v.
 MUNNA LAL.

govern the former class of cases. The Legislature can never have meant that while an application under s. 365 of the Code for substitutions of the legal representative of an appellants must be made within sixty days after the appellant's death, an application for substitution of a respondent might be made at any time within three years after the respondent's death.

[STRAIGHT, J.—The omission of the word “respondent” in art. 171B was probably an oversight.]

The. Hon. T. Conlan for the appellant in reply.

EDGE, C. J.—This is an application on behalf of the plaintiff-appellant to bring upon the record the representative of the deceased defendant-respondent. The defendant-respondent died on the 4th January, 1888. This application was presented to the Court on the 19th March last. Mr. Ross also applied, on behalf of the legal representative of the deceased defendant-respondent, for an order directing that the appeal should abate. The question raised is whether art. 171B. of sch. ii of the Limitation Act applies to this case. It has been decided in the case of *Balkrishna Gopal v. Bal Joshi Sadashiv Joshi* (1) that art. 171B, sch. ii, of the Limitation Act does not apply to the case of a defendant-respondent. Having regard to the fact that by art. 171 the Legislature provided specifically for the cases of the death of an appellant or the death of a plaintiff, and there is no express reference in art. 171B to the death of a respondent, I am of opinion that art. 171B does not apply to the death of the respondent, whether that respondent was originally in the action plaintiff or defendant. I think the principle applicable to this case is the same principle which was the basis of my brother Straight's judgment in the Full Bench case of *Narain Das v. Lajja Ram* (2), with which, so far as the report enables us to see, at least two Judges of the Court concurred. This opinion of mine is in conflict with the judgment of Oldfield and Tyrrell, JJ., in *Baldeo v. Bismillah Begam* (3). It does not appear to me that Oldfield, J., who delivered judgment in that case, considered or discussed the bearing of the judgment of the majority of the Court in the Full Bench case of *Narain Das v. Lajja Ram* (2). Indeed, my brother Tyrrell is now of opinion that that judgment was in opposition to the decision

(1) I. L. R., 10 Bom. 663. (2) I. L. R., 7 All. 693.

(3) I. L. R., 9 All. 118.

1888

 DEBI DIN
 v.
 CHUNNA LAL.

of the majority in the Full Bench case. My opinion is also apparently at variance with the decision of Oldfield and Mahmood, JJ., in *Rameshar Singh v. Bisheshar Singh* (1). I think I am bound to follow the principle which is enunciated in the Full Bench case and with which principle I agree. As in my opinion art. 171B does not apply, and as there does not appear to be any other article than 178 applicable to the case, I am of opinion that the application of Mr. Conlan on behalf of the appellant must be allowed, and the application of Mr. Ross on behalf of the legal representatives of the deceased-respondent should be refused with costs.

STRAIGHT, J.—I am of the same opinion. The learned Chief Justice has correctly interpreted the principle upon which I based my decision in the Full Bench case of *Narain Das v. Lajja Ram* (2). To put it shortly, that principle is this, that the word “defendant” in the art. 171B does not include a “respondent,” and that consequently the period of limitation provided in that article is not applicable to the failure on the part of the appellant to bring on the record the heir of a deceased “respondent.” I am of opinion that the limitation applicable to cases of this kind is that which has been stated in a Full Bench case of the Madras High Court (3), and has, as I understand it, been approved by the Calcutta High Court, (4) has also, from what we see now, met with approval by the Bombay High Court (5), and has been adopted by us.

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

TYRBELL, J.—I concur in the order made.

MAHMOOD, J.—In delivering my judgment in *Chajmal Das v. Jagdamba Prasad* (6), in which I concurred in the conclusion at which the learned Chief Justice and my learned brethren arrived, I had no intention to concede any principle that the ruling in the case of *Narain Das v. Lajja Ram* (2) could be interpreted so as to render the rule that was there laid down applicable also to the cases in which a defendant who happened also to be a respondent died, because it is to be borne in mind that in that case the appellant was defendant in the original suit. In that Full Bench case the whole of my dissentient judgment of course proceeded upon repu-

(1) I. L. R., 7 A. 1. 734.

(2) I. L. R., 7 All. 693.

(3) I. L. R., 9 Mad. 1.

(4) I. L. R., 12 Calc. 520.

(5) I. L. B., 10 Bom. 563.

(6) *Ante*, p. 260.

1888

DEBI DIN
v.
CHUNNA LAL.

diating any distinction between a plaintiff-respondent and defendant-respondent, because I held there, at page 700 of the report, that the effect of s. 582 was to demolish the distinction between the plaintiff and defendant for purposes of the array of parties in appeal. The effect of my view was that the defendant-appellant was a "plaintiff," as indeed a plaintiff-appellant also would have been a "plaintiff," so a defendant-respondent would have been a "defendant," as also a plaintiff-respondent would be a "defendant" for the purposes of art. 171B of sch. ii of the Limitation Act. That ruling, however, had to be considered by me in conjunction with Oldfield, J., in *Rameshar v. Bishesar Singh* (1) where I endeavoured to show that the Full Bench ruling in *Narain Das v. Lajja Ram* (2) was distinguishable from cases in which a defendant-respondent had died, and the plaintiff who was originally in the aggressive position in the first Court was also in that same position in the Court below. In that view Oldfield, J., concurred with me, though with hesitation. Exactly the same view was taken by Oldfield, J., with the concurrence of my brother Tyrrell, in *Baldo v. Bismillah Begam* (3). I think these two cases are authorities for showing that a distinction does lie between the case of the death of a plaintiff-respondent and a defendant-respondent.

There is indeed the case of *Balkrishna Gopal v. Bal Joshi Sadashiv Joshi* (4), in which West, J., without having his attention drawn to this distinction, has applied a rule similar to that of *Narain Das v. Lajja Ram* (2) to the case of the death of the defendant-respondent. But that judgment, with all due respect for such an eminent Judge, does not seem to me to have dealt with the real difficulty in the case—i. e., the effect of reading s. 3 of the Civil Procedure Code with art. 171B of the Limitation Act. That enactment, as I said in the case of *Narain Das v. Lajja Ram* (2) and as was said by Field and Beverley, JJ., in *Soshi Bhusan Chund v. Grish Chunder Taluqdar* (4) is to show that "defendant" as it occurs in art. 171B does include a respondent.

Whether it includes a plaintiff-respondent or not is a matter undoubtedly settled by the ruling in the case of *Narain Das v.*

(1) I. L. R., 7 All. 734.

(3) I. L. R., 9 All. 118.

(2) I. L. R., 7 All. 693.

(4) I. L. R., 11 Calc. 594.

Lajja Ram (1). The rulings of the Full Bench of Madras and other High Courts to which full reference has been made by me in *Muhammad Husain v. Khushalo* (2), which is also a Full Bench case, need not be referred to again. But why the word 'defendant' should be interpreted as excluding a defendant who is admittedly a defendant, but happens also to be a respondent, I confess with due deference that I fail to see. These words must be understood either with due regard to s. 582 or not. If so understood, then by s. 3 of the Civil Procedure Code the 'defendant' in art. 171B must be understood as defendant is understood in the Civil Procedure Code, and s. 582 is an essential part of that Code and defines a respondent. If the Civil Procedure Code lends us no help, then there is no rule of interpretation which would limit a term in itself general only to a defendant who does not happen to be a respondent.

1888
DEBI DIN
v.
CHUNNA LAL.

In this view of course I am in a portion of my *ratio decidendi* departing from the judgment in *Narain Das v. Lajja Ram* (1). But it is in consequence of the opinion of the majority of the Judges that I cannot utilize the definition of 'defendant' in s. 582 for interpreting art. 171B of the Limitation Act.

I am of opinion that inasmuch as the Full Bench case of this Court in *Narain Das v. Lajja Ram* (1) does not settle the exact point now before me, the word 'defendant' read with clause 2 of s. 3 of the Civil Procedure Code in conjunction with s. 582 does include a defendant-respondent, and that a plaintiff-appellant not applying within the time provided by art. 171B to bring upon the record the proper parties, is liable to the abatement of his appeal within the meaning of s. 368 of the Civil Procedure Code read with s. 582. I would therefore allow the application made by the heir of the deceased, and I would declare that this appeal should abate with costs.

As to the second application, *viz.*, that made by Mr. Conlan, it follows from what I have said that that application cannot be maintained, and those reasons are in principle the same as those stated by me in the case of *Narain Das v. Lajja Ram* (1) as also in my recent judgment in *Muhammad Husain v. Khushalo* (2). It is an application which admittedly having been made after the lapse

(1) I. L. R. 7 All. 693.

(2) *Ante*, p. 223.

1888
DEBI DIN
v.
CHUNNA LAL.

of sixty days as provided by art. 171B is an application which cannot be entertained, because we should then be placing upon the record of an appeal which has abated persons who are the heirs of deceased respondents. I would therefore reject that application (1).

1888
April 30.

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

RAM SARUP (DEFENDANT) v. RAM SAHAI AND ANOTHER (PLAINTIFFS).*

Act XV of 1877 (Limitation Act), sch. ii., Nos. 171B, 178—Death of plaintiff-respondent—No application for substitution—Application by defendant-appellant for hearing of appeal.

Held by the Full Bench that inasmuch as art. 178 and not art. 171B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased plaintiff-respondent could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place.

This was a second appeal which came for hearing before Brodhurst and Mahmood, JJ., who on the 24th March, 1888, passed the following order:—

“In this case Mr. *Kashi Prasad*, on behalf of the appellant, states that one of the plaintiffs-respondents, Ram Sahai, died more than sixty days ago, and that the other plaintiff-respondent, Sadho, is not to be found. Upon this state of things the learned pleader contends that his client, Ram Sarup, being defendant-appellant, was not bound to make any application to implead any person as respondent to the suit as legal representative of the plaintiff-respondent, and that, there being neither any right to apply for such substitution of parties nor any period of limitation applicable thereto, the result would be that the suit will abate, and that the decree of the lower appellate Court should be reversed. The point so raised is very similar to that which has arisen in some other cases, such as *Chajmal Das v. Jyadamba Prasad* (2), which is to be considered, by the order of the learned Chief Justice, by a Bench of three Judges. We think that this case should also be disposed of

* Second Appeal No. 2046 of 1886 from a decree of Rai Mata Din, Officiating Additional Subordinate Judge of Ghazipur, dated the 29th May, 1886, reversing a decree of Syed Zain-ul-abdin, Munsif of Korantadih, dated the 5th December, 1885.

(1) See Act VII. of 1888, s. 66 (4).

(2) *Ante* p. 260.