

1888

MUHAMMAD
HUSAIN
v.
KHUSHALO.

One is the case of *Naraini Kuar v. Durjan Kuar* (1), which relate to the exercise of powers under s. 32 of the Code, and the other case is *Har Narain Singh v. Kharag Singh* (2). The former of these cases does not appear to me to clash with my views because there is no question of intervenors in this case; but the latter no doubt militates against the *ratio decidendi* which I have adopted in this case. With much that was laid down in that case I am respectfully unable to agree for the reasons which I have already fully stated.

There is only one more point to which I need refer, *viz.*, the difficulty contemplated as to costs if my views of the law were adopted. Under s. 223 of the Code of Civil Procedure read with ss. 582 and 587 of that enactment this Court would have the power to make any order as to costs within its judicial discretion, just as a Court of first instance would have similar power. And in this appeal, if Sita Ram has been improperly impleaded, or if Musammat Khushalo has wrongly forced herself upon the record as a party to the appeal, and the appeal prevails or fails, these would be considerations regulating the discretion of the Court regarding the order as to costs.

For these reasons, without adjudicating upon the contention of the appellants that Sita Ram is the proper legal representative of the deceased Diphand, and without adjudicating upon any such claims as he may have to that capacity as against Musammat Khushalo or *vice versa*, I would place both upon the record as parties respondents to this appeal, and would proceed to hear the same and dispose of it.

1888
April 30.

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

CHAJMAL DAS AND OTHERS (DEPENDANTS) v. JAGDAMBA PRASAD
(PLAINTIFF)*

Civil Procedure Code, ss. 3, 368, 582—Act XV of 1877 (Limitation Act), sch. ii, Nos. 171B, 178—Death of plaintiff-respondent—Application by defendants-appellants for substitution of legal representative.

The judgment of the majority of the Full Bench in *Narain Das v. Lajja Ram* (3) only decided that art. 171B, sch. ii, of the Limitation Act of 1877, did not apply

* First Appeal No. 59 of 1884 from a decree of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) I. L. R., 2 All. 738. (2) I. L. R., 9 All. 447.
(3) I. L. R., 7 All. 693.

to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art. 178 applies to such applications.

So held by the Full Bench, MAHMOOD, J., dissenting.

Held by MAHMOOD, J., that by reason of s. 3 (read with ss. 368 and 582) of the Civil Procedure Code, the word "defendant" in art. 171B, of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand v. Grish Chand Taluqdar* (1) referred to.

This was a suit brought by one Jagdamba Prasad for possession of a share of alleged ancestral property which was sold in execution of simple money decrees against the plaintiff's father, Narain Lal. The Court of first instance decreed the claim in full on the 31st March, 1884. On the 15th April, 1884, the defendants (purchasers under the decrees in execution of which the property in suit had been sold) appealed to the High Court from the Subordinate Judge's decree. On the 17th September, 1885, while the appeal was pending, the plaintiff-respondent died.

On the 20th March, 1888, an application was made on behalf of one Musammat Genda Kuar, mother of the deceased plaintiff-respondent, in the following terms :—

1. "That your petitioner's name be entered as the heiress and legal representative of her deceased son, Jagdamba Prasad, plaintiff in the original suit under the provisions of ss. 365, 366, and 582 of the Civil Procedure Code (Act XIV of 1882).

2. "That as the appellants (defendants in the suit) have failed to bring the proper legal representative of the deceased respondent into Court within the time prescribed therefor by the Limitation Act, their appeal be ordered to abate under the last paragraph of s. 368 coupled with s. 582 of the Code."

The appeal came for hearing before Straight and Mahmood, JJ., It was ordered to be laid before the Full Bench for consideration of Musammat Genda Kuar's application.

The Hon. T. Conlan, Munshi Hanuman Prasad, and Lala Juala Prasad, for the appellants.

The Hon. Pandit Ajudhia Nath and Babu Jogindro Nath Chaudhri, for the respondent.

(1) I. L. E., 11 Calc. 694.

1888

CHAJMAL
DAS
v.
JAGDANDA
PRASAD.

EDGE, C. J.—In this case the plaintiff obtained a decree from the Court below. From that decree an appeal was filed in this Court on the 15th April, 1884. The plaintiff-respondent died on the 17th September, 1885. No application has been made by or on behalf of the appellant to bring upon the record the representative of the deceased plaintiff-respondent, nor has any representative of the deceased plaintiff-respondent applied to be brought upon the record. The present application, which was preferred on the 20th March, 1888, is made on behalf of the mother of the deceased plaintiff-respondent. It is an application for an order of the Court decreeing that the appeal has abated. I consider that the judgment of the majority of the Full Bench in the case of *Narain Das v. Lajja Ram* (1), notwithstanding the head-note, simply decided that article 171B of sch. ii of the Limitation Act of 1877 did not apply in that case. That case is on all fours with that now under consideration, so far as the question of limitation is concerned. The result of that decision, I think, must be that art. 178 of sch. ii of the Limitation Act must apply. As three years have not expired since the death of the plaintiff-respondent, and as I do not propose to reconsider the question decided in the case of *Narain Das v. Lajja Ram* (1), I think that the application is premature and, as such, must be rejected with costs.

STRAIGHT, J.—I am of the same opinion. I was a party to the Full Bench ruling in this Court to which the learned Chief Justice has referred. Any one who will take the trouble to read what I said in that case will find that what I laid down there was that art. 171B of the Limitation Act did not apply to a case like this. I was of opinion, for reasons stated therein, that the word "respondent" had, whether from intention or mistake, been omitted from that article, and comparing it with the preceding article, I showed, in reference to s. 582, that it seemed rather as if it had been intentionally omitted. That view has been adopted by five Judges of the Calcutta Court, and the same view has been taken by the Madras Court. I add these remarks for the purpose of showing that when I used the expression at the end of my judgment in that case, "it therefore appears to me impossible to say that the appellant in the present case has failed to make the application within the period

(1) I. L. R., 7 All. 698.

prescribed therefor, because no period for making such an application is in fact prescribed at all," I was limiting my remarks to art. 171B, no other article having been suggested to me, and it not having occurred to my mind that art. 178 of the Limitation Act was applicable. I think that art. 178 is applicable, and that, therefore, where a respondent dies, the appellant has three years from the date of such death, that is to say, from the date "when the right to make the application" accrues to him, to come into Court and have the heirs of the deceased respondent brought on the record. I concur with the learned Chief Justice that this application is premature and that it should be rejected with costs.

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

TYRRELL, J.—I concur.

MAHMOOD, J.—The order which I have to make on this application must be the same as that made by the majority of the Court. But I am anxious to guard myself against being understood to hold that the provisions of s. 582 of the Code of Civil Procedure, read with s. 368 of that Code, would not render the word 'defendant' as used in art. 171B, sch. ii, Limitation Act, applicable also to the case of the death of the plaintiff-respondent. I say this, of course, with due deference to the rulings to the contrary, which need, however, not be now cited. I dealt with most of those cases in my dissentient judgment in the Full Bench case of *Narain Das v. Lajja Ram* (1). At page 700 of the report I expressed the exact reasons why by dint of the interpretation clause of the Civil Procedure Code, the word defendant occurring in art. 171B, sch. ii of the Limitation Act, must necessarily include a plaintiff-respondent. That was a view in full accord with what was said by Field and Beverley, JJ., in *Soshi Bhusan Chand v. Grish Chunder Taluqdar* (2). The ruling in this last case however though apparently not cited or considered, has been dissented from by a Bench of five Judges of the same Court; and all the other cases bearing on this point were collected by me in delivering my judgment in the recent Full Bench case of *Muhammad Husain v. Khushalo* (3), in which the order of the Full Court was passed on

(1) I. L. R., 7 All. 698. (2) I. L., 11 Calc. 694.

(2) *Ante*, p. 223.

1888

CHAJMAL
DAS
v.
JAGDAMBA
PRASAD.

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 Blusan 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.