1895.

MUKARRAB HUSAIN v. HURMAT-UN-NISSA.

to the attachment of the property in question was an objection under section 278 of the Code of Civil Procedure, and their only remedy was a suit under section 283, and they have no right of appeal.

I am of opinion that the appellants cannot be held to be parties to the suit within the meaning of clause (c) of section 244. They were no doubt originally made parties, but they were released from liability for the decree. There is no decree as against them, and consequently no question as between them and the decree-holder relating to the execution of the decree. They are not parties to the execution proceedings, and indeed there is no decretal order in respect of which the decree-holder by execution could claim any relief as against them. So far, therefore, as the property now sought to be attached is concerned, they are in the position of strangers and not of parties to the suit, and the question which arose between them and the decree-holder was not a question within section 244, cl. (c). This view is supported by the ruling in *Jangi Nath* v. *Phundo* (1), the principle of which applies to this case. In fact this is a much stronger case than that of *Jangi Nath* v. *Phundo*. As no appeal lay, this appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Aikman.

1895. *July* 30.

ABBASI BEGAM (DEFENDANT) *v.* IMDADI JAN (PLAINTIFF).*

Civil Procedure Code, section 32—Removal of name of defendant from record—Such order not to be made after first hearing.

An order striking the name of a defendant off the record of a suit cannot be made under s. 32 of the Code of Civil Procedure at a period subsequent to the first hearing of the suit.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Raoof*, for the respondent.

BLAIR and AIKMAN, JJ.—This is an appeal from an order striking off the name of the defendant. The suit was instituted

*First Appeal No. 53 of 1895, from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 10th May 1895.

(1) I. L. R., 11, All., 47.

1895.

ABBASI BEGAM v. IMDADI JAN.

on the 1st of December 1894, proceeded with up to the framing of the issues on the 27th of the same month, and on the 11th of February 1895 came on for hearing and was heard. On the 15th of February an application was made to add certain persons as defendants, one of whom was one Muhammadi Begam. The names were added, and it became necessary that notices be served upon all the defendants so added. An effort appears to have been made to serve Muhammadi Begam at the address supplied to the Court, we suppose, by the party who got the name put upon the record. She was not found at that place, and, on further information pointing to her being at the time elsewhere, fresh notices were issued and sent for service at the place where she was supposed to be. Again there was a failure to discover her. Thereupon, on the 8th of May, an application was made on behalf of the plaintiff to strike out her name from the list of defendants. It was based on the delay caused by the inability of the serving officer to serve notices upon her. That application was not supported by any affidavit. On the 10th of May the order was made striking out her name. On the same day, after the order, an application was made by the defendant for a substituted service upon the lady. We assume that that application was not granted. The order striking the name off is the one appealed against.

Mr. *Ghulam Mujtaba*, who appears for the appellant, called our attention to s. 32 of the Code of Civil Procedure which specifies the circumstances under which the Court has power to add, or to remove, parties. The first paragraph relates solely to its powers of striking out. "The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out." There appear to be three conditions precedent to the striking out. There must be an application by one party or the other. The Court must not have progressed beyond the first hearing, and the Court must find the party improperly joined. When we come to the second clause, which relates to the addition and, so to speak, transmutation of parties, the language is different. "The Court may, at any time,

either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added." That is a discretion unlimited in point of time and not requiring that the Court should be moved by any party.

Mr. *Ghulam Mujtaba* contends that, the striking out of the name of the defendant not having taken place on or before the first hearing, such name could not be properly struck out afterwards. On the other hand it was suggested to us that this lady was a fictitious person and her name might be struck out as a clerical error. The facts hardly suggest that state of things. It was not alleged that she had no interest in the property and that therefore she was improperly joined as a party. It was also suggested that Mr. *Raoof's* application might be taken to be an application for a review of judgment. We have asked for the production of the document in order to see whether it discloses circumstances and sets forth any of the reasons for which, under s. 623 of the Code of Civil Procedure, a review might properly be granted. It was not produced, and we feel the only reason is that the application was not one under s. 623. We accede therefore to Mr. *Mujtaba's* contention that the Court had no right to strike off the name of the defendant after the first hearing of the case. It appears to us that the defendant applied to the Court for a proper remedy for the difficulty in which the parties found themselves. If the lady could not be found, the substituted service, even if such service never came to her knowledge, would be a good notice to her and binding her interest, if any, as if she had appeared. We set aside the order of the Court below, and allow the appeal with costs.

Appeal decreed.