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THE
MUIR MILLS
COMPANY,
LIMITED, OF
CAWNPORE
v.
T. H.
CONDON
AND
A. BUTTER-
WORTH.

register the transfers were not legitimate. If their reasons had been legitimate, we should not be justified in sitting "as a Court of appeal" to use the words of James, L. J., in *Ex parte Penney* (1) "from the deliberate decision of the Board of Directors to whom by the constitution of the Company the question of the determining the eligibility or non-eligibility of new members is committed."

In *In re Coal-port China Co.* (2) where the Court refused to interfere, there was no evidence to show that the Directors had exercised their power improperly or with want of *bond fides*.

Although, as I have said, I consider that the Directors of the Muir Mills Company duly considered the applications before them and in rejecting the applications for registration acted *bond fide*, and as they believed in the interests of the Company, yet the reasons upon which they based their refusal not being legitimate reasons, the Court has power to interfere, and I therefore think that the Court below was right in directing the Company to register the names of the applicants.

I would accordingly affirm the decrees of the Court below with costs in this Court in each case.

*Appeal dismissed.**

Before Mr. Justice Henderson.

HEM KUNWAR AND ANOTHER (PLAINTIFFS) v. AMBA PRASAD AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, sections 368, 582, 591—Abatement of appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, Rule 9.

Where one of four respondents (plaintiffs) in the lower appellate Court died, and no application was made within six months to put the legal representative on the record, and in the application that eventually was made the wrong person was named as legal representative: *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate: *Held* further, that where the order of the lower Court as to abatement was embodied in the judgment and decree,

* Second Appeal, No. 40 of 1900, from a decree of Syed Muhammad Tajamul Husain, Subordinate Judge of Aligarh, dated the 26th September 1899, modifying a decree of Munshi Anant Prasad, Munsif of Etah, dated the 6th January 1898.

(1) (1872) L. R., 8 Ch. 446 at p. 449

(2) (1895) L. R., 2 Ch., 404.

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objection was properly taken thereto by way of second appeal against the decree. *Sheo Nath Singh v. Ram Din Singh* (1); *Sher Singh v. Diwan Singh* (2); *Dhari Upadhya v. Raushan Chaudhri* (3); *Sant Lal v. Sri Kishen* (4); *Chandarsang v. Khimabhai* (5) referred to.

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

Munshi *Gokul Prasad* and Pandit *Madan Mohan Malaviya*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

HENDERSON, J.—In this case four plaintiffs, Raj Bahadur, Musammat Mohni, Musammat Lachha Kunwar and Hem Kunwar, sued the defendants to recover possession of certain property to which they claimed to be jointly entitled. The Court of first instance gave the plaintiffs a decree from which the defendants appealed, making all four plaintiffs respondents.

Before the appeal came on for hearing, the appellants alleged that Musammat Mohni and Musammat Lachha Kunwar were dead, and upon their application Hem Kunwar was added a respondent, as the legal representative of the two respondents said to have died. When the appeal came on for hearing, Hem Kunwar satisfied the Court that Musammat Mohni was alive, and that he was not the legal representative of Musammat Lachha; and further, that the application to place him as their representative on the record was made more than 6 months after the death of the latter. No notice of the appeal had been served on Musammat Mohni, and upon that ground the lower appellate Court held that as against her the appeal could not proceed. With regard to Musammat Lachha, he set aside the order, which was an *ex-parte* order, by which Hem Kunwar had wrongly been placed on the record as legal representative of Musammat Lachha, and went on to say:—"The result is that under section 368 read with section 582 of the Code of Civil Procedure, the appellants' appeal as against Lachha Kunwar, the deceased respondent, will fail." Thereupon, in the same judgment, he proceeded to deal with the appeal on the merits, and in the result made the following decree, namely, "that the appeal of the defendants-appellants be decreed as against the

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(1) (1895) I. L. R., 18 All., 19.

(3) Weekly Notes, 1899, p. 136.

(2) Weekly Notes, 1900, p. 109.

(4) (1892) I. L. R., 14 All., 221.

(5) (1898) I. L. R., 22 Bom., 718.

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plaintiffs-respondents, Raj Bahadur and Hem Kunwar only, and the Munsif's decree so far as it concerns them be set aside, and in place thereof it is decreed that the claim of the plaintiffs-respondents, Raj Bahadur and Hem Kunwar, be dismissed with costs, that the appeal of the defendants-appellants be dismissed with costs as against the plaintiffs-respondents Nos. 2 and 3 (*i.e.* Musammât Mohni and Musammât Lachha Kunwar), and the Munsif's decree so far as it concerns them be upheld as it is." There was a further order as to costs which is immaterial in this case.

Against the decree of the lower appellate Court, Raj Bahadur and Hem Kunwar appealed on the following grounds, namely— (1) because the appeal should have abated as the representatives of the deceased respondent Lachha Kunwar were not brought upon the record within the period of six months allowed by the Statute, (2) because the trial of the appeal was contrary to the express provisions of section 368 of the Code of Civil Procedure. A preliminary objection was taken that these grounds were not directed against the decree of the lower appellate Court, and that the appeal was really an appeal against an order of the lower appellate Court under section 368, in effect, if not in terms, directing that the appeal should abate so far as Musammât Lachha Kunwar was concerned and not against the decree. I think there is no ground for this objection. The appeal, in my opinion, was against the decree. There was no separate judgment upon the matter of the death of one of the respondents who died. That matter and the merits of the appeal were dealt with in the same judgment, and the finding of the Court as to both was embodied in the decree. In substance the appellants before the Court impugned the decree on the ground that the trial of the appeal upon the merits was contrary to the provisions of section 368 read with section 582 of the Code of Civil Procedure, and that the decree made was therefore bad.

I think section 591 of the Code applies to this case. The decree of the lower Court was appealed against. This Court was asked to set aside the decree of the lower appellate Court on the ground that the trial on the merits was contrary to law; but even if the order that, by reason of the death of Lachha Kunwar, the

appeal against her failed, be treated as an order in the suit separate from the findings upon which the decree is based (which I do not think it is), then, there is an objection which is taken and set forth as in the memorandum of appeal, that the appeal to the lower appellate Court ought to have abated altogether and not partially.

My attention has been drawn to the following cases:—*Sheo Nath Singh v. Ram Din Singh* (1); *Sher Singh v. Diwan Singh* (2); *Dhari Upadhia v. Raushan Chaudhri* (3); and to a Full Bench decision referred to in the first of these cases; but in the view I take of the present case I do not think that any of these cases apply, as I consider that in the present case there is an appeal directed against the decree of the lower appellate Court. Here no application was made within the time limited to place the legal representatives of Lachha Kunwar, the deceased respondent, on the record. The appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died, and under these circumstances, section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate.

In any case, in my opinion, there is no substance in the preliminary objection. Under the Rules of the Court (Rule 9) every memorandum of appeal must be headed "First Appeal," or "Second Appeal," as the case may be, and it was contended that this appeal, though headed "Second Appeal" as being an appeal from the decree of the lower appellate Court, dated the 26th September, 1899, was in reality a first appeal from an order made on the same date and embodied in the decree. I see no reason why, if that contention were right, the memorandum of appeal should not be amended. The misdescription was not one which could have taken the respondents by surprise, or otherwise prejudiced them. The stamp on the appeal, as a second appeal, is more than that required in an appeal from order. Moreover, I find I am supported in this view by a case reported in *Sant Lal v. Sri Kishen* (4). In the view which I take, however, it is not

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necessary to amend the memorandum of appeal, as in my opinion the preliminary objection fails.

It was not suggested that if the decree of the lower appellate Court should be set aside, an opportunity should be given to the appellants in that Court to bring the representatives of the deceased respondent on the record, as was suggested by the Court in *Chandarsang v. Khimabhai* (1). They had, it was found, by a mistake put a person on the record as representative, who was not in fact the legal representative of the deceased respondent, but even then the application to amend the record was made too late.

For the reasons which I have given, I think the proper order for the lower appellate Court to have made was to have directed the appeal to abate. I therefore allow this appeal and set aside the decree of the lower appellate Court. The result will be that the decree of the first Court will be restored. The appellants are entitled to their costs in this Court and the lower appellate Court.

Appeal decreed.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

GANGA BAKSH AND OTHERS (PLAINTIFFS) v. RUDAR SINGH
(DEFENDANT).*

Civil Procedure Code, sections 294, 317—Indian Trusts Act (No. II of 1882), sections 82, 88—Purchase by alleged agent of decree-holder at sale in execution.

Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

* Second Appeal No. 997 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 22nd September 1897, reversing a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Aligarh, dated the 30th June 1896.