

1900
February 5.

Before Mr. Justice Burkitt.

KAMLAPAT AND ANOTHER (DEFENDANTS) v. BALDEO AND OTHERS
(PLAINTIFFS).*

*Execution of decree—Suit under section 231 of the Civil Procedure Code—
Suit decreed—Appeal by decree-holders—Death of one of two joint
decree-holders—Abatement of appeal.*

A suit was instituted against two joint decree-holders under section 233 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of first instance, but decreed by the lower appellate Court. The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period.

Held that the appeal abated. *Ghamandi Lal v. Amir Begam* (1), referred to.

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

Munshi *Gulzari Lal*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondents.

BURKITT, J.—In this case the plaintiffs, now respondents, instituted a suit against the defendants, now appellants, to have it declared that certain property attached by the defendants in execution of a money decree against the father of the plaintiffs belonged to the plaintiffs, and was not liable to be taken in execution of the decree against their father. The suit was dismissed by the Court of first instance, but was decreed on appeal by the Subordinate Judge. From that decree the unsuccessful defendants (the decree-holders Kamlapat and Musammat Anandi) preferred a second appeal to this Court.

That appeal came on for hearing before me sitting alone, and having heard the parties I referred an issue to the lower appellate Court under section 566 of the Code of Civil Procedure. The Subordinate Judge in reply returned the issue without any finding. He reported that Kamlapat, one of the appellants, had died, and that therefore he was unable to proceed to the trial of the issue remitted to him. The fact of Kamlapat's death was not known when the appeal originally came on before me for hearing.

* Second Appeal No. 70 of 1899 from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 18th October 1898, reversing a decree of Babu Chajju Mal, Munsif of Mainpuri, dated the 19th May 1897.

(1) Weekly Notes, 1894, p. 22.

Under the above circumstances it is contended for the respondents that the appeal has now abated, and I have to decide whether that contention is well founded or not.

It is not denied that more than six months have elapsed since the death of Kamlapat, and admittedly no application either by the co-appellant, Musammat Anandi, or by anyone on behalf of the representatives of the deceased appellant, to have his representative brought on the record, has been made. So *prima facie* it would appear that the appeal must be held to have abated. It is contended, however, that the right to proceed with the appeal has survived to the co-appellant, Musammat Anandi, and that I should act as provided in section 362 of the Code of Civil Procedure. The argument is that as the money decree passed in favour of Kamlapat and Musammat Anandi was a joint decree, Musammat Anandi is, under section 231 of the Code of Civil Procedure, entitled to sue out execution of the entire decree for the benefit of all the joint decree-holders and of the representatives in interest of any deceased joint decree-holder, and that the right to proceed with the appeal in the absence of any representative of her co-appellant has therefore survived to her. The reply to this argument is that the proceedings now before me are not proceedings in execution of a decree, but are appellate proceedings in a suit to which section 231 has no application. What I have to decide is not whether Musammat Anandi alone could prosecute execution proceedings under section 231, but whether the right to appeal from the Subordinate Judge's decree in a suit in which she and her deceased co-appellant, Kamlapat, were unsuccessful defendants survives to her within the meaning of section 362 of the Code. In my opinion that question must be answered in the negative. In the case of *Ghamandi Lal v. Amir Begam* (1) it was distinctly laid down that a Court hearing an appeal should have before it all persons whose interests might be affected by the decree in appeal. Now here there were two persons, Kamlapat and Musammat Anandi, both equally interested to procure a reversal of the decree of the Subordinate Judge by which their suit was dismissed. One of those persons died more than six months ago after they had appealed to this Court against the

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decree of the Subordinate Judge. No application has been made to bring his representative on the record. It has not been shown or even alleged that the deceased Kamlapat left no legal representative, or that the surviving appellant, Musammat Anandi, is such representative. It is most unlikely that she could be Kamlapat's legal representative. On this state of facts there are no materials on which I can find that the right to prosecute the appeal survived to Musammat Anandi alone. I must therefore hold that the appeal has abated. I accordingly dismiss it with costs.

Appeal dismissed.

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February 8.

Before Sir Arthur Strachey, Knight, Chief Justice and Mr. Justice Banerji.

GOBARDHAN DAS (DEFENDANT) v. JAI KISHEN DAS (PLAINTIFF).^{*}
Act No. IX of 1872 (Indian Contract Act), sections 15, 16, 19—Contract—Undue influence—Coercion—Civil Procedure Code, sections 522, 528—Award—Validity of award—Award purporting to be a considered award of the arbitrators, but really an agreement between the parties to the submission.

Under section 16 of the Indian Contract Act, 1872, as it stood before it was amended by Act No. VI of 1899, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind: but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract. *Jones v. Merionethshire Building Society* (1), referred to.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.

THE facts of this case are fully stated in the judgment of Strachey, C. J.

Babu Jogindro Nath Chaudhri and Munshi Jwala Prasad,
for the appellant.

Pandit Sundar Lal, for the respondent.

^{*} First Appeal No. 76 of 1898 from a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 25th November 1897.

(1) L. R., 1892, 1 Ch., 173.