

## APPELLATE CIVIL.

Before Mr. Justice Sulaiman, Acting Chief Justice, and  
Mr. Justice Weir.

MUHAMMAD ZAFARYAB KHAN (DEFENDANT) *v.* ABDUL  
RAZZAQ KHAN AND OTHERS (PLAINTIFFS).\*

1928  
May, 15.

*Civil Procedure Code, section 2(11); order XXII, rule 5—  
Abatement of appeal—“Legal representative”—Effect  
of order bringing a person on to the record as legal  
representative of a deceased appellant.*

When, by an order which has become final, a certain person's name has been brought on to the record of an appeal as the legal representative of the deceased appellant, it is not open to the respondent to urge that the appeal has abated because some other heirs have been left out.

THE facts, material for the purpose of this report, appear from the judgement of the Court.

Maulvi Iqbal Ahmad and Muhammad Abdul Aziz. for the appellant.

Munshi Girdhari Lal Agarwala and Munshi Shiam Krishna Dar, for the respondents.

SULAIMAN, A. C. J. and WEIR, J. :—[After stating the facts giving rise to the suit]. A preliminary objection is taken on behalf of the respondents that the appeal has abated. What happened was that during the pendency of the appeal Muhammad Zafaryab Khan, the defendant appellant, died, and an application was made on behalf of his second wife, Musammat Zubeda Begam, alleging that she was the only heir of the deceased defendant. Notice was issued to the plaintiffs respondents, but they did not appear. An order was passed *ex parte*, bringing Musammat Zubeda Begam on the record as the legal representative of Muhammad Zafaryab

\*First Appeal No. 283 of 1925, from a decree of Ganga Prasad Verma, Subordinate Judge of Bulandshahr; dated the 16th of May, 1925.

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Khan. Subsequently the respondents applied to this Court for a declaration that the appeal had abated on the ground that some of the heirs of Muhammad Zafaryab Khan had not been brought on the record in time. This application was referred to a Bench of two Judges, who held that the *ex parte* order could not be re-opened and that Musammat Zubeda Begam must be treated as the legal representative of the deceased. As the property in dispute in this case consisted mainly of occupancy holdings it might have been thought that under section 22 of the Agra Tenancy Act the widow was the only heir to this property. However, the order of the Bench holding that the matter cannot be re-opened is now final.

We might also point out that under section 2 of the Code of Civil Procedure "legal representative" does not necessarily mean all the heirs under the personal law, but means some person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. Order XXII, rule 5, requires that when the question of the claimant being the legal representative of a deceased party arises the court shall determine that question. The provisions in rules 3 and 4 show that after the court has determined that a particular person is the legal representative, it shall proceed with the suit. It is, therefore, quite obvious that for the purposes of this appeal it must be taken that Musammat Zubeda Begam is the legal representative of the deceased appellant, and, therefore, it is not now open to the respondents to urge that the appeal has abated, because some other heirs have been left out.

[The rest of the judgement is not material for the purpose of this report.]

*Appeal dismissed.*