

(b) If the application is one for the remaining unpaid balance of the decretal amount under the second part of the decree it is not governed by article 182 at all but by article 181 and limitation will run from the date of the last of any two successive defaults, the decreeholder being entitled to an order for the whole balance due, less the amount of any individual instalments which, regarded as individual instalments, are already barred by limitation.

(c) In cases of this description it is undesirable to interpret the application too strictly; the court may well pay regard to the substance of the application.

PRIVY COUNCIL.

WAJID ALI KHAN v. PURAN SINGH AND OTHERS.

J.C.*
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December, 6.

[On Appeal from the High Court at Allahabad.]

Pre-emption—Decree obtained by co-sharers jointly—Death of one plaintiff pending appeal—Failure to join representatives—Reversal of decree—Abatement—Rights of representatives—Civil Procedure Code, order XX, rule 14(2) and order XXII, rules 4(3) and 11.

Where plaintiffs obtain a joint decree for pre-emption, without any adjudication under order XX, rule 14(2), of their respective rights, they each have the right to pre-empt the whole property. If one of them dies pending an appeal, and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money is paid over to the defendant with the consent of the surviving plaintiffs.

A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.

*Present:—Lord SHAW, Lord CARSON, Lord BLANESBURGH, Sir JOHN WALLIS, Sir LANCELOT SANDERSON.

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Judgement of the High Court, I.L.R., 47 All., 100, varied.

APPEAL (No. 67 of 1927) from a decree of the High Court (July 11, 1924) varying an order of the Subordinate Judge of Bulandshahr.

The appeal arose out of a suit for pre-emption in which four plaintiffs obtained a joint decree for possession of the pre-empted property. On appeal the High Court had set aside the decree of the court of first instance. In the execution proceedings for the restoration of the property that followed, it was discovered that the appeal had been heard and decided in the absence of the legal representatives of one of the plaintiffs who had died during the pendency of the appeal:

The facts of the case appear from the judgement of the Judicial Committee.

The High Court (in a judgement reported in I.L.R., 47 All., 100) held that the decree on appeal had abated wholly, not merely as against the present respondents, the representatives of the deceased plaintiff. The judgement was subsequently disapproved by the Full Bench in *Mahadeo Singh v. Talib Ali* (1).

1928. June, 25. *DeGruyther*, K. C. and *Dube*, for the appellants.

Hyam, for the respondents.

Dec. 6. The judgement of their Lordships was delivered by Sir JOHN WALLIS :—

In this case Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh, who were co-sharers in the village of Bighepur, filed a suit for pre-emption of certain land which the defendant Muhammad Wajid Khan, who is the present appellant, had purchased in the village. The sole question in the case was whether the custom of pre-emption obtained in the village, and the

(1) (1928) I. L. R., 50 All., 792.

Additional Subordinate Judge of Aligarh having found this issue in favour of the plaintiffs gave them a decree for possession on their depositing the pre-emption money in court. They duly deposited the money and obtained possession in execution of the decree.

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It was suggested for the first time before the Board that the fourth plaintiff Pirthi Singh, who actually deposited the money in court and obtained possession, was the only plaintiff who executed the decree, and that the right of the other decree-holders and their legal representatives to execute had become barred by limitation. In their Lordships' opinion there is no foundation for this contention. The application for execution of the decree, which was signed by all the four decree-holders, stated that the money had been deposited by them and prayed that possession might be given to them. The execution proceeded upon this basis and, in reply to objections subsequently raised by the defendant, Pirthi Singh himself stated that the decree-holders had obtained possession. It is clear, therefore, that the deposit was made and possession obtained on behalf of all the decree-holders.

The defendant appealed to the High Court at Allahabad, making all the plaintiffs parties to the appeal. When the appeal came on for hearing Amar Singh, the third plaintiff, had been dead for about a year and his legal representatives had not been brought on the record. These facts were not brought to the notice of the court, and the appeal was allowed to proceed on the footing that he was before the court, and the appellate decree recites that he had been duly represented at the hearing, whereas in fact he had died and the authority to represent him had determined. Their Lordships are not in a position to say how this regrettable omission came about, and will only observe generally that it cannot be

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too clearly understood that a practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the court to bring to its notice, if he is aware of it, the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him. Had the court been apprised of the fact, as it should have been, the questions now before the Board could have been decided at the hearing of the appeal and this subsequent litigation would have been unnecessary.

As it was, the surviving respondents allowed the appeal to be heard without objection in the absence of the third plaintiff and his legal representatives, thus taking the chance of succeeding on the merits; and when they had failed and the decree of the lower court had been reversed and the suit dismissed and the defendant had obtained formal restitution of possession in execution of the appellate decree, they joined with the representatives of the deceased third plaintiff in putting in the application to the Subordinate Judge, which is the subject of this appeal to His Majesty in Council, objecting that the whole appeal had abated by reason of the representatives of the third plaintiff not having been brought on the record within the time limited by law and that the appellate decree was a nullity and did not entitle the defendant to restoration of possession. They accordingly prayed that the order which the defendant had obtained without notice to them might be set aside and that they might be put in possession again.

On this application the Subordinate Judge ruled that the three surviving plaintiffs had no *locus standi*, as under the provisions of the Code of Civil Procedure the appeal had only abated as to the deceased plaintiff and the survivors were bound by the appellate decree. As against the representatives of the deceased plaintiff

he held that by reason of the abatement the appellate decree was not binding on them and that they were entitled to possession in execution of the decree of the first court, if the other plaintiffs acquiesced in the pre-emption money, which was still in court, being paid to the defendant, which they did by their Counsel at the hearing of the appeal from this order as stated in the judgement of MUKERJI, J. In other words, he held that the defendant was not entitled to restoration of possession as against them if they were prepared to pre-empt him.

The defendant and the surviving plaintiffs both preferred appeals against this order and the defendant also applied to the High Court under order XLVII of the Code of Civil Procedure for a review of the appellate judgement, and an order that the abatement should be set aside and the appeal re-heard in the presence of the representatives of the deceased respondent. The court rejected the grounds for review put forward by the defendant and held that the allegation that there had been a conspiracy to conceal the death of the third plaintiff from the appellant was not made out, and that he knew of the death and had been guilty of laches. They accordingly refused to set aside the abatement and dismissed the application for a review of judgement.

Consequently, as regards the deceased plaintiff, the abatement stands and cannot now be questioned.

The appeals from the order of the Subordinate Judge subsequently came on for hearing when the two learned Judges differed, MUKERJI, J., being of opinion that under the provisions of the Code of Civil Procedure the appeal had abated as regards the deceased third plaintiff and no further, and that by virtue of the abatement his representatives were entitled to a one-fourth share of the property; while DALAL, J., held that the whole appeal had abated and that the surviving plaintiffs also were entitled to be restored to possession. In

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consequence of this difference of opinion there was a reference under section 98, sub-section 2, of the Code of Civil Procedure to another Bench, which held that the whole appeal had abated and that the appellate decree was incapable of execution.

In accordance with this answer to the reference the defendant's appeal, No. 202 of 1923, was dismissed, and the appeal of the surviving plaintiffs, No. 281 of 1923, was allowed, and they were restored to possession.

The defendant then obtained leave to appeal to His Majesty in Council from the order of the High Court dismissing his appeal No. 202 of 1923.

In dealing with the questions which arise in this appeal it is desirable in their Lordships' opinion to refer in the first place to the scope and nature of the present suit. Where the custom of pre-emption obtains in a village every co-sharer has a right to pre-empt a stranger purchasing land in the village. When several co-sharers desire to exercise this right, and there are differences between them as to their shares or priorities, they may join as plaintiffs in a suit for pre-emption against the stranger-purchaser, and may obtain in that suit a decision, not only as to their right to pre-empt, but also as to their rival claims and a decree, as provided in order XX, rule 14 (2), of the Code of Civil Procedure, in accordance with which each pre-empting plaintiff will be entitled in default of the others to pre-empt alone. On the other hand, two or more co-sharers may simply sue the stranger-purchaser for pre-emption, as in the present case, without asking the court to adjudicate on their rival claims, and may obtain a decree for possession on depositing the pre-emption money in court. In their Lordships' opinion the effect of that decree is to establish, as against the defendant, the right of each of the plaintiff co-sharers to pre-empt him and to entitle them

to possession on depositing the pre-emption money, leaving them to adjust their shares and priorities among themselves, these being matters in which the defendant has no concern so long as the pre-emption money is secured to him.

This being the nature of the suit and the effect of a decree for the plaintiffs, if the defendant files an appeal from such a decree making all the plaintiffs respondents, and one of the respondents dies before the hearing of the appeal and the appeal abates as against him under the express provisions of order XXII, rule 4 (3), of the Code of Civil Procedure, read with rule 11, because his legal representatives have not been brought on the record within the time limited by law, and the appeal is heard in the absence of the legal representatives of the deceased respondent, and the decree of the first court is reversed and the suit dismissed as against all the plaintiffs, it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree and are entitled to exercise the right of pre-emption which the decree of the first court established in his favour against the defendant, that is a right to pre-empt the whole. A stranger-purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it; and their Lordships are therefore unable to accept the view of MUKERJI, J., in the High Court that in the circumstances of this case the representatives of the deceased plaintiff only became entitled to pre-empt one-fourth of the suit property, leaving the defendant in possession of the remainder. They do not find any satisfactory grounds on which such a limited right can be based.

These were substantially the grounds on which the Subordinate Judge ruled against the defendant, and their Lordships prefer this view to that taken by the majority

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of the learned Judges in the High Court that in this suit the abatement against the deceased plaintiff made it impossible to proceed effectively with the hearing of the appeal as against the surviving plaintiffs, and rendered the judgement and decree of the appellate court passed in the absence of the representatives of the deceased plaintiff a complete nullity so that the surviving plaintiffs were entitled to be restored to possession in accordance with the decree of the first court along with the representatives of the deceased plaintiff. With this view their Lordships are unable to agree.

In their Lordships' opinion the order of the Subordinate Judge was right, and the decree of the High Court dated the 11th of July, 1924, ought to be set aside and in lieu thereof it ought to be declared that the representatives of the third plaintiff—fourth and fifth respondents here—are entitled to re-delivery of possession, on condition that the money deposited in court should be made over to the appellant with the consent of all the other respondents within three months of the date of the order herein, otherwise the suit is to be dismissed; but that there ought to be no costs either in the High Court or of this appeal, and any costs paid under the decree ought to be returned. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*