

## REVISIONAL CIVIL

*Before Justice Sir Lal Gopal Mukerji and Mr. Justice Young*

JAIMALA KUNWAR AND ANOTHER (DEFENDANTS) v. COLLECTOR OF SAHARANPUR (PLAINTIFF) AND OTHERS (DEFENDANTS)\*

1933  
May, 2

*Civil Procedure Code, order I, rules 1 and 10—Addition of parties—Representative suit—Withdrawal application—Right of other persons interested to intervene and maintain the suit—Suit by Collector on behalf of Hindu widow who had succeeded to her husband's estate (under Court of Wards) to contest an alleged adoption—Withdrawal of suit by Collector—Right of reversioner to be joined as a plaintiff and to continue the suit—Transposition of parties in revision—Court of Wards Act (Local Act IV of 1912), sections 53, 55.*

On behalf of two Hindu widows who had succeeded to their husband's estate, which was held under the Court of Wards, the Collector instituted a suit for a declaration that an alleged adoption set up by the principal defendant had not taken place and he had no title to the property, and for other reliefs against him and a transferee from him. Subsequently the Collector made an application withdrawing the suit; and this was opposed by the two widows as well as by a person who was, according to the plaint itself, the next reversioner and they asked to be made parties to the suit and to be allowed to continue it. The court allowed the Collector to withdraw the suit and dismissed it. The application of the others to be made parties was disallowed. The widows thereupon filed a revision in the High Court, making the reversioner a *pro forma* opposite party, who subsequently applied in the High Court to be transposed as an applicant for revision.

*Held* that the revision did not lie on behalf of the widows. The Collector having decided to withdraw the suit, his discretion could not, according to section 53 of the Court of Wards Act, be called in question by the civil court, and by virtue of section 55 of that Act the widows were unable, by themselves, to continue the suit. The lower court, in allowing the Collector to withdraw the suit and in rejecting the widows' application to continue it, could not be said to have acted illegally in the exercise of its jurisdiction, and no revision lay on their behalf. But the revision could be maintained at the instance of the reversioner, who had been impleaded as a

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party thereto, who was equally interested in it and who had applied to be transposed as an applicant; in such circumstances the fact that his application was a belated one did not stand in his way.

Where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by merely withdrawing the suit. He may, no doubt, go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.

The suit instituted by the Collector on behalf of the two widows who had succeeded to their husband's estate was a suit of a representative character, and the widows having only a limited estate the reversioner was also materially interested in the result of the suit. For the proper safeguarding of his interest the lower court should have allowed the reversioner to be added as a plaintiff before allowing the Collector to go out of the suit.

Although it might be that the provisions of order I, rule 10 of the Civil Procedure Code, or of any other rule, like order I, rule 1 of the Code, were not in terms applicable to the case, yet it was open to the court to allow the reversioner to be added as a plaintiff. Cases have arisen from time to time in which the provisions of the Civil Procedure Code have been found to be, in terms, inapplicable and yet parties have been added or substituted, where they ought to be added or substituted, on general principles.

Messrs. *S. K. Dar* and *Gopi Nath Kunzru*, for the applicant.

Dr. *S. N. Sen* and Messrs. *S. N. Gupta*, *S. N. Verma*, *G. S. Pathak*, *S. K. Mukerji* and *A. M. Gupta*, for the opposite parties.

MUKERJI and YOUNG, JJ. :—This is an application in revision and arises under the following circumstances. A suit was instituted by the Collector of Saharanpur on behalf of the estate of Lala Janeshar Das; the owners of the estate, for the time being, being Janeshar Das's two widows, Jaimala Kunwar and Chando Kunwar. It was alleged that the last owner of the property in suit was one Deep Chand, and on the death of his widow,

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Mst. Dhani Kunwar, the property devolved on Janeshar Das and Badri Das, two brothers, in equal shares. The suit was directed, *inter alia*, to obtain a declaration that one of the defendants, Atma Ram, who professed to have been adopted by Dhani Kunwar was not at all adopted and that Janeshar Das and Badri Das were entitled to the property, and on the death of Janeshar Das and Badri Das their widows were entitled to recover the property. The widow of Badri Das, Mst. Phulwanti, was made a defendant in the case. The defendants to the suit were, besides Atma Ram, his brother Abheynandan Lal. We have already stated that Mst. Phulwanti was made a defendant. A fourth person, Abdul Majid Khan, was made a party as a transferee from Lala Atma Ram and Abheynandan.

The Collector of Saharanpur, who was the plaintiff in the suit, made an application to the court on the 19th of April, 1932, withdrawing the suit. This application was opposed by the widows, Jaimala Kunwar and Chando Kunwar, and one Beni Prasad. Beni Prasad, according to the allegations of the widows and himself and according to the pedigree stated in the plaint, was, along with his brothers, the next reversioner to the estate of Janeshar Das and Badri Das. Their application was dated the 19th of May, 1932, and was to the effect that they should be made parties to the suit and the conduct of the suit should be given to all or any one of them. In support of their application they filed an affidavit, which is on the record. Various allegations were made in this affidavit, the important allegations being that Beni Prasad was a reversioner to the estate of Janeshar Das and Badri Das and was therefore interested in the litigation.

On behalf of the Collector it was urged that he was the sole plaintiff and he was entitled to withdraw the suit at his pleasure and that under section 53 of the Court of Wards Act of 1912 his discretion could not be

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questioned by the civil court. The learned Subordinate Judge considered the application and held that the applicants could not be made parties, and having allowed the Collector to withdraw the suit, dismissed it with half the costs.

The application in revision is by Jaimala Kunwar and Chando Kunwar alone. Beni Prasad was made a *pro forma* respondent. On the 10th of April, 1933, Beni Prasad applied that he may be transposed to the array of the applicants as applicant No. 3. No order has yet been passed on this application and it is therefore before us for disposal.

On behalf of the respondents a preliminary objection has been taken that the revision is not maintainable because the learned Subordinate Judge had jurisdiction to hear the application of the Collector and as he applied his mind to the application and to the petitions of the applicants and Beni Prasad, the decision of the learned Subordinate Judge is final and is not open to revision by this Court.

It appears to us that so far as the petition of the two ladies, Jaimala Kunwar and Chando Kunwar, is concerned the learned Judge did apply his mind and wrote a judgment which, whether it be right or wrong, cannot properly be revised by this Court, under the provisions of section 115 of the Civil Procedure Code. We cannot interfere with an order simply because it is wrong in law. We must be satisfied that the lower court had acted illegally or with material irregularity in the exercise of its jurisdiction. The preliminary objection, therefore, must hold good as regards the applications of the two ladies.

So far as the application of Beni Prasad is concerned, we fear that it has not received a proper hearing and consideration from the learned Judge in the court below. He has totally misapprehended the nature of Beni

Prasad's application and dealt with it summarily. We shall deal with it at length in the course of this judgment.

It was next contended that Beni Prasad filed no petition in revision and his application of the 10th of April, 1933, being a belated one it could not be granted. We are not prepared to accept this contention. Beni Prasad was already a party to the revision filed by Jaimala Kunwar and Chando Kunwar and was therefore already before the court. Where out of three petitioners, two filed a revision against the order passed against their application, the third may very well accept that justice would be done towards the joint petition and the third need not file a separate application in revision. In this view we cannot reject Beni Prasad's application on the sole and simple ground that it is a "belated" one. The revisional jurisdiction of the High Court need not be invoked by a party and it may be exercised by the High Court of its own accord. We accordingly direct that the application of Beni Prasad for being put into the array of the applicants be granted and that the application in revision be amended accordingly.

Now we come to the merits of the case. On behalf of Beni Prasad it had been contended that the suit instituted by the Collector on behalf of the two ladies Jaimala Kunwar and Chando Kunwar was a suit of a representative character and it was necessary for the court below to allow Beni Prasad to be impleaded as a plaintiff in view of the fact that the Collector representing the widows was going to withdraw the suit. It was argued that the right to recover the property from the defendants accrued to Janeshar Das in his life time (according to the facts stated in the plaint) and that, therefore, if the suit instituted on behalf of the ladies be withdrawn, a valuable estate would be lost to the rever- sioners of Janeshar Das and Badri Das and no remedy would be left to Beni Prasad. No answer has been given to this argument. The argument that has been

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addressed to us on behalf of the respondents was mainly this. The Collector was the sole plaintiff and he had every right to withdraw the suit. Nobody can deny that the Collector as the sole plaintiff was entitled to withdraw the suit. But then nobody can deny that the Collector's suit was a suit on behalf of the ladies, Jaimala Kunwar and Chando Kunwar, and that, therefore, the suit of the ladies was a suit instituted by them in a representative capacity. These ladies had only a life interest in their husband's property and during their lives they represented the entire estate including the interests of the future reversioners to the estate. A decree properly obtained against Jaimala Kunwar and Chando Kunwar would bind those who would actually inherit the property on the death of the ladies. The mere fact that under section 55 of the Court of Wards Act of 1912 the ladies could institute the suit only in the name of the Collector did not prevent the suit as instituted by the Collector from being a representative suit. In this view of the case, Beni Prasad was materially interested in the result of the suit.

It has been held that where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by merely withdrawing the suit. He may no doubt go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.

To mention some instances of such cases : Where a trustee brings a suit for the benefit of the beneficiaries and then wants to nullify the result of the litigation, it has been held that the beneficiaries may be properly brought on the record to continue the litigation; *Sankaralinga Nadan v. Rajeswara Dorai* (1). The Civil Procedure Code itself recognizes the necessity of making the beneficiaries a party in certain circumstances; see

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order XXXI, rule 1 of the Civil Procedure Code. In *Kunju Kombi Achan v. Ammu* (1) the head of a Malabar Tarwad instituted a second appeal and was anxious to compromise the case with the respondent. Two junior members of the family were allowed to prosecute the appeal in spite of the fact that the original appellant did not want to do so. The argument accepted by the court was that the suit was a representative one and the plaintiff must be subject to the orders of the court.

Cases of partition, accounts, dissolution of partnership and other similar cases may be cited as instances in which the plaintiff may withdraw a suit, but he cannot put an end to the litigation.

It is an established rule of Hindu law that where females representing an estate have rendered themselves incapable of safeguarding the rights of the reversioners, a distant reversioner may institute a suit to safeguard his interest: See *Adi Deo Narain Singh v. Dukharan Singh* (2); *Sachit v. Budhua Kuar* (3) and *Rani Anand Kunwar v. Court of Wards* (4).

In the case before us, the Collector on behalf of the ladies filed a representative suit. The Collector decided to withdraw the suit. The result was that by virtue of section 55 of the Court of Wards Act the ladies themselves, however anxious they may have been to continue the litigation, were unable to do so. In the circumstances, on principle, it must follow that the reversioner Beni Prasad should be permitted to continue the litigation. The result of disallowing Beni Prasad's request to continue the litigation would be that (assuming that the statements made in the plaint were correct) an estate worth 1½ lakhs would go to the defendants without the smallest attempt being made to recover it. We are of opinion that Beni Prasad's application should have been allowed.

(1) (1931) 61 M.L.J., 549.

(2) (1883) LL.R., 5 All., 532.

(3) (1886) LL.R., 8 All., 429.

(4) (1880) LL.R., 6 Cal., 764.

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It was, however, contended that Beni Prasad could not be impleaded because the language of order I, rule 10 of the Civil Procedure Code did not permit his being impleaded. Cases have arisen from time to time in which the provisions of the Civil Procedure Code have been found to be, in terms, inapplicable and yet parties have been added or substituted where they ought to be added or substituted, on general principles; for example, in *Keshab Rai Jieu Thakur v. Jyoti Prasad* (1) a mahant died and his successor in the office of the mahant was allowed to be substituted for him. The case did not fall strictly within the earlier rules of order XXII, but the court found that the successor in title of the mahant must be substituted and the order for substitution was sought to be justified by the application of rule 10 of order XXII. It is difficult to say that rule 10 completely covered the case and that it was a case of assignment, creation or devolution of any interest during the pendency of the suit. Similarly in *Pitchayya v. Rattamma* (2), which was a benamidar's suit, the true owner was substituted for him. In *Kadri v. Khubmiya Mahomedmiya* (3), where a scheme for the management of the trust had been framed and liberty to apply had been granted, it was held that persons who were not originally parties to the litigation could be brought in, to question the propriety of the scheme or to make proper applications to the court. The learned Judge relied on order I, rule 10. But it is doubtful whether that rule could, in terms, be applied. But it is perfectly clear that the order was a right one, and there is no rule in the Civil Procedure Code which directly applies. In the case of *Rajaratnam Iyer v. Halasyasundaram Iyer* (4) the presumptive heir was allowed to be brought on the record along with the widow to protect a reversionary interest. The suit was by one who claimed to have been adopted by the last male owner.

(1) A.I.R., 1932 Cal., 783.

(3) A.I.R., 1931 Bom., 388.

(2) A.I.R., 1929 Mad., 268.

(4) A.I.R., 1923 Mad., 521.



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In all these cases the application for addition or substitution of parties did not fall within the language of the rules of the Civil Procedure Code and there was no difficulty to make the necessary order. In *Venkatanarayana Pillai v. Subbammal* (1) their Lordships of the Privy Council relied on order I, rule 1 for ordering the substitution of a more distant reversioner to continue a litigation which had been instituted by a closer reversioner.

There is, therefore, enough authority for holding that in a case like this it is open to the court to allow Beni Prasad to be made a party and then to allow the Collector to go out of the suit, if he does not want to prosecute it.

It is argued on behalf of Abdul Majid, the transferee defendant, that the moment the application was made by the Collector to withdraw the suit, the suit ceased to exist in the eye of the law and the court could not pass any order for substitution or addition on an application made to it on the 9th of May, 1932. This argument in our opinion is not correct. The case could not cease to exist till an order was made by the court and when the court came to pass an order it could pass an order not only on the application of the Collector, the original plaintiff, but also on the application of the two ladies and Beni Prasad.

In our opinion the learned Subordinate Judge should have allowed Beni Prasad to be added as a plaintiff before allowing the Collector to withdraw the suit.

We accordingly modify the order of the court below and direct that Beni Prasad be made a plaintiff in the suit and that the suit be tried as between Beni Prasad, on the one hand, and the original defendants, on the other.

(1) (1915) I.L.R., 38 Mad., 406.