the decree and judgment are not contrary to law, etc. even if notice has been issued and parties have appeared through counsel.

Our answer to the question referred to us, therefore, is that it is open to the court to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and the court is not precluded from determining such question merely because notices to the opposite party and the Government Advocate have been issued previously.

## APPELLATE CIVIL

*Before Mr. Justice Kendall and Mr. Justice Iqbal Ahmad*

ZEBAISHI BEGAM AND OTHERS (DEFENDANTS) *v.* NAZIR-UDDIN KHAN AND ANOTHER (PLAINTIFFS)*

1934 *September, 6*

*Civil Procedure Code, order I, rule 9—Non-joinder of a defendant—Suit for possession—Maintainability of suit where want of parties—Abatement of suit, extent of—Civil Procedure Code, order XXII, rule 4.*

It is not in every suit for possession that the omission to implead one of the defendants in possession is fatal to the suit. When the interest of the person not made a party to the suit is distinct and separate from the interests of the persons who have been made parties to the suit, the suit is maintainable and there would be no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the court are concerned, as directed by order I, rule 9. In such cases the decree, while operative against the interests of the persons who are parties to the decree, can in no way adversely affect the distinct and separate interest in the subject-matter of the suit of the person who has not been made a party, and it can not, therefore, be rendered infructuous or nugatory at his instance.

The interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and therefore the non-joinder as a defendant of one of the co-heirs in a suit brought by another co-heir for possession

*First Appeal No. 145 of 1930, from a decree of Muhammad Junaid Nomani, Subordinate Judge of Agra, dated the 18th of December, 1929.

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

of his share can be no ground for dismissing the suit. Similarly, the failure in such a suit to bring on the record the legal representatives of a deceased defendant can not lead to the abatement of the suit as a whole but only as against the deceased defendant.

Messrs. *S. K. Dar, Baleshwari Prasad* and *U. S. Gupta,* for the appellants.

Dr. *N. P. Asthana* and Messrs. *B. Malik, G. Agarwala, M. L. Chaturvedi* and *Kartar Narain Agarwala,* for the respondents.

KENDALL and IQBAL AHMAD, JJ.:—The dispute in this and the connected appeal No. 175 of 1930 is about the property that belonged to one Nadir Ali who died before the year 1877 leaving a widow Nadirjan and two sons Sher Ali and Hamza Ali and a daughter named Shafat Begam. Nadirjan transferred the share that devolved on her by right of inheritance from Nadir Ali to her two sons. The plaintiffs in the suit were the heirs of Shafat Begam, viz. Nasiruddin her husband and Fakhruddin her son, and they are the contesting respondents in both the appeals. The claim by them was with respect to the share that on the death of Nadir Ali devolved on Shafat Begam by right of inheritance, and to which share the plaintiffs became entitled on the death of Shafat Begam in the year 1916, as her heirs. Admittedly Shafat Begam was entitled to a 14/80 share in the property left by Nadir Ali and the plaintiffs' claim was with respect to that share.

The property owned by Nadir Ali was a zamindari share in mahal Sher Ali in village Datauli. It is not disputed that Shafat Begam was never in actual possession of that share, and it is common ground that some time before the year 1910 a partition between Sher Ali and Hamza Ali took place. By that partition the zamindari share was divided into two holdings, holding No. 1 and holding No. 4. The former holding was allotted to Hamza Ali and the latter to Sher Ali.

Between the years 1911 and 1920, by various transfers effected by Sher Ali and his widow, the whole of holding No. 4 passed bit by bit into the hands of certain transferees who have built glass factories over portions of the property transferred. Hamza Ali also sold a portion of holding No. 1 to certain persons but practically the whole of that holding is still with Hamza Ali's heirs. Hamza Ali died in the year 1919 leaving a widow Zebaishi Begam and three sons and two daughters. One of his daughters was a lady named Muzammil Begam who was arrayed as defendant No. 6 in the suit. The widow and the sons and the daughters of Hamza Ali were all defendants in the suit. Sher Ali also died in the year 1921 leaving two sons who were defendants 1 and 2 in the suit. All the transferees were also impleaded as defendants. It would thus appear that the defendants in the suit were the heirs of Sher Ali and Hamza Ali and their transferees.

The case formulated in the plaint was that the brothers of Shafat Begam, who were in actual possession of the zamindari share left by Nadir Ali, were, *qua* the share of Shafat Begam, in the position of trustees and that Shafat Begam must be deemed to have all along been in constructive possession of the share to which she was entitled.

Almost all the defendants, except the sons of Sher Ali, contested the suit mainly on the allegation that on the 12th of April, 1890, Shafat Begam executed a deed of relinquishment with respect to the share that devolved on her by right of inheritance from Nadir Ali in favour of her two brothers and thus ceased to be the owner of the share in dispute. The allegation of the plaintiffs that Shafat Begam was in receipt of the profits of the property was also denied by the contesting defendants and the plea of limitation was put forward in bar of the plaintiffs' claim. The transferees claimed to be transferees in good faith for valuable consideration and

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

contended that they were protected by section 41 of the Transfer of Property Act. The plea of estoppel was also raised by the transferees.

During the pendency of the suit in the court below Muzammil Begam died and an application to bring upon the record her legal representatives in the array of defendants was filed by the plaintiffs. There was, however, difficulty in effecting service on the proposed heirs and, by an application dated the 28th of July, 1929, the plaintiffs prayed that the proposed heirs of Muzammil Begam be exempted from the claim, and the court granted that application.

The court below overruled all the pleas urged in defence. It held that Shafat Begam did not execute the deed of relinquishment; that Shafat Begam was in receipt of the profits of her share in her lifetime; that the defendants were not in adverse possession of the property in dispute and the suit was not barred by time; that the plaintiffs were not estopped from maintaining the suit and that the transferees were not entitled to the benefit of the provisions of section 41 of the Transfer of Property Act.

* * * * * *

The present appeal is by the three sons and the widow of Hamza Ali . . . The connected appeal is by some of the transferees.

On behalf of the defendants the finding of the court below that the execution of the deed of relinquishment by Shafat Begam was not proved has been assailed.

[The evidence was then discussed in detail and the following conclusions were arrived at.] We accept the finding of the court below that the execution of the document by Shafat Begam was not proved.

It was admitted by the defendants that Shafat Begam used to receive Rs.30 a year . . . It may be that she

did not receive her full share of the profits but that does not matter. Moreover Shafat Begam and her two brothers were in the position of co-owners and there is no evidence of her ouster in the present case. The suit giving rise to these appeals was filed within 12 years of the death of Shafat Begam. There was, therefore, no substance in the plea of limitation raised by the defendants.

Similarly section 41 of the Transfer of Property Act had no application to the facts of the case . . . The plea of estoppel raised by the defendants was also rightly rejected by the learned Judge of the court below . . .

We now proceed to consider an argument based on the exemption of Muzammil Begam's heirs from the claim. It is argued on behalf of the defendants that in a suit for ejectment the omission to implead any of the persons in possession is fatal to the suit, irrespective of the fact whether the property claimed is held by tenants-in-common or joint tenants or by coparceners. It is said that, apart from any of the provisions in the Code of Civil Procedure relating to the non-joinder of necessary parties or the abatement of a suit, a decree in a suit for ejectment cannot be passed unless all the parties in possession of the property in dispute are before the court, as the decree will not be binding on the person in possession who is not impleaded in the suit and, as such, will be infructuous. It is contended that this principle also applies to the claim preferred by one of the heirs of a deceased Muhammadan against his co-heirs. In short, it is argued that if one of the heirs of a deceased Muhammadan, who is not in actual possession of the share to which he is entitled, sues his other co-heirs for possession of his share and omits to implead one of the co-heirs in possession, the suit is not maintainable. In support of this contention reliance has been placed on the decisions in *Haran*

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

*Sheikh* v. *Ramesh Chandra* (1), *Arunadoya Chakrabarty* v. *Mahammad Ali* (2), *Faqira* v. *Hardewa* (3) and *Ram Dei Misrain* v. *Jurawan Misir* (4).

The learned counsel for the plaintiffs respondents on the other hand points out that this point was not raised in the court below, and accordingly contends that the defendants ought not to be allowed to raise the point in appeal. He rightly maintains that if this question had been debated in the court below, the plaintiffs could have met the contention of the defendants by proving that all the persons in possession were before the court, and that Muzammil Begam had no share in the property in dispute on the date of the institution of the suit. In this connection he has invited our attention to a deed of waqf executed by Zebaishi Begam, the mother of Muzammil Begam, and the brothers of Muzammil Begam on the 7th of February, 1923. It is recited in that deed that Muzammil Begam made a gift of her share in the property in dispute in favour of Zebaishi Begam. We consider that the learned counsel for the plaintiffs is justified in putting forward the contentions noted above. If an issue as regards the effect of the exemption of Muzammil Begam's heirs on the suit had been raised in the court below, the plaintiffs could very well have met the point by proving that Muzammil Begam had no share left, and, as such, all the persons in possession of the property in dispute were before the court. We are, therefore, of the opinion that it would be unfair to the plaintiffs to allow the defendants to raise this point. But as the question of law has been argued at some length before us we propose to give our decision on the point.

The general rule laid down by the legislature is that no suit shall be defeated by reason of non-joinder of parties, and the court may, in every suit, deal with the

(1) A.I.R., 1921 Cal., 622.
(2) A.I.R., 1928 Cal., 138.
(3) (1927) 26 A.L.J., 217.
(4) [1930] A.L.J., 857.

matter in controversy so far as regards the rights and interests of the parties actually before it (*vide* order I, rule 9 of the Civil Procedure Code). It is in conformity with this rule that in order XXII of the Code, that deals with the death of parties during the pendency of a suit or appeal, the legislature has provided in express terms that the omission to take steps to bring on the record the legal representatives of a deceased plaintiff or defendant will result in the abatement of the suit only so far as the deceased plaintiff or defendant is concerned. Similarly the rule laid down by order XXXIV, rule 1 of the Civil Procedure Code, that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage, is "subject to the provisions of the Code", i.e. subject to the provisions of order I, rule 9 and of other rules in order I that provide about "parties to suits". It is manifest from these provisions that the non-joinder of a necessary party cannot, by itself, be a ground for dismissing the suit, and that the court is bound to adjudicate on the rights of the parties actually before it.

There is, however, another well recognized rule which, so to say, constitutes an exception to the general rule noted above. That rule is that a court will refrain from passing a decree which would be ineffective and infructuous, and the reason for this rule is obvious. It would be idle for a court to pass a decree which would be of no practical utility to the plaintiff and be a waste paper in the sense that the relief that it purports to grant to the plaintiff cannot be vouchsafed to him because of the objection of some person who is not bound by that decree. But this rule has no application to cases in which, notwithstanding the fact that some of the persons interested in the subject-matter of the suit are not parties to the suit, the court is in a position to pass a decree that is capable of execution and cannot be

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

rendered nugatory at the instance of persons not made parties to the suit. The inability of the court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or to the nature of the interest that the person who is not made a party to the action has in the subject-matter of the suit. An illustration of the former class of cases is furnished by suits for partition or dissolution of partnership and rendition of accounts. In such cases, in the absence of all the interested parties it is impossible for the court to deal with the matter in controversy between the parties before it and to pass an effective decree. In a suit for partition of joint property, if one of the owners is not joined as a party, the court will withhold its hand and not proceed to pass a decree, as a decree for partition must deal with the shares of all the persons interested in the property sought to be partitioned, and in the absence of one of the owners his share can obviously be not affected by the decree. Similarly in a suit for dissolution of partnership and rendition of accounts it is impossible for a court to have the accounts adjusted between the partners *inter se* unless all the partners are before it, and, as such, the omission to implead one of several partners is always fatal to the suit. It is needless to say that we are not attempting to lay down an exhaustive list of the cases in which the rule laid down in order I, rule 9 of the Civil Procedure Code cannot be given effect to because of the inability of the court to pass an effective and an operative decree.

Similarly the nature of the interest in the subject-matter of a suit possessed by a person who is not a party to the suit may be such as to render it impossible for the court to pass an effective decree in his absence. Such is the case when the suit is with respect to some property belonging to a joint Hindu family and all the co-parceners are not made parties to the suit. In such a

case the court cannot pass a decree granting relief to the plaintiff without prejudicially affecting the right of the coparcener who is not a party to the suit, and, as such, the court cannot but dismiss the suit.

But the rules noticed above have no application to cases in which the interest of the person, who has not been impleaded as a party, in the subject-matter of the suit is ascertained or ascertainable, as in such cases the decree, while binding the interests of the persons who are parties to the decree, cannot adversely affect the separate and distinct right of the person who has not been made a party to the suit. In such cases the short answer to the objection raised by the absent party is that his interest being distinct and separate from the interests of the persons who are parties to the decree, the decree, while operative against the interests of the persons who are parties to the decree, can in no way adversely affect his right or interest in the property in suit. The interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and, as such, the absence of one of the co-heirs from a suit brought by another co-heir for possession of his share cannot be a ground for dismissing the suit.

The principles enumerated above were laid down by the decisions in *Faqira* v. *Hardewa* (1) and *Ram Dei Misrain* v. *Jurawan Misir* (2) and these decisions, though relied upon by the learned counsel for the defendants, are of no help to him.

The case of *Haran Sheikh* v. *Ramesh Chandra* (3) has also no application to the facts of the case before us. In that case the plaintiffs prayed for a declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon but omitted to implead one of the persons interested in the servient tenement,

(1) (1927) 26 A.L.J., 217. (2) [1930] A.L.J., 857.
(3) A.I.R., 1921 Cal., 622.

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

and it was held that the omission was fatal to the suit. It is obvious that a decree passed in that suit in favour of the plaintiffs would have been infructuous, as the decree would not have been binding on the owner of the servient tenement who was not arrayed as a defendant.

The decision in *Arunadoya Chakrabarty* v. *Mahammad Ali* (1) appears to favour the contention of the defendants. It was held in that case that in an action for ejectment, if any of the persons in possession is left out, a decree passed in the suit is infructuous as the person who was not made a party remains in possession as not being affected by the decree and "the persons ejected as being bound by the decree can always come in under the person who remains in possession". The learned Judges also observed that " there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree". If the learned Judges intended to lay down that in every action for ejectment the omission to implead one of the parties in possession is fatal to the suit, we, for the reasons given above, are unable to agree with the decision. When the interest of the person not made a party to the suit is distinct from the interests of the persons who are parties to the suit, there is no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the court are concerned. The position may well be illustrated by the following example:

A Muhammadan dies leaving five sons and each of the sons inherits a 1/5th share in the property of the deceased. Four of the sons enter into actual possession of the property and the fifth son is out of possession. It is obvious that each of the four sons is in possession of a 1/20th share of the property in excess of his legiti-

(1) A.I.R., 1928 Cal., 138.

1934

ZEBAISHI BEGAM v. NAZIRUDDIN KHAN

mate share. If the son who is out of possession brings a suit for possession and omits to implead one of the four sons, there is no reason why he should not be granted a decree for so much of his share as is in possession of the three sons who are made parties to the suit. In such a case the plaintiff can be granted a decree for 3/20th of the property and the decree can in no way adversely affect the 1/20th share of the plaintiff that is in possession of the brother who has not been made a party to the suit.

For the reasons given above we hold that the omission to implead the heirs of Muzammil Begam could not be a ground for dismissing the suit. We may however add that any decree passed in the present suit will in no way be binding on Muzammil Begam's heirs.

---

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh*

GULAB CHAND AND OTHERS (PLAINTIFFS) *v.* PEAREY LAL (DEFENDANT)*

1934 *September*, 6

*Limitation Act, section* 12(3); *article* 179—*Application for leave to appeal to Privy Council—Time spent in obtaining copy of judgment—No exclusion of such time.*

An application for leave to appeal to His Majesty in Council is specifically provided for by article 179 of the Limitation Act; it is not an appeal, and sub-section (3) of section 12 of the Limitation Act does not apply to the application. Reading sub-sections (2) and (3) of section 12 it is clear that the legislature has deliberately omitted applications for leave to appeal from sub-section (3). So, the time requisite for obtaining a copy of the judgment can not be excluded in computing the period of limitation for an application for leave to appeal to His Majesty in Council.

Mr. *S. B. L. Gaur,* for the applicants.

Messrs. *P. L. Banerji, Panna Lal* and *Kamta Prasad,* for the opposite party.

*Application No. 16 of 1934, for leave to appeal to His Majesty in Council.