

For these reasons we think that there are no merits in the argument of learned counsel for the respondents and that he has no right whatever to be heard at any stage of the proceedings under order XLIV, rule 1 on the merits of the proposed appeal. All that he can argue is on the question of whether the proposed appellant is or is not a pauper and on that point he has not brought any affidavit or other materials. He asked for further time. The order was dated nearly a year ago, on the 5th of September, 1938. We think there are no merits in the request for further time. As already pointed out, in the present case the appellant sued as a pauper and under order XLIV, rule 2, proviso, the issue of notice was not necessary.

We accordingly hold that the applicant is a pauper and we allow the applicant to appeal as a pauper.

Before Sir John Thom, Chief Justice, and
Mr. Justice Ganga Nath

DHANDEI KUAR (PLAINTIFF) *v.* FATMA ZOHRA
AND OTHERS (DEFENDANTS)*

1939
August, 11

Abatement—Abatement of appeal as a whole upon abatement as against one respondent—Where two inconsistent decrees would otherwise result or decree be incapable of effectual execution—Cause of action and relief jointly against several persons—Civil Procedure Code, order XXII, rules 4, 11.

Where in an appeal the absence of the legal representatives of a deceased respondent from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in the appeal, the appeal must abate not only as against the deceased respondent but must abate as a whole. Whether this result will follow or not will depend on the nature of the relief granted by the decree appealed against. Where the cause of action is based on the joint act of several defendants and a joint relief is sought by the plaintiff against all the defendants, there in the absence of the legal representatives of a deceased defendant respondent the whole appeal must fail.

*Appeal No. 38 of 1938, under section 10 of the Letters Patent.

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DRANDEI
KUAR
v.
FATMA
ZOHRA

Mr. *Harnandan Prasad*, for the appellant.

Mr. *A. M. Khwaja*, for the respondents.

THOM, C. J., and GANGA NATH, J.:—This is a plaintiff's appeal against the decision of a learned single Judge of this Court. The appeal arises out of a suit brought by her against the defendants respondents and Mst. Zainab Bibi, since deceased, for an injunction to restrain them from allowing a grain market to be conducted on their plot No. 683 in mauza Dilawarpur and not to open any bazar in the said village or at any other place in tahsil Mariahun, and to recover Rs.50 for damages. The plaintiff's case was that under the terms of an award made in 1884 between Durga Prasad, predecessor in title of the plaintiff, and Muhammad Mehdi, predecessor in title of the defendants, the defendants were precluded from allowing any market to be conducted in these villages. The defendants contended *inter alia* that the award was invalid, that they were not bound by it and that they were entitled to hold the market on their land. Both the lower courts decreed the suit. On appeal by the defendants to this Court the learned single Judge allowed the appeal and dismissed the suit.

During the pendency of this appeal respondent No. 13, Mst. Zainab Bibi, died. Her representatives were not brought on the record in her place. A preliminary objection is taken by learned counsel for the respondents that the appeal must be held to have abated and should be dismissed.

If the absence of the legal representatives of a deceased party from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in an appeal, the appeal must fail. The decision will naturally depend on the relief granted by the decree appealed against.

In this case the plaintiff based her claim on an act alleged to have been jointly committed by all the defendants. A relief against the defendants jointly was

claimed by the plaintiff in these terms: "A perpetual injunction may be issued ordering the defendants to close the Gola Bazar, known as Qutubganj, which they have newly opened on abadi plot No. 683 in mauza Dilawarpur, pargana Mariahun, district Jaunpur, and not to open any bazar as against the plaintiff's Gola in the said village, or at any other place in tahsil Mariahun, in future." If this relief were granted to the plaintiff against the remaining respondents, it would not be within their power to comply with the decree and to close down the market, because the legal representatives of the deceased would still be entitled, under the decree of the learned single Judge, to maintain the market on the land in dispute, and it would not be possible for the respondents to make them join with them in closing it down. It would not, therefore, be possible to execute the decree of this Court if the appeal were allowed.

As already stated, the dispute was as to whether the award which was made in 1884 was binding on the heirs of Muhammad Mehdi. The respondents' contention was that the award was void and illegal and was not binding on them. On the other hand, the plaintiff's case was that the award was perfectly valid and binding on the heirs and successors in title of Muhammad Mehdi. The learned single Judge has held that the award was void and illegal and was not binding on the successors in title of Muhammad Mehdi. This decree has become final so far as the legal representatives of the deceased respondent are concerned. If this appeal were allowed, therefore, there would be two inconsistent decrees in the same case.

A joint relief is being sought by the plaintiff against all the defendants, on whose joint act the cause of action for the suit is based. In the absence of the legal representatives of Mst. Zainab it is not possible to grant this relief, because it involves the taking of action which cannot be completed without their joining in it.

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These difficulties are insurmountable. The appeal as it stands is imperfectly constituted and it is not possible to proceed with it. In the result the appeal is dismissed with costs.

REVISIONAL CRIMINAL

Before Mr. Justice Mulla

EMPEROR v. BRAHMANAND MISRA*

1939

August, 11

Criminal Procedure Code, sections 64, 196—Power of Magistrate to arrest for any offence committed in his presence—Immaterial that the offence is such that the Magistrate can not take cognizance without sanction of Local Government—Criminal Procedure Code, sections 499, 514—Bail bond by surety—Requirements of valid bond—Time, place and court for attendance of accused must be specified—Personal bond by accused must be taken before bail bond by surety—Forfeiture order must be set aside if bond itself invalid.

Under section 64 of the Criminal Procedure Code a Magistrate has power to arrest and to release on bail a person who commits any offence in the presence of the Magistrate within the local limits of his jurisdiction, although the offence may be such that the Magistrate cannot take cognizance of it without the sanction of the Local Government. In acting under section 64 the Magistrate does not function as a court, and section 196 of the Code does not control the powers of a Magistrate under section 64 but only prevents a court from taking cognizance of certain offences except upon complaint by or sanction of certain authorities.

The provisions laid down in section 499 of the Criminal Procedure Code as to the nature and contents of a bail bond are imperative and must be strictly fulfilled. The time and place where, or the court before which, the person released on bail is to appear must be specified in the bail bond. Again, section 499 provides that when a person is released on bail he must himself execute a bond, and so it is incumbent under the section to get a bond executed by the person who is released on bail, and unless that is done there can be no valid bail bond by a surety alone. Non-fulfilment of these provisions renders the bail bond of the surety invalid and illegal.

*Criminal Revision No. 443 of 1939, from an order of F. G. Cracknell, Additional District Magistrate of Cawnpore, dated the 1st of December, 1938.