

rule of evidence and we can find nothing on the record to support the plea of estoppel raised on behalf of the defendant appellant on the basis of the decree for specific performance of contract (exhibit 54).

For the reasons given above we uphold the finding of the learned Additional Subordinate Judge on issues Nos. 4 and 8.

The plea based upon the doctrine of part performance was not argued before us, and the finding of the learned Additional Subordinate Judge on issue No. 9 was not challenged before us.

In view of our findings on issues Nos. 2, 4 and 8 this appeal must fail and we accordingly dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava

FAZAL MOHAMMAD KHAN (PLAINTIFF APPELLANT) v. ALI MOHAMMAD KHAN AND OTHERS (DEFENDANTS RESPONDENTS)*

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October, 25

Civil Procedure Code (Act V of 1908), order XXII, rules 4 and 11—Partition suit—Appeal—Death of some respondents—Legal representatives of deceased not substituted—Abatement of appeal against deceased respondents—Appeal not possible to be proceeded with—Appeal, whether abates in toto.

Where in an appeal in a partition suit some of the respondents die during the pendency of the appeal and no steps are taken within the prescribed period to bring the names of their legal representatives on the record and the appeal abates against them and it is impossible for the appeal to proceed in the absence of the representatives of the deceased respondents against whom the appeal has abated, the appeal abates *in toto*. *Raj Chunder Sen v. Gangā Das Seal (1), Midnapur Zamindary*

*First Civil Appeal No. 27 of 1932, against the decree of Pandit Bhajan Lal Chaturvedi, Assistant Collector, 1st class of Gonda, dated the 26th of March, 1931.

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Co., Ltd. v. Amulya Nath Roy Chowdhury (1), and Wali Muhammad v. Barkhurdar (2), relied on.

Mr. *Mohammad Ayub*, for the appellant.

Messrs. *Radha Krishna, Bindeshri Prasad and Rameshwar Dayal*, for the respondents.

KING, C.J. and SRIVASTAVA, J.:—These three appeals arise out of an application for partition of a zamindari share. The Assistant Collector decided certain questions of proprietary title and these three appeals are directed against certain points decided by him.

A preliminary objection has been taken that the appeals have abated *in toto*, or that in any case it is impossible to proceed with the appeals, because in each case one or more of the respondents has died during the pendency of the appeal and no steps have been taken within the prescribed period to bring the names of his legal representatives upon the record.

It is admitted that in each of these three appeals the appeal has abated against one or more respondents. The question is whether in such circumstances the appeals have abated *in toto*, or whether the appeals can be proceeded with as against the surviving respondents whose names remain on the record.

In a suit for partition it is undisputed that every one of the cosharers is a necessary party. We think that it would be impossible to decree the appeal against certain respondents when the decree of the Assistant Collector must hold good as against the legal representatives of the deceased respondents who are cosharers with the respondents remaining upon the record. We may consider the effect of the abatements as against certain respondents with more particular reference to the facts.

In appeal No. 27 the purpose of the appeal is to reduce the area found to be held by certain persons in under-proprietary right. The Assistant Collector found that an area of 394.92 acres was held by certain persons as under-proprietors. The plaintiff who is the appel-

(1) (1926) I.L.R., 53 Cal., 752

(2) (1924) I.L.R., 5 Lah., 429.

lant in appeal No. 27 challenges this finding and urges that a lesser area is held by the opposite party in under-proprietary right. Now if the appeal were allowed as against those respondents who are upon the record what would be the result? It would mean that the respondents upon the record are under-proprietary cosharers in only 344 acres (or whatever lesser amount might be found by this Court) whereas the legal representatives of the deceased cosharers against whom the appeal has abated would remain cosharers in the whole area of 394.92 acres. We think that such conflicting decisions would be anomalous and it would be impossible to carry out the partition on such lines.

The same difficulty would arise regarding the tenure of 208.03 acres of land. The Assistant Collector has found that certain persons hold this land as tenants with special rights and not as ordinary statutory tenants or as perpetual lessees. The appellant in appeal No. 27 challenges the finding on this point and contends that the tenants have got no special rights but are merely ordinary tenants. As the appeal has abated against certain of these tenants we hold that it is impossible that the appeal should proceed against the surviving joint tenants, whose names remain upon the record as respondents. We think it is impossible for the appeal to proceed when the result might be that certain joint tenants or joint under-proprietors should be held to have one class of rights in one area of land whereas others should be held to have a different right or to hold a lesser or greater amount of land.

Authority has been shown to us for a view that in a case of this sort it is impossible for the appeal to proceed and it should be held that all the appeals have abated. The decision in the case of *Raj Chunder Sen v. Ganga Das Seal* (1), is in point. The suit was in substance for the winding up of a partnership business and for taking of accounts thereof. During the pendency of the appeal

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against the decree of the trial Court certain of the respondents died and the appeal abated as against them. The question was whether the appeal could proceed in the absence of the representatives of those deceased respondents. This Lordships of the Judicial Committee observed:

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“It is not disputed that the right to sue did not survive against the other defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry.”

Their Lordships held that in the circumstances the appeals were perfectly idle. In this case also we think that it is impossible for the appeals to proceed in the absence of the representatives of the deceased respondents against whom the appeals have abated.

A similar view was taken by the Calcutta High Court in the case of *Midnapur Zamindary Co., Ltd. v. Amulya Nath Roy Chowdhury* (1). In that case several plaintiffs sued the defendants for joint possession and obtained a decree. The defendants-appellants failed to substitute in time the legal representative of one of the plaintiffs-respondents who had died during the pendency of the second appeal to the High Court. At the hearing of the second appeal the respondents took a preliminary objection that the appeal could not proceed against the other co-respondents in the absence of the dead co-respondent, or his duly substituted representative. Their Lordships held that the appeal abated as a whole. PAGE, J. made the following observations at page 756 which appear to be applicable to this case:

“Whether or not the appeal abates as against the deceased respondent only or as a whole must depend upon the particular circumstances of each case, the test to be applied being whether in the absence of the respondent against whom the appeal has abated, the appeal can proceed.”

(1) (1926) I.L.R., 53 Cal., 752.

We may also refer to a decision of the Lahore High Court in *Wali Muhammad v. Barkhurdar* (1). In that case the plaintiffs sued 43 persons for a declaration to the effect that they were not entitled to have any share in the *shamilat* of a certain village and that the plaintiffs were the exclusive owners thereof. The suit having been dismissed by the trial Court the plaintiffs filed a first appeal in the High Court. Some of the defendants-respondents died during the pendency of the appeal and no application was made to bring their legal representatives on the record within the time prescribed by law. It was urged by the respondents that the appeal had therefore abated. It was held that the appellants were under a necessity of impleading all the persons who were parties in the Court below and had obtained a decree in their favour and that if any of them died during the pendency of the appeal and no steps were taken by the appellants to bring the legal representatives on the record within the time prescribed by law, the appeal abated *in toto*. It may be noted that the decision of the Assistant Collector regarding the underproprietary right and the nature of the tenure of the tenants is in the nature of a declaratory decree and the decision in the Lahore case is directly applicable.

Taking the view that the appeals cannot proceed in the absence of the legal representatives of those respondents against whom the appeals have abated we dismiss the appeals with costs.

Appeal dismissed.

(1) (1924) I.L.R., 5 Lah., 429.

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