

FULL BENCH.

1928
May, 2.

Before Sir Louis Stuart, Knight, Chief Judge, Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

RAJA RAMPAL SINGH (PLAINTIFF-APPELLANT) *v.* ABDUL HAMID (DEFENDANT-RESPONDENT).*

Civil Procedure Code (Act V of 1908), section 2 (2), and order XXII, rules 1 and 3—Death of a plaintiff—Substitution application by heir of the deceased plaintiff—Court's order that right to sue did not survive—Abatement of suit, order of—Order of court whether a decree under section 2 (2) of the Code of Civil Procedure—Appeal against the order of abatement.

Where on the death of a plaintiff his heir applied under the provisions of order XXII, rule 3 of the Code of Civil Procedure to be entered as a legal representative of the deceased and to continue the suit and the court, while recognizing him to be the legal representative of the deceased, arrived at the conclusion that the right to sue had come to an end with the death of deceased and decided under the provisions of order XXII, rule 1 of the Code of Civil Procedure that the suit had abated, *held* that the decision was a final adjudication which conclusively determined his right in regard to a matter in controversy in the suit, that the heir was clearly a party to the suit as the legal representative of the deceased plaintiff and so the order giving effect to this decision was a decree within the meaning of section 2 (2), Code of Civil Procedure and an appeal lay against it.

Per HASAN, J. :—“Matters in controversy in the suit” are not merely matters which arise on the face of the plaint as at first presented. They may include matters which are of vital importance between the parties but which may come to arise and in respect of which the parties may be at controversy at a subsequent stage of a suit and a question as to whether a right to sue survives or not within the meaning of rule I of order XXII of the Code of Civil Procedure is such a matter.

*Second Civil Appeal No. 287 of 1927, against the decree of Asghar Hassan, 3rd Additional District Judge of Lucknow, dated the 16th of May, 1927, dismissing the plaintiff's appeal.

THIS case was originally heard by a Bench consisting of HASAN and NANAVUTTY, JJ., but there being conflict of authorities it was referred to a Full Bench of three Judges. The order of reference of the Bench is as follows:—

1928

 RAJA RAMPAL
SINGH
v.
ABDUL
HAMID.

HASAN and NANAVUTTY, JJ.:—The suit out of which this appeal arises was brought by one Raja Bhagwan Bakhsh Singh for a declaration and also for a consequential relief of possession in respect of certain plots of land held by the defendant in the character of a *guzaradar*. During the pendency of the suit, Raja Bhagwan Bakhsh Singh died. Raja Rampal Singh who has admittedly succeeded to the estate of the deceased Raja Bhagwan Bakhsh Singh, made an application to be brought on the record of the case in place of the deceased Raja Bhagwan Bakhsh Singh as a plaintiff. This application must be deemed to have been made under rule 3, sub-rule (1) of order XXII of the Code of Civil Procedure. The defendant opposed this application, and the court decided that the right to sue did not survive in favour of Raja Rampal Singh and made an order of abatement. On appeal by Raja Rampal Singh the learned Additional Judge of Lucknow has upheld the order of the abatement on two grounds:—(1) that no appeal lay from the order of abatement, and (2) that even if an appeal lay he would uphold the order for the reason that a fresh suit could be brought by Raja Rampal Singh.

1928

Ma'ch, 13.

On the question as to whether the appeal in the lower court from the order of abatement was competent or otherwise, there is a great conflict of opinion. In the circumstances we think that it is a fit question for decision by a Full Bench of this Court. Accordingly, under section 14, sub-section (1) of the Oudh

1928

RAJA RAMPAL
SINGH
v.
ABDUL
HAMID.

Courts Act, 1925, we refer the following question for decision to a Full Bench :—

Was the order of abatement passed in this case appealable?

Messrs. *A. P. Sen, L. S. Misra and S. C. Das*, for the appellant.

Messrs. *Haider Husain and Rauf Ahmad*, for the respondent.

STUART, C.J. :—This is a reference under section 14, sub-section (1) of the Oudh Courts Act to a Full Bench of this Court. We are asked to reply to the question “was the order of abatement passed in this case appealable?” These are the facts. Raja Bhagwan Bakhsh Singh instituted a suit against a certain Abdul Hamid. As I read the plaint in the suit his case was that Abdul Hamid had been granted under an agreement an allowance of Rs. 30 a month and a certain amount of land at a fixed rental and that Abdul Hamid having forfeited his rights under this agreement, his rights had terminated on the 24th of September, 1924. The plaintiff asked for a declaration that the agreement was at an end and also for possession of the land. The suit was filed on the 22nd of October, 1924. Raja Bhagwan Bakhsh Singh died on the 25th of August, 1925. Raja Rampal Singh applied under the provisions of order XXII, rule 3 on the 15th of November, 1926, to be entered as a legal representative of Raja Bhagwan Bakhsh Singh and to continue the suit. Abdul Hamid contested his claim. The Additional Subordinate Judge decided on the 24th of January, 1927, that Raja Rampal Singh was the legal representative of Raja Bhagwan Bakhsh Singh being the person in law who represented the latter's estate. There can be no doubt as to the fact that this conclusion was correct. Not only has Raja Rampal

Singh succeeded to the taluqdari estate, but as a brother of the deceased Raja Bhagwan Bakhsh Singh he is his heir under the Hindu law. The learned Additional Subordinate Judge, however, arrived at the conclusion that the right to sue had come to an end with the death of Raja Bhagwan Bakhsh Singh. He, therefore, decided under the provisions of order XXII, rule (1) that the suit had abated. The question which we have to decide is whether an appeal lies against that order. The learned Additional District Judge before whom the appeal was presented rejected the appeal on the ground that no appeal lay. There is no special provision in the Code of Civil Procedure for an appeal against a decision that a suit has abated on the ground that such a decision is an order; but it has been argued before us that in this particular case the decision of the 24th of January, 1927, is a decree. What were the facts? The facts were these. Raja Rampal Singh stated that he was the brother of the deceased Raja Bhagwan Bakhsh Singh and in law represented his estate. The court agreed to that view. He continued that the deceased Raja Bhagwan Bakhsh Singh had on the 24th of September, 1924, terminated an agreement in favour of the defendant, that from that period the agreement had terminated and that the land had vested in Raja Bhagwan Bakhsh Singh. He continued that as the legal representative of Raja Bhagwan Bakhsh Singh he had a right to a declaration that no further money was payable and that he had a right to recover possession of the property. The court arrived at the conclusion that the right to terminate the agreement was a right personal to Raja Bhagwan Bakhsh Singh and that until a decree terminating it had been arrived at there had been no termination. This I understand to be the learned

1928

RAJA RAMPAL
SINGH
v.
ABDUL
HAMID.

Stuart, C. J.

1928

RAJA RAMPAL
SINGH
v.
ABDUL
HAMID.

Stuart, C. J.

Additional Subordinate Judge's view, though it is not put in so many words. He therefore rejected the claim of Raja Rampal Singh and apparently found that although Raja Rampal Singh was the legal representative of Raja Bhagwan Bakhsh Singh the right to sue did not survive. What is the effect of this as far as Raja Rampal Singh is concerned? In my opinion it is an adjudication which conclusively determines his right in regard to a matter in controversy in the suit. It was a final adjudication. Raja Rampal Singh was clearly a party to the suit as the legal representative of the deceased plaintiff. Thus the order giving effect to this decision was a decree within the meaning of section 2(2), Act V of 1908 and an appeal lay against it. I would accordingly answer the question in the affirmative.

HASAN, J. :—I agree that the question referred to the Full Bench should be answered in the affirmative. It is agreed that the order of abatement recorded by the learned Additional Subordinate Judge on the 24th of January, 1927, is not appealable, if it is merely an order. It is further agreed that it is appealable, if it is a decree. The question therefore for decision is as to whether that order is a decree. According to the definition given in the Code of Civil Procedure "the formal expression of adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" is a decree. If the question as to whether the right to sue survived to Raja Rampal Singh on the death of his brother Raja Bhagwan Bakhsh Singh in respect of the cause of action for which the suit of Raja Bhagwan Bakhsh Singh was instituted is a matter in controversy in the suit, then I have no doubt that the order of the Additional Subordinate Judge is a

decree. Rule 9 of order XXII of the Code of Civil Procedure clearly debars Raja Rampal Singh from instituting a fresh suit on the same cause of action on which the deceased brother had instituted this suit; and if it is held as against Raja Rampal Singh that the right to sue did not survive in his favour it follows that he cannot pursue the same cause of action which was the basis of his brother's suit and the order of the court must be deemed to be a final determination of Raja Rampal Singh's right in respect of that cause of action. But the contention of Raja Rampal Singh is that he is entitled in law to continue the present suit on the same cause of action on which it had originally been instituted. If this question is decided in favour of Raja Rampal Singh it would then follow that the old suit must continue. In this state of things it appears to me that there can be little doubt that the order of the Additional Subordinate Judge of the 24th of January, 1927, determines the rights of the parties finally with regard to the question of Raja Rampal Singh's right to continue or not the same cause of action and is final. That it is also a matter in controversy in the suit is clear to my mind. It was argued that the matter as to whether the old cause of action has survived in favour of Raja Rampal Singh or not is not a matter in controversy in the suit for the reason that it arose out of an independent application made by Raja Rampal Singh under the provisions of rule 3 of order XXII of the Code of Civil Procedure. I am unable to accept this argument. "Matters in controversy in the suit" are not merely matters which arise on the face of the plaint as at first presented. They may include matters which are of vital importance between the parties but which may come to arise and in respect

1928

RAJA RAMPAL
SINGH
v.
ABDUL
HAMID.

Hasan, J.

1928
 RAJA RAMPAL
 SINGH
 v.
 ABDUL
 HAMID.

Hasan, J.

of which the parties may be at controversy at a subsequent stage of a suit, and the question as to whether a right to sue survives or not within the meaning of rule 1 of order XXII of the Code of Civil Procedure is, to my mind, such a matter. There is no doubt in this case that Raja Rampal Singh must be treated as a party to the suit. He is clearly the legal representative of the deceased plaintiff and if he is also the person in whom the right to sue survives, as it may be found that he is, then he is a person entitled to be substituted on the record of the case as a plaintiff in place of his deceased brother Raja Bhagwan Bakhsh Singh under the provisions of rule 3 of order XXII of the Code of Civil Procedure. Whether a person is a legal representative or not is again a question which may be a matter in controversy in the suit if his status as such is disputed. In the present case however the courts below are agreed that Raja Rampal Singh is a party in the sense that he is a legal representative of the deceased Raja Bhagwan Bakhsh Singh and I, therefore, need not pursue this point any further.

MISRA, J. :—I am also of opinion that the answer to the reference made to us should be in the affirmative. My reason for coming to that conclusion is that one of the points which was for decision before the Additional Subordinate Judge in order to enable him to hold whether the suit abated or not was the question whether the cause of action survived in favour of the applicant Raja Rampal Singh. The Additional Subordinate Judge found that Raja Rampal Singh was the legal representative of his deceased brother Raja Bhagwan Bakhsh Singh. If the cause of action be held not to have survived in his favour then the suit must abate. The dismissal of the suit by the Additional Subordinate Judge that it had

abated was, therefore, tantamount to a decision that the cause of action did not survive in favour of the applicant. This adjudication under the terms of order XXII, rule 9 is final and no suit can be brought again by the applicant upon the same cause of action. If, therefore, the order passed by the learned Additional Subordinate Judge to the effect that the suit had abated had the effect of holding that the cause of action did not survive, and if it was a final order in the sense that it was not open to the applicant to bring another suit upon the same cause of action, it appears to me to be clear that it was a final adjudication of the rights in controversy so far as the parties to the suit were concerned. That being the case, I am of opinion that the order of the Subordinate Judge, dated the 24th of January, 1927, amounts to a decree as defined in section 2 of the Code of Civil Procedure. If that view be not held the applicant would be deprived of getting the question raised in the suit adjudicated upon on the merits. I am, therefore, of opinion that the order being a decree an appeal lay to the Court of the District Judge.

BY THE COURT :—The answer is in the affirmative.

Case remanded.

1928

RATA RAMPAL
SINGH
v.
ABDUL
HAMID.

Misra, J.