

## MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr.  
Justice Ziaul Hasan

1940  
March, 1

B. JAGDISH BAHADUR (APPELLANT) v. MAHADEO PRASAD  
AND OTHERS (RESPONDENTS)\*

*Civil Procedure Code (Act V of 1908), order 22, rules 8, 9 and 12—Execution of decree—Appeal from order in execution proceedings, whether exempted from operation of order 22, rule 8—Sufficient cause under order 22, rule 9—Ignorance of death of respondent, whether sufficient cause for setting aside abatement.*

Order 22, rule 12, of the Code of Civil Procedure does not exempt pending appeals from the operation of rule 8 of that order, though the appeals arise out of execution proceedings. *Hari Saran Das, Mahant v. Har Kishen Das* (1), *Chhanga Mal and others v. Ram Dularey Lal* (2), and *Sundayee Ammal v. Krishnan Chetti* (3), followed. *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh* (4), dissented from. *Mir Khan and others v. Sharfu and others* (5), referred to.

Mere ignorance of the death of a respondent is not a sufficient cause within the meaning of order XXII, rule 9, Civil Procedure Code. *Bhagwan Din and others v. Muru* (6), relied on.

This application was originally heard by the Hon'ble Mr. Justice RADHA KRISHNA, who referred it for decision to a Bench of two Judges, under section 14(2) of the Oudh Courts Act. His referring order is as follows:

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November, 1 RADHA KRISHNA, J.:—In this appeal (Execution of Decree Appeal No. 39 of 1938) respondent No. 1 Mahadeo Prasad, one of the decree-holders, died during the pendency of the appeal.

The appellant on the 12th July, 1939, i.e. the first day on which this Court reopened after the long vacation, applied under order XXII, rule 4 for substitution of the names of his two sons in his place on the allegation that Mahadeo Prasad had died on the 28th May, 1939. This application was opposed by the respondents Nos. 2 to 4 on the ground that Mahadeo

\*Civil Miscellaneous Application No. 402 of 1939, in Execution of Decree Appeal No. 39 of 1938, against the order of M. Ziauddin Ahmad, Esq., District Judge of Gonda, dated the 4th of May, 1938.

(1) (1934) 11 O.W.N., 917.

(2) (1933) I.L.R., 55 All., 509.

(3) (1928) I.L.R., 51 Mad., 858.

(4) (1929) I.L.R., 9 Patna, 372 F.B.

(5) (1923) 74 I.C., 577.

(6) (1940) O.W.N., 219.

Prasad had died on the 14th January, 1939, and so the application was barred by time. Parties were given an opportunity to produce evidence as to the exact date of the death of Mahadeo Prasad.

The case has come up for hearing today.

The appellant has put in an application today *admitting* the date of the death of Mahadeo Prasad, respondent No. 1, to be *the 14th January, 1939*, as alleged by the respondents Nos. 2 to 4. He has prayed that his former application, dated the 12th July, 1939, be treated as an application under order XXII, rule 9 of the Code of Civil Procedure for setting aside the abatement. He has alleged certain grounds in this application as sufficient cause for setting aside the abatement. This application is opposed on behalf of the respondents Nos. 2 to 4. The learned Counsel for the applicant contends that the provisions of rules 3 and 4 do not apply to execution proceedings and his application, dated the 12th July, 1939, is not subject to any rule of limitation.

The reply on behalf of the respondents Nos. 2 to 4 is that rule 12 of order XXII of the Code of Civil Procedure does not exempt execution of decree appeals from the operation of order XXII. The point arising for decision is not covered by any decision of this Court.

The Patna High Court in a Full Bench case reported in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh* (1), took the view that an appeal arising out of an order in the course of proceedings in the execution of a decree or order does not abate on the death of the respondent if the appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law on the ground that appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and rule 12 of order XXII is applicable to such appeals.

The Allahabad High Court in *Chhanga Mal and others v. Ram Dularey Lal* (2), which is a case later than *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh* (1), took the view that an execution appeal stands on quite a different footing from applications for execution and that rule 12 does not contemplate that if an appeal has been preferred from an order in execution, then also rules 3, 4 and 8 would never apply. In the opinion of the Allahabad High Court the language of rule 11 is clear and applies to appeals in execution proceedings.

(1) (1929) I.L.R., 9 Patna, 372 F.B. (2) (1933) I.L.R., 55 All., 509.

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In the Lahore High Court in *Mir Khan and others v. Sharfu and others* (1), a learned Judge held the opinion that rules 3 and 4 of order XXII of the Code of Civil Procedure had no application to appeals arising out of execution proceedings by virtue of provisions of rule 12 of that order.

As there is a difference of opinion on the point between the different High Courts in India I consider that this case must be referred for decision to a Bench of two Honourable Judges of this Courts under section 14(2) of the Oudh Courts Act and I order accordingly.

Mr. *Har Govind Dayal*, for the appellant.

Mr. *H. D. Chandra*, for the respondents.

THOMAS, C.J. and ZIAUL HASAN, J.:—This application for substitution arises in an execution of decree appeal. It came up for hearing before a learned Judge of this Court who has, under section 14(2) of the Oudh Courts Act, referred it to a Bench for decision, as in the opinion of the learned Judge there was a divergence of opinion in different High Courts and that there was no decision of this Court in respect of the point involved in the application.

It is now admitted by the learned counsel on behalf of the applicant that Mahadeo Prasad, respondent No. 1, died on the 14th January, 1939, and this application for substitution was presented on the 12th July, 1939, that is beyond ninety days, but on the first day on which this Court re-opened after the long vacation.

The application was made under order XXII, rule 4, for substitution of the names of the two sons of Mahadeo Prasad deceased, and it was urged that he had died on the 28th May, 1939. The application was opposed by the respondents Nos. 2 to 4 on the ground that Mahadeo Prasad had died on the 14th January, 1939, and the application therefore was barred by time. The parties were given an opportunity to prove the date of the death of Mahadeo Prasad. The appellant then put in an application admitting the date of the death of Mahadeo Prasad to be the 14th January, 1939,

(1) (1923) 74 I.C., 577.

and prayed that the former application of the 12th July, 1939, be treated as an application under order XXII, rule 9 of the Code of Civil Procedure for setting aside the abatement.

In this application the sufficient cause shown for setting aside the order of abatement is that the deceased lived 34 miles away in a village. The applicant is a lawyer practising at Gonda. The contention on behalf of the applicant is that an appeal or an order arising out of an order in the course of proceedings in execution of the decree does not abate on the death of the respondent in cases where an appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law because the appeals in proceedings relating to execution of a decree are more continuance of execution proceedings and therefore rule 12 of order XXII is applicable to such appeals. In support of this contention the learned counsel has relied on a Full Bench decision of the Patna High Court reported in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh* (1). It is true that the above decision supports the contention of the learned counsel on behalf of the applicant, but this view was not followed by the Allahabad High Court in the case of *Chhanga Mal and others v. Ram Dularey Lal*, (2), in which it was held that order XXII, rule 12 of the Code of Civil Procedure does not exempt pending appeals from the operation of rule 8 of that order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rules 3, 4 and 8 would never apply.

The case reported in *Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh* (1) was referred to before

(1) (1929) I.L.R., 9 Patna, 372 F.B. (2) (1933) I.L.R., 55 All., 509.

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the learned Judges of the Allahabad High Court. but they preferred to follow the decision of the Madras High Court in the case of *Sundayee Ammal v. Krishnan Chetti* (1).

In the Lahore High Court in the case of *Mir Khan and others v. Sharfu and others* (2), a learned Judge held the opinion that rules 3 and 4 of order XXII of the Code of Civil Procedure had no application to appeals arising out of execution proceedings by virtue of the provisions of rule 12 of that order.

There is a Bench decision of this Court which was not brought to the notice of the learned Judge of this Court who has made this reference. It is reported in *Hari Saran Das, Mahant v. Har Kishen Das* (3), in which it was held that "if during the pendency of an appeal by the judgment-debtor arising out of execution of a decree for mesne profits and cash, the decree-holder respondent who happens to be a tenant for life dies, an application by the appellant judgment-debtor, who happens to be the remainder man, stating that the rights of the deceased in the decree had come to vest in him and that another person who claimed to be a legal representative of the deceased was not such representative, is maintainable. The provisions of order XXII, rule 5, Civil Procedure Code, impose an obligation on the Court to determine whether the applicant or the opposite-party is the legal representative of the deceased and the proceedings in appeal from any decree or order in proceedings in execution are not proceedings in execution so as to exclude application of rule 4 by rule 12 of order XXII, Civil Procedure Code, they being proceedings in appeal and rule 11 making the whole of order 22 applicable to appeals." This view is in accordance with the view taken by the Allahabad High Court in *Chhanga Mal and others v. Ram Dularey Lal* (4).

(1) (1928) I.L.R., 51 Mad., 858.

(2) (1923) 74 I.C., 577.

(3) (1934) 11 O.W.N., 917.

(4) (1933) I.L.R., 55 All., 509.

We are of opinion that the law laid down in *Hari Saran Das, Mahant v. Har Kishen Das* (1) is correct and therefore held that order XXII, rule 12 of the Code of Civil Procedure does not exempt pending appeals from the operation of rule 8 of that order, though the appeals arise out of execution proceedings. In our opinion an appeal stands on a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rules 3, 4 and 8 would never apply.

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The next point urged on behalf of the applicant is that as the applicant lived about 34 miles away from the village in which Mahadeo Prasad deceased lived, he could not come to know of his death and the delay was due to his ignorance of the death of Mahadeo Prasad. This in the opinion of the learned counsel was the sufficient cause for not applying to bring the legal representatives of the deceased on record within the prescribed period of limitation.

On behalf of the opposite party it is urged that the applicant is a permanent resident of village Achalpur and the deceased was also a resident of the same village as the mortgage-deed dated the 30th June, 1922, would show in which the residence is given as Achalpur. The residence of the deceased in the plaint is different. Whether the deceased was a resident of village Achalpur or not, we do not attach much importance, because in our opinion mere ignorance of the death of a respondent is not a sufficient cause within the meaning of order XXII, rule 9.

In the case of *Bhagwan Din and others v. Muru* (2) it was held that "the procedure provided for the disposal of suits and appeals demands an active prosecution and great vigilance on the part of the parties to a litigation and the appellant in the prosecution of his appeal is under an obligation to keep himself informed

(1) (1934) 11 O.W.N., 917.

(2) (1940) O.W.N., 219.

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as to the existence of his opponent. Mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate."

The applicant has failed to satisfy us that there was sufficient cause for not filing the application within the period of limitation.

We, therefore, reject the application with costs, and refuse to set aside the abatement.

It is conceded by the learned counsel on behalf of the applicant that the whole appeal has abated. We, therefore, dismiss the appeal. No order as to costs.

*Application dismissed.*

### FULL BENCH

*Before Mr. Justice Ziaul Hasan, Mr. Justice A. H. deB. Hamilton and Mr. Justice Radha Krishna Srivastava*

1940  
May, 10

MST. AHMADI BEGAM (DECREE-HOLDER APPELLANT) v. MST. BADRUNNISA AND OTHERS (RESPONDENTS)\*

*Mahomedan Law—Musalman Waqf Validating Act (VI of 1913), section 13—Waqf—Ultimate object of waqf described in waqf alalaulad as "charitable purposes highly commendable according to Hanafi School—Waqf whether valid—Author of waqf indebted—No arrangement made in waqf deed for payment of debts, effect of—Transfer of Property Act (IV of 1882), section 53—Waqif's failure to carry out his duties properly, whether evidence of waqf being fictitious.*

(*Per Full Bench—ZIAUL HASAN, J. dissenting*):—A waqf is not valid according to the Musalman Waqf Validating Act (VI of 1913) unless the author of the waqf specifies a particular object and that particular object is recognized by the Mahomedan Law, as religious, pious, or charitable and is of a permanent character. A waqf describing the ultimate object of the benefit as "charitable purposes, highly commendable according to Hanafi School" is invalid on the ground of vagueness and uncertainty having regard to the decision of their

\*Execution of Decree Appeal No. 8 of 1937, against the order of S. Abid Raza, Esq., Civil Judge of Gonda, dated the 19th of October, 1936.