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with regard to appeals no appeal lies against an order passed under that section.

The appeal is decreed with costs and the case remanded to the lower appellate court for being restored to its original number in the register of appeals and heard and decided in the light of the above remarks.

Appeal allowed.

MISCELLANEOUS CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

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January, 29

AZIZUR RAHMAN, MOULVI, MOHAMMAD (APPLICANT-APPELLANT) *v.* RAM PIARI, MUSAMMAT, AND OTHERS (OPPOSITE-PARTY RESPONDENTS)*

United Provinces Encumbered Estates Act (XXV of 1934), sections 4 and 9(5)(a) and 45—Appeal validly filed under old section 45—No retrospective effect given to amended section 45—Appeal whether entertainable—Parties added after publication of notices—Notices under sections 9 and 11, whether to be published again.

Where an appeal was validly brought under the law as it stood at that time it would not be fair to hold that it should not be entertained on account of a subsequent amendment of law which does not specifically give retrospective effect to the amendment. *Nuralhaqshah* v. *Emperor* (1), *Haidar Husain* v. *Puran Mal* (2), *Kundan Lal* v. *Faqir Bakhsh* (3), and *A. T. Pannirselvam* v. *A. Veeriah Vandayar* (4), referred to.

Where certain necessary parties were added under section 9(5)(*a*) to the application under section 4 of the Encumbered Estates Act after notices under sections 9 and 11 had been published, *held*, that it was not necessary to publish notices under sections 9 and 11, again.

Mr. *Haidar Husain*, for the appellant.

Mr. *B. K. Dhaon*, for the respondents.

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*Miscellaneous Appeal No. 14 of 1937, against the order of Mr. Shiva Charan, Special Judge of First grade, Unao, dated the 28th of January, 1937.

(1) (1937) A.I.R., Sind, 129.
(2) (1935) A.I.R., All., 706.
(3) (1938) I.L.R., 14 Luck., 71.
(4) (1931) A.I.R., Mad., 83.

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AZIZUR RAHMAN MOULVI MOHAMMAD v. RAM PIARI MUSAMMAT AND OTHERS

ZIAUL HASAN and YORKE, JJ.:—This is an appeal against an order of the learned Special Judge, First Grade, Unao, under the Encumbered Estates Act passed in proceedings under the Act.

It appears that one Wasiuzzaman died on the 13th January, 1933, leaving two sons Azizul Rahman and Maqboolul Rahman and some property burdened with debts. The property was by a family settlement divided among the two sons and one grandson. Azizul Rahman, the present appellant, filed an application under section 4 of the Encumbered Estates Act and notices under sections 9 and 11 were duly published in the official gazette. On the 23rd September, 1936, the present appellant applied to the learned Special Judge that Maqboolul Rahman and his son may be made parties as joint debtors under section 9(5)(*a*) of the Encumbered Estates Act. Maqboolul Rahman and his son Mushiruzzaman appeared and consented to be made parties to the appellant's application under section 4. Thereupon the learned Judge passed an order that they may be made parties but ordered that publication would take place again under sections 9 and 11. It is against the latter order that the present appeal has been filed.

A preliminary objection was taken on behalf of some of the respondents-creditors that no appeal lies against the order in question. This objection is based on the fact that though originally under section 45 of the Encumbered Estates Act every order passed by a Special Judge was appealable, the amending Act XI of 1939 has however modified section 45 so as to restrict the right of appeal against those orders only which finally dispose of a case. The order in question is undoubtedly an interlocutory order and does not dispose off the case and it is therefore contended that no appeal lies against it under the law as it stands at present. The argument is that rules of law which lay down procedure have retrospective effect according to the decisions of various High

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Ziaul Hasan and Yorke, JJ.

Courts in India and in support of this argument reliance is placed on the cases of *Nuralhaqshah* v. *Emperor* (1), *Haidar Husain* v. *Puran Mal* (2), *Kundan Lal* v. *Faqir Bakhsh* (3), and *A. T. Pannirselvam* v. *A. Veeriah Vandayar* (4). None of these cases, however, deals with a case of an appellant whose right of appeal should have been taken away by legislation made subsequently to the filing of the appeal. It cannot be denied that the present appeal was validly brought under the law as it stood at that time and it would not be fair in our opinion to hold that an appeal validly filed should not be entertained on account of a subsequent amendment of law which does not specifically give retrospective effect to the amendment. There is no reason to make a distinction between an appellant under the Encumbered Estates Act whose appeal happened to be heard before the amending Act came into force and one whose appeal had to be adjourned for no fault of his own and taken up after the passing of the amending Act.

The learned counsel for the respondents relies on the following passage occurring at page 199 of Maxwell on the Interpretation of Statutes, 8th Edition:

> "The general principle however seems to be that alteration in procedure are retrospective unless there be some good reason against it;"

but at page 200 we also find the following:

> "But a new procedure would be presumably inapplicable where its application would prejudice rights established under the old. . ."

We are therefore of opinion that the preliminary objection has no force.

Coming to the merits of the case, we consider that the order for re-publication of notices under sections 9 and 11 of the Encumbered Estates Act was wholly unjustified. Maqboolul Rahman and Mushiruzzaman were

(1) (1937) A.I.R., Sind, 129.
(2) (1935) A.I.R., All., 706.
(3) (1938) I.L.R., 14 Luck., 71.
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undoubtedly necessary parties under section 9(5)(*a*) of the Act, and the order making the parties was perfectly correct. As they had also applied under the Encumbered Estates Act the order of their applications being consolidated with the appellant's application cannot also be objected to. There was however no justification for notices being published again. Perhaps the order was not unconnected with the fact that Nilkanth and Gaya Prasad, creditors, had filed their written statements beyond time on not very strong grounds and the learned Judge wanted to help them.

Ziaul Hasan and Yorke, JJ.

The learned counsel for the respondents tried to justify the order in question by arguing that republication of notices was necessary as proceedings had been taken under section 49 of the Act. This argument has no foundation whatever except the fact that in the last paragraph of his application under section 4, the applicant mentioned section 49 of the Act. There is however absolutely nothing on the record to show that any proceedings were taken under that section or even that that section was applicable to the case.

We therefore allow this appeal with costs and set aside the order of the learned Civil Judge regarding republication of notices.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

EADAN, MUSAMMAT (PLAINTIFF-APPELLANT) *v.* MUSAMMAT RAM DULARI AND OTHERS (DEFENDANTS-RESPONDENTS)*

1940 *January*, 30

Mortgage suit—Omission to implead one heir of deceased mortgagor—Other heirs parties—Estate whether sufficiently represented—Decree whether binding on heirs not impleaded.

Where in a suit on foot of a mortgage one of the heirs of the deceased mortgagor was inadvertently not impleaded, *held*,

*Section 12(2) Oudh Courts Act appeal No. 5 of 1937, against the order of the Hon'ble Mr. Justice G. H. Thomas, Judge, Chief Court of Oudh, dated the 11th January, 1937.