

dence which would merit any consideration of their evidence by the Court. Their evidence has been shown by the Court below to be discrepant and inconsistent with the case of the plaintiffs as laid in the plaint which they want to improve by setting up two events : (1) the previous dedication of the property, *Sankalp*, and *Samarpan* in the presence of the people; and (2) the subsequent execution of the deed of trust.

We have carefully gone through the oral evidence and considered the comments made on behalf of the parties. In fact, Mr. *Das* did not feel confident of the oral evidence tendered on behalf of the plaintiffs and consequently did not seem to rely upon it. We need not repeat the reasons given in detail by the learned District Judge who appears to us to have carefully and exhaustively gone into the evidence. Suffice it to say that we entirely concur with his estimate of the evidence. We prefer the evidence given on behalf of the defendants to that adduced on behalf of the plaintiffs. Upon the evidence, oral and documentary, therefore, no real dedication of the property has been proved, nor has it been proved that defendant no. 1 was a trustee of the properties in question.

Agreeing, therefore, with the view of the Court below, we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

LILLO SONAR

v.

JHAGRU SAHU*

Civil Procedure Code, 1908, (Act V of 1908), Order XXII, rules 4 and 11—Legal representatives of a deceased respondent, substitution of whether necessary when one of them already on the record as a respondent.

Where, after the death of one of several respondents, the appellant sought to substitute his legal representatives after

* In the matter of an application in Second Appeal no. 388 of 1923.

1924.

DEO SARAN
BHARTI
v.
DEOKI
BHARTI.

1924.

April, 25.

1924.
 LILLO SONAR
 v.
 JHAGRU
 SAHU.

the expiry of the time allowed by law, on the ground that, one of such representatives being already on the record, the appeal could not have abated.

Held that (i) the fact that one of the representatives of the deceased was already on the record, (though not in a representative capacity), did not relieve the appellant or the other heirs of the deceased respondent from making an application for substitution of legal representatives of the deceased respondent in terms of rule 4 of Order XXII;

(ii) Order XXII requires legal representatives of parties to be brought on the record in the case of the death of any of them irrespective of whether the deceased was joint or separate from other members of the family;

(iii) Rule 4 of Order XXII does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement.

Bhikaji Ramchandra v. Purshotam(1), *Adusupalli Venkata Row v. Marikruthu Ammal*(2), and *Mussammatt Sughar Kunwar v. Babu Sitapat Ram*(3), distinguished.

Appeal by the applicant.

The facts of the case material to this report are stated in the order of the Court.

Sambhu Saran, for the appellant.

Guru Saran Prasad and *Anand Prasad*, for the respondents.

JWALA PRASAD AND KULWANT SAHAY, J. J.—On the 1st of February, 1924, the petitioner applied for substitution in place of the deceased respondent no. 1, Jhagru Sahu. This application was made more than ninety days after the death of Jhagru Sahu. The proposed legal representatives of Jhagru Sahu have entered appearance and oppose the application for substitution. Their case is that the appeal has already abated, no application for substitution having been made within time. The learned Vakil on behalf of the appellant-petitioner submits that no substitution was necessary and the abatement did not take place, inasmuch as one of the legal representatives, Doman,

(1) (1886) I. L. R. 10 Bom. 220. (2) (1912) 18 Ind. Cas. 318.

(3) (1917) 39 Ind. Cas. 185.

was already on the record as respondent no. 2, and the family being a joint *Mitakshara* family he was competent to represent all the other heirs of Jhagru Sahu. It is said that so long as Doman is on the record the appeal could not abate, notwithstanding that all the heirs of Jhagru Sahu were not on the record. This contention is based upon the legal notion of a joint *Mitakshara* family, but "legal representative" as defined in clause (11) of section 2 of the Civil Procedure Code includes the person on whom the estate devolves on the death of the party suing or sued in a representative character. Therefore even if Jhagru Sahu and Doman were members of a joint *Mitakshara* family, their legal representatives will be the heirs on whom the estate would devolve upon their death by survivorship. In the present case upon the death of Jhagru Sahu, his legal representatives would be the surviving members of the family, the opposite party. Order XXII requires legal representatives of parties to be brought on the record in the case of the death of any one of them irrespective of whether the deceased was joint or separate from the other members of the family. Assuming for the sake of argument that the said heirs, who are now proposed to be substituted, are the legal representatives of Jhagru Sahu, they must be brought on the record in accordance with law and the procedure set forth in Order XXII. The procedure in a case of this kind is prescribed by rule 4 of the said Order which requires that, upon the death of a defendant, and when the right to sue does not survive against the surviving defendant, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party. By rule 11 of the said Order the word "defendant" includes "respondent". Therefore, the respondent in the present case being dead, the substitution could only be made upon an application made in that behalf by the appellant or by the legal representatives of the deceased. The fact that Doman, one of the legal representatives of the deceased, is already on the record does not relieve the appellant or the other heirs of Jhagru Sahu from making an

1924.

LILLO SONAB

v.

JHAGR
SAHU.

1924.
LALO SONAR
v.
JHAGRU
SAHU.

application for substitution as legal representatives of Jhagru Sahu in terms of rule 4 of Order XXII. Doman was respondent in his own capacity. Now, if the appellant wants him to be placed on the record as legal representative of Jhagru Sahu, a proper application should be made. Therefore, the appeal did abate before the application for substitution was filed.

Reliance has been placed upon a number of cases [*Bhikaji Ramchandra v. Purshotam* (1), *Adusupalli Venkata Row v. Marikruthu Ammal* (2) and *Mussamat Sughar Kunwar v. Babu Sitapat Ram* (3)] in support of the contention that the presence of Doman on the record as legal representative would prevent the appeal from abating. These cases do not go so far. They only lay down that where there are several representatives, if an application is made within time for bringing any one of them on the record, the appeal does not abate, and that the other legal representatives may be made parties to the case even after the expiry of the time fixed for substitution. It is notable that in all those cases an application was made as required by rule 4 of Order XXII as regards one of the legal representatives within time. The rule does not require that all the legal representatives should be on the record, and if one of them is properly brought on the record as legal representative there will be no abatement. The aforesaid cases are not on all fours with the present one.

The learned Vakil on behalf of the appellants then urges that upon the grounds stated in the petition the abatement should be set aside. On this score he seems to stand on a firmer footing. It appears that Jhagru Sahu died in September last, and the appellants came to know of his death in December, and that after certain correspondence with the learned Vakil who appears for them in the present case the application was made within time from the date of knowledge of the death of the deceased. The allegations made in

(1) (1888) I. L. R. 10 Bom. 220. (2) (1912) 13 Ind. Cas. 318,
(3) (1917) 89 Ind. Cas. 135.

the application are not at all controverted by any counter-affidavit, and regard being had to the fact that the appellant lives at a distance from the residence of the deceased Jhagru Sahu, it is possible that, as alleged by him, he did not come to know of the death of the deceased until December. We, therefore, accept the reasons given in the petition for not making the application for substitution in time, and accordingly we set aside the abatement and direct that the substitution as prayed for be made. The opposite party has entered appearance and in this case he is entitled to costs.

S. A. K.

*Substitution ordered.***APPELLATE CIVIL.***Before Das and Ross, J. J.***'AMOLAK CHAND**

v.

MANSUKH RAI MANGAN LAL*

Provincial Insolvency Act, 1920 (Act V of 1920), sections 2 (1) (d) and 28—"Property" whether includes ancestral property—Hindu Law—business carried on by father and major sons and resulting in insolvency—whether shares of minor sons liable to be sold for the debts.

Where the father of a joint Hindu family and his two major sons engaged in business which proved unsuccessful and they were adjudged insolvent, and a Receiver was appointed, held, overruling an objection by the minor sons that their shares in the joint family property did not vest in the Receiver, that ancestral property is "property" within the meaning of section 2 (1) (d) of the Provincial Insolvency Act, 1920, and is liable to be sold in satisfaction of antecedent debts.

Sant Prasad Singh v. Sheodut Singh(¹) and *Sahaj Narayan Sahi v. Wajid Hussain*(²), not followed.

* Appeal from original Order no. 52 of 1924, from an order of H. W. Boyce, Esq., i.c.s., District Judge of Bhagalpur, dated the 13th March, 1924.

(1) (1923) I. L. R. 2 Pat. 724.

(2) (1919) 49 Ind. Cas. 848.

1924.

ILO SONAR

v.

JHAGRU
SAHU.

1924.

May. 9.