

APPELLATE CIVIL.

Before *Jwala Prasad and Macpherson, J.J.*

RAI KASHI NATH SINGH BAHADUR

v.

KAILAS SINGH.

1924.

July, 7.

Civil Procedure Code, 1908 (Act V of 1908), Order XXII, rule 4—Suit for rent against several defendants—joint and several liability—Death of one of the defendants before the decree, whether makes the entire decree void.

Under a rent decree the liability of the defendants is joint and several and the plaintiff is entitled to enforce his claim for rent against the defendants jointly and severally.

The effect, therefore, of the omission of the plaintiff, in a suit for rent against several defendants jointly, to bring upon the record the legal representative of a deceased defendant, would only be that the suit would abate as against that defendant and not that it would abate necessarily as against all the defendants.

Abdul Aziz v. Basdeo Singh(1) and *Joy Gobind Laha v. Monmotha Nath Banerji*(2), followed.

Appeal by the plaintiff.

This was an appeal against an order passed by the Subordinate Judge of Gaya, dated the 18th December, 1923, setting aside an order of the Munsif of Gaya, dated the 19th June, 1923.

The order in question related to the execution of a decree obtained by the appellant against a number of persons as defendants. The decree was dated the 17th February, 1922, and was said to be a rent decree. An objection was raised by some of the judgment-debtors to the execution of the decree upon the ground that three of the judgment-debtors were dead at the

* Appeal from Appellate Order no. 50 of 1924, from an order of B. Jotindra Nath Ghose, Additional Subordinate Judge of Gaya, dated the 19th June, 1923, reversing an order of M. Shah Khalilur Rahman, Munsif of Gaya, dated the 19th June, 1923.

(1) (1912) I. L. R. 34 All. 604.

(2) (1906) I. L. R. 33 Cal. 580.

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time when the decree was passed and consequently the decree was a nullity and incapable of execution. This objection was overruled by the Munsif who held that there was no good evidence to show that three of the judgment-debtors were dead before the decree was passed.

On appeal the Subordinate Judge held that there was good evidence as to one of the judgment-debtors Chhedi having died before the decree was passed and he also held that as one of the judgment-debtors, Chhedi, had died before the decree was passed, the entire decree was a nullity and incapable of execution. Upon this view he allowed the appeal and dismissed the execution cases.

Jalgebind Prasad, for the appellants : The death of one of the judgment-debtors before the decree will not make the whole decree void and incapable of execution. The decree is still capable of execution as against the surviving judgment-debtors. There is a subsisting liability on the part of the judgment-debtors to pay the rent, and hence the death of one of them will not exonerate the others from that liability. If the liability of the defendants had been joint only, the case would have been otherwise. *Rajanikant Bhowmik v. Karamat Ali* (1), relied on by the lower appellate Court, has no application to the present case. The liability of the defendant-tenants in the present case was joint and several and there are numerous authorities in support of the proposition that where the liability of the defendants is joint and several the suit will not abate by reason of the death of any one of them.

S. A. K.

JWALA PRASAD, J. (after stating the facts, as set out above, proceeded as follows) :—

As a point of law the learned Subordinate Judge is not correct in stating that the death of one of the

(1) (1910) 5 Ind. Cas. 528.

defendants necessarily makes the entire decree null and void. The suit apparently was instituted against a number of defendants with respect to arrears of rent due from them. The decree or a copy thereof is not on the record but the description thereof in the application for execution shows that it was a rent decree and the Munsif also incidentally refers to it as a rent decree. If it was a rent decree the liability of the defendants was joint and several and the plaintiff was entitled to enforce his claim for rent against the defendants jointly and severally. Therefore upon the death of one of the defendants he was entitled to continue his suit against the remaining defendants and the effect of the omission to bring the legal representatives of the deceased defendant upon the record would only be the abatement of the suit against that defendant and not necessarily the abatement of it against all the defendants. Such is the law as laid down in rule 4 of Order XXII of the Code of Civil Procedure, which runs thus :

" 4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

Clause (2) of that rule says :

" Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

Therefore, if the right to sue as against the remaining defendants, survives, the death of one of the defendants will not cause the abatement of the entire suit but only as against the deceased defendant. The present Code of 1908 has set at rest the doubt that possibly arose under the old law. As a matter of fact under the old law although the wording was not clear the interpretation given to it by the several High Courts shows that the suit would not necessarily abate on account of the death of one of several defendants if the right to sue survives against the remaining defendants. The authorities have been referred to in

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Mulla's Code of Civil Procedure under Order XXII, rule 4, and I need only refer to two cases, *Abdul Aziz v. Basdeo Singh* (1) and *Joy Gobind Laha v. Monmotha Nath Banerji* (2). I quote these authorities not only for the purpose of showing that the suit will not abate by reason of the death of one of the defendants provided the right to sue survives against the remaining defendants but also for the proposition that a claim for rent is joint and several as against the tenants. The *placitum* in the Allahabad case which agrees with the body of the ruling runs as follows :

"Held, that the liability of joint-holders of a fixed-rate tenancy to payment of rent is joint and several and not joint only. The failure, therefore, of the plaintiff in a suit for rent against several fixed-rate tenants jointly, to bring upon the record the representative of a deceased defendant, is no bar to the continuance of the suit against the remaining defendants."

The learned Judges observe that the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha v. Monmotha Nath Banerji* (2). That was a suit against several persons for the recovery of the rent of a holding. Their Lordships also observed that they found no reason for distinguishing between the liability of several holders of a fixed-rate tenancy, and the liability of several tenants of any other holding. Therefore if the decree was with respect to rent the liability of the judgment-debtors was joint irrespective of the nature of the holding. Consequently the death of the judgment-debtor, Chhedi, does not at all affect the liability of the other defendants and the suit did not abate against those defendants and the decree against those defendants remains valid. As observed above I have referred to the authorities of the Calcutta and Allahabad High Courts because they related to claims for rent but the cases referred to by Mr. Mulla which I have carefully gone through show that the principle applies to all kinds of claims where the claim can be enforced jointly and severally against the defendants. The test therefore is whether the liability,

(1) (1912) I. L. R. 34 All. 604.

(2) (1906) I. L. R. 33 Cal. 580.

of the defendants or the judgment-debtors is joint and several in order to determine whether the death of one of the defendants or judgment-debtors renders the entire decree null and void. It would have been well if we had a copy of the decree upon the record but in the absence of the decree I rely on the description thereof given in the execution petition and the judgment of the Munsif. I therefore set aside the order of the Subordinate Judge and restore that of the Munsif and direct the execution to proceed except as against the deceased judgment-debtor, Chhedi Singh, and his legal representatives. The decree so far as Chhedi and his legal representatives are concerned is null and void. The appeal is decreed with costs. There is no appearance on behalf of the opposite party.

MACPHERSON, J.—I agree.

Appeal decreed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J.J.

HARAKHPAN MISSIR

v.

JAGDEO MISSIR.*

1924.

July, 8.

Mesne profits, application for ascertainment of—Limitation—cause of action, when accrues—Civil Procedure Code, 1908, Order XX, rule 12.

Under the Civil Procedure Code, 1908, an application for ascertainment of future mesne profits is no longer an application in execution but a part of the suit itself.

Gangadhar Manika v. Balkrishna Soiroba Kasbekar(1), *Ramana Reddi v. R. Babu Reddi*(2) and *Puran Chand v. Roy Radha Kishen*(3), distinguished.

* Second Appeals nos. 1845 of 1921 and 111 of 1922, from a decision of B. Krishna Sahay, Subordinate Judge of Gaya, dated the 5th September, 1921, reversing a decision of M. Muhammad Shams-ud-din, Munsif of Aurangabad, dated the 29th March, 1921.

(1) (1921) 61 Ind. Cas. 448.

(2) (1904) I. L. R. 37 Mad. 186.

(3) (1892) I. L. R. 16 Cal. 182, F. B.