CIVIL REFERENCE.

1930.

Dec. 13.

Before Wort and Khaja Muhammad Noor, JJ.

BARJU BISWAL

v.

KUNJA BEHARI MAHAPATRA.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLVI, rule* 1—*reference does not lie when order is appealable —order declaring a suit to have abated, whether is appealable as a decree.*

An order declaring that a suit has abated because the legal representative of the deceased defendant had not been brought on the record in time is a decree and is appealable as such, though no formal decree dismissing the suit has been drawn up.

Suppu Nayakan v. *Perumal Chetti*(1) and *Subbalakshmi Ammal* v. *Ramanujam Chetty*(2), followed.

Order XLVI, rule 1, Code of Civil Procedure, 1908, provides :

" Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court."

Where, therefore, a reference was made by the Munsif under Order XLVI, rule 1, asking the opinion of the High Court as to whether a suit can abate where the sole defendant dies after the passing of the preliminary decree but before the application for final decree and no step is taken by the plaintiff in time to bring on record the legal representative.

Held, that in whatever way the Munsif decided the matter his order would be appealable as a decree, and, that being so, no reference would lie under Order XLVI, rule 1.

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* Civil Reference no. 1 of 1930 (Cuttack).

(1) (1916) 30 Mad. L. J. 486.

(2) (1918) I. L. R. 42 Mad. 52.

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Reference under Order XLVI, rule 1, Code of Civil Procedure, 1908.

The facts of the case material to this report are stated in the judgment of Wort, J.

S. N. Sen Gupta, for the reference.

G. C. Ray, against the reference.

WORT, J.—This is a reference under Order XLVI, rule 1, by the learned Munsif of Cuttack in a case in which there has been an application by the plaintiff for the substitution of the heir of the sole defendant in a mortgage suit. A preliminary decree had been passed but before the application for the final decree the sole defendant had died and the question that came up before the Munsif was whether the suit in those circumstances abated or not. He appears to have been under some difficulty in deciding the question and as a result referred the case to this Court under Order XLVI, rule 1. An objection is taken on the part of the defendant that the reference to this Court is not competent. That depends on the question of whether the order which the Munsif would make was appealable or not. Order XLVI, rule 1, provides that before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, the Court is entitled under the provisions of this Order to make a reference to decide any question of law, etc.

In the first place it is quite clear that if the learned Munsif had decided that the suit did not abate and had made a final decree, there would have been an appeal. That much is admitted. The question arises whether in the circumstances of his deciding that the suit did abate and refusing to pass a final decree, there would also have been an appeal. Order XXXIV, rule 5, sub-clause (*3*) provides that where payment in accordance with sub-rule (*1*) has not been

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made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, etc. Now in the case of *Subbalakshmi Ammal* v. *Ramanujam Chetty*(1) this question came up for decision. The facts of the case were that the respondent to the application obtained a preliminary decree for sale on October 27, 1910. He applied for execution of the preliminary decree by sale of the mortgaged property but had not obtained previously a final decree. There was a direction by the Court to apply for a final decree and accordingly that application was made. The objection of the defendant was that the application was barred by limitation. In the result the Court dismissed the application for passing a final decree. There was an appeal to the Subordinate Judge and the question that came up before the Madras High Court was whether the appeal to the Subordinate Judge was competent or not. The Madras High Court decided that there was an appeal and relied in the course of its own judgment on a decision in the case of *Suppu Nayakan* v. *Perumal Chetti*(2) where the same Court had held that an order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time was a decree and appealable as such though no formal decree dismissing the suit had been drawn up. In my judgment that is an authority for the question that comes before us to decide that in this case whichever way the learned Munsif decides the matter which came before him, there was an appeal from the decree and, in consequence of there being an appeal, the reference to this Court under Order XLVI, rule 1, is not competent.

The reference must, therefore, be rejected. The application before the learned Munsif will be heard

(1) (1918) I. L. R. 42 Mad. 52.
(2) (1916) 30 Mad. L. J. 486.

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and determined according to law. There will be no order for costs.

KHAJA MOHAMAD NOOR, J.—I agree.

Reference rejected.

APPELLATE CIVIL.

Before Jwala Prasad and James, JJ.

1930.

Dec. 15.

RAM SURAT MAHTON

v.

HITANANDAN JHA.*

Hindu Law—Mitakshara School—widow, power of, to alienate husband's estate—limitations—legal necessity or husband's directions, proof of, whether necessary for justifying alienations for charitable and religious purposes—portion of husband's estate, mortgage of, for the excavation and consecration of tank, whether is valid.

A Hindu widow takes the estate of her husband solely for the good of his soul, and she has power to spend the income of the estate and to alienate it, provided it is done for the good of her husband's soul. In order to justify an alienation for religious and charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, the widow is not bound to prove legal necessity or any express direction by her deceased husband.

Where, therefore, a widow, governed by the Matakshara school of Hindu Law mortgaged 1 bigha 4 cottahs of land out of her husband's estate which comprised of 12 bighas of land for the excavation and consecration of a tank, and there was no recital in the bond that the excavation was in pursuance of the directions of her husband or for his spiritual benefit, *held*, that the alienation was valid.

* Appeal from Appellate Decree no. 609 of 1929, from a decision of F .F. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 11th January, 1929, setting aside a decision of Babu Baidyanath Das, Munsif of Sitamarhi, dated the 8th September, 1928.