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was final and was enforceable as a decree. In my opinion, therefore, the decision of the learned Subordinate Judge on this part of the case was correct.

The result is that the appeal succeeds in part only and the case will be remanded to the trial Court for a decision on the evidence on the record on the question of the rabi produce rent for 1328 and the amount, if any, of damages due to wilful neglect to cultivate any of the produce-rent lands in suit.

There will be no costs of this appeal.

WORT, J.—I agree.

Decree modified.

Case remanded.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 3 *and* 4—*one of the representatives of deceased respondent already on the record—appeal, whether abates—appellant, duty of, to apply for substitution within time—managing member already on the record—other members, substitution of, whether necessary.*

The fact that one of the legal representatives of a deceased respondent is already on the record but not as such, does not prevent the abatement of the appeal, and the appellant is not thereby relieved from the duty of applying within time for the substitution of the legal representatives of the deceased respondent in terms of Order XXII, rule 4, Code of Civil Procedure, 1908.

*First Appeal no. 2 of 1924, from a decision of Babu Shivanandan Prasad, Subordinate Judge of Darbhanga, dated the 5th May, 1923.

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Lilo Sonar v. *Jhagru Sahu*(1), *Daroga Singh* v. *Raghunandan Singh* (2), followed.

Shib Dutta Singh v. *Sheikh Karim Baksh*(3) distinguished.

Even if the managing member of a Hindu joint family is a party to the appeal, the appeal abates for want of substitution if other members are not brought on the record on the death of some of the members of the family who are on the record.

Daroga Singh v. *Raghunandan Singh* (4), followed.

Sheosankar Ram v. *Jadu Kocri* (5), distinguished.

The effect of an abatement against the subsequent purchasers of a property is that the plaintiff is not entitled to prosecute his suit for specific performance of a contract for sale in respect of that property.

Appeal by the plaintiffs.

This appeal arose out of a suit for specific performance of a contract. The plaintiffs' case was that the defendant no. 1, as manager of his joint family, entered into a contract on the 9th of August, 1921, with the plaintiffs for the sale of his share in mauza Raipur for a consideration of Rs. 16,500, out of which Rs. 600 was paid in cash as earnest money and it was stipulated that a deed of sale should be executed by the 2nd of October, 1921. It was provided in this agreement that, if the plaintiffs failed to get the deed registered by the defendant by the date stipulated, the earnest money would lapse and the plaintiffs would be liable to pay interest to the creditors of the defendant from the date of the agreement up to realization and, that, if the defendant failed to register the deed by the stipulated date the deed of agreement should be taken as the deed of sale and the plaintiffs should be competent to enter into possession of the property and deposit the balance of the consideration money in a competent Court. The deed of sale, however, was not executed by the 2nd of October, 1921. On the 20th of September, 1921, a notice was

(1) (1924) I. L. R. 3 Pat. 853. (2) (1925) 6 Pat. L. T. 451.
(3) (1925) I. L. R. 4 Pat. 320.
(4) (1925) 6 Pat. L. T. 451. (5) (1914) I. L. R. 36 All. 383 P. C.

given by the defendants 2—4, who were the minor members of the family of the defendant no. 1, to the effect that the defendant no. 1, had no right to execute any conveyance in respect of the property and that the deed of contract was not binding upon them. A reply was sent by the plaintiff no. 1 to the said notice on the 25th of September, 1921. Thereafter, the defendant no. 1 agreed to execute the deed of sale in terms of the contract, and on the 21st of November, 1921, a draft deed of sale was prepared in the presence of the defendant no. 1 by the pleader Babu Brahmadeva Narayan, and the plaintiffs' karpardaz purchased the necessary stamp-paper for the execution of the deed. Defendant no. 1, however, executed a deed of sale on the 3rd of December, 1922, in favour of three persons Babu Dilan Singh, Babu Ramlagan Singh and Babu Narain Singh who were defendants nos. 5—7 and were described as defendants second party in the suit. The plaintiffs, therefore, instituted the present suit for specific performance of the contract of the 9th of August, 1921. The suit was contested by the defendants and was ultimately dismissed by the learned Subordinate Judge who found that the plaintiffs had failed to perform their part of the contract and that time was the essence of the contract. The plaintiffs, therefore, filed the present appeal to the High Court.

The appeal came on for hearing on the 10th of May, 1927, when it was represented that two of the defendants second party respondents, viz., Dilan Singh and Ramlagan Singh were dead. An application was made to the Court for adjournment of the case in order to enable the appellants to bring the heirs of the deceased respondents on the record. The Court, by its order dated the 10th of May, 1927, adjourned the appeal for a fortnight to enable the plaintiffs-appellants to take the necessary steps, and at the same time remarked that the surviving respondent Narain Singh, brother of the deceased respondents Dilan Singh and Ramlagan Singh, was on the record, but it did not appear whether the three

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brothers were members of a joint family or not and, that, if it should appear that they were members of the same joint family, then it would not be necessary to substitute the heirs, although a note would have to be made in the record of the appeal that the two respondents were dead and that their interests had survived to Narain Singh. Subsequently, an application was made on behalf of the appellants stating that the three brothers were members of a joint Hindu family and that the surviving respondent Narain Singh was the karta of the family and was already on the record and it was, therefore, prayed that the fact of the death of the said two respondents be noted and that the appellants be permitted to prosecute the appeal. This application was placed before the Registrar on the 31st of May, 1927, and the Registrar directed that a note be made on the record in conformity with the order of the Bench, dated the 10th of May, 1927, that Dilan Singh and Ramlagan Singh who were members of a joint family died in a state of jointness with Narain Singh and, that their interests had survived to Narain Singh. An objection was taken on behalf of the respondents that Dilan Singh had left a son who was not on the record and that the said son should have been substituted, and that he had also left three nephews who were all members of the joint family and that they should also have been substituted. The Registrar, however, made no order in respect thereof and he simply observed that the vakil for the respondents would be able to represent the matter to the Bench.

When the appeal came on for hearing before the Bench it was represented that the appeal had abated inasmuch as none of the heirs of the deceased respondents had been substituted within the period of limitation. It appeared that Dilan Singh died on the 11th of December, 1924, and Ramlagan Singh on the 1st of March, 1927. The limitation for an application for substitution was 90 days from the date of death, and, under Order XXII, rule 4, if the application for

substitution was not made within the time limited by law the suit abated as against the deceased defendants; and under rule 11 "defendant" included "respondent" in the appeal. In so far as Dilan Singh was concerned the appeal had abated on the 31st of May, 1927, when the application was made before the Registrar, and as regards both the deceased respondents the appeal had abated when it finally came before the Bench for disposal on the 6th of December, 1927. On the 7th of December, 1927, an application was made before the Bench by the appellants stating that Dilan Singh had died in a state of jointness with his brothers Narain Singh and Ramlagan Singh and his son Ramprit Singh and his nephews Sitaram Saran Singh, Ramhit Singh and Ram Benoy Singh, and that Ramlagan Singh had died leaving no son, and that his brother Narain Singh and his nephews named above were the surviving members of the joint family. It was stated in that petition that Narain Singh was the karta and managing member of the joint family and as such represented the family of the defendants second party. It was then stated that the appellant no. 1 had attained majority only recently and that the other appellants were still minors, and in paragraph 5 of the petition it was stated that the fact of the death of Dilan Singh and Ramlagan Singh was brought to the notice of the appellants' vakil for the first time when the case was on the daily-list but, that as the respondents second party were members of a joint family, no application for substitution was made. In paragraph 6 of the petition the appellants submitted that no substitution was necessary but, that, if substitution be held to be necessary, then it was prayed that the abatement be set aside and the persons named above be added as party respondents. A counter affidavit was filed on behalf of the surviving respondent second party Narain Singh to the effect that he (Narain Singh) did not represent the joint family in the present litigation and that the statement that the appellant no. 1 had attained majority

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only recently was vague and misleading, the fact being that he had attained majority long before 1924 and that the appellants lived only two miles away from the house of the defendant second party and were fully aware of the death of both Dilan Singh and Ramlagan Singh, as would appear from the counter-affidavit filed by them when the matter was before the Registrar on the 31st of May, 1927, the fact stated in that affidavit being that the fact of the death of the said Dilan Singh and Ramlagan Singh was fully known to the appellants inasmuch as they were all gotias and partook of the dinners given during the performance of the funeral ceremonies of the said deceased respondents.

Upon these facts it was contended on behalf of the appellants that there had been no abatement of the appeal.

Janak Kishore, for the appellants.

N. N. Sinha (with him *B. P. Sinha* and *D. N. Verma*), for the respondents.

KULWANT SAHAY, J. (after stating the facts set out above proceeded as follows:) In the first place, it is contended that Narain Singh, a member of the joint family of the defendant second party was already on the record and no substitution was necessary, and, secondly, it is contended that even if substitution was necessary the fact that one of the heirs was on the record will save the appeal from abatement; and that the only question which arose was as to the want of all the necessary parties on the record. In my opinion the contention of the learned vakil for the appellants is not sound. Under Order XXII, rule 4, where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, 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. In the present case the right to

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sue did not survive against the surviving defendant Narain Singh alone and, therefore, it was necessary for the appellants to make an application for the legal representatives of the deceased respondents being substituted in their place. Sub-rule (3) of rule 4, Civil Procedure Code, provides that 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, on account of the appellants' failure to make an application for substitution of the heirs of the deceased respondents within the time limited by law the present appeal did abate as against the deceased respondents. The question was considered by this Court in *Lilo Monar* v. *Jhagru Sahu* (1), where it was held that the fact that one of the legal representatives of a deceased respondent is already on the record, but not as such, does not relieve the appellant from the duty of applying within time for the substitution of the legal representatives of the deceased. It was pointed out in that case that the fact that one of the legal representatives was already on the record did not relieve the appellant from making an application for substitution in terms of rule 4 of Order XXII. In *Daroga Singh* v. *Raghunandan Singh* (2), it was held that where one of the plaintiffs-respondents died leaving two sons who were all members of a joint family, and the appellants failed to bring them on the record, the whole appeal abated. In that case one of the members of the joint family Jagdeo Singh, who was a respondent in the appeal, died on the 28th of July, 1923 and his father Raghunandan Singh, who was apparently the karta of the family, was alive and a party to the suit. Jagdeo Singh died leaving two sons who were not substituted in his place and it was held that as no steps were taken to bring the sons of Jagdeo on the record the appeal had abated notwithstanding the fact that his father Raghunandan was already on the record. These two cases are clear authority for holding that the fact of Narain Singh

(1) (1924) I. L. R. 3 Pat. 853. (2) (1925) 6 P. L. T. 451.

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being on the record did not prevent the abatement of the appeal when admittedly the other two respondents died leaving other members of the family as their legal representatives and those members were not brought on the record.

Reliance was placed on behalf of the appellants upon the observations made by this Court in *Shib Dutta Singh* v. *Sheikh Karim Bakhsh* (1). That case is clearly distinguishable from the present case. In that case an application had been made for substitution, but only two of the heirs of the deceased were substituted while other heirs were left out, and it was held that when there was an application for substitution of some of the legal representatives, that application saved the appeal from abatement. In the present case no application was made for substitution within the time limited by law.

Reliance was also placed on the decision of the Privy Council in *Sheo Shankar Ram* v. *Jadu Koeri* (2), for the proposition that the other members of the family were properly and effectively represented in the suit by the managing member of the family. That was, however, a different case. There a suit was instituted by some of the members of the joint family for redemption of a mortgage after a decree for foreclosure had been made in the presence of the managing member of the joint Hindu family, and it was held that all the members were effectively represented by the managing member. It was not a case of abatement; while we have direct authority of this Court in *Daroga Singh* v. *Raghunandan Singh* (3), to the effect that even if the managing member of he family is a party, the suit does abate for want of substitution if other members are not brought on the record on the death of some of the members of the family who are on the record.

(1) (1925) I. L. R. 4 Pat. 320. (2) (1914) I. L. R. 36 All 383, P. C.
(3) (1925) 6 P. L. T. 451.

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The observation made by this Court in the order of 10th May, 1927, to the effect that no substitution would be necessary if Narain Singh was a member of the joint family was evidently made on the supposition that Narain Singh was the sole surviving member of the family. It was not represented to the Court that there were other surviving members of the family and the appellants can derive no benefit from the said observation.

It is clear, therefore, that the appeal has abated as against the respondents 5 and 6, and that having regard to the nature of the suit the appeal has also abated as against Narain Singh the defendant no. 7. The defendants 5, 6 and 7 were the subsequent purchasers of the property and the effect of the abatement as against these defendants is that the plaintiffs are not entitled to prosecute the suit for specific performance of the contract. Having regard to the counter affidavit filed by the respondent, no ground has been made out for setting aside the abatement.

It is, however, contended that the appellants are, in any event, entitled to a decree for damages and for refund of the earnest money paid by them to the defendant no. 1. The defendant no. 1 has come to terms with the appellants and has agreed to a decree being passed against him for a sum of Rs. 600 advanced by the plaintiffs as earnest money and for Rs. 50 the costs paid by the appellants for the guardian-ad-litem of the minor respondents 2—4 and for proportionate costs on the sum of Rs. 600. Therefore, by consent of parties, a decree will be made in favour of the appellants for Rs. 650 with proportionate costs on Rs. 600 with future interest thereon at 6 per cent. per annum. This decree by consent will be against the defendant no. 1 alone. As regards the respondents 2—4 the appeal must be dismissed, and as regards the respondents 5—7 it is declared that the appeal has abated.

DAS, J.—I agree.

Appeal dismissed.