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that his execution case should not have been dismissed with a note of full satisfaction; but this is a matter which can very easily be rectified.

Rule discharged.

APPELLATE CIVIL.

Before Wort and Khaja Mohamed Noor, JJ.

JAINARAYAN OJHA

v.

HIRA OJHA.*

JAMES AND AGARWALA, JJ.
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April, 22, 24.

Abatement—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXII, rules* 2 *and* 4—*Hindu co-widows impleaded as defendants as representing the estate of their deceased husband—death of one—right to sue, whether survives against the other alone—substitution, whether necessary—rule* 2, *applicability of.*

Where in a suit the defendants were the two widows of a Hindu as representing the estate of their deceased husband and during the pendency of the appeal, in which the widows were the respondents, one of them died and no step was taken to bring on the record her legal representative.

Held, (*i*) that on the death of one of the widows the right to sue survived against the other alone and that, therefore, the case was governed by Order XXII, rule 2, Code of Civil Procedure, 1908.

(*ii*) that no substitution being necessary in the circumstances, there could not be an abatement of the appeal. *Lilo Sonar* v. *Jagru Sahu*(1), *Daroga Singh* v. *Raghunandan Singh*(2), *Basist Narain Singh* v. *Modnath Das*(3), and *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi* (4), distinguished.

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* Appeal from Original Order no. 216 of 1931 with Civil Revision no. 583 of 1931, from the orders of S. K. Das, Esq., I.C.S., District Judge of Shahabad, dated the 22nd July, 1931 and 16th May, 1931.

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1930) I. L. R. 10 Pat. 341.

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Per KHAJA MOHAMED NOOR, J.—Co-widows who hold the estate of their deceased husband jointly are governed by the rule of survivorship. Both of them jointly and severally represent the estate and if one of them dies the other continues to represent the estate alone.

Appeal by the plaintiffs.

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

S. M. Mullick and *Ramanandan Prasad*, for the appellants.

S. N. Ray and *Harihans Kumar* for the respondents.

WORT, J.—It was urged by Mr. S. N. Ray during the course of the argument that this case was a case which necessitated a reference to a Full Bench having regard to certain decisions which have been arrived at by this Court from time to time which, according to Mr. Ray, deal with the point which comes up for consideration in this appeal. But, in my judgment, the necessity for that course does not arise for the reasons which will presently appear and which mainly are that the cases which have been relied upon by Mr. Ray can certainly be distinguished so far as their facts are concerned from the facts which present themselves in this case.

So far as this case is concerned there were two widows who were defendants, amongst other persons, in an action. The action resulted in a decision which was partly in the defendants' favour and to that extent there was a decree in favour of the defendants. There was an appeal and during the pendency of the appeal one of the widows died. I should have stated that these two ladies were the widows of one Bhiki Ojha. The matter came before the learned District Judge on the 16th May, 1931, and the substance of his order was that having regard to the fact that one of the widows had died and her legal representatives had not been brought on to the record, the whole

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appeal abated. I might say at this stage that if in fact and in law the appeal had abated there would have been no necessity for the order made by the learned Judge but that perhaps is immaterial. On the 11th of July of the same year the appellant before us filed a petition praying that in the circumstances the order for the abatement of the entire appeal may be set aside. As a result of that petition the learned District Judge on the 22nd July, 1931, made this order which it is perhaps necessary to state in extenso :

"No sufficient cause is shown why the application to bring the legal representatives of the deceased was not made within the prescribed time. No such cause is even suggested. The application is therefore dismissed."

The first contention of Mr. Ray, who appears on behalf of the respondents, as I understand his argument, is that the procedure adopted by the appellant was entirely out of order and as a result the appeal was barred by limitation. Mr. Ray's contention is that the petition of the 11th July, 1931, was nothing more in substance than an application to review the judgment or order made by the District Judge on the 16th May, 1931. It is not seriously denied by Mr. Ray that if the circumstances allowed, and in fact the petition of the 11th July, 1931, was an application to set aside the abatement, then there could be no objection to the procedure which the appellant had adopted, and his preliminary point, he admits, under those circumstances would have to be overruled. Whatever words the appellant used in his petition of the 11th July, 1931, may have been, there can, to my mind, be no doubt that that was in substance an application to set aside the abatement and if that prayer was refused as it appears to have been refused on the 22nd July, 1931, there can be no doubt that there was an appeal to this Court and that equally there was no doubt that the appeal is within time. I might add in this connection that there is an application in revision against the order of the 16th May, 1931, and even supposing that my decision had been otherwise as regards the point with which I have just dealt, I

should be constrained to hold that such an application would lie in the circumstances. But it becomes unnecessary to express one's view definitely on that point having regard to my decision on the first question which I have stated Mr. Ray has raised.

WORT, J.

Now so far as the merits of the case are concerned, the question is whether the appeal either abated in whole or in part. Again it is not denied that in so far as the learned District Judge purported to state or did state that the appeal abated as a whole then that part of the order in any event cannot be supported. The question is whether it abated in part. As it has been pointed out no application was made to bring the representatives of the deceased widow on the record and it is for that reason that it is said that the appeal has abated. Mr. Ray would have us hold that Order XXII, rule 2, of the Code of Civil Procedure does not apply but Order XXII, rule 4. Order XXII, rule 2, provides—

> " where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants ".

Now I wish to be very careful in the observations which I am about to make and confine those observations strictly to the point which we have to decide. The point is whether this case can be said to come within Order XXII, rule 2. Order XXII, rule 2, clearly contemplates at least those cases of joint tort-feasors or joint contractors, the right surviving as it does in those cases to the survivor. But the question is does it apply to this particular case. In no sense of the word can it be said that the two widows representing the estate of their deceased husband represent each other. On the death of the one it cannot be said that the surviving widow represents the other, either as her legal representative or as her heir,

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and it is only under those circumstances could it possibly be said that the argument of Mr. Ray could succeed.

In support of the argument which Mr. Ray advances reference has been made to four cases of this Court. The first is the case of *Lilo Sonar* v. *Jhagru Sahu*(1). That was a case in which the respondent no. 1 Jhagru Sahu had died and his legal representative was Doman respondent no. 2 who was already on the record. The observation upon which Mr. Ray particularly relies in that case is to be found at the bottom of page 855 and it is this: "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 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". Though it is perhaps quite unnecessary for the purposes of this case, it might be said that it is not seriously disputed that if a person is on the record first in his own capacity and it is sought to have him on the record in the capacity of legal representative of the deceased party it may be necessary to make such an application. That I have said and I wish to be particularly careful in this case not to go beyond the facts. Whether the last proposition to which I have referred establishes this point, I wish to repeat, it is immaterial to state.

In connection with the passage to which I have just referred, Mr. Ray will have us read it as applying to the facts of this case. In that case both Jhagru and Doman were members of a joint Mitakshara family; they were both on the record, and it is contended that the learned Judge was confining himself to those facts, and, as I understand the argument of

(1) (1924) I. L. R. 3 Pat. 853.

Mr. Ray, it is said that the learned Judge disregarded the fact for the purposes of that case that there were those who were not already on the record —a fact which, in my judgment, makes all the difference—to repeat, that there were other members of the joint family who took by survivorship and who were not on the record. In my opinion the contention of Mr. Ray cannot be supported. It seems to me that whatever this case, the case of *Lilo Sonar* v. *Jhagru Sahu*(1), decided, it did not decide the question with which we have to deal in this case. I think that is sufficiently indicated by a reference to the earlier part of the judgment in which the learned Judge pointed out that the legal representatives of Jhagru Sahu entered appearance and opposed the application for substitution. In my judgment the case to which I have just referred does not finally decide this point with which we have to deal.

The next case is the case of *Daroga Singh* v. *Raghunandan Singh*(2). The point with which we have to deal is expressly decided in this case. It was a case of a mortgage decree. Some of the plaintiffs who were respondents in the appeal died during its pendency, first the karta and then his son. The question raised was whether there was an abatement in the circumstances that the son had died and there being no steps to bring his sons on the record. It was decided by Dawson Miller, C. J. that there was, and to this extent it is contended that the case is in favour of the present respondent's contention as to abatement. But the learned Chief Justice expressly stated that so far as the death of the karta was concerned no question arose as the interest devolved upon the other members by survivorship.

Now the other case referred to is the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(3). The only observation that I propose to

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1930) I. L. R. 10 Pat. 341.

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make with regard to this case is that there was no question of survivorship. There the question was in regard to the legal representatives of one of the deceased respondents who was a Mohammadan being already on the record; and quite clearly whatever else that case may have decided it could not have decided a case where, as undoubtedly in this case, the right to sue survived against the surviving litigant. In this case it is obvious that the estate of the deceased Bhiki Ojha was represented in the first place by the two widows and on the death of one of them it was represented by the surviving heir. In my judgment, therefore, this case clearly comes within Order XXII, rule 2.

For these reasons I would hold that the decision of the learned District Judge was wrong and it must be set aside. The learned District Judge will now hear the appeal and determine it according to law.

The appeal is allowed with costs.

KHAJA MOHAMED NOOR, J.—I agree. Apart from the technical objections raised by Mr. Ray on behalf of the respondent which have been dealt with in the judgment of my learned brother and with which I entirely agree, the question involved in this appeal is whether the appeal before the learned District Judge abated either in whole or in part in consequence of no application having been made for substitution of the name of representatives of Musammat Parkalo Kuer inspite of the fact that her co-widow Musammat Pramjanto was already on the record, the two widows having been impleaded in the suit to represent the estate of one Bhiki Ojha.

The strongest case in favour of the view taken by the learned District Judge that an application for substitution was necessary is the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(1), a decision to which I was a party. I will come to this

(1) (1930) I. L. R. 10 Pat. 341.

decision in a moment, but before I do so I would like to refer to the cases on which it was based. That case was decided on the authority of three earlier decisions of this Court (*1*) *Lilo Sonar* v. *Jhagru Sahu*(1), (*2*) *Daroga Singh* v. *Raghunandan Singh*(2) and(*3*) *Basist Narain Singh* v. *Modnath Das*(3). I have examined these cases and I am clearly of opinion that none of these three cases lays down the proposition which has been urged by the respondent, namely, that even in a case when all the members of a joint Hindu family are sued as such and one of them dies and the right to sue survives against the remaining members of the family alone, an application contemplated by Order XXII, rule 4, is necessary. The case of *Lilo Sonar* v. *Jhagru Sahu*(4) only decides that if one of the representatives of the deceased respondent is already on the record the appellant is not absolved from making an application for bringing the other legal representatives on the record. In that case only one member of the family was on the record, not all of them, and the learned Judges decided that in the circumstances of that case an application was necessary. The second case is that of *Daroga Singh* v. *Raghunandan Singh*(5). It is, as has been pointed out by my learned brother, to some extent in favour of the appellant. There two deaths had taken place, first that of the father and then that of the son. In dealing with the death of the father Dawson Miller, C. J. definitely stated that nothing turned upon that death because the sons of the survivors of the interest of the father were already on the record; but the appeal was held to have abated in consequence of the death of the son later on whose two sons were not brought on the record within the time allowed by law. The observation made by the learned Chief Justice, therefore, indicates that in case of a suit against all the members of the joint family the fact that no

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1924) I. L. R. 3 Pat. 853.
(5) (1925) 6 Pat. L. T. 451.

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application for substitution is made on the death of one of them, the remaining being his only survivors, would not be fatal to the suit. The third case is *Basist Narain Singh* v. *Modnath Das*(1) in which Kulwant Sahay, J., who was a party with me to the decision in the case of *Musammat Waleyatunnissa Begam* v. *Musammat Chalakhi*(2), while referring to the two cases I have already referred to, observed as follows :—

" These two cases are clear authority for holding that the fact of Narain Singh 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 ".

This is an observation which clearly indicates that the decision turned upon the fact that all the representatives of the deceased respondent were not on the record.

Having dealt with these three cases on which the decision of the case of *Musammat Waleyatunnissa Begum* v. *Musammat Chalakhi*(2) was based, I come to that case itself. No doubt in that case, as it appears from the judgment, all the heirs of Musammat Tamizan were already on the record, but as has been pointed out by my learned brother that was a case of Mohammadans in which no question of survivorship arose; the other respondents were on the record in their own individual capacities, and what was decided in that case was that they ought to have been impleaded as representatives of the deceased. That is quite a different thing from the present case where the simple question was whether if the two widows are sued as representing the estate of their deceased husband and one of them died an application for substitution of another widow already on the

(1) (1927) I. L. R. 7 Pat. 285.
(2) (1930) I. L. R. 10 Pat. 341.

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record was necessary. Co-widows who hold the estate of their deceased husband jointly are governed by the rule of survivorship. Both of them jointly and severally represent the estate of their deceased husband and if one of them dies the other continues to represent the estate alone. No substitution is necessary.

I agree with my learned brother that this case is clearly governed by the provisions of Order XXII, rule 2. Perhaps it was necessary to file an application that a note be made and the application dated the 11th July, 1931, might have been treated as such an application.

I therefore agree in holding that the appeal did not abate even as against the widow much less it abated as a whole. I agree that the order of the learned District Judge be reversed and that the appeal be heard by him and determined according to law.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Agarwala and Rowland, JJ.

1933.

July, 7, 11.

FIDA HUSSAIN

v.

SARFARAZ HUSSAIN.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 522, *clause* (3)—*time limit, whether imposed by the section—court of appeal, confirmation, reference or revision, whether can pass order after the expiry of one month from the original conviction or the disposal of appellate or revisional proceeding.*

Clause (3) of section 522, Code of Criminal Procedure, 1898, does not impose any time limit within which a court of appeal, confirmation, reference or revision must act.

Held, therefore, that it is competent to such a court to pass an order for restoring the property to the complainant even

* Criminal Revision no. 283 of 1933, from an order of M. Hamid, Esq., Additional District Magistrate, Patna, dated the 1st May, 1933.