the decrees of the Munsif. The plaintiffs will be entitled to their costs throughout.

JWALA PRASAD, J.—I agree.

Appeals allowed.

1930.

BANKE BIHARI LALL v. RAM ANUGRAH CHAUDHURI.

JAMES, J.

APPELLATE CIVIL.

Before Kulwant Sahay and Khaja Mahammad Noor, JJ.

MUSAMMAT WALEYATUNNISSA BEGAM

v.

MUSAMMAT CHALAKHI.*

1930.

Oct., 31, Nov., 3, 4, 20.

Mortgage—mortgagee, right of, to split up lien—mortgagor, whether can object—one of the heirs of mortgagor not impleaded in mortgage suit—suit, whether must fail in entirety—test—Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* 1, *rule* 9, *and Order XXXIV, rule* 1—*appeal—death of respondent—heirs already on record—application for substitution, whether necessary—limitation—Order XXII, rules* 2 *and* 4, *scope of—abatement of appeal against one of the mortgagor respondents, whether operates as abatement of the entire appeal.*

Order XXII, rule 2, Code of Civil Procedure, 1908, contemplates cases where the right to sue survives against the surviving defendant in his own capacity and not as the legal representative of the other defendants. Where the right to sue survives against the surviving defendants in their capacity as representatives of the deceased defendant, the case comes under rule 4 and an application for substitution within the period of limitation is necessary.

Where, therefore, respondent died and his legal representatives were already on the record in their own capacity, *held* that an application for substitution under Order XXII, rule 4, was necessary.

* Appeal from Original Decree no. 176 of 1928, from a decision of Babu Shivanandan Prasad, Subordinate Judge of Purnea, dated the 19th May, 1928.

1930.

MUSAMMAT WALEYATUN-NISSA BEGAM v. MUSAMMAT CHALAKHI.

Lilo Sonar v. *Jhagru Sahu*(1), *Daroga Singh* v. *Raghunandan Singh*(2), *Basist Narain Singh* v. *Modnath Das*(3) and *Gurditta Mal* v. *Muhammad Khan*(4), followed.

Chowdhry Shamanand Das v. *Rajnarain Das*(5) and *Kartar Singh* v. *Lal Singh*(6), not followed.

As a general rule all persons having the equity of redemption ought to be brought on the record; but the failure to bring any one of them on the record does not in every case necessitate the dismissal of the suit, if the court in his absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it.

N, a Mohammedan, executed a mortgage in favour of *W* on the 29th Jeth, 1322. The due date of payment stipulated in the bond was 14th May, 1915. The suit was instituted on the 10th May, 1927, just four days before the expiry of the period of limitation, against the heirs of the mortgagor who was then dead. One of the heirs, *S*, however, was not impleaded as a defendant. Objection to this effect was taken in the written statement filed by the defendants in the suit; and on the 2nd of December, 1927, the plaintiff made an application to bring *S* on the record as a defendant; the application was allowed and *S* was made a defendant on the 24th of January, 1928, after the period of limitation had expired. An objection was, therefore, taken that the suit was barred by limitation not only as against *S* but also as against all the other defendants. The trial court held that the suit was barred as a whole and not only as against *S* and accordingly dismissed the entire suit. The plaintiff appealed to the High Court against that decision. During the pendency of the appeal one of the respondents *T*, one of the heirs of the mortgagor, died and no application for substitution was made within the period of limitation, with the result that the appeal abated as against *T*. The respondents contended, first, that the suit was rightly dismissed and secondly, that the abatement against *T* had the effect of the abatement of the entire appeal.

(1) (1924) I. L. R. 3 Pat. 852.
(2) (1925) 6 Pat. L. T. 451.
(3) (1927) I. L. R. 7 Pat. 285.
(4) (1925) 90 Ind. Cas. 41.
(5) (1906) 11 Cal. W. N. 186.
(6) (1920) 59 Ind. Cas. 288.

1930.

MUSAMMAT WALEYAFUNNISSA BEGAM v. MUSAMMAT CHALAKHI.

Held, that the entire suit could not fail; the shares of the heirs of the original mortgagor being defined by law, the mortgagee could give up his mortgage lien on the share of any one of the heirs by making a proportionate deduction of the mortgage money and enforce his mortgage for the balance as against the shares of the other heirs who were on the record.

Semble, that the abatement of the appeal as against *T* could not operate as an abatement of the entire appeal.

Sital Prasad Rai v. *Asho Singh*(1), *Kherodamoyi Dasi* v. *Habib Shaha*(2), *Harikissen Bhagat* v. *Vilait Hussain*(3) and *Har Chandra Roy* v. *Mahumed Husein*(4), followed.

Girwar Narain Mahto v. *Musammat Makbunnissa*(5), referred to.

Every bit of the mortgaged property stands as a security for the whole of the mortgage money; but it is always open to the mortgagee to release a portion of the mortgaged property from the mortgage lien and the mortgagor cannot dispute his right to do so, provided no additional burden is cast on any portion of the mortgaged property.

Appeal by the plaintiff.

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

Hasan Jan and *A. A. Syed Ali*, for the appellants.

Khurshaid Husnain (with him *Syed Ali Khan* and *H. R. Kazmi*) for the respondents.

KULWANT SAHAY, J.—This is an appeal by the plaintiff in a mortgage suit. The mortgage sought

(1) (1922) I. L. R. 2 Pat. 175.
(2) (1924) 29 Cal. W. N. 51.
(3) (1903) I. L. R. 30 Cal. 755.
(4) (1920) 25 Cal. W. N. 594.
(5) (1916) 1 Pat. L. J. 468.

1930.

MUSAMMAT WALEYATUN-NISSA BEGAM v. MUSAMMAT CHALAKHI.

KULWANT SAHAY, J.

to be enforced was executed by one Nijabat Hussain and is dated the 29th Jeth, 1322. The due date of payment stipulated in the bond was Baisakh, 1323, corresponding to the 14th of May, 1915. The suit was instituted on the 10th of May, 1927, just four days before the expiry of the period of limitation, against the heirs of Nijabat Hussain who was then dead. It, however, appears that one of the heirs named Sadruddin was not impleaded as a defendant. Objection to this effect was taken in the written statement filed by the defendants in the suit; and on the 2nd of December, 1927, the plaintiff made an application to bring Sadruddin on the record as a defendant; the application was allowed and Sadruddin was made a defendant on the 24th of January, 1928. This was after the period of limitation had expired. An objection was, therefore, taken that the suit was barred by limitation not only as against Sadruddin but also as against all the other defendants. The learned Subordinate Judge framed a number of issues, and issue no. 7 was to the effect

"Whether the suit was barred by limitation".

The learned Subordinate Judge has tried this issue only and has held that the suit was barred as a whole and not only as against Sadruddin and he has, accordingly, dismissed the entire suit without recording his findings on the other issues framed in the suit. It has been repeatedly pointed out that courts whose decisions are liable to appeal ought to record their finding on all the issues arising in the case, so that if on appeal the decision on any one of the points be reversed there may be no necessity to make a remand. It is regrettable that this salutary rule which has been repeated more than once was not observed by the learned Subordinate Judge in the present case and he has dismissed the suit on the preliminary ground of limitation without recording his judgment on the other issues in the suit. The result is, as we are inclined to disagree with the view taken by the

Subordinate Judge, that the case has to be remanded for hearing and decision of the other issues in the case.

It appears that after the filing of the appeal one of the respondents, Musammat Tamizan died. She was defendant no. 8 in the suit and was one of the widows of the original mortgagor. On the 1st of December, 1928, the notice of the appeal addressed to the said respondent was returned unserved on the ground that she was dead. The peon's report as regards the non-service of the notice on account of the death of the respondent is dated the 17th September, 1928. She must, therefore, have died before that date. On the matter coming before the Registrar on the 5th of December, 1928, he allowed a fortnight's time to the appellants for making the necessary application for substitution. On the 2nd of January, 1929, we find an order on the order-sheet of the appeal to the effect that no steps having been taken within the statutory period for substitution of the heirs of the deceased respondent, the appeal had abated as against her, and it was also stated that the learned Vakil mentioned to the Registrar that he will file an application for setting aside the abatement within two weeks. On the 21st of January, 1929, we find an order of the Registrar in the order-sheet to the effect that a note be made that the heirs of the deceased respondent no. 8 were already on the record. Under these circumstances it has been argued on behalf of the respondents that the appeal had abated as against the respondent no. 8 after the expiry of the statutory period and that on account of the abatement of the appeal as against that respondent, the whole appeal had become infructuous and could not be proceeded with. It is contended, however, on behalf of the appellant that there was no abatement inasmuch as the heirs of the deceased respondent were already on the record, and that even if there was an abatement the appeal had abated only in so far as the deceased respondent was concerned and that it could proceed as against the other respondents.

1930.

MUSAMMAT WALEYATUN-NISSA BEGAM v. MUSAMMAT CHALAKHI.

KULWANT SAHAY, J.

In my opinion the contention of the learned Advocate for the respondents is correct to the extent that the appeal had abated as against the respondent no. 8. The contention of the learned Advocate for the appellant is that the case falls within the provisions of Order XXII, rule 2, and that the right to sue survives against the surviving defendants alone and that there was no necessity to make an application for substitution under rule 4 within the period of ninety days from the date of death. It is contended that all that was necessary was to make an application for the fact being noted that the right to sue survived against the surviving respondents under rule 2 for which no period of limitation was prescribed and that such an application had been made in the appeal. It is clear that this contention cannot prevail. Rule 2 of Order XXII contemplates cases where the right to sue survives against the surviving defendant in his own capacity and not as the legal representative of the other defendants. Where the right to sue survives against the surviving defendants in their capacity as representatives of the deceased defendant the case comes under rule 4 of Order XXII, and an application for substitution within the period of limitation is necessary.

There has been some conflict of opinion on this point in some of the other High Courts; but so far as this Court is concerned the view has always been taken that under the circumstances as disclosed in the present case an application for substitution is necessary. In *Lilo Sonar* v. *Jhagru Sahu*(1) it was distinctly held that an application for substitution was necessary even where one of the legal representatives of the deceased was on the record in his own capacity and that Order XXII, rule 4, applied. The same view was taken by Dawson Miller, C.J. and Macpherson, J. in *Daroga Singh* v. *Raghunandan*

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

Singh(1), and it was again reiterated in *Basist Narain Singh* v. *Modnath Das*(2). There is no decision of this Court to the contrary effect.

Rampini and Mookerjee, JJ. in *Chowdhry Shamanand Das* v. *Raj Narain Das*(3) took a different view and held that section 362 of the Civil Procedure Code of 1882 (which corresponds with the present Order XXII, rule 2) was not limited in its application to cases where the right to sue survives against the surviving defendants not as the legal representatives of the deceased, but by reason of a right vested in them antecedent to the suit. With great respect to the learned Judges I am unable to agree with this view. To my mind, there is a clear distinction between the provisions of Order XXII, rule 2, and Order XXII, rule 4, and that whenever the surviving defendant is sought to be made liable as the legal representative of a deceased defendant an application under Order XXII, rule 4, becomes necessary. In the Lahore High Court there has been a conflict of decisions on this point. In *Kartar Singh* v. *Lal Singh*(4) Abdul Raoof, J. held that no application to bring on the record the legal representatives of the deceased respondent was necessary when his heirs are already on the record but the learned Judge in a later case disagreed from the view he had taken in this case and held that under those circumstances the case fell under rule 4 and that an application was necessary [*Gurditta Mal* v. *Muhammad Khan*(5)]. This decision was of a Division Bench consisting of Abdul Raoof and Fforde, JJ., whereas the previous one was of Abdul Raoof, J. sitting singly, and the learned Judge observed that the question had not been fully considered by him in the case of *Kartar Singh* v. *Lal Singh*(4) and he agreed with the view taken by this

(1) (1925) 6 Pat. L. T. 461.
(2) (1927) I. L. R. 7 Pat. 285.
(3) (1906) 11 Cal. W. N. 186.
(4) (1920) 59 Ind. Cas. 238.
(5) (1925) 90 Ind. Cas. 41.

1930.

MUSAMMAT WALEYATUNNISSA BEGAM v. MUSAMMAT CHALAKHI.

KULWANT SAHAY, J.

Court in *Lilo Sonar* v. *Jhagru Sahu*(1). In a still later case, however, another Division Bench of the Lahore High Court consisting of Zafar Ali and Addison, JJ. differed from the decision of Abdul Raoof and Fforde, JJ. in *Gurditta Mal* v. *Muhammad Khan*(2) and held that no application under rule 4 need be made when the heirs of the deceased defendant are already on the record. We are, however, bound by the decisions of this Court which have consistently held that under circumstances like those in the present case an application under Order XXII, rule 4, is necessary, and as such an application was not made within the statutory period I am bound to hold that the appeal has abated so far as the respondent no. 8, Musammat Tamizan was concerned.

The question as to whether the abatement of the appeal as against the heirs of respondent no. 8 will have the effect of abatement of the whole appeal depends on the question raised in the appeal itself, namely, whether a mortgage decree can be passed in the absence of one of the persons who owned a share in the equity of redemption; and I would, therefore, proceed at once to consider that question. The learned Subordinate Judge has held that every person in whom any portion of the equity of redemption vests is a necessary party in a suit on a mortgage, and that if any of the persons having the equity of redemption is not made a party the suit to enforce the mortgage cannot be entertained. I am of opinion that this proposition has been too broadly enunciated. As a general rule all persons having the equity of redemption ought to be brought on the record; but the failure to bring anyone of them on the record does not in every case necessitate the dismissal of the suit. The learned Subordinate Judge has referred to the decision of this Court in *Sital Prasad Ray* v. *Asho Singh*(3). That was a case in which the plaintiff brought a suit for

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 90 Ind. Cas. 41.
(3) (1922) I. L. R. 2 Pat. 175.

enforcing a mortgage but failed to implead a subsequent mortgagee as a defendant. He attempted to bring him on the record after the expiry of the period of limitation; but it was objected that the suit was barred as against him and that the whole suit was bad for non-joinder of parties. The learned Subordinate Judge gave effect to this objection and dismissed the suit. On appeal the District Judge was of opinion that the defect in the particular circumstances of the case was not a bar to the whole suit, but he dismissed the suit on the authority of the decision of this Court in *Girwar Narain Mahto* v. *Musammat Makbunnissa*(1). On second appeal to this Court it was held by Dawson Miller, C.J. and Mullick, J. that the fact of the subsequent mortgagee not being impleaded in the suit within the period of limitation did not operate as a bar to the whole suit and that the suit could proceed in so far as the defendants on the record were concerned. Dawson Miller, C.J. observed that the combined effect of Order I, rule 9, and Order XXXIV, rule 1, of the Civil Procedure Code in so far as mortgages were concerned was that all persons whose rights and interests may be adjudicated upon and determined in the suit ought to be added as parties, but that failure to add one or more of such persons should not have the effect of defeating the suit, if the Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. His Lordship then proceeded to consider cases where a suit could not proceed and those where a suit could proceed in the absence of some of the parties and observed as follows: "But if a decree can be passed and given effect to in so far as the rights of the parties actually

(1) (1916) 1 Pat. L. J. 468.

1930.

MUSAMMAT WALEYATUN-NISSA BEGAM v. MUSAMMAT CHALAKHI.

KULWANT SAHAY, J.

before the Court are concerned without interfering with the interests of others, there seems to me no reason why the suit should not proceed". The difference between proper parties and necessary parties to a suit was then considered, and it was held that a subsequent mortgagee was a proper party but not a necessary party, and that the suit could not fail in the absence of a subsequent mortgagee. The principles laid down in this decision are, if I may be permitted to say so, sound principles which would apply to the circumstances of each case. In the present case if a decree can be made and given effect to as against the parties who are actually before the Court there is no reason why the suit should fail as a whole.

The learned Subordinate Judge in the course of his judgment refers more than once to the principle that a mortgage is indivisible, and in his view the mortgage must be enforced as a whole or not at all. This is not a correct view of the law. There is no doubt that the general principle of law is that a mortgage contract is indivisible, but the law reports abound in cases where mortgages have been split up. It is no doubt under certain circumstances the right equally of the mortgagor as well as of the mortgagee to keep a mortgage indivisible, but this is not an invariable rule of law. It is primarily the interest of the mortgagee to insist that the integrity of the mortgage should not be broken up. Every bit of the mortgaged property stands as a security for the whole of the mortgage money; but it is always open to the mortgagee to release a portion of the mortgaged property from the mortgage lien and the mortgagors cannot dispute his right to do so, provided that no additional burden is cast on any portion of the mortgaged premises. If, as in the present case, the parties being Muhammadans, the share of each of the heirs of the original mortgagor is defined by law, there seems to be no reason why the mortgagee cannot give up his

mortgage lien on the share of any one of the mortgagors by making a proportionate deduction of the mortgage money and enforce his mortgage for the balance as against the shares of the other heirs who are on the record. Such a decree can be made and given effect to, and if that be so, the principle enunciated in the case of *Sital Prasad Rai* v. *Asho Singh*(1) applies in favour of the plaintiff, and the learned Subordinate Judge was clearly wrong in coming to a contrary conclusion on the authority of this case. The same view was expressed by the Calcutta High Court in *Kherodamoyi Dasi* v. *Habib Shaha*(2) in which a number of previous decisions was referred to and reliance was placed on the decision of Mookerjee and Fletcher, JJ. in *Har Chandra Roy* v. *Mahumed Husein*(3). It was held by Banerjee and Pargitter, JJ. in *Harikissen Bhagat* v. *Vilait Hussain*(4) that under circumstances such as those of the present case the mortgage is split up and the mortgage debt is apportioned between the shares of the party left out and those on the record. I am, therefore, of opinion that the fact that the suit was barred as against Sadruddin and that the appeal has abated as against Musammat Tamizan does not operate as a bar to the maintainability of the suit and that the mortgage can be enforced as against the shares of the remaining defendants for a proportionate share of the mortgage money.

It may be mentioned here that a contention was raised by the learned Advocate for the respondents that the effect of the abatement of the appeal in so far as the respondent Musammat Tamizan was concerned would have the effect of abating the whole appeal inasmuch as a decree has already been passed dismissing the suit, and that a portion of the decree

(1) (1922) I. L. R. 2 Pat. 175.
(2) (1924) 29 Cal. W. N. 51.
(3) (1920) 25 Cal. W. N. 594.
(4) (1903) I. L. R. 30 Cal. 755.

1930.

MUSAMMAT WALEYATUN-NISSA BEGAM v. MUSAMMAT CHALAKHI.

KULWANT SAHAY, J.

cannot be upheld and another portion set aside. There seems to be no substance in this contention. The fact of a decree having been made will not under the circumstances of the present case preclude the appellant from asking the Court to set aside a portion of the decree as against the remaining defendants. The question depends entirely upon the view whether under the circumstances of the case a mortgage decree can be passed against the remaining defendants. If this can be done, the abatement of the appeal as against one of the respondents does not necessarily have the effect of abatement of the appeal as a whole.

The result is that the appeal is allowed, the decree of the learned Subordinate Judge is set aside and the case will be remanded to him for trial of the remaining issues in the suit. The plaintiff-appellant is entitled to her costs in this Court; costs in the Court below will abide the result of the suit.

KHAJA MAHOMED NOOR, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

1930.

Nov., 3, 4, 5, 21.

Before Ross and Dhavle, JJ.

THAKUR PRASAD

v.

MUSAMMAT DIPA KUER.*

Hindu Law—reversioner's right to avoid widow's alienations, whether is personal or devolves on his heirs—presumptive reversioner, consent of, whether validates transfers made by the widow—consent, value of—attestation of presumptive reversioner on deed of transfer, whether creates estoppel or implies consent—family arrangement or bona fide

* Appeals from Original Decrees nos. 53, 54, 70, 119 and 136 of 1927, from a decision of Babu Harihar Prashad, Subordinate Judge of Patna, dated the 15th July, 1926.