APPELLATE CIVIL.

1935.

November, 5, 6, 12.

Before Macpherson and Khaja Mohamad Noor, JJ.

SANKRU MAHTO

v.

BHOJU MAHATO.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rules 2, 3 and 4—abatement of suit—Suit cannot abate where the cause of action survived to the parties already on the record—whole suit, whether abates if the shares are separable.

One of the appellants and one of the respondents died during the pendency of the appeal in the first appellate court and the appellant filed a petition that the heirs of the deceased appellant and respondent were already on the record. A preliminary objection was raised by the respondent that as no application for substitution had been made within the period allowed by law, the appeal of the deceased appellant and the entire appeal against the deceased respondent had abated and further that, having regard to the nature of the suit, the whole appeal had abated. The Subordinate Judge upheld the objection and dismissed the appeal.

Held, that when the representatives of a deceased party are already on the record and the right to sue and be sued survives to the remaining plaintiff or the remaining defendants, the case comes within rule 2 and not within rule 3 and no petition for substitution is necessary.

Jainarayan Ojha v. *Hira Ojha*(1) and *Punyabrata Das* v. *Monmohan Ray*(2), followed.

Musammat Waleyatunnissa Begam v. *Musammat Chalakhi*(3), *Basist Narayan Singh* v. *Modnath Das*(4), *Lilo*

*Appeal from Appellate Decree no. 1553 of 1930, from a decision of Babu Ashutosh Mukharji, Subordinate Judge of Purulia, dated the 28th August 1930, confirming a decision of Babu Nand Kishore Choudhari, Munsif of Purulia, dated the 21st March 1927.

(1) (1933) I. L. R. 12 Pat. 778.
(2) (1934) A. I. R. (Pat.) 427.
(3) (1930) I. L. R. 10 Pat. 341.
(4) (1927) I. L. R. 7 Pat. 285.

Sonar v. *Jhagru Sahu*(1) and *Daroga Singh* v. *Raghunandan Singh*(2), distinguished.

Held, also, that even if the legal representatives of the deceased were her widow or daughter, the whole appeal could not abate. The shares of the plaintiffs being separate, they will get a decree to the extent of their shares.

Hari Charan Moulik v. *Kalipada Chakravarti*(3), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

A. K. Ray and *Pulin Bihari Ganguli*, for the appellants.

R. S. Chatterji, for the respondents.

KHAJA MOHAMAD NOOR, J.—This appeal has arisen out of a suit instituted by the plaintiffs, seven in number, all being Kurmi Mahtons of Chota Nagpur, for recovery of possession of some plots of land on the allegation that they were part of their joint occupancy holdings and that the defendants wrongfully got their names recorded in respect of them in the settlement records and that from a portion they were dispossessed in consequence of a proceeding under section 145 of the Code of Criminal Procedure and from the rest the defendants forcibly dispossessed them. The defendants disputed the plaintiffs' title to the lands in question and pleaded limitation. The trial Court dismissed the suit. The plaintiffs preferred an appeal to the district Court. During the pendency of the appeal the plaintiff (appellant) no. 2 died in Jaith 1336 B.S. and the defendant (respondent) no. 8 died in Kartik 1335 B.S. No application was made for substitution of the names

(1) (1924) I. L. R. 3 Pat. 853.
(2) (1925) 6 Pat. L. T. 451.
(3) (1928) I. L. R. 56 Cal. 622.

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of the representatives of the deceased appellant and the deceased respondent. When the appeal came up for hearing before the learned Subordinate Judge, applications were made on behalf of the remaining plaintiff appellants to the effect that the heirs of the deceased appellant and the respondent were already on the record. It was alleged that under the tribal custom which governs the parties the appellant no. 2 was succeeded by his brother the appellant no. 1, and that the respondent no. 8 also was succeeded by his brothers already on the record. A preliminary objection was raised on behalf of the respondents that the appeal of the appellant no. 2 and the entire appeal against respondent no. 8 had abated on account of no application for substitution of their representatives having been made within the period allowed by law and that according to the nature of the suit the whole appeal had abated. The learned Subordinate Judge allowed this preliminary objection and dismissed the appeal. The surviving plaintiffs have preferred this second appeal.

The only question for our consideration is whether in the circumstances stated by the surviving plaintiffs in their applications, dated the 26th August 1930, the appeal before the learned Subordinate Judge had abated. The relevant provisions of law in this connection are contained in rules 2, 3 and 4 of Order XXII. These rules are as follows :—

"2. 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."

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

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

"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 a 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

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

Under Order XXII, rule 11, these rules apply *mutatis mutandis* to appeals. It is obvious that in case rule 2 applies, no application for substitution is necessary. The Court (of course, on being informed) shall cause an entry to be made in the record that a particular plaintiff or defendant is dead and that the right to sue survives in favour of the surviving plaintiffs or against the surviving defendants. Rules 3 and 4 apply where one or more of the several plaintiffs or defendants dies and the right to sue does not survive in favour of the remaining plaintiffs or against the remaining defendants, and in that case if no application is made for substitution of the representatives of the deceased plaintiffs or defendants the appeal shall abate so far as the deceased plaintiff or deceased defendant is concerned. The question is whether the present case is governed by rule 2 or by rules 3 and 4. It is contended on behalf of the appellants that in the present case on the death of plaintiff no. 2 the right to sue survived in the remaining plaintiffs and on the death of respondent no. 8 the right to sue of the remaining plaintiffs survived against the remaining defendants and, therefore, rule 2 applies and no application was necessary. The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be

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sued in the absence of the deceased plaintiff or defendant respectively. Now if the allegation of the appellants is correct that the appellant no. 1 is the only representative of appellant no. 2, there can be no question that the surviving plaintiffs alone can institute the present suit on the allegations in the plaint. Similarly, the surviving defendants alone can be sued. There are no others who can join as plaintiffs and no others who can be joined as defendants. The learned Subordinate Judge seems to have held on the authority of *Basist Narayan Singh* v. *Modnath Das*(1) that even if the heirs of a deceased appellant be on the record it is still necessary that an application for substitution be made so that the appellants already on the record may be shown also in their capacity as the representatives of the deceased appellant. No doubt, at first sight this may appear to be the view taken in that case, but a closer examination of the facts of that case and the judgment of the Court will show that such is not the case. In that case two of the respondents had died. One of the heirs of the deceased respondents was already on the record, but their other heirs were not. Kulwant Sahay, J., after referring to the two earlier decisions of this Court in *Lilo Sonar* v. *Jhagru Sahu*(2) and *Daroga Singh* v. *Raghunandan Singh*(3) observed—

"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."

It is clear, therefore, that this case was decided upon the fact that all the heirs of the deceased respondent were not on the record. It is no authority for the proposition that if all the heirs of a deceased

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

appellant or respondent are already on the record any application for substitution under rule 3 or rule 4 is necessary. So far as this Court is concerned there is no case, except that of *Musammat Waleyatunnisa Begam* v. *Musammat Chalakhi*(1) which lays down that an application for substitution is necessary even when all the heirs of a deceased appellant or respondent are already on the record. I shall come to this case in a moment. At present I wish to examine the two cases which were followed in *Basist Narayan Singh* v. *Modnath Das*(2). The first is that of *Lilo Sonar* v. *Jhagru Sahu*(3). In that case also as it appears from the judgment, all the representatives of the deceased respondent were not on the record. Only one member of the family was there and it was held that under the circumstances of the case an application was necessary. The second case of *Daroga Singh* v. *Raghunandan Singh*(4) is rather an authority against the view taken by the learned Subordinate Judge. In that case there were two deaths, first of the father and then of one of the sons. Sir Dawson Miller in giving the judgment of the Bench of which my brother Macpherson J., was a member definitely held that no application having been made for substitution of the heirs of the father would not be fatal if his sons were already there, but an application was necessary as one of the plaintiff's sons had predeceased him and his sons were not on the record and no application having been made within the time allowed by law the appeal in the mortgage suit was held to have abated. It is clear, therefore, that neither the case relied upon by the learned Subordinate Judge nor the cases on which that case is based lays down that where all the representatives of a deceased party are already on the record an application under rule 3 or 4 is necessary.

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

(2) (1927) I. L. R. 7 Pat. 285.

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

(4) (1925) 6 Pat. L. T. 451.

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I now come to the case of *Musammat Waleyatunnisa Begam* v. *Musammat Chalakhi*(1). It is true that it was laid down in that case that even if all the heirs of a deceased party are already on the record the case comes under Order XXII, rules 3 and 4, and that an application for substitution is necessary. I was a party to that decision, but since then I have had occasion to reconsider the position and have come to entertain doubts about its correctness. The question came up before another Bench of this Court consisting of Wort, J., and myself where all the above decisions of this Court were considered. That was the case of *Jainarayan Ojha* v. *Hira Ojha*(2). Agreeing with my brother Wort, J., I held that at least in the case of a Hindu joint family if all the members of the family were already on the record the case came under rule 2. It was not necessary for me in that case to express any definite opinion about the correctness of the decision in *Musammat Waleyatunnisa Begam* v. *Musammat Chalakhi*(1). The case was distinguishable on the ground that it was a case of a Muhammadan family where the heirs took by succession, and not by survivorship. The view which my learned brother Wort, J., and I took in that case has been accepted to be the correct law by another Division Bench of this Court (Courtney Terrell, C.J. and Varma, J.) in *Punyabrata Das* v. *Monmohan Ray*(3). Therefore, the consensus of opinion in this Court is that when the representatives of a deceased party are already on the record and the right to sue and be sued survives in the remaining plaintiffs or the remaining defendants, the case comes within rule 2 and not within rules 3 and 4 of Order XXII. Almost all the High Courts are practically of the same view, and it is needless to refer to the cases in detail. I do not think it is necessary for the purposes of this case to refer the question to a Full Bench for

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

(2) (1933) I. L. R. 12 Pat. 778.

(3) (1934) A. I. R. (Pat.) 427.

an authoritative decision whether the case of *Musammat Waleyatunnisa Begam*(1) was correctly decided. First of all the consensus of opinion is against the view taken in that case and secondly it was a case governed by the Muhammadan Law where it may be said that survivorship does not exist. In my opinion, therefore, if under the law which governs the plaintiffs' family, appellant no. 1 represents the interest of the deceased appellant no. 2, the appeal of appellant no. 2 has not abated. There is again no question that the respondent no. 8 has been succeeded by his brothers who are already on the record, and the appeal against that respondent has also not abated and continues against his representatives.

Assuming, however, that the appellant no. 1 is not the legal representative of appellant no. 2 and that the widow or daughter of the deceased appellant has succeeded him then the appeal of appellant no. 2 has certainly abated. But there is no reason to hold that even in that case the whole appeal has abated. The shares of the plaintiffs must be separate and the remaining plaintiffs if successful will get a decree only to the extent of their share. In a similar case of *Hari Charan Moulik* v. *Kalipada Chakravarti*(2) the Calcutta High Court allowed the surviving plaintiffs to amend the plaint by asking for joint possession to the extent of their shares. I do not, however, think that an amendment of the plaint is essential. If the plaintiffs ask for more than is due to them the Court can always pass a modified decree.

The order which I would pass in this case is that the case be remanded to the learned Subordinate Judge. He will allow the surviving appellants to adduce evidence to show that appellant no. 1 represents the deceased appellant no. 2 so that the right to sue which appellant no. 2 had survives to appellant no. 1. That they may do by establishing

(1) (1930) I. L. R. 10 Pat. 341.
(2) (1928) I. L. R. 56 Cal. 622.

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that the tribal law excluding females governs the family of appellants 1 and 2, or failing that that they are governed by the Hindu Law according to the Mitakshara and were a joint family. If he finds in the affirmative on either of these points he will cause an entry to be made in the memorandum of appeal that right to sue survives to the surviving appellants and proceed to hear the appeal on the merits. If, on the other hand, he finds that the widow or the daughter of appellant no. 2 has succeeded him, he will declare that the appeal of appellant no. 2 has abated, and then proceed to determine whether the remaining appellants are entitled to any decree and if so, to what extent. In order to determine the share of the remaining appellants he will take additional evidence himself or direct it to be taken by the trial Court and if the remaining plaintiffs succeed he will pass a decree for joint possession in their favour to the extent of their share. The costs of this appeal will abide the ultimate result of the suit.

MACPHERSON, J.—I agree.

I desire to add with reference to the decision in *Daroga Singh* v. *Raghunandan Singh*(1) that my view has always been that where, in spite of a death among plaintiffs (or defendants) the whole interest is represented by the surviving plaintiffs (or defendants) the provision applicable is rule 2 of Order XXII and not the subsequent rules, and there is no question of abatement, but in the decision mentioned it appeared that the whole interest in the mortgage was not represented by the surviving plaintiffs-respondents in which case rule 2 would not apply.

As to the ground given by the learned Subordinate Judge for failing to go into "the question whether according to tribal custom among the Mahto Kurmis the brother of a deceased person inherits his property to the exclusion of the deceased's widow and

(1) (1925) 6 Pat. L. T. 451.

daughters '', it has been found to be unsound. It is observed that the courts in Manbhum appear to be apprehensive of tackling the point, and indeed the answer may vary in accordance with circumstances. In the present instance the question is whether the right to sue of appellant no. 2 survived to his brother, appellant no. 1. The appellants' claim was that they were governed by the tribal law of the Kurmi Mahtos of Manbhum and the neighbouring districts which, as in the case of all aboriginal races, excludes inheritance by females (except perhaps occasionally in the way of temporary indulgence to a widow or unmarried daughter if that can be termed inheritance). The Kurmi Mahtos have in Manbhum in many cases become somewhat Hinduised. The question is whether in any particular instance they have abandoned their tribal rules of inheritance and adopted Hindu Law in that regard. There are observations on the point in *Kritibas* v. *Budhan*(1). In Manbhum or at least in parts of it the further question will arise and is relevant on the present occasion whether if they have not only become Hindus but have also adopted Hindu law, it is the Mitakshara form of it (which certainly governs the great landholding families of the district and which may be the indigenous law), or whether members of this preeminently Manbhum tribe have adopted the Dayabhag law from Bengali immigrants of the higher castes. In the present instance if the appellants' family is governed by the Mitakshara rules, it will further be necessary to consider whether the appellant no. 1 and appellant no. 2 constituted a joint family. If they did, appellant no. 1 took by survivorship and represented the whole interest. If they did not, the widow and daughter of appellant no. 2 would represent his interest as of course they also would if the Dayabhag law applies.

Appeal allowed.

Case remanded.

(1) (1925) 6 Pat. L. T. 604.