APPELLATE CIVIL.

1939.

May, 5, 9, 10.
August, 7.

Before Harries, C.J. and Manohar Lall, J.

RANI HARSAMUKHI DASI

v.

AGADHU MOHAPATRA.*

Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 8, and Order XXII, rule 4—abatement of appeal—some of the respondents permitted to represent the others in appeal—death of one or more of the respondents so representing—legal representatives not brought on record—appeal, whether abates—Court, duty of, in such cases.

The provisions of Order XXII of the Code of Civil Procedure, 1908, which relate to the death of a plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons under Order I, rule 8, of the Code.

Where, therefore, there are numerous respondents some of whom have been allowed, under Order I, rule 8, of the Code, to represent the others, the appeal does not abate if any one of the persons appointed to represent the others dies and the legal representatives of the deceased are not brought on the record within time.

In such cases a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons, or the original number should be maintained by adding some more respondents.

Jagdam Ram v. *Asarfi Ram*(1) and *Venkatakrishna Reddi* v. *Srinivasachariar*(2), followed.

Musammat Afzalunnisa v. *Fayazuddin*(3), dissented from.

Wali Muhammad v. *Barkhurdar*(4), distinguished.

Udmi v. *Hira*(5), referred to.

*Appeal from Original Decree no. 2 of 1936 (Cuttack), from a decision of Babu Chintamoni Acharjya, Rent Suit Deputy Collector of Puri, dated the 11th October, 1933.

(1) (1936) 17 Pat. L. T. 926.
(2) (1930) I. L. R. 54 Mad. 527.
(3) (1931) I. L. R. 13 Lah. 195.
(4) (1924) I. L. R. 5 Lah. 429.
(5) (1920) I. L. R. 1 Lah. 582.

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Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Manohar Lall, J.

S. M. Mullick and *Nitai Chandra Ghose*, for the appellant.

G. P. Das and *P. Misra*, for the respondent.

MANOHAR LALL, J.—This is an appeal by the plaintiff against the decision of the learned Rent Suit Deputy Collector of Puri, dated the 11th October, 1933, by which the suit of the plaintiff was dismissed. That suit was instituted for recovery of arrears of rent and cess for the second kist of 1336 and both kists of 1337 and First Kist of 1338 in respect of the Tanki Bahel tenure of the defendants in tauzi no. 268 lying in certain villages—the tenure has a large area of about 3,170 acres.

The principal question for decision in the present appeal is whether the claim of the plaintiff so far as road cess is concerned can be maintained and also whether the defendants can be allowed to claim a set off for the amount of road cess which they say they have paid erroneously for about 10 years prior to the institution of this suit. A preliminary point as to the maintainability of the appeal was also raised on behalf of the respondents which will be considered in its proper place later on.

The facts necessary for determination of the controversy in the appeal may now be shortly stated. The plaintiff instituted the suit, referred to above, against a very large number of tenure-holders, the number being about 2,000. The arrears of rent and cess claimed for the period in suit were stated to be recoverable jointly and severally from the defendants. On the 8th of August, 1932, six of the defendants, namely, defendants 4, 7, 19, 48, 164 and 302, appeared and filed a written statement. In paragraph 10 of the written statement they stated that as

they are the kartas and mamlatkars amongst all the defendants they have filed the written statement on behalf of all the defendants. In other words they attempted to defend the suit not only on their behalf but as representing the other defendants also. The Court did not allow the written statement to be treated as a representative written statement with the result that the written statement remained as a written statement filed on behalf of these six defendants only, the other defendants remaining unrepresented and the case proceeded *ex parte* against them.

The plaintiff claimed rent at Rs. 1,994-9-10 per annum and road cess at the rate of Rs. 479-14-4, being the rate of cess for the tenure included in the annual valuation of 1902, for the period 1337 to the first kist of 1338; but for the second kist of 1338 the plaintiff claimed cess at the rate of Rs. 876-1-6 on the basis of a revaluation in the current year. The defendants resisted the claim of the plaintiff so far as the road cess for the period ending the first kist of 1338 is concerned on the ground that there was a revaluation in the year 1917 but in that year the tenures in suit escaped assessment and, therefore, the plaintiff was debarred from suing for cess for these years at the old valuation of 1902 which was superseded by the valuation of 1917. The plaintiff replied that it was true that there was a revaluation in 1917, but as there was no revaluation of the tenures in suit in 1917 the valuation of 1902, which was not interfered with, must be held to be payable by the defendants for these tenures.

The learned Rent Suit Deputy Collector overruled this contention. He held that there was a revaluation in 1917, the new roll of the estate of that year was duly published but when no revaluation could be found of the tenure in question in the revaluation roll of 1917 the result was that there was an escapement of revaluation and the tenure was not liable to pay any road cess at all.

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Mr. S. M. Mullick appearing on behalf of the plaintiff contested this proposition and asserted that by virtue of the provisions of sections 6, 12, 36, 38 and 40 of the Cess Act of 1880 it must be held that the plaintiff is entitled to recover road cess for the first period at the old rate fixed in 1902. In my opinion this argument is fallacious. The moment it is admitted that there was a revaluation in 1917 the rights and liabilities of the parties will be determined by the valuation for the tenures which may be found in the revised roll of the estate. That roll has to be (and in the present case it was) published as provided by section 35 of the Cess Act and this provision applies both to the original valuation or of any revaluation which may be made of a tenure under Chapter II, Part II, of the Act. Indeed section 37 provides for a remedy where any estate or tenure has been omitted from revaluation or assessment or which was not in existence when such revaluation or assessment was made. In the present case the procedure provided by section 37 has not been admittedly followed for some reason with the result that from the year 1917 the tenures have escaped assessment. I, therefore, conclude that for the first period in suit no cess is payable either at the old rate or at any rate at all. For the period which concerns the second kist of 1338 Fasli when another revaluation was again effected upon the tenures in suit the claim for cess is valid and has not been resisted. The result is that I agree with the learned Rent Suit Deputy Collector who held that the claim of the plaintiff so far as it is based upon the rate of cess fixed by the annual valuation of 1902 for the period ending first kist of 1338 Fasli must be disallowed.

The appellant argues in the next place that the learned Rent Suit Deputy Collector was in error in allowing a set-off for a sum of Rs. 4,628-12-2 which was paid on behalf of all the defendants for the period 1917 to 1928 as evidenced by Exhibit A series.

The claim put forward by the defendants is for an ascertained amount and, therefore, comes within the provisions of Order VIII, rule 6, of the Code of Civil Procedure being a claim for legal set-off for an ascertained sum. The respondent argues that although there cannot be a set-off in law, his clients are entitled to claim an equitable set-off. I do not agree with this contention. This is not a case of any equitable set-off but a case of legal set-off. If the argument of the respondent was correct there would be no need to resort to the provisions of a legal set-off in any case and the requirements of the Code could be always nullified. No court-fee has been paid on behalf of the defendants for the amount which is sought to be claimed to be set-off. The question is whether the claim should be allowed.

In the written statement, as I have already stated, which was on behalf of six defendants only, their request to defend the suit on behalf of all the defendants was negatived. The claim of set-off is stated in paragraphs 7 and 8 of the written statement and may be summarised as a claim for recovery of the amount which the defendants paid by way of road cess at the rate of Rs. 479-14-4 per annum illegally from the year 1917 to 1928. The date of knowledge of the allegation that payments were made erroneously was attributed to some of these defendants only whose names are not disclosed in the written statement or in the evidence. The written statement merely states:

> "Some of these defendants brought these matters to the knowledge of the plaintiff herself at Calcutta."

On a reading of the whole written statement I do not find any assertion as to the date when some or all of the defendants came to know of the illegal payment or payment under a mistake by the defendants of the road cess, which I have held was not due. The evidence on behalf of the defendants is equally vague and consists of two witnesses only.

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The first witness is a tahsildar who said that he collected the tanki rent of the Brahmins of one of the villages in the tenure. He says that Rs. 479-14-4 was realised as cess annually and that no cess was assessed on these lands in the previous revaluation (meaning the revaluation of 1917). He says:

"We came to know of this at the present assessment of revaluation from the revaluation amlas."

The date of this information again is not disclosed. But we were informed at the Bar that exhibit E, an application for information, dated the 24th March, 1931, may be taken to be the date when the information was obtained by the defendants. Only one defendant, Anant Mohapatra, examined himself. He is witness no. 2 for the defendant. He is aged 36 and says that Rs. 479-14-4 was being paid by them (meaning the defendants) as the amount was assessed as road cess in the Provincial Settlement. He says:

"There was no revaluation of road cess after this so far as our village was concerned. Without knowing that it was not assessed we went on paying the amount."

The share of rent of this defendant is only Rs. 8 per year and he says that he cannot state the rent payable by other contesting defendants. In the face of the evidence referred to just now, which is the only evidence upon the record, I am unable to hold that this Court is in a position to determine accurately the date or dates when the defendants came to know that the payments made by them were made under a mistake. But there is a further difficulty. The six defendants have been unable to show that they have paid any specific sums to the plaintiff on account of road cess. The evidence, as I have stated, is extremely vague. In these circumstances I am of opinion that the claim for set-off ought to have been disallowed. The defendants had a remedy open to them to institute a suit for recovery of the sums which they say they had paid under a mistake of law or fact by asserting and

proving the date of the cause of action in a properly constituted suit. The plaintiff would then be able to defend his position by adducing proper evidence to rebut the allegations of the defendants. The Civil Procedure Code allows the defendants to seek the same relief by way of defence but by proceeding in the manner indicated therein for the making of a legal set-off. The claim is required to be treated as a counter claim or as a plaint and a proper court-fee is to be paid thereon. For these reasons the claim for set-off is disallowed and the decree of the learned Rent Suit Deputy Collector should be varied accordingly.

The following amounts should be excluded from the claim of the plaintiff: Rs. 959-12-8 or any other sum being the claim for cess for the second kist of 1336, for both the kists of 1337, and for the first kist of 1338. The plaintiff's claim will also be reduced by a sum of Rs. 901 paid to her on the 23rd September, 1931, as well as the sum of Rs. 101-14-8 paid on the 11th February, 1933. The claim for interest will be reduced proportionately. The amount ultimately found due to the plaintiff will be worked out by the office showing how much is due from the defendants on the lines indicated.

The learned Rent Suit Deputy Collector also reduced the claim of the plaintiff by a sum of Rs. 1,071-9-0 as being the amount realised by the plaintiff in execution of a decree in certain rent suits against the defendants. This sum the learned Rent Suit Deputy Collector has allowed as a set-off against the claim for cess in the present case. For reasons similar to those given above, as this sum relates to part of the cess paid for the period before 1927, the claim for set-off is disallowed.

It now remains to deal with the preliminary objection that the appeal is no longer maintainable in the following circumstances. The present appeal was filed on the 10th of January, 1934. On the 6th

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December, 1934, there was an order by the Registrar that the application of the appellants who wanted that the numerous respondents should be represented in a representative capacity through some of the respondents only under Order I, rule 8, of the Code of Civil Procedure, should be put up on a future date. On the 26th July, 1935, notice was issued on this application under Order I, rule 8. On the 13th February, 1936, order no. 8 passed by a Division Bench consisting of Mr. Justice Noor and Mr. Justice Rowland dealt with the application under Order I, rule 8, at length. It is pointed out in that order that the plaintiff-appellant seeks permission under Order I, rule 8, to proceed only against those six defendants who had appeared and defended the suit in the trial court, that the notice of this application was given by public advertisement and in response to it some of the respondents appeared, filed vakalatnama and were heard. The order which the Bench passed was that the appellant will be permitted to proceed against the 15 respondents, namely, respondents 4, 7, 19, 48, 164, 302, 644, 723, 736, 744, 990, 1010, 1263, 1332 and 1492, as representatives of the entire body of respondents. The Bench also directed that the notice of this appeal will be served upon those respondents only and that the notice will also be published in the 12 villages where the tenures in suit are situated and in the newspapers, named in the order, which are published in Orissa. It was also directed that the notice which was to be published in the villages will be hung up on some conspicuous part of it followed by beat of drum or by such other method as the Rent Deputy Collector of Puri may decide. It was after these preliminaries, carefully enumerated, had been observed that the appeal was admitted on the 16th April, 1936. It is now argued on behalf of the respondents that two of these 15 respondents who were permitted to be proceeded against as the representatives of the entire body of the respondents are

dead and that as no substitution has been made in their place the appeal has become incompetent.

A large number of cases were referred to at the Bar in support of the contention of the respondents but in my view the matter so far as this point is concerned has been accurately decided by Khaja Mohamad Noor, J. in the judgment which is reported in *Jugdam Ram* v. *Asarfi Ram*(1) where he points out that in these cases the appeal cannot be held to have abated, the reason for the rule being that " the provisions of Order XXII, which relate to the death of plaintiff or defendant cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under Order I, rule 8 ".

In the present case, as already pointed out, 15 respondents were given permission by this Court to defend the entire appeal on behalf of all the respondents and the only thing which this Court should consider is whether, when two of these respondents have died, the Court should allow the remaining persons to conduct the case or whether more persons should be added as respondents for this purpose. In the present case I do not see that by the mere death of two out of 15 respondents the defence of this appeal cannot be or is not being properly conducted. Mr. G. P. Das, appearing on behalf of the respondents, has placed before us everything which could be urged on behalf of all the respondents and there is no trace of any collusion between the thirteen respondents who are now represented before us and the appellant. Accordingly it will be ordered that this Court permits the remaining thirteen respondents to conduct the appeal on behalf of all the respondents. In this view of the matter it is unnecessary to consider as to what would be the situation if one or more of the persons who were represented through the 15 respondents or

(1) (1936) 17 Pat. L. T. 926.

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through the 13 respondents as they now stand had died and no substitution made in his or their places.

It is desirable to refer to the three cases decided by the Lahore High Court upon which reliance was placed strongly by the learned Advocate for the respondents. In the case reported in *Udmi* v. *Hira*(1) the facts were that some of the plaintiff-respondents who had died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under Order I, rule 8, of the Code of Civil Procedure, but among the persons on behalf of whom the six plaintiffs had sued. It was held that as they were not parties to the suit and were needlessly made respondents in the appeal, the failure to bring their legal representatives on the record would not result in an abatement of the appeal. As I have stated above this question does not arise for consideration in the present case.

Four years later a similar question arose in *Wali Muhammad* v. *Barkhurdar*(2). In that case the plaintiffs had sued 43 persons for a declaration to the effect that they were not entitled to have any share in certain lands and that the plaintiffs were the exclusive owners thereof. The suit was dismissed by the trial court and the plaintiffs filed an appeal before the High Court. The appellants had made an application under Order I, rule 8, of the Code of Civil Procedure, to the effect that four of the respondents should be permitted to defend the appeal on behalf of the others and this application had been accepted. When the appeal was called on for hearing it was found that some of the respondents who were allowed to be represented had died and no application had been made for bringing their legal representatives on the record. It was also found that one of the four respondents who were allowed to represent all the respondents had died

(1) (1920) I. L. R. 1 Lah. 582.
(2) (1924) I. L. R. 5 Lah. 429.

but in his case an application had been made within time to bring his legal representatives on the record. A preliminary objection was taken by the respondents that the appeal had abated and the learned Judges held that the defendants-respondents who had died were not only parties to the suit in the Court of the first instance but were also made parties to the appeal, and, relying upon an unreported case of the same Court, held that when certain respondents who have died were parties to the suit and to the appeal the order passed under Order I, rule 8, of the Code of Civil Procedure, will not relieve the appellants from the necessity of impleading all those persons who were parties in the Court below and had obtained a decree in their favour and the representatives of any of those persons who had died during the pendency of the appeal. The circumstances in the present appeal are entirely different from what was decided by the case just referred to.

The next case referred to was *Musammat Afzal-un-nisa* v. *Fayaz-uddin*(1). In that case it was held that "where there are numerous respondents, some of whom have been allowed, under Order I, rule 8, of the Code of Civil Procedure, to represent the others, the appeal does not abate, if one of the persons, who are represented by the others, dies and the legal representatives of the deceased are not brought on the record within time; but the appeal will abate if any one of the persons appointed to represent the others dies and his legal representatives are not so impleaded". So far as the first point decided by this case is concerned I have stated above that the question does not arise in the present case. But I respectfully differ from the conclusion arrived at in this case so far as the point which arises in the present appeal before us is concerned. I have already pointed out that I do not see how an appeal can be said to have abated if one of the persons

(1) (1931) I. L. R. 13 Lah. 195.

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appointed to represent the others dies and his legal representatives are not impleaded. The other persons were ordered to be represented by a certain number and if there is a diminution in that number by reason of death or any other cause the only effect is that a duty is cast upon the Court to decide whether the respondents should be allowed to be represented by the surviving persons who were allowed to represent the entire body of respondents as pointed out by my brother Khaja Mohamad Noor in the case of *Jagdam Ram* v. *Asarfi Ram*(1). It may again be respectfully pointed out that the learned Judges of the Division Bench in *Afzal-un-nisa* v. *Fayaz-uddin*(2) did not follow the constitutional practice of referring the question to a Full Bench if they were disposed to take a different view from what was expressly decided by another Division Bench [*see* the observations of their Lordships of the Judicial Committee in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*(3)]. In *Venkatakrishna Reddi* v. *Srinivasacharlar*(4), a similar question arose for decision and Ramesam, J. gave the opinion that where sanction is given by the Court to a certain number of persons *eo nomine* to prosecute or defend a suit and one of them dies, the proper procedure is for the remaining persons to apply to the Court for directions; and it is for the Court to decide whether it will permit the remaining persons to whom the original sanction was given to continue to prosecute or defend the suit, or whether it will insist upon the original number being maintained by adding some of the respondents.

For the reasons given above I agree that the correct view is laid down by my brother Khaja Mohamad Noor in *Jagdam Ram* v. *Asarfi Ram*(1) where he approves of the correctness of the decision

(1) (1936) 17 Pat. L. T. 926.
(2) (1931) I. L. R. 13 Lah. 195.
(3) (1926) I. L. R. 5 Pat. 634; L. R. 53 Ind. App. 164.
(4) (1930) I. L. R. 54 Mad. 527.

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in the Madras case just referred to. The appeal, in view of our order above, remains competent and has not abated.

The result is that the appeal is allowed. There will be a decree in favour of the plaintiff for the amount which the office will determine in the light of the directions given above; but in the circumstances of this case I will direct that each party will bear his own costs throughout.

HARRIES, C. J.—I agree.

Appeal allowed.

S.A.K.

LETTERS PATENT.

Before Harries, C.J. and Fazl Ali, J.

1939.

July, 31.
August, 1, 8.

PATNA CITY MUNICIPALITY

v.

DWARKA PRASAD SINHA.*

Bihar and Orissa Municipal Act, 1922 (*B. & O. Act VII of* 1922), *sections* 58, 62 *and* 172—*municipality, whether has an unrestricted power to sell or lease roadway—sections* 62 *and* 172(*f*), *scope of—owner of land abutting on a roadway, whether entitled to access at all points on his boundary.*

The owner of land abutting on a roadway is entitled to access to that roadway at all points along the whole length of his boundary.

The power to sell, lease, exchange, or otherwise dispose of any land, given to the Commissioners by section 62 of the Bihar and Orissa Municipal Act, 1922, is not confined to land which has been acquired by the municipality under that section but extends to land which is vested in the municipality by reason of section 58 of the Act.

The word "land" in section 62 includes a road.

*Letters Patent Appeal no. 9 of 1938, from a decision of Mr. Justice Dhavle, dated the 5th of May, 1938.