APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Raoof.

1920

July 9.

UDMI AND OTHERS (DEFENDANTS)—*Appellants,*

versus

HIRA AND OTHERS (PLAINTIFFS)—*Respondents.*

Civil Appeal No. 1041 of 1916.

Civil Procedure Code, Act V of 1908, Order 1, rule 8—death of some of the persons on whose behalf a suit was brought impleaded as respondents in the Appellate Court—abatement of appeal—order that appeal has abated—whether a decree and open to appeal.

The *Jat* proprietors, 393 in number, claimed to be alone entitled to the income of the *shamilat* land of the village as against the *Brahman* proprietors, 53 in number. The plaint was signed by 6 persons and was accompanied by a petition by the same persons under Order 1, rule 8, Civil Procedure Code, praying that they be allowed to sue on behalf of all the *Jat* proprietors and that two of the defendants be permitted to defend the suit on behalf of all the *Brahman* proprietors. This was sanctioned by the Court and a decree was eventually passed in favour of the plaintiffs for a declaration of their rights as prayed. The defendants appealed and in the list of parties in their memorandum of appeal set out the names of 52 defendants as appellants and the 393 plaintiffs as respondents. On the date of hearing it was discovered that three of those respondents had died and applications to bring their legal representatives on the record had not been presented within the period of limitation. Thereupon the Lower Appellate Court decided that the appeal had abated *in toto* relying on *Hadu* v. *Lala* (1). On appeal to this Court, it was contended that no appeal was competent as the order of the Lower Appellate Court was not a decree.

Held, that the order of the Lower Appellate Court was in effect that inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time the whole appeal had abated and that such an order falls within the definition of the term "decree" and is appealable as such.

Niranjan Nath v. *Afzal Hussain* (2), followed.

Held also, as the plaintiff-respondents who died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under Order 1, rule 8 of the Code of Civil Procedure but among the persons on behalf of whom the

(1) 41 P. R. 1915. (2) 128 P. R. 1916 (F. B.).

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six plaintiffs had sued, they were not parties to the suit and were unnecessarily made respondents in the appeal. It was therefore not necessary to bring their legal representatives on the record and the appeal had not abated.

Ram Diyal v. *Mohammad Raju Shah* (1), followed.

Second appeal from the order of Khan Bahadur Maulvi *Inam Ali, District Judge, Hissar, dated the 20th December* 1915, *affirming that of* Munshi *Zaka-ud-Din, Munsif, 1st Class, Hissar, dated the 1st April* 1912, *decreeing the plaintiffs' claim.*

NANAK CHAND, Pandit, for Appellants.

TEK CHAND, for Respondents.

The facts of the case are given in the judgment of this Court delivered by—

ABDUL RAOOF, J.—This is an appeal from an order of Mr. Inam Ali, District Judge of Hissar, dated the 20th December 1915, declaring the appeal of Udmi and others (Defendants-Appellants), *v.* Hira and others (Plaintiffs-Respondents) to have abated under Order XXII, rule 4, of the Code of Civil Procedure. A preliminary objection is taken on behalf of the respondents to the hearing of this appeal on the ground that the order appealed against, not being a decree, is not open to an appeal. In order to decide this preliminary objection it is necessary to give the facts giving rise to the appeal before the learned District Judge in which the order appealed against was made :—

In the village Sisai Bhola the majority of the *biswedars* are *Jats*. There are some *Brahman biswedars* also, who own and possess some of the land. The suit out of which the appeal before the District Judge arose was instituted by the *Jat biswedars* on the allegations that they alone as the real founders of the village were entitled to the income of *shamilat* lands and that *Brahman biswedars* had no right in the said income. It was stated that this allegation was borne out by the entry made at the first settlement of 1863, but that at the settlement 1891-92 a vague entry was made to the effect that the profit and loss of the income was shared by the *biswedars* in proportion to *khewat* shares. This the plaintiffs alleged went to show that the *Brahmans* also

(1) 46 P. R. 1919.

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had been sharing the income as *biswedars*. The relief claimed in the plaint shortly put was that it may be declared that they alone had the right to the income and that the *Brahman biswedars* had no concern with it. In the heading of the plaint the names of 393 persons are mentioned, who are described as *akwam-i-jatan saknai mouza Sisai Bhola, tahsil Hansi, muddian.* In the array of defendants the names of 53 persons are mentioned with the description "*Brahmanan saknai mouza Sisai Bhola, tahsil Hansi, muddaalaihim.*" The date of the presentation of the plaint is mentioned as the 15th of January 1912. It was signed by six of the persons described as plaintiffs—namely, Harasi, Dhari, Plaintiff; Maman, son of Malka, Plaintiff; Jagram, Plaintiff; Ujagar and Sonda, Plaintiff. The verification of the plaint is also signed by these six persons. Along with the plaint a petition was presented under Order 1, rule 8, of the Code of Civil Procedure by the six persons, who had signed the plaint which contained the following statement and prayer:—

"In the suit mentioned in the heading there are 393 plaintiffs belonging to the *Jat* tribe, and there are 53 defendants belonging to the *Brahman* tribe. On behalf of the plaintiffs Hira, Maman, Mehri, Jagram, Ujagar and Sonda *Lambardars* of the *deh* institute the suit (*muddaian ki taraf se*, etc., etc., etc., *numberdaran-i-deh dawa karte hain*). It is therefore prayed that permission be granted to Hira, etc., *Lambardars*, applicants in accordance with Order I, rule 8, of the Code of Civil Procedure to institute the suit and prosecute it in the place of the entire body of the *Jat* proprietors of the village Sisai Bhola. The defendants are also numerous. It is accordingly prayed that Udmi, son of Sheo Ram, and Mutsaddi, son of Data Ram, defendants, be permitted to defend the suit on behalf of the entire body of the defendants and notice be given to the parties to the suit by proclamation."

This permission was granted by the Court on the 16th January 1912 in the terms of the petition presented by the six plaintiffs mentioned above. Accordingly the suit was registered on this date, namely the 16th January 1912. Notifications, as contemplated by the law, were issued. No objections were raised and apparently the entire body of the *Jats* accepted the six plaintiffs as the proper persons to institute and prosecute the suit in the interest of all the *Jats*. On the 8th of February 1912 a written statement was filed on behalf of some of the

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defendants and while pleas impugning the claim on the merits were raised no objection appears to have been raised as to the right of the six plaintiffs to institute the suit on behalf of the entire body of *Jats*. Another written statement was filed by one of the defendants, Bansi Dhar, in which also no question as to the array of parties was raised. Thus though originally the names of 393 plaintiffs were entered in the heading of the plaint the suit was registered as a suit filed by six of the plaintiffs whose signatures are to be found at the foot of the plaint.

The Court of first instance passed a decree in favour of the plaintiffs in the following terms :—

"It is therefore ordered that a decree for declaration of rights to the effect that the *Jats* (the plaintiffs) alone are entitled to the income accruing from *malba*, other *shamilat* and miscellaneous kind of *abadi* and *Gorah deh* land, and that they alone are co-sharers in this income and that the defendants, *i.e.*, the *Brahman biswedars* have no concern with it, be passed in favour of the plaintiffs against the defendants."

The parties were ordered to bear their own costs.

Although the suit was treated as having been instituted by the six plaintiffs alone yet curiously enough the names of the 393 persons originally mentioned in the heading of the plaint were entered in the heading of the judgment of the first Court, and the same mistake was repeated in the heading of the decree. The defendants appealed to the Lower Appellate Court and in the list of parties given in the heading of the memorandum of appeal the names of 52 defendants-appellants were mentioned, and in the list of respondents the names of all the 393 persons were given. On the date of hearing it was discovered that three of the respondents, namely Sisa, Ballu and Daya had died. Their legal respresentatives were not brought on the record within the period of limitation, namely, six months from the dates of their deaths. Applications had been made beyond time for substitution of names and had been granted *ex-parte*. The Court held that out of the plaintiffs-respondents (*Jats*), all having common interest in this litigation, Sisa died on the 6th June 1912, Ballu died on the 18th July 1912 and Daya died on the 19th September 1912, and that applications for substitution of their legal representatives were

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made long after the period of six months fixed and made the following order :—

"Hence the appeal had abated (*vide* P. R. 41 of 1915). I cannot proceed with this appeal which had abated under the law (*vide* Order XXII, rule 4, of the Code of Civil Procedure.)"

On the appeal being called for hearing in this Court the preliminary objection mentioned above was raised. The decision in the Full Bench ruling *Niranjan Nath* v. *Afzal Hussain* (2), was relied upon in support of this objection. In our opinion the decision instead of supporting the contention of the learned *Vakil* for the respondent goes to show clearly that so far as the facts of this case are concerned the order impugned is clearly a decree and is open to an appeal. The following passage to be found at page 403 of the judgment deals with the precise question, which arises on the facts of this case :—

"When there are two or more plaintiffs, and one of them dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, and no application to bring the legal representative on the record is made within six months, Order XXII, rule 3, lays down that the suit shall abate so far as the deceased plaintiff is concerned. What is the effect of this partial abatement on the suit of the surviving plaintiff or plaintiffs ? If the suit is of such a nature that it cannot proceed in the absence of the deceased's legal representative the partial abatement will result in the total abatement or dismissal of the suit. Whether the final decision is called an abatement or a dismissal, *qua* the surviving plaintiff or plaintiffs, it is manifest that it falls within the definition of term 'decree' and is appealable as such"

From the order of the Lower Appellate Court it is manifest that the Court declared the appeal to have abated on the ground that the plaintiffs in whose favour the decree stood had a common interest in the litigation. Apparently the Court intended to adjudicate that inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time the whole appeal had abated. Hence in terms of the ruling

"whether the final decision is called an abatement or dismissal

* * * * it falls within the definition of the term 'decree' and is appealable as such.

We accordingly hold that the preliminary objection has no force and must be overruled.

(1) 41 P. R. 1915. (2) 128 P. R. 1916 (F. B.).

As regards the merits of the appeal we feel no difficulty in giving our decision. The three respondents who have been found by the Lower Appellate Court to have died were not among the six plaintiffs who had instituted the suit in accordance with the order of Court made under Order 1, rule 8, of the Code of Civil Procedure. They were among the persons on behalf of whom these six plaintiffs had sued. Therefore in fact and in law they were not parties to the suit and their names had unnecessarily been mentioned in the array of the respondents. It was, therefore, not necessary for the further progress of the appeal to bring on the record their legal representatives. If it was not necessary to bring their legal representatives on the record the appeal cannot be said to have abated. This view is clearly supported by the decision of a Division Bench in *Ram Diyal—defendant-appellant* v. *Mohammad Raju Shah and others—plaintiffs-respondents* (1). It is not necessary for us, therefore, to give any further reasoning in support of the view we have taken, for the precise question which arises for decision before us arose before the Division Bench and was fully dealt with and decided by the learned Judges. Following the decision of the Division Bench, we hold that the order passed by the Lower Appellate Court was erroneous. We, therefore, set it aside and remand the case under Order XLI, rule 23, of the Code of Civil Procedure with the direction that the appeal be replaced on its original number in the register of pending appeals and be disposed of accordingly. We make no order as to the costs of this appeal. The other costs will follow the event.

Appeal accepted.

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(1) 46 P. R. 1919.