

## APPELLATE CIVIL.

*Before Mr. Justice Young and Mr. Justice Baguley.*

1924

June 16.

MAUNG BYAUNG AND ONE

v.

MAUNG SHWE BAW AND TWO.\*

*Abatement of appeal—Death of one of the plaintiff-appellants in a redemption suit—Civil Procedure Code (V of 1908), Order 22, Rule 2 and Order 41, Rule 4.*

The plaintiff-appellants, a Burmese Buddhist couple, filed a redemption suit in respect of a certain piece of land of which they were joint-owners and mortgagors. On their suit being dismissed they preferred an appeal; but after the appeal was filed the husband died and his legal representatives were not brought on the record within the period of limitation.

*Held*, that the appeal did not abate as far as the surviving spouse was concerned and that she could carry on the appeal by herself.

*Hay*—for the Appellants. •

*Maung Kun*—for the Respondents.

YOUNG and BAGULEY, JJ.—This was a suit filed by Maung Byaung and Ma Ngwe E jointly for redemption of a certain piece of land. They were husband and wife, and, as such, joint-owners.

The lower Court dismissed the suit, and against this order of dismissal they filed an appeal.

Since the filing of the appeal, Maung Byaung died; his legal representatives have not been brought on the record within the period of limitation.

The question to be decided is whether the appeal has entirely abated, or whether Ma Ngwe E, can carry it on alone.

The main argument before the Court turned upon the meaning of Order XXII, Rule 2.

Omitting the portions not applicable to the present case, this rule runs as follows:—"Where there are

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\* Civil First Appeal No. 178 of 1923 against the decree of the District Court of Hanthawaddy in Civil Regular No. 50 of 1922.

more plaintiffs than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, the Court should 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."

This rule also applies to appeals.

The question is what is the exact meaning of the word "alone."

It is argued that, because the right to sue or to appeal survives to Ma Ngwe E and Maung Byaung's legal representatives, it cannot be said to survive to Ma Ngwe E alone. With this reading of the rule we are not in agreement.

These two persons as joint-owners of the land and joint mortgagors, when both alive, were each individually entitled to redeem the mortgage; Ma Ngwe E alone could have redeemed the mortgage. It is true that Maung Byaung would have had to be made a *pro forma* defendant; but Ma Ngwe E could have filed a suit by herself. This we understand to mean that Ma Ngwe E alone had the right to sue.

Quite apart from this, however, Order XLI, Rule 4 gives Ma Ngwe E the right to appeal entirely by herself. This reads—"Where there are more plaintiffs than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, any one of the plaintiffs may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs." This would most certainly give Ma Ngwe E the right to prosecute her appeal by herself.

We hold then that the appeal does not abate entirely. It will abate so far as Maung Byaung is concerned; but Ma Ngwe E can carry on the appeal by herself.

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