

terest that must be paid before redemption, and the case will have to go back in order that the decree may be worked out on those terms.

Their Lordships therefore think that the appeal must be allowed, with costs here and below, and they will humbly advise His Majesty accordingly.

A. M. T.

Appeal allowed.

Solicitor for appellants: *E. Dalgado.*

APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Moti Sagar.

WALI MUHAMMAD AND OTHERS (PLAINTIFFS)

Appellants

versus

BARKHURDAR AND OTHERS (DEFENDANTS)

Respondents.

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May 8.

Civil Appeal No. 993 of 1920.

Civil Procedure Code, Act V of 1908, Order XXII rule 4, and Order I rule 8—Appeal—Representatives of deceased respondents not brought upon the record within time—Abatement of appeal—notwithstanding an order permitting some of the respondents to defend the appeal on behalf of all.

The plaintiffs sued 43 persons for a declaration to the effect that they were not entitled to have any share in the *shamilat* of *Mausa Lal Hussain*, and that the plaintiffs were the exclusive owners thereof. The suit having been dismissed by the trial Court, the plaintiffs filed a first appeal in the High Court. Some of the defendant-respondents died during the pendency of the appeal, and no application was made to bring their legal representatives on the record within the time prescribed by law. It was urged by the respondents that the appeal had therefore abated. An application had been made by the appellants under Order I rule 8, Civil Procedure Code,

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to the effect that four of the respondents be permitted to defend the appeal on behalf of the others, and this application had been accepted. Only one of these four respondents had died, and in his case an application had been made within time to bring his legal representatives on the record.

Held, that the order passed under Order I rule 8, Civil Procedure Code, did 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 that if any one of them died during the pendency of the appeal and no steps were taken by the appellants to bring his legal representatives on the record within the time prescribed by law, the appeal abated *in toto*.

Rup Chand v. Bunyad Ali (1), followed. .

Ram Diyal v. Mohammad Raju Shah (2), distinguished.

First appeal from the decree of Sheikh Rukn-ud-Din, Senior Subordinate Judge, Shahpur at Sargodha, dated the 25th February 1920, dismissing the claim.

ABDUL QADIR and I. C. CHOPRA, for Appellants.

RAM CHAND, MANCHANDRA and JAGAN NATH, BRANDARI, for Respondents.

The judgment of the Court was delivered by—

MOTI SAGAR J.—This appeal arises out of a suit for a declaration that defendants Nos. 1 to 43 are not entitled to have any share in the *shamilat* of *Mauza Lal Hussain* in the *Khushab Tahsil* of the *Sargodha District*, and that the plaintiffs are the exclusive owners thereof. The suit having been dismissed the plaintiffs have filed a first appeal in this Court.

A preliminary objection is taken on behalf of the respondents that the appeal has abated by reason of the death of some of the defendant-respondents and the failure of appellants to apply for their legal repre-

sentatives to be brought on the record within the time prescribed by law. On behalf of the appellants it is contended that they made an application under Order I-rule 8, Civil Procedure Code, that four of the respondents might be permitted to defend the appeal on behalf of the others, and that this application was accepted by the learned Judge in Chambers who admitted the appeal. It is pointed out that only one of these four respondents has died, and that an application to implead his legal representatives was made by the appellants within the statutory period. Reliance is placed on *Ram Dyal v. Muhammad Raju Shah* (1) and it is urged that the other deceased respondents were not necessary parties and that there was no necessity in their case to make an application under Order XXII rule 4, Civil Procedure Code. In our opinion the ruling cited is clearly distinguishable and has no application to the present case. In that case a suit was brought by a certain person for himself and 29 others under Order I rule 8, Civil Procedure Code. The suit was decreed, and an appeal against that decision also having been dismissed, a second appeal was filed by the defendants in this Court. During the pendency of the second appeal some of the plaintiffs, on whose behalf the suit had also been instituted, died and no steps were taken by the appellants to bring their legal representatives on the record within the statutory period. The plaintiffs, who had died, had never applied to the Court to be made parties to the suit under Order I rule 8 (2), Civil Procedure Code. It was held that they were not parties to the suit, and that there was no necessity for them to be made respondents in the appeal to the Chief Court. The facts of the present case are entirely different. In this case

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the defendant-respondents, who have died, were not only parties to the suit in the Court of first instance but were also made parties to the appeal in this Court. In a recent case decided on the 12th of June 1922 (see Civil Appeal No. 3159 of 1918)* it has been held by a Bench of this Court that when certain plaintiffs, who have died, were parties to the suit and to the appeal in the Lower Appellate Court, an order passed under Order I rule 8, Civil Procedure Code, will not relieve the appellants from the necessity of impleading all those persons who were parties in the Courts below and had obtained a decree in their favour, and the representatives of any of those persons who had died, and the appeal will abate *in toto* if no steps have been taken by the appellants to bring the legal representatives of the latter on the record within the time prescribed by law. The facts of the above case are exactly on all fours with those of the present case, and we hold that the preliminary objection prevails and that the appeal has abated *in toto*. We further direct that the costs of the respondents shall be borne by the appellants.

A. R.

Appeal abated.

*The judgment in Civil appeal No. 3159 of 1918, *Rup Chand v. Bunyād Ali*, by Mr. Justice Martineau and Mr. Justice Harrison, dated 12th June 1922, referred to above.

The plaintiffs in this case who were *khādims* of a shrine known as *Dargah Hazrat Roshan Charagh* in Delhi sued for possession of certain land in Kila Chiragh which used to be the site of a house occupied by one Rattan Singh and was purchased by defendants Nos. 1 to 3 after his death in the execution of a decree passed against him. The Courts below have concurred in giving the plaintiffs a decree for possession, finding them to be the owners of the land. Defendants Nos. 1 to 3 have filed a second appeal in this Court.

Several of the plaintiffs-respondents died a year or more ago, and as no steps have been taken by the appellants to have their legal representatives brought on the record it is contended on behalf of the other respondents that the appeal has abated. To this Mr. Moti Sagar on behalf of the appellants replies that in March 1919 he made an application that four of the respondents might be allowed, under Order 1 rule 8, Civil Procedure Code, to defend the appeal on behalf of the others, and that the application was granted subject to all just exceptions, and he contends that as the persons who have died are, with the exception of one who died less than three months ago, not among the four who were appointed to defend the appeal on behalf of the other respondents, it was not necessary to have their legal representatives impleaded, and that therefore the appeal does not abate. He has cited *Ram Diyal v. Muhammad Raju Shah* (1) and *Udmi v. Hira* (2) in support of this contention, but in those cases some persons had been allowed by the trial Court to sue on behalf of others, and the persons on whose behalf they sued were not made parties to the suit, so that there was no necessity to implead them or their representatives in the appeal. The present case is clearly distinguishable, as the plaintiffs who have died were parties to the suit and to the appeal in the lower appellate Court. Even if, as is contended by Mr. Moti Sagar, the procedure prescribed by Order 1 rule 8, Civil Procedure Code, is applicable to appeals by the operation of section 107, an order passed under that rule will not relieve the appellants from the necessity of impleading all those persons who were parties in the Courts below and have obtained a decree in their favour, and the representatives of any of those persons who have died.

Then it is argued for the appellants that the respondents sued in a representative capacity as *khadims* of the shrine, and that therefore their rights to sue have not survived to their heirs. *Rahim Bakhsh v. Channan Din* (3) is relied upon in support of this argument. That was a case in which the plaintiffs sued for a declaration that certain land was *waqf*, being attached to a shrine and it was in their capacity as disciples

(1) 46 P. R. 1919.

(2) (1920) I. L. R. 1 Lah. 582.

(3) (1920) 55 I. C. 210.

and followers of the shrine that they brought the suit, whereas in the present case, although the plaintiffs are *khadims* of the shrine, they are not claiming the land for the benefit of the shrine, but they are suing for it in their own right as its owners. We do not, therefore, agree with Mr. Moti Sagar's argument. The decree has been given to the plaintiffs for themselves and not in a representative capacity, and as the representatives of the deceased plaintiffs have not been impleaded the appeal must abate.

There is one other reason also for holding that the appeal abates, namely, that although one of the plaintiffs Inayat Ali died and his widow Haji Khanam was impleaded in his place while the case was pending in the first Court, Haji Khanam has not been impleaded as a respondent in this Court. The fact that in the lower appellate Court also Haji Khanam was not impleaded and that the respondents did not raise the objection then does not debar them from raising it now.

Lastly, it is argued for the appellants that even if the appeal abates it would abate only in respect of the shares of the deceased plaintiffs. It has, however, been held by this Court that when a decree is passed in favour of several plaintiffs jointly, and one of them dies during the pendency of the appeal and his representatives are not brought on the record, the appeal abates in its entirety. The most recent ruling on this point is *Sardari Lal v. Ram Lal* (1), in which *Jamna v. Sarjit* (2) and other rulings to the same effect have been followed.

We hold that the appeal has abated *in toto* and we direct that the appellants shall pay the respondents' costs.

(1) (1919) I. L. R. 1 Lah. 225.

(2) 67 P. R. 1919