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Aug. 6.

APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*MA THAN MAY *v.* MOHAMED EUSOOF.**Appeal—Defendant added as respondent—Appeal barred against defendant—Prosecution of appeal against original party—Two inconsistent decrees.*

Where a person has acquired a valuable right under a decree he ought not to be impleaded as a party respondent to the appeal from the decree at a later stage when the appeal as against him has been barred by limitation.

In the absence of a necessary party, the appeal cannot proceed against the original respondent, if in the result the decree of the appellate Court would in substance differ from the decree of the trial Court which, as between the parties to the appeal and the party not impleaded in the appeal, has become conclusive.

Badri Narayan v. East India Railway Co., I.L.R. 5 Pat. 755; *Midnapur Zamindary Co. v. Amulya Nath Roy*, I.L.R. 53 Cal. 752; *V.P.R.V. Chetty v. Seethai Acha*, I.L.R. 6 Ran. 29—referred to.

Rauf for the appellant.

P. B. Sen for the respondent.

PAGE, C.J.—Although the pleadings in this suit are not artistically drawn, there can be no doubt that in substance it is a suit by one of the heirs of U Po Aing against the other heirs for administration of his estate. It was agreed between the parties that the plaintiff and the first and second defendants were the sole heirs of U Po Aing, the plaintiff being his nephew, the first defendant his wife, and the second defendant his niece.

At the trial it was common ground that the first defendant was entitled to a fourth share in the estate, the dispute being whether the plaintiff was entitled to a half share, and the second defendant to a quarter share.

* Civil First Appeal No. 15 of 1931 from the judgment of the District Court of Bassein in Civil Regular No. 59 of 1928.

The learned Judge decided that the plaintiff was entitled to a share twice as great as the share of the second defendant, that is to say, at the trial it was proved or admitted that the plaintiff was entitled to a half share, the first defendant to a fourth share, and the second defendant to a fourth share; and a preliminary decree was passed for accounts to be taken upon that footing. In due course the Commissioner presented his report, and this report was considered by the learned District Judge, who passed a final decree setting out the details of the estate of which administration had been decreed.

The first defendant appealed to the High Court against the final decree of the District Court, making the plaintiff a respondent, but failing to implead the second defendant as a respondent.

In these circumstances a preliminary objection has been raised on behalf of the respondent that in the absence of the second defendant the appeal cannot proceed. It was further contended that the Court in the circumstances of the case ought not to allow the second defendant to be impleaded as a respondent. In my opinion, the preliminary objection must prevail. Under the decree of the District Court the second defendant acquired a valuable right, namely to have the estate distributed upon the basis of that decree, and if she were to be impleaded now she would be made a respondent after an appeal as against her had been barred by limitation. In my opinion, in such circumstances the Court ought not to allow the appellant to implead the second defendant as a party respondent to the appeal.

Now, in the absence of the second defendant, ought the appeal to be allowed to proceed? The test to be applied is this. Assume that the appeal

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against the respondent proved to be successful, would the effect be that there would be in existence two inconsistent decrees, one of the High Court and the other of the District Court, with respect to the subject matter of the suit? In my opinion, there would. In the memorandum of appeal the appellant alleges that the items representing the estate under administration were not correctly found in the report of the Commissioner, or set out in the decree of the District Court. In respect of certain items the appellant contends that increased deductions ought to be allowed to her in respect of disbursements that she had made, and that in respect of certain properties she should receive a larger share than under the decree was allotted to her. If the appeal were to succeed in respect of all or any of the items set out in the memorandum of appeal the decree of this Court as against the respondent would both in form and in substance vary from the decree passed by the District Court which, as between the parties to the appeal and the second defendant, has become conclusive. In these circumstances the appeal cannot be allowed to proceed. [V.P.R.V. *Chokalingam Chetty v. Seethai Acha and others* (1); *Midnapur Zamindari Co., Ltd. v. Amulya Nath Roy Chowdhury* (2); and *Badri Narayan v. East Indian Railway Co.* (3).]

The appeal accordingly is dismissed. There will be no order as to costs.

MYA BU, J.—I agree.

(1) (1927) I.L.R. 6 Ran. 29.

(2) (1926) I.L.R. 53 Cal. 752.

(3) (1926) I.L.R. 5 Pat. 755.