

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

GOPAL DAS AND ANOTHER (DEFENDANTS)

Appellants

versus

MUL CHAND AND OTHERS (PLAINTIFFS)

Respondents.

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April 27.

Civil Appeal No. 473 of 1922.

Civil Procedure Code, Act V of 1908, Order XXII, rules 2, 4, 11—Death of one of several plaintiffs-respondents during pendency of appeal—the right to sue surviving to the other plaintiffs-respondents who were his sole legal representatives—whether application under rule 4 is necessary—Abatement.

One of the plaintiffs-respondents having died in November 1924, no application to bring his legal representatives on the record was made till April 1926. The deceased was a Hindu minor and his legal representatives were his brothers who were co-plaintiffs and respondents with him and the right to obtain relief survived against them alone.

Held, that rule 2 of Order XXII applied and it was not necessary to make an application under rule 4, and the appeal did not abate.

Kartar Singh v. Lal Singh (1), *Fateh Shah v. Bahadur Shah* (2), *Dowlat Ram v. Asa Ram* (3), *Mussummat Hafiz-un-Nisa v. Jawahir Singh* (4), *Maung Po v. Ma Shwee Ma* (5), and *Shyamanand Das v. Raj Narain Das* (6), followed.

Gurditta Mal v. Muhammad Khan (7), differed from.

Lilo Sonar v. Jhagru Sahu (8), distinguished.

Second appeal from the decree of H. F. Forbes, Esquire, District Judge, Dera Ghazi Khan, dated the 16th November 1921, affirming that of Sayad

(1) (1920) 59 I. C. 238. (5) (1924) 84 I. C. 992: I. L. R. 2 Ran. 445.

(2) 26 P. L. R. 248. (6) (1906) 4 Cal. L. J. 568.

(3) 46 P. R. 1886. (7) (1925) 90 I. C. 41.

(4) (1921) 66 I. C. 24. (8) (1924) I. L. R. 3 Pat. 853.

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Muhammad Baqir, Subordinate Judge, Dera Ghazi Khan, dated the 10th May 1921, granting the plaintiffs a preliminary decree for possession of the shop in suit, etc.

HARGOPAL AND B. A. COOPER, for Appellants.

SHEO NARAIN, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—Counsel for the plaintiffs-respondents raises a preliminary objection that the appeal has abated, because one of the four plaintiffs-respondents, namely, Thana Ram, died so far back as the 4th November 1924 but no application to bring his legal representatives on the record was made till the 1st April 1926. The appellants' counsel replies that the legal representatives of Thana Ram who was a Hindu minor were his brothers who were co-plaintiffs with him and that as the right to obtain relief survived against them alone all that was necessary was to make an entry to that effect as provided by Order XXII, rules 2 and 11, Civil Procedure Code.

It is not denied that the surviving brothers alone are the legal representatives of the deceased and that the right to obtain relief survives against them alone, but counsel for respondents contends on the authority of a decision of a Division Bench of this Court consisting of Abdul Raof and Eforde JJ. and reported as *Gurditta Mal v. Muhammad Khan* (1) that even in a case like the present an application should have been made within 90 days to bring the legal representatives of the deceased party on the record. In the case referred to the said learned Judges held that "the mere fact that the legal representatives of the deceased respondents are already on the record does

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not relieve the appellant from the necessity of making an application under Order XXII, rule 4, Civil Procedure Code." In arriving at that conclusion the learned Judges appear to have followed *Lilo Sonar v. Jhagru Sahu* (1), but that case is quite distinguishable because there only one of the legal representatives of the deceased party was already on the record but not the rest, and it was held that "the fact that one of the representatives of the deceased was already on the record (though not in a representative capacity) did not relieve the appellant or the other heirs of the deceased respondent from making an application for substitution of legal representatives of the deceased respondent in terms of rule 4 of Order XXII". The distinction between the above case and the present is therefore obvious. The decision in *Gurditta Mal v. Muhammad Khan* (2), it may be observed, is contrary to several previous judgments of this Court, one of which reported as *Kartar Singh v. Lal Singh* (3) is by Mr. Justice Abdul Raoof himself. In that case the learned Judge held that "where on the death of a respondent it appears that his heirs are already parties to the appeal it cannot be said to have abated merely because no fresh application is made to bring on the record the legal representatives of the deceased." In *Fateh Shah v. Bahab Shah* (4) a Division Bench of this Court of which Mr. Justice Fforde was a member came to the same conclusion, and the same view was taken in *Dowlat Ram v. Asa Ram* (5). The rulings of the other Courts to the same effect are *Mussamat Hafiz-un-Nisa v. Jawahir Singh* (6), *Maung Po v. Ma Shewe Ma* (7) and *Shyamanand Das v. Raj Narain Das* (8).

(1) (1924) I. L. R. 3 Pat. 853. (5) 46 P. R. 1886.
 (2) (1925) 90 I. C. 41. (6) (1921) 66 I. C. 24 (Oudh).
 (3) (1920) 59 I. C. 238. (7) (1924) 84 I. C. 992; I. L. R. 2 Ran. 445.
 (4) 26 P. L. R. 248. (8) (1906) 4 Cal. L. J. 568.

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Where, as in the present case, Order XXII, rules 2 and 11 clearly apply, it is difficult to see why it is necessary to make an application under Order XXII, rule 4. Rules 2 and 4 contemplate two different sets of circumstances and the provision made in rule 2 is independent of and is in no way subject to the provisions of rule 4. We are therefore of opinion that where rule 2 is applicable no application under rule 4 need be made, and that if it is not made the appeal does not abate where, as in this case, all the representatives of the deceased respondent are already on the record.

But the appeal must fail on the merits.

[The remainder of the judgment is not required for the purpose of this report—Ed.]

C. H. O.

Appeal dismissed.