

For the reasons given we accept the appeal, set aside the order of the District Judge and restore the order of the trial Judge, decreeing a sum of Rs. 68-10-9 with proportionate costs on that sum and dismissing the rest of the claim with costs to the defendant-firm. The appellant-firm will also have its costs in this Court and in the lower appellate Court.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Bhide JJ.

LACHHMAN AND OTHERS (DEFENDANTS)

Appellants.

versus

BANSI AND ANOTHER (PLAINTIFFS)
MST. RUP DEVI AND OTHERS
(DEFENDANTS)

} Respondents.

Civil Appeal No. 2502 of 1926.

Civil Procedure Code, Act V of 1908, Order XXII, Rule 9—Suit for declaration by some reversioners—previous suit by another reversioner on the same cause of action, which abated—whether bars present suit—Second Appeal—new plea raised in—point of law—whether entertainable—if can be decided on material on the record.

In a suit by *B.* and *S.* for a declaration that a certain alienation of land made by four Hindu widows should not affect their reversionary rights, it was pleaded by defendants for the first time in second appeal that the suit was barred under Order XXII, rule 9, Civil Procedure Code, inasmuch as a previous suit on the same cause of action by another reversioner (*A*) had abated on his death and the application to bring his representatives on to the record had been dismissed as time-barred; that *B* and *S* were parties to that previous suit as *pro forma* defendants; and that on the death of *A*,

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they had put in an application to be substituted as plaintiffs in place of A, but that both that application and another asking to be permitted to continue the suit in their own right as reversioners of the widows, had been rejected.

Held, that although the plea of bar under Order XXII, Rule 9, had not been raised in either of the lower Courts, it could be allowed in second appeal as it was a pure point of law which could be decided on the material on the record.

Held also, that Order XXII is confined to the question of the continuance of a suit by virtue of the devolution of deceased's "right to sue" on other persons during the pendency of the suit; and has no application to cases in which the suit can be continued by other persons, who have an independent right to sue on the same cause of action, and that therefore the present suit was not barred by Rule 9 of the Order.

Venkatanarayana Pillai v. Subbammal (1), relied upon.
Khair Muhammad v. Umar Din (2), referred to.

Second appeal from the decree of Sardar Sewa Ram Singh, District Judge, Hoshiarpur, dated the 2nd August 1926, affirming that of Chaudhri Niamat Khan, Senior Subordinate Judge, Kangra, at Dharamsala, dated 30th November 1925.

JAGAN NATH BHANDARI, for JAGAN NATH AGGARWAL, for Appellants.

CHANDRA GUPTA, for FAKIR CHAND, for Respondents.

BHIDE J.

BHIDE J.—This second appeal arises out of a suit by two persons named Bansi Lal and Salig Ram for a declaration that a certain alienation of land made by four Hindu widows shall not affect their reversionary rights. The suit was decreed by the Courts below subject to payment of a sum of Rs. 907-4-0 which was held to be a valid charge upon

(1) (1914) I. L. R. 33 Mad. 406 (P.C.). (2) (1924) I. L. R. 5 Lah. 421.

the land. From this decision the defendants have preferred a second appeal.

The only ground which the learned counsel for the appellants has urged before us is that the suit was barred under Order XXII, rule 9, Civil Procedure Code, inasmuch as a previous suit on the same cause of action by another reversioner named Amin Chand had abated and the application to bring his representatives on the record had been dismissed as time-barred. It appears that the present plaintiffs were parties to that previous suit as *pro formâ* defendants. On the death of Amin Chand they had put in an application for being substituted as plaintiffs in place of Amin Chand, but the application was dismissed as time-barred. They applied to the Court to be permitted to continue the suit in their own right as reversioners of the widows, but this application was also rejected. Thereafter they instituted the present suit which resulted in a decree in their favour as stated above.

In the trial Court it was urged on behalf of the appellants that the present suit was barred by the provisions of section 11 of the Civil Procedure Code. The previous suit was, however, not decided on the merits and it was conceded before us that section 11 would be no bar. It was, however, contended that a second suit on the same cause of action is clearly barred by the provisions of Order XXII, rule 9 of the Civil Procedure Code. This contention does not appear to have been raised either before the trial Court or before the learned District Judge, but we have allowed it to be raised as it is a pure point of law which can be decided on the material on the record.

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The decision of the point raised depends upon the proper interpretation of rule 9 of Order XXII of the Civil Procedure Code. According to sub-rule (1) of that rule "where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action." It is urged that Amin Chand's suit being of a representative character, its abatement bars a fresh suit on the same cause of action by any other reversioner. There is no doubt that a suit of this type is of a representative character [see *Khair Muhammad v. Umar Din* (1)], but the question whether an abatement binds all reversioners in such a case is not free from difficulty. No authority directly in point has been cited. The aforesaid rule, being a disabling one, must be strictly construed. After carefully considering the provisions of Order XXII, Civil Procedure Code, I am of opinion that the contention of the learned counsel for the appellant is not sound. Order XXII deals with the effect of the death, marriage and insolvency of parties on pending suits. It distinguishes between cases in which the "right to sue" survives and those in which it does not. In the latter class of cases no question of continuance of the suit by any other persons arises. In the former class of cases, the suit is allowed to be continued by or against the legal representatives, provided they are brought on the record within the period of limitation. It will thus appear that Order XXII is really confined to the question of the continuance of the suit by virtue of the devolution of the deceased's "right to sue" on other persons during the pendency of the suit. But there may be cases in which the suit can be continued by other persons who have an independent right to sue on the same cause

of action. In *Venkatanarayana Pillai v. Subbammal* (1), it was held by the Privy Council that a suit by one reversioner to get an adoption declared invalid could on his death be continued by another reversioner. Their Lordships considered the question whether the latter could be held to be a legal representative of the deceased plaintiff for the purposes of Order XXII, rule 3, Civil Procedure Code, but did not express any definite opinion on the point. They preferred to rest their decision on the broad ground that inasmuch as the second reversioner had a right to sue on the same cause of action and could have been joined as a co-plaintiff in the suit by virtue of Order I, rule 1, Civil Procedure Code, there was no objection to his continuing the suit brought by the deceased reversioner. This decision implies that the provisions of Order XXII as to abatement do not hold good in such a case. For if they did, according to rule 3 of Order XXII the suit would have abated unless it were continued by a "legal representative" of the deceased plaintiff by a proper application made within the period of limitation.

I would accordingly dismiss this appeal, but in view of the fact that the law point involved is not free from difficulty, I would leave the parties to bear their costs.

ADDISON J.—I agree.

N. F. E.

ADDISON J.

Appeal dismissed.

(1) (1915) J. L. R. 38 Mad. 406 (P.C.).

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