APPELLATE CIVIL.

Before Harrison and Tek Chand JJ.

MUSSAMMAT AFZAL-UN-NISA (PLAINTIFF) Appellant

versus

FAYAZ-UD-DIN, ETC. (DEFENDANTS) Respondents.

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March 25.

Civil Appeal No. 3054 of 1925.

Civil Procedure Code, Act V of 1908, Order I, Rule 8—in appeal some respondents were allowed to represent the others—whether appeal abates when one of the other respondents dies without his legal representatives being brought on the record—Section 11, Explanation IV—Res Judicata—*whether applicable—where parties are not litigating under same title.*

Held, that where there are numerous respondents, some of whom have been allowed, under Order I, Rule 8 of the Code of Civil Procedure, to represent the others, the appeal does not abate, if one of the persons, who are represented by the others, dies and the legal representatives of the deceased are not brought on the record within time; but the appeal will abate if any one of the persons appointed to represent the others dies and his legal representatives are not so impleaded.

Wali Muhammad v. *Barkhurdar* (1), *Rup Chand* v. *Bunyad Ali* (2), and the subsequent rulings based thereon, disapproved.

Ram Diyal v. *Mahomed Raju Shah* (3), *Udmi* v. *Hira* (4), *Duke of Bedford* v. *Ellis* (5), *Commissioners of Sewers of the City of London* v. *Gellatly* (6), and *Jenkins* v. *Robertson* (7), referred to.

In this suit for possession the defendants pleaded that they were permanent tenants of the site underneath the properties in suit and that they were not liable to be evicted. It was contended on behalf of plaintiff that the question as to

(1) (1924) I. L. R. 5 Lah. 429.
(2) (1924) I. L. R. 5 Lah. 432
(3) 46 P. R. 1919.
(4) (1920) I. L. R. 1 Lah. 582.
(5) 1901 A. C. 1, 8.
(6) (1876) L. R. 3 Ch. D. 610, 615.
(7) (1867) L. R. 1 H. L. Sc. 117.

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whether or not the defendants were the permanent tenants of the site was *res judicata* by reason of the decision in a previous suit between the parties. The previous suit was instituted by the present defendants for a declaration that they were the owners of the site in question. They failed to prove their claim and it was held that the site in question belonged to the present plaintiff. For the plaintiff it was contended that in the previous suit the defendants should have put forward an alternative claim on the ground of permanent tenancy, and having omitted to do so, the plea was not open to them in the present case under Explanation IV of Section 11 of the Code of Civil Procedure.

Held, that the provisions of section 11 of the Code did not apply as the claim in the two suits were based upon wholly different titles. The parties were no doubt the same, but the *capacity* in which they appeared in Court was different.

Duchess of Kingstone (1), relied upon.

First appeal from the decree of Sayad *Abdul Haq, Subordinate Judge, 1st Class, Delhi, dated the 20th August 1925, granting the plaintiff possession of certain rooms only.*

MEHR CHAND MAHAJAN and BISHEN NARAIN, for Appellant.

KISHEN DAYAL and BHAGWAT DAYAL, for Respondents.

TEK CHAND J.

TEK CHAND J.—This appeal arises out of a suit for possession of certain properties situate in *Mohalla* Kishan Ganj, Delhi. The suit has been decreed as regards some of the properties and has been dismissed as regards the others. The plaintiff has preferred a first appeal praying that a decree in full should have been passed.

A preliminary objection is taken by Mr. Kishan Dayal that the appeal has abated as two of the respondents, named Muhammad Sadiq, son of Ahsan Ullah (No. 21), and Muhammad Sadiq, son of Abdur

(1) 2 Smith's Leading Cases 731, 759.

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Rahman (No. 44), died more than 90 days ago and that no application under Order XXII, rule 4 or 9, Civil Procedure Code, had been made. The decree of the lower Court shows that there were 49 defendants in the case and that, so far as the properties in dispute in this appeal are concerned, the suit was dismissed against all of them. In the memorandum of appeal presented in this Court, all the 49 defendants were impleaded as respondents. An application under Order 1, rule 8 was, however, presented by the appellant on the 4th of March 1926, supported by an affidavit, stating that the respondents in the appeal were numerous and had the same interest in the dispute, that their defence in the trial Court was common and they were represented by one counsel, and that in order to avoid expense and delay, an order under Order 1, rule 8 be passed appointing respondents Nos. 1 to 8 to defend the appeal on behalf of the others. This application was granted on the 7th of May 1926, subject to all just exceptions, it being ordered that due notice of the application and the appeal be given to all the respondents at the expense of the appellant. This was duly done, but no objection has so far been raised by any one of the other respondents, nor has any application under sub-rule (2) of rule 8 been made. In this appeal Mr. Kishan Dayal represents all the surviving respondents, and he has stated that their interests are the same as those of the two deceased persons. He, however, contends that the fact that proceedings were taken under Order 1, rule 8 in this Court does not relieve the appellant of 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 has died during the pendency of the appeal it is incumbent upon the appel-

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lant to bring his legal representatives on the record within the period prescribed by law. In support of this contention the learned counsel relied upon *Wali Muhammad* v. *Barkhurdar* (1), which followed an earlier ruling in *Rup Chand* v. *Bunyad Ali* (2). These rulings certainly support Mr. Kishan Dayal's contention. After full consideration and with the utmost respect to the learned Judges who decided those cases, I think, that they do not lay down the law correctly.

It is clear—and indeed it was conceded by the respondents' learned counsel—that if proceedings under Order 1, rule 8, are taken in a case in the Court of first instance the really effective parties to the litigation are the persons who have been permitted to sue, or be sued, on behalf of, or for the benefit of all the persons equally interested with them, and that thereafter the suit proceeds in a representative character, it being always open to the other persons interested, or some of them, to apply under sub-rule (2) and put an end to their representation by the persons appointed under sub-rule (1) and have themselves placed on the record as effective parties. But so long as this is not done, the persons appointed under sub-rule (1) are the only necessary parties for the conduct of the suit and the others need not be shown as parties at all, or if they are so shown, it is done merely for facility of reference and with a view to have a record of the persons who are to be ultimately bound by the decree. This being the correct legal position, if any one of the latter class dies it is obviously unnecessary to substitute his legal representatives on the record. So far as proceedings in the trial Court are concerned this was clearly laid down

(1) (1924) I. L. R. 5 Lah. 429. (2) (1924) I. L. R. 5 Lah. 432.

in *Ram Diyal* v. *Mahomed Raju Shah* (1), and *Udmi* v. *Hira* (2), the correctness of both of which has not been impeached by Mr. Kishan Dayal. He, however, contends that the position is materially different in a case, in which proceedings under Order 1, rule 8, had not been taken in the trial Court and each of the persons shown as defendants on that Court's record had secured a decree in his favour. It is urged that in such a case proceedings under Order 1, rule 8, cannot be taken for the first time at the appellate stage. In my opinion, this argument can not be supported either by the wording of the Code or on general principles. Under section 107 of the Code, the appellate Court has the power to take proceedings under Order 1, rule 8, and pass appropriate orders in cases in which it is satisfied that there are numerous respondents to the appeal, whose interests are identical and that it is desirable that some of them be selected to defend the appeal on behalf, and for the benefit of all. In such a case an appellate Court has as much authority as a Court of first instance to hand over the conduct of the case to certain named persons, subject, of course, to the necessary procedure as to notice etc. being followed, and from that stage it is these persons and they alone who become the really effective parties to the appeal.

The principle which has found legislative recognition in Order 1, rule 8, is an exception to the general rule that all persons interested in a dispute should be before the Court, so that it may be able to do complete justice between them after affording them proper opportunity of being heard in support of their respective contentions. "But", as observed by Lord

(1) 46 P. R. 1919. (2) (1920) I. L. R. 1 Lah. 582.

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Macnaghten in the *Duke of Bedford* v. *Ellis* (1), while dealing with the corresponding provision in the English Judicature Act (Order XVI, rule 9) " when the parties were so numerous that you never could 'come at justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience : for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff (or the defendant) proposed to represent." Equally expressive language was used by Jessel M. R. in *Commissioners of Sewers of the City of London* v. *Gellatly* (2), " where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number, some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted." As pointed out by Amir Ali and Woodroffe in their Commentary on the Code of Civil Procedure (2nd Ed., page 533), on the authority of the decision of the House of Lords in *Jenkins* versus *Robertson* (3), " the great risk from abatement, and the inconvenience and the expense involved in a great number of persons being parties, led the Equity Courts (in England) to recognize the representative

(1) 1901 A. C. 1, 8. (2) (1876) L. R. 3 Ch. D. 610, 615.
(3) (1867) L. R. 1 H. L. Sc. 117.

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system, as it was not inconsistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class might, if fairly and honestly conducted, bind or benefit the whole class." If this is the principle on which the rule is based, I fail to see, why its applicability should be confined to proceedings in the trial Court alone, and why the appellate Court should be debarred from resorting to these salutary provisions, if in a particular case it is just and proper to do so. In my judgment, the mere fact that a decree had been passed in favour of all the respondents, before an application under Order 1, rule 8, is made, does not make any difference at all, though it must be admitted that an appellate Court will be chary to take action if an application under the rule had not been made in the trial Court, or if made, had been rejected.

For the foregoing reasons I think with all deference, that *Wali Muhammad* v. *Barkhurdar* (1) (on which *Rup Chand* v. *Bunyad Ali* (2) and all subsequent rulings are based) was not correctly decided. In my opinion the correct law is that where there are numerous respondents, some of whom have been allowed under Order 1, rule 8, to represent the others, the appeal does not abate if one of those persons, who are represented by the others, dies and the legal representatives of the deceased are not brought on the record within time; but the appeal abates if any one of the persons appointed to represent the others dies and his legal representatives are not so impleaded.

Coming now to the merits, the plaintiff's case is that she is the owner of the entire site of *Mohalla* Kishen Ganj, portions of which are held by the

(1) (1924) I. L. R. 5 Lah. 429. (2) (1924) I. L. R. 5 Lah. 432.

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Mohalladars as permanent tenants under her, as decided by their Lordships of the Privy Council in *Mussammat Afzal-un-Nisa and others* v. *Abdul Karim and others* (1). She alleges that a short time before the suit the *Mohalladars* took possession of three *chabutras* (marked Nos. 1, 2, and 3 on the plan) belonging to her, on which they have unlawfully constructed *saibans* and that they have also taken wrongful possession of a shop No. 4 and a *baithak* No. 6. She accordingly prayed that possession of these properties be restored to her.

The defendants pleaded that the *Mohalladars* were permanent tenants of the sites underneath the properties in suit, that the structures in question had been put up many years ago, that the plaintiff and her predecessors-in-title had full knowledge of this, and that she is now estopped from maintaining the suit. In support of their plea of permanent tenancy they pleaded an oral agreement.

The learned Subordinate Judge has decreed the plaintiff's suit with regard to shop No. 4, but has dismissed it with regard to the *chabutras* and *saibans* Nos. 1, 2 and 3 and the *baithak* No. 6.

On appeal it is contended by Mr. Mehr Chand on behalf of the plaintiff-appellant that the question, whether the defendants were the permanent tenants of the site of the *chabutras* Nos. 1, 2, and 3 and the *baithak* No. 6, is *res judicata* by reason of the decision of Mr. Coldstream, District Judge, in C. A. No. 153 of 1920 decided on 8th March, 1920, between the present parties. After examining the pleadings in the two cases and the judgment of the learned District Judge, I am of opinion that the contention is

(1) 81 P. R. 1919 (P. C.).

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without force. The previous suit was instituted by the present defendants as representing the *Mohalladars* for a declaration that they were the *owners* of the sites in question. They failed to substantiate this claim and it was held that the sites in question belonged to the present plaintiff. Mr. Mehr Chand contends that in that case the defendants should have put forward an alternate claim on the ground of permanent tenancy, and as they had omitted to do so, the plea is not open to them now, under Explanation IV of section 11 of the Code of Civil Procedure. But before the rule of *res judicata*, as embodied in section 11 of the Code, can be made applicable it must be established that the parties have been "*litigating under the same title*" in both the suits. As stated already the previous suit was based on the ground that the present defendants were the *owners* of the property. In the present suit they admit that ownership vests in *Mussammat* Afzal-un-Nisa, plaintiff, and that they are holding these sites under her, but they claim that their status is that of permanent tenants and not tenants-at-will. It is obvious that the claims in the two suits are based upon wholly different titles and for this reason the provisions of section 11 are not applicable. The parties to the two suits are no doubt the same but the *capacity* in which they appear is different. Various rulings of this Court and other Courts have been cited before us, but it is not necessary to discuss them in detail as the decision in each case proceeded upon its own peculiar facts. There is no doubt as to the governing rule which is well settled and which was stated by Chief Justice de Grey in the leading case of the *Duchess of Kingstone* (1) as follows:—"A verdict against a

(1) 2 Smith's Leading Cases 731, 759.

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man suing in one capacity will not stop him when he sues in another distinct capacity, *and, in fact, is a different person.*" I hold, therefore, that the defendants are not barred by Explanation IV of section 11 from pleading that they are permanent tenants of the sites in question.

But while this is so, the defendants have clearly failed to produce any evidence, worth the name, to substantiate their claim that they are permanent tenants of the sites in dispute. In the written statement they pleaded that the permanent tenancy was created by an oral agreement. There is, however, not a tittle of evidence on the record that any such agreement was ever entered into. It was urged, that permanent tenancy should be inferred from long user of the sites by the defendants and from the surrounding circumstances. But no such circumstances have been pointed out to us and mere user does not by itself create a permanent tenancy. I must, therefore, hold that the defendants have failed to prove that they are permanent tenants of any of these sites.

The next question which has been debated before us is whether the plaintiff is estopped from evicting the defendants from the *chabutras* and the *baithak* in dispute. As regards the *chabutras* it is admitted that they belong to the plaintiff. All that is claimed on behalf of the defendants is that they have been occasionally using them for the purpose of saying prayers, and that they have constructed *saibans* on them. These facts, however, are not sufficient to create any estoppel against the plaintiff. The *saibans* were constructed in 1914 and are not buildings of a permanent character. The plaintiff is a *parda nashin* lady and it is not alleged that she was aware of what the defendants were doing at the

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time. Litigation relating to the *chabutras* and *saibans* started in 1918, and since then the plaintiff has been contesting the rights of the defendants to use the *chabutras* or build the *saibans*. In my opinion, the plea of estoppel *qua* properties Nos. 1, 2, and 3 cannot be sustained, and disagreeing with the finding of the lower Court I hold that the plaintiff is entitled to possession of the *chabutras*. The defendants can, of course, remove the materials of the *saibans*, which they have constructed on them, within six months from to-day.

The case relating to the *baithak* No. 6 stands on a different footing. The findings are that this *baithak* has existed on the present site for many years. It was certainly there in 1901. Some witnesses whose evidence was accepted by the trial Judge as true and which was not challenged by Mr. Mehr Chand before us, have deposed that they had been seeing the *baithak* for the last 40 or 50 years. Further, there is the important fact that when this *baithak* fell down 6 or 7 years before the present suit, it was rebuilt by the defendants at their own expense. It is common ground between the parties that possession of the *baithak* has been all along with the defendants and that they have been using it whenever they needed it. During all this long period, the plaintiff and her predecessors-in-title have stood by and have raised no objection whatever. In these circumstances, I am of opinion that the learned Subordinate Judge was right in holding that the plaintiff is estopped by her acts and conduct from claiming possession of the *baithak*.

The result is that this appeal must be accepted and the decree of the lower Court modified by passing

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a decree in favour of the plaintiff-appellant for possession of the *chabutras* Nos. 1, 2 and 3, the defendants being allowed six months from to-day within which they can remove the materials of the *saibans*. The suit as regards the *baithak* No. 6 is dismissed. The decree as regards shop No. 4, of course, stands.

Having regard to all the circumstances I would leave the parties to bear their own costs in both Courts.

HARRISON J.

HARRISON J.—I agree. On re-consideration I am of opinion that the view taken on the question of abatement by the late Martineau J. and myself in *Rup Chand* v. *Bunyad Ali* (1) was wrong.

A. N. C.

Appeal accepted in part.

APPELLATE CIVIL.

Before Broadway and Abdul Qadir JJ.

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July 3.

MELA MAL AND ANOTHER (PLAINTIFFS) Appellants

versus

BISHEN DAS AND OTHERS (DEFENDANTS) Respondents,

Civil Appeal No. 140 of 1931.

Civil Procedure Code, Act V of 1908, Order XXXVIII, r. 5—Attachment before judgment by Civil Court in British India of property in Kashgar (China)—whether valid.

The plaintiffs sued on the basis of a partnership between them and the defendants which included a business at Kashgar (in China). Under Notification No. 2058-G of 4th October 1920 (Order in Council published in *Gazette of India*, dated 9th October 1920) the Court of the Consul-General at Kashgar is deemed to be that of a District Judge and the Code of Civil Procedure and the other Indian enactments relating to the administration of Civil Justice and to Insolvency

(1) (1924) I. L. R. 5 Lah. 432.