

defendant No. 1, and yet the learned Judge has passed a decree that they be divided among the three brothers. It will thus be seen that the case has been very carefully handled and must be sent back for re-trial.

I would accordingly accept the appeal, set aside the decree of the Senior Subordinate Judge and remand the case for trial and decision in accordance with law. * * * * *

Court-fee on this appeal will be refunded; other costs will be costs in the cause.

A. N. C.

*Appeal accepted.
Case remanded.*

APPELLATE CIVIL.

Before Broadway C. J. and Abdul Qadir J.

BHOLA RAM (DEFENDANT) Appellant

versus

ARJAN DAS AND OTHERS

(PLAINTIFFS)

NANAK CHAND AND OTHERS

(DEFENDANTS)

} Respondents.

Civil Appeal No. 2215 of 1926.

*Civil Procedure Code, Act V of 1908, Section 105:
Appeal from decree—Order setting aside abatement of suit not embodied therein—whether correctness of—can be re-agitated in the appeal.*

The surety-defendant died in April 1921 during the pendency of the suit. An *ex parte* decree passed against his estate in June 1921 was set aside and, on plaintiff's application, dated October 1921, to implead deceased's minor sons, the trial Judge concluded that the abatement should be set aside and, after hearing pleas by the *guardian ad litem*, proceeded to pass a decree in the suit against the estate of the deceased surety as well, without making any further reference therein to the abatement which had been set aside.

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Held, that the question of abatement could not be reopened on appeal.

Mohamed Nuru Amin v. Manohar Saran Deb Mohanta (1), and *Sayma Bibi v. Madhusudan Mohanta* (2), followed.

Hem Kanwar v. Amba Parsad (3), dissented from.

First Appeal from the decree of Bhagat Jagan Nath, Senior Subordinate Judge, Gurdaspur, dated the 12th June, 1926, decreeing the plaintiffs' suit with costs against defendants 4 and 5.

DIWAN MEHR CHAND and BADRI NATH, for Appellant.

MEHR CHAND MAHAJAN and HEM RAJ MAHAJAN, for Respondents 1 to 3; and DIN DAYAL KAPUR, for Respondents 5 and 6.

BROADWAY C.J.

BROADWAY C. J.—A preliminary point is taken in this appeal to the effect that the matter raised in the first ground of appeal relating to an order passed by the Court below setting aside an abatement, is not open to appeal in this Court. The facts briefly are that one Nanak Chand executed a bond in favour of Arjan Das and others for Rs. 5,500. Bija Ram signed this bond as a surety. Arjan Das and others were compelled in 1920 (the bond having been executed on the 1st December 1913) to sue Nanak Chand and Bija Ram for the amount due on the bond which amounted to Rs. 6,940. On the 17th June 1921 an *ex-parte* decree was passed against Nanak Chand and Bija Ram as they failed to put in an appearance. This was subsequently set aside as against Bija Ram only on the ground that Bija Ram had died on the 4th April 1921. The fact of Bija Ram's death had only come to the knowledge of the plaintiffs on the 4th October 1921.

(1) 1925 A. I. R. (Cal.) 473. (2) (1925) I. L. R. 52 Cal. 472.

(3) (1900) I. L. R. 22 All. 430.

and within a fortnight of that date the plaintiffs put in an application asking that Bija Ram's representatives be brought on the record in his place. This application was granted and in due course a decree was passed against Bija Ram's estate represented by his four sons. Subsequent to this it was found necessary to set aside the decree as it was discovered that two of the sons were minors and they were allowed through their *guardian ad litem* to put in pleas. They thereupon again pleaded that the suit had abated on the death of Bija Ram and should therefore, be dismissed. On the merits they had practically nothing to say. The trial Court carefully examined the circumstances in which the plaintiffs made their application in October 1921 and came to the conclusion that the abatement should be set aside—a conclusion which on the merits appears to be perfectly sound. It then in the same judgment proceeded to deal with the remaining issues in the case and granted the decree against the estate of Bija Ram. In the present appeal in the first ground the correctness of the decision of the trial Court on the question of abatement is attacked.

Mr. Mehr Chand Mahajan objected that this matter could not be re-opened and in support of his contention referred to the provisions of section 105 of the Civil Procedure Code and a decision of the Calcutta High Court *Mohamed Nuru Amin v. Manohar Saran Deb Mohanta* (1), where it was held that an order setting aside an abatement and allowing substitution of the heirs of a deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before, or simul-

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taneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of section 105. Mr. Mehr Chand Dewan placed his reliance on *Hem Kanwar v. Amba Parsad* (1) a decision of a Single Judge which certainly supports his view. This case was however specifically referred to in the Calcutta case and not followed. I note that in the Allahabad case the setting aside the abatement formed a part of the decree whereas no reference whatever is made to the question of abatement in the decree now under appeal. Mr. Mehr Chand Dewan further urged that inasmuch as the authority relied upon by him appeared in an authorised report and *Mohamed Nuru Amin and others v. Manohar Saran Deb Mohanta and others* (2) appeared in an unauthorised report we should give preference to the Allahabad case. This is a matter which I do not think it necessary to discuss for I find that the same view was taken by a Division Bench of the Calcutta High Court in *Sayma Bibi v. Madhusudan Mohanta* (3) where the Allahabad authority was also considered and not followed.

In my opinion the view taken by the Calcutta Court is a correct one and this question of abatement cannot be agitated before us. Mr. Mehr Chand Dewan had nothing further to say on the merits and the appeal is accordingly dismissed. In the circumstances, however, I would leave the parties to bear their own costs.

ABDUL QADIR J.

ABDUL QADIR J.—I agree.

N. F. E.

Appeal dismissed.

(1) (1900) I. L. R. 22 All. 490. (2) 1925 A. I. R. (Cal.) 473.

(3) (1925) I. L. R. 52 Cal. 472.