The appeal fails and is dismissed with costs.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Coldstream and Currie JJ.

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July 21.

RAM DITTA AND ANOTHER (PLAINTIFFS) Appellants

versus

SHAMA AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 62 of 1927.

Civil Procedure Code, Act V of 1908, Order XXII, rules 4 and 9: Suit for declaration against village proprietary body that a certain area of land is not part of the Shamilat—Abatement of suit—death of some of the defendants—failure to implead legal representatives—whether abatement in toto.

In the course of proceedings for the partition of the *Shamilat Deh* two members of the village proprietary body sued the others for a declaration that an area of five *Biswas* of land in their possession was their exclusive property; and were granted this declaration on 14th December 1925; but on appeal the decree was held to be a nullity, the failure of the plaintiffs to implead the representatives of certain defendants, including one Shama, who had died during the pendency of the suit, having caused it to abate *in toto*. It was contended in second appeal that as the proprietors were tenants-in-common of the village *Shamilat* with separate and definite shares in it, the rights of the remaining defendants could have been determined without affecting the rights of the representatives of the deceased proprietors.

Held, that the fact, that the defendants' interests in the subject matter of a suit are defined and separable, is one which may be of vital importance in deciding whether that suit abated as a whole when one of the defendants died, but it is impossible to formulate a rule of general application, and the question whether abatement takes place as a whole or only in respect of the interest of the party who had died, must depend upon the nature of each case. *And* as in the

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present case, if the decree were allowed to stand against some of the proprietors only, it might result in two inconsistent decrees, the lower appellate Court had rightly held that the suit should stand dismissed as against all the defendants.

Shah Muhammad v. *Karam Ilahi* (1), followed.

Sant Singh v. *Gulab Singh* (2), referred to.

Second appeal from the decree of R. B. Lala *Ganga Ram, Soni, District Judge, Ludhiana, dated the 8th October, 1926, reversing that of* Maulvi *Barkat Ali Khan, Senior Subordinate Judge, Ludhiana, dated the 14th December, 1925, dismissing the plaintiffs' claim.*

NAWAL KISHORE, for Appellants.

MOOL CHAND, for Respondents.

COLDSTREAM J.

COLDSTREAM J.—On the 15th December 1924 Ram Ditta and his brother Chetu, Jat, members of the proprietary body of the village Birsal in Jagraon *Tahsil* brought a suit against the other proprietors for a declaration that an area of five *Biswas* of land in their possession was their exclusive property. They had preferred this claim in the course of proceedings for the partition of the *Shamilat Deh*, and had been referred to the Civil Court by the Revenue Authorities.

The Senior Subordinate Judge, Ludhiana, granted the declaration on the 14th December, 1925. Before this decree was passed, however, three of the defendants, members of the village proprietary body, had died—namely, Shama (in August 1925), Bhana (in December 1925) and Partapa (several months before the decree).

(1) (1922) 65 I. C. 121. (2) (1929) I. L. R. 10 Lah. 7 (F. B.).

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In their appeal against the decree the defendants took the ground that as no application had been made under Order 22, rule 4 of the Procedure Code for making the legal representatives of the deceased defendants parties to the suit, the suit had abated and the decree was therefore a nullity. The District Judge found this contention well founded, accepted the appeal and dismissed the suit on the 8th October, 1926.

On the 6th December 1926 Ram Ditta and Chetu submitted an application under Order 22, rule 9, Civil Procedure Code, praying for the abatement to be set aside. This application was dismissed by the District Judge on the 4th March, 1927.

There are before us now two appeals by Ram Ditta and Chetu, one (No. 62 of 1927) against the dismissal of their appeal by the District Judge and the other (No. 1573 of 1927) against the rejection of their application under Order 22, rule 9.

I deal first with Appeal No. 1573.

Bhana died after arguments had been heard, and his death does not affect the validity of the judgment (rule 6 of Order 22).

As regards Partapa it was alleged before the District Judge that he died at a distance from the village and the defendants learnt of his death during the arguments in appeal, and also that his legal representatives, that is to say, his brothers Pohla, Lekal and Bhagu were already impleaded among the defendants. As regards Shama the appellants' excuse was that he died heirless, the claim of one Kishen Singh to be his heir being disputed.

There is no proof that Partapa's brothers are his legal representatives, but it may be presumed that they are, for the defendants have not impleaded any other

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person as his representative. It is, however, to be noted that when the appeal was heard by the District Judge, it does not appear to have been asserted that Partapa's only representatives were his brothers.

The allegation that Shama has no heir appears to have been an invention for the purpose of the appeal for it is clear from the District Judge's order that all that was urged before him in respect of the omission to implead Shama's representatives was that the appellants came to know of his death after a long time.

Admittedly no application for impleading any person as his heir was made until December, 1926. The District Judge's rejection of the application to set aside the abatement was, in my opinion, proper. I would dismiss the appeal No. 1573 with costs accordingly.

This disposes of Mr. Nawal Kishore's argument in appeal No. 62 of 1927, so far as it contests the correctness of the District Judge's order rejecting the appellants' application under Order 22, rule 4 of the Procedure Code.

The only question remaining for decision in appeal No. 62 is whether the District Judge was right in holding that the suit abated as a whole in consequence of the omission to implead Shama's representative. In support of his contention that the decision was wrong Mr. Nawal Kishore relies upon this Court's judgment in *Sant Singh* v. *Gulab Singh* (1), delivered after the judgment under appeal. His argument is simply that as the proprietors are tenants-in-common of the village *Shamilat*, with separable and definite shares in it, the rights of the remaining de-

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fendants could have been determined without affecting the rights of the representatives of the deceased proprietors.

I am unable to see force in this argument. No doubt the fact that the defendants' interests in the subject matter of a suit are defined and separable is one which may be of vital importance in deciding whether that suit abated as a whole when one of the defendants died, but, as pointed out by the learned Chief Justice in *Sant Singh* v. *Gulab Singh* (1), it is impossible to formulate a rule of general application (the question there was one of abatement of an appeal but the same principles apply in the case of a suit) and the question whether abatement takes place as a whole, or only in respect of the interest of the party who had died, must depend upon the nature of each case.

In *Sant Singh* v. *Gulab Singh* (1), X had sold immoveable property to A, B, C and D in equal shares. The vendor's reversioners sued for a declaration that the sale would not affect their reversionary rights. The suit was dismissed and the reversioners appealed. A died and the appeal abated as against his interest. It was held by the Full Bench that the appeal could proceed against B, C and D.

It was pointed out that there might be one decree as to A's share and another of an inconsistent character governing the shares of the other vendees, but as the decree would not affect the same property there would be no difficulty in giving effect to them. If the decision went one way A's representatives would ultimately become tenants-in-common with the vendees, if it went the other they would be tenants-in-common with

(1) (1929) I. L. R. 10 Lah. 7 (F. B.).

the reversioners. But A's title in his undivided fourth share would not be affected.

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The present case is wholly different. The suit could not have been properly framed, and could not have proceeded as against some of the proprietors only. If the appeal had been entertained by the District Judge and decided in plaintiffs' favour as between them and the remaining defendants only, the result would have been two inconsistent decrees, one to the effect that the five *Biswas* in suit were part of the whole *Shamilat*, partible at the instance of Shama's representative, the other declaring that this area was not part of the *Shamilat* so partible. The inconsistency would obviously be not merely technical, for the adjudication in favour of the plaintiffs in appeal would reduce the whole partible area in which Shama's representative had a share (although no decree had been passed against him) and would force him to accept, as part of his unascertained share in the whole *Shamilat*, a piece of land which by reason of its locality and occupation by the plaintiffs might be worthless to him, and might deprive him of his right to claim, or prevent his obtaining in one single piece of land the share to which he was entitled.

I am, therefore, of opinion that in this case the learned District Judge rightly followed *Shah Mohammad* v. *Karam Ilahi* (1), the correctness of which has not, so far as I am aware, been questioned, and would dismiss the appeal No. 62 of 1927 with costs.

CURRIE J.

CURRIE J.—I agree.

N. F. E.

Appeal dismissed.

(1) (1922) 65 I. C. 121.