

LETTERS PATENT APPEAL.*Before Tek Chand and Abdul Rashid JJ.*

GANGA (PLAINTIFF) Appellant

versus

GOBIND DAS AND OTHERS (DEFENDANTS)

Respondents.

1934

March 6.

Letters Patent Appeal No. 100 of 1927.

*Civil Procedure Code, Act V of 1908, Order XXII, rule 4 :
Abatement—whether automatic on the death of the sole con-
testing respondent—Appeal heard and decided in ignorance of
death of respondent—Application for review by the legal re-
presentatives of the deceased respondent.*

P, the sole contesting respondent in a Letters Patent Appeal, died on 23rd August 1932. In ignorance of this fact, the appeal was heard and decided in favour of the appellant on 6th February 1933. On 8th May 1933, *G. D.* one of the sons of *P.* presented a petition for review of the judgment of the Letters Patent Bench, accompanied by an application to have himself and his two brothers brought on the record as the legal representatives of *P.* Their application was granted subject to just exceptions. The petition for review was subsequently accepted and it was ordered that the original Letters Patent Appeal be reheard by a Division Bench, which was also to decide the question whether the appeal had abated “ by reason of the appellant’s failure to implead the legal representatives of the deceased *P.* within 90 days of his death.” On the matter coming up before the Division Bench, counsel for the appellant contended that the application of *G. D.* for substitution of his name and the names of his two brothers in place of *P.*, having been granted, the representatives of the deceased were actually brought on the record, and therefore the appeal was properly constituted and should be heard and decided on the merits.

Held, (repelling the contention) that if a respondent dies and his legal representatives are not impleaded within time, the appeal abates automatically as against him on the expiry of the statutory period and it is not necessary for the Court to pass a formal order declaring that the appeal had abated.

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It is, however, open to the appellant to have the abatement set aside on a proper application made under Order XXII, rule 9, Civil Procedure Code, but no such application was made in this case.

Held also, that the sole object of the review petition and the accompanying application for substitution was to have it declared that the Letters Patent Appeal had actually abated in November 1932 and the order accepting it had been passed in ignorance of the real facts and was a nullity in the eye of the law, and as this was found to be the case, the appeal must be dismissed.

Sirinivasulu Chetti v. Palamkula Guruviah (1), referred to.

Appeal under clause 10 of the Letters Patent from the decree passed by Jai Lal J. in C. A. No. 2975 of 1926 on 7th April, 1927, affirming that of Sardar Sewaram Singh, District Judge, Hoshiarpur, dated 26th October, 1926, (which reversed that of Sayed Zulfikar-ud-Din, Subordinate Judge, 3rd Class, Hoshiarpur, dated 20th March, 1926), dismissing the plaintiff's suit.

FAKIR CHAND, for Appellant.

S. L. PURI and J. R. AGNIHOTRI, for Respondents.

TEK CHAND J.

TEK CHAND, J.—This appeal arises out of a suit brought by Ganga, plaintiff, under section 12 of the Punjab Act II of 1913 for a declaration to the effect that a certain area of land was mortgaged by the plaintiff and defendants 2 to 6 in favour of Phoga, defendant No. 1, and that it was liable to be redeemed on payment of a certain sum of money. On second appeal, a learned Judge of this Court sitting in Single Bench dismissed the suit, leaving the parties to bear their own costs. The plaintiff preferred an appeal under clause 10 of the Letters Patent, which was

heard and accepted by the learned Chief Justice and Mr. Justice Broadway on the 6th February, 1933. It appears, however, that Phoga, the sole contesting respondent in the appeal, had died on the 23rd August, 1932, long before the appeal came on for hearing, and no application to bring his representatives on the record had been made within the time prescribed by law. The fact of his death does not appear to have been brought to the notice of the Bench at the time of the hearing of the appeal, and it was decided in ignorance of it.

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On the 8th May, 1933, Gobind Das, who is one of the three sons of Phoga, presented a petition for review of the judgment of the Letters Patent Bench and along with this application he filed an application under Order 22, rule 4, Civil Procedure Code, praying that he and his two brothers, Basanta and Chaukas, be brought on the record as the heirs and legal representatives of the deceased Phoga. The application for substitution was granted by the learned Chief Justice subject to just exceptions, and he also admitted the review petition to a hearing. The matter came up before the learned Chief Justice for final disposal on the 17th November, 1933, as before that date Broadway J. had left this Court. Before him, it was admitted by the counsel for the plaintiff-appellant that Phoga had died on the 23rd August, 1932, as stated in the petition for review and that the judgment of the Letters Patent Bench having been passed against a dead person was a nullity. The learned Chief Justice accordingly accepted the application for review and directed that the original Letters Patent Appeal be heard by a Division Bench, "who will decide *inter alia* the question whether the appeal had abated by reason of the failure of the appellant to implead the

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legal representatives of the deceased Phoga ” within 90 days of his death.

On the appeal coming up before us for final disposal Mr. Fakir Chand, counsel for the appellant, has not attempted to show that there was any sufficient cause for not making an application to implead the heirs of Phoga, deceased, within the period prescribed by law, nor has he made any application for setting aside the abatement. He has, however, urged that Gobind Das, son of Phoga, having himself applied on the 8th May, 1933, for substitution of his name and the names of his two brothers in place of Phoga, deceased, and this application having been granted by the learned Chief Justice, the representatives of the deceased have been actually brought on the record of the appeal and therefore the appeal was properly constituted and should be heard and decided on the merits. In my opinion this contention is without force and must be rejected. It is settled law that if a respondent dies and his representatives are not impleaded within time, the appeal abates automatically as against him on the expiry of the statutory period and it is not necessary for the Court to pass a formal order declaring that the appeal has abated. It is, however, open to the appellant to have the abatement set aside on a proper application made under Order 22, rule 9, Civil Procedure Code. In this case, however, no such application was made. As stated already Phoga, deceased, was the sole contesting respondent in the appeal, the other respondents being merely *pro forma* parties having the same interest in the litigation as the appellant. The result, therefore, was that the appeal had abated in its entirety in November, 1932, and should have been dismissed as such. It appears, however, that these facts were not within the

knowledge of counsel or the Court at the date of hearing, and the appeal was heard on the merits and accepted. When Phoga's sons came to know of the decision it became necessary for them to take steps to have the judgment reviewed, and for this purpose and this purpose alone, one of them applied on the 8th May, 1933, that he and his brothers be brought on the record. A perusal of the review petition and the accompanying application for substitution clearly shows that the sole object of Gobind Das in taking these proceedings was to have it declared that the Letters Patent Appeal had actually abated in November, 1932, and the order accepting it had been passed in ignorance of the real facts, and was a nullity in the eye of the law. By no stretch of imagination, therefore, could the granting of this application be considered to be tantamount to an order setting aside the abatement. Indeed, the learned Chief Justice, while allowing the review petition remarked that the question whether the appeal had abated was not being decided by him but was for decision by the Bench which would re-hear the appeal. In this connection reference may be made to *Sirinivasulu Chetti v. Palamkula Guraviah* (1), the facts of which are very similar to those of the present case.

I would accordingly hold that this appeal had abated in November, 1932, and must be dismissed. Having regard to all the circumstances the parties shall bear their own costs in this Court.

ABDUL RASHID J.—I agree.

P. S.

ABDUL
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Appeal dismissed.

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