

MISCELLANEOUS CIVIL.

Before Young C. J. and Din Mohammad J.

BAKSHISH SINGH AND OTHERS (DEFENDANTS)

Petitioners

versus

MAKHAN SINGH AND OTHERS (PLAINTIFFS)

Respondents.

Civil Miscellaneous No. 747 of 1934.

In Civil Appeal No. 3094 of 1927 (1).

Abatement — Death of some of the respondents during pendency of appeal — Shares of the respondents specified in the mutation — whether appeal abates in toto.

The property in dispute was left by *Mst. M.* the widow of *B. S.* On her death the entire property held by her was mutated in the names of the reversioners of *B. S.* in specified shares. The plaintiffs instituted the present suit claiming the entire estate left by *Mst. M.* on the *Chundavand* rule of succession, to the exclusion of the defendants, the other reversioners. Their suit was dismissed by the Subordinate Judge but was decreed by the present Bench of the High Court on appeal. The present application for review was filed on the ground *inter alia* that two of the respondents had died long before the hearing of the appeal, and as their legal representatives had not been brought on the record at all, the whole appeal had abated.

Held, that as the shares of the parties in the land in suit had been specified in the mutation recorded after the death of *Mst. M.*, the appeal did not abate *in toto*, but only to the extent of the shares of the deceased respondents whose legal representatives were not impleaded.

Sant Singh v. Gulab Singh (2), and *Baldeo Singh v. Ramji Das* (3), relied upon.

Application for review of the judgment and decree of Young C. J. and Din Mohammad J., passed in Civil Appeal No. 3094 of 1927, decided on 13th

(1) See page 742 *supra*.

(2) (1929) I. L. R. 10 Lah. 7 (F. B.).

(3) (1930) 124 I. C. 675.

1935

BAKHSISH
SINGH
v.
MAKHAH
SINGH.

July, 1934, reversing that of Lala Diwan Chand, Subordinate Judge, 1st Class, Lahore, dated the 26th October, 1927, and granting the plaintiffs a decree.

NAND LAL and L. C. MEHRA, for Petitioners.

J. L. KAPUR, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This is an application for review of the judgment and decree passed by us in Civil Appeal No. 3094 of 1927, on the 13th July, 1934 (1).

The dispute in this case relates to the property left by *Mussammat* Malan, widow of Bulaqa Singh. On her death the entire property held by her was mutated in the names of Bulaqa Singh's reversioners in specified shares. This property had originally descended from Jodh Singh who had married three wives, *Mussammat* Desan, *Mussammat* Jaunsan and *Mussammat* Jian. *Mussammat* Jian left two sons who died issueless. The sons by the other two wives of Jodh Singh, however, had sons and the present dispute lies between their descendants.

The deceased Bulaqa Singh belonged to the group of *Mussammat* Desan's progeny to which group the plaintiffs in this case also belong. The defendant belonged to the group of *Mussammat* Jaunsan's progeny. On the 5th July, 1924, the plaintiffs instituted a suit against the defendants laying claim to the entire property left by *Mussammat* Malan on the basis of *Chundawand* rule of succession. They alleged that they along with the defendants were in joint possession of the land measuring 1,653 *kanals*, 18 *marlas* situate at village Rosa in the district of Sheikhpura and in separate possession of the land measuring 645 *kanals*, 16 *marlas* at a village of the same name

(1) See page 742 *supra*.

in the district of Lahore while the defendants were in unlawful possession of 629 *kanals*, 18 *marlas* of land at the former village. On this basis they claimed a mere declaration as regards 1,653 *kanals*, 18 *marlas* in the district of Sheikhpura, and 645 *kanals*, 16 *marlas* in the district of Lahore, and sought possession of 629 *kanals*, 18 *marlas* of land in the district of Sheikhpura. Their suit was dismissed by the Subordinate Judge, but was decreed by us on appeal with the result that the plaintiffs were given possession of 629 *kanals*, 18 *marlas* of land while exclusive title to the rest of the land was upheld.

On the 10th October, 1934, the present application for review of our judgment and decree was made by the respondents in the appeal before us on the ground, among others, that, long before the hearing of the appeal, two of the respondents, namely, Fauja Singh and Karam Singh, had died, and as their legal representatives had not been brought on the record at all, the whole appeal had abated and could not, therefore, be heard or accepted on the 13th July, 1934. Notice was issued to the appellants on this ground alone. It is to be regretted that this matter was not brought to our notice at the hearing of the appeal, which has necessitated this further waste of time.

Counsel for the petitioning respondents strenuously contends that as no partition of the land had taken place among the parties to the suit, the effect of not bringing the legal representatives of the deceased respondents on the record was that the whole appeal abated and that it should have been dismissed *in toto* on that ground. Counsel for the successful appellants on the other hand maintained that as the shares of the defendants in the property in suit had been well

1935

BAKHSISH
SINGH
v.
MAKHAN
SINGH.

1935

BAKSHISH
SINGH
v.
MAKHAN
SINGH.

defined, the appeal in these circumstances abated *qua* those respondents only whose representatives were not impleaded and not *qua* others against whom the decree made by us is quite valid and binding. In support of his contention he relies on *Sant Singh v. Gulab Singh* (1) and *Baldeo Singh v. Ramji Das* (2). In *Sant Singh v. Gulab Singh* (1)—a case where X sold immovable property to A, B, C and D in equal shares, and the reversioners of X had instituted a suit for a declaration that the sale should not affect their reversionary rights after the vendor's death—the suit had been dismissed and the plaintiffs had appealed and during the pendency of the appeal one of the vendees had died whose representatives had not been brought on the record within time. It was held by a Full Bench of this Court composed of five Judges that as the interest of the deceased respondent in the subject-matter of the appeal was separate from those of the surviving respondents (the shares having been defined in the sale deed), and as it could not be said that the decree of the appellate Court, if in favour of the appellants, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal *qua* the deceased, the appeal did not abate in its entirety, but could proceed against the surviving respondents. In *Baldeo Singh v. Ramji Das* (2), *Sant Singh v. Gulab Singh* (1) was followed and it was laid down by Jai Lal J. that where the right of the deceased party was ascertained or ascertainable and was not joint with the surviving parties in the sense that they were not entitled to sue or liable to be sued in the absence of the others, then the suit or the appeal could not abate in its entirety on the death of one of the parties.

(1) (1929) I. L. R. 10 Lah. 7 (F. B.). (2) (1930) 124 I. C. 675.

The principle enunciated in these authorities appears to be based on the assumption that the plaintiff in such cases has a separate cause of action against every person who has a specified share in the property in dispute, and joins all such persons as defendants in one suit only because the ground of attack and defence being common, the law permits him to do so with a view to avoid multifariousness. In fact, he claims a separate relief against each one of them and if any one of them dies and his representatives are not impleaded, the plaintiff loses his remedy against that defendant alone and not against others. The test in such cases is whether the plaintiff will be debarred from seeking his relief against those persons in a separate suit whom he does not join in the previous suit. If so, the suit or appeal would abate *in toto* in the circumstances mentioned above. If not, the abatement will be limited to the share of those defendants only who are not on the record. If a plaintiff's suit could proceed in their absence, there is no reason why it should be dismissed *in toto* if after their death, they ceased to exist on the record.

Applying this principle to the present case, we find that the defendants' shares in the land in suit were specified in the mutation that followed *Mussamat* Malan's death and the plaintiffs could choose to oust any one of them they liked and allow those whom they did not want to disturb, to retain their shares in the land. In other words, they could lodge separate suits against each of these defendants and obtain the relief sought for. The elimination of some of them from the record should not, therefore, affect the plaintiffs' remedy against those that exist on the record and the decree passed in their favour cannot, therefore, be a nullity as against them.

1935

BAKSHISH
SINGH
v.
MAKHAN
SINGH.

1935
 BAKHSHISH
 SINGH
 v.
 MAKHAN
 SINGH.

We, therefore, accept this application for review to this extent that the dismissal of the plaintiffs' suit by the Court below against Fauja Singh and Karam Singh shall be upheld, and the plaintiffs' appeal against that portion of the decree shall stand dismissed. The rest of the decree passed by us will remain intact.

As the petitioners have succeeded only partially and were guilty of grave negligence in not raising this objection at the proper time, we will not allow them any costs of these proceedings.

P. S.

Review accepted in part.

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

RATTAN LAL AND ANOTHER (PLAINTIFFS)

Appellants

versus

ALLAHABAD BANK, LIMITED, LAHORE,
 AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1114 of 1934.

Court Fees Act, VII of 1870, section 7 (iv) (c), Art. 17 (iii) : Suit by son for declaration that joint Hindu family property mortgaged by father without necessity was not liable to sale in execution of the mortgage-decree against the father — proper court-fee.

Held, that a suit by the son of a Hindu governed by the *Mitakshara*, for a declaration that a mortgage of joint family property by the father had not been effected for legal necessity or for the benefit of the family and that the property was not liable to sale in execution of the decree obtained on foot of the mortgage against the father (*the son not having been made a party to the mortgage suit*) is governed by Art. 17 (iii), Schedule II of the Court Fees Act, and a