LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

1937

March 4.

HAYAT AND OTHERS (PLAINTIFFS) Appellants,

versus

MUTALLI AND OTHERS (DEFENDANTS) Respondents.

Letters Patent Appeal No.62 of 1936.

Civil Procedure Code (Act V of 1908) O. XLI r. 20 — Appeal — impleading among the defendants-respondents one who had died during pendency of case in trial Court — whether his representatives can be brought on the record by Appellate Court, as parties interested in the result of the appeal and whether S. 5 of the Indian Limitation Act (IX of 1908) is applicable — Abatement O. XXII r. 4 — Failure to implead the representatives of a deceased respondent having a defined share in the estate in suit — Abatement, whether partial or total.

Plaintiffs whose declaratory suit had been dismissed by the trial Court appealed to the District Judge impleading one S. among the 30 defendants as respondents, although he had died during the pendency of the suit in the lower Court. About a month after filing the appeal the mistake was discovered and appellants asked to have S's legal representatives brought on the record, the District Judge, however, held that no cause had been made out for the exercise of his discretion in the matter and that the appeal could not proceed in the absence of S's representatives and dismissed it.

Held, that under O. XLI r. 20 of the Code of Civil Procedure, an Appellate Court is empowered to implead as a respondent any person, who was a party to the suit in the Court from whose decree the appeal was preferred, and who had not been made a party to the appeal, but the condition precedent is that such person must be interested in the result of the appeal.

Therefore, if once the limitation for the appeal has expired, an Appellate Court is precluded from impleading as a respondent any person who was a party to the original suit and who has not been impleaded in the appeal, because a party against whom the right of appeal has become barred cannot be said to be 'interested in the result of the appeal.'

Held also, that S. 5 of the Indian Limitation Act does not apply to such a case.

V. P. R. V. Chockalingam Chetty v. *Seethai Acha* (1), followed.

Kunhanna Rai v. *Manakke* (2), not followed.

Held further, that where all the defendants impleaded in the case had a clearly defined interest in the suit, each being interested as a reversioner in his own share of the estate and no more, the mere fact that legal representatives of a deceased respondent were not impleaded in the appeal, would not bar the hearing of the whole appeal; only the share of the deceased respondent would be lost, but the remaining part of the estate could not be affected in any way.

Sant Singh v. *Gulab Singh* (3), per Shadi Lal, C. J., relied upon. Other case law, discussed.

Letters Patent appeal from the decree of Abdul Rashid J., passed on 22nd February, 1936, in Civil Appeal No.1366 of 1935, affirming that of Sardar *Teja Singh, District Judge, Shahpur, at Sargodha, dated 28th June, 1935, who affirmed that of* Sardar *Ata Ullah, Subordinate Judge, 4th Class, Sargodha, dated 26th February, 1934, dismissing the plaintiffs' suit for a declaration.*

CHIRANJIVA LAL AGGARWAL and KUNDAN LAL GOSAIN, for Appellants.

MEHR CHAND MAHAJAN and GHULAM MOHY-UD-DIN, for Respondents.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—This Letters Patent Appeal has arisen in the following circumstances :—

One Bakhsha, who owned a considerable amount of landed property in two villages, Mitha Lak and Dera, made two wills in favour of his daughter's sons,

(1) I. L. R. (1928) 6 Rang. 29 (P. C.). (2) 1929 A. I. R. (Mad.) 343. (3) I. L. R. (1929) 10 Lah. 7, 15 (F. B.).

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Hayat and Ali: a will of his property situated at Mitha Lak in 1909 and that of his property situated at Dera in 1911. He had a son, Jalal, living then but Jalal was a born idiot. It was provided in the wills that if Jalal ever got over his idiocy and exhibited sense, he would inherit the estate thus bequeathed to Hayat and Ali. On the 6th May, 1914, Bakhsha died, and on the 26th April, 1921, both Hayat and Ali brought a suit against Jalal for a declaration that they were the owners of the land. On the 22nd June, 1921, a decree was made in favour of Hayat and Ali to the effect that the Dera lands should be mutated in their favour at once and the Mitha Lak lands after the death of Jalal, provided that he died childless. On the 26th July, 1921, certain reversioners of Bakhsha instituted a suit for a declaration that the decree, dated the 22nd June, 1921, should not affect their rights. On the 20th February, 1922, the reversioners' suit was decreed in regard to the Dera lands only. On appeal to this Court, that decree was varied and the declaration in the reversioners' favour was extended to the whole of the ancestral property owned by Bakhsha, whether situated at Mitha Lak or at Dera and the non-ancestral property of Bakhsha, now in suit, was allowed to remain with Hayat and Ali. Jalal did not recover from his malady and died in the same morbid state of mind on the 15th July, 1930. The reversioners of Jalal alleged that he had left a will in their favour of the non-ancestral property and this gave rise to the present suit by Hayat and the three descendants of Ali, who are all minors. It was brought against 30 defendants and was for a declaration, by cancellation of the will, dated the 1st June, 1930, that the property in suit belonged to them and was in their possession

and that the defendants had no concern with it. Out of these 30 defendants, one was Salehon, son of Ahmad. He died during the pendency of the suit and was replaced on the record by his minor sons, Bakhsh and Maula, under the guardianship of their uncle, Lala. The Subordinate Judge held *inter alia* that the defendants had failed to prove any valid will in their favour but all the same dismissed the plaintiffs' suit on the ground that they had failed to prove their own title.

Against this order, the plaintiffs preferred an appeal to the District Judge and in the memorandum of appeal instead of impleading the legal representatives of Salehon, deceased, mentioned the name of Salehon himself in spite of his death. The suit had been dismissed on the 26th February, 1934, and the appeal was filed on the 22nd March, 1934. On the 21st April, 1934, this mistake came to the notice of the appellants who at once put in an application for its rectification. To this application objection was taken on behalf of the respondents on the ground that the Court had no power to implead those respondents out of time who had not been impleaded within time, and as the appeal could not proceed in their absence, it failed as a whole. The District Judge held that in spite of *V. P. R. V. Chokalingam Chetty* v. *Seethai Acha* (1) he was empowered by law to bring those respondents on the record who had not been impleaded, but as the appellants in his view had failed to make out a case for the exercise of his discretion, he expressed his inability to accede to their request. Consequently, on the admission of the appellants' counsel that the appeal could not proceed in the absence of those respondents whose names had been left out, he

(1) I. L. R. (1928) 6 Rang. 29 (P. C.).

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dismissed the appeal. The appellants then preferred a second appeal to this Court but the learned Judge before whom it came on for hearing agreed with that decision on the main points and dismissed the appeal. It is against that order that this appeal has been presented.

Counsel for the appellants has strenuously contended that, in the first place, the District Judge should have exercised his powers under Order 41, rule 20, Civil Procedure Code, and brought on the record the names of Salehon's representatives; secondly, the District Judge should have exercised his discretion in favour of the minor appellants under section 5 of the Limitation Act and should have condoned the delay in impleading the respondents who had been left out, inasmuch as the omission was accidental and had been occasioned by the existence of Salehon's name on the record, despite the fact that his legal representatives had already been impleaded in his place, and, thirdly, that, at any rate, the non-impleading of Salehon's representatives could not entail the failure of the appeal as a whole. Counsel for the respondents has re-iterated the arguments employed by the District Judge as well as the learned Judge of this Court and equally forcibly urged that none of the prayers made by the appellants could be granted and that the appeal before the District Judge could not be entertained in the absence of Salehon's representatives, inasmuch as the interests of all the respondents were joint and Salehon's representatives had obtained a decree in their favour which had concluded the whole matter.

We first take up the question of Order 41, rule 20, Civil Procedure Code. It is true that this rule enables a Court to implead as a respondent any person who was a party to the suit in the Court from whose

decree the appeal was preferred and who has not been made a party to the appeal, but the condition precedent is that he must be interested in the result of the appeal. Now, as remarked by their Lordships of the Privy Council, "giving these words their natural meaning—and they cannot be disregarded—it seems impossible to say that in this case the defendants against whom the right of appeal has become barred, are interested in the result of the appeal filed by the plaintiff against the other defendants." In the face of such a clear pronouncement, it was impossible for the District Judge to have brought Salehon's representatives on the record. The District Judge, however, thought differently, solely relying on *Kunhanna Rai* v. *Manakke* (1). We have given due consideration to the remarks made by the learned Judges in that case but we are constrained to say, with all respect, that we are not impressed by the points of distinction raised by them in getting out of the binding authority of the Privy Council judgment referred to above. That authority did not proceed on facts but was based on the interpretation of a rule of law and so long as the wording of the enactment remains as it is, the only authoritative interpretation of it is that put on it by their Lordships of the Privy Council.

We may also remark in this connection that section 5 of the Limitation Act does not come into play in this matter. The applications to which that section is applicable are clearly set forth in the section itself and unless a new rule is introduced in the Civil Procedure Code making section 5 applicable to applications made under Order 41, rule 20, or until their Lordships of the Privy Council change their view the

(1) 1929 A. I. R. (Mad.) 343.

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Courts in India are precluded from impleading as a respondent any person, who was a party to the original suit and who has not been impleaded in the appeal, if once the limitation for the appeal has expired. It may be that the minor plaintiffs may succeed in a separate suit in setting aside the decree of the Courts below on the ground of gross negligence of their next friend but that is an extraneous consideration which should not persuade us to overlook an express provision of law.

We now come to the discussion of the effect of the non-impleading of Salehon's legal representatives on the case as it stood before the District Judge. As stated above, the appellants contend that the appeal before the District Judge could proceed even without those respondents, except to the extent of their share, while the respondents urge that it could not proceed at all and that it failed *in toto* on account of the non-inclusion of Salehon's sons who had obtained a joint decree in their favour along with the other respondents. In support of their respective contentions, counsel on both sides have relied on authorities dealing with the question of abatement and so has the learned Judge of this Court, and though those authorities have no direct bearing on the matter before us, yet it may be possible to apply the principles deducible therefrom to this case by way of analogy.

The subject of abatement has been so fully discussed in the various judgments of this Court as well as of the other High Courts in India that it would be a mere act of supererogation to discuss it again at length. The main thing to be considered in this connection is the true import of Order 22, rule 4, Civil Procedure Code, which deals with the subject. Under sub-rule (1) of that rule, if one of two or more

defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, the Court, on an application made in that behalf, is empowered to cause the legal representative of the deceased defendant to be made a party and to proceed with the suit. If no application is made under sub-rule (1), the only penalty that sub-rule (3) provides is that the suit against the deceased defendant shall abate. On the letter of the law, therefore, the contention of the appellants must prevail, unless some other rule of law is violated thereby. For example, the argument that prevailed with the High Court and was approved by their Lordships of the Privy Council in *V. P. R. V. Chockalingam Chetty* v. *Seethai Acha* (1), was that the finding in favour of the defendants, who were not impleaded as respondents, enured to the benefit of those defendants also who derived their title from them and had consequently become *res judicata*. Similarly, if a decree is made jointly in favour of all the defendants and their interests *inter se* are neither separate nor separable, it may lead to two conflicting decrees if an appeal is allowed in the absence of some of the defendants in whose favour the original decree stands. In cases like these, therefore, the non-inclusion of some of the defendants as respondents must naturally result in the failure of the whole appeal. But where this is not the case and there is no danger of coming into conflict with any other recognised principle of law, there is no bar against an appeal proceeding in the absence of some of the defendants, who are not impleaded as respondents.

The leading authority of this Court on the question of abatement is *Sant Singh* v. *Gulab Singh* (2). In that case there was a joint sale in favour of four

(1) I.L.R. (1928) 6 Rang. 29 (P.C.). (2) I.L.R. (1929) 10 Lah. 7, 13 (F.B.).

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vendees and all that was said in the sale deed was that the property had been sold to the vendees in equal shares. The reversioners of the vendor brought a declaratory suit and failed. At the hearing of the appeal it was noticed that one of the vendees had died and his legal representative had not been brought on the record within time. Five learned Judges of this Court after discussing the matter most exhaustively came to the conclusion that the appeal had abated only to the extent of the deceased respondent's share in the sale. At page 13 of the Report, Sir Shadi Lal, C. J., observed :—

" It is a matter of common sense that the Court should not be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If, on the other hand, the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it."

The rule laid down in this authority was recently applied to another case reported as *Bakhshish Singh* v. *Makhan Singh* (1), where, too, the suit was partly declaratory and partly possessory, but the shares of the parties in the land in suit had been specified in the mutation recorded after the death of the last owner. We are in complete accord with the principles enunciated in these two judgments and hold that to cases like these the test laid down there is the only sound test to be applied.

We are aware that in *Mussammat Umrao Bibi* v. *Ram Kishen* (2) and *Ram Ditta* v. *Shama* (3), the

(1) I. L. R. (1935) 16 Lah. 747. (2) I. L. R. (1932) 13 Lah. 70.
(3) I. L. R. (1933) 14 Lah. 284.

decision of the learned Judges was against the appellants in those cases, but the principle underlying those judgments is the same as that laid down in *Sant Singh* v. *Gulab Singh* (1). In *Mussammat Umrao Bibi* v. *Ram Kishen* (2), it was expressly remarked that the shares of the defendants were neither separate nor separable and in *Ram Ditta* v. *Shama* (3), it was observed that on the facts of that case the suit could not have been properly framed without impleading the whole proprietary body and could not have proceeded against some of the proprietors only, and if the decree were allowed to stand against some proprietors and reversed against others, it would result in two inconsistent decrees.

Applying now the recognized test to the present case, though by way of analogy only as stated above, we find that all the defendants impleaded in the case had a clearly defined interest in the suit, their shares in the estate of Jalal, deceased, having been specified. As the succession had opened, every reversioner was interested in the estate only to the extent of his own share and no more. The suit that was instituted by the appellants, though declaratory in form, was possessory in effect. It was as if each one of the defendants ran the risk of being disturbed *qua* his own share of the property and relief was claimed against him to that limited extent only. The appellants could have even compromised the suit with some of the defendants if they so desired and proceeded against the rest in spite of the compromise. In these circumstances it cannot be urged that by merely omitting the names of Salehon's representatives from the list of respondents the appellants lost the whole appeal. He had 1/48th share in the land in suit and that was

(1) I. L. R. (1929) 10 Lah. 7 (F. B.). (2) I. L. R. (1932) 13 Lah. 70.
(3) I. L. R. (1933) 14 Lah. 234.

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undoubtedly lost but the remaining 47/48ths part of the estate could not be affected in any manner. The observations by Sir Shadi Lal, C. J. in *Sant Singh* v. *Gulab Singh* (1) are pertinent in this connection: "The Courts exist for determining the merits of the dispute between litigants, and it is their duty to avoid, if they can legally do so, a result which causes hardship."

On these grounds, we accept the appeal, reverse the judgment of the learned Judge of this Court and remand the case to the District Judge for disposal in accordance with law. The plaintiffs will get their costs here.

Costs in the Court of the District Judge will be in his discretion.

P. S.

Appeal accepted;
Case remanded.

APPELLATE CIVIL.

Before Coldstream and Abdul Rashid JJ.

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March 8.

DWARKA DAS-BADRI DAS (DEFENDANTS)
Appellants.

versus

SIRI RAM AND ANOTHER (PLAINTIFFS)
SURAJ BHAN (DEFENDANT) } Respondents.

Civil Appeal No. 1584 of 1935

Civil Procedure Code (Act V of 1908) O. XXXVIII rr. 5, 6 and 7 — Ex-parte *order for attachment before judgment — issued without notice and without conditional attachment — whether* void ab initio.

Where, on an application for attachment before judgment, the Court did not comply with rr. 5, 6 and 7 of O. XXXVIII of the Code of Civil Procedure, that is to say,

(1) I. L. R. (1929) 10 Lah. 7, 15 (F. B.).