APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

1884
July 14.

BAI JAVER AND MAGAN DAVLAT (ORIGINAL DEFENDANTS), APPELLANTS, *v.* HATHISING KESRISING AND ANOTHER (REPRESENTATIVES OF ORIGINAL PLAINTIFF No. 1), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *Secs.* 365, 368 *and* 582—*Appeal—Deceased sole respondent—Parties—Practice.*

Under section 368 of the Civil Procedure Code (XIV of 1882) a plaintiff may have the representatives of a deceased sole defendant placed on the record so that he may continue his suit against them, but there is no section which allows the representatives of a sole defendant who has died, to be placed on the record at their own request. Consequently, section 582 gives no authority to a Civil Court to place on the record at their own request the representatives of a deceased sole respondent. Such an application cannot be entertained.

THIS was a second appeal from the decision of A. H. Unwin, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad.

Bái Parsan and Mulchand brought this suit to recover from the defendants possession of certain lands and to obtain an order for the removal of a number of buildings erected upon those lands unlawfully by the defendants. The defendants contended at first that they were the owners of the lands and buildings, but they gave up this contention and pleaded that the buildings were erected by them with the permission and by the consent of the plaintiffs.

The Subordinate Judge passed a decree for the plaintiffs. The defendants appealed and the Assistant Judge reversed the decree, holding the suit to be time-barred. The High Court on the 28th of April, 1882, struck out the second plaintiff Mulchand from the record and reversing the decree of the Assistant Judge remanded the case for retrial on the merits, being of opinion that the suit was not time-barred. It was found by the Assistant Judge on remand that Bái Parsan the plaintiff (respondent) had died on the 18th of October, 1881. On the 20th of June, 1882, Hathising Kesrising and his brother the heirs and legal

*Second Appeal, No. 174 of 1883.

representatives of Bái Parsan made an application to the Assistant Judge to be placed on the record in place of Bái Parsan. The Assistant Judge complied with the application and upon the merits confirmed the decree of the Subordinate Judge of Ahmedabad in favour of the plaintiff.

Mánekshâh Jehángirshâh Táleyárkhán for the appellants.—Bái Parsan died on the 18th of October, 1881, and no application having been made within sixty days, the alleged representatives of Bái Parsan have no right to be placed on the record. The proceedings in the High Court as well as those of the Assistant Judge which took place after the expiration of sixty days were therefore null and void and should be reversed—Limitation Act XV of 1877, secs. 4 and 5, and art. 171, Sched. II.

Ráo Sáheb *Vásudev Jagannáth Kirtikar* for the respondents.—We were respondents in the Court below and no article of the Limitation Act expressly applies to us. By the analogy of section 368 of the Code of Civil Procedure it is for the appellant to take the initiative and procure the representatives of the respondent to be placed on the record—*Lakshmibái* v. *Bálkrishna*[1].

[SARGENT, C. J.—But can the representatives come in of their own accord ?]

If the plaintiff can bring them in, they can come in themselves and the limitation of three years seems to apply, as no express provision is made for their case—article 178 of Act XV of 1877. The decree of the Assistant Judge should therefore be confirmed.

SARGENT, C. J.—It is plain that when this Court struck out the second plaintiff from the record and sent the case back for retrial on the merits, it meant that the Court of appeal should proceed to decide the appeal, as if the first plaintiff had been the only respondent.

The Assistant Judge has treated the application in question as authorized by section 365 of the Civil Procedure Code extended to the case of appeal by section 582. But the present applicants to be placed on the record are not the representatives of a deceased

(1) I. L. R., 4 Bom., 654.

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appellant, but of a deceased respondent. Section 368 enables the plaintiff to have the representatives of a deceased sole defendant placed on the record, so that he may continue his suit against them, but there is no section in Chapter XXI which provides for the representatives of a sole defendant who has died being placed on the record on their own request, and, therefore, section 582 can supply no such procedure in the case of the death of a sole respondent. The application should, therefore, have been refused on the ground that it was not one authorized by the Civil Procedure Code. We must, therefore, reverse the order of the Assistant Judge, and disallow the application, with costs throughout.

Decree reversed.

APPELLATE CIVIL.

August 18.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

GIRIOWA (ORIGINAL DEFENDANT), APPELLANT, *v.*
BHIMA'JI RAGHUNA'TH (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Adoption by widow without consent of kinsmen—Adoption of a brother's son in pursuance of express authority of husband to adopt—Execution of such authority after a long time since death of husband—Agreement by widow to enjoy property for life, effect of—Acquiescence—Estoppel.

Báláji and Raghunáth were brothers and *vatandár kulkarnis* of a village in the Kaládgi District. Báláji died leaving him surviving his widow the defendant. On the death of Báláji, Raghunáth endeavoured to appropriate the whole *vatan* estate so as altogether to exclude the defendant. The defendant appealed to the Revenue authorities and Raghunáth admitted her right to a moiety of the *vatan*. Subsequently in 1856 the defendant passed a document to Raghunáth to the effect that in consideration of receiving certain property as her share, she would not trouble Raghunáth in the enjoyment by him of the rest of the *vatan*, and that she was to hold and enjoy this property for her life. The arrangement continued till 1881. In the meanwhile the defendant adopted her brother's son and made a gift to him of the property held by her under the agreement of 1856. Raghunáth having died, his son the plaintiff brought a suit against the defendant for a declaration that the adoption was invalid as also the gift to the adoptee, and that he was entitled to the property after the death of the defendant. The Court of first instance

*Second Appeal, No. 404 of 1883.