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IN RE
BASTOO
DUMAJI.

"In this order of discharge the Magistrate directed the accused Bastoo to pay Rs. 2 to the complainant as compensation for the loss of the palm leaves. This order is presumed to have been passed under section 545, Criminal Procedure Code, though the Magistrate has not quoted the section. The Magistrate cannot, I hold, legally pass such order when the accused is discharged. Such order can only be given on conviction of the accused, as the amount of compensation is laid down by section 545 to be paid from the amount of fine recovered. If no fine is imposed, I believe that no compensation could be awarded."

The reference was heard by a Division Bench (Parsons and Ranade, JJ.)

There was no appearance for the Crown or for the accused.

PER CURIAM:—As no fine was imposed in this case, an order for payment of compensation could not legally be passed under section 545 of the Criminal Procedure Code. We reverse the order.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Tybhji.

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March 17.

CHANDARSANG VERSABHAI AND OTHERS (ORIGINAL DEFENDANTS Nos. 1 TO 3), APPELLANTS. *v.* KHIMABHAI RAGHABHAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS. *

Practice—Procedure—Right of appeal—Death of one of several appellants pending appeal—Death of one of several respondents pending appeal—Civil Procedure Code (Act XIV of 1882), Secs. 366, 368, 544 and 582.

Any plaintiff or defendant has a right to appeal without the concurrence of any of the parties to the suit. The mere fact of the death of one of several appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so.

One of several appellants (defendants) died after appeal filed, but before the hearing. An application to have the name of his heir entered on the record as an appellant was rejected as too late. One of the respondents (plaintiffs) also died pending the hearing of the appeal, and an application to enter the name of his heir as respondent was rejected for the same reason. When the appeal came on for hearing it was dismissed as defective for want of parties.

* Second Appeal, No. 533 of 1896.

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Held, that the proper course for the appeal Court was to order that the appeal had abated so far as the deceased appellant (defendant) was concerned and to proceed with the hearing so far as the remaining appellants were concerned.

Held, also, with reference to the death of the respondent (plaintiff), that the appeal Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code (Act XIV of 1882), and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents under section 544 of the Civil Procedure Code, or else to have directed that the legal representatives of the deceased respondent should be placed upon the record.

SECOND appeal from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Dhandhuka.

Suit for possession of land. The defendants Nos. 1 to 4 were in possession of certain land (Survey Nos. 10, 11 and 12), defendant No. 5 being their tenant. The plaintiffs, who were nine in number, claimed the eastern portion of this land and filed this suit to recover it, alleging that the defendants had unlawfully taken possession of it.

The Subordinate Judge found that the land claimed belonged to the plaintiffs and that the defendants had removed the boundary marks and taken possession of it, and he passed a decree for the plaintiffs.

The defendants appealed, but pending the appeal one of them (Harisang) died, and an application to have the name of his heir entered on the record as an appellant was rejected by the District Judge as too late.

One of the respondents (plaintiff No. 3) also died pending the appeal, and an application to have the name of his heir placed on the record as respondent was also rejected by the District Judge as barred by limitation.

When the appeal came on for hearing it was dismissed by the Assistant Judge on the ground that, "the land being held in common, the appeal is, therefore, obviously defective for want of parties."

The defendants preferred a second appeal.

Sitanath G. Ajinkya for the appellants (original defendants Nos. 1 to 3):—The Judge was wrong in dismissing our appeal

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without going into the merits of the case. Under sections 366 and 368 of the Civil Procedure Code (Act XIV of 1882) the appeal would abate with respect only to those persons whose representatives were not brought on the record. Section 371 provides that the Court may, after passing the order of abatement, pass an order for the restoration of the appeal to the file. Under section 544 the Judge could, in the absence of the representatives of the deceased, have proceeded to hear the appeal and dispose of it on the merits. The suit was for recovery of land and not for partition. When the suit is for recovery of possession, the Court can proceed to decide it with respect to the survivors on the record.

Goranihanram M. Tripathi for the respondents (original plaintiffs).

TYABJI, J.:—This suit was originally filed by nine plaintiffs against five defendants. The plaintiffs sought to recover possession of certain land, alleging that they were the owners of the eastern portion of Survey Nos. 10, 11 and 12, and that the defendants Nos. 1 to 4 were the owners of the western portions of the same survey numbers. The defendant No. 5 was alleged to be a tenant of the first four defendants.

The plaintiffs' case was that the defendants took unlawful possession of three-fourths of a bigha of their land out of Survey Nos. 11 and 12, and of one-fourth of a bigha of their land out of Survey No. 10. The plaintiffs accordingly prayed for possession of the lands so alleged to have been unlawfully taken possession of by the defendants. The Subordinate Judge held that the land in dispute belonged to the plaintiffs, and that the defendants had removed the boundary marks and taken possession of the plaintiffs' land, and he accordingly passed a decree in favour of plaintiffs. Against this decree the defendants appealed. Before, however, the appeal could be heard, one of the appellants, *viz.*, the fourth defendant Harisang Kanubhai, died, and an application to the District Judge to have the name of the heir of Harisang entered as an appellant was rejected as time-barred. One of the respondents, *viz.*, the third plaintiff Samatsang Bhagubhai, also died before the hearing of the appeal, and an application to have the name of his heir entered as

a respondent was also rejected as time-barred. When the appeal came on for hearing, it was dismissed by the Assistant Judge on the ground that, "the land being held in common, the appeal is, therefore, obviously defective for want of parties."

We think that the learned Judge was wrong in dismissing the appeal. We take it to be quite clear that any plaintiff or defendant has a right to appeal without the concurrence of any of the other parties to the suit. In this case the proper course for the learned Judge was to have proceeded under the provisions of sections 366, 368 and 582 of the Civil Procedure Code. The cases of *Balkrishna v. The Municipality of Mahal* ⁽¹⁾, *Nundan Lall v. Lloyd* ⁽²⁾ and *Bindu Bashini Dasi v. Peari Mohun Bose* ⁽³⁾, which have been cited to us, seem to us to have no application. Those cases merely decide that one individual co-sharer cannot maintain a suit for recovering any part of the joint land, or the whole of the joint land, without bringing the other co-sharers before the Court, as the suit would be defective in their absence. Here the suit was properly framed, and all the parties interested in the subject-matter were before the Court. The decree having been passed against the defendants, it was open to any one of them to appeal against it, and if the ground of appeal was common to all the defendants, it was open to the lower appellate Court to deal with the appeal under section 544 of the Civil Procedure Code. The mere fact of the death of one of the appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so. As regards the appellants, therefore, the proper course for the lower appellate Court was to order that the appeal had abated so far as Harisang Kanubhai was concerned, and to have proceeded with the hearing of the appeal so far as the remaining appellants were concerned. So far as the death of the respondent Samatsang is concerned, the lower appellate Court ought to have proceeded under the provisions of section 368 of the Civil Procedure Code, and to have either declared that the appeal had abated as to him and proceeded against the rest of the respondents, under section 544 of the Civil Procedure Code, or else to have directed that the

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(1) I. L. R., 10 Bom., 32.

(2) 22 Cal. W. R., Civ. R., 71.

(3) I. L. R., 20 Cal., 107.

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legal representatives of Samatsang should be placed upon the record.

Under any circumstances we think that the order dismissing the appeal was wrong, and we must set it aside and remand the case to the lower appellate Court to dispose of the appeal in the light of the observations contained in this judgment. The costs of this appeal to be dealt with by the lower appellate Court at the time of passing the final decree.

Order set aside and case remanded.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

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March 30.

TRIMBAK BAPUJI PATVARDHAN (ORIGINAL DECREE-HOLDER AND APPLICANT), APPELLANT, v. KASHINATH VIDYADHAR GOSAVI (ORIGINAL JUDGMENT-DEBTOR AND OPPONENT), RESPONDENT.*

Limitation Act (XV of 1877), Sec. 19 and Sch. II, Art. 179 (4)—Decree—Execution—Payment of bhatta for the issue of the sale proclamation—Step in aid of execution—Payment of process fee—Limitation—Payment of part of the judgment-debt—Acknowledgment of liability by judgment-debtor's pleader.

To satisfy the requirements of article 179 (4) of Schedule II of the Limitation Act (XV of 1877), there must be an application to the proper Court, and time runs from the date of the application and not of the order made upon it. The application need not, however, necessarily be in writing; where the law does not require a writing, an oral application satisfies its requirements. Where an order made in aid of execution is of such a nature that the Court would not have made it without an application by the judgment-creditor, it may be presumed that due application had been made for it.

Quere:—Whether the payment of *bhatta* is sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid. Mere payment of a process-fee under circumstances from which no application can be inferred, does not satisfy the requirements of the article.

The payment of part of the judgment-debt by the judgment-debtor, with the acknowledgment of liability by his pleader, is sufficient, under the provisions of section 19 of the Limitation Act (XV of 1877), to give a fresh period of limitation.

* Second Appeal, No. 801 of 1896.