

1903.
 JEHANGIR
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itself and the property of the deceased vests in him from the moment of the testator's death. In England any person having an interest or appearance of an interest may call on the executor to exhibit an inventory and account, and a probable or contingent interest is enough: see *Phillips v. Bignell*⁽¹⁾; *Myddleton v. Rushout*⁽²⁾; *Rymes v. Clarkson*.⁽³⁾ It seems to me that if the property vests in the executor he has an appearance of an interest at all events. And inasmuch as he may at any time apply for probate, he has a contingent interest sufficient to entitle him to call upon his co-executors to account. I therefore must decide this point in favour of the applicant.

Citation made absolute.

Attorneys for applicant—*Messrs. Payne, Gilbert, Sayani and Moos.*

Attorneys for opponents—*Messrs. Sorabji and Jehangir.*

⁽¹⁾ (1811) 1 Phil. 239 p. 241.

⁽²⁾ (1797) *Ibid* 244.

⁽³⁾ (1809) *Ibid* 22 at p. 37.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.
 January 9.

CHINTAMAN NILKANT AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
 v. GANGABAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), sections 362, 544 and 583—Appeal—Death of joint appellant pending appeal—Legal representatives of deceased appellant not brought on the record—Appeal proceeded with by surviving appellant—Power of Court to hear the appeal and reverse whole decree.

In a suit for partition, the lower Court passed a decree for the plaintiffs. Two of the defendants, who denied the plaintiffs' right and claimed the property as their own, filed a joint appeal. Pending the appeal one of them died, and her representatives were not brought on the record. The surviving appellant, however, proceeded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs' suit dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant.

* Second Appeal No. 596 of 1900.

Held, that, as the two defendants had appealed on grounds common to them both, the lower Appellate Court had power to hear the appeal and to deal with the whole suit under section 544 of the Civil Procedure Code (Act XIV of 1882).

1903.

 CHINTAMAN
 v.
 GANGABAI.

SECOND appeal from the decision of Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri with Appellate Powers, reversing the decree of Ráo Sáheb K. H. Kirkire, Second Class Subordinate Judge of Vengurla.

Suit for partition. The plaintiffs sued for a fourth share of the property in question. Of the defendants (of whom there were fourteen in all), some admitted the plaintiffs' claim and demanded their own share in the property; others were merely tenants and did not appear. Two of the defendants, however, viz. Gangabai and Anpurnabai (defendants 10 and 11), denied the plaintiffs' right to partition and claimed the property as their own, alleging that it had belonged to their father Paudurang, and on his death had come to them as his heirs.

The Subordinate Judge found in favour of the plaintiffs and awarded partition of the property among them and certain of the defendants.

Gangabai and Anpurnabai (defendants 10 and 11) appealed. Pending the appeal Gangabai (defendant 10) died. Her legal representatives were not placed on the record, but the appeal proceeded at the instance of Anpurnabai only. On hearing the appeal the Judge reversed the decree of the lower Court and dismissed the suit.

The plaintiffs preferred a second appeal to the High Court and contended that under sections 362 and 582 of the Civil Procedure Code (Act XIV of 1882) the appeal by the defendants to the lower Court had abated inasmuch as the representatives of Gangabai had not been made parties, and that, at all events, under the circumstances the lower Court should not have reversed the whole decree, but only so much of it as related to Anpurnabai's share.

Pending the hearing of the second appeal Anpurnabai (defendant 11) also died and the appellants (plaintiffs) placed her representatives on the record as respondents.

Vinayak M. Mone for the appellants (plaintiffs):—He relied on sections 362 and 582 of the Civil Procedure Code (Act XIV of 1882) and cited *Chandarsang v. Khimabhai*.⁽¹⁾

(1) (1897) 22 Bom. 718.

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Chintamani A. Rale for the respondents (representatives of defendants 10 and 11) :—Gangabai and Anpurnabai filed a joint appeal against the decree of the lower Court. The facts that Gangabai died pending that appeal and that her representatives were not placed on the record in her place did not prevent Anpurnabai from proceeding with the appeal. The case of both of them was the same. They claimed the whole property and the decree dealt with that claim. Under section 541 of the Civil Procedure Code (Act XIV of 1882) the Judge in appeal had power to reverse the whole decree and did so: *Chandarsang v. Khimabhai*⁽¹⁾; *Puran Mal v. Krant Singh*.⁽²⁾

CHANDAVARKAR, J. :—The first point urged in this appeal is that Gangabai having died and no legal representative of hers having been brought on record the appeal abated, and that, therefore, the Appellate Court had no jurisdiction to deal with the decree passed against Gangabai.

No doubt under sections 362 and 582, Civil Procedure Code, the appeal abated so far as Gangabai was concerned, but under section 544, Civil Procedure Code, Anpurnabai had a right to appeal independently of the provisions of sections 362 and 582 of the Civil Procedure Code, if her defence was common to her and Gangabai, and the mere fact of her having been joined with Gangabai would not take away her right to appeal. It was held in *Chandarsang v. Khimabhai*⁽¹⁾ that “the decree having been passed against the defendants, it was open to any one of them to appeal against it if the ground of appeal was common to all defendants, and it was open to the lower Appellate Court to deal with the appeal under section 544.”

No doubt in the lower Appellate Court the appeal that was heard was the appeal of Anpurnabai, but in dealing with that appeal it was open to the lower Appellate Court to hear and deal with the whole suit if the defence was common.

The second point urged is as to the appreciation of evidence. The finding of the lower Appellate Court on this point is binding on us. Decree confirmed with costs.

Decree confirmed.

(1) (1897) 22 Bom. 718.

(2) (1897) 20 All. 8.