Court that the decree is admissible in evidence is upheld but on the abovementioned ground. As the decision of the lower Court is upheld on a ground on which there was an admission on behalf of the plaintiff (which is now withdrawn), I think there should be no order as to costs of these applications. The Rule in both the applications is discharged.

Rule discharged.

Y. V. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

THAKKAR NARANLAL JETHALAL (ORIGINAL DEFENDANT No. 2), APPLICANT *v.* SHIVPRASAD ACHRATLAL JANI AND OTHERS (HEIRS OF ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 AND 3), OPPONENTS.*

1939
December 21

Civil Procedure Code (Act V of 1898), O. XXII, r. 3—Death of sole plaintiff—Plaintiff's sons brought on record as heirs—Widow not brought on record—Death of widow—Plaintiff's sons not represented on record as heirs of their mother—Whether suit abated as to mother's interest—Practice and procedure.

One A filed a suit to recover possession of property. A died on February 1, 1938. On March 21, 1938, A's sons were brought on the record as his heirs. A left a widow. No application was made to bring her name on the record as heir of A. She died on April 15, 1938. Her heirs were sons of A, who were already on the record. It was contended that as the sons were not described on the record as suing, not only as heirs of A but also as heirs of their mother, the suit abated, at any rate as to the mother's interest.

Held, that inasmuch as on the death of the mother her legal representatives were already on the record, the Court could not cause them to be made parties; so that in terms O. XXII, r. 3 of the Civil Procedure Code, 1908, did not apply and there being no time limit in which an application must be made to describe the plaintiff as suing in a double capacity the suit did not abate as to the mother's interest. A mere formal amendment of the record was all that was needed.

Khodadad v. *Jerbai*,[1] disapproved.

Per *Beaumont C. J.* If the proper parties are not before the Court, the suit cannot proceed; but if a party is on the record, he can appear either in person or by counsel

* Civil Revision Application No. 213 of 1939.

[1] (1936) 39 Bom. L. R. 1156.

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and make any representation which seems good to him, whether in one capacity or in more than one capacity, and being on the record, it is in my opinion competent to him to put in a plaint or defence stating his attitude in the different capacities in which he is suing or being sued. On its being brought to the notice of the Court that the record does not show that he is suing or being sued in more than one capacity, it is the duty of the Court to have the record amended. But an amendment of that sort can be made at any time, and I apprehend that if an application were made to strike out a pleading on the ground that the interest of the party pleading was not properly shown on the record, the Court would amend the record, and not strike out the pleading. In my opinion there is no justification for enlarging the words of Order XXII, r. 3, so as to cover a case where all that is required is formal amendment of the record, and not the addition of new parties.

CIVIL REVISION APPLICATION praying that the order passed by L. P. Dave, Joint Subordinate Judge, at Ahmedabad, may be set aside.

The facts material for the purposes of this report are stated in the judgment of the Chief Justice.

J. C. Shah, for the applicant.

I. I. Chundrigar and *K. T. Pathak*, for the opponents.

BEAUMONT C. J. This is a revision application against an order made by the Third Joint Subordinate Judge of Ahmedabad refusing an application that the suit had abated. The suit was originally filed by one Achratlal Kalidas who was seeking to recover possession of certain property as the reversioner of the previous owner. The plaintiff died on February 1, 1938. On March 21, 1938, there was an application to bring the heirs of the plaintiff on record, and in answer to that application, the three sons of the plaintiff were brought on record. Besides those three sons, the plaintiff had left a widow named Bai Hira, and it is said that by reason of Act XVIII of 1937, which came into operation on April 14, 1937, Bai Hira was one of the heirs of the plaintiff jointly with the three sons, and that she ought to have been brought on the record. I will assume, without deciding, that Bai Hira was one of the heirs of the plaintiff and that she ought, therefore, to have been brought on the record. But Bai Hira died on April 15, 1938, which is less

than ninety days from the date of the plaintiff's death, and her heirs were the three sons of the plaintiff, who were already on the record. It is argued, however, that as the three sons were not described on the record as suing, not only as heirs of the plaintiff, but also as heirs of their mother, the suit abated, at any rate as to the mother's interest. That would seem to me to be a very unfortunate conclusion to arrive at, for I can see no justice in holding that a suit abates for want of parties when all parties interested were in fact before the Court, and I should be sorry to find that the rules require the Court so to hold. However, when I look at O. XXII, rr. 2, 3 and 4, of the Civil Procedure Code, I am clearly of opinion that the rules do not require the Court so to hold. Rule 2 deals with the case of the death of one of several plaintiffs or defendants where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, and in such a case the Court is required to cause an entry to that effect to be made on the record, and the suit then proceeds at the instance of the surviving plaintiffs, or against the surviving defendant or defendants. That rule does not specify any time limit within which the Court is required to make an entry in the record showing the character of the surviving plaintiffs or defendants. Then r. 3 provides, so far as material, that where there are one or more plaintiffs and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. And then sub-r. (*2*) provides that if an application under the preceding sub-rule is not made within the time limited by law (which is ninety days), the suit shall abate. Rule 4 deals with the case of the death of a defendant where the right to sue survives, and requires the legal representative of the

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Beaumont C. J.

deceased defendant to be made a party. But the rule, which governs the present case, is r. 3.

Now it is apparent that inasmuch as on the death of Bai Hira her legal representatives were already on the record, the Court could not cause them to be made parties. They were already parties, and a person cannot properly be made a party twice over, though I have known that course to have been adopted in this Court. So that in terms O. XXII, r. 3, does not apply, and there being no time limit in which an application must be made to describe the plaintiff as suing in a double capacity, I can see no ground whatever for holding that the suit abated. But Mr. Shah relies on a recent decision of Mr. Justice Engineer in *Khodadad* v. *Jerbai*[1] in which, disagreeing with certain authorities of the Lahore and Madras High Courts, and following two decisions of the Patna High Court, the learned Judge held that the fact that the legal representative of a deceased defendant happened to be on the record, not as such but in a different capacity, did not prevent the abatement of the suit, and that the plaintiff was not thereby relieved from the duty of applying within time for the substitution of the legal representative of the deceased defendant in place of the deceased. That was a case under r. 4 of O. XXII, but neither under that rule nor under r. 3 is there in terms an obligation to apply for the substitution of a legal representative of a deceased party in place of the deceased. The words of the rules require an application to be made to cause a legal representative of a deceased plaintiff or defendant to be made a party, and as I have already pointed out, a person who is already a party, cannot be made a party over again. I am quite unable to agree either with the conclusion or with the reasoning of the learned Judge in *Khodadad* v. *Jerbai*[1] which on this point is, in my opinion,

[1] (1936) 39 Bom. L. R. 1156.

not good law. The learned Judge considered that until a defendant was described as representing a deceased defendant, he could not put in a defence setting out his contention as such representative, and that there is really no substantial difference between an application to bring a party on record, and an application to show in what capacity that party is on the record. In my opinion there is all the difference in the world. If the proper parties are not before the Court, the suit cannot proceed; but if a party is on the record, he can appear either in person or by counsel and make any representation which seems good to him, whether in one capacity or in more than one capacity, and being on the record, it is in my opinion competent to him to put in a plaint or defence stating his attitude in the different capacities in which he is suing or being sued. On its being brought to the notice of the Court that the record does not show that he is suing or being sued in more than one capacity, it is the duty of the Court to have the record amended. But an amendment of that sort can be made at any time, and I apprehend that if an application were made to strike out a pleading on the ground that the interest of the party pleading was not properly shown on the record, the Court would amend the record, and not strike out the pleading. In my opinion there is no justification for enlarging the words of O. XXII, r. 3, so as to cover a case where all that is required is formal amendment of the record, and not the addition of new parties.

In my opinion the order of the learned Judge was right, and this application must be dismissed with costs.

SEN J. I agree.

Rule discharged.

J. G. R.