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title by Chowrasu Koer should be regarded as *bonâ fide* acts, or that they should be regarded "as blinds contrived by Sheodyal Singh to deceive the world and conceal his own title." But the assertion of her title by Chowrasu Koer being partly false makes the *bona fides* of it doubtful. Then, as is observed by the High Court, the fact that there is no evidence of any documents of partition or separation of any kind is of great importance, having regard to the value of the family property, and to the family being obviously one very much versed in the conduct of business affairs. It was clear that on the death of Doman, Dharam and Ramdyal were joint in estate, and on Ramdyal's death, Dharam became joint in estate with his nephews. The plaintiff had to meet the presumption that this continued, and to prove a separation in estate. The documentary evidence—the only reliable evidence in the case—is in their Lordships' opinion insufficient to prove this, even when considered with the oral evidence of the plaintiff and her two witnesses, which it is plain the Subordinate Judge thought was of no value. The High Court on appeal by the defendants dismissed the suit, and also dismissed a cross-appeal of the plaintiff, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitor for the appellant: Mr. *J. F. Watkins.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

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April 5.

SHAM CHAND GIRI *v.* BHAYARAM PANDAY.*

Abatement of suit—Civil Procedure Code (Act XIV of 1882), sections 361, 362, 365, 371—Survival of right to sue—Application to revive suit by person whose claim is in conflict with that of original plaintiff—Parties—Substitution of parties.

The language of sections 361 and 371 of the Code of Civil Procedure relating to abatement of a suit show that, where it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and revived

* Application in Original Civil Suit No. 179 of 1893.

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suit must be the same, and that no fresh cause of action can be imported into the revived suit. Where a suit was brought to have it declared that the plaintiff was entitled to succeed as *mohant* of the Tarkessur shrine on the allegations (*a*) that he had been selected as the *chela* or disciple of the deceased *mohant*, (*b*) that the ceremony of initiation had been duly performed, by which he was brought into the brotherhood of his *guru*, and (*c*) that the installation ceremony had been performed with the consent of the *dasnami*, and that by virtue thereof he became the *mohant* and exercised the functions of that office, and on the death of the plaintiff an application to be substituted in his place was made on grounds which put the applicant into opposition to the original plaintiff and made his claim not dependent on the original plaintiff's case but in conflict with it: *Held* that the right of suit could not be said to survive to the applicant within the meaning of the sections of the Code relating to abatement of suit, but that the suit abated by the death of the plaintiff.

THIS was an application by one Keshub Chunder Giri to be substituted as a party to the suit in the place of the plaintiff deceased.

The suit was brought by Sham Chand Giri to establish his right to succeed as *mohant* of the *muth* or temple of Tarkessur and *shebait* of the idol Issur Taruck Nath Shiva.

The plaint in the suit stated that one Madhub Chunder Giri was, during his lifetime and up to the time of his death, *mohant* of the said temple, and *shebait* of the said idol, and as such was in possession of a considerable amount of moveable and immoveable property; that Madhub Chunder Giri, being desirous of nominating, according to the custom prevalent amongst *mohants*, a duly constituted disciple whom he might place on the *guddi* of the shrine in case he should be prevented by accident or misfortune from carrying on his duties, had, in 1279 B. S. (1872-1873), duly adopted the plaintiff as his *chela* or disciple, by whom, according to the custom amongst *mohants* upon a person being adopted as *chela* by his *guru* or spiritual guide, the ceremony of *bijai homa* or initiation into the brotherhood of *mohants* (without which no person could be adopted as a *chela*) was performed; that according to another custom, when a duly elected *chela* is intended to be installed as a successor to the *guddi*, the plaintiff as his principal *chela* was selected by Madhub Chunder Giri as successor in his place, and was, in 1880 B. S. (1873-1874), with due ceremony, installed and proclaimed *mohant*, and there-

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upon he was according to custom recognized by the Maharajah of Burdwan, within whose *zemindari* the shrine was situated, as having the right of the succeeding *mohant* and received a certificate of his initiation and installation having been performed and also a *sanad* or letter of recognition from the Maharajah of Burdwan; that thereafter Madhub Chunder Giri executed in favour of the plaintiff a deed of appointment whereby he appointed the plaintiff to act for him as *mohant* during his absence, and further appointed him permanently to the *guddi* of the shrine in case of his (Madhub Chunder's) death; that in 1874 Madhub Chunder Giri was convicted of adultery and sentenced to three years rigorous imprisonment; that from the date of his installation as *mohant* up to 5th November 1878 the plaintiff occupied the *guddi* in the shrine as *mohant*, and was treated by the general public as *de facto mohant*, and as such was in possession of the moveable and immoveable property belonging to the shrine, received the offerings made to the idol, realized the rents and profits of the immoveable property belonging to the shrine and paid the dues in respect thereof; that in 1878 Madhub Chunder Giri resumed possession of the *guddi* as *mohant* and remained in such possession, until his death, and during the period between his resuming possession and his death the plaintiff was treated by him as his principal *chela* and was placed by him as *mohant* in charge of another shrine known as *gur* Bhowanipore, which he still held. Paragraph 15 of the plaint stated that "besides the plaintiff there is no duly constituted *chela* of the said Madhub Chunder Giri, nor any other person upon whom the said ceremony of *bijai homa* has been performed; nor did the said Madhub Chunder Giri at any time express any desire that any one other than the plaintiff should succeed to the said *guddi*, nor has the ceremony of installation been performed upon anybody except the plaintiff." The plaintiff went on to state that Madhub Chunder Giri died in Calcutta on 10th March 1893; that on the day prior to his death he sent for the plaintiff, who came to him and remained with him until his death, and duly performed his funeral ceremonies; and that in accordance with instructions received verbally from Madhub Chunder Giri to that effect before he died, the plaintiff proceeded to the shrine of Tarkessur and installed himself in the *guddi* in

the place of the deceased *mohant*, and remained in possession from 11th March up to 16th March 1893, when he was forcibly ejected by the defendant. The plaintiff prayed for a declaration that he was the duly constituted *mohant* of the shrine, and for possession thereof; for an injunction to restrain the defendant from interfering or dealing with the properties of the shrine; for a receiver; that an alleged will of Madhub Chunder Giri, under which the defendant claimed to have been appointed *mohant*, might be brought into Court, and the defendant required to prove it in solemn form; that the defendant might be declared ineligible for the office of *mohant* not being a *chela* or disciple; and for an account.

The petition of Keshub Chunder Giri in support of his application stated that a receiver had been appointed by consent on 20th March 1893, but before he could take possession, *viz.*, on the 21st March, the plaintiff died, and the receiver had consequently never been able to take possession, which it was important he should do as soon as possible, as otherwise much property, chiefly consisting of collections and offerings at the shrine, would be wasted; that according to the custom prevailing with regard to the succession to the office of *mohant* of the Tarkessur shrine the plaintiff Sham Chand Giri was entitled to succeed to the *guddi* of the shrine as *mohant* after the death of Madhub Chunder Giri, and after the death of the plaintiff the petitioner became entitled to succeed him and to be *mohant* of the shrine; that the petitioner was the *guru bhai* of the deceased plaintiff, and next in order of adoption and initiation to the deceased plaintiff as *chela* to Madhub Chunder Giri, and he was duly adopted and initiated by Madhub Chunder Giri and afterwards fully recognized by him as his *chela*, and as prior in order of adoption and initiation and senior to the defendant; that the petitioner was duly adopted as a *chela*, by Madhub Chunder Giri, and the ceremony of *bijai homa* was duly performed with reference to him by Madhub Chunder Giri on 9th of Bysack 1878; that in the will of Madhub Chunder Giri the petitioner was mentioned as the senior *chela* of Madhub Chunder Giri, and in the certificate granted to the plaintiff Sham Chunder Giri, as well as in the deed of appointment of the

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plaintiff mentioned in the plaint, the petitioner was described as the *chela* next in order to the plaintiff Sham Chunder Giri; that during the lifetime of Madhub Chunder Giri, and when the plaintiff performed the duties of *mohant*, the petitioner always assisted him with the concurrence of Madhub Chunder Giri; that after the *guddi* was resumed by Madhub Chunder Giri the petitioner was always placed in charge of the *guddi* during the absence of Madhub Chunder Giri, and when Madhub Chunder was at the temple he always assisted him in the discharge of the functions of a *mohant* and was practically in charge of the said shrine; that by the death of the plaintiff the petitioner had become the senior of the surviving *chelas* of Madhub Chunder Giri, and as such was entitled to succeed to the *guddi*.

The petitioner submitted that the right of suit survived to him, and that he was the legal representative of the plaintiff, and was entitled as such legal representative and successor to obtain the relief prayed for in the suit, and that the suit therefore had not abated by the death of the plaintiff.

The application was opposed by the defendant, who alleged that he was, on 1st February 1888, duly initiated and appointed a *chela* by the deceased *mohant*, Madhub Chunder Giri, by whom the ceremony of *bijai homa* had been duly performed with reference to the defendant. He claimed under a will, said to have been made by Madhub Chunder Giri on 5th March 1893 shortly before his death. Probate of this will had been refused by the District Judge of Hooghly, who found against the will, but an appeal from that decision to the High Court was pending. The defendant alleged that he performed the funeral ceremonies of the deceased *mohant* in succession to whom he had, in accordance with the will, duly installed himself as *mohant*; that Keshub Chunder Giri had separated himself from the shrine of Tarkessur and belonged to another hermitage; that he was not an heir to the plaintiff Sham Chunder Giri, as they belonged to different hermitages, and they had ceased to be *chelas* of the same *guru*, so that the relation of *guru bhai* did not exist between them; that there was no custom or usage by which a senior *chela* is entitled to succeed as *mohant*; that the ceremony of *bijai homa* had not been

performed by the late *mohant* with reference either to the plaintiff Sham Chand Giri, or Keshub Chunder Giri; and that he (the defendant), having been appointed *mohant* by Madhub Chunder Giri, who had power so to appoint him, and having duly installed himself as *mohant*, was entitled to be recognised as *mohant*, and his claim could not be disputed.

The application came on before the sitting Judge in Chambers.

Sir *Griffith Evans* (with Mr. *Woodroffe* and Mr. *Phillips*) in support of the application.

Mr. *Mitter* [with *The Advocate General* (Sir *Charles Paul*) and Mr. *W. C. Bonnerjee*] *contra*.

SALE, J.—After the elaborate arguments which have been addressed to me, I should have preferred stating the conclusion to which I have come and my reasons in a considered judgment, but the circumstances of the case show that it is important that delay should, if possible, be avoided.

The applicant is one Keshub Chunder Giri, who asks that his name may be entered in the record of this suit in the place of the deceased plaintiff, and that he may be allowed to amend the plaint as may be required by reason of the substitution of his name as plaintiff in place of the original plaintiff.

It is clear from the facts as stated by the applicant that, if the substitution be allowed, it would be necessary to alter very materially the case made in the plaint to enable the applicant, as the substituted plaintiff, to proceed with the suit.

The argument in support of the application is, first, that the right to sue has not abated by reason of the death of the plaintiff, and, next, that there has been a devolution of interest in favour of the applicant, which gives him the right to be made a plaintiff in place of the original plaintiff.

The first contention depends upon the meaning of the words "right to sue" in section 361 of the Code of Civil Procedure. That section provides that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." It does not predicate conversely that the death of a party shall cause

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the suit to abate, if the right to sue does not survive, but that is clearly the practical effect of that section and of the subsequent sections relating to abatement.

The law of abatement, as stated in the Procedure Code and elucidated in the illustrations to section 361, is the same as it is in England. Indeed, the case given in illustration (*c*) is founded on the maxim "*actio personalis moritur cum persona.*" The illustrations to section 361, as also the provisions of the next following sections, show what the right to sue is, and in whom it vests.

Sections 362 and 363 relate to the case of the death of one of several plaintiffs. Section 365 applies to the case of the death of a sole plaintiff, and has therefore a direct bearing on the present application. Section 372 relates to cases of transfer or devolution of interest not otherwise provided for. These sections prescribe the procedure to be followed by persons claiming to have the right to prosecute the suit under any of the circumstances therein mentioned. It is to be observed that under section 365, on the death of a sole plaintiff, the *right to sue* vests in his legal representative.

The "*right to sue*" is based upon facts which go to make up what is called the "cause of action," and section 371 provides that, "when a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action." The language of the latter section seems clearly to indicate that the cause of action of the original and revived suit must be the same, and that no fresh cause of action can be imported into a revived suit.

If I have correctly interpreted the meaning of section 361, it becomes essential to examine the plaint in this suit and to compare some of its principal allegations with the facts as alleged by the applicant. For the present purpose it will be sufficient to refer to the following allegations upon which the original plaintiff relies as the basis of his claim: (1), that he was selected as the *chela* or disciple of Madhub Chunder Giri the deceased *mohant*; (2) that the ceremony of initiation had been duly performed by which he was brought into the brotherhood of his *guru*; and (3) that the

installation ceremony had been performed with the approval and consent of the *dasnami*, and that by virtue thereof he became the *mohant* and exercised the functions of that office.

This suit was brought by the original plaintiff to have it declared that he was in fact the *mohant* of Tarkessur as the successor of Madhub Chunder Giri, and for consequential relief.

It would not serve the purpose of the present applicant to prove the allegations in the plaint showing that the original plaintiff succeeded Madhub Chunder Giri as *mohant*. The present applicant claims as a *chela*, not of the original plaintiff, but of his predecessor, and this claim in reality puts him in opposition to the original plaintiff, whose case, as stated in the 15th paragraph of the plaint, is to the effect that there was no *chela* besides himself as regards whom the ceremonies of initiation and installation were performed, or for whom the *sanad* of the Maharajah of Burdwan was obtained. The applicant therefore is in the position of a rival claimant who is desirous of setting up a claim of his own, which is not only *not* dependent upon the claim of the original plaintiff, but is in conflict therewith.

No doubt if this had been a suit to protect the property of the idol as against a trespasser, then it would be difficult to meet the arguments addressed to me on the part of the present applicant; but that is not the character of the suit, and the real object of the applicant is to establish a rival claim to the office of *mohant*, which can only be done by a separate suit. I take it that whoever is declared to be the *mohant*, the property which appertains to the shrine would follow that declaration. The suit is of a personal character inasmuch as its object is to establish a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that this suit abates. On the view I take of the first point it is not necessary that I should express any opinion on the second point, but it must be understood that in deciding, as I have done, I say nothing to prejudice the claim of the present applicant. All I say is that the claim cannot be set up in this suit.

The application is refused.

Mr. *Mitter* applies for costs as of a hearing.

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Sir *Griffith Evans* objects. This is a Chamber application. All that the Court can do is to certify for Counsel.

Mr. *Mitter*.—The application has been adjourned into Court and it must be taken as a Court application. Even that will cover only a portion of our costs.

SALE, J.—There is no precedent for dealing with the costs of an application of this nature as costs of a hearing. The costs will be dealt with as the costs of an ordinary Court application.

Application refused.

Attorney for the applicant Koshub Chunder Giri : Mr. *U. L. Bose*.

Attorneys for the defendant : Messrs. *Sen & Co.*

J. V. W.

Before Mr. Justice Sale.

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July 26.

KISSORY MOHUN ROY *v.* KALLY CHURN GHOSE.*

Practice—Mortgage—Suit on mortgage for an account and for sale of mortgaged property—Form of decree—Decree where puisne mortgagee is a party defendant and asks for an account on the footing of his mortgage—Application to vary decree.

In a suit on a mortgage, for an account, and for sale of the mortgaged property, where a puisne mortgagee who is made a defendant appears and proves his mortgage and asks that the decree sought to be obtained by the plaintiff may also provide for an account on the footing of his mortgage, and for payment of the amount found due to him out of the sale proceeds, the practice of the Court is, where no issue is raised as between the defendants and no question of priority arises, on proof of the subsequent mortgage, to make a decree directing an account on the footing of each of the mortgages, and fixing one period of redemption for all the defendants. *Auhindro Bhoosun Chatterjee* v. *Chunnoo Lall Johurry* (1) referred to.

An application made by the purchaser of the equity of redemption, who had been made a defendant in such a suit, and had been served with a summons but had failed to appear, that the decree, which had been made in accordance with the above practice, should be varied by limiting it to a decree in favour of the plaintiff alone on the ground that the Court had no jurisdiction in such a suit to make a decree between co-defendants, was dismissed.

THIS was the hearing of a rule to show cause why a decree which had been made in a mortgage suit should not be varied.

* Application in Original Civil Suit No. 595 of 1893.

(1) I. L. R., 5 Calc., 101.