

## APPELLATE CIVIL.

*Before Mr. Justice Mookerjee and Mr. Justice Carnduff.*

CHANDRA KUMAR MAJHI

*v.*

SANDHYAMANI.\*

1909  
Jan. 8.

*Legal representative—Civil Procedure Code (Act XIV of 1882), ss. 371, 582—  
Death of one defendant—Representative of deceased defendant, when can  
be substituted—Omission to substitute at death of defendant, effect of—  
Agreement between surviving defendant and plaintiffs.*

Where the legal representatives of a deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court) were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant.

SECOND APPEAL by the petitioners, Chandra Kumar Majhi and others, for revival of the appeal.

The plaintiffs, respondents in this Court, brought a suit for arrears of rent, against Bashiram Majhi, Banamali Majhi and Sridam Majhi. The suit was decreed after contest. Bashiram Majhi and Banamali Majhi preferred an appeal to the District Judge's Court. The appeal was dismissed on the 28th February 1905. Bashiram died in <sup>May</sup>/<sub>June</sub> 1905. Banamali alone preferred a second appeal to the High Court. In June 1906, the High Court remanded the case for deciding it after determination of certain points. The case was then transferred to the Court of the Officiating Second Subordinate Judge at Barisal. In March 1907, the plaintiffs, opposite parties, respondents made an application to the said Second Subordinate Judge at Barisal for withdrawal of the suit as against

\* Appeal from Original Order No. 457 of 1907, against the order passed by Ashutosh Banerjee, Subordinate Judge of Barisal, dated July 27, 1907.

Banamali. The application was granted and the Court ordered that the decree of the lower Court against the other defendants would stand good.

The petitioners, sons and heirs of Bashiram, made an application under section 371 of the Code of Civil Procedure for revival of the appeal on the ground that the petitioners were all minors at the time of the death of Bashiram, one of them having attained the age of 18 years just then, and that as the petitioners were jointly interested with Banamali in the case, there was no necessity for their appearance in the appeal before the agreement between their co-defendant and the plaintiffs which was prejudicial to their interests. The Subordinate Judge rejected the application for restitution of the appeal on all points. The petitioners, thereupon, appealed to the High Court.

*Babu Bepin Chandra Mallik* (for *Dr. Priyanath Sen*), for the appellants. It was not at all necessary for the legal representatives of the deceased defendant to take any steps and join the appeal when they knew that their co-defendant was prosecuting the appeal and attacking the entire decree.

No one appeared for the respondent

MOOKERJEE AND CARNDUFF JJ. This is an appeal against an order made under section 371 of the Code of Civil Procedure of 1882 read with section 582, refusing to set aside an order of dismissal of an appeal before the Subordinate Judge of Barisal.

The circumstances under which the order came to be made may be briefly stated. The plaintiffs respondents instituted a suit for rent against three persons, Sridam Chandra Majhi, Bashiram Majhi and Banamali Majhi. In the Court of first instance the plaintiffs succeeded, whereupon Bashiram and Banamali, two of the defendants, preferred an appeal to the District Judge of Barisal. Upon the hearing of the appeal, the case was decided against the appellants. Shortly after this, one of the appellants, Bashiram died; the remaining appellant

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Banamali then preferred a second appeal to this Court. This second appeal was heard on the 13th June 1906, with the result that at the instance of the sole appellant the entire decree of the Court below was set aside and the case was remitted to the Subordinate Judge in order that the appeal might be reheard. When the appeal came to be reheard before the Subordinate Judge, the first appellant Bashiram was dead and no steps had apparently been taken by his legal representatives to bring themselves on the record. In these circumstances, some arrangement was entered into between the other appellant Banamali and the plaintiffs respondents, with the result that the latter applied for leave to withdraw the suit against Banamali. The Subordinate Judge granted the application. But the order which he made did not in terms permit the withdrawal of the suit as against Banamali. He allowed the appeal of Banamali, the result of which would be that the suit was dismissed as against Banamali, and he went on to add that the decree of the first Court as against the other defendants would stand good. If we appreciate the effect of his order correctly, the result of this arrangement between the plaintiffs and the defendant Banamali was that the entire burden of the decree for rent made by the Court of first instance was thrown upon the other defendants, who were not represented before the Subordinate Judge. It is not necessary for us to express any opinion as to the propriety of the order which the Subordinate Judge made, because that order is not in question before us in the present case. But the result, which might have been anticipated, followed. As soon as the legal representatives of Bashiram discovered that the plaintiffs had withdrawn their suit against Banamali and thrown the entire burden of the decree upon them and Sridam, they applied for permission to revive the appeal and prosecute it. The learned Subordinate Judge held that they had not made out any sufficient cause within the meaning of section 371 of the Civil Procedure Code, which prevented them in due time from continuing the appeal. We are unable to accept the view taken by the Subordinate Judge. Upon the facts which we have stated, it is quite clear that upon the death of Bashiram,

Banamali alone prosecuted the appeal to the High Court, and the legal representatives of Bashiram were under the impression that as Bashiram was prosecuting the appeal and challenging the validity of the entire decree, it would not be necessary for them to take any steps and join in the appeal. They cannot, therefore, be blamed for their omission to take any steps to have themselves brought on the record. But as soon as they discovered that Banamali had arranged with the plaintiffs to be relieved of all responsibility and had thrown the burden upon them, they applied for leave to revive and prosecute the appeal, and in our opinion, they ought to have been allowed to do this.

The result, therefore, is that this appeal must be allowed and the order of the Court below set aside. The appeal will be revived so far as the applicants are concerned and they will be allowed to prosecute it before the Subordinate Judge, who will, at their instance, now carry out the directions given in the judgment of this Court in appeal from appellate decree No. 1179 of 1905.

The appellants are entitled to their costs of this appeal as against the plaintiffs respondents.

*Appeal allowed.*