PRIVY COUNCIL.

P. C.*
1904
February 11.
March 2.

RAJ CHUNDER SEN *v.* GANGA DAS SEAL

AND

RAMGATI DHUR *v.* RAJ CHUNDER SEN.

TWO APPEALS CONSOLIDATED.

[On appeal from the High Court at Fort William in Bengal.]

Appeal, abatement of—Death of respondent pending appeal—Suit for accounts of partnership—Application for substitution of representative made out of time—Limitation Act (XV of 1877), Sch. II, art. 175(c)—Civil Procedure Code (Act XIV of 1882) ss. 363, 582—Act VII of 1888, s. 66.

A respondent, to whom a sum of money was due under the decree of the first Court, died, pending an appeal to the High Court, and an application to have a representative substituted for him on the record was not made within six months after his death, and no sufficient cause was shown for the delay.

Held by the Judicial Committee that, the nature of the suit being such that the cause of action did not survive against the remaining respondents alone, the appeal abated under s. 368 (as amended by s. 66 of Act VII of 1888) and s. 582 of the Civil Procedure Code (Act XIV of 1882) and had been rightly dismissed by the High Court on that ground.

Two consolidated appeals from two decrees (March 20th, 1900) of the High Court at Calcutta dismissing two appeals brought by the appellants from a decree (July 6th, 1896) of the Subordinate Judge of Chittagong.

In the first appeal the plaintiff, and in the second appeal the defendants Nos. 5 and 7 were the appellants to His Majesty in Council.

The suit out of which the appeals arose was brought by Raj Chunder Sen against twelve defendants, eleven of whom he alleged were his partners. Defendants 1, 2 and 3 were the present respondents Ganga Das Seal, Hara Gobind Seal, and Guru Das Seal: defendant No. 4 was Abhoy Churn Chowdhry, and

PRESENT:—Lord Davey, Lord Robertson, and Sir Arthur Wilson.

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defendants 5 and 7 were Ramgati Dhur, and Bissumbhur Poddar, the appellants in the second appeal.

The plaint stated that the plaintiff and the first eleven defendants carried on a partnership business (karbar) in salt in Chittagong and a branch business at Naraingunge under a deed dated 9th August 1883; that of this business defendant No. 1 was the manager; that defendant No. 1 without the consent of the other partners took away from the karbar large sums of money and large quantities of salt without paying for them for the use of himself and defendants 2, 3 and 4; that the plaintiff on finding out the above called for an account from defendant No. 1, and the state of things discovered led to the closing of the business at Chittagong on 21st Assar 1298 and of the branch at Naraingunge in Pous of the same year; that an adjustment of accounts was made by a mohurir, which disclosed that defendants 1, 2, 3 and 4 had withdrawn Rs. 38,989-7 due to the business, out of which Rs. 9,747-5-9 was due to the 4-anna share of the plaintiff. For that sum "appropriated by them" the plaintiff prayed for a joint decree against defendants 1, 2, 3 and 4, or "a several decree for such amount as against each of them for what he might be found liable for." The plaintiff further prayed that, if those defendants did not agree to the adjustment of accounts made by the mohurir (which they had not signed) then a regular account should be taken from defendants 1, 2 and 3 or from such defendant as might be found liable for it, and that the plaintiff should have a decree for such amount, as he might be found entitled to.

The plaintiff dated his cause of action from the closing of the business. The other partners refused to join as plaintiffs in the suit and were made defendants.

The defendants put in written statements denying their liability to the plaintiff. Defendant No. 1 did not admit the correctness of the alleged adjustment of accounts, and denied that he ever appropriated any money or salt from the karbar for his own use or advantage. Other defences not now material were raised. The material defences resolved themselves into the question raised as one of the issues, "what amount, if any, is the plaintiff entitled to recover after adjustment of accounts, and from whom?"

The Subordinate Judge gave a preliminary judgment in which he held that the suit was a partnership suit, and that defendant No. 1 was liable to render accounts to all the partners.

The suit was then referred to a Commissioner, who was appointed to take the accounts and submit a statement showing what sum each partner was entitled to receive, or had to pay, as his share of the profit or loss. The Commissioner made his report, and in his final judgment the Subordinate Judge upheld his findings as to the accounts and by his decree the defendants 1, 3, 5 and 7 and the plaintiff were respectively directed to pay various sums as their contributions to the liabilities of the business, and it was directed that Abhoy Churn Chowdhry, defendant No. 4, should receive Rs. 1,749 as being due to him on the accounts.

From this decree two appeals were filed, 315 of 1896 by defendants 5 and 7, Ramgati Dhur and Bissumbhur Poddar, and 327 of 1896 by the plaintiff Raj Chunder Sen. They were filed respectively on the 18th and 19th November 1896.

On 9th July 1898 the defendant No. 4 Abhoy Churn Chowdhry, who was a respondent in both appeals' died. On 27th April, 1899 an application was made by the appellants in appeal 315 of 1896 to revive the appeal against Nagendra Lal Chowdhry, the sole executor of Abhoy Churn Chowdhry's estate, to whom probate had been granted on 18th November 1898, and a rule *nisi* was granted to show cause why the name of Nagendra Lal Chowdhry should not be substituted on the record for that of Abhoy Churn Chowdhry. On 1st May 1899 Raj Chunder Sen made a similar application in appeal 327 of 1896 and obtained a similar rule.

On 21st November 1899 a Division Bench of the High Court (MACPHERSON and STEVENS JJ.) discharged both these rules on the ground that the applications for substitution had been made more than six months from the death of the respondent Abhoy Churn Chowdhry and were therefore barred by Art. 175(*c*) of Sch. II of the Limitation Act (XV of 1877), unless it was shown that there had been sufficient cause for the delay. As to this the High Court said :—

"It seems to us that these applications come strictly within the terms of s. 368 read with s. 582 of the Civil Procedure Code. The suit was one for the settlement

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of a partnership account and all the partners were made parties to it. One of those partners has died, and the right to sue does not survive against the surviving defendant or defendants alone. That being so the applications could only be made within s. 368.

"In appeal No. 315 it is said that the delay in making the application was due to ignorance of the death of Abhoy Churn Chowdhry. It is a significant circumstance that no affidavit is made by either of the appellants and that their alleged ignorance is only deposed to by their servant on information said to have been received from them. If this ignorance existed there is no apparent reason why the appellants, or one of them, at all events, should not have made an affidavit to that effect, and the counter affidavit which has been put in affords strong ground for believing that there was no real ignorance.

"In the other case appeal No. 327, in which the plaintiff is the appellant, there was admittedly no ignorance. The plaintiff knew of Abhoy Churn's death shortly after it occurred; but it is said that his servant was deputed to see that an application for substitution was made in this Court, and that the servant deceived the plaintiff by falsely leading him to suppose that such an application had been made and granted. The affidavit is wanting in details which are certainly necessary for testing the truth of this story which is in itself a highly improbable one, and in the face of the affidavit, which has been put in by the other side, we are not disposed to believe it. The applicant's affidavit, so far as the materials given in it go, could only be contradicted by the affidavit of the person, who is said to have been deputed, and we are not certain that *that* person is not still under the control or influence of the appellant.

"Then it is said that after the misconduct of the applicant's servant had been detected, Nagendra Lal Chowdhry, who had taken out probate of the will of the deceased Abhoy Churn Chowdhry, himself led the plaintiff to believe that he would apply for substitution and took active measures to give effect to that intention, but subsequently colluding with other respondents in the appeal refused to make the application. We need not discuss in detail the matters which are set out at some length in the affidavits which have been read to us. We need only say that we are not satisfied on those affidavits that the applicant's version is true. Whatever the reason may have been for the omission to apply, we must come to the conclusion on the materials before us that it was not due to ignorance of the fact of Abhoy Churn's death, or to the circumstances which are set out in the affidavit put in by the plaintiff.

"Disbelieving as we do the reasons which have been put before us, we cannot say that there was sufficient cause for not making the application within the prescribed period, and that being so, we are bound to reject the applications and to discharge the rules, which we do, with costs."

When the appeals came on for hearing before the High Court objections were taken that they had abated under s. 368 of the Civil Procedure Code (Act XIV of 1882) and the Division Bench of the Court dismissed them on that

same ground. The material portion of the judgment was as follows :—

"In our opinion the appeal has abated and cannot possibly go on in the absence of the representatives of the deceased respondent, Abhoy Churn Chowdhry. The suit was in substance one for the winding up of a partnership business and for the taking of the account thereof and it was so dealt with in the Court below. All the partners, Abhoy Churn being one of them, were made parties, and the Subordinate Judge after disposing of all the preliminary questions and determining the respective interests of the parties appointed a commissioner to take the account. This was done and in the result a decree was made, the effect of which was that a sum of Rs. 3,308 was found to be due on account of the partnership to creditors; this and a further sum of Rs. 5,980 due to the partners, defendants Nos. 4, 6, 8, 9, 11, and 12, was to be paid in specified portions by the remaining partners, the plaintiff, defendants Nos. 1 and 3 and defendants Nos. 5, 7 and 10. Out of the last mentioned sum, Abhoy Churn Chowdhry had to receive a sum of Rs. 1,740, so that there was a decree to that extent in his favour.

"The case comes strictly under the provisions of s. 368 of the Code. All the partners are necessary parties to a suit for the winding up of the partnership business and in the absence of any of them the suit could notgo on. If a person, who was a partner, was not joined in the first instance, but was joined at a time when the case as against him would be barred by limitation, the whole suit would fail. *Ramdayal* v. *Junmenjoy Coondoo*(1). If Abhoy Churn had died, while the suit was pending in the Lower Court, the right to sue would not have survived against the surviving defendants only, and if his legal representatives had not been substituted in the manner provided in s. 368, the suit would have abated. So far as the appeal is concerned, the result must be the same, when he died pending the appeal. The decree settling the partnership account and giving effect to the settlement could not be set aside so long as he is unrepresented, the more so as the decree is in his favour and he has, under it, to receive a sum of money from some of the other partners.

"Sir Charles Paul argued, however, for the appellants, defendants Nos. 5 and 7, that this was not strictly a suit for the winding-up of the partnership business; that it was a suit to recover from some of the partners as *tort feasors* partnership money and the value of partnership goods misappropriated by them; and that, in such a suit Abhoy Churn was not a necessary party. He said that the appellants were in the same position as the plaintiff, and that their grievance was that the suit had not been treated as one of that character. It is difficult, however, to see that the appellants were in the same position as the plaintiff. Defendant No. 5 denied in his written statement that the Naraingunge business was a part of the partnership business and that there had been any adjustment of the accounts. He said he was willing to have an adjustment, and he asked that a certain sum which he said would be found due to him might be given to him. Defendant No. 7 put in no written statement, but he also

(1) (1887) I. L. R. 14 Calc. 791.

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seems to have raised a question about the Naraingunge business. Looking at the plaint, which is informally drawn, and the pleadings, it seems clear that the suit was based on a partnership and that it involved the taking of the partnership account, and it was so treated in the Lower Court. Although the plaint did set out that defendants Nos. 1 to 4 had appropriated to themselves partnership goods and money and prayed for the recovery of a specific sum due from them according to an account, which the plaintiff had made up, the prayer was dependent upon their agreeing to that account. If, as happened, they did not agree, the prayer was for the taking of a regular account from such defendant as was found liable to render it, and for a decree in the plaintiff's favour for such sum as he was found entitled to against such defendant as was found to be liable. There was a further prayer for the sale of the partnership property for the recovery of sums overdrawn by the partners, for the realization of dues and the payment of debts and the awarding to the plaintiff of a 4-anna share of the surplus. We think the appeal has abated under s. 368 and that it cannot, therefore, proceed. Under any circumstances, in the absence of the representation of Abhoy Churn it would be impossible to set aside the decree in so far as it is in his favour; and if the rest of the decree is set aside it is difficult to see whence the money decreed to him would come. For the same reasons, we hold that appeal No. 327, which is preferred by the plaintiff, has also abated."

Cohen K. C. and *C. W. Arathoon* for the appellants contended that the High Court in erroneously holding that the provisions of s. 368 of the Civil Procedure Code were applicable, had misunderstood the nature of the suit. The suit was not wholly for a partnership account; some of the defendants were sued for personally misappropriating money and goods belonging to the business; and the prayer of the plaint was not dependent upon all the partners agreeing to the adjustment of account. Section 362 of the Civil Procedure Code was, it was submitted, applicable: the cause of action survived against the remaining defendants alone, and the representative of Abhoy Churn Chowdhry was not a necessary party to the appeals: this was so more particularly in the appeal of the defendant-appellants. It had been therefore wrongly held that the appeals had abated. Reference was made to Civil Procedure Code (Act XIV of 1882), ss. 361, 362, 368, 372 and 582: Civil Procedure Code Amendment Act (VII of 1888), ss. 32, 33 and 66: Probate and Administration Act (V of 1881), ss. 35 and 38: and Limitation Act (XV of 1877), Sch. II, Art. 175(*c*).

H. Cowell for the Seal respondents was not called upon.

The judgment of their Lordships was delivered by

LORD DAVEY. The only question on these Consolidated appeals is whether the High Court at Calcutta was right in holding that the suit had abated, and the appeals to that Court could not proceed in the absence of a representative of one of the respondents, who had died pending the appeals.

The material facts are as follows:—The suit was in substance for taking the accounts and winding up the affairs of a partnership, which had subsisted between the plaintiff and the several defendants to the suit. There were complicated questions as to the respective relations of the parties *inter se*. These preliminary questions were disposed of by the Subordinate Judge, and he thereupon directed the accounts to be taken by a Commissioner. Objections were taken to the report of the Commissioner, and in the result a final decree, dated the 6th July 1896, was made by the Judge, by which it was ordered (so far as material for the present purpose) that a sum of Rs. 9,288 odd should be contributed in certain proportions by the plaintiff (appellant in the first appeal), the defendants Ramgati Dhur and Bissumbhur Poddar (appellants in the second appeal), and certain other parties, and that out of that sum a sum of Rs. 1,740 odd should be paid to Abhoy Churn Chowdhry, one of the defendants, and other payments be made to other parties. The defendants Ramgati Dhur and Bissumbhur Poddar and the plaintiff respectively appealed to the High Court. The defendant Abhoy Churn Chowdhry died on the 9th July 1898, leaving a will, probate of which was granted to his son Nagendra Lal Chowdhry on the 18th November 1898. On the 27th April 1899 application was made by the appellants in the second appeal for an order for substitution of the name of Nagendra Lal Chowdhry for the deceased defendant on the record. A similar application was made by the first appellant On the 21st November, 1899 these applications were rejected on the ground that they were out of time and no sufficient cause had been shown for the delay. The substantive appeals came on for hearing on the 20th March 1900, when the Court held that the appeals had abated and could not therefore proceed. The present appeals are from the decrees then made.

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By s. 368 of the Civil Procedure Code, if any defendant dies before decree and the right to sue does not survive against the surviving defendant or defendants alone, the plaintiff may apply to have a specified person, whom he alleges to be the legal representative of the deceased, substituted for him, and the Court is thereupon to enter the name of such person on the record, but it is provided that, when the plaintiff fails to make such application within the period prescribed, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period.

By s. 582 the words "plaintiff," "defendant," and "suit" include an appellant, respondent, and an appeal respectively.

By s. 66 of the Civil Procedure Code Amendment Act (Act VII of 1888) the period of six months from the date of the death of the deceased defendant is the period prescribed for making an application under s. 368 of the Civil Procedure Code.

It is not disputed that the right to sue did not survive against the other defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry. But applications to substitute his legal representative for the deceased respondent were not made, until after the expiration of the period of six months from that respondent's death. The legal representative of Abhoy Churn Chowdhry was constituted nearly two months before the expiration of the period, and there was no apparent difficulty in making the application in proper time. The only question therefore could be whether the Court was satisfied that the appellants had sufficient cause for not doing so. No serious attempt was made for this purpose. In the circumstances therefore the Court had no option and the present appeals are perfectly idle. Their Lordship will humbly advise His Majesty that they should be dismissed. The appellants will respectively pay the costs of them.

Appeals dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*

J. V. W.