



3. Timal Singh died on 11-7-1947. The plaintiff thereupon made an application on 11-8-1947, to the Court alleging that he and Nandan alone were the legal representatives of the deceased and that they were already parties to the suit, and praying that Timal Singh's name be struck off the array of defendants. 28-10-1947, was fixed for orders upon this application and no objections having been filed to it by Sm. Shyam Rathi, the Court should have ordered on that date that Timal Singh's name be struck off the array of defendants. The Court, however, omitted to pass necessary orders and the name of Timal Singh continued on the record until the date of the judgment of the lower appellate Court, now under appeal, and perhaps continues even now.

4. On 25-8-1947, after the death of Timal Singh, Nandan executed a deed of adoption, in which he stated that he had adopted as his son Sahab Singh, the grandson of Sm. Shyam Rathi, on 20-8-1947. Thereafter, Nandan also died on 8-10-1947. The plaintiff seems to have been unaware of this adoption and in ignorance of this adoption he applied on 28-10-1947, that the name of Nandan deceased be also struck off the array of defendants. Issues were framed in the case on that very day. It appears that after the counsel for the plaintiff had left the Court, an application was made on behalf of Sm. Shyam Rathi, stating that Nandan had left behind him an adopted son, Sahab Singh. The Court allowed time upto 15-11-1947, to the plaintiff to file objections to this application, but no notice of it appears to have been given to the plaintiff.

5. When the hearing of the case started on 9-1-1948, the counsel for Sm. Shyam Rathi did not refer to the application in which it was stated that Nandan had left behind him an adopted son and the case was allowed to proceed. After the evidence was over and when the case was taken up for arguments three days later, on 12-1-1948, the learned counsel for Sm. Shyam Rathi referred to that application and contended that inasmuch as no objection to that application had been filed and the adopted son of Nandan had not been brought on the record, though more than ninety days had elapsed since Nandan's death, the suit had abated. The plaintiff protested that he had no notice of the application. The Court thereupon fixed a date for the hearing of the objection.

6. The plaintiff disputed the adoption, The Court proceeded to record evidence upon that point and having decided on 3-4-1948, that Sahab Singh was adopted by Nandan, made an order that the suit had abated, because Sahab Singh had not been brought on the record within the prescribed period of limitation.

7. It is obvious that not only is the order passed by the Court absolutely wrong, but also that it has acted illegally and with material irregularity in the exercise of its jurisdiction in ordering that the suit had abated. Order 22, Rule 4, Civil P. C., provides:

"(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant."

8. In this case there were three defendants. At any rate, there were two when Nandan died. So the rule, in so far as it relates to the death of a sole defendant, does not apply to it. For the application of the rule to a case where there are more than one defendants, it is necessary that the right to sue should not survive against the surviving defendant or defendants alone. For the reasons to be stated hereinafter, I am of the opinion that in this case the right to sue had survived against the surviving defendant Sm. Shyam Rathi. It would, therefore, appear *prima facie* that this rule has no application whatsoever to the present case. There is no other rule in the Code of Civil Procedure which provides for the abatement of a suit when a defendant dies. I do not wish to enter in this case into the vexed question, whether by reason of the fact that the right to sue has survived against the surviving defendant, Sm. Shyam Rathi, there has or has not been any abatement in the suit at all, but is evident from the plain reading of the section that if the suit has abated to any extent at all it has abated against the deceased defendant Nandan only. The rule does not provide for the abatement of a suit as a whole against all the defendants under any contingency whatsoever. A suit abates against the deceased defendant only under certain contingencies. The learned Munsif was, therefore, manifestly wrong in holding that the suit itself had abated. The utmost that he could hold was that the suit had abated against Nandan.

9. After it has been found that a suit has abated against a particular person, the next question that calls for decision by the Court whether the suit can proceed at all in the absence of the legal representatives of the deceased. If it becomes improperly constituted by reason of the fact that the legal representatives of the deceased are not parties to it, it cannot proceed further and has to be dismissed as improperly constituted. The proper order to pass in such a case is to dismiss the suit as improperly constituted and not to declare that the suit has abated. This is a matter of substance and not merely a matter of form, for the 'dismissal of a suit amounts to a decree against which the plaintiff has a right of appeal, whereas an order declaring that a suit has abated is perhaps not appealable at all.

10. The next question to be considered now, therefore, is whether the suit did become improperly constituted by reason of Nandan's representative, Sahab Singh, not having been brought on the record within the prescribed period of limitation. This will also incidentally determine the question, whether the right to sue had or had not survived against Sm. Shyam Rathi alone, a question upon which I had reserved my opinion so far. No relief was claimed by the plaintiff against Nandan or Timal Singh. It was open to him to have brought the suit with Sm. Shyam Rathi alone as the defendant. Timal Singh and Nandan were merely *pro forma* defendants. Merely because the plaintiff desired the benefit of the decree to go to Nandan and Timal Singh also, it does not follow that he

cannot claim the benefit of that decree in the absence of Timal Singh and Nandan. The object of the suit being only to dispossess a trespasser and the trespasser being still alive and being a party to the suit. I am of the opinion that the right to sue did survive against the surviving defendant the trespasser, and that right is in no way affected by the death of those against whom it was not claimed. The suit had therefore not become improperly constituted on the ground that it had abated against Nandan deceased. The learned Munsif has acted illegally and with material irregularity in the exercise of his jurisdiction in declaring the suit to have abated without applying his mind-to the provisions of Order 22, Rule 4, Civil P. C., and without adverting to the questions which called for his decision. As a matter of fact, he has not at all considered the effect of the abatement of the suit against Nandan and he simply declared the suit to have abated as a consequence of his finding that the legal representative of Nandan has not been brought on the record within the prescribed period of limitation.

11. The order of the learned Munsif, as it stood, was not appealable. It was not an order dismissing the suit although that should have been the order if the learned Munsif thought that the suit could not proceed against Sm. Shyam Rathi alone. The lower appellate Court has misled itself into supposing that the learned Munsif had dismissed the suit. The learned District Judge had no jurisdiction to hear the appeal and his order is without jurisdiction. The learned counsel for the appellant, therefore, rightly contends that the order of the lower appellate Court, setting aside the order of the Munsif and remanding the case for decision, should be set aside as an order passed without jurisdiction.

12. He is, however, met by the preliminary objection that no appeal lies from the order of the lower appellate Court in this case and that, therefore, this appeal is not maintainable. Learned counsel for the appellant, contends in reply that where a Court usurps jurisdiction and decides a case, an appeal lies from its decision on the ground that the order or decree appealed against is without jurisdiction, exactly in the same way as if he had jurisdiction to pass the order or the decree. This proposition is well founded but does not help the appellant in the present case, for the order of remand having been passed by the lower appellate Court, not in an appeal from a decree but in a miscellaneous appeal from an order, no further appeal would have lain against it to this Court even if the lower appellate Court had (no?) jurisdiction to entertain it. Vide *Dharam Singh v. Tikam Singh*, 1988 A. L. J. 63: (A. I. R. (25) 1938 ALL. 124). I, therefore, accept the preliminary objection and hold that this appeal is not maintainable.

13. Learned counsel for the appellant prays that this appeal may be treated as a revision and the order of the lower appellate Court be set aside under Section 116, Civil P. C., as an order passed without jurisdiction. I have acceded to this request, for I consider this to be a fit case in which I should set aside the order of the lower appellate Court, as it is entirely without jurisdiction. I have not only found that the order of the lower appellate Court is without jurisdiction, but I have found that the order of the trial Court also is manifestly wrong and that in making that order that Court has acted illegally and with material irregularity in the exercise of its jurisdiction. I, therefore, set aside that order also in the exercise of my revisional jurisdiction.

14. In the result, the order of the lower appellate Court, dated 29-8-1949, and the order of the Munsif, dated 3-4-1948, are both set aside and the case is remanded to the Court of the Munsif, through the lower appellate Court, with the direction that it should proceed against Sm. Shyam Rathi alone and decide it in accordance with law. I direct the parties to bear their own costs of these proceedings in all the Courts. Other costs of the suit shall be in the discretion of the trial Court.