

A. I. R. 1917 Lahore 371

SCOTT-SMITH AND SHADI LAL, JJ.
Niranjan Nath—Plaintiff—Appellant.

v.

Afzal Hussain—Defendant—Respondent.

Second Appeal No. 520 of 1914, decided on 2nd February, 1917, from the Decree of Dist. Judge, Delhi, dated 16th December, 1913.

Civil P. C. (5 of 1908), O. 22, R. 3—Suit for ejectment and arrears of rent—Death of co-plaintiff—Failure to bring on record legal representative—Suit abated only in respect of share of deceased.

Two brothers, B and N, who were not members of a joint Hindu family, sued for ejectment of defendant from a house and for arrears of rent due from him. During the pendency of the suit B died and his legal representatives were not brought on record within the statutory period:

Held, that inasmuch as the suit could proceed in the absence of B's legal representatives, it abated only in respect of his share, and not in respect of the share of N. A. I. R. (1914) Lah. 123, dist. [P. 371, C. 2.]

Kanuar Narain—for Appellant.

Muhammad Iqbal—for Respondents.

Judgment.—The suit out of which the present appeal arises was for the ejectment of the defendant-respondent from a house and for arrears of rent due from him. The suit was brought by two brothers, Pandit Bishambar Nath and Niranjan Nath. While the suit was pending Bishambar Nath died and no application to bring his legal representative on the record was made within the statutory period. The suit as regards Bishambar Nath, therefore, abated under O. 22, R. 3, Civil Procedure Code. The first Court held that the suit abated as a whole, because the right to sue was joint and could not be separated. The lower Appellate Court agreed with the view of the first Court and dismissed the appeal, and Niranjan Nath has filed a second appeal to this Court.

The question whether the order appealed against was a decree was referred to a Full Bench, which has decided it in the affirmative. We now proceed to decide the appeal on the merits. It is admitted before us that the original plaintiffs were not members of a joint Hindu family, but it was contended that each of them had a specific share in the property in dispute. Appellant's Counsel urges that the

suit could proceed as regards his client's share. The Full Bench in its order laid down that if the suit was of such a nature that it cannot proceed in the absence of the deceased's legal representative, the partial abatement will result in the total abatement or dismissal of the suit. We have, therefore, to consider whether the present suit could proceed in the absence of Bishambar Nath's legal representative. If it could not so proceed then the order of the lower Court is correct. Rulings such as *Hadu v. Lala* (1) do not help us much in the present case. The facts of the present case are distinguishable from those of that case. In the latter the shares of the parties in the joint property had to be determined and it was held that the Court must have all the co-sharers before it. It was also pointed out that the suit could not have been instituted and prosecuted until all the co-sharers had been made parties. In the present case if Niranjan Nath is a co-sharer in the property in dispute, we see no reason why the suit cannot proceed as regards his share. Suppose in the first instance his brother Bishambar Nath deceased had not joined him in suing, it cannot be held that Niranjan Nath could not have sued alone. In our opinion he could certainly have sued as regards his share in property, although the Court would have probably ordered his brother to be made a defendant. Proceeding with the suit in the absence of Bishambar Nath's legal representative will not prejudice the defendant in any way. No doubt Niranjan Nath cannot get a decree for ejectment of the defendant from the whole of the house in dispute, but he can get a decree declaring his own rights such as would entitle him subsequently to sue for partition of his share.

We, therefore, accept the appeal and setting aside order of the lower Courts remand the case to the Court of first instance for decision on the merits. Stamp in this Court and in the lower Appellate Court will be refunded and other costs will be costs in the cause. R.M./R.K.

Appeal accepted ; Suit remanded.

(1) A. I. R. (1914) Lah. 123=21 I. C. 951 =41 P. R. 1915.