PATNA HIGH COURT

Mahindra Singh

Vs

Chander Singh

A.F.A.D. Nos. 730 and 771 of 1950

(Raj Kishore Prasad, J.)

23.01.1956

JUDGMENT

Raj Kishore Prasad, J.

1. These two second appeals arise out of two appeals preferred before the Court of appeal below, and have been heard together with the consent of the parties, as they arise out of one and the same suit.

2. S. A. 730 of 1950 is by the pliantiffs, arising out of Title Appeal 88/6 of 1948/50, preferred by defendant 5 in the matter of cost only, which was allowed by the Court of appeal below, and the decree for cost awarded against defendant 5 was set aside. S. A. 771 of 1950 is also by the plaintiffs arising out of Title Appeal 91 of 1948, allowed by the -Court of appeal below, reversing the decision of the first Court, and dismissing the plaintiffs' suit.

3. The facts material for determination of the present appeals may briefly be stated thus: The suit out of which the present appeals arise, was originally instituted by Mr. M. Nunawati on 27-1-45 as plaintiff No. 1 for recovery of possession of the disputed properties, of which the last male-holder was Awadh Behari Singh, who died in Chait 1349 Fs., corresponding to the year 1942. The plaintiffs' case was that Awadh Behari, her brother, died issueless, and she was his sole surviving sister, out of his four sisters. She impleaded Mahinder Singh the present plaintiff No. 1 and appellant No. 1, in both the appeals, as defendant 7, on the allegation that he was the only son of Ramwati Kuer, another predeceased sister of Awadh Behari. Original plaintiffs 2 and 3 were transferees from Musst. Nunawati, but they having died during the pendency of the suit were substituted by their heirs, the present plaintiffs 2 and 3. Defendant 3 was son and defendant 4 grandson of Mt. Sonawati, one of the sisters of Awadh Behari, who was married to Ramasray Singh. The plaintiffs admitted that Sonawati was one of the sisters of Awadh Behari and was married to Ramasray Singh, but they alleged that she died shortly after her marriage, and thereafter Ramasray married another lady, and begot on her defendant 3, and Harekishun Singh, father of defendant 4. These defendants 3 and 4 were described as defendants 2nd party in the suit. Defendants 1 and 2 who were described as defendants first party, were transferees from the defendants 2nd party.

Defendant 5, who was described as defendant 3rd party, was made a party to the suit on the allegation that he claimed to be bharnadar of some of the suit plots under a bharna deed dated 18-7-1890 and also claimed certain other plots on the basis of an oral purchase. The plaintiffs, however, alleged that the bharna bond had been redeemed by Awadh Behari, and that he did not sell any land to defendant 5.

4. The suit was contested by defendants 1 to 5. The common defence of these three sets of defendants was that Awadh Beliari had only one sister, namely, Mt. Sonawati, whose son was defendant 3, and whose grandson was defendant 4, and that Mt. Nunawati, plaintiff 1, was not the sister of Awadh Behari, nor was defendant 7 his sister's son. Defendant 5's further defense was that the ijara was intact and it had not been redeemed, and that he had purchased some plots under a registered sale deed and some others under an oral purchase.

5. The first Court found that Mt. Nunawati, original plaintiff 1, was not the sister of Awadh Behari; Mahinder Singh was the sister's son of Awadh Behari; defendant 3, and the father of defendant 4, were not the sons of Mt. Sonawati, the sister of Awadh Behari; defendant 5 was not the purchaser of plots 51 and 55, as claimed by him by oral sale; the bharna of 1890, in favour of defendant 5, had not been redeemed by Awadh Behari, and as such defendant 5 was still the bharnadar of plots 1333, 1432 and 2389 under the deed of 1890; and defendant 5 had purchased plot 2388 by a registered sale. On these findings the learned Munsif dismissed the suit of the plaintiffs in respect of plot 2388 as claimed by defendant 5, but granted them a decree in respect of the remaining lands in suit. He however, allowed costs to the plaintiffs against defendant 5 also, in spite of the fact that his defence was accepted substantially.

6. Against the above decree, two appeals were preferred before the Court of appeal below. Title Appeal 88/6 of 1948/50 was preferred by defendant 5, who was defendant third party in the suit, against the joint decree for cost, allowed to the plaintiffs against defendant 5 and the other defendants. This appeal was allowed by the learned Subordinate Judge, and he directed that the plaintiffs and defendant 5 should bear their own costs of the trial Court. The other appeal was Title Appeal 91 of 1948, preferred by the defendants 1st party. This appeal was also allowed by him, and the plaintiffs' suit was dismissed in toto as not maintainable.

7. The lower appellate Court, in agreement with the first Court, found that Mt. Nunawati, the original plaintiff no. 1, was not the sister of Awadh Behari, and that Mahinder Singh, original defendant 7, was the sister's son of Awadh Behari. It, however, in disagreement with the learned Munsif, found that Mt. Sonawati, the sister of Awadh Behari, who was married to Ramasray Singh, gave birth to two sons, namely, Harekishun, father of defendant 4, and Ramjanam, defendant 3, and as such half of the inheritance of Awadh Behari devolved upon defendant 3, and the other half on Mahinder Singh, original defendant 7, and present plaintiff 1. It however found that Mahinder Singh, although sister's son of Awadh Behari, had no right to continue the suit, after the death of Mt. Nunawati, and, therefore, the plaintiffs' suit was not maintainable. On these findings the learned Subordinate Judge set aside the decree passed by the first Court, and dismissed the plaintiffs' suit.

8. As regards S. A. 730 of 1950, the only point which has been pressed before me by Mr. Kameshwar Dayal appearing for the plaintiffs-appellants is that the appeal by defendant 5 before the Court of appeal below being an appeal against a decree for cost was not maintainable, and as such the Court of appeal below has erred in law in setting aside the decree for cost awarded to the

plaintiffs against the defendant 5 by the first Court. In support of his contention, he has relied on *Umesh Chandra Dutt v. Bibhuti Bhusan Pal*[1], in which it was held that an appeal raising a question of costs only, where no question of principle is involved, is incompetent. In this case there was no question of principle involved. The only question was that the first appellate Court thought that the plaintiffs should be awarded more than what the first Court had allowed. In those circumstances, the order of the first appellate Court was set aside. His Lordship Fletcher, J., with whom Cuming, J., agreed, observed :

> "Now, if it is assumed in the present case that this is a decree, or an appealable order, then an appeal would involve a question of costs only. If it is a non-appealable order, it is quite clear that there cannot be an appeal. Now, what is the question of principle involved in this case? There is nothing except that one Judge thinks that the plaintiffs should be awarded more than what the first Court allowed. There is no question as to any difficult construction of the terms of the agreement arrived at between the parties, or any similar question. Similarly, there is no question as to what amount must be allowed to the plaintiffs under the terms of the arrangement. It is quite clear that, in a case like this, the appeal raising the question of costs only, where no question of principle was involved, was not competent and could not be heard and decided by the learned District Judge."

9. I am in respectful agreement with the above observations of his Lordship.

10. It is a well-settled principle that the matter of awarding, or disallowing costs is in the discretion of the Judge; and when the judge gives reason for his order awarding, or disallowing, costs, and these reasons are sufficient and sound, the appellate Court will not interfere with his order. Such a discretion should only be interfered with in appeal if the trial Court had exercised its discretion improperly.

11. The usual rule, as given in Section 35(2), Civil Procedure Code, is that "the costs shall follow the event", which means that the party, who on the whole succeeds in the action, gets the general costs of the action, but where the action involves separate issues whether arising under different causes of action, or under one cause of action, the word "event" should be read distributively, and the costs of any particular issue should go to the party who succeeds upon it. An issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part. Such discretion must be a judicial discretion, to be exercised on legal principles, not by chance, medley, nor by caprice, nor in temper. It must be exercised on fixed principles, that is, according to the rules of reason and justice, not according to private opinion, or benevolence, or even sympathy (see Mulla's C. P. Code, 12th edition).

12-13. In this connection, I reproduce below, what Beevor, J., with whom Manohar Lall, J., agreed, in *Kameshwar Singh v. Nebilal Mistri*[2], while considering the extent of, and nature and mode of exercise of, discretion under Section 35, C. P. Code, said :

> "Section 35, C. P. C., deals with the Court's powers regarding costs, and the substantial portion of the section directs that costs shall be in the discretion of the Court. Where

discretion has properly been exercised, the appellate Court and this Court in revision will not interfere with the exercise of that discretion. The discretion given is, however, a judicial discretion to be exercised in accordance with definite principles. It has, however, been held in many cases that where a principle is involved the Court will always interfere and entertain review from the decision of Taxing Officer : vide *Langley v. D'Arcy*[3], where the English decision *Hill v. Peel*[4], is cited for this proposition and there is no doubt that where a question of principle is involved this Court will interfere in revision with orders for costs."

".....It is clear that a very wide discretion is given to the Courts under Section 35, Civil Procedure Code, and that discretion extends not only to the question which party should bear the costs of a suit or proceeding, or in what proportion, but also in many instances to the question whether a particular item should be allowed as costs of a party, and if so, for what sum."

"Without attempting to lay down any hard and fast rule, I think that in practice it will be found convenient to keep separate any question regarding the exercise of a general discretion given to the Court to determine to what extent a successful party should be allowed to recover his costs and from whom from any question relating to the exercise of the discretion to determine whether a particular item should be allowed as cost and if so for what sum. No doubt in some cases the same circumstances may afford a ground both for disallowing a portion of the costs of the successful party and for disallowing a particular item. This will not, however, affect the principle". I am in respectful agreement with the above observations of their Lordships.

14. In the present case the learned Subordinate Judge, in my opinion, correctly stated the principle when he said :

"It is a settled principle of law that ordinarily costs should abide the result. It is also well settled that the order for costs passed by the trial Court should not be interfered with unless it involves some injustice to the party aggrieved."

15. The learned Subordinate Judge considered all the aspects of the case, and found that the learned Munsif was not justified in saddling defendant 5 with cost even when a major portion of the property claimed by him had been allowed and his defence accepted in respect thereof; and therefore, he was of the opinion that a matter of principle was involved and as such he was entitled to interfere with the order of the first Court regarding costs. The learned Subordinate Judge, therefore, directed that the plaintiffs and defendant 5 should bear their own costs of the trial Court, as well as of the appeal before him. It cannot, therefore, be said that the appeal before the learned
Subordinate Judge did not involve any question of principle, or that he was not aware of the principles, which should guide a Court of appeal in such an appeal, and that, therefore, he was not justified in passing the order which he did.

16. I am not unmindful of the decision of their Lordships of the Supreme Court in *Namdeo*

Lokman v. Narmadabai[5], in which his Lordship Mahajan, J., observed :

> "In this situation the High Court was fully justified in finding that in second appeal it would not interfere with the discretion of the Courts below in refusing to grant relief against forfeiture."

17. It is well-settled that when the question is one of a discretion of the first Court, the appellate Court cannot in appeal interfere with the way in which the discretion was exercised, or not exercised, unless it appears that the first Court did not apply its mind at all to the question, or acted capriciously, or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal objection to the way in which discretion has, or has not been exercised by the first Court then the first appellate Court would not in appeal substitute its own discretion for that of the first Court. It is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. But where the first appellate Court has substituted its discretion for that of the trial Court, and the High Court finds that the discretion exercised by the first appellate Court was more sound, the discretion of the lower appellate Court should not be interfered with in second appeal by the High Court. Vide *Rehmatunnissa Begum v. Price*[6], and *Jaigobind Singh v. Lachmi Narain Ram*[7], (G). In my opinion the learned Subordinate Judge has given good reasons for interfering with the order for cost passed by the first Court in favour of the plaintiff.

18. Further, whether the appeal before the learned Subordinate Judge was valid or competent, or not, was a question entirely for the first appellate Court, before which the appeal was filed, to determine. No doubt this determination is possible only after the appeal is heard, and there is nothing to prevent a party from filing an appeal, which may ultimately be found to be incompetent. But, in the present case it does not appear that the incompetency of the appeal was at all challenged by the appellants before the lower appellate Court. No doubt their omission to challenge the maintainability of the appeal before the Court of appeal below would not bar their present appeal, or prevent them from challenging the order of the Court of appeal below in the present appeal; but, in my opinion, this question of incompetency of the appeal before the first appellate Court should have been agitated before it so that this court might have got the benefit of the view of that Court. However, the discretion exercised by the lower appellate Court seems to me to be more sound than that of the trial Court, and as such I decline to interfere with the discretion exercised by the lower appellate Court in the matter of costs.

19. In the result, this appeal fails, and is dismissed; but, in the circumstances of the case, there will be no order for costs.

20. As regards S. A. 771 of 1950, the only point, which has been canvassed before me by Mr. Kameshwar Dayal, appearing for the plaintiffs-appellants, is that the Court of appeal below has wrongly non-suited the plaintiffs, and dismissed their suit. In order to appreciate this point, it is necessary to state a few more facts. During the pendency of the suit in the first Court, which, as I have stated before, was instituted on 27-1-45, after the death of Awadh Behari, the last male-holder, in 1942, Mt. Nunawati, original plaintiff 1, died on 16-7-46. On 20-9-46, in the first Court, Mahinder Singh, original defendant 7, filed a petition for his own substitution in place of Nunawati, the deceased plaintiff 1. An amendment of the plaint accordingly was also asked for.

The defendants objected to Mahinder, defendant 7, being substituted in place of Nunawati, the original plaintiff 1 on the ground that he was not at all the heir of the deceased plaintiff 1, Mt. Nunawati. This objection of the defendants was overruled, and substitution was allowed, and the plaint was also amended on the same day, that is on 20-9-46. The position, therefore, was that Mahinder Singh, original defendant 7 and present plaintiff 1, after being substituted in place of the original plaintiff 1, Mt. Nunawati, continued the suit without any further objection by any party in the suit itself. The suit was decreed in part on 20-1-48. On appeal, however, the right of Mahinder Singh to continue the suit was challenged, and the Court of appeal below upheld the objection of the defendants, and dismissed the plaintiffs' suit on that ground, as I have stated earlier. The contention of Mr. Dayal is that the decision of the Court of appeal below on point No. 4 in its judgment, which deals with this question, is erroneous in law. Mr. Rai, T. N. Sahai, appearing for the defendants-respondents, however, has supported the judgment of the Court of appeal below on the above point on the ground that on the death of Mt. Nunawati, original plaintiff 1, her right to sue did not survive to Mahinder Singh, original defendant 7, and as such he could not continue the suit, nor could he be substituted in her place, as he was not her legal representative, and as such the suit with the death of Mt. Nunawati, came to an end.
He has further contended that the suit by Mt. Nunawati, who was a stranger to the family of Awadh Behari, on the concurrent findings of the Courts below, therefore, became dead, and it could not be revived, or continued even by a legal heir of Awadh Behari, if he was not originally one of the plaintiffs of the suit. I shall, therefore, now proceed to examine the respective submissions made by learned counsel for the parties, and the cases cited by them in support of their respective contentions.

21. Mr. Kameshwar Dayal's contentions are two-fold : (i) that Mahinder Singh was already a party to the suit as defendant 7, and. therefore, he could be transposed as co-plaintiff to continue the suit of the deceased plaintiff, Mt. Nunawati, and as such there is no question of abatement of the suit after the death of Mt. Nunawati and (ii) that the suit brought by Mt. Nunawati must be considered to be a representative suit, inasmuch as the other legal heirs of Awadh Behari, namely, the sons of his deceased sisters, were already parties to the suit as defendants 3 and 7, and, therefore, there is no question of abatement in such a suit.

22. In support of his first contention, Mr. Dayal relies on *Bhupendra Narayan Sinha v. Rajeswar Prosad*[8], in which their Lordships of the Privy Council held that the course of adding pro forma defendants as co-plaintiffs should always be adopted where it is necessary for a complete adjudication upon the questions involved in the
suit and to avoid multiplicity of proceedings. In this case all the necessary persons were parties to the suit, and the plaintiff of the suit was not a stranger to the family, but admittedly a member of the family. The other members of the family were also parties to the suit. In such circumstances, Sir George Lowndes, in delivering the judgment of the Board, said :

> "All the members of the family were parties to the suit, and were at least jointly entitled to the whole. The pro forma defendants asked that a decree should be passed in favor of the appellant. If there was a technical objection to this, the Court clearly had power at any stage of the proceedings to remedy the defect under Order 1 Rule 10, Civil Procedure Code, by adding the pro forma defendants as co-plaintiffs with the appellant. Such a course should, in their Lordships' opinion always be adopted where it is necessary for a

complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings."

I am in respectful agreement with the principles laid down by their Lordships, but they do not apply to the present case. In the present suit Mt. Nunawati, the original plaintiff, was unconnected with Awadh Behari, on the findings of the Courts below, and as such she was not a reversioner, much less the nearest reversioner to the estate of Awadh Behari Singh. In a case like the present, where a suit is brought by a stranger to the family, and who is not the next, or even a reversioner of the last male-holder, then on her death, her suit must come to an end, because the admitted legal representative, even if he is a party to the suit as a defendant cannot continue it in place of the original plaintiff after her death. There was, therefore, no question of adding Mahinder Singh, defendant 7, as a co-plaintiff after the death of Mt. Nunawati.
The question of adding pro forma defendants as co-plaintiffs arises only when the original plaintiff is already on the record, but for some technical reason he is not entitled to get a decree either for the full amount, or a portion of it, and, therefore, it is necessary to have the defendant, or the pro forma defendant, transposed as a co-plaintiff in order to give a decree to the plaintiff, as was the case in the Privy Council decision, just referred to. The present case, however, is entirely different, and, therefore, the first contention of Mr. Dayal must be overruled.

23. With regard to the second contention of Mr. Dayal, it becomes essential to examine first the scheme of the Code of Civil Procedure, regarding death of a party to a suit, and its effect on it, and when it abates, and when it can be continued.

24. Order 22 of the Code of Civil Procedure deals with, inter alia, "death of parties". The law of abatement, as stated in the Civil Procedure Code, and elucidated in the illustrations to Order 22 Rule 1, given in Mulla's C. P. Code, 12th edition, is found on the maxim 'actio personalis moritur cum persona'. The above illustrations to Order 22 Rule 1, as also the provisions of the next following rules of O. 22, show what the right to sue is, and in whom it vests. Rule 1 of O. 22 provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 2 of O. 22 deals with the procedure where one of several plaintiffs or defendants dies and the right to sue survives. Rule 3 of the same Order deals with the procedure in case of death of one of several plaintiffs or of sole plaintiff. Similarly, R. 4 deals with the procedure in case of death of one of several defendants or of sole defendant, Order 22 Rule 3, has, therefore, a direct bearing on the present question. Rule 10 of O. 22 relates to cases of transfer or devolution of interest not otherwise provided for in a case where devolution takes place by reason of death and the matter falls under Rule 4, R. 10 will have no application : see the *State of Madras v. Javali Govindappa*[9]*,*

25. The above rules 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 Rule 3 on the death of a sole plaintiff, the 'right to sue' vests in his legal representative. The 'right to sue' means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. The words "the right to sue" has been held to mean "the right to prosecute by law, to obtain relief by means of legal procedure". Vide *Chettikulam Prasanna Venkatachala Reddiar v. Collector of Trichinopoly*[10]*,* The right to sue is based upon facts, which go to make up what is called the cause of action, and Rule 9 of Order 22 provides

that "where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action". The language of R. 9 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.

26. The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it becomes necessary materially to alter the pleadings, it becomes manifest that the original cause of action is being substituted for another cause of action, which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit, which has to be tried. The legal representative of a deceased plaintiff in such a case is confined to the pleadings and case of the plaintiff, whose representative he is, and cannot agitate in that suit his own claims against the other plaintiffs in the case though he may do so in any other proceedings. As the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, likewise, the defendant can raise no other defence against him other than what he could have raised against the deceased plaintiff. Vide *Sham Chand Giri v. Bhayaram Pandey*[11], *Subbaraya Mudali v. Manikka Mudali*[12], *Mahomed Naina Maracair v. Ummanaikani Ammal*[13], *Gulzar Shah v. Sardar Ali Shah*[14], and *Ramsarup Das v. Rameshwar Das*[15],

27. The general rule is that all rights of action and all demands whatsoever existing in favor of or against a person at the time of his death survive to and against his representative, but rights intimately connected with the individuality of the deceased will not survive. One aspect of this exception is expressed by the maxim "actio personalis moritur cum persona", that is, "a personal right of action dies with the person", as just mentioned. In eases of personal actions, that is, any actions where the relief sought is personal to the deceased, the "right to sue" will not survive to his representative.

28. A suit by or against a reversioner in respect of the estate of a Hindu widow,
however, is one brought or defended in a representative capacity and on behalf of all the reversioners. Consequently, on the death, pending suit, of such reversioner, the next reversioner will be entitled to continue the suit, or defend it, and there is no abatement. Where, however, on the death of the reversioner events happen, such as the death of the limited owner, which change the nature of the relief to be granted, there can be no continuation of the suit. Similarly, a suit by a reversioner in respect of the estate of the last male-holder against the other reversioners and the alienees of the last male-holder, will be a suit brought in a representative capacity and on behalf of all the reversioners, and on the death, pending suit, of such reversioner, the next reversioner will be entitled to continue the suit, or to defend it, and there is no abatement.

29. A suit for possession brought by a Hindu widow in a representative capacity as representing the estate, as such also, does not abate on her death. The right to sue survives to the reversioner of the last male owner, who are her legal representatives within the meaning of Section 2(ii) of the Civil Procedure Code, and as such are entitled to be brought on the record. In such a case the widow does not bring the suit on any cause of action personal to herself, nor does she seek any benefit for herself only. She sues as representing her husband's estate; and the property, if recovered would continue to appertain to that estate; and would, on her death, go with the rest of it to the succeeding heirs. Vide *Gandi Ramaswami v. Puramsetti Pedamunayya*[16], and *Premmoyi Choudhrani v. Preonath Dhur*[17], A suit by a reversioner is not only a representative suit, but is

also a suit by plaintiff in a representative character as mentioned in Order 7 Rule 4, Civil Procedure Code vide *Krishnaswami Iyer v. Seethalakshmi Animal*[18]*,*

30. In the case of *V. Venkatanarayana Pillai v. Subbammal*[19]*,* his Lordship Ameer Ali, J., while considering the nature of suits by a presumptive reversioner, observed :

> "Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility, or spes successionis. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death."

Later on, while considering Articles 118 and 125 of the Limitation Act, in this connection, his Lordship said :

> "But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two articles are distinct in their scope and character; one relates to status and involves the adjudication of a right in rem; the other raises a question of mere justifiable necessity. But in both 'the right to sue' is based on
> the danger to the inheritance common to all the reversioners which arises from the nature of their rights."

Further on, while considering whether the "right to sue" survives, his Lordship observed :

> "There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or conclusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question 'whether the next presumable heir' is 'the legal representative' of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights."

Then, with regard to Order 22, Rules 1 and 3, and Order 1 Rule 1 of the Code of Civil Procedure his Lordship said :

> "It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiff's in the presumptive reversioner's suit. The right to relief on the part of the reversioners exists severally in order of succession and arises out of one and the same

transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, viz., the validity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the 'next presumable reversioner' is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for."

31. In the subsequent case of *Janaki Ammal v. Narayanaswami Aiyar*[20], in which the above case was relied upon, a suit was brought by a next reversioner of a deceased male-holder against- his widow and another, making charges of a serious character against the conduct and management of the estate by the deceased's widow. None of these serious charges were held to be well founded in fact. The Subordinate Judge, however, declared the plaintiff to be the next reversionary heir of the deceased after the lifetime of the defendants (his widow and mother). Lord Shaw, in this connection, made the following observations :

"It is impossible to predicate at this moment who is the reversionary heir of the deceased proprietor. If a Court of law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of
reversionary heir. A priori, accordingly, a declaration of right granted at the present stage would appear to be stamped with - something in the nature of futility".

"It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all from a spes successionis, is recognised by Courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life."

"But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the corpus of the estate may pass unimpaired to those entitled to the reversion." His Lordship, further on, with regard to the declaration granted to the plaintiff by the first Court, said :

"In their Lordships' opinion the plaintiff-respondent was not entitled to such a declaration. Had waste of, or danger to the estate been established, the title of the plaintiff to bring those matters before the Court in his representative capacity as a possible reversionary heir would have been allowed, and a decree following upon the finding of fact of such waste or danger would have followed. But the whole of that part of the case has failed. And in their Lordships' opinion the case must accordingly be treated as if the suit had been directed simpliciter to a declaration of the plaintiff's individual right. In the view of the Board it is not legitimate to give a plaintiff, under cover of a request for 'further relief, after all the substantial heads of a claim have failed, greater right to obtain a declaration than he would have had if such a declaration had been asked directly and unaccompanied

by other and unfounded claims."

32. The principles laid down in the above cases apply to suits brought by a next reversioner of a deceased male-holder or female holder both in respect of his or her estate.

33. Bearing the above principles in mind, in the present case, the questions for determination are : (1) did the right to sue, after the death of Mt. Nunawati, survive to Mahinder, original defendant 7 and present plaintiff 1? and, (2) if the right to sue did not survive to Mahinder, could he, as an admitted reversioner, continue the suit, originally brought by Mt. Nunawati, who as found by the Courts below, saw a complete stranger to the family of Awadh Behari, and not his sister or legal representative? Under these two heads the second contention of Mr. Dayal may now be examined.

34. With regard to the question, whether the right to sue, after the death of Mt. Nunawati, survived to Mahender, original defendant 7 and present plaintiff 1, it has to be borne in mind that

> "the true doctrine is that whenever you find that the deceased person has by his wrong diverted either property or the proceeds of the property belonging to some one else into his own estate, you can then have recourse to that estate through his legal representative when he is dead, to recover it", subject to the limitation that the decree will be limited to the assets of the deceased wrong-doer's estate. In the words of their Lordships of the Court of Appeal, who decided the case of *Philips v. Homfray*[21],
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> "In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value."

In laying down the above principles, their Lordships have considered the application of the common law rule of actio personalis moritur cum persona. In my opinion, the answer to the question raised before me depends upon the nature of the suit. If the plaintiff is suing to establish his right to a certain property in his own rights, and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will, therefore, abate. Likewise, where the plaintiff's suit is of a personal character, in which the rights claimed by him are intimately connected with his individuality, on his death, the right to sue would not survive, and the suit will therefore, abate.

35. In the present case the admitted position, on the findings of the Courts below, which have not been challenged before me, is that : (1) Mt. Nunawati, the original plaintiff, was not the sister of Awadh Behari, the last male-holder of the estate in dispute; (2) Mahender, present plaintiff 1 and the original defendant 7, and the admitted son of a predeceased sister of Awadh Behari was not the legal representative of Mt. Nunawati; and (3) none of the legal representatives, if any, of Mt. Nunawati, applied for being substituted in her place after the death, either during the pendency of the suit, or during the pendency of the appeal in the Court of Appeal below or in this Court. Mt. Nunawati being a stranger to the family of Awadh Behari, and not his reversioner, much less his next reversioner, the suit brought by her cannot, therefore, be considered to be a suit brought by the reversioner, even though the next reversioners were parties to the suit as defendants, so as to give the suit of Mt. Nunawati the character of a representative suit, and to bring it within the principles, which apply to suits brought by next reversioners of a deceased male-holder or female holder, in respect of his or her estate, as discussed before. On this ground also, therefore, the right to sue after the death of Mt. Nunawati did not survive to Mahinder. No doubt, as I have shown before, if a suit is brought by an admitted next reversioner against the other reversioners, then such a suit can be said to be a representative suit brought by one reversioner for the benefit of the whole body of
reversioners, because in such a suit all the reversioners of the last holder of the estate are parties to the suit. But in a case like the present, where the suit is brought by an utter stranger, who is not even a relation, much less a reversioner of the last holder of the estate, it cannot be said to be a representative suit so as to allow the admitted reversioner to continue the suit. In *Jadubansi Kuer v. Mahpalsingh*[22], a suit was brought for recovery of possession by a Hindu woman in possession of a certain estate. It was held that a Hindu woman in possession of an estate as such represents the estate and a suit brought by her to recover possession of the estate can be continued on her death pending the suit by a person entitled to succeed to the estate after her. In this case an argument was advanced that if the original plaintiff's allegations be true, she was entitled to possession of the property claimed for a Hindu woman's estate. On her death her married sisters (surviving her) would take jointly. On behalf of the respondents it was contended that the claim of the original plaintiff was one personal to her, and that her sisters would not take as her heirs but as the persons entitled next after her, and, therefore, they can in no way be said to be her legal representatives under Section 2(11) of the Code of Civil Procedure. Their Lordships observed :

> "If a reversioner can represent the estate, there seems to be much stronger reason for holding that a Hindu woman in possession of the estate as such represents the estate. It has been held over and over again that in honest litigation the widow does so represent the estate, and that reversioners are bound by the results of the litigation. If reversioners are bound by the result of the litigation on the principle of res judicata there seems very little reason why the persons who succeed one after another to the estate should not be entitled on successions to continue the litigation commenced by their predecessors."

The present case does not come under any class of the cases discussed before. No case has been cited before me by the parties showing that a suit by a person, alleging himself or herself as the next reversioner of the last holder of the estate, but on decision of the suit found to be a stranger to the family of the last holder of the estate and not even a reversioner, can either be said to represent the estate of the last male-holder, or the suit brought by such a person can be said to be a representative suit, so as to entitle the persons legally entitled to the estate to be substituted in

place of such a deceased person and continue the litigation. In my opinion, therefore, the suit brought by Mt. Nunawati, in the circumstances of the present case, must be deemed to be a suit of a personal character, in which the rights claimed by her were intimately connected with her individuality, and, for that reason the right to sue, on her death, did not survive and, therefore, the suit abated.

36. The second question for determination is, if the right to sue on the death of Mt. Nunawati did not survive, could Mahinder, as an admitted reversioner, continue the suit, brought originally by Mt. Nunawati. In this connection I may here consider the argument of Mr. Rai T. N. Sahai, appearing for the defendants respondents, that the trial Judge acted illegally in allowing the amendment of the plaint on 20-9-46 by substituting the name of Mahinder, on his application, in place of the deceased Mt. Nunawati, in spite of the objection of the defendants-respondents that Mahinder was
not the legal representative of Mt. Nunawati, and, therefore, he cannot be allowed to be substituted in her place, and to continue the suit. His reasoning for contending that the amendment could not be allowed is, that Mahinder claimed to be the son of a predeceased sister of Awadh Behari, and not of the original plaintiff, Mt. Nunawati, and as such his claim in reality put him in opposition to the original plaintiffs, and, therefore, Mahinder was in the position of a rival claimant, who was desirous of setting up a claim of his own, which was not dependent upon the claim of the original plaintiff, but was in conflict therewith. In this connection he has relied on a single Judge decision of the Madras High Court in *Inaganti Venkatrama Rao v. Venkatalingama Nayanim Bahadur Varu*[23], In this case an application was made by the legal representative of the deceased plaintiff to amend the plaint as originally filed. The amendment sought was virtually a denial that a certain transaction, which was the basis of the suit, was binding on him. In this connection, in setting aside the order allowing the amendment, his Lordship observed as follows :

> "I am of opinion that the Subordinate Judge was wrong in allowing the amendment, which virtually amounts to the assertion of a title by the legal representative hostile to that person whom he purports to represent, and denying that the transaction entered into by the deceased plaintiff and on the footing of which he sued is binding on him. In cases where there is a conflict of interests between the deceased plaintiff and his legal representative and where the latter claims that he is not bound by the transactions of the deceased plaintiff, I think the proper course is for the legal representative to file a separate suit to enforce his rights, and that it is not open to the legal representative in his capacity, as such, to repudiate the transactions, which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased claimed certain reliefs in the plaint.

Order 22, R. 3, Civil Procedure Code enacts that where the right to sue survives the court, shall, on the application made in that behalf, cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. So that it is clear from the above rule that all that the legal representative can do is to take up the suit at the stage at which it was left by the deceased plaintiff and to continue the proceedings as legal representative. It is not open to him to assert any individual and hostile rights, which he may have against the deceased plaintiff and

those claiming through or under him and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint. So far as the amendment of the plaint is concerned it seems to me that the limits to the amendment should be determined by the consideration whether it would have been granted if the deceased had made the application. Within those limits it is of course open to the legal representative to ask for amendment and the court would, in my opinion, be justified in granting it. But where the amendment sought is one which the deceased himself could not have asked, it seems to me difficult to see how his legal representative could ask for it". I respectfully agree to the above observations of his Lordship. In the present case the amendment of the plaint was allowed at the instance of Mahinder Singh in spite of the objection of the defendants respondents, and the court below, as
appears from its order nos. 31 and 32 dated 20-9-46 did not record any reason for overruling the objections of the defendants and for allowing the substitution and amendment of the plaint as prayed for. This substitution and amendment matter was attacked before the court of appeal below, and it rightly upheld the objection of the defendants respondents that their omission to get the order of the first court vacated did not prevent them from agitating it in the appeal before the first appellate Court.
The court of appeal below having held that the right to sue did not survive, and that, therefore, Mahinder had no right to continue the suit, non-suited him, and dismissed his suit. In my opinion, it was not open to Mahindar to assert his individual and hostitle rights, which he may have against the deceased plaintiff and those claiming through or under her, and to seek to enforce those individual and paramount rights under the guise of an application to amend the plaint. The limits to the amendment should have been determined by the consideration whether it would have been granted if the deceased had made the application. It is obvious that it could not have been allowed, because it was a negation of her rights. I hold, therefore, that the amendment was illegally allowed. I agree with the finding of the court of appeal below on this point.

37. The principles laid down in the case of ILR 28 Pat 989 : AIR 1950 Patna 184, in my opinion, should apply to the present case. It is obvious that Mahinder, as the substituted party, could only prosecute the cause of action as originally framed in the suit by Mt. Nunawati, but as he could not succeed on that cause of action, it is manifest that the original cause of action was being substituted for another cause of action, which could very well form the subject matter of a separate suit. His suit must be considered to be a new suit, which has to be tried separately on a different cause of action, and not on the original cause of action, as originally framed in the suit of Mt. Nunawati. Virtually Mahinder was in the position of a rival claimant, who was desirous of setting up a claim of his own, which was not dependent upon the claim of the original plaintiff, but was in conflict therewith. Mahindar's claim in the present suit therefore, in reality put him in opposition to the original plaintiff. For that reason it appears to me that Mahindar, although an admitted reversioner of Awadh Behari, could not legally continue the suit originally brought by Mt. Nunawati, the original plaintiff, who, on the unchallenged findings of the courts below, was a complete stranger to the family of Awadh Behari. Her suit cannot be considered a representative suit. It must be treated as if the suit had been directed simpliciter to a declaration of the deceased plaintiff's individual right. The original plaintiff being dead, and her right to sue not having survived, her suit abated, and, therefore, her suit could not be deemed to be still pending so as to entitle Mahinder to claim to be transposed, and to continue the suit. In my opinion, therefore, the suit of Mt. Nunawati on her death was dead, and, therefore, it could not be revived, or continued by Mahinder, the present plaintiff No. 1. The plaintiffs, therefore, had been rightly non-suited, and their suit held not maintainable. I, therefore, uphold the contention of Mr. Sahay on this

point.

38. For the reasons given above, the second contention of Mr. Dayal must also be overruled.

39. In the result, this appeal also fails, and is dismissed but without costs,
Appeal dismissed.

Cases Referred.

[1] ILR 47 Cal 67
[2] ILR 23 Pat 927 at pp. 928-930 : (AIR 1945 Pat 184 at pp. 184-185)
[3] AIR 1930 Bom 24 : ILR 54 Bom 62
[4] (1870) 5 CP 172
[5] AIR 1953 SC 228
[6] AIR 1917 PC 116: 45 Ind App 61
[7] AIR 1940 FC 20 : 21 Pat LT 1109
[8] AIR 1931 PC 162 : 58 Ind App 228
[9] AIR 1954 Mad 766
[10] AIR 1914 Mad 708 : ILR 38 Mad 1061
[11] ILR 22 Cal 92
[12] ILR 19 Mad 345
[13] AIR 1930 Mad 593
[14] ILR 12 Lah 1 : AIR 1930 Lah 703
[15] ILR 28 Pat 989; AIR 1950 Pat 184
[16] ILR 39 Mad 382: AIR 1916 Mad 611
[17] ILR 23 Cal 636
[18] AIR 1919 Mad 479
[19] AIR 1915 PC 124 : 42 Ind App 125
[20] AIR 1916 PC 117 : 43 Ind App 207
[21](1883) 24 Ch D 439
[22] AIR 1916 All 34 : ILR 38 All 111
[23] AIR 3922 Mad 49