LETTERS PATENT APPEAL.

Before G. D. Khosla, C. J. and Gurdev Singh, J.

AMAR KAUR AND OTHERS,—*Appellants.*

versus

SADHU SINGH AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 307 of 1958.

1960

July, 28th

Code of Civil Procedure (V of 1908)—Order I, Rule 10—Appeal filed in the name of a dead person—Whether can be prosecuted by his legal representatives.

Held, that the powers under Order I, rule 10, Civil Procedure Code, cannot be exercised to substitute a different person for a dead plaintiff or appellant. The "person" refered to in this rule means a person in existence who may, of course, be either a human being or a legal person capable of suing or being sued, but it does not include a fictitious person or a person who having died is no longer in existence on the date of the institution of the suit or appeal. A person who is dead has no existence, either in fact or in law, and he is incapable of instituting a suit or an appeal or performing any act. For the same reason no attorney or counsel of his would be competent to file an appeal or institute a suit, as no one can act for, or on behalf of, a person who is dead and has lost his existence. The mistakes of identity that can be corrected under Order I, rule 10, Civil Procedure Code, are those where through inadvertance or *boni fide* mistake a wrong person is made a party in place of the one who is the real party. By substituting the name of the correct party the Court merely permits the person wrongly impleaded to walk out and his place to be taken by the right one. But where an appeal or a suit has been instituted in the name of a person who is not in existence, the very act of instituting the suit or lodging the appeal is nullity and thus there can be no question of putting in his place another as a plaintiff or an appellant.

Letters Patent Appeal under Clause 10 of the Letters Patent against the judgment of Hon'ble Mr. Justice Bishan

Narain, dated the 19th March, 1958, passed in E.F.A. 174 of 1956, affirming that of Shri Ram Gopal Kohli, Senior Subordinate Judge, Hoshiarpur, dated the 25th June, 1956, accepting the objection petition in part and releasing one half share of the attached land from attachment and rejecting the objection petition regarding the other one half share and the trees standing on the land and further ordering that if the objector deposits in court rupees 352-8-0, on account of the price of one half of the trees on or before the 10th July, 1956, the objection petition would stand accepted with regard to one half share of the land along with one half share of the trees.

H. S. GUJRAL AND DALIP SINGH, CHAUDHURI, ADVOCATES, for the Appellants.

SHAMAIR CHAND, ADVOCATE, for the Respondents.

JUDGMENT

Gurdev Singh, J.

GURDEV SINGH, J.—In this appeal under clause 10 of the Letters Patent against the order passed by a learned Single Judge of this Court on 19th March, 1958 in Execution First Appeal No. 174 of 1956, the sole question for decision is whether an appeal filed in the name of a person, who was dead on the date of the institution, could be continued by permitting his legal representatives to be substituted in his place as appellants. The facts giving rise to this appeal are as follows:

Ram Lal, husband of Shrimati Amar Kaur (the appellant before us) obtained a decree for Rs. 18,000 with costs against the estate of Udham Kaur in the hands of respondents Sadhu Singh and others. In execution thereof certain properties situate in village Ganeshpur were attached. Objections to the attachment having been preferred by Dhanna, one of the judgment-debtors, the executing Court released one half of the properties from attachment,—*vide* its order dated 25th June, 1956.

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On 27th October, 1956, the decree-holder Ram Lal died in Africa. In ignorance of his death on 5th November, 1956 an appeal against the order of the executing Court dated 25th June, 1956 was presented to this Court by Shri Harbans Singh Gujral, Advocate, who purported to act as counsel for the decree-holder Ram Lal on the strength of the power-of-attorney given to him by the decree-holder's wife Shrimati Amar Kaur. When the appeal came up for hearing on 19th March, 1958 before a learned Single Judge of this Court the respondents objected that the appeal could not be entertained having been filed by a dead person. This objection prevailed and Bishan Narain J. dismissed the appeal without making any order as to costs.

Shri Harbans Singh Gujral, the learned counsel for the appellants, in assailing the order of the learned Single Judge has not disputed the fact that the execution appeal was filed in the name of a dead person as Ram Lal appellant had died a few days earlier on 27th October, 1956. He has, however, urged that since an appellate Court has all the powers of the original Court, as laid down in section 107, Civil Procedure Code, the learned Judge acting under Order I, rule 10, Civil Procedure Code, should have allowed the names of Shrimati Amar Kaur and Sohan Singh to be substituted for the decreased appellant Ram Lal, being his legal representatives, as it was on account of sheer ignorance of the death of Ram Lal that the appeal was filed in his name and not that of his legal representatives. In support of this contention he relies upon *H. H. Darbar Alabhai Vaisurbhai and others* v. *Bhura Bhaya and others* (1), *Mehar Singh* v. *Labh Singh* (2), and *Karimullah*

(1) A.I.R. 1937 Bom. 401.
(2) A.I.R. 1932 Lah. 305.

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Khan and another v. *Bhanu Pratap Singh Giriraj Singh* (1). I, however, find that even the decisions of the Bombay, Lahore and Nagpur Courts are conflicting and an appeal filed in the name of a dead person being a nullity cannot be resuscitated either under Order I, rule 10, or sections 151 and 153, Civil Procedure Code. In *Mehar Singh* v. *Labh Singh* (2), Johnstone J., relying upon *A. Gopala Krishnayya* v. *Lakshmana Rao* (3), held that in an appeal filed against a dead person his legal representatives could be substituted and the delay in such substitution must be excused in exercise of general powers of amendment that vested in a Civil Court under section 153, Civil Procedure Code. The decision of a Division Bench of the Lahore High Court reported as *Roop Chand* v. *Sardar Khan* (4), was distinguished on the ground that it related to the question of abatement. An earlier decision of that Court, *Mt. Boondu* v. *Moti Chand* (5), was not cited before Johnstone J.

The decision in *H. H. Darbar Alabhai Vaisurbhai and others* v. *Bhura Bhaya and others* (6), is again based upon A. *Gopala Krishnayya* v. *Lakhshmana Rao* (3). In that case their Lordships allowed the legal representatives of one of the respondents, who was dead, to be substituted acting under sections 151 and 153, Civil Procedure Code, "in order to prevent injustice being done."

Both the Lahore and the Bombay cases referred to above are clearly distinguishable on facts. There the appeals were properly presented

(1) A.I.R. 1938 Nag. 458.
(2) A.I.R. 1932 Lah. 305.
(3) I.L.R. 49 Mad. 18 (F.B.).
(4) A.I.R. 1928 Lah. 359.
(5) A.I.R. 1923 Lah. 652.
(6) A.I.R. 1937 Bom. 401.

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was dead. Thus the appeal could not be considered a nullity. It may further be pointed out that even in those cases for the substitution of the legal representatives of a deceased respondent resort was had to the general powers of amendment and inherent powers under sections 151 and 153 and not to the provisions of Order 1, rule 10, Civil Procedure Code. In *Karimullah Khan and another* v. *Bhanu Pratap Singh Giriraj Singh* (1), *Niyogi* J. was dealing with a suit that had been filed in the name of a dead plaintiff and he took the view that it was a case of wrong person who was made a plaintiff and the defect was capable of being cured under Order I, rule 10, Civil Procedure Code, by permitting his legal representatives to be substituted in his place. In dealing with this matter his Lordship observed:

> "It appears to me that the distinction drawn between a suit filed by a dead plaintiff and one filed in the name of a wrong person as plaintiff is without any difference. The suit filed in the name of a dead plaintiff is manifestly one that is filed in the name of a wrong plaintiff."

With all respects I find myself unable to agree with these observations. In my opinion the powers under Order I, rule 10, Civil Procedure Code, cannot be exercised to substitute a different person for a dead plaintiff or appellant. The "person" referred to in this rule means a person in existence who may, of course, be either a human being or a legal person capable of suing or being sued, but it does not include a fictitious person or a person who having died is no longer in existence on the date of the institution of the suit or appeal. A person who is dead has no existence, either in fact or in law, and he is incapable of instituting a suit or an

(1) A.I.R. 1938 Nag. 458.

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appeal or performing any act. For the same reason no attorney or counsel of his would be competent to file an appeal or institute a suit, as no one can act for, or on behalf of, a person who is dead and has lost his existence.

The mistakes of identity that can be corrected under Order I, rule 10, Civil Procedure Code, are those where through inadvertence or *bona fide* mistake a wrong person is made a party in place of the one who is the real party. By substituting the name of the correct party the Court merely permits the person wrongly impleaded to walk out and his place to be taken by the right one. But where an appeal or a suit has been instituted in the name of a person who is not in existence, the very act of instituting the suit or lodging the appeal is a nullity and thus there can be no question of putting in his place another as a plaintiff or an appellant.

The view that I have expressed above was accepted in some decisions of the Courts from which the appellant has cited the above noted authorities. In *Hazarimal Bholaram* v. *Shriramchandraswami. etc.*, (1), it was held that the expression "wrong person" used in Order I, Rule 10, Civil Procedure Code, does not mean a dead person and before Order I, rule 10, Civil Procedure Code, can be applied the plaint or the memorandum of appeal must be in existence and the legal representatives of the appellant who is dead at the time of the institution of the appeal cannot be substituted. In a recent decision of the Bombay High Court reported as *Bai Pani Vankar* v. *Madhabhai Galabhai Patel* (2), Chagla C. J. has expressed the same view, dissenting from *A. Gopala Krishnayya* v. *Lakshmana Rao* (3), *Karimullah Khan and*

(1) A.I.R. 1934 Nag. 55.
(2) A.I.R. 1953 Bom. 356.
(3) I.L.R. 49 Mad. 18.

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another v. *Bhanu Pratap Singh Giriraj Singh* (1); *and Mehar Singh* v. *Labh Singh* (2). His Lordship preferred the view taken in *Rampratab* v. *Gourishankar* (3), *Veerappan Chetty* v. *Tindal Ponnen* (4), *and Sudhir Kumar De* v. *Amritalal Seal* (5), and observed:

> "An effective order under Order I, rule 10, can only be made provided there is a suit or an appeal before the Court, but if the suit or the appeal is a nullity, then any order made in that suit or appeal is equally a nullity."

I am in respectful agreement with the above observations which are in consonance with the decision of the Lahore High Court in *Mt. Boondu* v. *Moti Chand* (6), where a Division Bench of that Court, of which Shadi Lal C.J. was a member, held that where the plaint was presented on behalf of a minor by his mother as his next friend and it turned out that the minor had died long before the suit, the Court had no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased. Their Lordships followed the decision of the Madras High Court reported as *Veerappan Chetty* v. *Tindal Ponnen* (4), where a Division Bench of that Court held that there was nothing in the Code of Civil Procedure to authorize the institution of a suit against a dead person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of

(1) A.I.R. 1938 Nag. 458.
(2) A.I.R. 1932 Lah. 305.
(3) A.I.R. 1924 Bom. 109.
(4) I.L.R. 31 Mad. 86.
(5) I.L.R. 1946 (2) Cal. 611.
(6) A.I.R. 1923 Lah. 652 (1).

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the deceased, even when the suit is instituted *bona fide* and in ignorance of the death of the defendant. As observed in *Bai Pani Vankar* v. *Madhabhai Galabhai Patel* (1) this decision was not specifically overruled in the subsequent Full Bench decision of the Madras High Court reported as *Adusumilli Gopala Kristnayya and another* v. *Adivi Lakshmana Rao* (2).

Since all the decisions cited on behalf of the appellants are based upon the Full Bench decision of the Madras High Court in *Adusumilli Gopala Kristnayya and another* v. *Adivi Lakshmana Rao* (2) it is necessary to refer to that case. It was again a case in which the appeal had been instituted by a person who was alive but the respondent was dead at the time of the institution. Subsequently on discovering the mistake the appellant made an application for substitution of the legal representatives of the respondent which was allowed. Upholding that order the learned Judges constituting the Full Bench observed—

> "Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a suit and as such has full powers under section 153, Civil Procedure Code, to direct an amendment of the appeal memorandum.

> "As observed by Ramesam and Wallace, JJ., in *Sankaran* v. *Sayarimuthu Pillai*, C.M.P. No. 2807 of 1923, the question resolves itself into one of Court fees only, and if the party has only made an unintentional error in inserting the

(1) A.I.R. 1953 Bom. 356.
(2) I.L.R. 49 Mad. 18 (F.B.).

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> name of the wrong respondent in his appeal memorandum, there is no reason to make him pay Court fees twice over, and it is simpler for the Court to direct an amendment of the cause-title."

The authorised report of that case goes to show that though the earlier decision of the Madras High Court in *Veerappan Chetty* v. *Tindal Ponneu* (1), was cited before their Lordships of the Full Bench, it was not referred to in their judgment nor was it expressly overruled. This decision is clearly distinguishable and does not apply to the facts of the present case. In the case before us as Ram Lal appellant was dead on the day the appeal was instituted in his name by his counsel, the appeal was itself a nullity and there was nothing before the Court on which any order for substitution of the legal representatives of the deceased could be passed.

In a recent decision of the Madras High Court reported as *Mura Mohideen* v. *V. O. A. Mohomed and others* (2), a Division Bench of that Court consiting of Rajamannar, C.J., and Rajagopala Ayyangar, J., observed (at page 299) while dealing with the provisions of Order I, rule 10, Civil Procedure Code:—

> "Suits by or on behalf of dead persons stand in a different category. This principle that a mis-description could be corrected by amendment could not obviously be applied to such a case. * * * *".

The decision in *Rangrao Vyankatesh Deshpande* v. *Kashinath Dhondu* (3), is again of Niyogi,

(1) I.L.R. 31 Mad. 86
(2) A.I.R. 1955 Mad. 294
(3) A.I.R. 1947 Nag. 73.

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J., who following his earlier decision reported as *Karimullah Khan and another* v. *Bhanu Pratap Singh Giriraj Singh* (1), held that where one of the two plaintiffs, in whose names the suit had been filed, was later discovered to be dead on the date of the institution of the suit, the plaint could be amended by allowing the legal representatives of the deceased plaintiff to be substituted under Order I, rule 10, Civil Procedure Code. This decision is also distinguishable, since it was a case in which the plaint could not be deemed to be a nullity as one of the plaintiffs was alive and was still capable of not only instituting the suit but prosecuting it as well.

Section 153, Civil Procedure Code, empowers the Court at any time to amend any defect or error in any proceeding in a suit and to make all necessary amendments for determination of the real question or issue raised before it. Undoubtedly these powers can also be exercised by an appellate Court, but before such powers can be invoked, there must be a valid suit or proceedings before the Court. Order XLI, rule 1, Civil Procedure Code, lays down that "every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court to such officer as it appoints in this behalf". For the proper institution of the appeal presentation by the appellant or his authorised agent is necessary. In the present case the appellant neither signed nor presented the memorandum of appeal and it was only a counsel authorised by his wife who presented the memorandum in the appellate Court. He purported to act on the power-of-attorney given to him by the appellant's wife, whose outhority to act for the appellant Ram Lal itself had come to an end by

(1) A.I.R. 1938 Nag. 458.

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the death of Ram Lal prior to the presentation of the appeal. Thus the memorandum of appeal was itself a nullity and as such there were no proceedings before the Court in which it could exercise its powers of amendment under section 153, Civil Procedure Code, and allow the legal representatives of the deceased appellant to be substituted in his place. Therefore, from whichever angle the matter be viewed, there is no escape from the conclusion that the order of the learned Single Judge is correct.

Before closing I would like to observe that though in the grounds of appeal filed before us the appellant's counsel had urged that in view of the order passed by the learned Single Judge on 19th of February, 1957, allowing the substitution of the legal representatives of the deceased appellant Ram Lal, the appeal could not be dismissed as a nullity, yet this contention was not advisedly pressed at the time of arguments. The record shows that an application for substitution of the legal representatives of the late Ram Lal was made while the appeal was pending for hearing before a learned Single Judge of this Court, but the order on that application was:

> "Granted subject to just exceptions. Death certificate is filed today."

The appellant cannot avail of this *ex parte* order as it was made subject to "just exceptions". In any case, since it is found that the appeal was itself a nullity, such an order of substitution could not benefit the appellant.

For the reasons stated above, I find no force in this appeal and dismiss the same with costs.

G. D. Khosla, C. J

G. D. KHOSLA, C. J.,—I agree.

K. S. K.