

within the six degrees of the same line for the purpose of inheritance among collaterals.

The grandson of the uncle is, therefore, to be preferred to the widows of other uncles of the propositus.

We affirm the order of the lower Court. The parties may have their costs out of the estate.

Decree affirmed.

G. B. R.

1911.

KASHIRAI
v.
MORESHVAR
RAGHUNATH.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

LAKHMICHAND REWACHAND (ORIGINAL PETITIONER), APPELLANT, v.
KACHUBHAI GULABCHAND AND OTHERS (ORIGINAL OPPONENTS),
RESPONDENTS.*

1911.

April 10.

Civil Procedure Code (Act V of 1908), Order I, Rule 10—Limitation Act (IX of 1908), Article 171—Partition suit—Death of a party—Abatement—Application to set aside the abatement—Limitation of sixty days—In a partition suit all parties should be before the Court—Inherent power of the Court to add a party at any stage of the suit for the ends of justice.

On the 5th April 1892 the plaintiff obtained a decree for partition and died in October 1893, leaving him surviving a minor son, who attained majority in February 1907. At a very late stage of the execution-proceedings, the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree.

Held, that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Article 171 of the Limitation Act (IX of 1908), the application was time-barred.

Held, further, that in a partition suit all the parties should be before the Court, and that there was nothing in the Civil Procedure Code (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice.

* Appeal No. 51 of 1910 from order.

1911.

LAKHMI-
CHAND
REWACHANDv.
KACHUBHAI
GULABCHAND.

APPEAL from an order passed by D. G. Medhekar, First Class Subordinate Judge of Poona, in the matter of an application for execution of a decree for partition.

In a partition suit, No. 90 of 1891, between one Rewachand Gujar as plaintiff and (1) Kachubhai Gulabchand, (2) Nyhalchand Shirchand, (3) Sarupchand Shirchand, and (4) Harakechand Dipchand as defendants, the Court passed a decree, dated the 5th April 1892. The plaintiff died in October 1893 leaving him surviving a minor son Lakhmichand, who attained majority on the 7th February 1907. On the 13th April 1908 Lakhmichand made an application for commission to effect partition of non-revenue-paying immoveable property under section 396 of the old Civil Procedure Code (Act XIV of 1882), but the Court, on the 28th November 1908, held the application to be time-barred and rejected it under section 368 of the same Code. The applicant, thereupon, appealed to the High Court and in the appeal he withdrew the application.

Subsequently Lakhmichand on the 16th April 1910, preferred an application under Order 26, Rule 13 of the Civil Procedure Code (Act V of 1908) for the issue of a commission to make a partition according to the rights declared in the partition decree. The defendants opposed the application on the ground, among others, that it was not tenable inasmuch as it was not made within the time allowed by law for the substitution of the applicant's name as required by section 368 of the Civil Procedure Code (Act XIV of 1882).

The First Class Subordinate Judge rejected the application on the grounds that the suit had abated long before the presentation of the application, that it was not proved that the applicant was prevented by sufficient cause from continuing the suit, and that the application did not contain any prayer for setting aside the order of abatement.

The applicant preferred an appeal.

S. R. Bakhle for the appellant (applicant).

G. K. Dandekar for respondent 1 (opponent 1).

SCOTT, C. J. :—We think that the suit abated as soon as the Civil Procedure Code of 1908 came into force so far as regarded

the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, is barred by Article 171 of the Limitation Act of 1908. It is obvious, however, that in a partition suit all the parties should be before the Court. The suit has actually reached the stage of a commission to divide the property, and the applicant is a sharer. Nothing in the Code limits or affects the inherent power of the Court to make such orders as may be necessary for the ends of justice, and under Order I, Rule 10, the Court may, at any stage of the proceedings, order that the name of any person whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. We, therefore, order that the applicant be added as a defendant in the suit, being bound by all the proceedings up to date.

Costs costs in the cause.

Order set aside.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

SUBRAYA BIN VENKATESH BUDDA SHETTI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANPA *alias* GOVIND NARAYAN NAIK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1911.
April 11.

Mortgage—Mortgagee failing to pay a part of consideration as provided in the mortgage-deed—Failure of consideration—Subsequent payment cannot be taken as part of mortgage-debt—Transfer of Property Act (IV of 1882), sections 56, 81, 88—Marshalling of securities.

In 1896, G. mortgaged some lands (Serial Nos. 1—10) to V. for Rs. 400, of which Rs. 200 were paid in cash and Rs. 200 were to be paid to N., a prior mortgagee. V. having failed to pay to N., G. sold to defendant No. 5 some of the lands mortgaged (Serial Nos. 6—10) and other property and redeemed N.'s mortgage by paying Rs. 200 to him. Subsequently V. paid Rs. 200 to G.

* Second Appeal No. 797 of 1907.