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In this view of the case it is not necessary to consider Mr. Gokhale's argument on behalf of the respondent that there could be no customary easement in respect of the right to overhang the trees on a neighbour's land as such a right is not an easement within the meaning of the definition of 'easement' under the Indian Easements Act. I express no opinion on the general question as to whether the right to retain the trees overhanging the neighbour's land is a customary easement within the meaning of section 18 of the Indian Easements Act.

On these grounds I would dismiss this appeal and confirm the decree of the lower appellate Court with costs.

KEMP, J. :—I agree.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

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June 25.

VATSALABAI ALIAS SITABAI, WIFE OF VISHNU SABAJI SUKHTANKAR, MINOR BY HER NEXT FRIEND, HER HUSBAND VISHNU SABAJI AND ANOTHER (ORIGINAL PETITIONERS), APPLICANTS v. SAMBHAJI PANDURANG NABAR AND OTHERS (ORIGINAL OPPONENTS), OPPONENTS.*

Civil Procedure Code (Act V of 1908), Order XXII, Rules 3 and 5—Death of plaintiff—Order made to bring the legal representatives on record—Subsequent application by other persons to alter the order—Power of the Court to correct the order.

A suit was filed by five persons one of whom R died while the suit was pending. Thereupon an application was made on behalf of the minor G, son of the 1st plaintiff, that he should be brought on the record as heir and legal representative of the deceased R, relying upon an alleged adoption of G to R.

* Civil Application under Extraordinary Jurisdiction No. 58 of 1917.

The Subordinate Judge granted the application and amended the record by substituting G's name for that of R. Subsequently the petitioners (minor daughters of R) having learnt of the application applied that G's name should be deleted and that their names should be brought upon the record in his place as G's adoption to R was fictitious. The Subordinate Judge held that he could not alter his previous order in view of Rule 3 of Order XXII, Civil Procedure Code, 1908.

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Held, that under Rule 5 of Order XXII, Civil Procedure Code 1908, the Subordinate Judge had the power to correct the order previously made and to determine who were the real legal representatives of the deceased plaintiff.

CIVIL application under extraordinary jurisdiction praying that the order passed by R. K. Bal, Subordinate Judge of Malwan in an application in suit No. 205 of 1914 may be set aside.

The facts were as follows :—

A suit to recover possession of certain lands was filed by the following five persons : (1) Sambhaji Pandurang Nabar, (2) Sadashiv Shripat Nabar, (3) Vishnu Shripat Nabar, (4) Radhabai widow of Jivaji Nabar and (5) Laxmi-bai, widow of Yeshwant Vithal. Plaintiff No. 4, Radhabai, died *pendente lite* on March 10, 1916. On April 18, an application was made on behalf of Govind, the minor son of plaintiff No. 1, that having been adopted by the deceased Radhabai on March 10, 1916 he should be brought on the record as the heir and legal representative of the deceased plaintiff. The application was not opposed by the defendants. The Subordinate Judge directed that Govind's name be brought on the record under Order XXII, Rule 3 of the Civil Procedure Code, 1908. The petitioners, the minor daughters of Radhabai, having learnt of this, applied by their next friend on July 26, that Govind's name should be deleted and their names should be brought upon the record in his place. This application was opposed by the other plaintiffs.

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The Subordinate Judge found that the alleged adoption of Govind was fictitious and that the petitioner No. 2 was the heir and legal representative of the deceased Radhabhai. He, however, held that the petitioner's application was not maintainable and that he had no jurisdiction to grant relief after he had once passed an order under Order XXII, Rule 3, Civil Procedure Code, 1908.

The petitioners applied to the High Court.

A. G. Desai, for the applicants :—The lower Court was wrong in holding that my application was not maintainable after it had once passed an order under Rule 3 of Order XXII, Civil Procedure Code, 1908. When a dispute arises as to who is the legal representative of a deceased plaintiff or a deceased defendant, it is obligatory on the Court to try and decide the question: see Rule 5 of Order XXII. To refer the parties to a separate suit would be taking too narrow a view of the provisions of Order XXII, Civil Procedure Code, 1908.

S. G. Abhyankar, for opponent No. 4 :—I submit that Rules 3 and 5 of Order XXII, Civil Procedure Code, 1908, must be read together as laying down different provisions for different contingencies as they arise at the time of the application. After an order is once passed the Court is bound to proceed with the suit under Rule 3. The party aggrieved by the order may get it set aside by a separate suit, because it is an order in a matter of procedure and interlocutory for the particular purpose, namely, representation in suit. This is corroborated by the fact that the New Code has omitted from Rule 5 the words "at or before hearing" occurring in section 367 of the Code of 1882, as they were unnecessary in view of the words "the Court shall proceed with the suit" in Rule 3 of Order XXII, Civil Procedure Code, 1908.

Secondly, I submit that the right of appeal being taken away by the New Code, the order ought to be treated as final : compare section 588 (18) of the Code of 1882 with Order XLIII, Rule 1 of the Civil Procedure Code, 1908.

SCOTT, C. J. :—The question for decision arises with reference to the constitution of a suit No. 205 of 1914 filed by five persons, the fourth of whom was Radhabai. She died after the suit had been filed on the 10th of March 1916 and, on the 18th of April, an application was made on behalf of the minor Govind Sambhaji, son of the 1st plaintiff, that he should be brought on the record as heir and legal representative of the deceased Radhabai, relying upon an alleged adoption. The learned Judge acceded and the record was amended by the substitution of Govind Sambhaji's name for that of Radhabai. The petitioners having learnt of the application applied on the 26th of July that Govind's name should be deleted and that the minor daughters of Radhabai should be brought upon the record in his place. The learned Judge, however, after hearing the evidence adduced by the disputing parties held that he could not alter his previous order as Rule 3 of Order XXII provides that after the record has been amended by adding the representative of the deceased plaintiff as a party the Court shall proceed with the suit.

It appears to us that this is taking too narrow a view of the provisions of Order XXII, Rule 5 provides that where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or the deceased defendant, such question shall be determined by the Court. The learned Judge, however, has held that he cannot determine the question.

Now let us consider what injustice that might work in the case of a deceased defendant. There might be a suit filed by the plaintiff against several defendants,

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and on the death of one of these defendants the plaintiff might apply to have some one substituted as representative who was not really the legal representative and could be relied upon not to put forward any defence on behalf of the deceased defendant's estate. This obviously might lead to grave miscarriage of justice and yet if the learned Judge's view is correct, an order once having been made for adding a bogus representative of a deceased defendant the suit must be proceeded with without any real representative of the estate being brought in even though the Court is aware that the defendant's interests would not be defended by the bogus representative. In the case of plaintiffs the danger is not so great, for plaintiffs cannot sever in their attack and all are represented by the same legal advisers and therefore one plaintiff can generally be relied upon to protect the interests of all the plaintiffs even though some have died and are represented by persons who take no interest in the proceedings. Tested, however, from the point of view which I have suggested, it is clear that it would be a very unfortunate reading of Rule 3 if we held ourselves bound to accede to the view of the learned Judge and hold that once an order, though obviously a mistaken order, has been made, it is not in the power of the Court to correct it notwithstanding the provisions of Rule 5. We cannot take that view of the case.

A question has arisen as to whether Govind is the legal representative of the deceased Radhabai, and such question has to be determined by the Court. We, therefore, set aside the order of the lower Court and direct it to determine the issue left undetermined upon the application of the petitioners.

Costs costs in the cause.

Order set aside.

J. G. B.