

**(1922) 06 CAL CK 0017**  
**In the Calcutta High Court**

Rajani Kanta Roy and Others

APPELLANT

Vs

Jyoti Prasad Singh Deo and Others

RESPONDENT

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**Date of Decision :** 09-06-1922

**Acts Referred:**

**Citation :** AIR 1924 Cal 90

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### **Judgement**

1. This appeal is against the final decree in a suit for partition of a Mouza called Ismail.

2. There is a preliminary objection to the hearing of the appeal on the ground that the defendant No. 2 Rakhal died and no substitution was made within time, that another defendant No. 41 Sibani Debya also died and no substitution was made in time, and that the suit being one for partition the appeal cannot proceed.

3. Rakhal died on the 24th May, 1920. The application for substitution of his heirs was made on the 5th February, 1921, and substitution was ordered to be made subject to objection at the hearing.

4. It appears that Rakhal's interest was sold away in execution of a decree in 1918. On Rakhal's death, therefore, the interest was not in his heirs but devolved on a third party. It was re-purchased on the 23rd January, 1921 by his heirs and they were brought on the record on the 5th May, 1921, subject to objection at the bearing. The appellant was not bound to recognise the purchaser and could have proceeded against the heirs of the deceased; but there was a devolution of the interest of Rakhal, and before the appeal came on for hearing the persons on whom the interest devolved were made parties to the case. Three months limitation does not apply to a case of assignment or devolution of interest pending the suit.

5. It is contended for the respondents that the application even if treated as one under Order 22, Rule 10 not having been made in the Court below, same cannot be made in this Court and that as a matter of fact, the application was not under that rule but for substitution of the heirs of the deceased.

6. So far as the first point is concerned, it has been held by a Division Bench of this Court (Civil Rules Nos. Section 147 and Section 148 of 1920 disposed of on the 11th March, 1921) that the application can be made on appeal.

7. With regard to the second contention there is no doubt that the application was not under Order 22, Rule 10. But the application can be allowed to amended, and having regard to all the circumstances, we are not inclined to dismiss the case on such a ground when all the parties are before the Court, and the application for substitution may be allowed to be amended.

8. As for Sibani, her heirs are already on the record and it is only necessary to have a note made on the record that her interest survives to those respondents.

9. The appellant is accordingly allowed to amend the application dated the 5th May, 1921, by adding a prayer under Order 22, Rule 10, and we direct that the persons mentioned in the application be added as respondents. in supersession of the order for substitution passed on the 5th May, 1921. We also direct that a note be made in the record that the interest of the deceased Sibani survives against the defendant No. 37.

10. The appellant, however, must pay the costs of this application for amendment, five gold mohurs, to the respondents on or before the 12th July in this Court. The plaintiff-respondent will be entitled to withdraw the said amount if it is deposited in this Court. If the said costs are not paid within the time aforesaid, this appeal will stand dismissed with costs.

11. This disposes of the preliminary objection.

12. The first contention raised in this appeal is that a number of defendants, died while the suit was pending in the Court below and their heirs were not substituted.

13. It appears that some of these deaths took place before the case came on for hearing. It also appears that certain minors were represented by the Deputy Registrar when the case came up to this Court in Appeal No. 197 of 1910. When the case went back on remand, no guardian ad litem was appointed for them in the Court below and the decree bears the name of Mr. Joyce as their guardian ad litem. Those of them who have attained majority after the decree of the lower Court have (along with others) preferred this appeal, and two of them are still minors and are respondents represented by the present Deputy Registrar in this appeal. It is accordingly contended that the partition proceedings and the decree are bad, as there was no substitution of the heirs of the deceased, and the minors were not properly represented.

14. The Court below observed : "There is nothing to show that any of the defendants died before the Commissioner did he survey work and the Khanapuri work." But if the partition affects 15 annas co-sharers - a question which we will deal with presently, the decree for partition should not have been made in the absence of the legal representatives of the deceased Defendants, and without

the minors being properly represented.

15. But it is not only the plaintiff but the Court below also seem to have been under the impression that substitution of the heirs was not necessary, as the death appeared to have taken place before the survey and Khanapuri works were finished. The fact of the death of the defendants does not appear to have been brought to the notice of the Court below except the death of one of them incidentally in an application filed on the 7th September, 1908 objecting to the Commissioner's proceedings, and it does not appear that the plaintiff had any knowledge of these deaths. All the heirs of the deceased defendants have now been made parties to the appeal and all persons interested in the property are before the Court. In these circumstances, we think that the suit should not be dismissed on the ground that the heirs were not substituted.

16. It is unnecessary to make any further order for substitution seeing that all the heirs have already been substituted and all the necessary parties are before the Court.

17. The second contention is that there should have been a partition of the Mouza among all the co-shares and not merely of the plaintiff's one anna share. It is urged that the judgment of the High Court dated the 25th August, 1915 must be given effect to only so far as the share of the plaintiff is concerned, but that it did not prevent a partition of the shares of the other co-sharers nor prevent a determination of the other issues in the suit.

18. The rest of the judgment deals with details of partition.