relate to the business of purchasing oil-seeds and extracting and selling oils. The finished product assumes a totally different form and becomes a new commodity and, in my view, is not exempted from liability to tax. For similar reasons, dealers in non-ferrous metals who buy semi-finished goods, cannot be exempted from liability to pay the tax as they turn the material into finished articles after subjecting them to a process of manufacture. Civil Writ No. 898 of 1959, which is on behalf of dealers in non-ferrous metals, cannot be allowed. In Civil Writ No. 1271 of 1959 the petitioners deal in cotton and also buy iron-scrap and convert it into a variety of finished goods. In so far as taxes levied on them on iron-scrap, they cannot be exempted from paying the same, though in regard to their dealings in cotton, they are on the same footing as petitioner in Civil Writ No. 359 of 1959.

For reasons stated above, I agree with the order proposed by the Hon'ble the Chief Justice.

B.R.T.

APPELLATE CIVIL.

Before G. D. Khosla, C.J., and Tek Chand, J.

ROSHAN LAL AND OTHERS,—*Appellants.*

versus

KAPUR CHAND AND OTHERS,—*Respondents.*

Regular First Appeal No. 264 of 1950.

1959

Dec., 15th

Code of Civil Procedure (Act V of 1908)—Order 22 Rule 10—Appellants trustees dying during the pendency of the appeal—Their successor trustees not brought on the record within ninty days—Appeal—Whether abates Application by successor trustees for permission to continue the appeal—Whether governed by any period of limitation—Words and Pharases—"Ugahi"—meaning of.

Two of the five trustees filed the suit impleading the other three as defendants. One of the defendant-trustees supported the plaintiffs. The plaintiffs filed an appeal for enhancement of the amount decreed. They died during the pendency of the appeal and their successors trustees did not make any application for bringing themselves on record as legal representatives of the deceased trustees within time but after a lapse of some years made an application for permission to continue the appeal and to transpose the respondent trustee, who had supported the appellants to the list of appellants. The question arose whether the appeal had abated.

Held, that when a trustee dies, his estate cannot be said to devolve upon any one—certainly not upon his legal heirs—and, therefore, the provisions of order 22 rule 3, Civil Procedure Code, do not apply, and the appeal cannot be held to have abated. It is a case where the court may permit the appeal to be continued by persons on whom the interest of the original appellants had devolved under the provisions of order 22, rule 10. For applying for this permission there is no limitation whatsoever. There is also no objection to the supporting respondent being transferred to the catergory of the appellants.

Held, that the word "Ugahi" really means ouststanding or amounts which are to be treated as a person's assets and not only the amount which is recovered by a creditor from his debtors.

First appeal from the decree of Shri Sunder Lal, Sub-Judge 1st Class, Delhi, dated the 24th July, 1950, granting the plaintiffs' a decree for Rs. 32,792-10-0, with proportionate costs against defendants No. 1, 2, 4, 5 and 6 and further ordering that so far defendant No. 6 the minor was concerned, the decree would be to the extent of the assets of Babu Mull and company which might have came to his hands and the decree against defendant No. 5 was ex-parte *and further ordering that the plaintiffs' suit against defendants No. 7 to 10 would stand dismissed with costs.*

JUDGEMENT.

G. D. Khosla, C. J.

G. D. KHOSLA, C.J.—This appeal arises out of a suit for the recovery of Rs. 61,114/1/6 on account

of money which one Sunder Lal is alleged to have deposited with the defendants. The trial Court passed a decree in favour of the plaintiffs for Rs. 32,792-10-0 with proportionate costs and the plaintiffs have appealed to this Court claiming the full amount in suit.

The case of the plaintiffs was that Sunder Lal, a jeweller by profession (now deceased), deposited large sums of money with a firm of jewellers known as Messrs Baboo Mull and Company. Sunder Lal, during his lifetime, appropriated a sum of Rs. 25,000 by way of trust for the benefit of a pharmacy known as Sunder Lal Jain Digambar Aushdhalya. On 16th November, 1931 he executed a will which was subsequently registered by means of which he devised the remainder of the money lying with Messrs Baboo Mull and Company for the purposes of the trust. He appointed five persons as executors under the will. They are Roshan Lal and Gulab Chand, plaintiffs 1 and 2. Sidhu Mal, defendant No. 3, who had throughout supported the case of the plaintiffs, and Sant Lal and Kapur Chand. Sant Lal is now represented by his son Hira Lal, and Kapur Chand is defendant No. 1. The executors were connected with the firm Baboo Mull and Company in the following manner: The firm Baboo Mul and Company consisted of two joint Hindu family firms. The first of these consisted of Sant Lal and his two sons, Hira Lal and Kapur Chand (Sant Lal and Kapur Chand are two of the executors appointed under the will of Sunder Lal). The second joint Hindu family firm consisted of Nawal Kishore and his descendants. Nawal Kishore had two sons, Baboo Mull and Kharaiti Lal. Baboo Mull is now represented by his descendants, defendants Nos. 4, 5 and 6, and Kharaiti Lal is now represented by defendants Nos. 7 to

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10. It is clear that there was mutual trust between Sunder Lal and the members of the firm Baboo Mull and Company and that is why he appointed some members of this firm as executors. Sunder Lal died on 2nd June, 1932 and his executors applied for probate. Probate was granted and in due course letters of administration were taken out by them. Demand was made for the amount due from Baboo Mull and Company on account of the deposits which had been made from time to time by Sunder Lal, but the executors did not receive satisfaction. On 23rd July, 1947 a telegraphic notice was sent by the trustees to Baboo Mull and Company for payment of the money due from the firm. The amount demanded was the amount now in suit, viz., Rs. 61,114-1-6. The present suit was then instituted on the 30th of July, 1947.

A number of pleas were taken up in defence and the main contentions were that the plaintiffs had no *locus standi* to sue, the suit was barred by time and the amounts which were alleged to have been deposited by Sunder Lal constituted loans and not deposits. It was also pleaded that the plaintiffs were not entitled to any interest. Parties went to trial on the following issues :—

(1) Did all the defendants Nos. 1 to 10 constitute the firm Baboo Mull and Company?

(2) Did Sunder Lal deposit the sum of Rs. 25,000 with the defendants' firm?

(3) Have the plaintiffs *locus standi* to sue

(4) Is the suit within time?

(5) Are the plaintiffs entitled to interest, and, if so, at what rate ?

The findings of the trial Court were that defendants 1, 2, 4, 5 and 6 only were members of the firm Baboo Mull and Company; Sunder Lal did deposit the sum of Rs. 25,000 with the defendant-firm and, therefore, the trustees were entitled to a decree in respect of this sum; the plaintiffs had *locus standi* to sue, but the suit was within time only with respect to the sum of Rs. 25,000, because the remaining amount constituted a loan and this part of the plaintiffs' claim did not fall within Article 60 of the Indian Limitation Act. Interest was allowed at the stipulated rate of ten annas per cent per mensem up to 1947, the last date when balance is alleged to have been struck according to the account-books produced in Court. On these findings the Subordinate Judge passed a decree for Rs. 32,792-10-0.

At the outset a preliminary objection was taken by the learned counsel for the defendants who argued that the appeal had abated. The facts are that both the appellants, Roshan Lal and Gulab Chand, died during the pendency of the appeal. The decree of the trial Court was passed on the 24th of June, 1950. Roshan Lal died on the 5th of December, 1952. His son, Harak Chand, was, in due course, appointed trustee in his place. Gulab Chand died on the 16th of February, 1953, and Rup Chand, son of Hoti Lal, who is also a member of this family, was appointed trustee and executor in his place. To complicate matters further Sant Lal, who is one of the executors, had died in 1940. His place had been taken by his son Hira Lal. Hira Lal also died on the 17th of June, 1956 and in his place Kashmir Chand was appointed trustee. I may mention here that Harak Chand and Rup Chand were appointed trustees in September, 1953 and Kashmir Chand in September, 1956. The new trustees were however, not brought on record

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until September, 1959 when an application to continue the appeal was made by them under Order 22, rule 10, Civil Procedure Code. The new trustees sought the permission of the Court to continue the appeal and they also prayed for the transposition of Sidhu Mal to the list of appellants. It will be remembered that Sidhu Mal had throughout supported the case of the plaintiffs-appellants.

The contention raised by Mr. Sodhi on behalf of the defendants is that since no steps were taken within the time required by law to bring on record the legal representatives of the deceased appellants, the appeal abated. On the other hand, it was contended that this is not a case of abatement or even the setting aside of an abatement under Order 22, rule 3, Civil Procedure Code, but a case where the Court may permit the appeal to be continued by persons on whom the interest of the original appellants had developed under the provisions of Order 22, rule 10. For applying for this permission there is no limitation whatsoever. Mr. Sodhi was not able to place before us any reported or unreported case in which the successor-in-interest of trustees were treated as legal representatives within the meaning of Order 22, rule 3, Civil procedure Code. Our attention has been drawn to one or two cases in which on the removal or death of trustees the interest of those trustees was held to have devolved upon their successors. In such cases there was no bar on the ground of limitation to the making of such an application and the matter rested within the discretion of the Court. *Thirumalai Pillai and others* v. *Arunachella Padayachi and others* (1), is a case in which the facts were somewhat similar to the facts of the present case. Head-note (b), which represents the decision of the Court correctly, is in the following terms:—

(1) A.I.R. 1926 Mad. 540

"Where some of the trustees die or retire during the pendency of a suit and new persons are elected to fill their place: it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under Order 22, rule 10, notwithstanding the question of limitation."

In that case one of the trustees died in 1923, another retired in April, 1924, and the application to bring on record their successors was not made till 1925 when the appeal was being heard before the Madras High Court. The *ratio decidendi* of that case was that when a trustee dies, his estate cannot be said to devolve upon anyone—certainly not upon his legal heirs—and, therefore, the provisions of Order 22, rule 3, Civil Procedure Code, do not apply. The suit by the two executors was of a representative character. The remaining three executors were listed among the defendants, and of them one, Sidhu Mal, was supporting the plaintiffs' case. A prayer was subsequently made for transferring him to the list of appellants. *Basistha Narayan and others* v. *Sankar Dayal and others* (1), was a case in which the facts were somewhat different, but, the principle applied was the same, namely, where a part of the interest of one of the parties to a suit devolves upon another, that other is entitled to make an application to be added as a party to the suit. Such an application is obviously not an application under Order 22, rule 3, Civil Procedure Code. A reference may also be made to two other cases, *Taraprasanna Ganguly and others* v. *Naresh Chandra Chakrabarty and others* (2), and *Committee of Management of Bunga Sar-*

(1) A.I.R. 1952 Pat. 323
(2) A.I.R. 1933 Cal. 329

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kar and others v. *Sardar Raghbir Singh and others* (1), I would, therefore, hold that in this case there has been no abatement and the bar of limitation does not apply to the application which has been made for the permission of this Court to continue the appeal in the name of Harak Chand and Kashmir Chand, nor is there any objection to Sidhu Mal being transferred to the category of appellants.

Coming now to the merits of the case, the case of the plaintiffs is that all the moneys which were given to the firm Baboo Mull and Company were in the nature of deposits. Sunder Lal was treating Messrs Baboo Mull and Company as his bankers. The account-books of the firm show that the account of Sunder Lal ran just as a bank account does. The account-books themselves are not part of the evidence on record, but transliterations of relevant entries are on the file. At the early stages of the suit an application was made by the plaintiffs for the appointment of a receiver to take possession of these account-books. Shri Radhe Mohan Gupta, Pleader, was accordingly appointed commissioner for this purpose. He went to the office of Messrs Baboo Mull and Company, jewellers, but found that the doors were locked. He accordingly made a report to this effect. The Court authorised the commissioner to break open the lock of the shop and take the account-books in custody. This was done, and the commissioner reported that he had found *khata*, *kachi rokar*, *karigar khata*, *jakharah bahi* and *kacha chitha* and had taken them into possession. A report to this effect was made by Shri Radhe Mohan Gupta on the 14th of August, 1947. On the 26th of November, 1947 Chhagan Lal defendant prayed for the return of the account-books. He

(1) A.I.R. 1951 Simla 257

said that he wanted to produce the books before an arbitrator. The plaintiffs raised no objection on the defendant undertaking to produce the books whenever they were required by the Court. The books were then handed back to defendant No. 5 but thereafter they were not produced. Subsequently attempts were made to bring the books to Court, but these attempts failed. The books were apparently returned to defendant No. 5, Hazari Lal, by the order of the Court. Hazari Lal could not be found, although attempts to secure his presence in Court were made. A bailable warrant was issued against him by Court, but Hazari Lal did not attend. Transliterations of the relevant entries in defendants' account-books were ultimately filed. These are Exhibits P. 4 to P. 28. These transliterations bear the certificate of correctness signed by Hazari Lal defendant No. 5. They have been accepted as secondary evidence of the defendants' account-books for lack of the originals. There is no doubt at all that the original account-books were kept back by the defendants and their non-production was not due to any fault of the plaintiffs. The plaintiffs had taken the usual steps to secure this evidence, but on their failure to do so, secondary evidence became admissible. According to these transliterations, all the moneys, which were being paid by Sunder Lal, were in the nature of deposits. The oral evidence of the plaintiffs also supports this allegation. The defendants, however, rely upon the document, Exhibit D. 5, in which the word '*ugahi*' is used. Exhibit D. 5 is a list of the assets of Sunder Lal which was filed along with the application for probate of his will. It is argued that the word '*ugahi*' means the amount which is recovered by a creditor from his debtors. '*Ugahi*', however, has a much wider sense than this. '*Ugahi*' really means outstandings or amounts which are to be treated as a person's assets. One of the items

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in the list filed was a sum of Rs. 46,267-8-3. This, in the Annexure 'A' printed at page 167 of the paper-book, is described as "book debts of which the details are given separately". In the details is an item of Rs. 15,182-7-3 due from Messrs Baboo Mall and Company, and this item is mentioned in Exhibit D. 5. There are several other items also mentioned in Exhibit D. 5, but unless it can be shown that each one of the other items was also in the nature of an advance or loan to a debtor, it cannot be assumed that the figure standing against Messrs Baboo Mull and Company was a loan. The word *'ugahi'* certainly does not mean that the amount was a loan given to a debtor. That being so, we cannot hold simply on the evidence of word *'ugahi'* that the amount, apart from Rs. 25,000, was a loan and not a deposit. We have the sworn testimony of the plaintiffs' witnesses and the evidence of transliterations of the *bahi* entries, and as against this, there is only the one word *'ugahi'* from which we are asked to draw an inference adverse to the plaintiffs. It is clear to me that Sunder Lal was treating Messrs Baboo Mull and Company as his bankers and depositing money from time to time. At one stage he constituted a trust for a sum of Rs. 25,000. The remainder was left as a deposit and, therefore, the limitation for the recovery of this amount is governed by Article 60 of the Limitation Act and the suit must be held to be within time.

In this view of the matter, this appeal must be allowed and the plaintiffs granted a decree for the full sum of Rs. 61,114-1-6 with full costs throughout. The plaintiffs will also be entitled to interest at the rate of 6 per cent per annum on this amount from the date of the suit till realisation.

Tek Chand, J.

TEK CHAND, J. I agree.

B.R.T.