1921

PRAMATHA NATH BASU v. BHUBAN MOHAN BASU.

MOOKERJEE J.

unable to interfere with the decree awarded against the first defendant.

The result is that the decree made by the Subordinate Judge is affirmed and both the appeals dismissed with costs. The hearing-fee in Appeal No. 94 is assessed at five gold mohurs.

BUCKLAND J. I agree.

A. S. M. A. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Richardson J.

SARAT CHANDRA SARKAR

v.

MAIHAR STONE AND LIME CO., LD.*

1921

April 15.

Appeal—"Judgment."—Abatement—Order setting aside abatement—Limitation—Civil Procedure Code (Act V of 1908) O. XXII, rr. 4, 9.

An order setting aside an abatement of a suit is a "judgment" under cl. 15 of the Letters Patent and is appealable.

Padmabati v. *Tulsi Munjuri Debi* (1) referred to.

An abatement ought not to be set aside as a matter of course or lightly; and the plaintiff has to satisfy the Court that there was sufficient cause for not applying in time to bring the legal representatives of the deceased defendant on record.

APPEAL from an order of Pearson J.

On the 1st September 1916, the plaintiff company filed this suit for recovery of Rs. 1,959-12-2, being the

*Appeal from Original Order No. 31 of 1921.

(1) (1918) Unreported.

balance of price of lime sold to the defendant Jadu Nath Sarkar. The defendant entered appearance and filed his written statement on 2nd June 1917. On 22nd December 1920, the suit appeared in the Special List and was adjourned at the plaintiff's instance, on the attorney stating that the defendant was dead. Thereafter, on the 15th February 1921, an application was made on behalf of the plaintiff company for an order setting aside the abatement and for amendment of the cause title and register of this suit by substituting the name of Sarat Chandra Sarkar in place of Jadu Nath Sarkar. Mr. Justice Pearson made the order.

On that this appeal was preferred by Sarat Chandra Sarkar.

Mr. N. N. Sircar, for the appellant.

Mr. Langford James and *Mr. B. K. Ghosh*, for the respondent.

SANDERSON C. J. This is an appeal from the judgment of my learned brother, Mr. Justice Pearson, whereby he set aside the abatement of a suit and directed that the record be amended by substituting Sarat Chandra Sarkar for the original defendant, Jadu Nath Sarkar, who has died. The learned counsel Mr. Langford James took a preliminary objection that there was no right of appeal in respect of this judgment, but our attention was drawn to an unreported decision of this Court in *Padmabati and others* v. *Tulsi Munjuri Debi and Others* (1) [Appeal No. 16 of 1918, decided on the 18th June 1918], to which I was a party, the actual decision being given by my learned brother, Mr. Justice Woodroffe, and, when Mr. Langford James had read that decision, he agreed that he could not further contend that there was no right of appeal

(1) (1918) Unreported.

1921

SARAT CHANDRA SARKAR v. MAIHAR STONE AND LIME CO., LD.

SANDERSON C. J.

This case is one, which I hope is out of the ordinary; and, in order to substantiate that remark, it is necessary for me to refer to some material dates. The suit was filed on the 1st of September 1916—we were informed that it was a suit to recover a sum of about Rs. 1,900 which is alleged to have been due to the plaintiffs in respect of goods sold and delivered. The suit was of a simple nature. The written statement was filed after considerable delay on or about the 2nd of June 1917. No steps were taken by the plaintiffs in this suit with the result that on the 22nd of December 1920, more than three years after the written statement had been filed, the case was put into the Special List by the officials of the Court to be disposed of by the learned Judge on the Original Side. It was alleged on behalf of the plaintiffs that it was then discovered that the defendant was dead; and, according to the evidence which was put in on behalf of the plaintiffs, it appears that, in consequence of an enquiry which was made, it was ascertained on the 26th of December 1920 that the defendant had died on the 24th of December 1918, leaving him surviving, Sarat Chandra Sarkar, his only heir and legal representative. It appears from the affidavit, which was put in on behalf of the defendant, that an application was made on behalf of H. P. Moitra, on the 4th of January last, for an extract from the Death Register showing the death of the defendant, and that a certificate was obtained on the 5th January, so that it is clear that the plaintiffs knew on the 26th of December 1920, that the defendant had died on the 24th of December 1918 and they got the certificate on the 5th of January 1921. On the 22nd of December 1920, the learned Judge made an order that, in view of the fact that the attorney for the plaintiffs had stated that the defendant was dead, and as he was taking steps to obtain

substitution of the heirs of the defendant, the learned Judge directed that the case should appear in the list on the 12th January 1921 and that the plaintiffs' attorney should then state what steps he had taken. The plaintiffs' attorney took no steps; and, when the case again came in the list, on the 12th of January 1921, the learned Judge made an order that an application for revival should be made within a month and that in default the suit should be dismissed with costs. Even then the plaintiffs did not comply with the order, because it was not until the 12th of February that a notice was issued on behalf of the plaintiffs, addressed to the attorney for the defendant on the record and also to Sarat Chandra Sarkar, such notice stating that an application would be made on the 15th of February, that the abatement should be set aside and that substitution should be effected; so that, even after the 26th of December, it seems to me that the plaintiffs were guilty of unexplained delay and neglect. In order to complete the story, I must give two or three other dates. The defendant died on the 24th of December 1918, and by reason of Article 177 of the Limitation Act, the suit abated on the 24th of June 1919. The plaintiffs, by reason of Article 171, had 60 days from the 24th of June 1919 within which they might make an application to set aside the abatement. No such application was made and the time expired on the 24th of August 1919. Therefore, the time for making an application to set aside the abatement had expired. It was necessary, therefore, for the plaintiffs to show in these circumstances that they had sufficient cause, within the meaning of section 5 of the Limitation Act, for not preferring the application within such a period. Assuming for the sake of this judgment, though I am not wholly satisfied about it, that the plaintiffs could get over that difficulty and that the learned Judge was

1921

SARAT CHANDRA SARKAR v. MAIHAR STONE AND LIME CO., LD.

SANDERSON C. J.

right in entertaining the application, the plaintiffs had then to show under Order XXII, rule 9, that they were prevented by sufficient cause from continuing the suit. That means, in my judgment, that the plaintiffs had to satisfy the Court that there was sufficient cause for not applying in time to bring the legal representatives of the deceased defendant on the record. Ignorance of the death of the defendant up to the 22nd of December 1920, standing by itself, might be a sufficient cause. But, in my judgment, the death of the defendant having occurred in December 1918, it is clear that if the plaintiffs had shown the smallest diligence in prosecuting this suit in the ordinary way they must have discovered earlier than December 1920, two years after the death, the fact that the defendant was dead. In my judgment, the plaintiffs have failed to satisfy me that they were prevented by sufficient cause from continuing the suit within the meaning of Order XXII, rule 9.

For these reasons I am of opinion that the order which the learned Judge made setting aside the abatement and substituting the defendant's son for the defendant ought not to have been made. The facts of this case are so extraordinary that although I have great respect for the opinion of the learned Judge, I am forced to the conclusion that this appeal must be allowed.

The result is that the learned Judge's order is set aside, including the order that the costs of the application should be costs in the cause, and the plaintiffs' application is dismissed. The plaintiffs must pay the costs of Sarat Chandra Sarkar of the application before Mr. Justice Pearson and of this appeal.

RICHARDSON J. I agree. When a suit has abated, the setting aside of the abatement deprives the party,

in whose favour the abatement operates, of a valuable right. This, I understand, is why a decision which sets aside an abatement is a "judgment" within the meaning of clause 15 of the Letters Patent, and therefore appealable. For the same reason an abatement ought not to be set aside as a matter of course or lightly. I am not of course suggesting for a moment that the learned Judge in the present case has made the order appealed from as a matter of course or lightly, but when all the facts are stated, as my Lord has stated them, it seems to me that Pearson J. in confining himself to the somewhat narrow ground covered by the affidavits of the parties and in leaving out of account the deplorably dilatory conduct of the suit by the plaintiffs, has omitted to consider the question which arises under clause (*3*) of rule 9 of Order XXII. Under clause (*2*) of the rule, the plaintiffs had to satisfy the Court that they were prevented by some sufficient cause from continuing the suit within the period allowed by Article 177 of the Schedule of the Limitation Act. Under clause (*3*) the plaintiffs had to satisfy the Court that they had sufficient cause for not making the application to set aside the abatement within the period allowed by Article 171. The application was made long after the expiry of the latter period and, in my opinion, no sufficient cause has been shown for the delay. With great respect, therefore, to the learned Judge I agree that the appeal should be allowed.

N. G. *Appeal allowed.*

Attorney for the appellant: *M. N. Sen.*

Attorneys for the respondent: *Kar Mehta & Co.*