

**CIVIL RULE.**

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*Before Walmsley and Mukerji JJ.*

1924

Feb. 12.

JOGUNNESSA BIBI

v.

SATISH CHANDRA BHATTACHARJI.\*

*Statute—Construction—Revision—“ Acted illegally ” in clause (c) of section 115 of the Civil Procedure Code, meaning of—Civil Procedure Code (Act V of 1908), s. 115, cl. (c).*

The expression “ acted illegally ” in clause (c) of section 115 of the Code of Civil Procedure, 1908, does not merely imply the committing of an error of procedure such as “ acted with material irregularity ” does. This part of the clause was advisedly left in indefinite language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it.

CIVIL RULE obtained by the heirs and representatives of the original judgment-debtor in a rent suit.

Petitioner No. 1 was a *pardanashin* Mahomedan lady and the remaining petitioners were her minor children. A *jote* standing in the name of her husband, Umed Ali, was sold at a rent execution sale on the 14th March, 1920, for Rs. 500 and was purchased by the opposite party No. 1. On or about the 28th May, 1920, the said Umed Ali came to know about it and filed an application under Order XXI, rule 90, of the Code of Civil Procedure to set aside the sale on the 28th May, 1920. During the pendency of this application, *i.e.*, on the 18th July, 1920, Umed Ali died,

\* Civil Rule No. 832 of 1922.

leaving the petitioners as his sole heirs. The fact of death was reported to the Court on the 24th July, 1920, and several adjournments were granted to substitute the heirs of the deceased petitioner and finally on the 4th February, 1921, an application to substitute the heirs of Umed Ali was made and on the next day it was granted. After substitution, notices were issued on the opposite party and the application was dismissed for default on the 12th March, 1921, but it was finally restored on the 6th August, 1921. Against the said restoration, the opposite party No. 1 filed an appeal, it being Miscellaneous Appeal No. 204 of 1921 in the Court of the District Judge of Tippera. The appeal was dismissed for default, then restored and fixed for hearing on the 18th March, 1922. In the meantime, after several adjournments, the application to set aside the sale was granted on the 18th February, 1922. Against this order the opposite party No. 1 preferred a Miscellaneous Appeal, it being No. 86 of 1922. The appeal was allowed on the ground that the petitioner Umed Ali having died on the 18th July, 1920, and no substitution having been made until the 5th February, 1921, *i.e.*, the substitution having been made after the expiry of six months, the proceedings automatically abated under Order XXII, rule 3, of the Code, and that the Munsif had no jurisdiction to try the case to set aside the sale. Against the said order of the District Judge the petitioners moved the High Court under section 115 of the Code of Civil Procedure, 1908, and obtained this Rule.

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*Maulvi Nurul Huq Chaudhuri*, for the petitioners, argued that the petitioner No. 1 being a *pardanashin* illiterate Mahomedan lady and the other petitioners being minor children of the petitioner No. 1, there was no one to look after her case and to give her

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independent advice. When the opposite party No. 1 appeared and contested the application, he did not raise any objection against the substitution being made out of time. If he had done so, an application under Order XXII, rule 9 (2), would surely have been made and the defect would have been cured, but he, not having done so, waived his right. He contested the application on the merits. The fact of late substitution was never raised at any stage of the application. The point was not also raised in the appeal against restoration. The petitioners, moreover, had deposited the sum of Rs. 500 together with solatium and the Munsif had allowed the application on taking proper evidence. The learned Judge had acted with material irregularity in setting aside the sale without looking into the facts and circumstances of the case. At the same time, the application made on the 4th February, 1921, might be treated as one under Order XXII, rule 9 (2).

*Babu Nagendra Chandra Chaudhuri*, for the opposite party No. 1, contended that no application lay under section 115, as there had been no material irregularity and that the abatement having once taken place, the application was infructuous and the opposite party got a valuable right which should not be lightly brushed aside.

*Maulvi Nurul Huq Chaudhuri*, in reply, contended that an application under section 115, clause (c), did lie, the language of clause (c) being quite elastic.

*Cur. adv. vult.*

MUKERJI J. The facts which have given rise to the present application are these.

One Umed Ali applied under Order XXI, rule 90, Civil Procedure Code, in the Court of the 6th Munsif at Comilla for setting aside a sale, and during the

pendency of the said proceedings died on the 18th July, 1920. On the 24th July, 1920, the death was reported to the Court, and the learned Munsif made a note of it in the order-sheet. Thereafter on five different dates the proceedings were adjourned, on the ground that the heirs had not been made parties and six months had not yet elapsed from the date of death. On the 5th February, 1921, one of the dates to which the case was adjourned, an application for substitution was made on behalf of the heirs and legal representatives of Umed Ali and the same was allowed. It does not appear whether the opposite party were present on that date or not, but on none of the dates to which the case was subsequently adjourned, was any objection taken to the order for substitution that had been made, and the proceedings went on with the result that the learned Munsif set aside the sale by an order passed on the 18th February, 1922. The opposite party preferred an appeal to the District Judge of Tippera and the learned District Judge set aside the Munsif's order and dismissed the application for setting aside the sale, on the ground that the application had as a matter of fact abated by reason of the death of Umed Ali and the application for substitution was incompetent and the substitution had been wrongly allowed. The petitioners have thereupon moved this Court and obtained the present Rule to show cause why the order of the District Judge should not be set aside and that of the Munsif restored or why such other or further orders should not be passed as to this Court may seem fit.

We have heard the parties and considered the facts and circumstances of the case in so far as they bear upon the present Rule. The learned District Judge was undoubtedly right in his view of the law that the proceedings had automatically abated on the 18th January, 1921 under Order XXII, rule 3, Civil Procedure

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Code, and no application for substitution could be entertained after that date, but the petitioners by presenting a proper application under Order XXII, rule 9(2), Civil Procedure Code, and only by showing sufficient cause could obtain an order setting aside the abatement. We think, however, that by reason of the application for substitution being readily allowed by the learned Munsif and no objection having been taken by the opposite party at any stage of the protracted proceedings that followed in his Court, the petitioners were deprived of an opportunity to make an application under Order XXII, rule 9(2) of the Code, and they were misled by the course of the proceedings that were adopted. The order passed by the learned District Judge reversing the decision of the learned Munsif and dismissing the application for setting aside the sale has also not given the petitioners any such chance, and, as matters stand, they are altogether without any remedy.

It has been pressed on us on behalf of the opposite party that our powers of interference under section 115, Civil Procedure Code, are very limited. In my opinion the case does not fall within clause (a) or (b), but under the first part of clause (c) of that section. "Acting illegally" in that clause does not merely imply the committing of an error of procedure such as "acting with material irregularity" does. In my opinion this part of the clause was advisedly left in indefinite language in order to empower the High Courts to interfere and correct gross and palpable errors of subordinate Courts, the justification for the interference being determined upon the grossness and palpableness of the error complained of and upon the gravity of the injustice resulting from it. In the present case, in my opinion, injustice has been done to the petitioners.

The question then is what should be our order. Having regard to the fact that the petitioners are all minors, with the exception of one who is their guardian and who is said to be a *pardanashin* Mahomedan lady and who, as far as can be made out, is also illiterate, an application on their behalf under Order XXII, rule 9(2), Civil Procedure Code stands a good chance of succeeding. I would, therefore, treat the order for substitution as being one setting aside the abatement, and would set aside the order of the learned District Judge and remit the appeal to him to be dealt with on the merits. No order is made as to the costs of this Rule.

WALMSLEY J. I agree.

S. M.

*Rule absolute.*

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sanderson C. J., and Richardson J.*

A. M. K. GOULDING, *In re*.\*

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*Security for Costs—Civil Procedure Code (Act V of 1908), O. XLI, r. 10—  
 Appeal from an order made by a Judge in the Ordinary Original Civil  
 Jurisdiction—Jurisdiction of Appellate Court to order appellant to give  
 security.*

On an application for security for costs in an appeal against judgment of a learned Judge sitting on the Original Civil Side of the Court, it was held that Order XLI, rule 10 of the Civil Procedure Code (Act V of 1908) applies to such appeals in the absence of any rule of this Court framed in the exercise of the power to regulate its own procedure in its Original Civil Jurisdiction.

\* Appeal from Original Civil No. 9 of 1924.