

APPELLATE CIVIL.

Before B. B. Ghose and Panton JJ.

JANAKINATH SINGHA RAY

v.

NIRODBARAN RAY.*

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Abatement—Suit for possession before new Civil Procedure Code of 1908 came into force—Decree as contemplated by O. XX, r. 12, C. P. C., in 1918—Death of defendant in 1919—Application for substitution of heirs made more than six months after death—Application not stating date of death and other particulars entitling extension of time—Mesne profits, whether to be ascertained in suit or in execution proceedings—Vested interest in procedure, whether exists—Application for substitution, if can be treated as application for setting aside abatement—Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 9, 12.

A suit for possession and for mesne profits, instituted before the coming into force of Act V of 1908, was finally decreed in 1918, and the decree directed that the amount of mesne profits be subsequently ascertained and decreed under Order XX, rule 12 of the Code of 1908. The defendant No. 1 died in December, 1919, and the applications for ascertainment of mesne profits and for substitution of heirs of deceased defendant were made in December, 1920.

Held that the amount of mesne profits should be determined in the suit and not in execution proceedings, and the rules of abatement of a suit would apply.

Kedarnath Goenka v. Anant Prasad Singh (1) distinguished.

Held, also, that no person has any vested interest in procedure, and it is well settled that matters of procedure apply to a pending suit if the law is changed during the pendency of the suit.

Held, further, that, in the present case, inasmuch as in the petition for substitution, filed on 17th December, 1920, no dates were given of the deaths of the persons whose heirs were sought to be substituted, nor the date when the plaintiff came to know about their deaths, nor were any grounds given which might induce the court to extend the period of limitation, the petition for substitution could not be treated as an application for setting aside the abatement under Order XXII, rule 9 of the Code, and hence any application for setting aside the abatement was barred by limitation.

APPEAL by plaintiff, Janakinath Singha Ray.

A suit for the possession of a *hana* and for mesne profits (produce of fish) thereof was instituted by plaintiff's father on the 7th of April, 1908 and was decreed by the Munsif on the 29th June, 1909, but dismissed by the District Judge on appeal. The

*Appeal from Order, No. 76 of 1928, against the order of Satish Chandra Basu, Subordinate Judge of Burdwan, dated Nov. 11, 1927.

(1) (1925) I. L. R. 4 Pat. 507; L. R. 52 I. A. 188.

High Court, on appeal, remanded the case to the first court, on the 14th March, 1916, for fresh trial and that court finally passed a decree for possession on the 14th September, 1918 and directed in the decree that proceedings with regard to the determination of the amount of mesne profits will be taken later on under Order XX, rule 12 of the Code of 1908. The plaintiff executed the decree and obtained possession in November, 1918. The defendant No. 1, Bipinkrishna Ray died on 18th December, 1919, and his son Manmathanath Ray died on the 3rd March, 1920. Thereafter, on 17th December, 1920, the plaintiff applied for substitution of the heirs of the deceased Bipinkrishna Ray and Manmathanath Ray, alleging that he had learnt of their deaths only a fortnight before the date of the application; and, on 18th December, 1920, made an application for a decree for Rs. 8,858, which he calculated as the amount of mesne profits for the 12 years he was out of possession together with interest thereon. The application for substitution did not mention the dates of the deaths of the deceased, nor that the application was made beyond time, nor that, on account of any facts or circumstances, the petitioner was entitled to an extension of limitation under section 5 of the Limitation Act. The Munsif returned the petition for *wasilat*, as being beyond his pecuniary jurisdiction, and the same was filed before the Subordinate Judge, before whom the defendants submitted an application on the 13th June, 1922, praying for a dismissal of the plaintiff's petition on the ground that the suit had abated on account of the substitution, not having been made within the time allowed by law. This objection was allowed on 27th June, 1922, whereupon the plaintiff, on 22nd July, 1922, made an application, under Order XXII, rule 9, praying for the setting aside of the order of abatement, on the ground that he was not aware of the deaths of the deceased Bipinkrishna Ray and Manmathanath Ray till a fortnight before his application for substitution and

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supported this application by an affidavit of his agent, Nibaranchandra Bandopadhyay. This application was refused by the Subordinate Judge, on the grounds that the plaintiff had been guilty of considerable laches and had not made out sufficient cause for the delay of over 2 years since his decree for making the application for determination of mesne profits. The plaintiff appealing to the High Court, the case was remanded for inquiry on the points, *firstly*, whether the plaintiff was prevented by a lawful cause from making the application for substitution within the statutory period, and *secondly*, whether the plaintiff had shown circumstances which would entitle him to an extension of time under section 5 of the Limitation Act for making the application under Order XXII, rule 9 of the Civil Procedure Code. The Subordinate Judge held against the plaintiff on both these points and found that there was no sufficient reason for setting aside the abatement as against defendant No. 1. The plaintiff appealed to the High Court.

Mr. Sitaram Banerji (with him *Mr. Bijayprasad Singha Ray* and *Mr. Suryakumar Aich*), for the appellant. I rely on *Kedarnath Goenka v. Anant Prasad Singh* (1) as authority for the proposition that, in this case, the proceedings for the ascertainment of mesne profits should be considered as matters in execution as is provided in the Code of 1882. The rules as to abatement of suits do not apply to these proceedings. Next, the heirs, having appeared in pursuance of the application of the 18th December, 1920, and made no objection for such a long period, they must be deemed to have been duly substituted as heirs. In the case of a mother of certain minor defendants who appeared throughout the proceedings in a suit as their guardian without a formal order of appointing her as guardian-ad-litem, it was held that she effectively represented the minors in the suit and with the sanction of the

(1) (1925) I. L. R. 4 Pat. 507 ; L. R. 52 I. A. 188.

court, *Walian v. Banke Behari Pershad Singh* (1). Further, in circumstances like the present, this Court did take an application for substitution as an application for setting aside the abatement. *Jogunnessa Bibi v. Satish Chandra Bhattacharji* (2).

Mr. Brajalal Chakravarti (with him *Mr. Nalinikumar Mukherji* and *Mr. Byomkesh Basu*), for the respondents.

B. B. GHOSE AND PANTON JJ. This is an appeal by the plaintiff against the order of the Subordinate Judge, dated the 11th November, 1927, refusing to set aside an abatement of the suit with regard to the ascertainment of mesne profits, as directed by the court under Order XX, rule 12 of the Code of Civil Procedure. The first contention on behalf of the appellant is that the procedure which governs this case should be according to the rules laid down in the repealed Code of Civil Procedure of 1882 and not by the Code of 1908 and the reason given in support of this contention is that the suit for possession and for mesne profits was brought on the 7th April, 1908, when the present Code had not come into operation. The suit was decreed in the trial court on the 29th June, 1909, and dismissed on appeal by the defendant. That decree was set aside by the High Court on the 14th March, 1916, which remanded the case for fresh trial to the first court and, on such retrial, the suit was finally decreed on the 14th September, 1918. In the decree, it was directed that proceedings with regard to the amount of mesne profits will be taken later on under Order XX, rule 12 of the Code of 1908. The learned advocate for the appellant relies upon the case of *Kedarnath Goenka v. Anant Prasad Singh* (3) in support of his contention that, in this case, the proceedings for ascertainment of mesne profits should be considered as a matter in execution, as it used to be done under

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(1) (1903) I. L. R. 30 Calc. 1021; (2) (1924) I. L. R. 51 Calc. 690,

L. R. 30 I. A. 182. 693.

(3) (1925) I. L. R. 4 Pat. 507; L. R. 52 I. A. 188.

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the Code of 1882. That being so, the rules as regards the abatement of a suit would not apply to these proceedings. The case relied upon by the appellant does not seem to us to support the proposition put forward. In that case the decree of the trial court was made under the old Code of 1882, by which it was directed that the mesne profits should be ascertained in execution. That decree was affirmed on appeal and finally by the Judicial Committee after the Code of 1908 came into operation, but there was no alteration in the terms of the decree. In that case their Lordships held that the ascertainment of mesne profits was a matter to be proceeded with in execution, and the rules laid down for abatement of suits do not apply to those proceedings. In the present case the decree was as contemplated under Order XX, rule 12 of the Civil Procedure Code of 1908 and it was rightly so. No person has any vested interest in procedure and it is well settled that matters of procedure apply to a pending suit if the law is changed during the pendency of the suit. The rules as regards abatement of a suit will, therefore, apply to the present case, as provided in the Code of 1908. It is not disputed that, if that is so, the suit abated in the present case as against defendant No. 1. Defendant No. 1 died on the 18th December, 1919. The plaintiff took possession of the property in execution in 1918. One of the sons of the original defendant No. 1 died on the 3rd March, 1920. On the 17th December, 1920, the plaintiff made an application to the court for substitution of the heirs of the deceased defendant No. 1 and also that of his deceased son Manmathanath Ray. In that application the petitioner did not state the date of the death of either of those persons and he simply prayed for substitution of the heirs of the deceased persons without stating any fact that the suit had abated or that the application for substitution was made beyond time or that on account of any fact the petitioner was entitled to an extension of the period

of limitation for making the application under section 5 of the Limitation Act. The Munsif apparently made an order substituting the heirs of those deceased persons, some of whom were minors represented by their guardians appointed by the district court. Then it was found that the claim was beyond the pecuniary jurisdiction of the Munsif, and the case was transferred to the Subordinate Judge. After a considerable lapse of time it was objected on the part of the defendants that the suit had actually abated as against defendant No. 1. Thereupon, on the 22nd July, 1922, an application was made by the appellant purporting to have been under Order XXII, rule 9, of the Code for setting aside the abatement. Even in that petition, no prayer was made for extending the period of limitation for making such an application, nor were there any facts stated which would entitle him to ask for such an indulgence from the court. The only thing that was stated in this petition of the 22nd July, 1922 was that the plaintiff came to know of the death of defendant No. 1 on the 2nd December, 1920. On these facts, the learned Subordinate Judge refused to set aside the abatement and the appeal is against that order. The Subordinate Judge held that the application under Order XXII, rule 9, was time-barred, as it undoubtedly was, and there was no ground for extending the period of limitation under section 5 of the Limitation Act. It is contended, on behalf of the appellant, that, in some cases in this Court, the application for substitution has been taken as an application for setting aside an abatement. That might have been with reference to the facts stated in those particular cases in the petition for substitution. In this case, the petition cannot be taken to have been a proper application at all. No dates were given either of the death of the persons whose heirs were sought to be substituted or the date when the plaintiff came to know about their death or any ground which might induce the court to extend the period of limitation.

At first sight, the court might consider that the

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petition of the 17th December, 1920, was quite in order and the application for substitution was made on account of the death of the persons mentioned there within three months of their death. This does not seem to be a *bona fide* application at all. Under such circumstances, we agree with the learned Subordinate Judge that the abatement should not be set aside and the application was barred by limitation and that no grounds have been shown why the period of limitation should be extended under section 5 of the Limitation Act. This appeal must, therefore, stand dismissed with costs, hearing fee, five gold mohurs.

R. K. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Rankin C. J. and C. C. Ghose J.

J. C. GALSTAUN

v.

PRAMATHANATH RAY.*

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Mar. 7

Decree by Consent—Procedure for setting aside consent decree on grounds of fraud—Civil Procedure Code (Act V of 1908), ss. 96, 104, 151, 152; O. XXIII, O. XLVII.

The proper course of having a consent decree amended or vacated upon the ground that it was obtained fraudulently is to proceed by a separate suit. *Obiter.* It is not competent under O. XLVII of the Civil Procedure Code to obtain a review of a consent decree on the ground of fraud.

Gulab Koer v. Badshah Bahadur (1), *Ram Gopal Mazumdar v. Prasanna Kumar Sanial* (2), *Chhajju Ram v. Neki* (3) and *Barhamdeo Prasad v. Banarsi Prasad* (4) referred to.

Ram Lagan Sahu v. Ram Birish Koeri (5) followed.

APPEAL FROM APPELLATE DECREE by the defendant.

The facts out of which this appeal arose are as follows: This dispute was between J. C. Galstaun

*Appeal from Appellate Decree, No. 645 of 1927, against the decree of N. G. A. Edgley, Additional District Judge of 24-Parganas, dated Nov. 19, 1926, confirming the decree of Jatindra Chandra Lahiri, Subordinate Judge of 24-Parganas, dated April 30, 1924.

(1) (1909) 13 C. W. N. 1197.

(4) (1901) 3 C. L. J. 119.

(2) (1905) 10 C. W. N. 529.

(5) (1919) 4 P. L. J. 205.

(3) (1922) I. L. R. 3 Lah. 127;

L. R. 49 I. A. 144.