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been a prolonged one, and that several blows were inflicted on the skull completely smashing it, leave very little doubt that the intention of the accused was to inflict such bodily injury as was likely to cause death. The fourth clause of section 300 of the Indian Penal Code applies, and the accused have been rightly convicted of the offence of murder as defined in the Code. The lesser of the two sentences has been imposed, and there is no doubt as to the guilt of the accused. We therefore dismiss the appeal and maintain the convictions and sentences.

[*Cf. Emperor v. Bhola Singh*, I.L.R., 29 All., 282—ED.]

### PRIVY COUNCIL.

\* P. C.  
1913  
April 16, 29.

DEBI BAKHSH SINGH (PLAINTIFF) v. HABIB SHAH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

*Plaintiff, non-appearance of—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Civil Procedure Code (1908), order IX, rules 8 and 9—Order XXII, rules 3 and 9—Sections 115 and 151—Rules and orders applicable only to defaulters wrongly applied in case of dead party.*

On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy Commissioner in an application made under order XXII, rules 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under section 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under order IX, rule 8, of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that order XXII, rule 3, of the Code applied only to a still pending suit, and not to one that had been dismissed.

*Held* (reversing the decisions of the Court of the Judicial Commissioner) that those decisions were vitiated by applying to a dead man orders and rules

\* *Present*:—Lord SHAW, Lord Moulton, Sir JOHN EDGE and Mr. AMBER ALI.

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applicable only to a mere defaulter. An "abuse of the process of the Court" within the meaning of section 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section, any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits.

APPEAL from a judgement and decree (5th December, 1911) of the Court of the Judicial Commissioner of Oudh (affirmed on review on the 20th of February, 1912), which reversed on appeal an order (11th September, 1911) of the court of the Deputy Commissioner of Bahraich.

On the 3rd of May, 1911, Raja Maneshar Bakhsh Singh, the father of the appellant, brought in the court of the Deputy Commissioner of Bahraich, a suit against the respondent for the recovery of arrears of rent under a lease, to which suit the respondent filed his defence on the 31st of May, and the suit was fixed for hearing on the 4th of July, 1911; Raja Maneshar Bakhsh Singh died on the 21st of June, 1911; and on the day fixed for hearing the suit was dismissed in default for non-appearance of the plaintiff.

On the 3rd of August, 1911, an application was made on behalf of the appellant as the heir and legal representative of his father, by his general agent, to the clerk or General Superintendent of the office of the Deputy Commissioner, under order XXII, rule 3, and order IX, rule 9, of the Civil Procedure Code (Act V of 1908) in which the appellant stated that owing to the death of his father, and his being engaged in the performance of the necessary funeral ceremonies he had been unable to be present in court on the 4th of July; and prayed that the suit which had been dismissed in default might be restored, and that his name might be substituted for his father's on the record of the suit.

When leaving the application with the clerk, the appellant's agent said he had been waiting in the court since 2 p.m. (it was then 4.30 p.m.) to present it to the court, but that as the Deputy Commissioner had not taken applications on that day, he had been unable to do so. The General Superintendent reported this statement to the Deputy Commissioner, who on the 4th of August, 1911, made the following order:—"He was in my court and might have filed it then. It may be accepted."

On the 11th of September, 1911, the Deputy Commissioner granted the application and made an order in the terms set out in the judgement of their Lordships of the Judicial Committee.

On the 9th of October, 1911, the respondent applied to the Court of the Judicial Commissioner of Oudh under section 115 of the Civil Procedure Code (Act V of 1908) for revision of the orders of the Deputy Commissioner of the 4th of August, and the 11th of September, 1911, and on the 5th of December, 1911, that Court (Mr. B. LINDSAY, 1st Additional Judicial Commissioner, and Mr. M. RAFIQ, 2nd Additional Judicial Commissioner) held that the application ought to have been dismissed by the Deputy Commissioner because the appellant had not reported to the authorities his succession to his father Maneshar Bakhsh Singh as required by clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901); and because the application could not be entertained by the Deputy Commissioner as having been made more than 30 days after the dismissal of the suit. The clerk of the court, it was said, had no authority to receive the application, which therefore must be considered as not having been received until the 4th of August, 1911, and consequently out of time; that order XXII, rule 3, of the Civil Procedure Code, 1908, did not give the legal representative six months within which to set aside the dismissal of the suit; and that the appellant had produced no evidence in support of his application. The Judicial Commissioner's Court accordingly set aside the orders of the Deputy Commissioner which were under revision.

The appellant thereupon applied for a review of the judgement of the 5th of December, 1911, mainly on the grounds that the dismissal of the suit under order IX, rule 9, was *ultra vires*, that the court of the Deputy Commissioner had inherent jurisdiction under section 151 of the Civil Procedure Code to set aside its own order, and that no effect had been given to order XXII, rule 3, of the Code.

The Court of the Judicial Commissioner (consisting of the same Judges as before) said—

“ We are unable to admit that the Deputy Commissioner's order of dismissal was an order *ultra vires*. On the contrary it is clear that the order was *intra vires*, and one which the court was in the circumstances bound to make. The words of order IX, rule 8, are imperative :—‘ Where . . . the plaintiff does not

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appear . . . the court shall make an order that the suit be dismissed.' There can be no doubt whatever that on the 4th of July, the plaintiff did not appear, and in the absence of any information as to the cause of his non-appearance we fail to see how the court could have acted otherwise than it did. It is said that the Deputy Commissioner could have ignored this previous order or could have set it aside under section 151 of the Code of Civil Procedure. But the case cannot be brought within the terms of section 151, for the court could not take action under that section seeing that a procedure for setting aside an order of dismissal is specially provided in order IX of the Code.

"It is said that the effect of our decision is to set at naught all the provisions of the Code of Civil Procedure and the Limitation Act, which allow a period of six months within which the representative of a deceased party can apply to have his name substituted on the record . . . . No doubt six months from the date of the decease of the plaintiff are allowed to his legal representative for the purpose of making an application to have his name brought on the record so as to enable him to continue the suit. But a reference to order XXII in general and to rule 3 of that order in particular shows clearly that what is contemplated in the cases referred to in order XXII is an application made while a suit is still pending. To take the words contained in rule 3 of that order—'The court . . . shall cause the legal representative of the deceased plaintiff to be made a party, and shall proceed with the suit' These last words obviously refer to a case which is still undecided. The court having made the substitution continues the hearing of the suit from the point to which it had advanced at the time when the deceased party died. In the present case the suit had come entirely to an end by virtue of the order of the 4th of July, 1911, by which the suit was dismissed for default and no substitution of the name of Debi Bakhsh Singh as plaintiff in place of his deceased father could be made unless and until the suit had been revived by means of an order passed under order IX, rule 9 . . . . Debi Bakhsh Singh had in any case a remedy by application under order IX, rule 9, and he availed himself of it, but did not do so within the time (30 days from the date of the order of dismissal) prescribed by law. We are unable, therefore, to see how it can be said that our decision of the 5th of December, 1911, in any way ignores the provisions of the Code of Civil Procedure and the Limitation Act."

The application for review was consequently dismissed.

On this appeal, which was heard *ex parte*—

*De Gruyther, K. C.*, and *S. A. Kyffin* for the appellants contended that pending an application to substitute on the record the appellant's name as heir to his deceased father, the suit had been wrongly dismissed for default of prosecution; and when it was brought to the notice of the Deputy Commissioner that the plaintiff's non-appearance was owing to his having died before the order dismissing the suit was made, the Deputy Commissioner had rightly held that the order of dismissal was not under the circumstances a proper order, and that the appellant

was entitled to continue the suit. The appellant applied within the time limited by law to be put on the record in place of his father, and was entitled to the further relief that the order of the 4th of July dismissing the suit should be set aside. The appellant's application having been admitted, and accepted by the order of the Deputy Commissioner as being within time, could not, it was submitted, be regarded as being barred by limitation. The provisions of clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901) did not operate as a bar to the continuance of the suit. The Court of the Judicial Commissioner had no power under the Civil Procedure Code (Act V of 1908) to interfere with the orders made by the Deputy Commissioner on the 4th of August and the 11th of September, 1911: any defect in procedure was cured by the powers conferred on the Deputy Commissioner by section 151 of the Code which justified his making the orders. The orders of the Court of the Judicial Commissioner were erroneous and should be set aside. Reference was made to the Civil Procedure Code (Act V of 1908), section 115; order IX, rules 8 and 9; order XXII, rule 3, clauses (1) and (2); order XXII, rule 9, clauses (1) and (2); and the Limitation Act (IX of 1908), schedule I, article 176.

*1913, April, 29th.*—The reasons for the report of their Lordships were delivered by Lord SHAW:—

The appellant's father, Raja Maneshar Bakhsh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd of May, 1911, in the court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st of May, 1911. On the 4th of July the following occurred before the Deputy Commissioner:—  
“On the case being called to-day the plaintiff was not present. I therefore dismiss the claim. Costs upon plaintiff.”

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st of June. It is plain to their Lordships that, upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognized. It requires no words of their Lordships to show the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the

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situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under the category of default, does not seem to be very stateable.

The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under order XXII, rule 9, of the Civil Procedure Code. He did so on the 3rd of August, which was well within the period of six months' limitation under article 176 of the first schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under section 34 of the Land Revenue Act.

On the 11th of September, 1911, the Deputy Commissioner pronounced the following order :—

"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Mallanpur. The other side claim that the re-hearing is barred under section 34 of the Land Revenue Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented applicant's putting up this case. Under these circumstances I accept this application, and fix the 27th of October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly.

On the 5th of October, 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order, and on the 20th of February, 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgements cannot stand, being vitiated by applying to a dead man orders and rules applicable to a defaulter. By the Code of Civil Procedure, section 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise effect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court." In their Lordships'

opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th of September, 1911, restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd of August, 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

*Appeal allowed.*

Solicitors for the appellant:—*T. L. Wilson, & Co.*

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BRIJRAJ SINGH AND ANOTHER (DEFENDANTS) v. SHEODAN SINGH AND OTHERS  
(PLAINTIFFS) 2 APPEALS CONSOLIDATED.

\*P. C.  
1913

April, 16, 17!  
May, 5.

[On appeal from the High Court of Judicature at Allahabad.]

*Hindu law—Partition—Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.*

By a document called a "will" dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind, and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was a provision that, "If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli"

\* Present:—Lord SHAW, Lord MOUNTON, Sir JOHN EDGAR, and Mr. AMBER ALI.