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already been determined by the Civil Court. How can the Civil Court determine the same rights twice? The action of the Magistrate has rendered the Civil Court decree nugatory. The order being passed without jurisdiction can be revised.

Mr. *D. R. Sawhny*, for the opposite party:—

Proceedings under section 145 are expressly excepted from the operation of section 435. Except on the ground of want of initial jurisdiction such proceedings cannot form the subject of revision by the High Court. The Magistrate was duly empowered to act under Chapter XII of the Code of Criminal Procedure. There existed a dispute in fact, although it may be that none should have existed in law. So the Magistrate had jurisdiction to hold the inquiry and was properly seised of the case. The conclusion arrived at by him may or may not be correct, but that is no ground for revision. The arguments advanced by the applicant were considered in the case of *Jhingai Singh* v. *Ram Partap* (1). I rely on that case and also on the case of *Maharaj Tewari* v. *Har Charan Rai* (2).

RYVES and PIGGOTT J.J:—In our opinion this case is covered by an authority of this Court in *Maharaj Tewari* v. *Har Charan Rai* (2). This case was followed in *Jhingai Singh* v. *Ram Partap* (1). We entirely agree with the view expressed in both these cases. We accordingly dismiss this application.

Application dismissed.

APPELLATE CIVIL.

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February, 25.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. JAWAHIR LAL (PLAINTIFF)*.

Act No. IX of 1908 *(Indian Limitation Act), section 5—Civil Procedure Code* (1908), *order XXII, rules 4 and 9—Limitation—Parties—Application for substitution of names filed beyond time—Procedure.*

Section 5 of the Indian Limitation Act, 1908, does not apply to an application made under order XXII, rule 4, of the Code of Civil Procedure. Where, therefore, such an application is made after time, the suit or appeal must be

* First Appeal No. 225 of 1912 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 4th of April, 1912.

(1) (1908) I. L. R., 31 All., 170. (2) (1908) I. L. R., 30 All., 144.

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declared to have abated, and the remedy for the plaintiff or appellant is to proceed by application under order XXII, rule 9.

THE facts of the case fully appear from the following referring order of PIGGOTT, J.

"This is an application in F. A No. 225 of 1912 in which the Secretary of State for India is appellant and one Hakim Jawahir Lal was impleaded as sole respondent. I am informed that the suit itself is of considerable value, and the appeal one which must necessarily come before a Bench of two Judges. The application before me is one under order XXII, rule 4, of the Code of Civil Procedure. According to the affidavit by which it is supported, Hakim Jawahir Lal died on the 18th of April, 1913, and it was not until the 12th of December, 1913, that application was made to this Court on behalf of the appellant to bring the legal representatives of the deceased respondent on the record. *Primâ facie*, therefore, the application is beyond time and is barred by article 177 of schedule I to the Indian Limitation Act, No. IX of 1908. In the affidavit before me certain reasons are put forward on behalf of the appellant which are said to be sufficient cause for the application in question not having been preferred within the prescribed period of limitation. I am not at present considering the sufficiency of these reasons. The point taken before me on behalf of the legal representatives of the deceased respondent, to whom notice was issued of this application, is that I have no jurisdiction to consider at this stage the sufficiency of the reasons put forward on behalf of the appellant, and that I have no option but to reject this application as one barred by time. The question is whether section 5 of the Indian Limitation Act, No. IX of 1908, applies to the present application. That section itself, so far as it relates to applications, refers only to applications for review of judgement or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. Under section 372A of the former Code of Civil Procedure (Act XIV of 1882), the corresponding section of the Indian Limitation Act of 1877 was made applicable to applications under section 368A of that Code, corresponding to order XXII, rule 4, of the present Code of Civil Procedure. This section 372A of Act XIV of 1882 has been replaced in the present Code of Civil Procedure by order XXII, rule 9. But there is an important difference of language. By the third sub-rule of order XXII, rule 9, the provisions of section 5 of the Indian Limitation Act are directed to apply to applications under sub-rule 2 of the same rule, but are not directed to apply to any other rule in order XXII, as for instance, to rule 4 of order XXII. Moreover the words 'the plaintiff or' at the beginning of sub-rule (2) of rule 9 are new, and suggest a change of policy on the part of the Legislature. The effect of these alterations, as I understand them, is as follows: The sufficiency of the reasons alleged in the affidavit now before me for not making an application under order XXII, rule 4, within the prescribed period of limitation cannot be considered at this stage. The present application ought to be dismissed as time-barred. The appeal in question, F. A. No. 225 of 1912, would then come up for disposal before two Judges and would be declared to abate under the provisions of order XXII, rule 4, sub-rule (3). It would then be open to the appellant to come to court with an application under

order XXII, rule 9 sub-rule (2) showing cause under the provisions of section 5 of the Indian Limitation Act for his having neglected to continue the suit, that is to say, to make the necessary application under order XXII, rule 4, of the Code of Civil Procedure within the prescribed period. It would then be open to this Court to consider the sufficiency of the reasons put forward and to pass such orders as it might consider proper. According to this view of the law, the proper order for me to pass to-day would be one dismissing the application now before me. On behalf of the appellant, however, I have been asked to pass some order which would have the effect of bringing the whole matter before the Bench which must deal with the appeal itself. If my view of the law is correct, it would certainly be expedient that an application like the one now before me should be dealt with by a Bench capable of finally disposing of the appeal. An order for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application; and though I feel no doubt in my own mind regarding the question of law raised, it being a question which was fully threshed out before me in the Judicial Commissioner's Court, Oudh, I think it expedient that this application should be dealt with by a Bench capable of disposing of the appeal itself. My order, therefore, is that this application along with the file in F. A. No. 225 of 1912 be laid on an early convenient date before a Bench of two Judges."

Mr. *W. Wallach*, for the appellant:—

Munshi *Benode Behari* and Pandit *Shiam Krishna Dar*, for the respondent.

RICHARDS, C.J., and BANERJI, J.—This is an application under order XXII, rule 4, of the Code of Civil Procedure to bring on the record the legal representatives of the deceased respondent. The application was made after the expiry of the period of limitation prescribed for such an application. A learned Judge of this Court has referred the application to us for disposal, he being of opinion that under order XXII, rule 4 no application can be entertained unless it is filed within the period of limitation allowed by the Limitation Act, that is to say, within six months from the date of the decease of the respondent. We agree with the view taken by our learned colleague. The law seems to have been altered in this respect in the present Code of Civil Procedure. By section 5 of the Limitation Act, that section can apply only to cases to which, besides the cases mentioned in the section itself, it is made applicable by any other provision of law. That section is not made applicable to an application under rule 4 of order XXII. The rule distinctly provides, in sub-rule (3), that where within the time limited by law no application is

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made under sub-rule (1), the suit shall abate as against the deceased defendant. In the case of an appeal the word "appeal" should read for "suit" and "respondent" for "defendant." Therefore, as the law now stands, since no application was made under sub-rule (1) within the time allowed by law, the appeal must abate. The remedy of the person who could not make his application within the time allowed by the law of limitation is that provided by rule 9 of the order. He may, after the order of abatement has been passed, apply to have it set aside on the ground that he was prevented by any sufficient cause from continuing the suit or appeal, as the case may be, and this rule clearly makes section 5 of the Limitation Act applicable to it. We are of opinion that the application to bring the heirs of the respondent on the record cannot be entertained, having been made beyond the period of limitation prescribed for such an application. We accordingly reject it with costs.

The appeal was then taken up and the following judgement was delivered.

RICHARDS, C. J., and BANERJI, J.—As no application was made in this case to bring on the record the legal representatives of the deceased respondent within the six months prescribed by the Limitation Act this appeal has abated. We accordingly declare that the appeal has abated. This order is made without prejudice to any application which the appellant may be advised to make under order XXII, rule 9, of the Code.

Appeal abated.