Before Mr. Justice Walsh.

LACHMI NARAIN (PETITIONER) *v.* MUHAMMAD YUSUF AND OTHERS (OPPOSITE PARTIES).*

1920
April, 21.

Civil Procedure Code (1908), *order XXII, rule* 9—*Abatement of appeal—Application for substitution presented after time—Act No. IX of* 1908 (*Indian Limitation Act*), *section* 5.

Whether or not a formal order to that effect is passed, a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant. If no formal order has been made, an application for substitution must be considered as an application under order XXII, rule 9 (2), of the Code of Civil Procedure.

Under the rule above-mentioned a court is competent to decide whether in the circumstances of the case there is reason for allowing the application, although presented beyond time, without being confined to the circumstances given in section 5 of the Indian Limitation Act, 1908.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Durga Prasad*, (with him Dr. *Surendra Nath Sen*) for the applicant.

Mr. *M. L. Agarwala*, (for Dr. *S. M. Sulaiman*) for the opposite parties.

WALSH, J. :—This is an application in form to bring on the record the names of two persons, Gomti Prasad and Kauleshar Prasad, collateral relatives of the deceased appellant, Lachmi Narain. Lachmi Narain died on the 2nd of July, 1919, and the time for substitution of names, namely, six months, therefore, expired on the 2nd of January, 1920. An application was made to this Court *ex parte* on the 5th of February, a month and three days beyond time. The learned Judge, who happened to be myself, issued notice to the other side to show cause why in spite of the expiration of time leave should not be given. Mr. *M. L. Agarwala*, for the plaintiff, appears to show cause, and he has raised certain objections with which it is necessary for me to deal. In the first place he says that there is no order of abatement; and that the application is one to bring certain names on the record and not to set aside any order of abatement. I agree that that is an accurate description of the technical position ; but for some reason or another,

* Application in Second Appeal No. 653 of 1918.

which I have never been able to understand, we have no system in this Court by which, if an appeal abates or is dismissed automatically for breach of some condition precedent, or for failure to comply with some order such as giving security for costs, an order is automatically drawn up in the ministerial side of the office recording that the appeal stands dismissed or abated, as the case may be. What happens is, that it is put up amidst a lot of other applications of a similar kind before an unfortunate Judge who has to deal with some rapidity in the half hour allowed for petitions, and the usual order is made, namely, "put up in ordinary course." I have, in my experience, known of more than one such case which has been put up in the ordinary course because it was found that the appeal had abated, and afterwards an adjudication in Court took place; whereas in fact, the appeal abated *automatically* on the expiration of six months. The absence of any formal order by this Court carrying the abatement into effect cannot serve as an obstacle to any body who wants to put himself right, or to correct some *bona fide* mistake which has occurred. Therefore I agree with Mr. *Durga Prasad*, for the applicant, that in substance this is an application to set aside the abatement under order XXII, rule 9, and to allow the names to be substituted and the appeal to proceed in spite of the fact that the six months have expired and the right of appeal abated automatically by law. I hold that I have the right to consider this matter and to decide whether in my opinion the applicant was prevented by any sufficient cause from continuing the appeal, and if I am satisfied on that ground, to set aside that abatement and allow the appeal to be continued on such terms as I think right. Order XXII, rule 9, is made to apply to appeals by rule 11.

Then Mr. *Agarwala* says that the circumstances of the case do not bring the application within section 5 of the Limitation Act. Without deciding whether they do or whether they do not, I think I have a duty under rule 9, sub-section (2), to decide whether there was sufficient cause independently altogether of sub-section (3). Sub-section (3) merely provides that the provisions of section 5 of the Limitation Act shall apply to such

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applications, so that if the case is one clearly within section 5 of the Limitation Act the court may rule that that is sufficient cause. But I do not think that that provision confines the sufficient cause mentioned in sub-section (2) to the circumstances given in section 5 of the Limitation Act.

[His Lordship then considered the merits of the case and made an order for substitution conditional upon the applicants depositing security for costs.]

Application allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

RAM NATH (PLAINTIFF) *v* HUB NATH AND ANOTHER (DEFENDANTS).*

1920
April, 24.

General Rules (Civil) of the High Court, 1911, *Chapter XXI, rule* 1—*Fee certificate—Date for filing certificate—Civil Procedure Code* (1908), *order XVIII, rule* 2.

Held on a construction of Chapter XXI, rule 1, clause (1), of the general rules (civil) of the High Court, 1911, that a fee certificate which is not filed on or before the day fixed for the hearing of the suit referred to in order XVIII, rule 2 (1), of the Code of Civil Procedure is not within time and cannot be taken into consideration in assessing the costs of the suit.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Gokul Prasad*, for the respondents.

MEARS, C. J., and PIGGOTT, J.:—The question in these appeals is whether the certificates for the pleader's fees were tendered to the officer of the court within the time prescribed by the General Rules (Civil) of 1911 for Subordinate Courts.

The date fixed for the commencement of the hearing of the suit No. 62 of 1918 (Original Suit No. 70 of 1916) was the 24th of November, 1916.

On the 17th of November, an application was made that suit No. 103 of 1916 (afterwards First Appeal No. 362 of 1917) should the put up with no. 70 of 1916 and decided at the same time, as the two actions covered the same ground. No order was made on the 17th but the matter was ordered to be put up on the 24th of November, the day which had been fixed for the hearing. On

*First Appeal No. 362 of 1917, from a decree of Ganga Sahai, Subordinate Judge of Benares, dated the 25th of July, 1917.