

his lands to Lachmi Prasad, the present appellant, and executed a sale-deed in favour of one Dwarka.

Upon this, the respondent, Baldeo Dube, applied to the District Judge for cancellation of the lease and the sale-deed.

The District Judge cancelled the lease by his order, dated the 14th of January, 1921.

From this order Lachmi Prasad preferred this appeal.

Munshi *Kamalakanta Varma*, for the respondents, took a preliminary objection that no appeal lay in this case. He submitted that, according to section 48 of Act VIII of 1890, an order made under the Act was final and could not be contested by suit or otherwise, save as provided by section 47 of the Act, or by revision. Section 47 of the Act enumerated specifically the orders under the Act from which an appeal could lie to the High Court. The section made no mention of an order passed under section 30 of the Act, under which section the order appealed from must be taken to have been passed, and there was no ground for revision. Hence the order of the District Judge was final and it could not be interfered with.

Babu *Piari Lal Banerji*, for the appellant, replied.

PIGGOTT and WALSH, JJ. :— We are satisfied that no appeal lies in this case, and we are not disposed to interfere in revision. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr. Justice Gohul Prasad.

GUJRATI (PLAINTIFF) v. SITAI MISIR AND OTHERS (DEPENDANTS).*

Civil Procedure Code (1908), order XXII, rule 9(2)—*Abatement of appeal—Necessity for formal order declaring appeal to have abated—Application to set aside order of abatement.*

The abatement of a suit or appeal does not take place automatically, but it is necessary that there should be an order of the Court declaring the suit or appeal to have abated, and an application to set aside such an order will lie under order XXII, rule 9(2), of the Code of Civil Procedure. *Secretary of State for India v Jawahir Lal* (1) followed. *Lachmi Narain v. Muhammad Yusuf* (2) overruled.

THIS was an application purporting to be one to set aside the abatement of an appeal. The facts of the case appear from the various orders below.

* Application in Second Appeal No 991 of 1920.

(1) (1914) I. L. R., 36 All., 235.

(2) (1920) I. L. R., 42 All., 540.

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Munshi *Kailas Chandra Mital*, for the appellant.

Dr. *S. M. Sulaiman* and Pandit *Narmadeshwar Prasad Upadhyaya*, for the respondents.

The application came first before a single Judge of the Court, who passed the following order :—

BANERJI, J.:—This application purports to be an application to set aside the abatement of an appeal. One out of several respondents to the appeal is dead, and no application was made within the period of ninety days allowed by law for bringing his legal representatives on the record. No order declaring that the appeal has abated either wholly or against the respondent who is dead has yet been passed. But before the passing of such an order the present application has been made on the ground that the applicant was not aware of the fact of the death of the respondent before the expiry of the ninety days. The application is opposed on the ground that it is premature inasmuch as no order declaring that the appeal has abated has yet been passed. In answer to this contention the ruling of a learned Judge of this Court, reported in I. L. R., 42 All., 540, has been cited. I have doubts as to the correctness of the view taken by the learned Judge in that case. I therefore direct that this application be laid before a Bench of two Judges.

The next order was by the Division Bench.

RYVES and GOKUL PRASAD, JJ.:—This purports to be an application to set aside an order of abatement. It appears that one of the respondents died in March, 1921, and an application was put in by the learned vakil for the appellant after ninety days had expired. The learned vakil in the application stated that the appeal as against the deceased respondent had abated and he applied for an order under order XXII, rule 9. (2). The matter came before a learned Judge of this Court who was of opinion that the application was premature inasmuch as there was no order of the Court declaring the appeal to have abated. As, however, a learned Judge of this Court in *Lachmi Narain v. Muhammad Yusuf* (1), was of opinion that on the expiry of ninety days after the death of a respondent, if no application was made within ninety days to bring his representatives on to the record, the appeal automatically abated and it was not

(1) (1920) I. L. R., 42 All., 540.

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necessary that a formal order should have been passed to that effect before an application under order XXII, rule 9 (2), could be made. As the learned Judge before whom this application first came, doubted the correctness of the ruling, the matter was referred to two Judges and comes before us. It seems to us that the point is concluded by the decision in *Secretary of State for India v. Jawahir Lal* (1), and we think that that decision was correct. In order XXII, rule 9 (2), it is stated that the plaintiff may apply for an order to set aside the abatement or dismissal. It is quite obvious that a suit cannot be dismissed automatically. It seems to us therefore that a formal order declaring that a suit or an appeal has abated, is necessary before an application under this rule can be entertained. We therefore dismiss this application and order the appeal to be put up in the ordinary course. In order to save time we direct that the appeal be put up to-morrow before us for orders.

A formal order declaring the appeal to have abated as against one of the respondents was then passed:—

RYVES and GOKUL PRASAD, JJ.:—We are informed that in this case one of the respondents died more than three months ago and no steps have been taken to bring his legal representatives on the record. We declare this appeal to have abated as against him.

And the appellant presented a fresh application to set it aside:

RYVES and GOKUL PRASAD, JJ.:—This application has been presented by Mr. *Mithal* to-day. Mr. *N. Upadhiya* who represents the respondents is present. Let this matter be put up at an early date for disposal along with the previous application for setting aside the order of abatement disposed of by our order of yesterday.

In the end the order of abatement was cancelled:—

RYVES and GOKUL PRASAD, JJ.:—This is an application to set aside an order of abatement in an appeal pending in this Court. We are satisfied from the affidavit filed on behalf of the appellant that sufficient cause has been made out to explain why there was a delay in bringing the heirs of the deceased Babu Lakshmi Das

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on to the record. We therefore allow the application, set aside the order of abatement and direct that the appeal be put up in the ordinary course. We make no order as to costs.

Before Mr. Justice Ryves and Mr. Justice Gobul Prasad.

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PARAS RAM SINGH (DEFENDANT) v. PANDOHJI AND OTHERS (PLAINTIFFS.)*

Mortgage—Prior and puisne mortgages—Prior mortgage foreclosed without puisne mortgages being made parties—Rights of the two mortgages inter se.

The owners of certain zamindari property, having mortgaged the same by way of conditional sale to the defendant, subsequently made a usufructuary mortgage of certain specific plots of land included in the first mortgage to the plaintiff. The defendant sued for foreclosure, but without making the plaintiffs parties to his suit, and having obtained a decree got possession of the mortgaged property. The plaintiffs then sought to redeem the prior mortgage: the prior mortgagees on the other hand pleaded that they ought to be permitted to redeem the plaintiffs.

Held that in the circumstances of the case and more particularly to prevent further litigation in future the equities of the case demanded rather that the defendant should be allowed to redeem the plaintiffs.

Hasanbhai valad Budhanbhai v. Umaji bin Hiraji (1), *Kedar Nath v. Saiyad Hafiz Ali* (2), *Gharvi v. Raj Bahadur* (3), *Muhammad Ram Piar v. Raghunath Singh* (4) and *Kedar Prosanna Lohiri v. Girindra Prasad Subul* (5) referred to.

THE facts of this case are set forth in the judgment of RYVES J.

Dr. S. M. Sulaiman and Dr. Kailas Nath Katju, for the appellants.

Munshi Kamalakanta Varma, for the respondents.

RYVES, J.—The essential facts, so far as they are necessary for the purposes of this appeal, can be stated very shortly. The mortgagor, who is no longer interested, by a mortgage by conditional sale, dated the 20th of September, 1900, mortgaged his zamindari share in four villages to the defendants. Subsequently, on the 15th of July, 1903, he executed a usufructuary mortgage in favour of the plaintiffs of three small plots of sir

* Second Appeal No. 335 of 1920, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 10th of February, 1920, confirming a decree of Piar Lal Rastogi, Additional Subordinate Judge of Ghazipur, dated the 6th of March, 1919.

(1) (1903) I. L. R., 28 Bom., 153. (3) (1909) 2 Indian Cases, 495.

(2) (1907) 10 Oudh Cases, 356. (4) (1915) 29 Indian Cases, 794.

(5) (1908) 8 C.L.J., 173.