FULL BENCH.

1926 January, 11, 20.

Before Mr. Justice Lindsay, Mr. Justice Sulaiman and Mr. Justice Mukerji.

CHURYA AND OTHERS (PLAINTIFFS) *v.* BANESHWAR (DEFENDANT).*

Civil Procedure Code, order XXII—Abatement—Application to revive suit which has abated—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 171.

The abatement of a suit or an appeal is an automatic process, and in order to work an abatement in either case no order of the court is required. *Gujrati* v. *Sital Misir* (1) overruled. *Lachmi Narain* v. *Muhammad Yusuf* (2), approved. *Secretary of State for India in Council* v. *Jawahir Lal* (3), referred to.

THE facts of this case were as follows :—

A suit was brought for ejectment against three defendants. Baneshwar was defendant No. 3 and was not related to the other defendants. The plaintiffs' case was that they were occupancy tenants of certain plots, that defendants Nos. 1 and 2 were their sub-tenants and that defendant No. 3 was the sub-tenant of the defendants' sub-tenants. The court of first instance dismissed the suit, but on appeal the District Judge decreed the claim on the 23rd of December, 1921. A second appeal to the High Court was preferred by Baneshwar, defendant No. 3, and was allowed, and it was ordered that the memorandum of appeal presented in the court of the District Judge should be returned to the respondent for presentation to the proper court. A Letters Patent Appeal was filed by the plaintiffs against this order. As a matter of fact the defendant Baneshwar had died on the 28th

* Miscellaneous Case No. 255 of 1915.

(1) (1922) I.L.R., 44 All., 459. (2) (1920) I.L.R., 42 All., 540.
(3) (1914) I.L.R., 36 All., 235.

1926

CHURIA v. BANESHWAR.

of February, 1924, while the appeal was pending, but this fact was not brought to the notice of the Bench hearing the Letters Patent Appeal, which allowed the appeal and restored the decree of the District Judge.

When the plaintiffs proceeded to execute their decree against the defendants, including Baneshwar, an objection was filed by the heirs of Baneshwar on the 5th of January, 1925, to the effect that Baneshwar having died before the decision of the Letters Patent Appeal, the decree was not binding on them. The plaintiffs accordingly filed two applications, one praying that the appeal may be declared to have abated as against Baneshwar, the other praying that the appeal might be restored to its original number and the names of his two sons be brought on the record as respondents. Their allegation was that they became aware of the death of Baneshwar only when objections were filed on the 5th of January, 1925, and they made further inquiries in the village. On the other hand the allegation on behalf of the opposite party was that the applicants were fully aware of the death of Baneshwar even long before the 5th of January, 1925.

A preliminary objection to the hearing of these applications was taken that they were barred by time. It was urged that the abatement of the appeal took place on the expiry of 90 days from the 28th of February, 1924, when Baneshwar died, and that no application for setting aside the abatement having been made within 60 days of the said expiry, the present applications were barred by time. On the other hand the learned vakil for the applicants relies on the case of *Gujrati* v. *Sital Misir* (1) and urges that it was necessary to pass an order of abatement before the appeal could abate, and that, inasmuch as

(1) (1922) I.L.R., 44 All., 459.

1926

CHURYA v. BANESHWAR

no order of abatement has yet been passed, time under article 171 of the Indian Limitation Act has not yet begun to run against them.

The Bench before which these applications were laid, having doubts as to the soundness of the ruling in *Gujrati* v. *Sital Misir* (1), directed the papers to be laid before the Hon'ble Chief Justice for consideration whether the matter should or should not be referred to a Full Bench. The case was accordingly laid before a Full Bench.

Munshi *Shiva Prasad Sinha* for Babu *Sailanath Mukerji*, for the applicants.

Pandit *Uma Shankar Bajpai*, for the opposite party.

THE following judgements were delivered :—

LINDSAY, J :—This case has been referred to a Full Bench in order to obtain a pronouncement as to whether the case of *Gujrati* v. *Sital Misir* (1), was rightly decided. This question is connected with the question of the proper interpretation of certain expressions to be found in order XXII of the Code of Civil Procedure.

That order deals with what is to happen to suits in cases of the death, marriage and insolvency of parties, and in general terms the order declares that on the happening of certain events the suit abates. This procedure is also made applicable to appeals by virtue of rule 11 of order XXII, so that, under the order in question it is possible for either a suit or an appeal to abate.

When a suit or appeal abates under the order, rule 9 lays down a procedure by way of revivor, and if that procedure is followed the suit or appeal which has abated and, so to speak, become dead is revived.

(1) (1922) I.L.R., 44 All., 459.

1926

CHURYA v. BANESHWAR.

Lindsay, J.

The question upon which there has been a considerable difference of judicial opinion in this Court is whether, before a suit abates, it is necessary for the court to pass what has been called an order for abatement, that is to say, the question is whether a suit abates automatically or whether in order to bring about abatement it is necessary that the court should pass an order to that effect.

It seems to me on a study of the language of order XXII that it is impossible to contend that there is any need for a court to pass what is called an order for abatement; for, in my opinion, abatement is an automatic proceeding and results from the happening of certain events which are mentioned in order XXII.

That was the view which was taken also by Mr. Justice WALSH in the case of *Lachmi Narain* v. *Muhammad Yusuf* (1).

It seems, however, that this judgement was overruled by the Bench decision which we are now considering, namely, the decision in I.L.R,. 44 All. 459. There two learned Judges of this Court said as follows at page 461 of the report :—

" It seems to us that the point is concluded by the decision in *Secretary of State for India* v. *Jawahir Lal* (2), 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 appeal has abated is necessary before an application under this rule can be entertained."

All I can say is that with great respect I am unable to follow the opinion of the two learned Judges. It is certainly true that there can be no automatic dismissal of a suit under order XXII. The only

(1) (1920) I.L.R., 42 All., 540. (2) (1914) I.L.R., 36 All., 235.

1926

CHURYA v. BANESHWAR.

Lindsay, J.

provision for dismissal of a suit under this order is to be found in rule 8(2). The case which is there contemplated is one in which the plaintiff has become insolvent, and under rule 8(2) the defendant may apply to the court for the dismissal of the suit on the ground of the plaintiff's insolvency. On that application being made the court may make an order dismissing the suit. Quite clearly there can be no automatic dismissal, for, as has just been pointed out, this dismissal must result from an application made by the defendant. But it does not follow that, because a suit may not be dismissed automatically, the suit does not abate automatically. On the contrary, it seems clear in every way that abatement in the case of a suit or appeal is an automatic proceeding and that for the purpose of producing what is described as the condition of abatement no order of the court is necessary. It does indeed happen in practice that courts do declare that a suit or appeal has abated, but in making this declaration they are merely recording a fact which has happened in law and the abatement does not result in any way from the making of the order. The order is merely a declaration of an existing fact.

With regard to the case of *Secretary of State for India in Council* v. *Jawahir Lal* (1), which is cited as an authority by the learned Judges who decided the case reported in I. L. R., 44 All., referred to above, I am of opinion that this decision does not lay down that it is necessary that the court should pass a formal order to bring about the abatement of a suit or appeal. It is quite true that certain expressions in the judgement in that case as also in the referring order might lead one to suppose that the making of a formal order was necessary. For example, in the referring order of PIGGOTT, J., we find the following :—" An order

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

for the abatement of the appeal would certainly follow automatically upon an order rejecting the present application." Again in disposing of the case the two learned Judges who decided the reference say that "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." These expressions, as I say, might indicate that the passing of an order for abatement was legally necessary. On the other hand, it would appear from another passage in the judgement that the learned Judges were not of the opinion that such an order was required, for they say at page 238 of the report as follows:—"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."

Lindsay, J.

However that may be, it seems to me perfectly clear that the abatement of a suit or appeal is an automatic process and that in order to work an abatement in either case no order of the court is required.

Some of the confusion which has attended the discussion of this question has probably arisen from the fact that under the Code of Civil Procedure, Act No. XIV of 1882, there were certain sections which declared that an order for abatement of a suit might be passed by the court. I may refer in this connection to section 366 of Act No. XIV of 1882. Section 371 also provided certain procedure by which an order for abatement could be set aside. It is also pertinent to notice in this connection that, under the Limitation Act of 1877, article 171 provided a period of sixty days for applications made under section 371 of the Code of Civil Procedure for an order "to set aside an order for abatement," and the period of sixty days was declared to begin to run from the date of

1926

CHURYA v. BANESHWAR

the order for abatement or dismissal. This period of limitation was obviously so framed because of the language of section 371, which, as I have already said, provided for the setting aside of an order for abatement.

If we turn now to Act No. IX of 1908, which was passed in the same year as the present Code of Civil Procedure, we find that article 171 is couched in different language. The article provides a period of sixty days for an application under the Code of Civil Procedure, 1908, for an order to set aside an abatement (not to set aside an order for abatement), and the period of sixty days begins to run not from the date of any order of abatement but from the date of the abatement.

I am satisfied, therefore, that the decision in I.L.R., 44 All., 459, is not a correct decision and ought to be overruled. In my opinion the correct law was laid down in the judgement above referred to, which is reported in I. L. R., 42 All., 540. The true interpretation of order XXII is that in order to work the abatement of a suit or appeal it is not necessary for the court to pass any order.

SULAIMAN, J :—I fully agree. I would add that, according to the English practice (Order 17, rule 9), where any cause or matter "becomes abated," the solicitor for the plaintiff or person having the conduct of the cause or matter merely certifies the fact to the proper officer, who causes an entry thereof to be made in the Cause Book opposite to the name of such cause or matter.

MUKERJI, J :—I entirely agree. As an additional reason I would refer to the provision contained in sub-rule (3) of order XXII, rule 9.

BY THE COURT.—The case can now be sent back again to the learned Judges who referred the above matter to this Bench for opinion

On the return of the case, the following order was passed :—

SULAIMAN and MUKERJI, JJ. :—The Full Bench having decided that an application for setting aside an abatement must be made within the period of sixty days from the actual abatement, and not from the passing of an order declaring the abatement, we have to consider the application for substitution of names, on the merits. It is admitted that Baneshwar died on the 28th of February, 1924. The applicants' case is that they came to know of the death on the 5th of January, 1925. The question is, admitting this date to be true, whether they acted diligently in coming before this Court with the application for substitution. The period allowed for an application for substitution is ninety days and the present application is beyond time, even if this period of ninety days is computed from the date of knowledge, namely the 5th of January, 1925. In the circumstances, we do not think that there was any diligence on the part of the plaintiffs appellants.

We declare that the Letters Patent Appeal has abated. We set aside the order allowing the appeal and instead give the declaration aforesaid. We make no order as to costs.

Order set aside.