

## REVISIONAL CIVIL.

1927  
April, 22.

*Before Mr. Justice Wazir Hasan and Mr. Justice C. M. King.*  
KHALIL AHMAD KHAN AND ANOTHER (APPLICANTS) v.  
KHATIR ZAMAN KHAN AND ANOTHER (OPPOSITE-  
PARTY).\*

*Civil Procedure Code, order XXII, rule 4 and order XXIII, rule 9(2)—Death of respondent pending appeal—Substitution application not made within time, effect of—Limitation Act (IX of 1908), section 5—Substitution application made after the expiry of limitation, court's power to entertain the application.*

Where the respondent died during the pendency of the appeal and his representatives were not brought on the record in time, but the appellants applied after the expiry of the prescribed time for substitution of the names of the heirs of the deceased respondent alleging that they had no previous knowledge of his death, *held*, that the application was in substance an application under order XXIII, rule 9(2) of the Code of Civil Procedure and the court was competent to decide whether it should be entertained having regard to the provisions of section 5 of the Limitation Act.

Mr. M. Wasim, for the appellants.

Mr. Hargovind Dayal, for the respondents.

HASAN and KING, JJ. :—This is an application in revision under section 115 of the Code of Civil Procedure from the order of the Additional Subordinate Judge of Sultanpur, dated the 23rd of December, 1926.

The facts of the case are very simple though the order under appeal is not as clear as it ought to have been.

One Wali Jan Khan obtained a decree for a sum of Rs. 300 against Khatir Zaman Khan and Fida Ahmad Khan from the Court of the Munsif of Musafir-khana. The defendants appealed from that decree

\* Civil Revision No. 9 of 1927, against the order of Krishnanand Pandey, Additional Subordinate Judge of Sultanpur, dated the 23rd of December, 1926.

and the Subordinate Judge of Sultanpur accepted the appeal and modified the decree of the court of first instance on the 3rd of May, 1926, by reducing the decree of that Court to the sum of Rs. 100 only and costs in proportion.

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The appeal was instituted as against Wali Jan, the original plaintiff but before the decree of the court of appeal was passed on the 3rd of May, 1926, Wali Jan had died. Thus the decree was against a person who was dead on the date of the decree. The applicants before us are the sons of Wali Jan. They have now applied for execution of the Munsif's decree, treating the decree of the Subordinate Judge passed on the 3rd of May, 1926, as a nullity on the ground that it was passed against a dead person. As against this application for execution the defendants prayed for the substitution of the names of Wali Jan's sons, the present applicants, on the record of the appeal and with a view to save the period of limitation for the purposes of substitution they alleged that they came to know of the death of Wali Jan after the 23rd of August, 1926. The court below has accepted the allegation of the defendants that they had no knowledge of the death of Wali Jan previous to the 23rd of August, 1926, and has substituted the names of the sons of Wali Jan on the record of the appeal.

*Hasan and  
King, JJ.*

We are of opinion that the order passed by the learned Subordinate Judge is substantially correct. The fact of the death of Wali Jan during the pendency of the appeal and of the omission of his legal representatives being brought on the record within the period of limitation prescribed by law, had the effect of abatement of the appeal under the provisions of order XXII, rule 4 of the Code of Civil

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Procedure. The application of the appellants in that appeal is, therefore, in substance an application under order XXIII, rule 9 (2) of the Code of Civil Procedure. In those circumstances the court below was competent to decide the question as to whether the application for substitution should be entertained having regard to the provisions of section 5 of the Indian Limitation Act, 1908.

Hasan and  
King, JJ.

The result of all this is that the appeal should be restored to its original number in the register of appeals and in the array of the respondents the names of the sons of Wali Jan should be recorded in the place of the deceased Wali Jan. Having done all this the learned Subordinate Judge should proceed to decide the appeal afresh. We make no order as to costs.

*Appeal restored.*

## REVISIONAL CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

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June, 1.

MENDI LAL (APPLICANT) v. UDMI CHAND (OPPOSITE-PARTY.)\*

*Provincial Small Causes Courts Act (IX of 1887) section 17—  
Restoration of small cause court suit decided ex parte—  
Tender for deposit of money required by section 17 of  
Small Causes Courts Act filed within the prescribed time  
but money deposited after its expiry, whether sufficient  
compliance of section 17 of Act IX of 1887.*

Where the applicant filed his application for restoration of a small cause court suit, which had been decided *ex parte*, within the prescribed period of 30 days accompanied by a tender for the deposit of the amount required by section 17 of the Provincial Small Causes Courts Act (IX of 1887) but the money was actually deposited on receiving back, the

\*Civil Revision No. 24 of 1927, against the order of Muhammad Abdul Haqq, First Additional Judge of the Court of Small Causes, Lucknow, dated the 9th of April, 1927, dismissing the applicant's petition.