

REVISIONAL CIVIL.

Before Coultts and Das, J.J.

MUSSAMMAT BIBI KHOZAIMA

v.

1922.

July, 24.

THE OFFICIAL LIQUIDATOR OF THE KAYESTHA
TRADING AND BANKING CORPORATION,
LIMITED.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rule 9—death of sole defendant—abatement of suit—substitution, whether order of, can be made until abatement set aside—Limitation Act, 1908, (Act IX of 1908), section 5 and Schedule 1, Article 177.

When a sole defendant dies and the suit has abated by reason of the period of limitation for substituting having elapsed, no order for substitution can be made until the abatement has been set aside under Order XXII, rule 9.

The facts of the case material to this report were as follows :—

The respondent corporation instituted a suit against one Abdul Jabber and obtained an *ex-parte* decree on the 5th March, 1918. An application for execution of the decree having been made against the heirs of Abdul Jabber they objected that Abdul Jabber had died on the morning of the 5th March, 1918, before the decree was passed, and that therefore the decree was null and void. This objection was upheld by the trial Court and an appeal by the plaintiff was dismissed by the High Court on the 15th July, 1921. On the 11th August, 1921, the plaintiff applied to the trial Court to substitute the legal heirs of Abdul Jabber in the original suit. The application was allowed. The heirs of Abdul Jabber petitioned the High Court.

Sultan Ahmed (with him *Md. Hasan Jan*), for the petitioners.

Siva Saran Lal, for the opposite party.

*Civil Revision No. 189 of 1922, against an order of B. Akhouri Nityanand Singh, Subordinate Judge of Chapra, dated the 4th May, 1922.

Courts, J.—This application arises out of an order by the Subordinate Judge of Chapra allowing an application for substitution. The case is a somewhat curious one. It appears that the Kayestha Trading and Banking Corporation brought a suit against one Abdul Jabber. On the 5th March, 1918, they obtained an *ex-parte* decree. They then made an application for execution against the heirs of Abdul Jabber who was then dead, but they were met with the objection that Abdul Jabber had died on the morning of the 5th March before the decree was passed. The executing Court allowed the objection, holding that the decree was null and void and incapable of execution. Against this decision the plaintiff appealed to the High Court. The appeal was dismissed and the order of the first Court was confirmed on the 15th July, 1921. On the 11th August, 1921, the plaintiff applied to the Subordinate Judge to substitute the legal heirs of Abdul Jabber in the original suit. This has been allowed and it is against this order that the present application has been made by Abdul Jabber's heirs.

I am not quite clear as to the reasons of the learned Subordinate Judge for allowing substitution, but he refers to section 14 of the Limitation Act and says that the decree was obtained and executed against a dead person owing to a *bonâ fide* mistake, and that under these circumstances the plaintiff is entitled to an exclusion of the whole period during which he was proceeding against the dead man from the period of limitation in applying for substitution. He further says that as the decree against Abdul Jabber is null and void there is no decree in the case and the plaintiff is in the same position as if the decree had been set aside. The suit has, therefore, not abated and the plaintiff is entitled to succeed.

I will first deal with the last proposition of the learned Subordinate Judge. He is entirely wrong when he says that the suit has not abated and he has

1922.

MUSSAMMAT
BIBI
KHOZAIMA
v.
THE OFFICIAL
LIQUIDATOR
OF THE
KAYESTHA
TRADING
AND
BANKING
CORPORATION,
LIMITED.
COURTS, J.

1922.
 MUSSAMMAT
 BIBI
 KHOZAIMA
 v.
 THE OFFICIAL
 LIQUIDATOR
 OF THE
 KAYESTHA
 TRADING
 AND
 BANKING
 CORPORATION,
 LIMITED.
 COTTIS, J.

evidently not studied the provisions of Order XX on this point. Order XX, rule 4, provides that :

" Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a part and shall proceed with the suit,"

and in sub-clause (3) it is provided that :

" Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

The period of limitation is three months so that in the present case the decree being null and void the suit abated after the expiry of three months from the date of the death of the defendant.

We now come to Order XX, rule 9. This rule provides for setting aside an abatement, and under sub-clause (2) an abatement is to be set aside when it is proved that the plaintiff was prevented by sufficient cause from continuing the suit. The period of limitation under this sub-clause is sixty days under Article 177 of the Limitation Act, but under sub-clause (3) of Order XX, rule 9, section 5 of the Limitation Act is made applicable so that even after the expiry of sixty days the abatement might have been set aside if the plaintiff had satisfied the Court that he had sufficient cause for not making the application within the period of limitation. The abatement must, however, be set aside before the substitution can be made and in making the substitution without setting aside the abatement, the Court certainly acted without jurisdiction.

The learned Subordinate Judge has not considered the question of " sufficient cause " in this case and it is clear that there was no sufficient cause. It may be that when the plaintiff first applied to execute the decree against the heirs of Abdul Jabber he believed that the decree was good as against the heirs, but when the objection was allowed he should at once have

applied for setting aside the abatement and for substitution. He chose, however, to appeal and even after the decision of the High Court against him he waited for nearly a month before making any application. Furthermore he made an application for substitution instead of for setting aside the abatement. In the circumstances it is difficult to see how the plaintiff could possibly be allowed any benefit from section 5. The order of the learned Subordinate Judge is manifestly wrong and without jurisdiction and should be set aside.

1922.
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 BIBI
 KHOZAIMA
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 KAYESTHA
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 AND
 BANKING
 CORPORATION,
 LIMITED.
 COUTTS, J.

I would accordingly allow this application and set aside the order of the learned Subordinate Judge.

DAS, J.—I agree.

Application allowed.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.

RAGHUBIR SINGH

v.

JETHU MAHTON.*

1922.

July, 25.

Hindu Law—Woman's estate—transfer of holding, effect of—suit by reversioner, whether notice to quit necessary—Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908)—Transfer of Property Act, 1882 (Act IV, of 1882), section 106.

If a Hindu woman in possession of a *raiyat* holding as a limited owner, transfers the holding, the next reversioner of the last full owner may, on the death of the limited owner, treat the transfer as a nullity, and in such a case he is not bound to sue to set aside the transfer.

Bijoy Gopal Mukerji v. Krishna Mahishi, Debi(1), applied.

*Letters Patent Appeal No. 3 of 1922.

(1) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.