# ORIGINAL CIVIL.

*Before Sir C. Sargent, Knight, Chief Justice, and Mr. Justice Bayley.*

FULVAHU, PLAINTIFF, *v.* GOCULDA'S VALABDA'S, DEFENDANT.* 1885 *March* 27.

*Practice—Reviver—Abatement—Civil Procedure Code (XIV of 1882), Secs. 366-371.*

*The plaintiff died on the 28th August 1883, and in December, 1884, letters of administration to his estate were granted to the Administrator General. The defendant died in June, 1884, leaving a widow and one son him surviving. By his will he appointed two executors. On the 3rd February, 1885, the Administrator General took out a summons to revive the suit.*

*Held* that, notwithstanding the provisions of section 365 of the Civil Procedure Code (XIV of 1882) and of the Limitation Act XV of 1877, it was competent for a Judge in chambers to revive the suit by making an order for abatement under section 366 of the Code, coupled with an order under section 371 setting aside the order for abatement.

SUMMONS adjourned into Court by Bayley, J., under Rule 10 clause (*a.j.*) of Rules of Court.

By a decretal order dated the 11th July, 1878, this suit was referred to the Commissioner for taking Accounts, and the reference was duly proceeded with before him.

On the 28th August, 1883, the plaintiff died, and on the 3rd March, 1884, by an order of the High Court the Administrator General was authorized to collect and take possession of the property of the plaintiff, and was directed to apply for letters of administration to the property and credits of the plaintiff. Letters of administration were subsequently (on the 18th December, 1884), granted to the Administrator General.

The defendant died in June, 1884, leaving a will, whereby he appointed one Dayál Mulji and Gordhandás Khatáo his executors. The defendant left a widow (Gomtibái) and son (Cursandás Goculdás) him surviving.

On the 3rd February, 1885, the present summons was obtained on behalf of the Administrator General L. R. W. Rivett-Carnac as the administrator of the property of the deceased plaintiff, calling on the executors (Dayál Mulji and Gordhandás Khatáo)

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and the widow and son of the deceased defendant "to show cause why this suit should not be revived, and why the said L. W. G. Rivett-Carnac, as such administrator, should not be substituted as plaintiff in this suit in the place and stead of the said Fulvahu, widow, deceased, and why they, the said Dayál Mulji and Gordhandás Khatáo and Gomtibái and Cursandás Valabdás should not be substituted as defendants in this suit in the place and stead of the said Goculdás Valabdás, deceased, and why such amendments in the title and proceedings as may be necessary to be made in consequence of such revival and reconstitution of this suit as aforesaid should not be made." At the hearing of the summons before the Judge in chambers his Lordship was of opinion that the application was barred; but leave was given to amend the summons and to renew the application, which his Lordship ordered to be made in Court before two Judges. The following words were added to the summons:—"Or, in the alternative, why the suit should not abate, and, in the event of an order for abatement being made, why such order should not be set aside under section 371 of the Code of Civil Procedure, and why an order for revivor of the suit should not then be made?"

The summons now came on for argument before Sargent, C.J., and Bayley, J.

*Lang* for Dayál Mulji showed cause.—We contend, first, that, having regard to the provisions of the Civil Procedure Code (XIV of 1882) and of the Limitation Act (XV of 1877) as amended by Act XII of 1879 and Act VIII of 1880, the order sought for cannot be made; and, secondly, that, even if there is power to make it, the order ought not to be made under the circumstances of the case.

The first question is, whether the representatives of the plaintiffs can now be made parties, and the suit be revived. It is now more than eighteen months since the death of the plaintiff, and the application is by his representatives. The application made in the first part of the summons is barred by section 365 of the Civil Procedure Code (XIV of 1882) and article 171 of Schedule 2 of the amended Limitation Act, and hence the application in the alternative contained in the concluding part of

the summons, *viz.*, for an order under section 366, that the suit shall abate, to be followed immediately by an order under section 371 setting aside that order of abatement. This is merely an artifice to evade the provisions of those Acts, which the Court will not sanction.

[SARGENT, C. J.—That, however, is a matter for the discretion of the Judge in chambers. The question now before us is, whether by law the thing can be done?]

It is clear the Legislature did not intend to permit it. The effect will be that no lapse of time will prevent the representatives of a deceased plaintiff from reviving a suit, for there is no provision in the Limitation Act applying to such an application made by representatives *of a plaintiff*. Article 171A. applies to an application made *by a defendant*, and he is limited to one hundred and twenty days from the date of the plaintiff's death. Why should the representative of a plaintiff have this advantage over a defendant? A defendant may not even have heard of the plaintiff's death, and yet after one hundred and twenty days he is barred.

It is clear, from the section itself, that the Legislature did not contemplate an application for abatement under section 366 of the Civil Procedure Code being made by representatives of a plaintiff, but only by a defendant. In fact, it could be no advantage to a plaintiff to get an order for abatement, unless indeed, as in this case, with a view of getting the order immediately set aside under section 371, and having the suit revived.

[SARGENT, C. J.—As long as a suit is not abated, the defendant may go on incurring costs, *e. g.* by executing a commission or collecting evidence. In that case it would be for the plaintiff's advantage to abate the suit.]

In *Bhoyrub Dass Johurry* v. *Doman Thakoor*[1] Wilson, J. appears to have granted an application similar to this, but that was before the Limitation Act was amended by Act XII of 1879.

(1) I. L. R. 5 Calc. 139.

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I contend that the representatives of the plaintiff having failed to apply within sixty days after the plaintiff's death, they are now barred by article 171 of the Limitation Act, and that section 366 of the Code does not include an application by representatives of the plaintiff, and that, therefore, the part of this summons as regards the representative of the plaintiff must fail.

But the summons also asks that the representatives of the defendant, who died in June, 1884, be now made defendants to this suit. This application is also too late: see section 368 of the Civil Procedure Code and article 171B. of the Limitation Act. It should have been made within sixty days of the defendant's death. The device of getting an order for abatement, and then setting that order aside under section 371, cannot be resorted to in the case of defendants, for section 371 does not apply to cases of abatement under section 368. Sixty days after the defendant's death this suit abated *of itself* under that section without any order being made. An abatement under section 368 required an order, and such an order may be set aside under section 371. The order made under section 371 refers only to an "order for abatement or dismissal", that is to say, only to orders made under sections 368 and 370. An abatement under section 368 cannot be set aside.

I submit that, even if the Court has the power to make the order asked for, it will refuse this application, as being merely a trick to escape the provisions of the Codes and the clear intention of the Legislature.

With regard to the facts, the applicant has failed to show that he was prevented by sufficient cause from continuing the suit under section 371. Several months of the delay are wholly unaccounted for.

*Macpherson*, for the applicant, was not called on.

SARGENT, C. J.—We approve of the ruling of Mr. Justice Wilson in *Bhoyrub Dass Toburry* v. *Doman Jhakoor*[1]. The period of limitation for an application under sections 366 and 271 of the Code is unaltered by Act XII of 1879. There is no objection I think to the proposed order being made by a Judge

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in chambers. Whether he could conveniently deal with the question of costs under section 366 might be open to doubt.

BAYLEY, J.—I concur. As Judge in chambers I was of opinion that the order applied for in this case should be granted. I felt doubtful, however, as to whether I had power to make it, and, therefore, I referred the question to the Court.

That point being now settled, the alternative part of the summons will be made absolute.

The following order was made:—"This Court doth order that the suit shall abate, and this Court doth set aside such order for abatement, and doth order that the name of the said L. W. G. Rivett-Carnac, administrator of the property and credits of the plaintiff Fulvahu, be entered in the place of the said Fulvahu on the record, and that the name of the said Dayál Mulji, the alleged executor of the said defendant Gocaldás Valabdás (now deceased) and Gomtibái, the widow, and Cursandás, the son of the said Gocaldás Valabdás, be entered on the record in the place of the said defendant."

Attorneys for the plaintiffs.—Messrs. *Crawford* and *Buckland*.
Attorneys for the defendants.—Messrs. *Hore, Conroy* and *Brown*.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.*

BAI DAYA, WIDOW (ORIGINAL PLAINTIFF), APPELLANT, *v.* NATHA GOVINDLAL (ORIGINAL DEFENDANT), RESPONDENT.*

1885
*January 7.*

*Hindu law—Maintenance—Step-mother, right of, to maintenance—Family property.* Under the Hindu law there is no legal obligation upon a step-son to support a step-mother independently of the existence in his hands of family property.

THIS was a second appeal from the decision of F. Beaman, Assistant Judge of Ahmedabad, reversing the decree of Ráv Sáheb Lallubhai P. Párekh, Joint Subordinate Judge of Ahmedabad.

The plaintiff Dayá sued her step-son to recover from him arrears of maintenance, alleging that he had inherited from her husband moveable and immoveable property of the value of Rs. 10,000. The defendant replied that the property owned by his father did not amount to more than Rs. 1,125; that

* Special Appeal, No. 498 of 1883.