REVISIONAL CIVIL.

Before Addison and Din Mohammad JJ.

BASHIR AHMAD (DEFENDANT) Petitioner, 1938

versus *Jan. 5.*

MRS. MARY MINCK (PLAINTIFF) Respondent.

Civil Revision No. 496 of 1937.

Civil Procedure Code (Act V of 1908), O. 3, rr. 1, 4 (1) (5) — Pleader putting in application on behalf of litigant — whether 'acts' — 'to apply' — meaning of.

Held, that a Pleader who puts in an application in Court on behalf of a litigant acts for him and cannot do so within the meaning of O. 3, r. 4 (1) of the Code of Civil Procedure, unless he is authorised by a document in writing signed by him.

'To apply' is to do something more than 'to appear' or 'to plead,' it is to take some active step on behalf of a person and thus to act for him and 'applying' is, therefore, included in 'acting.'

In the matter of filing Powers by an Advocate or Pleader (1), *K. L. Gauba* v. *The Indo Swiss Trading Company, Ltd.* (2) *Amir Shah* v. *Abdul Aziz* (3), *Nandamani Anangabhima* v. *Modono Mohono Deo* (4) and *Mohammad Rafiq* v. *Mohammad Yasin* (5), relied upon.

Jagadeesh Chandra Dhabal Deb v. *Satya Kinkar Shahana* (6), *Banwari Rai* v. *Chethru Lal Rai* (7), *Allah Bakhsh* v. *Municipal Committee, Rohtak* (8), *Khaira* v. *Nathu* (9), *In the matter of the Petition of Bisheshar Nath* (10) and *Mahomed Jafar* v. *Sheikh Ahmad* (11), distinguished.

Revision from the order of Chaudhri *Tirath Dass Sehgal, Subordinate Judge, 3rd Class, Lahore, dated 21st May, 1937, restoring the suit.*

(1) I. L. R. (1926) 4 Rang. 249.
(2) I. L. R. (1936) 17 Lah. 610.
(3) I. L. R. (1932) 13 Lah. 775.
(4) 1937 A. I. R. (Mad.) 239.
(5) (1932) 33 P. L. R. 517.
(6) I. L. R. (1936) 63 Cal. 733.
(7) 1924 A. I. R. (Pat.) 114.
(8) 1926 A. I. R. (Lah.) 223.
(9) (1920) 55 I. C. 990.
(10) I. L. R. (1918) 40 All. 147.
(11) 1926 A. I. R. (Bom.) 336.

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C. L. AGGARWAL and DURGA DAS JAIN, for Petitioner.

VISHNU DATTA, for Respondent.

The order referring the case to a Division Bench, dated 22nd November, 1937.

TEK CHAND J.

TEK CHAND J.—This petition for revision raises a question of general importance which, I think, should be authoritatively decided by a larger Bench.

The facts briefly are that the respondent, Mrs. Mary Minck, instituted a suit against the defendant for declaration of a right of way and issue of a perpetual injunction. For the conduct of this case the plaintiff engaged *Bawa* Faqir Singh, Advocate, who presented the plaint and conducted proceedings till November, 1936. The next hearing of the case was fixed for the 3rd December, 1936, but a day before that date *Bawa* Faqir Singh was convicted in a criminal case and committed to prison. The plaintiff was in England at the time and her local attorney, Mr. A. Minck, was not aware of the conviction of *Bawa* Faqir Singh. When the case was called on the 3rd December, there was no appearance on behalf of the plaintiff and the suit was dismissed in default under Order 9, rule 8, Civil Procedure Code. On the 23rd December, 1936, an application purporting to be under Order 9, rule 9, and section 151, Civil Procedure Code, was presented by Mr. Kali Sharn, Pleader, who described himself as "counsel for the plaintiff." This application was not signed or verified by the plaintiff or her attorney, nor was it accompanied by a *wakalatnama* in favour of Mr. Kali Sharn from either of them. The Subordinate Judge fixed the 4th January, 1937, for the usual *kaifiyat* by the office.

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On that date, a *wakalatnama*, executed by Mr. A. Minck in favour of Mr. Kali Sharn was filed in Court. This *wakalatnama* bears the date "4th of January, 1936," which is admittedly a mistake for "4th of January, 1937," as the Court fee stamp, which it bears, was purchased on that date. Notice of the application for restoration was issued to the opposite party, on whose behalf an objection was taken at the next hearing that there was no proper presentation of the application within 30 days from the date of dismissal prescribed by law for making such applications. It was urged that under Order 3, rule 4, Mr. Kali Sharn could not 'act' on behalf of the plaintiff on the 23rd December, 1936, as on that date he had no *wakalatnama* in writing from the plaintiff or her authorised agent. The Subordinate Judge has held that for the purpose of making an application for restoration of the suit, it was not necessary for the pleader to file a written *wakalatnama* from the plaintiff, and that "oral instructions" of the plaintiff's attorney were sufficient.

The defendant has preferred a petition for revision of this order and has contended that the view of the law taken by the Court below is wrong, and that the order restoring the suit was *ultra vires* as it had been passed on an application which could not be considered to have been properly made before the 4th January, 1937, when it was time-barred. That a revision lies from such an order is admitted by the learned counsel for the respondent, and there is ample authority for it [see *Piroz Shah* v. *Qarib Shah* (1), *Abdul Aziz* v. *Punjab National Bank, Ltd.* (2), *Wiru Ram* v. *Amar Chand* (3), *Bhajan Ram-Gil Raj Mal* v.

(1) I. L. R. (1926) 7 Lah. 161. (2) (1928) 107 I. C. 395.
(3) 1926 A. I. R. (Lah.) 344.

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Mst. Narain Devi (1), *Muhammad Sadiq* v. *Mst. Samiul-Nissa* (2) and *Hari Krishna* v. *K. B. Khosla* (3)].

The real question in dispute is one of the correct interpretation of rule 4 of Order 3, which lays down that ' No pleader shall *act* for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing, signed by such person or by his recognised agent, or by some other person duly authorised by, or under, a power of attorney to make such appointment.' The word ' act ' is not defined in the Code. It was added by the Civil Procedure Code second Amendment Act of 1926. It has been argued that " acting " does not include " making an application " in the progress of the suit, or an application for restoration of a suit which had terminated by dismissal in default or in which a decree had been passed *ex parte*. It is urged that it has a different meaning in the Code than what it has in England, as in rule 1 of Order III, a clear distinction has been made between " appearance," " application " and " act," and in rule 4 it is with regard to " acting " alone that authority in writing is necessary. In *Amir Shah* v. *Abdul Aziz* (4), I, sitting in Single Bench, held that " acting " included " making an application to refer a pending suit to arbitration." The correctness of that decision, in so far as it relates to the interpretation of rule 4, has been challenged, and it appears that the practice in the Courts is not uniform. The question is not altogether free from difficulty and is of general importance, and should, I think, be authoritatively settled by a large Bench. I accordingly refer it to a Division Bench. An early date will be fixed.

(1) 1926 A. I. R. (Lah.) 642.
(2) 1936 A. I. R. (Lah.) 618.
(3) 1934 A. I. R. (Lah.) 231.
(4) I. L. R. (1932) 13 Lah. 775.

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The judgment of the Division Bench was delivered by—

DIN MOHAMMAD J.—The only question that falls to be determined in this case is whether an application for restoration of a suit dismissed for default can be made by a pleader whose appointment has not been made in writing.

The relevant provisions dealing with the subject are O. III, r. 1 and O. III, r. 4, Civil Procedure Code, the material portions of which for facility of reference are reproduced below :—

O. III, r. 1, reads as follows :—

" Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, * * * be made or done * * * by a pleader appearing, applying or acting on his behalf."

O. III, r. 4, is in the following terms :—

(1). " No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent * * * * * * * *."

(2) * * * * * *

(3) * * * * * *

(4) * * * * * *

(5) " No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating * * * * * * * * *."

It would appear that the two provisions of law taken together lay down that in order to be able to act

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a pleader must be appointed by a document in writing and in order to be able to plead he should submit a memorandum of appearance stating the particulars prescribed by sub-rule (5). No other method of authorising a pleader to act or plead is mentioned in O. III, Civil Procedure Code. It has been frankly conceded by counsel for the respondent that to put in an application of the nature involved in this case is not "to plead." The only question, therefore, that remains to be considered is whether the putting in of such petition amounts to acting or whether, as contended by counsel for the respondent, it is neither pleading nor acting and has thus not been specifically provided for in the Civil Procedure Code.

After hearing counsel on both sides we are disposed to think that a pleader who puts in an application on behalf of a litigant acts for him and cannot, therefore, do so unless he is authorized in writing by him. It is true that, while rule 1 of O. III, mentions three functions of a pleader, *viz.* 'appearing,' 'applying' or 'acting,' sub-rule (1) and sub-rule (5) of rule 4 merely deal with 'acting' and 'pleading' respectively, but that does not indicate that 'applying' is not covered by 'acting.' 'To apply' is to do something more than 'to appear' or 'to plead.' It is to take some active step on behalf of a person and thus to act for him. 'Applying,' therefore, is included in 'acting' and this is why no separate provision has been made by the Legislature in relation to this function of a pleader. To hold otherwise would lead to absurd results. Rule 4 of Order III being silent on the point of applying, any pleader without any authority from a litigant and without putting in any memorandum of appearance would be in a position to present any application on his behalf. This obviously

could not be the intention of the Legislature. It is a recognised principle of law that statutes should be interpreted in a reasonable manner so as to avoid all absurd interpretations, and the only reasonable interpretation in these circumstances is the one that we propose to put on the rule.

In the conclusion at which we have arrived, we are supported by authority. *In the matter of filing Powers by an Advocate or Pleader* (1) a Division Bench of the Rangoon High Court held that "an advocate 'acts' when he files a memorandum of appeal or cross-objections or any other document in a case (other than a memorandum of appearance) and that in all such cases a power of attorney is necessary." This ruling was followed by a Single Judge of this Court in a case reported as *K. L. Gauba* v. *The Indo Swiss Trading Company, Ltd.* (2) where it was held that an appeal presented by an advocate other than the one in whose favour the appellant's power of attorney was given, is not properly presented and cannot be entertained. To the same effect is *Amir Shah* v. *Abdul Aziz* (3) where Tek Chand J. held that in view of the distinction drawn in sub-rules (1) and (5) of O. III, rule 4 of the Civil Procedure Code, between pleaders acting and pleading, though a pleader could, on filing the necessary memorandum of appearance, appear and plead for another pleader on behalf of the persons who had engaged the latter, he had no power to act on his behalf without a document in writing executed in the manner prescribed, and in referring a pending suit to arbitration the Advocate 'acted' and did not merely 'plead.' In *Nandamani Ananga-bhima* v. *Modono Mohono Deo* (4) a Division Bench

(1) I. L. R. (1926) 4 Rang. 249.
(2) I. L. R. (1936) 17 Lah. 610.
(3) I. L. R. (1932) 13 Lah. 775.
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remarked that applications for execution could be made only by a pleader who was authorized in writing to do so and that in the absence of any such authority in writing the pleader was wanting in capacity or in competence to act. In *Mohammad Rafiq* v. *Mohammad Yasin* (1) a Division Bench of this Court, of which one of us was a member, held that if an appeal is presented on the last day of limitation with a telegram attached authorising counsel to file an appeal and the power of attorney is later on put in, the appeal cannot be regarded as having been presented within limitation.

As against these authorities counsel for the respondent has relied on *Jagadeesh Chandra Dhabal Deb* v. *Satya Kinkar Shahana* (2), *Banwari Rai* v. *Chethru Lal Rai* (3), *Allah Bakhsh* v. *Municipal Committee, Rohtak* (4), *Khaira* v. *Nathu* (5). *In the matter of the Petition of Bisheshar Nath* (6) and *Mahomet Jafar* v. *Sheikh Ahmad* (7). But in our opinion none of these authorities is in point. In *Jagadeesh Chandra Dhabal Deb* v. *Satya Kinkar Shahana* (2) an application for execution had been made within three years of the decree by a pleader who did not file his power of attorney till after more than three years had elapsed from the date of the decree. The application was, however, duly signed and verified by the decree-holder himself and was accepted by the Court which proceeded to act on it by issuing notices. On these facts a Single Judge of the Calcutta High Court held that the application was in accordance with law and was not barred by limitation. It is noticeable, however, that the learned Judge did hold that in presenting the

(1) (1932) 33 P. L. R. 517.
(2) I. L. R. (1936) 63 Cal. 733.
(3) 1924 A. I. R. (Pat.) 114.
(4) 1926 A. I. R. (Lah.) 223.
(5) (1920) 55 I. C. 990.
(6) I. L. R. (1918) 40 All. 147.
(7) 1926 A. I. R. (Bom.) 336.

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application for execution the pleader *acted* on behalf of the decree-holder and the omission to put in the power of attorney was excused on different grounds. *In Benwari Rai* v. *Chethru Lal Rai* (1) A. had been authorised by B. to put in an application in a Court. He accordingly signed a *vakalatnama* in B.'s name and B. accepted the authority given to the pleader by A. It was held by a Division Bench that the power to present the application included power to give and sign the power of attorney. In *Allah Bakhsh* v. *Municipal Committee of Rohtak* (2) Dalip Singh J. observed that when the person on whose behalf an appeal is filed has accepted or ratified the action of the person who presented the appeal on his behalf, the person presenting the appeal has authority to present the appeal. He, however, did not base his judgment on this observation alone and further remarked that he would be inclined to extend the time under the provisions of section 5 of the Indian Limitation Act, if he considered it necessary to do so. Moreover, there the only question that arose for decision was whether a power of attorney signed on behalf of a Municipal Committee by the Secretary who had not been expressly authorised by the Committee to institute an appeal was valid, especially when the President had ratified the Secretary's act. It would be obvious, therefore, that that judgment was given on its own facts. In *Khaira* v. *Nathu* (3) Chevis J. held that when an appeal was presented by a pleader whose power of attorney was not signed by the appellant till after limitation had expired the omission was obviously an oversight and the subsequent signing cured the defect. *In the matter of the Petition of*

(1) 1924 A. I. R. (Pat.) 114. (2) 1926 A. I. R. 4 (Lah.) 223.
(3) (1920) 55 I. C. 990.

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Bisheshar Nath (1) Walsh J. observed that where a suit is duly authorised, the proper signing of the plaint is a matter of practice only and if a mistake or omission has been made it may be amended at any time. In *Mahomed Jafar* v. *Sheikh Ahmed* (2) an appeal had been presented by a pleader duly appointed to act on the appellant's behalf by virtue of a power of attorney having been signed and in these circumstances the non-filing of the power of attorney in Court was condoned.

In the result, we allow the petition and set aside the order of the Subordinate Judge restoring the suit. The petitioner will get his costs from the respondent.

A. N. K.

Revision accepted.

CIVIL REFERENCE.

Before Addison and Din Mohammad JJ.

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Jan. 6.

GOPI NATH-VIR BHAN (ASSESSEE) Petitioners,

versus

THE COMMISSIONER OF INCOME-TAX— Respondent.

Civil Reference No. 23 of 1937.

Indian Income-tax Act (XI of 1922), S. 10 (2), Cls. (i) and (ix) — share of net profits paid by assessee — whether 'rent' or 'expenditure' incurred solely for earning profits within the meaning of the section.

The assessee entered into an agreement with a Company for the ginning of his cotton at a ginning factory taken on lease by the latter, stipulating to pay it, besides the ginning charges, one-third of the net profits. He paid to the Company Rs.22,000 odd as one-third of the net profits and claimed to deduct this sum from his total income under s. 10 (2), cls. (*i*)

(1) I. L. R. (1918) 40 All. 147. (2) 1926 A. I. R. (Bom.) 336.