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"Accordingly at the desire of both parties I refer the following points for the opinion of the High Court:—

"1st.—Whether the defendant is or is not a soldier, within the terms of section 190?

"2nd.—Whether, as such soldier, a suit for less than £30 can be entertained against him in this Court?"

There was no appearance for the parties.

SARGENT, C. J.—The proviso to section 144 of the Army Act of 1881 makes it clear that a suit will lie against a soldier in Her Majesty's service up to judgment, however small may be the amount of the debt. The question, whether the defendant is a soldier or not, will only arise when the plaintiff seeks to execute the decree he may obtain; and as his position may then be different from what it is at present, it would be premature to discuss it.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

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BHIKA'JI RA'MCHANDRA, DECEASED, BY HIS MINOR SON, NARSINH, (ORIGINAL PLAINTIFF), APPELLANT, *v.* PURSHOTAM AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), *Secs.* 366 *and* 2—*Abatement, order of—Appeal from such order—Legal representative of a deceased, omission to apply by, within sixty days—Procedure—Limitation.*

An order made under section 366 of the Civil Procedure Code (Act XIV of 1882) that a suit do abate, being virtually a decree within the meaning of section 2, is appealable.

The appellant's father having died during the pendency of an appeal lodged by him, a notice was served upon the appellant's two adult brothers; but they having failed to apply within sixty days, the appellant, who was a minor, applied several months afterwards to be put on the record in his deceased father's place as his legal representative, which was done. The Assistant Judge, who heard the appeal, was of opinion that, in consequence of the omission on the part of the brothers of the appellant to apply, the appeal abated, and he passed an order accordingly.

Held, that the application having been made by the minor son within the time limited by law, the order of abatement made by the Judge was wrong. Although

* Appeal No. 355 of 1885.

the complete legal representation vested in the minor son and his two brothers, section 366 of the Civil Procedure Code (Act XIV of 1882) only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made. If neither of the brothers was willing to have his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal.

THIS was a second appeal from an order passed by S. B. Thákur, Acting Assistant Judge of Thána.

The appellant's father having died during the pendency of an appeal lodged by him in a suit in which he was plaintiff, the usual notice was served upon the appellant's two adult brothers, the appellant being a minor, but they omitted to apply to have their names put on the record in place of their deceased father within the time prescribed by the Limitation Act XV of 1877. Several months after his father's death the appellant made an application through his mother and guardian, and was put on the record in his deceased father's place as his legal representative. When the appeal came on for hearing and disposal before Mr. Thákur, the Acting Assistant Judge of Thána, he was of opinion that, in consequence of the omission of the appellant and his two brothers to apply within the required time, the appeal had abated. He, therefore, passed an order accordingly with the following remarks:—

"The question which I have to determine before proceeding to deal with the merits of the appeal is, whether the appeal abates owing to the omission of the three sons of the deceased appellant, Bhikáji Rámchandra, to apply to have their names entered on the record within sixty days of his death. My finding is that the appeal abates under sections 366 and 582 of the Civil Procedure Code (Act XIV of 1882).

"The only son of the deceased whose name has been entered on the record is a minor. His name was entered several months after his father's decease. But his case would be governed by the special exemption under the Limitation Act XV of 1877: see also *Mahipatráv Chandraráv* v. *Nensuk Anandráv*[1]; *Phoolbas Koonwar* v. *Lálla Jogeshur Sahoya*[2], a Privy Council case. But

(1) 1 Bom. H. C. Rep., 109, A. C. J. (2) I. L. R., 1 Calc., 226.

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the minor has two brothers, who are not minors, and, therefore, it was necessary that their names should have been entered within sixty days. Both of them were served with summonses. One of them, Balvantráv, who, the minor's vakil says, has been long divided, was duly served, but has failed to appear. The other, Rámchandra is alleged to be a lunatic, and the service of the summons in his case was accepted by his mother, who is also the minor's guardian and next friend * * * . Moreover, no certificate regarding the alleged lunatic has been taken under Act XXXV of 1858.

"I, therefore, pass an order that the appeal abates* * * *."

Against this order the appellant preferred a second appeal.

Vásudev Gopál Bhándárkar for the respondents raised a preliminary objection, that no appeal lay from an order of abatement under section 588, cl. 18, of the Civil Procedure Code (Act XIV of 1882), and cited *Ahmad Átá* v. *Mátá Badal Lál*(1).

Shántárám Nárâyan for the appellant:—The order of abatement being final and having the force of a decree as defined in section 2 of the Civil Procedure Code (Act XIV of 1882), an appeal lies from it. An order rejecting a memorandum of appeal as barred has been held appealable: see *Gulâb Rái* v. *Mangli Lal*(2). All that section 366 of the Code requires, is that an application should be made by a person claiming to be the legal representative of a deceased. The appellant's brothers were incapable of doing it, as one of them is of unsound mind and the other separated. The omission on their part to apply within the required sixty days would not affect the appellant, who is a minor. His application is not barred.

Vásudev Gopál Bhándárkar for the respondents:—The rule of limitation is that where there are persons who could represent the minor, or any other person incapacitated for suing, any omission on their part is binding on the minor or such other person. Here the minor had his adult brothers, who, though served with notices to apply, did not do so. The appellant is not entitled to be put on the record as his father's representative.

(1) I. L. R., 3 All., 841. (2) I. L. R., 7 All., 42.

after the period of sixty days has elapsed: see *Kálidás Kevaldás* v. *Nathu Bhagván* (1).

SARGENT, C. J.:—A preliminary objection has been taken, that an order, under section 366 of the Code of Civil Procedure (Act XIV of 1882), that a suit do abate, is not appealable. We think, however, that it is virtually a decree within the meaning of section 2 of Act XIV of 1882, as it disposes of the plaintiff's claim as completely as if the suit had been dismissed.

As an application to enter his name as the legal representative of his father was made by the minor son within the time limited by law, the Assistant Judge was wrong in ordering the suit to abate. It is true that the complete legal representation as a fact is vested in him and his two brothers, but section 366 only requires an application to be made by a person claiming to be the legal representative, to prevent the order of abatement being made.

The only question which arises, therefore, is, how the appeal is to proceed, on the supposition that neither of the other brothers, as we assume to be the case, is willing to have his name placed on the record? Under these circumstances, the respondent is entitled to have them made defendants, so that they may be bound by the decree. The minor son can then proceed with the appeal alone. Costs of this appeal to be costs in the appeal below.

(1) I. L. R., 7 Bom., 217.