1922.

KARIYAPPA, *In re.*

matter, there has been a complete disregard of the imperative provisions of section 137. The conditional order under section 133 was made by the Sub-Divisional Magistrate on the 5th December 1921, and, on the 17th February 1922, he made that order absolute. Now, if we refer to section 137, it is manifest that the materials on which the conditional order can be made absolute by the Magistrate who makes that order are described in the language of the section as evidence taken as in a summons case. That imports the necessity of the Magistrate taking the evidence before himself and he cannot, even with the consent of the parties, refer the matter for inquiry and report to another Magistrate. I am not speaking now of those cases where parties are directed to appear before another Magistrate of the First or Second Class as provided for in the last paragraph of section 133 (*1*): for that is not the case in the present matter. The order having thus been made absolute on materials which are not provided for by the section and in a manner contrary to the express provision of the section, no consent of the parties can possibly cure the illegality. I, therefore, agree that the proceedings must be set aside.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

1922.

June 15

LAKSHMIBAI WIFE OF JAGANNATH VAMAN JOSHI, AND OTHERS (HEIRS OF ORIGINAL DEFENDANT), APPLICANTS *v.* YESHVANT VITHAL BAGKAR (ORIGINAL PLAINTIFF), OPPONENT*.

Indian Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), section 2—Abatement—Application to bring heirs on record made

* Civil Extraordinary Application No. 184 of 1921.

1922.

LAKSHMIBAI v. YESHVANT VITHAL.

after statutory period, effect of—Notice returned unserved—Withdrawal of suit with liberty to file a fresh suit a year after institution of suit.

In 1919, the plaintiff sued to recover possession of certain immoveable property. The defendant died pending the suit on the 17th September 1920. On the 12th March 1921 the plaintiff filed an application to bring the heirs of the deceased defendant on record. The Court ordered the heirs to be brought on record subject to the objection of the heirs under Act XXVI of 1920, under which six months' period of limitation for bringing heirs on record was reduced to ninety days. Thereafter on the 28th July 1921, the plaintiff's pleader applied for permission to withdraw the suit with liberty to bring a fresh suit as some of the heirs could not be served. The Court granted the application. The defendants applied to the High Court under its revisional jurisdiction and contended (1) that the heirs of the defendant should not have been brought on record without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death ; and (2) that the lower Court wrongly allowed the plaintiff to withdraw the suit with liberty to bring a fresh suit after the parties were brought on record.

Held, (1) that the omission to set aside the abatement was a formal defect not affecting the merits of the order and the delay was rightly excused.

(2) That permission to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit should not have been granted as the application was not based on a valid ground.

APPLICATION under extraordinary jurisdiction against the order passed by R. R. Gupte, Subordinate Judge at Dapoli.

The opponent-plaintiff filed a suit (No. 242 of 1919) for possession of certain immoveable property against one Moreshwar Joshi.

Moreshwar died pending the suit on the 17th September 1920.

On the 12th March 1921, the opponent applied to bring the daughters of deceased Moreshwar as his heirs on record. The Court granted the application and allowed the heirs to be brought on record subject to the objection of the heirs under Act XXVI of 1920.

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The summonses were issued to five daughters, out of whom applicants Nos. 1 and 2 appeared and stated on the 20th July 1921 that the application to bring heirs on record was not filed in time, and that there was no sufficient cause for admitting it beyond time.

On the 28th July 1921, the opponents applied to the Court for permission to withdraw the suit with liberty to file a fresh suit on the ground that some of the heirs could not be served as their addresses could not be found and that the suit was an old one. The Court granted the application.

The heirs of the defendant applied to the High Court.

P. V. Kane, for the applicants.

K. H. Kelkar, for the opponents.

SHAH, AG. C. J:—Two points have been urged in support of this application. First, it is urged that the defendant's heirs were brought on the record more than three months after the death of the original defendant; and that they should not have been so brought on the record without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death. We do not think that there is any substance in this point. The application was made within six months, which was the period allowed by the Indian Limitation Act of 1908, and the change in the period of limitation which was effected by Act XXVI of 1920 may not have been and probably was not known to the parties. The delay was rightly excused and the omission to set aside the abatement was a formal defect not affecting the merits of the order. Secondly, it is urged that after the parties were brought on the record, the lower Court wrongly allowed the plaintiff to withdraw this suit with liberty

to bring a fresh suit on the 28th July 1921. The application for that purpose was based upon the ground that notices on the heirs could not be served. This is hardly a ground for allowing the plaintiff to withdraw a suit with liberty to bring a fresh suit. It was a suit of 1919 and in July 1921 the heirs were already on the record. There is no reason why the plaintiff should not have made proper efforts to serve the notices upon the heirs and proceeded with the suit. In any case no valid ground for allowing the withdrawal with liberty to bring a fresh suit has been made out. We set aside the order allowing the plaintiff to withdraw the suit and direct the papers to be sent back to the trial Court in order that the suit may be proceeded with and tried according to law.

Costs of this application to be costs in the suit.

Order set aside.

J. G. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

MAHADU KASHIBA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* KRISHNA WALAD TATYA MAHAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

1922.

June 16.

Bombay Hereditary Offices Act (Bom. Act III of 1874), sec. 18—Appointment of Panch—Procedure—Award, validity of—Civil Court—Jurisdiction.

Unless the provisions of section 18 of the Bombay Hereditary Offices Act (III of 1874) are substantially complied with, the award of a Panch purporting to act thereunder can have no validity.

A Civil Court has no jurisdiction to determine disputes, procedure for the determination of which is laid down in the above section.

* Second Appeal No. 568 of 1919.