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ORIGINAL CIVIL.

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[609] ORIGINAL CIVIL.

SURENDRA KESHUB ROY *v.* KHETTER KRISHTO MITTER.*
[31st March, 1903.]

Practice—Revival of suit—Substitution of parties—Code of Civil Procedure (*Act XIV of* 1882) *ss.* 368, 372—"*Pending suit*"—*Right to apply, accrual of—Limitation Act* (*XV of* 1877) *Sch. II, Art.* 178.

On directions to take an account in a suit, the suit is still "pending" within the meaning of s. 372 of the Code of Civil Procedure until the final order on the taking of the account is made; and the right to apply in such a suit to have the death of a certain defendant recorded, and the names of his heirs substituted on the record, accrues from day to day and is not barred under Art. 178, Sch. II of the Limitation Act. The provisions of s. 368 of the Code have no application to a case like this.

Gocool Chunder Gossamee v. *The Administrator-General of Bengal* (1), *Kedarnath Dutt* v. *Harra Chand Dutt* (2), and *Ram Nath Bhuttacharjee* v. *Uma Charan Sircar* (3) relied upon.

[Ref. 37 C. 796; 64 I. C. 307.]

APPLICATION.

This was an application in chambers made on the petition of one of the defendants, Norendro Keshub Roy, to havethe death of Brojendra Nath Mitter, another defendant who had died, recorded and to have the suit revived by having the names of the heirs and legal representatives of the said Brojendra Nath Mitter substituted as defendants in his place.

The petition stated that the suit had been originally instituted in this Court on the 21st of August 1884 for the construction of the last will and testament of one Rajah Bijoy Keshub Roy Bahadur, and had finally gone up on appeal to Her late Majesty's Privy Council; that pending such appeal to the Privy Council one of the then defendants in the suit, Ranee Doorga Sundary Dassi, a widow of the said testator, had died, and that the said appeal was revived by an order of the Privy Council by adding the defendant, Khetter Krishto Mitter, who had on the death of the said Ranee Doorga Sundary Dassee become the sole heir to the testator. That by a decree of the Privy Council dated [610] the 6th of February 1822, it was *inter alia* declared that Norendro Keshub Roy, the present petitioner, was entitled on attaining his majority to receive certain moneys during the life of the said Ranee Doorga Sundary Dassee, deceased, and that this Court should direct several specified accounts to be taken, and that any other question arising out of the relief thereby granted should be dealt with by this Court on further directions.

It was further stated in the petition that by an order of this Court dated the 18th of August 1892, the defendants Abinash Chander Mitter, Brojendra Nath Mitter, Nogendra Nath Mitter, and Kally Prosad Mitter, the then heirs and representatives of the said Ranee Doorga Sundary Dassee, deceased, had been added as defendants in this suit for further proceedings.

That Brojendra Nath Mitter died some three years ago, leaving him surviving his father, Bhabodayini-Charan Mitter, his heir and legal representative. That the said Bhabodayini-Charan had also since died, and that upon his death the defendants Abinash Chunder Mitter, Nogen-

* Application in Original Suit No. 402 of 1884.

(1) (1880) I. L. R. 5 Cal. 726.
(2) (1882) I. L. R. 8 Cal. 420.
(3) (1899) 3 C. W. N. 756.

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dra Nath Mitter, and Kally Prasad Mitter, brothers of the said Brojendra Nath Mitter, deceased, became the heirs and legal representatives of the said defendant, Brojendra Nath Mitter, deceased.

Mr. *N. Chatterjee* for the petitioner. I apply under s. 372 of the Code of Civil Procedure for the substitution of the names of Abinash Chander Mitter, Nogendra Nath Mitter, and Kally Prosad Mitter as defendants in the place of Brojendra Nath Mitter, deceased. It is an application in a pending suit in which no final order has been made: see *Gocool Chunder Gossamee* v. *The Administrator-General of Bengal* (1). The right to bring the names on the record accrues from day to day, and is not governed by Art. 175 C, Sch. II of the Limitation Act: see *Kedarnath Dutt* v. *Harra Chand Dutt* (2); *Ram Nath Bhattacharjee* v. *Uma Charan Sircar* (3).

Babu *Subodh Chunder Mitter* (contra). The application comes under s. 368 of the Code of Civil Procedure and not s. 372, and is barred by limitation: see *Jamnadas Chhabildas* v. *Sorabji Kharshedji* (4).

[611] STEPHEN, J. In this case the petitioner prays that the death of a defendant may be recorded, and that the suit may be revived by placing the names of certain defendants in the place of the deceased defendant.

The suit is for the construction of a will, which, not to notice the earlier stages of the litigation, led to a decree of the Privy Council, dated 6th February 1892, by which it was declared that the petitioner was entitled to a moiety of certain property, and this Court was directed to order an account to be taken of the testator's property at the time of his death and of the accumulations of the income of his estate during the life of one of his widows.

The changes that have taken place in the parties to the suit are as follows. The widow being one of the parties to the suit died during the pendency of the appeal to the Privy Council. One of the present defendants was then brought in as sole heir to the testator, and four brothers were made defendants as heirs to the widow, some of whose moveable property was stated to have been retained by them after her death. Of these brothers one Brojendro Nath Mitter died more than three years ago, leaving his father, Bhabodayini-Charan, his heir. The son was never added as a defendant and died some time in 1902. It is now sought to have the death of the deceased brother recorded and to have the remaining brothers brought in as his heirs. Under these circumstances I think it is plain that the petitioning defendant's right to have the substitution prayed for made must be treated as though he were asking for the substitution to the son instead of substitution to the father as the son's heir. If the right to have the substitution could have been barred, if the son were alive, it is difficult to see how it can be revived by his death. Treating the case from this point of view, the first question raised is, does either section 368 or section 372 of the Civil Procedure Code apply. It is plain that section 368 cannot apply, since the decree in this suit is the decree of the Privy Council, and the son did not therefore "die before decree" in the terms of that section. The case is therefore one of the "other cases" mentioned in section 372, and the final order on the taking of the accounts not having been made, there is a "pending suit" according to the judgment of Pontifex, J. in [612] *Gocool Chunder Gossamee* v. *The Administrator-General of Bengal* (1).

(1) (1880) I. L. R. 5 Cal. 726.
(2) (1882) I. L. R. 8 Cal. 420.
(3) (1899) 3 C. W. N. 756.
(4) (1891) I. L. R., 16 Bom. 27.

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The next point is whether this application is barred by Article 178 of the Limitation Act, 1877, that is, whether three years have elapsed since the right to apply accrued. As I have already said, I consider that the present application might have been made at the death of the son, which was admittedly more than three years ago, and the question argued before me is, did the right to apply accrue at that time within the meaning of the Act? Reliance has been placed on the decision of Wilson, J. in *Kedarnath Dutt* v. *Harra Chand Dutt* (1), followed by Sale, J. in *Ram Nath Bhuttacharjee* v. *Uma Charan Sircar* (2), in which it was decided that a right to make a similar application, being one in a pending suit, the right to apply was a right which accrued from day to day, and therefore it was not barred by lapse of time.

In both these cases the application was made after a partition had been decreed and before it had been carried out, and it is suggested that for that reason they cannot be held to apply to the present case. This, no doubt, creates a difference between those cases and the present one; since a right to partition, if it accrues at all, accrues from day to day, and a right to account does not.

It is not, however, on this characteristic of the case before him that the judgment of Wilson, J. is founded, but on the fact that a suit was pending—a characteristic common both to that case and this. It is further urged that if that principle is applied to this case, there can be no limitation to an application under section 372. I am not concerned to say that this is the proper construction to be put on Mr. Justice Wilson's language, but if it is, I do not think the argument is conclusive. I consider therefore that the present case is governed by the two cases I have quoted, and that the petitioner's right to make this application accrues from day to day, and is therefore not barred by limitation. The petition is therefore granted in terms of the prayer.

Attorney for the petitioner: *Jnanendra Nath Dutt.*

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30 C. 613 (=7 C. W. N. 419.)

[613] APPELLATE CIVIL.

RAKHAL MONI DASSI v. ADWYTA PROSAD ROY.* [6th March, 1903.]

Compromise—Minor—Guardian of Minor—Proper course to set aside a compromise-decree—Appeal—Adoption, suit to set aside—Guardians and Wards Act (VIII of 1890), *ss.* 47, 48—*Civil Procedure Code (Act XIV of* 1882), *ss.* 443, 622.

When a compromise, and a decree based upon it are sought to be set aside on the ground that the compromise was entered into by the guardian of a minor defendant without the leave of the Court having been granted after a judicial determination that it was for the minors's benefit:

Held, that the proper course to set aside such a decree would be by way of an application for review in the first Court or by a separate suit, but not by an appeal from the compromise decree.

Biraj Mohini Dasi v. *Chinta Moni Dasi* (3) followed.

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* Appeal from Appellate Decree No. 588 of 1900, against the decree of W. B. Brown, District Judge of Cuttack, dated Jan. 17, 1900, reversing the decree of Behari Lal Mullick, Subordinate Judge of that district, dated Aug. 22, 1899.

(1) (1882) I. L. R. 8 Cal. 420.

(2) (1899) 3 C. W. N. 756.

(3) (1901) 5 C. W. N. 877.