Privy Council Appeal No. 70 of 1916.

H. H. Brij Indar Singh - - - - *Appellant,*

v.

Lala Kanshi Ram and Others - - - *Respondents,*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1917.

Present at the Hearing:

LORD DUNEDIN.
LORD SHAW.
LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

The facts out of which this case arises are very clearly and succinctly stated by Mr. Justice Johnstone in his judgment of the 6th April, 1909, which is part of the necessary history of the judgment actually before their Lordships. He says:—

"The history of this case is in brief as follows: In 1903 His Highness Raja Balbir Singh of Faridkot brought a suit under section 283 Civil Procedure Code (1882) against Kashi Ram and Joti Mal, decree-holders, Mr. G. H. Coates, judgment debtor, and two others, for a declaration that certain property, attached under Kashi Ram and Joti Mal's decree, was plaintiff's property, and so not liable. Great delay took place and an application for transfer of the case was made to the Chief Court; but a new District Judge having been ordered to Ferozepur, transfer became unnecessary. Again plaintiff applied for transfer of the case, and again the petition was rejected, and the case was taken up thereafter on the 21st April, 1904. In the course of the hearing on the 16th July, 1904, an application was made to the Chief Court to revise an order of the District Judge, directing a party to produce certain books. I need not go into details concerning this. Suffice it to say that the petition remained in the Chief Court till the 1st January, 1908, when Mr Herbert, pleader for plaintiff,

withdrew it, and that in the meantime certain casualties had occurred among the parties. In February 1906 Raja Balbir Singh died and was succeeded by the present Chief. On the 9th May, 1906, the latter applied in Chief Court for substitution of his own name and this was ordered on the 19th May, 1906. Joti Mal, defendant 2, had also died on the 15th April, 1906, and plaintiff said he heard of this (plaintiff is a minor) on the 8th November of the same year. Application for substitution of his five sons was made on the 13th December, 1907, and, the file still being in the Chief Court, on the 11th January, 1908, the prayer was granted. These orders of the 19th May, 1906, and the 11th January, 1908, were apparently both *ex parte.*

" The papers went back from Chief Court to District Judge on the 13th March, 1908, and then an application was made to District Judge on the 16th March, 1908, by Kashi Ram, defendant 1, and Lala Achhru Ram, one of the sons of Joti Mal, praying for an order of abatement on the grounds that in none of the following cases had representatives of deceased parties been put on the record within time, viz. :—

" 1. Vice Raja Balbir Singh, died February 1906;

" 2. Vice Joti Mal, died April 1906; and

" 3, Vice Mr. G. H. Coates, died about December 1906.

" The new District Judge, Captain Sanford, without enquiry and without notice to plaintiff, the present Chief, and obviously without looking at the Chief Court's orders of the 19th May, 1906, and 11th January, 1908, summarily there and then ordered abatement, and gave applicants costs out of the deceased Raja's estates. The order was passed under both section 366 and section 368, Civil Procedure Code (1882), all three grounds set forth in the petition being accepted as sound.

" Upon a petition by the present Chief, Captain Sanford's successor, on the 8th April, 1908, reconsidered the *ex parte* order of the 16th March, 1908, and set aside the order of abatement in so far as it depended upon the matter of the decease of the late Raja. This was an order under section 371, Civil Procedure Code, and was within the power of the District Judge. Then, on the 24th April, the District Judge, took up the other two demises, and set aside the abatement order also in respect of them. On both occasions it was urged before the District Judge that section 371 did not authorise the reconsideration by him of an order under section 368, Civil Procedure Code, but he overruled the objection."

Having thus set forth the facts, the learned Judge expressed his opinion that though section 371 authorised the setting aside of the abatement in so far as it depended on a failure to substitute a new plaintiff under section 366, it did not do so, in so far as the abatement order depended on a failure to substitute a new defendant under section 368. Accordingly, holding the District Judge Prenter's order to review to be *ultra vires,* he quashed that order and restored the *ex parte* order of the District Judge Sanford which abated the suit.

It follows from what Mr. Justice Johnstone had said, that in his opinion the proper course for the plaintiff who, by an *ex parte* order in the District Court, had had his suit brought to an end, was to appeal to the Chief Court against that order. This the plaintiff did. But on presenting his appeal he was met by the objection that it was time-barred. The case depended

before the same Judge, Mr. Justice Johnstone. He upheld the objection. The case was then set down for review by the Chief Court. In that Court Mr. Justice Johnstone sat as sole judge. He, after a careful reconsideration, not unnaturally repeated his former judgment, but gave leave to appeal to His Majesty in Council.

The sole question directly raised is whether the time which was spent in getting the District Judge Prenter's judgment, which was afterwards decided to be wrong and in getting it set aside, falls to be deducted in calculating the time during which appeal was possible. This depends on section 5 of the Limitation Act, which is in these terms :—

> "Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had some sufficient cause for not presenting the appeal or making the application within such period."

It is right, also, to quote section 14 of the same Act, which is as follows :—

> "In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or a Court of Appeal, against the defendant, shall be excluded, when the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

This, it will be observed, does not in terms apply, as it deals with suits and not with appeals, but its relevance will be seen by the judgments afterwards quoted.

The learned Judge, Mr. Justice Johnstone, in his first deliverance on this matter, cited the case of *Ramjiwan Mal* v. *Chand Mal* (I. L. R. 10 All. 587). That case laid down the broad proposition that a mistake in law never could be the foundation for an application for the indulgence which may be granted under section 5. If that were sound there would be an end of the case. Upon the assumption that review was not the proper remedy for an abatement granted in respect of section 368 (which assumption the plaintiff by acquiescing in Mr. Justice Johnstone's judgment of the 6th April, 1909, must be held to concede), the proceeding by way of review instead of by appeal was a mistake in law. But the learned Judge's attention does not seem to have been called to the fact that the case cited was really reversed by the decision of *Brij Mohan Das* v. *Mannu Bibi* (I. L. R., 19 All. 348), where a full Bench held that a mistake in law may be the foundation for the relief craved. The case on its facts is not directly in point here, for it was concerned with a suit and not with an appeal: *i.e.*, was directly under section 14; and further, the mistake made was clearly within the words "a Court which from defect of jurisdiction is unable to entertain it." In the second judgment the learned Judge carefully reconsidered the authorities. The case of *Karm*

Bakhsh v. *Daulat Ram* ("Punjab Record," 1888, at p. 478) had been specially pressed upon his attention; a Full Bench decision of his own Court which, if applicable, he was bound to follow. He refused to consider it applicable, because, in his opinion, it laid down no general rule, and each case he considered depended on its own facts.

Their Lordships find it impossible to agree with the view that the case of *Karm Bakhsh* v. *Daulat Ram* laid down no general rule. The case was first taken in chambers, when Plowden J., the point being raised, said "This class of cases is constantly cropping up, and some definite rule should be laid down." Following this view, when with another Judge he took up the case in the Divisional Court, he referred the matter to a Full Bench. The case was heard before a Full Bench, and Plowden J. delivered the judgment. It will be enough to cite two passages from that judgment. After setting forth the terms of section 5 of the Limitation Act, he says:—

> "All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown the Court may in its discretion, which is of course a judicial and not an arbitrary discretion, admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal, and we think further that he ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against, and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal."

And again—

> "We also agree with the High Court of Allahabad in the case reported in I. L. R., 5 All. 591, that the circumstances contemplated in section 14 of the Limitation Act should ordinarily constitute a sufficient cause within the meaning of section 5."

These citations seem to show that there is a general rule expressed, and that the case was only sent to a Full Bench in order that some general rule should be laid down.

The learned Judge says that each case depends on its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

It would doubtless be within the power of this Board to hold that the general rule so laid down was wrong. But here it must be noticed that though as authority binding on Mr. Justice Johnstone it rests on the Punjab case, the authority for it is really much wider. The case of *Brojender* v. *Coomar*

Roy (7 Sutherland Weekly Reporter 529) was also a Full Bench case, sent to the Full Bench of Calcutta in order to obtain a general rule, and it is well summarised in the head note which runs:—

"If a party presents an application for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as presented within time."

And in delivering judgment Peacock, C.J., mentioned that they were upholding the ruling of fourteen Judges in 1865, and that the practice upheld had been the practice of Madras since 1860. Their Lordships were also informed that the same rule had been followed in Bombay. In Allahabad the same result is reached by combining the case reported in I.L.R., 5 All. 591, with the case in I.L.R., 19 All. 348.

Now if the matter were entirely open, inasmuch as a mere mistake in law is not *per se* sufficient reason for asking the Court to exercise its discretion under section 5 (instances of which are given in some of the cases cited by the learned Judge), there would be a good deal to be said in argument in favour of making the rule universal, and upholding in its entirety the ruling given in the case of *Ramjiwan Mal* v. *Chand Mal* above cited. But the matter is not open. To interfere with a rule, which after all is only a rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts of India, and acted on for many years, would cause great inconvenience, and their Lordships do not propose so to interfere.

It was strenuously urged by the learned counsel for the respondents that inasmuch as the power in section 5 is admittedly a discretionary power, this Board ought not to interfere with the discretion exercised by Mr. Justice Johnstone, and he cited cases of which *Sharp* v. *Wakefield* [1891] A.C. 173, may be taken as a type. In reality, however, that case is against him. For it laid down that discretion there as here must be a judicial and not an arbitrary discretion. Now if the Judge who purports to exercise the discretion does so under the view that there is no general rule, when in fact there is one, if he has, to use an expression often used in another class of cases, misdirected himself as to the law to be applied to the case, he cannot exercise a judicial discretion, and the Superior Court—in this case this Board—must either remit the case or exercise the discretion themselves. In a case like *Sharp* v. *Wakefield* there would necessarily be a remit. Here it is otherwise, for the general rule applies, and it only remains to see whether the proceedings in the review were reasonably prosecuted and in good faith. That they were so their Lordships have no doubt. The District Judge Sanford made the order for abatement on the 16th March, 1908. The plaintiff applied on the 20th March to set it aside, and it was set aside by the District Judge Prenter on the 24th April, 1908. Mr. Justice Johnstone speaks of the

plaintiff "persisting" in prosecuting review after the defendants had taken the point that appeal and not review was the proper remedy. But the defendants were held by the District Judge Prenter to be wrong, and their Lordships think that the plaintiff cannot be held in any fair sense to have "persisted" in his attitude till Mr. Justice Johnstone's first judgment of the 6th April, 1909. Accepting that judgment, he appealed on the 21st April, 1909. The question of what he did in the fifteen days is neither here nor there. For, accepting the general rule as stated above, the period for appealing being ninety days, the dates stand thus: the District Judge Sanford's order was made on the 16th March, 1908. That order was set aside on the 8th April, 1908. Thus only twenty-three days out of the ninety had expired. That left forty-seven days. And after the proceedings for review terminated only fifteen days were consumed before the appeal was presented.

Though it is not in the appellant's mouth to say that Mr. Justice Johnstone's first judgment, settling that review was incompetent, is wrong, he having acquiesced therein, still as the matter has been mooted and discussed, their Lordships think it better to say that in their view the District Judge Prenter's judgment on this point was right, and that of Mr. Justice Johnstone wrong. The point seems to their Lordships very clear. Section 365 provides for the substitution of a new plaintiff when the plaintiff has died, upon the application of the representative of the deceased plaintiff. Section 366 deals with the state of circumstances when no such application is made within a certain time. The defendant may either (1) have the suit abated; or (2) get an order putting up a new plaintiff. Section 368 deals in a similar manner with the case of the death of a defendant. Thus it will be noticed that abatement is a penalty which is only imposed on a failure of the plaintiff.

Then comes section 371. This primarily deals with what abatement involves: "No fresh suit shall be brought on the same cause of action." It is obvious that it is only a plaintiff that is hurt by this. Nothing could be better for a defendant. It is also obvious that an abatement is equally hurtful to the plaintiff whether granted in respect of a failure under section 366 or section 368. When section 371 goes on to say under what conditions the plaintiff can get rid of the abatement, it would be expected that it would deal with abatement however procured. And the opening words make it clear that it is so; "When a suit abates or is dismissed *under this chapter*. This chapter includes section 368 just as much as section 366. The learned Judge seems to think that an argument can be founded on the fact that in the appeal section 588, an appeal is given against orders pronounced under section 368 and the second paragraph of section 366, but none against those under the first paragraph of section 366. The reason is apparent. Section 371 which gave review was

sufficient as to abatement so far as the plaintiff was concerned; but being a plaintiff's section only, it was unavailable to a defendant and as already pointed out, a defendant as such never would want to complain of abatement. But in paragraph 2 of section 366 and in parts of section 368, there are other matters than abatement. Under 366 paragraph 2 a defendant might bring about the introduction of a wrong plaintiff against the will of the right one; under section 368 a plaintiff might introduce a wrong defendant. To the persons so aggrieved there is given appeal.

Though they think that Mr. Justice Johnstone's judgment on this point is erroneous, there is one remark which he makes in his opinion with which their Lordships agree, and which they wish to approve and emphasise. He points out how the whole mischief has arisen from the fact that the District Judge Sanford's order abating the suit was pronounced *ex parte* without giving the opposite party the opportunity of appearing. An order abating the suit, looking to the terms of section 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant. To pronounce such a judgment *ex parte*, when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a defendant who has not been cited to appear. The practice, if it is a practice, is quite indefensible.

Their Lordships think it better to say further, that if the defendant had been present, it is clear that no order of abatement ought to have been pronounced. The plaintiff as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages, and the prayer, which seems to have been made *ob majorem cautelam*, by the plaintiff, in his application to the District Judge Prenter, under section 365, was superfluous and of no effect. Coates, the judgment debtor, was only formally called, and the non-presence of his representatives would afford no ground for the abatement of the suit.

Their Lordships will therefore humbly advise His Majesty to allow this appeal, and to remit to the Chief Court to allow the appeal and to set aside the order of the District Judge Sanford, and to remit to the District Judge to proceed with the hearing of the case on the merits. The respondents will pay the appellant the costs of this appeal and in the Courts below the costs so far as the proceedings were directed to setting aside the order of Judge Sanford. The general costs of the suit will abide the result on the merits.

Privy Council.

H. H. BRIJ INDAR SINGH

v.

LALA KANSHI RAM AND OTHERS.

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