APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

KESO AND OTHERS,—*Appellants*,

versus

GOPAL SINGH,—*Respondent.*

Second Appeal from Order No. 23 of 1966.

March 24, 1967.

Code of Civil Procedure (Act V of 1908)—S. 151, O. 22 R. 4—Suit for recovery of money by a money-lender without obtaining licence under Pepsu Money-lenders Act—Suit stayed—Sole defendant dying during stay—Application for restoration along with application for impleading the legal representatives field after obtaining licence within 30 days thereof but beyond 150 days of defendant's death—Suit—Whether abates—Application made for impleading legal representatives of deceased defendant—Whether can be treated for setting aside abatement.

Held, that since the suit had been stayed, an application to implead the legal representatives of the deceased defendant could be filed when a right to revive the suit arose. If on that date the suit had abated, an application to set aside abatement could be made within sixty days. The application in the present case was made within 30 days, and in no circumstances the same could be said to be beyond limitation.

Held, that an application made for impleading the legal representatives of the deceased defendant and not for setting aside the abatement, can be treated as one for the latter purpose also as the label of an application does not matter.

Second Appeal from the decree of the Court of Shri J. P. Gupta, District Judge, Kapurthala, dated the 19th March, 1966 reversing that of Shri Rajinder Lall, Sub-Judge 1st Class, Phagwara, dated 24th July, 1965, remanding the suit to the trial Court for deciding it in accordance with law.

TIRATH SINGH, ADVOCATE, for the Appellants.

M. R. AGNIHOTRI, ADVOCATE, for the Respondent.

ORDER

MAHAJAN, J.—The question of limitation alone is involved in this appeal. The suit giving rise to this appeal was filed for recovery of money on the basis of pronotes. That suit was stayed because the

plaintiff money-lender had not obtained the necessary licence under the Pepsu Money-lenders' Act. During the period that the suit was stayed, the sole defendant, the debtor, died. The date of his death is January, 1964. The creditor obtained the requisite licence on the 23rd of September, 1964 and made an application for restoration of the suit along with an application for impleading the legal representatives of the deceased debtor. The application for impleading the legal representatives was held to be barred by time, with the result that the suit was dismissed. An appeal against this decision has been allowed by the lower appellate court and the application for impleading the legal representatives has been held to be within time and consequently the suit was decreed. This decision is now being challenged in second appeal by the legal representatives of the defendant-debtor. As already observed, it is only the point of limitation that has been agitated.

Mr. Tirath Singh's contention is that the suit had abated when Dalip Singh, the sole defendant, died and, therefore, the application made on the 20th of October, 1964, for impleading his legal representatives along with the application for restoration of the suit was beyond time. According to the learned counsel the least that the respondent should have done was to file the applications on the date when he got the license, i.e., on the 23rd of September, 1964. This contention loses sight of the fact that during the stay of the suit there were no proceedings pending. Order 22 of the Code of Civil Procedure contemplates an application in a pending proceeding. When no proceedings are pending, there is no point in making an application. I am fortified in my view by the decision of the Hyderabad High Court in *Venkat Narsimhan Reddy* v. *Konda Reddy* (1). At page 56 of the report the learned Judges observed as follows :—

> "We have heard the learned Advocates for the parties at length and come to the conclusion that the orders appealed from cannot be allowed to stand. Sub-section (3) of section 399, which is equivalent to Order 22 rule 4, sub-rule (3), Indian Civil Procedure Code, provides that where within the time limited by law no application is made under sub-section (1), the suit shall abate as against the deceased defendant. This section has been made applicable to appeals by section 405, which is equivalent to Order 22, rule 11, Indian Civil Procedure Code.

(1) A.I.R. 1951 Hyd. 55.

Article 156, Hyderabad Limitation Act, which in consequence of an amendment has become Article 155 and which corresponds to Article 177, Indian Limitation Act, except with regard to the period of limitation, requires that an application under the Code of Civil Procedure to have the legal representative of a deceased defendant or of a deceased respondent made a party is to be presented within six months (now four months) from the date of the death of the deceased defendant or respondent. These provisions of law which require a substitution within a limited period of time contemplate pending proceedings. The proceeding loses its character of pendency as soon as the Court having seisin of the suit orders that it be struck off and sent up to the appellate Court. On the 14th of Amardad when Konda Reddy died there was no suit pending before the Original Court. Therefore, no question of the appellant filing an application for substitution in the Original Court can possibly arise. It is agreed by the learned Advocates for the respondents that the suit should be deemed to be potentially pending before the Court of Revision and for this reason it was obligatory on the appellant, if he wanted to save his suit from abatement as against Konda Reddy to apply for substitution in time and as a matter of fact he applied and his application was dismissed for non-payment of process-fee, the result of which in law would be the abatement of the suit in so far as the deceased is concerned. We are unable to follow this argument. If this argument is held to be sound it would mean that if a case comes up in appeal, two periods of limitation would begin to run simultaneously bringing about the abatement of the appeal and of the suit as well. Thus if the plaintiff succeeds in the Original Court and an appeal is brought by the defendant and during the pendency of appeal the plaintiff-respondent dies and no attempt is made to bring the legal representative of the deceased on record, then according to the theory propounded by the learned Advocates for the respondents not only the appeal but also the suit in which the deceased had succeeded would automatically abate. Moreover, the whole theory of abatement is inapplicable to applications in revision. *See Baksho* v. *Piaro* (2), *Naoomal* v. *Tara*

(2) 80 I.C. 456=A.I.R. 1920 Sind 120.

Chand (3), *Kasim Husain* v. *Piarey Lal* (4), *Madduleti Reddy* v. *Rahiman Bi* (5). Indeed it would be preposterous to hold that though Article 156 (now 155), Hyderabad Limitation Act, did not apply to revision proceedings, at the same time it applied to the suit which was not pending in the Original Court. Such an absurdity cannot be held to be within the contemplation of the Legislature."

These observations fully apply to the present case. The need for an application to implead the legal representatives of the defendant would arise when the suit could be revived, i.e., the 23rd of September, 1964. Thus on that date the suit is to be taken to have abated and an application to set aside abatement could be made within sixty days. The present application was made on the 20th of October, 1964, i.e., within thirty days, and in no circumstances the same could be said to be beyond limitation. Mr. Tirath Singh contends that the application made on the 20th of October, 1964 was merely for impleading the legal representatives of the deceased defendant and not for setting aside the abatement. This would be of no consequence because the label of an application will not matter. It is the substance which will matter. Mr. Tirath Singh placed reliance on a Single Bench decision of this Court in *Harbans Lal* v. *Bela Singh* (6), but that decision does not in any manner support the contention of the learned counsel. In that case an application for setting aside abatement was made more than a year after the suit could have been revived. That is not so in this case. That being so there is no merit in the contention of the learned counsel that the learned District Judge was in error in holding that the application, dated the 20th of October, 1964 was within time.

No other contention has been advanced.

In the result this appeal fails and is dismissed, but there will be no order as to costs. The parties have been directed to appear in the trial Court on the 25th of April, 1967.

R. N. M.

(3) 144 I.C. 883=A.I.R. 1933 Sind 200.
(4) 184 I.C. 81=A.I.R. 1939 Oudh. 277.
(5) 1947-2 M.L.J. 487=A.I.R. 1949 Mad. 199.
(6) 1966 Cur. L.J. (Pb.) 98.