

(1924) 11 CAL CK 0027
In the Calcutta High Court

Hem Kanta Ghosh and Others

APPELLANT

Vs

Srimati Monoj Prova Singha and Another

RESPONDENT

Date of Decision : 11-11-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9

Citation : 87 Ind. Cas. 173

Hon'ble Judges : Suhrawardy, J; Cuming, J

Bench : Division Bench

Judgement

1. This Rule is directed against an order of the District Judge of Howrah, dated the 27th June. 1924 rejecting the appeal preferred by the petitioners on the ground that no appeal lay from the order of the Court below and in the alternative the Rule is directed against an order passed by the Subordinate Judge of Howrah dated the 28th July 1923 (wrongly mentioned as dated the 8th July 1923 in the order-sheet issuing the Rule,). No one appears on behalf of the opposite parties, though the service upon them has been found to be in order. The facts are that one Becharam Singh instituted a suit against the petitioners in the Court of the Subordinate Judge of Howrah. Subsequent to the institution of the suit he died, according to the petitioners, on the 21st February 1922 and according to the opposite party, on the 21st March 1922; On the 2nd June 1922, an application was made on behalf of the widow for substitution in place of the deceased plaintiff on the allegation that the plaintiff had died on the 21st March 1922. On the 7th June 1922, the learned Subordinate Judge passed an ex parte order granting the application and ordering substitution as prayed for. On the 2nd August 1922 the defendants-petitioners applied to have that order set aside on the ground that on the date on which the application for substitution was made by the opposite party the suit had already abated and in proof of it they produced a copy of the extract from the Register of births and deaths kept by the Calcutta Corporation. The learned Subordinate Judge, by his order dated the 12th August, held that, as a matter of fact, Becharam had died on the 21st February 1922 and that the suit had abated on the date on which the application

was made. On the 16th September 1922 the opposite party again filed an application purporting to be one under Order XXII, Rule 9, C. P.C., to set aside the order of abatement and to direct substitution of her name in place of the deceased plaintiff. That application was heard after a long time ex parte in the absence of the petitioners. The learned Subordinate Judge granted that application on the 28th July 1923 holding that the petitioners' right to apply under Order XXII, Rule 9, C. P.C., for substitution and to pray for extension of time under Clause (3) of that rule was not lost by the previous order of his predecessor holding that the suit had abated. The learned Subordinate Judge found that the opposite party was not aware of the death of her husband within three months of his death. He accordingly set aside the order of abatement and restored the suit to its file in the original number and ordered the issue of summonses upon the defendants. ""The petitioners thereupon filed an appeal to the District Judge who held that no appeal lay to him. We have heard the learned Pleader who appears for the petitioners and have gone through the papers in connection with this case and have come to the conclusion that the order passed by the learned District Judge is a correct one and cannot be disturbed. Under Order XLIII, there is no appeal from an order setting aside an abatement. Besides the petition that was filed on the 16th September 1922 by the opposite party was virtually one for review of the order passed on the 12th August 1923; but the application itself does not purport to be one for review. The prayer made in the application was that the order holding that the suit had abated might be discharged under Order XXII, Rule 9 and substitution made. The Subordinate Judge before whom the matter came held that the petitioners had still the right to apply under Order XXII, Rule 9 for setting aside the order of abatement. Be that as it may the real question that we are called upon to decide is whether the order passed by the Subordinate Judge on the 28th July 1923 is one under Order XXII, Rule 9, C. P.C. We are of opinion that the order is bad in law. The learned Subordinate Judge has not taken into consideration the period of limitation that is fixed by law for a party to apply to set aside an order of abatement passed under Order XXII, Rule 9. The period fixed for the purpose under Article 171 is two months from the date of abatement. In the present case the abatement took place on the 21st May according to the petitioners or on the 21st June according to the opposite party. Whichever date is taken, the application filed by the opposite party for setting aside the order of abatement on the 16th September 1923 must be held to be barred by limitation. In this view we do not think that the learned Subordinate Judge was right in allowing the application of the opposite party for setting aside the order of abatement.

2. The result is that this Rule is made absolute and the order passed by the Subordinate Judge of Hooghly on the 28th July 1923 set aside. We make no order as to, costs.