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although technically it has power to do so under the relevant provisions of the Contract Act."

In the case before me the reasonable return was converted into monetary value which was to be calculated at the rate of Re 0-1-3 per unit at a minimum of 120,000 units in two years and if that was what was calculated at the time of making the contract, it does not seem to be necessary for the Court to re-determine the same. The object of putting in this clause was in my opinion to fix by agreement the amount of reasonable return which the licensee Company was entitled to.

I am, therefore, of the opinion that (1) it has not been proved that there was a breach of the agreement by the licensee Company ; (2) the evidence discloses that the transformer which was installed by the Company was sufficient for the purpose of giving the energy required by the defendants ;(3) the suit, which has been brought, is not a suit based on a breach of contract, but for the enforcement of clause 4 given in the agreement ; (4) according to the Indian Electricity Act the Company is entitled to a fair return on its additional plant taking into account all the factors which are prescribed by section 23 read with clause VI of the Schedule to the Electricity Act ; and (5) the parties having agreed at the time of entering into the agreement as to what would be fair return, the plaintiff Company are entitled to enforce that clause.

In the result this appeal fails and is dismissed with costs.

FALSHAW, J.—I agree.

1953

May, 25th

APPELLATE CIVIL

Before Khosla and Soni, JJ.

BIRBAL AND OTHERS,—*Defendants-Appellants*

versus

HARLAL AND OTHERS,—*Defendants-Respondents*

Regular Second Appeal No. 648 of 1952

Code of Civil Procedure (Act V of 1908), Order 22—Abatement—Setting aside of—Ignorance of party's death—Whether sufficient ground—Decree passed after abatement—Whether a nullity—Procedure to be adopted after setting

aside abatement by the appellate Court—Legal representatives brought on record at the stage of appeal—Whether to be deemed as having been brought on record at the stage of the suit also—Redemption of Mortgages Act (II of 1913)—Application under, for redemption—Collector passing the order allowing redemption—Review of this order—Whether permissible—Section 12 of the Act—Effect of—Power of review—Whether inherent in a Revenue Court or a Civil Court or a Criminal Court.

Held (1), that abatement can be set aside even after the statutory period of 60 days has expired. Abatement takes place 90 days after the death of the defendant or respondent. So the opposite party is allowed a period of 150 days in which to apply for setting aside the abatement, but if for some reason he cannot move the court in this period he is entitled to extension under section 5 of the Limitation Act. Ignorance of the death of a party is a very good ground for not moving the court to bring his legal representatives on record, for a person cannot think of making an application in this behalf unless he knows that the party is dead. In such circumstances the court is justified in extending limitation for making an application to set aside the abatement.

(2) The effect of abatement is not that a decree against a dead person is a nullity for all purposes but that the decree can be set aside and the legal representatives given an opportunity of representing their case before the Court.

(3) Normally after setting aside the abatement, parties are restored to their original position at the stage of the proceedings when a party's death took place and proper procedure would be to remit the case to the trial Court with a direction that the proceedings be continued from that stage. But this course need be adopted only if the legal representatives of the deceased have been prejudiced in any way. Where the only proceedings that take place after the death of a party is the address of arguments by counsel, no prejudice is caused to the legal representatives and the Court is justified in not remitting the case to the trial Court.

Tota Ram and others v. *Kundan and others* (1), relied on.

(4) When the legal representatives of the deceased party are brought on record at the stage of the appeal, they must be deemed to have been brought on record at the stage of the suit also. This will be so in all cases where no prejudice to a party has been caused.

Brij Indar Singh v. *Kanshi Ram* (2), relied on.

(1) A.I.R. 1928 Lah. 784.
(2) I.L.R. 45 Cal. 94.

(5) That the Redemption of Mortgages Act, 1913, is complete in itself and lays down the procedure to be adopted by the Collector in dealing with the matters coming before him. The provisions of the Civil Procedure Code, do not apply to proceedings under this Act. The procedure is borrowed to some extent from the Punjab Tenancy Act, 1887. The Revenue Courts have power to review their judgments under section 82 of that Act and that section not having been applied to proceedings under the Redemption of Mortgages Act, a Collector, when, he is hearing an application for the redemption of land in a summary manner provided by this Act, has no power to review his orders, and the only way in which these orders can be avoided is by having recourse to the provisions of section 12 of this Act.

(6) Revenue Courts do not possess inherent power of reviewing their judgments. Such a power has been conferred on the Civil Courts by the Civil Procedure Code. No such power vests in Criminal Courts.

Regular Second Appeal from the order of Shri Maharaj Kishore, District Judge, Hissar, dated the 20th August 1952, affirming that of Shri Pitam Singh Jain, Senior Sub-Judge, Hissar, dated the 29th December, 1951, granting the plaintiff a decree for possession as mortgagee of the land in suit against defendants 1 to 5, with the declaration that the order of review, dated the 1st April 1950, was illegal and ultra vires.

F. C. MITTAL and SATISH MITTAL, for Appellants.

P. C. PANDIT and ANAND MOHAN SURI, for Respondents.

JUDGMENT.

Khosla, J. KHOSLA, J. This second appeal arises out of a suit by Harlal, plaintiff-respondent, for the possession of 227 Bighas 11 Biswas of land. The plaintiff also sought a declaration to the effect that an order passed by the Collector on the 1st April 1950, was invalid. The facts which have given rise to this appeal are briefly as follows :—

Ghayas-ud-Din and Siraj-ud-Din, two Muslims, were originally owners of the land in dispute. They mortgaged this land with possession to defendants 1 to 3 and the father of defendants 4 and 5 on the 25th May 1945, for a sum of Rs. 6,000. Possession was made over to the mortgagees. A little later, on the 21st February 1946, the owners executed a lease deed in favour of the plaintiff for

a sum of Rs. 11,000. The lease was a perpetual one and the deed was registered. Out of the total consideration Rs. 5,000 were paid by the plaintiff in cash and the remaining Rs. 6,000 were left in deposit for payment to the previous mortgagees, namely, defendants 1 to 5. The lease deed gave the plaintiff the right to redeem the property from the mortgagees. In order to give effect to this term the plaintiff made an application to the Collector on the 22nd April 1949, for the redemption of this land under the Redemption of Mortgages Act. The owners Ghayas-ud-Din and Siraj-ud-Din had, in the meantime, left India on the partition of the country and the property vested in the Custodian as evacuee property. While this application of the plaintiff was pending before the Collector an Ordinance was passed on the 25th July 1949, and this Ordinance was later succeeded by Act XXXVI of 1949, whereby all leases effected by evacuees were to be considered as having terminated with effect from the 25th July, 1949. Either in ignorance of this provision of the law or for some other reason the Collector passed an order of redemption in favour of the plaintiff on the 5th October 1949. It is clear that the legal position was never placed before the Collector. The Custodian, however, made an application to the Collector for the review of his previous order and the Act whereby the leases made by evacuees were terminated was relied upon by the Custodian. The Collector with the permission of his superiors reviewed his previous order and on the 1st April 1950, set aside the order of redemption passed by him. The Collector apparently acted under the provisions of the Punjab Tenancy Act, which gives power to the Collector to review his orders in certain conditions. The mortgagees had in the meantime filed a suit under section 12 of the Redemption of Mortgages Act. This suit was dismissed on the 2nd June 1950. Therefore at this stage the net result was that the remedy which the aggrieved party was entitled to pursue under law had failed and so the order of redemption stood good as far as the defendants were concerned. The Collector had, however, reviewed his order at the

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instance of the Custodian and the plaintiff was held not entitled to redeem the land. The plaintiff then filed the present suit on the 28th November, 1950 for a declaration that the order of the Collector reviewing the previous order was invalid as it was not warranted by law and he also prayed for possession of the property which had been ordered to be redeemed by him. This suit was decreed on the 29th December 1951, but a further complication had in the meantime arisen. While the suit was pending, Surja, one of the defendants, died on the 28th July, 1951, and no attempt was made by the plaintiff to bring his legal representatives on record. The decree followed on the 29th December 1951, as I have already mentioned above, and then an appeal was filed by the mortgagee-defendants including the legal representatives of Surja, namely, his sons and widow. This appeal was filed on the 29th January 1952, and one of the grounds taken up was that the decree was a nullity inasmuch as it had been passed against a dead person. The Custodian filed a separate appeal. This appeal was filed on the 6th February 1952. The plaintiff now made an application to bring the legal representatives of Surja on record and also prayed that the abatement of the suit, if any, be set aside. This application was made on the 7th April 1952, i.e., more than eight months after Surja's death. The District Judge made an enquiry into the questions whether Surja had died on the date alleged and whether the abatement should be set aside. He considered the pleas of the parties and also took their statements on oath and then he framed the following two issues :—

(1) Whether Surja, one of the defendant-mortgagees, died on the 28th of July 1951, and what is the effect of non-impleading his legal representatives within time on the present appeal ?

(2) If it be held that the suit had abated in the trial Court because Surja's legal representatives were not impleaded within time, then is that abatement liable to be set aside and can this Court set aside the abatement ?

The issues were framed on the 2nd of August 1952. Parties apparently did not ask for opportunity to produce evidence and the District Judge adjourned the case to a future date for hearing arguments. Arguments were heard and the learned District Judge gave his decision whereby he set aside the abatement, allowed the legal representatives of Surja to be brought on record, and proceeded to decide the appeal on merits after coming to the conclusion that it was unnecessary to remit the case to the lower Court for further proceedings from the stage at which Surja's death had taken place. On merits the learned District Judge found that there was no force in the appeal and that the order of the Collector reviewing his previous order was illegal as it was not warranted by law and so the lower Court's decree in favour of the plaintiff was allowed to stand. Against this order the defendants have come up in appeal to this Court and on their behalf two points were urged before us, one that the effect of Surja's death was that the suit abated and the decree against the dead person being a nullity was liable to be set aside. It was also contended that the District Judge should not have set aside the abatement because there was not sufficient ground for extending limitation under section 5 of the Limitation Act, and in any event the learned District Judge should have remitted the case to the Senior Subordinate Judge with the direction that proceedings be continued from the stage at which Surja died. In the second place it was urged that the order of the Collector reviewing his previous order was not invalid and that, therefore, the plaintiff was not entitled to the decree awarded in his favour.

With regard to the question of abatement it is clear that abatement can be set aside even after the statutory period of 60 days has expired. Abatement takes place 90 days after the death of the defendant or respondent. So the opposite party is allowed a period of 150 days in which to apply for setting aside the abatement, but if for some reason he cannot move the Court in this respect he is entitled to extension under section 5 of the Limitation Act. The effect of abatement is not that a

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decree against a dead person is a nullity for all purposes but that the decree can be set aside and the legal representatives given an opportunity of representing their case before the Court. In this case the first point to consider is whether there was sufficient ground for not making an application within the statutory period of 150 days. The plaintiff's contention was that he did not know of Surja's death. He has stated this on oath and this statement was accepted by the learned District Judge. Now ignorance of the death of a party is a very good ground for not moving the Court to bring his legal representatives on record, for a person cannot think of making an application in this behalf unless he knows that the party is dead. The defendants did not inform the Court and Surja's counsel continued to appear on his behalf. The plaintiff stated on oath that he did not know of Surja's death until much later. In the circumstances it seems to me that the plaintiff has shown sufficient cause for not making the application in time, and the learned District Judge was justified in extending limitation in this respect

The second point to consider is what is the procedure to be adopted in a case of this type. Abatement having been set aside, parties are restored to their original position at the stage of the proceeding when Surja's death took place, and the normal course would be to remit the case to the trial Court with a direction that the proceedings be continued from that stage. But this course need be adopted only if the legal representatives of the deceased have been prejudiced in any way. In the present case we find that Surja died on the 28th of July 1951. After this date no evidence was taken and the only proceedings which took place were the address of arguments by counsel, and the District Judge has found and rightly so that the decision of the case would not have altered in any way had Surja's legal representatives been brought on the record before the decree was passed in favour of the plaintiff. The learned District Judge has referred to a decision of the Lahore High Court

reported as *Tota Ram and others* v. *Kundan and others* (1) in which the facts were almost exactly similar to the facts of the case before us. In that case Chuni, one of the defendants, died and his legal representatives were not brought on record. After Chuni's death some evidence on the question of waiver by the plaintiff was recorded and then a decree was passed in favour of the plaintiff. The defendants objected and among the defendants were the legal representatives of Chuni. The same contentions were raised as have been raised before us in the present case, and a Division Bench of the Lahore High Court held that Chuni's legal representatives could have been brought on record after the expiry of the period of limitation, and since the plaintiff had given up the question of waiver there was no need to remit the case to the trial Court as the decision of the trial Court would not have altered in any way even if Chuni's legal representatives had been given the opportunity of putting forward their defence, and the appeal dismissed. It was also held in a Privy Council case reported as *Brij Indar Singh* v. *Kanshi Ram* (2), that once the representatives of a deceased party are brought on record for one purpose they must be deemed to have been brought on record for all purposes, and therefore, in the present case when the legal representatives of Surja are brought on record at the stage of the appeal they must be deemed to have been brought on record at the stage of the suit also. This will be so in all cases where no prejudice to a party has been caused.

For these reasons I would hold that the learned District Judge was right in allowing the legal representatives of Surja to be brought on record.

On the merits the appeal must fail. The plaintiff made an application under the Redemption of Mortgages Act. He was entitled to do so. He claimed to have the right to redeem and this claim was to be enquired into and adjudicated upon in a summary manner laid down in the

(1) A.I.R. 1928 Lah 784.
(2) I.L.R. 45 Cal. 94

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Redemption of Mortgages Act. The Collector did make an enquiry into it and ordered redemption. The only way of avoiding this order was by having recourse to the provisions of section 12, which says—

> "Any party aggrieved by an order made under sections 5, 7, 8, 9, 10, or 11 of this Act may institute a suit to establish his rights in respect of the mortgage, but, subject to the result of such suit, if any, the order shall be conclusive * * * * *."

Therefore, the order of the Collector allowing redemption must be considered conclusive unless it is set aside by a suit brought by any party aggrieved by that order. Such a suit was brought by the defendants but the suit was dismissed on the 2nd June 1950, as stated above and the order of the Collector must, therefore, stand as a final order upon the question of the right to redeem the land in dispute. The Collector has not been given any power to review his order. It is not suggested that the provisions of the Civil Procedure Code apply to proceedings under the Redemption of Mortgages Act. This Act is complete in itself and lays down the procedure to be adopted by the Collector in dealing with the matters coming before him. The procedure is borrowed to some extent from the Punjab Tenancy Act, and sections 79, 85, 86, 87, 89, 90, 91, 92 and 101 of that Act have been applied to the proceedings under this Act. Section 82 of the Punjab Tenancy Act confers upon the Collector the power to review his orders in certain circumstances. That section, however, has not been imported into the Redemption of Mortgages Act. Revenue Courts do not possess inherent power of reviewing their judgments. Such a power has been conferred on the Civil Courts by the Civil Procedure Code. No such power vests in Criminal Courts. Revenue Courts have power to review their judgments under section 82 of the Punjab Tenancy Act. That section not having been applied to proceedings under the Redemption of Mortgages Act, a Collector when he is hearing

an application for the redemption of land in a summary manner provided by this Act has no power to review his orders, and the only way in which these orders can be avoided is by having recourse to the provisions of section 12. Therefore, it is clear that the order of the Collector dated the 1st April, 1950, whereby he reviewed his previous order, is without jurisdiction and invalid. The Courts below were, therefore, right in awarding a decree to the plaintiff.

The Custodian is a party to these proceedings and the question might arise at some future time whether his interests have also been affected and finally adjudicated upon in this suit. This is a matter upon which I do not choose to make any pronouncement at this stage. The dispute in the present proceedings is entirely between the plaintiff, who claims to have a right to redeem the mortgage, and the mortgagees. As to whether the lease in the plaintiff's favour can or cannot be avoided by the Custodian is a matter which was not considered in the present suit and, therefore, we need not express any opinion upon it.

The appeal, therefore, fails and is dismissed but in the circumstances of the case I would leave the parties to bear their own costs as far as this Court is concerned.

SONI, J.—I agree.

APPELLATE CIVIL

Before Khosla and Soni, JJ.

DAYA RAM, ETC.,—*Plaintiffs-Appellants*

versus

GURTEG SINGH, minor, AND OTHERS,—*Defendants-Respondents.*

1953

May 26th

Regular Second Appeal No. 183 of 1950

Custom (Punjab)—Source of—Principles in deciding disputed cases of custom, stated—Adoption—Jats of Rupar Tahsil, District Ambala—Custom of adoption, whether exists.