the proposition canvassed. The matter there concerned *inter se* dispute between promotees and direct recruits for appointment to the post of Block Development and Panchayats Officers. According to the relevant service rules, which came into effect from January 1974, there was a 50 per cent quota fixed for each source, that is, direct recruits and promotees. Prior to these rules, executive instructions governed the matter, in terms of which the quota for direct recruits was 55 per cent and that of promotees 30 *per cent* and 15 *per cent* for others. At the time when the rules came to effect, there was a short-fall of 21 posts in the quota of direct recruits. The question arose whether this short-fall could be made good after the enforcement of the rules. Following the observations of the Supreme Court in *Y. V. Rangiah and others* vs. *J. Sreenivasa Rao and others,* (2), it was held that vacancies that arose prior to the enforcement of the rules, would be governed by the executive instructions in force, when they occurred. This decision is clearly on wholly different premises and cannot therefore, by any means be construed to bar the appointing authority from prescribing fresh or different qualifications for existing vacancies. This being so, the withdrawal of the concession regarding Punjabi, cannot be imputed with any legal infirmity or illegality.

(8) In the circumstances, therefore, there are no grounds to grant to the petitioner the relief sought. This petition is accordingly hereby dismissed. There will, however, be no order as to costs.

S.C.K.

Before R. N. Mittal, J.

MAGHAR MAL AND SONS,—*Petitioners.*

versus

THE NATIONAL FERTILIZERS LTD.,—*Respondent.*

Civil Revision No. 728 of 1983

September 25, 1988.

Code of Civil Procedure (V of 1908)—*Order XXII, Rules 3 and 9, Order XLIII, Rule 1(k)—Application for impleading legal representatives—Said application beyond limitation—Dismissal of said*

(2) A.I.R. 1983 S.C. 852.

application—Application not considered for setting aside abatement—Order of dismissal—Such order—Whether appelable.

Held, that the application filed before the Court was no doubt for impleading legal representatives of the deceased but the Court should have treated that as one for setting aside the abatement. However, the Court treated the applications simpliciter for impleading the Legal Representatives of the deceased and dismissed it on the ground that it was filed beyond limitation. Clause (k) of rule 1 of Order XLIII of the Code of Civil Procedure, 1908 provides that an appeal shall lie from an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. The impugned order is not one for refusing to set aside the abatement, and therefore, it is not appealable within the purview of former part of clause (k) *ibid.* It is one for dismissal of the suit. The petitioners have no right to file an appeal against it, as they were not parties to the suit. Thus, in either of the circumstances the petitioners have no right to file an appeal against the impugned order (Para 6)

Petition for revision under section 115 *C.P.C. Shri N. C. Prasher, PCS, Sub Judge. 1st Class, Anandpur Sahib, District Ropar dated 14th February,* 1983 *dismissing the suit with no order as to costs.*

H. S. Gill, Advocate, *for the Petitioner.*

Munishwar Puri, Advocate, *for the Respondent.* ...

JUDGMENT

R. N. Mittal, J.

(1) This is a Revision Petition against the order of Subordinate Judge First Class, Anandpur Sahib, dated February 14, 1983.

(2) Briefly, the facts are that Messrs Maghar Mal and Sons, through its Proprietor Behari Lal instituted a suit on June 15, 1981 for declaration to the effect that the plaintiff-Firm was a lessee under the defendant from year to year, against the defendant. During the pendency of the suit, Behari Lal died. On September 8, 1982, Mr. S. D. Sharma, Advocate filed an application for impleading Satya, widow, Vijay Kumar, Naresh Kumar, Ashwani Kumar sons, Shanti and Kumari Neelam daughters of Behari Lal deceased as his Legal Representatives. A notice was issued by the Court of the application on the same date to the Legal Representatives of the deceased for October 4, 1982. On October 4, 1982, the Court issued fresh notices to the Legal Representatives for November 9, 1982. The notices were not received back on the adjourned date

after service. The Court consequently issued fresh notices to the Legal Representatives for November 27, 1982. Again the notices were not served on the Legal Representatives for November 27, 1982. The Court issued fresh notices to them for December 13, 1982. The notice was served only on Vijay Kumar, who appeared on December 13, 1982. The Court issued notices to the remaining Legal Representatives of the deceased for January 19, 1983. On January 19, 1983, Mr. S. D. Sharma, Advocate, appeared on behalf of the Legal Representatives. The suit was adjourned by the Court to February 14, 1983, for Replication and Issues. On February 14, 1983, the impugned order was passed by the Court. It held that Mr. S. D. Sharma was not authorised by the Legal Representatives before December 8, 1982 to appear on their behalf. He had filed the Power of Attorney of only V. K. Sharma in his favour on December 13, 1982, i.e., five days after December 8, 1982. As the Legal Representatives did not come forward for being brought on the record within ninety days from the death of the deceased-plaintiff, therefore the suit stood abated after December 8, 1982. Consequently it dismissed the suit as such. Messrs Maghar Mal and Sons through the Legal Representatives of the deceased filed the present Revision Petition.

(3) Mr. Munishwar Puri, learned counsel for the respondent has raised a preliminary objection that an appeal was maintainable against the impugned order under Order XLIII rule 1(k), Code of Civil Procedure, before the District Judge, Ropar. He submits that, therefore, the Revision Petition is liable to be dismissed on this short ground alone.

(4) I have given my thoughtful consideration to the argument, but do not find any substance therein. Order XXII, rule 3, of the Code says that where a sole plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the Legal Representatives of the deceased-plaintiff to be made a party and shall proceed with the suit. It further says that where no application is made for impleading the Legal Representatives within the time limit prescribed by law, the suit shall abate so far as the deceased-plaintiff is concerned. Rule 9 relates to the question as to when the abatement can be set aside. It says that the plaintiff or any persons claiming to be the Legal Representative of a deceased plaintiff may apply to the Court for setting aside the abatement and the Court, if it is proved that he was prevented by any sufficient cause from continuing the suit, shall set aside the

abatement. Rule 5 deals with the determination of the question as to who is the Legal Representative. It says that where a question arises as to whether any person is or is not the Legal Representative of a deceased-plaintiff, such question shall be determined by the Court.

(5) From the abovesaid provisions, it is clear that in case a suit does not abate and an application for impleading the Legal Representatives of the deceased-plaintiff is made, the Court in case it is disputed that the persons sought to be impleaded are the Legal Representatives of the deceased, shall determine first that question and if they are found to be so, they shall be impleaded as plaintiffs. If the suit has abated in that case an application for setting aside abatement should be made. On that application, the Court in addition to finding out as to whether the applicants are the Legal Representatives of the deceased shall also determine whether there are sufficient grounds to set aside the abatement. If the Court determines both the questions in favour of the applicant, the abatement shall be set aside and the Legal Representatives will be impleaded as plaintiffs in place of the deceased. However, if either of the questions is decided against the applicants, Legal Representatives shall not be entitled to be substituted as the plaintiffs. It is well settled that if an application is made for impleading the Legal Representatives of a deceased-plaintiff in a suit which has abated, the application should be treated as an application for setting aside the abatement and proceeded with accordingly.

(6) Advertising to the facts of the present case, the Court dismissed the application under Order XXII, rule 3, Code of Civil Procedure, and also dismissed the suit as abated. The application filed before the Court was no doubt for impleading Legal Representatives of the deceased-plaintiff, but the Court should have treated that as one for setting aside the abatement. However, the Court treated the applications simpliciter for impleading the Legal Representatives of the deceased and dismissed it on the ground that it was filed beyond limitation. Clause (k) of rule 1 of Order XLIII of the Code provides that an appeal shall lie from an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. The impugned order is not one for refusing to set aside the abatement, and therefore, it is not appealable within the purview of former part of Clause (k) *ibid.* It is one for dismissal of the suit. The petitioners have no right to file an appeal

against it as they were not parties to the suit. Thus, in either of the circumstances the petitioners have no right to file an appeal against the impugned order. In the above view, I am fortified by the observations of Dua, J. (as he then was) in *Shakuntala Devi* v. *Kashmir Chand and others,* (1), which are as follows :—

> "It was argued in the reported case that the earlier decision of the Madras Court in *Subramania Iyer* v. *Venkataramier,* A.I.R. 1916 Madras 1068, had been wrongly decided and that the later decisions of that Court had thrown some doubt on its correctness because a person seeking to be brought on record as a legal representative, but not so brought, would not be a party to the suit, and, therefore, would have no right of appeal.
>
> This argument was repelled by the learned Single Judge in *Ramireddi's case* A.I.R. 1949 Madras 404 with the observation that although the unsuccessful applicant was not *eo nomine* a party to the order of abatement, yet, in essence, every person who could possibly claim any interest through the deceased would be affected by the order, because the order is in effect a finding that there was no person entitled to continue the suit after the death of the deceased. With the utmost respect of the learned Single Judge, I am not quite sure if his view of law is quite correct.
>
> The counsel for the parties before me have not cited any other decided case on the point in question. In my opinion, however, if an application for permission to prosecute the suit as a legal representative of the deceased is disallowed, then obviously any subsequent decree passed in the suit cannot, on general principles, be appealed against by the unsuccessful claimant. He has, however, an undoubted right of assailing the order passed on his application and this right, in my opinion, will not be taken away merely because a subsequent decree has been passed which decree he cannot appeal against without getting the order passed on his application under Order XXII Rule 3 reversed.

(1) A.I.R. 1961 Pb. 184.

It must constantly be borne in mind that this Court, and indeed all Courts in this Republic, exist for the purposes of advancing the cause of justice and so far as possible a suitor must not be turned away on hyper-technical grounds and denied justice."

I am in respectfully agreement with the observations of the learned Judge.

(7) Mr. Puri, learned counsel for the respondent made reference to *Maramreddi Ramireddi* v. *Vallapareddi Ramakrishna Reddy and another,* (2) *Ganpat Bapuji* v. *Shri Maruti Deosthan, Tandulwadi,* (3) *Thelapurath Kalyanikutty Amma* v. *M. K. Ravunni Nair and others,* (4) and *Radheylal and others* v. *Smt. Kalawati,* (5). No doubt, in *Maramreddi Ramireddi' case* (supra), it was observed that a person claiming to be a Legal Representative of the deceased appellant whose application to be brought on record is dismissed, has no other remedy except to appeal against the order of abatement of appeal. However, correctness of these observations was doubted in *Shakuntala Devi's case* (supra).

(8) In *Ganpat Bapuji's case* (supra), one of the respondents had died during pendency of the appeal and the application for setting aside abatement was made by the appellant. As the appellant was a party to the appeal, therefore, he could file an appeal against the order of refusing to set aside the abatement under Order XLI, rule 1(k). This case is distinguishable and the observations therein are of no help to Mr. Puri.

(9) With great respect to the learned Judges, I do not agree with the observations made in *Thelapurath Kalyanikutty and Radheylal and others' cases* (supra). Consequently, I am of the view that a Revision Petition is maintainable against the impugned order.

(10) The learned counsel for the petitioners has further argued that there was delay of five days in making the application. The

(2) AIR (36) 1949 Mad. 404
(3) AIR (39) 1952 Nagpur 181
(4) AIR 1965 Kerala 303
(5) AIR 1973 All. 237.

Court should have treated the application of the petitioners for setting aside the abatement and given them an opportunity to show that there were sufficient grounds to set aside the abatement. He also submits that the application for bringing on record the Legal Representatives was filed by the lawyer of the petitioners within time. However, vakalatnama was filed by him after some delay. Thus, there were sufficient grounds for setting aside the abatement. I have duly considered the argument. I agree with the submission of Mr. Gill that before holding that the suit stood abated, the petitioners should have been given an opportunity to show that there were sufficient grounds for setting aside the abatement. Rule 9(2) of Order XXII of the Code provides that a person claiming to be the Legal Representative of a deceased-plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. As observed above, an application for impleading Legal Representatives of a deceased should be treated to be an application under the aforesaid rule 9(2). It is evident from the said rule that the Court has to decide whether there was sufficient cause for setting aside the abatement, or not. The matter can be decided after giving an opportunity to the parties to lead evidence in case they want to do so. In the present case, no such opportunity was afforded by the Court to the parties. Therefore, I am of the opinion that the matter should be decided after in opportunity has been given to the parties to lead evidence. The question, as to whether the delay of five days should be condoned, or not, will be determined after the parties have led the evidence.

(11) For the aforesaid reasons, I accept the Revision Petition, set aside the order of the trial Court and remand the case to it for deciding the matter afresh after taking into consideration the observations made above.

(12)) No order as to costs.

(13) The parties are directed to appear before the trial Court on October, 26, 1987.

S.C.K.