

Dahyabhai Thurbhai Patel Vs. Bhaishanker Pitamber (Deed.) and ors.

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Court : Gujarat

Decided On : Jan-25-1963

Reported in : (1964)5GLR160

Judge : V.B. Raju, J.

Appellant : Dahyabhai Thurbhai Patel

Respondent : Bhaishanker Pitamber (Deed.) and ors.

Judgement :

V.B. Raju, J.

1. This appeal is against an order of the learned Extra Assistant Judge Nadiad dismissing an application filed by the original plaintiff who was appellant before him for joining the heirs of the deceased respondent No. 1 in the appeal before him. The prayer was that delay in filing the application may be condoned. That prayer was dismissed with costs by the learned Extra Assistant Judge. It is against that order that this appeal has been filed.

On behalf of the respondents it is contended that the appeal does not lie. The Learned Counsel for the appellant contends that the appeal lies under Order 43 Rule 1(k) C.P. Code which permits an appeal against an order under Rule 9 of Order 22 refusing to set aside or abatement or dismissal of a suit.

We are not dealing with a suit but an appeal and it is contended that an appeal is a continuation of a suit and therefore the word suit in Order 43 Rule 1(k) C.P. Code includes an appeal. Reliance is also placed on Order 22 Rule 11 C.P. Code which read as follows:

In the application of this order to appeals so far as may be the word plaintiff shall be held to include an appellant the word defendant a respondent and the word suit an appeal.

This is a specific provision whereby the word suit as used in Order 22 includes an appeal. There is no such provision in Order 43 C.P. Code. The word suit occurring in Order 43 Rule 1(k) C.P. Code therefore does not include an appeal. The contention that an appeal is a continuation of a suit and that therefore the word suit in Order 43 Rule 1(k) C.P. Code includes an appeal is rejected because even if the appeal abates the suit may not abate.

2. In fact no order of abatement of the appeal has been passed in this case. I therefore hold that this appeal is not maintainable. The same view has been taken in *Akka Mia v. Abdul Aziz* : AIR1929 Cal532 by a Division Bench and it was held that there is no appeal against an order under Order 22 Rule 9 refusing to set aside an abatement of an appeal because the word suit in Order 43 Rule 1(k) C.P. Code does not include an appeal.

I therefore dismiss the appeal. No order as to costs.

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