(18) For the reasons aforementioned, we acquit the appellant of the offence under section 307 of the Indian Penal Code and convert his conviction into one for an offence under section 326 of the Indian Penal Code and maintain the sentence awarded to him. In the result, the appeal stands disposed of accordingly.

Rajendra Nath Mittal, J.—I agree.

N.K.S.

Before G. C. Mital, J.

LAL SINGH,—*Petitioner.*

versus

KISHAN GOPAL and others,—*Respondents.*

Civil Revision No. 2205 of 1979.

July 14, 1980.

Limitation Act (XXXVI of 1963)—Section 5 and Articles 120 and 121—Code of Civil Procedure (V of 1908)—Order 22, Rules 3, 4 and 9—Application for bringing on record legal representatives not filed within ninety days of the death—Application filed for setting aside abatement within sixty days thereafter—Explanation for filing the later application on the ninety-first day or thereafter—Whether any duty is cast on the applicant to furnish such explanation—Duty of the applicant where application for setting aside abatement not filed—Stated.

Held, that for filing an application for bringing on record the legal representatives of a deceased plaintiff or a deceased defendant, the limitation would be ninety days as required by Article 120 of the Limitation Act, 1963. In case such an application is not made within a period of ninety days, then Article 121 of the Act provides a period of sixty days to obtain an order for setting aside the abatement which automatically takes place on the expiry of ninety days from the date of death of the party when no application is filed within a period of ninety days. In order to succeed in such application, the applicant will have to show as to why he could not file the application by the ninetieth day no duty is cast on him to show why he did not file the application on ninety-first day or soon thereafter when Parliament has specifically provided a clear period of sixty days under Article 121 of the Act. Any other interpretation would

mean that Article 121 is not being read in the statute book which, on the well known principles of interpretation cannot be done. This also explains the order 22, rules 9(2) and 9(3) of the Code of Civil Procedure, 1908. (Para 4).

Held, that if the application for setting aside abatement is not filed as required by Article 121 of the Act, then any application filed thereafter would be under section 5 of the Act and the applicant will have to show sufficient cause, firstly, why the application was not filed by the ninetieth day, secondly, why the application was not filed within sixty days thereafter for setting aside abatement and to explain each day's delay after the expiry of the aforesaid period of 150 days. (Para 5).

Petition under section 115, C.P.C., for revision of the order of the court of Shri K. S. Uppal, Sub-Judge, Jullundur, dated 24th August, 1979, allowing the application and set aside the abatement of the suit and further allowing the petitioner to continue the suit in place of Gujjar Mal.

S. P. Jain, Advocate, *for the Petitioner.*

H. L. Sarin, Sr. Advocate with M. L. Sarin & R. L. Sarin, Advocates, *for the respondents.*

JUDGMENT

Gokal Chand Mital, J.

(1) Gujjar Mal brought a suit for possession of agricultural land against Lal Singh and two others. While the suit was pending, the palintiff died on 18th August, 1978. One Vijay Kumar son of Kishan Gopal filed an application, within the period of limitation, for being brought on record as the legal representative of Gujjar Mal on the ground that the deceased had executed a will in his favour and as such he was his heir. That application was dismissed by the trial Court on 7th December, 1978, on the finding that the will was not found to be genuine. After the dismissal of the aforesaid application filed by Vijay Kumar Kishan Gopal filed application dated 21st December, 1978, under Order 22 rules 3 and 9 of the Code of Civil Procedure for condonation of delay and for bringing him on record as the legal representative of Gujjar Mal being his next heir as his sister's son. It was pleaded in that application that he was of the impression that Vijay Kumar had a better claim for succession and when he came to know of the dismissal of his application on 20th December, 1978, the present application was filed. Later on, an amendment application was filed for adding the plea that he was the adopted son of Gujjar Mal, deceased-plaintiff which

amendment was allowed by the trial Court. The application for being brought on the record was contested by the defendants but ultimately by judgment, dated 24th August, 1979, the trial Court allowed the application and brought Kishan Gopal on record as the legal representative of Gujjar Mal, deceased. In arriving at this conclusion, it was found that the applicant had been able to make out a case of sufficient cause as he was genuinely believing that he had no better case i nthe presence of Vijay Kumar's claim in view of the decision of this court in *Shakuntla Devi* v. *Kashmir Chand and others*, (1). It was also found that the application was filed within limitation as the same was presented on 124th day of the death of Gujjar Mal and was within sixty days of the date of abatement under Article 121 of the Limitation Act (hereinafter called the Act). Against the aforesaid decision, Lal Singh, defendant, has come up in revision to this Court under section 115 of the Code of Civil Procedure.

2. Mr. S. P. Jain, appearing for the petitioner has urged that no sufficient cause was made out and since Kishan Gopal had failed to file the application within the period of ninety days, as required by Article 120 of the Act, the Court below erred in exercise of its jurisdiction in allowing the application. I am not impressed with this argument in view of the decision of this Court in *Shakuntla Devi's* case (supra). The facts of that case were somewhat identical. Firstly, an application was filed by the widow on the ground that the deceased had performed Karewa with her and was, therefore, entitled to succeed and it deserved to be brought on the record as his legal representative. While that application was pending and more than 150 days had passed, another application was filed by the daughter alleging that she was thinking that the widow had a better claim but by then it had transpired that *Karewa* type of marriage was not recognised under the Hindu Law and instead of the widow, she would be a preferential heir and, therefore, the application was being filed by her. I. D. Dua, J., gave the following decision :—

> "Held, that C was not guilty either of gross or undue negligence or of inaction or of want of bona fides, that the claim put forward by B on the basis of *Karewa* marriage afforded a sufficient cause for C to abstain

(1) AIR 1961 Pb. 184.

from claiming herself to be the heir and legal representative of her deceased father and that, therefore, C was fully entitled to the benefits of section 5 of the Limitation Act and her petition should be held to be within limitation."

The facts of the present case are on better footing than the facts of the decided case. Here, soon after the dismissal of the application by Vijay Kumar, the present application was filed within 150 days of the date of death of Gujjar Mal, whereas in the reported case help of section 5 of the Act was sought for condonation of delay. Under the circumstances, I am of the view that I have no jurisdiction under section 115 of the Code of Civil Procedure to interfere with the order passed by the Court below as no error of jurisdiction has been pointed out. Moreover, it has not been shown as to what would be the failure of the justice or the irreparable injury to the petitioner if the order is allowed to stand. On the other hand, the parties will have ample opportunity to fight out the case on merits. Therefore, I decline to interfere in my revisional jurisdiction.

3. Before parting, one argument raised by Mr. H. L. Sarin, counsel for the legal representative may be noticed. It was argued by him that there is limitation of ninety days provided by Article 120 of the Act for filing an application for bringing on record the legal representatives of a deceased plaintiff. If for some reason the application is not filed within ninety days, then Article 121 of the Act provides a further period of sixty days for filing the application for an order to set aside the abatement and this period of sixty days starts from the date of abatement which takes place on the expiry of ninety days. According to him, since the Act itself provides a period of sixty days for filing an application to have the abatement set aside, the legal representatives had only to show a sufficient cause for not filing the application for bringing on record the legal representatives by the ninetieth day and if the application is filed within sixty days thereafter, he is not obliged to explain each day's delay as that is not the requirement of Article 121 of the Act. In reply, Shri S. P. Jain argued that the aforesaid two Articles have to be read in harmony with Order 22, rules 9(2), 3(2) and 4(3) of the Code of Civil Procedure. According to him, a reading of the aforesaid rules would show that if an application for bringing on record the representatives is not filed within the period of limitation,

the abatement takes place which can be set aside only if it is proved by the applicant that he was prevented by sufficient cause from continuing the suit and in order to do that he shall have to explain each day's delay after the expiry of ninety days from the date of death of the party.

4. After hearing the counsel for the parties, I am of the view that under the rule of interpretation such a construction will have to be given to the provisions of the Code of Civil Procedure relied upon by Mr. S. P. Jain, so that those provisions also stand without nullifying the provisions of Articles 120 and 121 of the Act and in doing so the only harmonious contruction would be that for filing an application for bringing on record the legal representatives of a deceased plaintiff or a deceased defendent the limitation would be ninety days as required by Article 120 of the Act. In case such an application is not made within a period of ninety days, then Article 121 of the Act provides a period of sixty days to obtain an order for setting aside the abatement which automatically takes place on the expiry of ninety days from the date of death of the party when no application is filed within a period of ninety days. In order to succeed in such application, the applicant will have to show as to why he could not file the application by the ninetieth day and no duty is cast on him to show why he did not file the application on ninety-first day or soon thereafter when Parliament has specifically provided a clear period of sixty days under Article 121 of the Act. Any other interpretation would mean that Article 121 is not being read in the statute book which, on the well-known principles of interpretation, cannot be done. This further explains Order 22, rules 9(2) and 9(3) of the Code of Civil Procedure.

5. If the application for setting aside abatement is not filed as required by Article 121 of the Act, then any application filed thereafter would be under section 5 of the Act and the applicant will have to prove sufficient cause, firstly, why the application was not filed by the ninetieth day, secondly, why the application was not filed within sixty days thereafter for setting aside abatement and to explain each day's delay after the expiry of the aforesaid period of 150 days. To my mind, this seems to be the correct view of law. This matter does not seem to have been considered in this manner in any reported case. This question of law need not be discussed in greater detail in this case and would be gone into in

some other suitable case as I have already declined to interfere in my revisional jurisdiction.

6. For the reasons recorded above, I dismiss this revision petition and direct the parties through their counsel to appear before the trial Court on 18th August, 1980, for further proceedings in the suit. No order as to costs.

S.C.K.

Before B. S. Dhillon and M. R. Sharma, JJ.

MANJIT SINGH,—*Petitioner.*

versus

STATE BANK OF INDIA,—*Respondent.*

Civil Revision No. 2515 of 1979.

July 15, 1980.

Code of Civil Procedure (V of 1908)—Sections 35-B and 115—Plaintiff allowed time to file replication on payment of costs—Costs not paid on the day replication is filed—Court allowing payment of costs on the next date of hearing—Non-payment of costs at the time of filing of the replication—Whether makes it obligatory for the Court to dismiss the suit—Order giving time for payment of costs challenged in revision—High Court—Whether to interfere in such circumstances.

Held, that it is no doubt true that the language employed in section 35-B of the Code or Civil Procedure, 1908, is pre-emptory in nature but the use of the word 'shall' does not necessarily indicate that a Court which is seized of the case has no discretion in the matter. It has to take into consideration the degree of the default, the nature and the stage of the proceedings for passing the appropriate order. Where the Court allows the payment of costs on the next date of hearing, it implies that the rights of the defendant were duly safeguarded. No injustice muchless manifest injustice has been caused to the plaintiff because of such an order. The parties are virtually at per and the case shall be heard and decided on merits. In a situation like this, the High Court seldom interferes under Section 115 of the Code, for the law is well settled that even if the order passed by the Court is technically incorrect, the High Court does not interfere on the revisional side if the order does not result in miscarriage of justice. (Paras 2 and 3).