
(1975) 12 GUJ CK 0027
In the Gujarat High Court

Chamar Govindbhai Hirabhai (since deceased by his heirs)	APPELLANT
Vs	
Harijan Tababhai Alabhai (since deceased by his heirs)	RESPONDENT

Date of Decision : 05-12-1975

Acts Referred:

Limitation Act, 1908 — Section 14, 5
Limitation Act, 1963 — Section 5

Citation : (1977) 18 GLR 202

Hon'ble Judges : J.B. Mehta, J;D.P. Desai, J

Bench : Division Bench

Judgement

J.B. Mehta, J.—The original defendant-appellant has come in this appeal as the learned Single Judge has refused to set aside the abatement of the second appeal in question. The plaintiff respondent in the second appeal Harijan Tababhai Alabhai is said to have expired on November 3, 1967. The present appellant however had got information of the death of this plaintiff-respondent from a school teacher of Bhalod of the death having taken place on February 18, 1968. Thereafter, the petitioner-appellant tried to get further information but he found no entry in the register in the village Koth or in the village Kalizundal. As he got information that the said death of the plaintiff-respondent took place in the village Kalizundal near Ahmedabad on February 18, 1968, the present Civil Application was filed on April 22, 1968 for impleading the heirs. When the plaintiff-respondent's heir Bai Jivi took up a contention that her husband died on November, 3, 1967, the C.A. given by the petitioner was amended. The petitioner had also produced a letter of the Talati on April 2, 1968, that in the birth and death register of the village Koth even though Tababhai Alabhai had died in that village, no entry was made in that register and so he could not send the relevant certificate. The learned Single Judge has passed the following order:

Heard. Read the affidavits filed by the parties and documents referred to. No sufficient cause for condoning the delay and setting aside the abatement. Story given out on behalf of the petitioner (appellant) not reliable and acceptable. C.A. is dismissed with costs.

It is against this order that the present Letters Patent Appeal has been filed by the original defendant-appellant.

2. Mr. Chhatrapati raised a preliminary objection that against such an interlocutory order that no such L.P. Appeal was competent, especially as the learned Single Judge was exercising appellate jurisdiction and no certificate had been obtained from him under Clause 15 for filing this appeal, and directly L.P. Appeal had been filed before this Court. After the decision in *Shanti Kumar R. Canji Vs. The Home Insurance Co. of New York*, the test as to what is the judgment within the meaning of Clause 15 of Letters Patent (Bom.) is now well settled. Their Lordships in terms held that in finding out whether the order was a judgment within Clause 15 it had to be found out that the order affected the merits of the action between the parties by determining some right or liability. The right or liability was to be found out by the Court. The nature of the order would have to be examined in order to ascertain whether there has been a determination of any right or liability. It, was therefore, held in that case that where an amendment took away from the defendant the defence of immunity from any liability by reason of limitation, it was a judgment within Clause 15. It was a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It was the final decision so far as the trial Court was concerned. Applying the settled test it is obvious that the order refusing to set aside the abatement of the appeal is clearly a final decision determining Us between the parties whether the appeal which had abated ought to be set aside or not, and it completely and finally settled the question because the appeal of the present appellant in view of this final order could not be decided on its merits. Therefore, it was a final determination of the rights and liabilities of the parties and such an order was clearly a judgment within the meaning of Clause 15. Even the, other question stands concluded by the decision in *Shantilal Chandrashanker v. Bai Basi* 16 G.L.R. 1 . at page 11. In that case the learned Single Judge had at the admission stage dismissed the appeal because the advocate of the appellant was absent and having gone through the judgment of the Court below and the memorandum of appeal, the learned Single Judge saw no reason to admit the appeal. When further order was passed by the learned Single Judge refusing to restore that appeal and readmit the same, L.P. Appeal was entertained and the learned Chief Justice, speaking for the Division Bench, in terms held that the order under appeal finally disposed of the rights of the parties and was really an order on an original proceeding before the learned Single Judge, viz. application for restoration, and therefore, the Letters Patent Appeal was clearly competent. In the present case, even the second appeal had abated by operation of law, and, therefore, there was no question of the learned Single Judge exercising any appellate Jurisdiction. The order passed by the learned Single Judge was clearly on the original proceeding which was taken by filing the present petition to set aside abatement under the relevant provision of Order 22 Rule 9 (2) read with Order 22 Rule 11. Therefore, the Letters Patent Appeal against such a Judgment within the meaning of Clause

15 of the Letters Patent was clearly maintainable without any certificate of the learned Single Judge. In this context Mr. Chhatrapati tried to press in aid the decision in *Kondabai Kunkalika Salunke Vs. Shrimant Chintamanrao and Others*, , where an appeal had been filed under Article 136 before the Supreme Court and the question had arisen whether the application for setting aside the abatement of the second appeal and condoning delay filed in the High Court could have been dismissed outright without issuing notice to the respondent by the learned Single Judge by the order "rejected." Their Lordships held that the applicant stated matters which required to be subsequently satisfactorily controverted before such an application could be dismissed. Even in cases where such an application was dismissed for some patent infirmity, the Court concerned should have given its reasons for the dismissal. It is in that context that their Lordships observed that such orders were judicial orders subject to a final appeal, for exceptional reasons even to the Supreme Court. Therefore, it was held that where such an application was dismissed without issuing any notice to the respondents and without stating any reasons at all for the dismissal, a good enough case was made out for the exercise of the special jurisdiction of the Supreme Court to interfere even under Article 136 of the Constitution. This decision could never be pressed in aid for showing that the Letters Patent Appeal would not be competent against this order or that such a proceeding is not original proceeding and that while disposing of such original proceeding the learned Single Judge was exercising appellate jurisdiction. The only effect of this ratio is that there are judicial orders which would be subjected to final appeal in exceptional reasons even before the Supreme Court and, therefore, they should be passed after notice to the other side and after giving reasons. Therefore, the preliminary objection raised by Mr. Chhatrapati must fail in view of this settled legal position.

3. The next question which was raised by Mr. Chhatrapati was that this was a pure discretionary order and when the learned Single Judge after reading the affidavits and the documents referred to refused to accept the petitioner-appellant's story as reliable and acceptable, and came to the conclusion that there was no sufficient cause for condoning delay and setting aside abatement, the appellate Court could not review exercise of the discretionary jurisdiction. The legal position in this connection is also well settled. In *Sarpanch, Lonand Grampanchayat Vs. Ramgiri Gosavi and Another*, , where the question had arisen on the exercise of discretion of the Minimum Wages Act authority to condone delay for sufficient cause, their Lordships held that the authority had discretion to condone the delay in presenting the application, provided sufficient cause had been shown to his satisfaction. That discretion like other judicial discretion must be exercised with vigilance and circumspection according to justice, common sense and sound judgement. The discretion was to know through law what was just, see *Keighley's case* (1609) 10 Co. Rep. 139 : 77 ER (1136). Their Lordships approved the settled legal position in connection with Section 5 of the Indian Limitation Act, which was laid down in *Krishna v. Chathappan* ILR (1890) Mad. 269 where the Madras High Court indicated how the discretion u/s 5 should be

exercised:

We think that Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood, the words, "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant.

Their Lordships pointed out that this decision had received approval in *Dinbandhu Sahu v. Jadumoni Mangaraj* AIR 1954 S.C. 411 at p. 414 and in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, , and it was settled legal position that the word "sufficient cause" in such a provision for condonation of delay should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is imputable to the applicant. Thereafter their Lordships pointed out that even where no appeal lay against the order of the authority, the High Court was vested with the power of judicial superintendence over the tribunals under Article 227 of the Constitution and the High Court ordinarily would not review the discretion of the Authority judicially exercised, but it might interfere if the exercise of discretion was capricious or perverse or ultra vires. In that case discretion was held to be properly exercised because having regard to all the circumstances of the case the employees were not guilty of inaction or negligence and the entire delay in presenting the application was due to their honest though mistaken belief that the relief of overtime wages would be granted to them through the intervention of inspectors and their superior officers. Again in *Union of India (UOI) Vs. Kamlabhai Harjiwandas Parekh and Others*, , on the question of condonation of delay, their Lordships adopted the settled principle laid down by the House of Lords in *Zacharia v. Republic of Cyprus* 1963 A.C. 634 at page 661, as observed by Viscount Simonds that such discretion should not be overruled by the appellate Court unless they were satisfied that the High Court had acted on some wrong principle or committed some error of law or had failed to consider matters which demanded consideration. That is why in such discretionary matters, even in the context of Section 115 of the Code of Civil Procedure, their Lordships held in *Ajantha Transports (P) Ltd., Coimbatore Vs. T.V.K. Transports, Pulampatti, Coimbatore District*, that the matter would be one in the realm of jurisdictional error. Their Lordships pointed out that relevancy or otherwise of one or more grounds of refusal of a permit could be a jurisdictional matter. A grant or its refusal on totally irrelevant grounds would be ultra vires or a case of excess of power. If a ground which was irrelevant was taken into account with others which were relevant, or a relevant ground, which existed was unjustifiably ignored, it could be said to be a case of jurisdictional error, which could be reviewed even u/s 115 of the C.P. Code. That is why this same principle has been well enunciated by the Court of Appeal in *Walker v. Walker* 1967 (1) W.L.R. 327 at page 330 as a settled principle as to how far the appellate Court should exercise its jurisdiction to interfere with the discretion exercised by the trial Court by proceeding on two

settled tests. In the context of refusal of grant of adjournment it was held that where such refusal would result in a serious injustice to the party requesting it, it should be refused only if that is the only way that justice can be done to the other party and that when discretion is exercised so as to result in injustice, the appellate Court has both the power and the duty to interfere by reviewing the exercise of such discretion. In view of this settled legal position Mr. Chhatrapati could hardly contend that such discretion which is fettered by our statute by the condition precedent of the existence of sufficient cause could ever be contended to be so absolute that it Could not be reviewed in appeal. Their Lordships have reviewed this discretion not only in the exercise of the appellate jurisdiction but even in the superintendence power or under the revisional jurisdiction even under the narrow limitations of Section 115, where only jurisdictional errors could be reviewed. Once it is held that the power is fettered by the statutory perspective laid down by the statute, the order would clearly attract the ultra vires doctrine, and therefore, in such cases it would both be the duty and the power of the appellate Court to interfere with such orders when discretion is wrongly exercised so as to result in such serious injustice.

4. The statutory perspective of this power of the Court to set aside the abatement is also well settled. In Union of India (UOI) Vs. Ram Charan and Others, their Lordships pointed out that the provisions of the Code in this context are with a view to advance the cause of justice. Their Lordships, therefore, held that the Court in considering whether the appellant had established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question did not relate to the merits of the dispute between the parties and because if the abatement was set aside, the merits of the dispute could be determined, while if the abatement was not set aside, the appellant was deprived of his proving the claim on account of his culpable negligence or lack of vigilance. Their Lordships sounded a caution that would not mean that the Court should readily accept whatever the appellant alleged to explain away his default. The duty of the Court in such cases is to scrutinise the appellant's allegations and it would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for impleading the legal representatives of the deceased or for setting aside the abatement. It was, therefore, pointed out that there was no duty on the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it did not mean that the mere fact of the appellant coming to know of I he respondent's death belated would by itself justify his application for setting aside the abatement. Their Lordships interpreted Order, Rule 9 of the Code as requiring the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. Therefore, the mere allegation about his not coming to know of the death of the opposite party was not sufficient. He had to state reasons which led to his not knowing of the

death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, especially when the correctness of those reasons was challenged by the legal representatives of the deceased who had secured a valuable right on the abatement of the suit. Further proceeding, their Lordships pointed out that this was the only remedy of the plaintiff because Rule 9(1) barred a fresh suit on the same cause of action. Therefore, the legal representative of the plaintiff had to get the abatement of the suit set aside by applying within time for that purpose and the Court would set aside such abatement if it was proved that the applicant was prevented by any sufficient cause from continuing the suit. Therefore it was held that this relevant statutory guideline meant that the applicant had to allege and establish facts, which in view of the Court, be sufficient reason for his not making application for bringing on record the legal representatives of the deceased within time. Their Lordships refused to accept the extreme contention that the limitation ran from the date of the knowledge. The relevant Articles of the old Limitation Act 177 and 171, corresponding to the new Articles 121 and 120, were referred to, and their Lordships pointed out that these five month" period was sufficiently long period which had been fixed by the Legislature on the expectancy that ordinarily the plaintiff would be able to learn of the death of the defendant and of the persons who were his legal representatives within that period. The Legislature might have expected that ordinarily the interval between two successive hearings of a suit would be much within three month and the absence of any defendant within that period at a certain hearing might be accounted by his counsel or some relation to be due to his death or might make the plaintiff inquisitive about the reasons for the other party's absence. The Legislature also took into account that there might be cases where the plaintiff might not know of the death of the defendant as ordinarily expected, and, therefore, not only provided a further period of two month under Article 177 for an application to set aside an abatement, in addition to the first limitation period of three month, under Article 171, but the provision was made to invoke even Section 5 of the Limitation Act to such application. Therefore, the plaintiff was allowed sufficient time to make an application to set aside the abatement which, if exceeded five month, would be considered justified by the Court in proved circumstances of the case. What considerations would constitute sufficient cause for setting aside the abatement or for not applying to bring the legal representatives on the record or for not applying to set aside abatement within the prescribed time, could not be precisely laid down, but their Lordships pointed out that the delay in making such applications should not be for reasons which showed plaintiff's negligence in not taking certain steps which he could have and should have taken. The necessary steps would again depend on facts and circumstances of each case and any statement of illustrative circumstances or facts would tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amounted to sufficient cause or not. The only salutary guideline laid down was that the Court had to use its discretion in the matter soundly in the interest of justice. The mere statement that the appellant was ignorant of the death could

not be a sufficient cause because the party would have to allege in the first instance why he did not know of the death of the respondent earlier or why he could not know about it despite his efforts, if he had made any efforts on having some cause to apprehend that the respondent might have died. The correctness of his reasons could be challenged by the other party. The Court would then decide how far these reasons had been established. In *Baijinath Prasad v. Ajodhya Parsad*, Civil Appeal No. 383 of 1957 decided on August 3, 1962, their Lordship emphasised that it would be unreasonable and singularly unrealistic to require the appellant who had filed an appeal to keep continuous vigil on the continued existence of his opponent. In dealing with such question it would be desirable that Courts should import commonsense and should not solely depend on technical or academic considerations. Therefore, in that case their Lordships in terms held that if it was shown that Kunj Behari's ignorance about the death of Imtiaz Unissa was not the result of lack of diligence on his part, it could be reasonable to condone delay in bringing Kaniza Fatima on record. It was also pointed out that what had been said about ignorance of a party about the death of his adversary might apply in a proper case about all the heirs of his adversary who happened to be a Mohemedan. It is this approach which has been emphasised in the *The State of West Bengal Vs. The Administrator, Howrah Municipality and Others*, a by pointing out that the expression "sufficient cause" should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide was imputable to a party, and that proof of sufficient cause was a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by Section 5 of the Limitation Act. The decision in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, was in terms approved, where the expression "within such period" in Section 5 was finally interpreted to mean, within the period which ends with the last day of limitation prescribed, so that in all cases falling u/s 5 what the party had to show was why he did not file such application for setting aside the abatement on the last day of the limitation prescribed. In other words in showing sufficient cause for condoning the delay, the delay would have to be explained between the last day prescribed for such application and the day on which the application for setting aside the abatement is made. If sufficient cause was not proved, nothing further had to be done, and the application for condoning the delay had to be dismissed on that ground alone. If, sufficient cause was, however, shown then the Court had to exercise discretion to condone the delay on considerations at that stage of the question of diligence or bona fides of the party. Their Lordships, therefore, emphasised that in such context the enquiry was not justified as to why the party was setting idle during all the time available to it or the whole of the limitation period, and that even considerations which are material and relevant u/s 14 of the Limitation Act should not be invoked u/s 5, but on a broad common sense approach this sound judicial discretion should be exercised to advance substantial justice. In such cases, therefore, it is the duty of the Court to scrutinise the reasons given and to consider the same on merits, and in the light of these settled legal principles, this question has to be disposed of.

5. Sufficient cause as alleged by the party would have to be examined when the reasons are challenged by the other side. The Legislature having given under the two relevant limitation articles the period of five month during which the application for setting aside the abatement can be made, it is only when the period is in excess of five month that the question of condonation of delay u/s 5 arises, for the period between the last day of the total five month limitation period and the date of the application for setting aside the abatement. As per the settled legal position in *Ram Charans case* (supra) in the first part of the enquiry, sufficient cause enquiry is directed to the question whether the concerned petitioner was in a position to know of the death of the other party earlier, or why he could not know despite his efforts, if his efforts were made on having some cause to apprehend that the other party might have died. Once this sufficient cause as to ignorance is established, not on the standard of strict proof of those facts, as held by their Lordships in the aforesaid decision, but by only finding out whether the version was a probable version or in the sense of more likely than not, thereafter the further inquiry for condonation of delay u/s 5 should be only from the point whether the aforesaid delay in not taking necessary steps, which could or should have been taken, is attributable to such default of inaction or serious negligence on the part of the petitioner that it can be inferred that there was no bona fide and diligent continuation of the proceeding. As discretion in such cases, which has been vested in the Court, has not to be exercised in a technical way but is the sound judicial discretion on common sense approach so as to advance substantial justice, it would be reasonable to condone such delay, if the ignorance about the death of the adversary or his heirs was not the result of such lack of diligence or inaction or want of bona fides in not taking necessary steps which the petitioner could or should have taken, as should justify depriving him of the protection of Section 5 of the Limitation Act. It is these guidelines which have been emphasised by M.P. Thakkar J. in *Karim Abdulla v. Bat Hoorbai* 16 G.L.R. 335. It is in this perspective that all the relevant facts which have bearing in this question have to be considered.

6. In the present case the facts were too eloquent because the case of the petitioner was that he was residing at Bavla which is at a distance of about 18 miles from the village Koth where the respondent-plaintiff resided. The defendant was of Chamar community while the respondent plaintiff was Harijan (Dhed) and they were thus of two different communities. Admittedly, there was no relationship between them and it was the petitioner's case that in Koth village he had no relation or acquaintance. The defendant was a piece-rated labourer when he expired at the age of 85. The case of the petitioner was that he: had received information at the end of March 1968 from one school teacher of the village Shalod that the respondent died on the Sunday succeeding the Maha Sud Punam of the year i.e. on February 18, 1968. He immediately tried to verify this information by finding out the place of death. He however, found no entry in the register of birth and death maintained by the local authorities in the village Koth

or in the village Kalizundal, where according to the other information gathered by him the respondent was said to have died. The petitioner was corroborated as to the ignorance alleged by him by independent evidence of the letter of the Talati, who had maintained birth and death register in the village Koth, on April 2, 1968, where the Talati had categorically stated that even if Tababhai Alabhai had died at the village Koth, there was no entry in the register of the village and so he could not send any such certificate. This letter is of April 2, 1968, which is completely eloquent as to the enquiry which had been made by the petitioner. This would have naturally puzzled him and therefore, it is obvious that he must have made further enquiry as alleged by him and, therefore, the application was first presented on April 22, 1968, on the basis of the information that he had received. The petitioner was under the impression that the death had taken place on February 18, 1968 and therefore the application was within time. In such circumstances if he had made this detailed enquiry no default could be attributed to him. If the maintenance of continuous vigil on the continued existence of the opposite party is not the law in such cases, it is obvious that on common sense approach in such cases no default of lack of diligence or want of bona fides whatever can be attributed to this petitioner, and so once he proved the sufficient cause for this ignorance, the delay in taking necessary steps to implead the heirs being occasioned by no default on his part should have been condoned as per the well settled principles.

7. The only challenge which was offered to this version of the appellant was that in 1962 elections this old man had taken part and so he may have acquaintances and relations in Koth village, and that the two communities were only two different castes. This would be hardly material to meet the case of the petitioner-appellant that now he was not healthy as admittedly he was more than 85 and he could not move out, and that he had no relation or acquaintance whatever in Koth, so that he could know of the fact of the death of the respondent earlier.

8. The question of appreciation of the two relevant versions would have bearing on the date and place of the death. The appellant's version was, as per the information received by him that the respondent died on February 18, 1968, at the village Kalizundal and he was supported by affidavit of the teacher Gulabbhai Chauhan of Bhalej village who was next door neighbour of the respondent's widow Jivi's brother. The version of the widow Jivi, being based on personal knowledge, it was preferred and it would only show that the date of the death was 3-11-67 and it had taken place in the village Koth. The date of death would be material on the question as to whether any abatement had taken place at all during the first limitation period of three months. So far as the present question of setting aside the abatement is concerned, if he came within five months period, the abatement would have been set aside. The question of diligence arose only because the subsequent delay had to be condoned u/s 5 for setting aside the abatement after the five months' limitation period had expired. In that context it must be borne in mind that the reason alleged by the petitioner-appellant for his not having come to know of the death earliest had remained almost

unchallenged. Thereafter, even further part of his version was that as soon as some information was received by him in March, 1968 from a teacher, he immediately tried to make enquiry from the village birth and death register to find out the correct date and place of the death. He, however, could find no such entry in both the villages Koth and Kalizundal. In that connection the letter of Talati, dated April 2, 1968, on the day when even the entire five month" period of limitation just expired, had categorically informed the appellant that no entry whatever had been made in the village birth and death register as to the fact of the death of the respondent at the village Koth. That would lead to the necessary inference that the information on the basis of which subsequent certificate was issued by the Talati on 27-7-1968 to the respondent, about the entry 37 of 3-11-67 of the death of Tababhai Alabhai Vaghela aged about 85, from stomachache, was subsequently received information or that this public servant had somehow misled the petitioner-appellant. This very circumstance would however be eloquent to establish the fact that as soon as the petitioner-appellant came to know of the fact of the death he immediately made proper inquiry in this public register where the relevant fact about the date and place of the death of the respondent could be normally found out and even as late as on April 2, 1968, he had not received full information. The delay which he really had to explain to invoke the protection of Section 5 of the Limitation Act was only from April 2, 1968 to April 22, 1968 i.e. the last day of five month" period of limitation and the date of the application to set aside the abatement, which in these eloquent circumstances could never be attributed to any default of lack of diligences or want of bona fides on his part in taking the necessary action. Therefore, the petitioner-appellant had established as to why, despite his efforts, after the clue was received as to the death of the respondent on March 1968, he could not implead the heirs within the time prescribed, and that thereafter immediately on gathering information, the present petition was diligently filed on April 22, 1968. Therefore, that subsequent period from April 2, 1968 to April 22, 1968 has been sufficiently explained and no default could be attributed to this appellant on the score of negligence or total inaction or want of bona fide. Therefore, the sufficient cause as per the statutory guidelines was clearly established in this case.

9. Mr. Chhatrapati no doubt vehemently objected to the additional evidence which was now tendered in the appeal because of the fact that the certified copy of entry No. 37 which had been given to the respondent did not show the position, as per the original record with certain erasures, and we had called for the original record to satisfy the Court's conscience and to see whether there was any prima facie case of any forgery but we found that the Talati may have bona fide made this late entry, for the simple reason that these corrections can be explained on the basis of information being received late by him and that is why after entries 34, 35 36 of 10th, 24th and 29th November, this entry of 3rd November finds its place and secondly, the fact of the death of four males has been altered to 5 males in the relevant column. For clarification of the

correctness of the entry such additional evidence could surely have been admitted, especially when the respondent has met this evidence by filing his affidavit, but it is not necessary for us to consider that additional evidence because even without such additional evidence, the fact remains that the Talati having intimated, on April 2, 1968, the petitioner-appellant that no such entry had been made in the village record, it is obvious that the said information had been subsequently received by the Talati and that the petitioner had been misled by the Talati, In such a case the fact that the subsequent certificate has been issued to the respondents of this entry 37 of the death of respondent on November 3, 1967, could not help the respondent to challenge the case of sufficient reasons advanced by the petitioner-appellant. Equally we have not considered other additional evidence which was tendered in the appeal for resolving the controversy as to the place of the death, and we are deciding the whole thing on the original evidence which was led before the learned Single Judge.

10. All the facts which were averred by the petitioner-appellant clearly established that he could not know earlier, the of the death of the respondent than in March 1968, and that he had taken all the necessary steps, after he got this first clue, to ascertain the date and place of the death, and whatever delay had taken place was due to the fact that the public servant like the Talati had either misled him or because no entry had been made in the village record of the death of the respondent, and despite his efforts after the clue was received as to the death of the respondent, the appellant could not within time implead these heirs, and even subsequent delay from April 2, 1968 to the date of the application having been duly explained as not being attributable to any default of negligence or inaction of the petitioner-appellant. The only conclusion which was possible on this evidence was that sufficient cause for condoning the delay and setting aside the abatement was shown as per the statutory guidelines settled in the context. As per settled law the inquiry as to due diligence or want of bona fides was really material and relevant in the context of only subsequent delay from April 2, 1968, the last day of the five month" period to the date of the application for setting aside the abatement, but in this case even the earlier delay for the entire period was wholly explained.

11. In that view of the matter the decision of the learned Single Judge was clearly untenable and should be reviewed even in appeal. Therefore, this appeal must be allowed by setting aside the order of the learned Single Judge and by allowing the Civil Application filed by the petitioner-appellant by making the rule absolute with costs. The Letters Patent Appeal is accordingly allowed with costs.