
(1915) 12 MAD CK 0020
In the Madras High Court

Devibhashyam Venkanna, Minor, by Paternal Grandmother
and Guardian Lachamma

APPELLANT

Vs

Peddinti Venkataramanayya and Another

RESPONDENT

Date of Decision : 08-12-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22(4)

Citation : 32 Ind. Cas. 579 : (1916) 3 LW 109

Hon'ble Judges : William Ayling, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Abdur Rahim, J.—There has been a delay of 34 days in the presentation of this appeal, and the affidavit filed on behalf of the appellant does

not account for the greater portion of that delay. The appeal is dismissed with costs.

2. The next question is whether we can hear the memorandum of objections, which was filed within one month from the filing of the appeal as

required by law. The question depends upon the construction of Order XLI, Rule 22, of the new Code corresponding to Section 581 of the old

Code. The new Code has made certain alterations in the law with respect to the hearing of the memorandum of objections. It provides by Clause 4

that even if the original appeal is withdrawn or dismissed for default, the objections filed may nevertheless be heard and determined. But it does not

say in so many words, at least so far as that clause is concerned, what will happen if the appeal is dismissed on the ground that it was filed after the

expiry of the time allowed by law.

3. The question came up recently for consideration before Coutts Trotter and Kumaraswami Sastri, JJ., in *Biridugadda Venkadu v. Receiver of*

Nidadavole and Medur Estates (1915) M.W.N. 792. They have held that the memorandum of objections filed in circumstances similar to this case should be heard, though they have refrained from expressing any definite opinion on the general question involved. I am inclined to take the view that the memorandum of objections can be heard. I treat a case like this, where the appeal has failed or rather has been dismissed because it was filed out of time, as being dismissed upon hearing, distinguishing it from the case where it is not heard at all, being withdrawn or dismissed for default. Cases of withdrawal or dismissal for default are expressly provided for in Clause 4, because it has been the relief under the old Code that in such cases the memorandum of objections fails ipso facto. I think the case of dismissal of an appeal filed out of time stands on a different footing and is very similar to the dismissal of a suit on the ground of limitation, and must be taken to be covered by Clause 1 of Rule 22, Order XLI. That is to say, the respondent in spite of the dismissal of the appeal because of limitation is entitled to have his cross-objections heard, if it was filed within one month of the filing of the appeal. That has been done in this case. Unless the Code lays down otherwise, I should say the respondent is entitled to have his objections heard. Having heard the objections on the merits, I think, however, that the memorandum of objections must be dismissed. It relates only to the question of costs and the Subordinate Judge appears to me to have exercised sound discretion in allowing part of the costs against the 1st defendant. At any rate, I am not prepared to say that there was no justification for the exercise of his discretion. He had a discretion and there were circumstances calling for the exercise of that discretion. The memorandum of objections is dismissed with costs.

Ayling, J.

4. As regards the preliminary question whether the respondent is entitled to have his memorandum of objections heard and determined, I am bound to say that my mind is not altogether free from doubt. The case to which we have been referred, Biridugadda Venkadu v. Receiver of Nidadavole and Medur Estate 30 Ind. Cas. 832, is certainly indistinguishable from the present one. But I feel somewhat pressed by the wording of Clause 4 of Order XLI, Rule 22, which so far as their judgment shows, was not considered by the learned Judges in that case. I find it unnecessary

to say more as in the present case, I entirely agree with my learned brother that the memorandum of objections is one which should be dismissed on its merits.

5. I concur in the order proposed by my learned brother.