

(1961) 11 KL CK 0003

In the High Court Of Kerala

Case No : C.M.P. No's. 902 to 905 of 1961 in S.A. No. 659 of 1957

Gopalakrishna Iyer

APPELLANT

Vs

Madhavi and Others

RESPONDENT

Date of Decision : 02-11-1961

Acts Referred:

Limitation Act, 1963 — Article 177, 3

Citation : (1962) KLJ 12

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : C.K. Viswanatha Iyer, for the Appellant; K.N. Karunakaran for Respondents 6 and 7, for the Respondent

Final Decision : Dismissed

Judgement

M. Madhavan Nair, J.—The sole respondent in this case died on September 15, 1957. C. M. P. No. 904 of 1961 is an application to implead his legal representatives; C. M. P. No. 903 of 1961 to set aside abatement of the appeal; C. M. P. No. 909 of 1961 to condone the delay in making the application to set aside the abatement; and C. M. P. No. 905 of 1961 to appoint a guardian for the minors among the legal representatives. These applications are dated February 12, 1961 and were filed in court on February 14, 1961. The affidavit in support of the first three petitions reads thus :

I state that I became aware of the death of the respondent only on receipt of a letter from my Advocate at Ernakulam on 10-2-1961 (which is filed herewith).

The delay in filing the petition to bring the Legal Representatives on record is due to my ignorance about the death of the respondent. There was no wilful neglect or default on my part.

The dispute involved in the Second Appeal is.....and I have throughout been diligent in the conduct of the proceedings.

So it is just and necessary that the delay in seeking to set aside the abatement should be excused and the abatement of the appeal should be set aside and the Legal Representatives of the respondent should be brought on record.

2. Relying on *Secretary of State v. Vinjamuri Krishnamacharyulu* (A.I.R. 1938 Mad 218), counsel for the appellant contended: "it is not incumbent upon an appellant to make periodical inquiries as to whether the respondent is alive", that as he got intimation from his counsel only on 10-2-1961 he had sufficient justification for not making the applications earlier and that therefore the petitions should be allowed. I do not feel persuaded by this contention. The Limitation Act, by its Section 3, commands that every application made after the period of limitation prescribed therefor by the first schedule to the Act shall be dismissed, although the limitation has not been set up as a defence; and prescribes, by its Article 177, a period of 90 days from "the date of the death of the deceased respondent" for an application to have his legal representative made party to the appeal. It follows then that till the appeal is heard the appellant in every appeal is bound to make regular inquiries at intervals not exceeding 90 days as to whether every respondent in his appeal is alive unless he be indifferent to his appeal getting abated. The contention that the appellant is not bound to enquire about the death of the respondent in his case directly contradicts the provisions of the Limitation Act and therefore cannot be accepted. I would, therefore, with respect, dissent from the dictum in AIR 1938 Mad 218, and hold that the appellant is bound to make his application to bring in the legal representatives of any deceased respondent within 90 days of the death of the respondent and to make the necessary inquiries to avoid delay in the matter.

For making an application to set aside abatement, the Limitation Act, by its Article 171, prescribes a period of 60 days, subject of course, to the provisions of Section 5 of the Act.

The affidavit (quoted above) filed in support of the application to condone the delay does not give any cause sufficient to explain the long delay of three and a half years in making the application. The only ground mentioned is that the information on the matter that came to him from his Advocate was belated. In my opinion, it is not the duty of counsel for the respondent to inform counsel for the appellant that his party has died, nor is it the duty of counsel for the appellant to inform his party that the respondent is no more. With the death of the respondent, the engagement of counsel ceases and thereafter he is not interested in the proceedings in the case. No fault can be found with him in not having informed appellant's counsel of the death of the respondent. Nor is it the duty of the legal representatives of the respondent to intimate counsel for the respondent of the death of the respondent. They need take any interest in the case only after they have been brought on record by the appellant. Nor can any blame be attributed to the appellant's counsel in not intimating his party of the death of the opponent in the case. Instructions as to facts are to come from the party to counsel and not vice versa. It therefore follows that there is no ground

made out to condone the delay in this case. The petition C. M. P. No. 902 of 1961 has therefore to be dismissed.

It then follows that the other petitions are beyond time and have also to be dismissed. The result may be that the appeal is to be declared abated and has to be removed from the file, the deceased having been the sole respondent in it. But that is no ground for overlooking the law laid down by the Limitation Act.

All the C. M. Ps. are dismissed.