

(1953) 10 KL CK 0016
In the High Court Of Kerala
Case No : C.R.P. No. 977 of 1952

Kevi Pillai Bhavani Amma

APPELLANT

Vs

Velayudhan Pillai Govinda Pillai

RESPONDENT

Date of Decision : 27-10-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 9
Limitation Act, 1908 — Section 5
Travancore Limitation Act, 1908 — Article 148

Citation : (1953) 10 KL CK 0016

Hon'ble Judges : Joseph, J

Bench : Single Bench

Advocate : T.S. Krishnamoorthy Iyer, for the Appellant; M. Madhavan Nair, for the Respondent

Final Decision : Allowed

Judgement

Joseph, J.—When this matter came before this Court in C.R.P. 584/51 it was remanded with the direction that the learned Munsiff should enter definite findings on the question of limitation and also as to whether Plaintiff's next friend was guilty of negligence in conducting the case. I am constrained to observe that the disposal after remand is still unsatisfactory.

2. The Plaintiff's next friend on, behalf of the Plaintiff sued for redemption of a mortgage. The suit was not diligently prosecuted and was dismissed on 32-10-1124. The Plaintiff filed a restoration petition on 9-4-1126/24-11-1950 alleging that his next friend was guilty of gross negligence, fraud and collusion and that these brought about the dismissal of the suit. The trial Court found that the next friend was negligent in the conduct of the case and that the question of limitation did not therefore arise. The petition was accordingly allowed and the Defendant has again come for revision.

3. The main point urged is that the question of limitation was not considered in spite of the direction in the order of remand. Under Article 148, Travancore

Limitation Act which was then in force, the Plaintiff had to file the application for setting aside the dismissal of the suit within 30 days. This was not done. It is open for him to show that he is entitled to the benefit of Section 5, Limitation Act. But the only ground referred in the affidavit for not making the application earlier is that the Plaintiff was unaware of the fact that such a suit has been filed. This can hardly help him. If he had filed the suit on the date of the restoration petition it might not have been in time. He has to fall back on the plaint filed by the next friend, to save the claim from the bar of limitation. At the same time, he cannot claim his alleged ignorance of the suit as a sufficient ground for not taking proper steps earlier. The reasoning of the trial Court that if the next friend was negligent, no question limitation would arise, is not sound. Besides, the mere assertion or finding that the next friend was negligent is insufficient to support an order restoring the suit to file.

In *Vaithilinga Naidu*, represented by next Friend, Subbammal and Another Vs. *Devanai Ammal and Another*, it was held that the words "sufficient cause" in Order 9, Rule 9 or Order 9, Rule 13 CPC could not be construed so as to include also cases of negligence on the part the next friend or guardian "ad litem" and that the effect of such a construction would be to render the expression "sufficient cause" entirely meaningless, as every non-appearance of a next friend or guardian "ad litem" would, in that view, attract the operation of Order 9, Rule 9 or Order 9, Rule 13. A more liberal view was taken in some earlier decisions referred to in - "*Vaithilinga Naidu v. Devanai Ammal (A)*". I think the law has been correctly stated in the decision cited above.

4. The next friend who was examined as P.W. 2 deposed that she did not know anything about the case as her husband was conducting the same. The Plaintiff attained majority while the suit was pending trial but he did not choose to move for the removal of the next friend or to conduct the case himself. Both the next friend and the Plaintiff were negligent in the conduction of the case. There was not sufficient cause either for restoration of the suit under Order 9, Rule 9 for condonation of delay u/s 5, Limitation Act. The order of the Court below is unsustain able and it has to be set aside.

5. In the result I reverse the order of the Court below and allow the Civil Revision Petition. There will be no order as to costs.