
(1999) 03 KL CK 0025

In the High Court Of Kerala

Case No : L.A.A. No. 1063 of 1992 and C.M.P. No. 1403 of 1993

State of Kerala

APPELLANT

Vs

Madhavakurup Ramachandran Pillai

RESPONDENT

Date of Decision : 17-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 22 Rule 4, Order 22 Rule 4(5)
Limitation Act, 1963 — Article 120, 5

Citation : AIR 1999 Ker 359 : (1999) 4 CivCC 652 : (1999) 2 ILR (Ker) 663 : (1999) 1 KLJ 863 : (1999) 3 RCR(Civil) 443

Hon'ble Judges : S. Krishnan Unni, J;P.A. Mohammed, J

Bench : Division Bench

Advocate : P.M. Poulose, for the Appellant; G. Janaradhana Kurup, for the Respondent

Final Decision : Dismissed

Judgement

Mohammed, J.—The above land acquisition appeal under S. 54 of the Land Acquisition Act, 1894 has been filed by the State on 20-8-1992 against the judgment and decree in L. A. R. No. 61 of 1987 of the Sub-Court, Thiruvananthapuram dated 12-11-1991 impleading the claimant Madhava Kurup Ramachandran Pillai as the sole respondent. Later the appellant-petitioner came to know that the claimant died on 20-11-1991. Therefore it filed C. M. P. No. 1403 of 1993 under Order 1, Rule 10(2) of the CPC praying to add respondents 2 to 6 who are the legal heirs of the deceased respondent as additional respondents 2 to 6 in the appeal.

2. The case of the petitioner as revealed from the affidavit dated 19-5-1993 filed by an Upper Division Clerk in support of the above petition is that the petitioner came to know of the death of the respondent only when notice issued to him by this Court was returned stating that he was no more. The said petition was not accompanied by a petition for condonation of delay. However this Court ordered

notice in that petition on 7-10-1993. Counsel for additional respondents 2 to 6 appeared and filed counter-affidavit and opposed it on the ground that there was no petition to condone the delay in filing the petition for impleading the legal heirs of the deceased respondent. However, when the C. M. P. came up for hearing subsequently it was submitted that a fresh petition to condone the delay would be filed. Accordingly a fresh petition, C. M. P. No. 1032/99 was filed, however there was no affidavit stating the reasons for the delay. In that petition the extent of delay was shown as 272 days. The said petition was filed on 18-2-1999, C. M. P. No. 1403/93 along with C. M. P. No. 1032/97 came up for hearing together on 19-2-1999. On that day it was represented on behalf of the State that the appellant would prefer to file a fresh affidavit and therefore adjournment was sought and accordingly it was posted to 22-2-1999. On that day a fresh petition, C. M. P. No. 1089 of 1999 for condonation of delay along with an affidavit by the District Collector, Thiruvananthapuram was filed. In that petition also the extent of delay was shown as 272 days. Thereafter on behalf of respondents 2 to 6 a counter affidavit was filed on 22-2-1999 opposing the said petition. Finally all the petitions came up for hearing on 24-2-1999 and counsel for the appellant and the respondents were again heard on that day.

3. Let us examine the extent of delay in filing the petition for impleadment of the legal heirs of the deceased respondent. According to the petitioner, as pointed out above, the extent of delay is only 272 days. In this context, it is necessary to find out as to how this calculation has been made. It is evident from the endorsements made on the certified copy of the judgment in L. A. R. No. 61 of 1987 that the appeal L. A. A. No. 1063 of 1992 had been filed on the last day of the period prescribed for filing the appeal, i.e., on 20-8-1992. C. M. P. No. 1403/93 for impleading the legal heirs was filed only on 22-5-1993. There is a delay of 272 days in filing this petition. But it was not accompanied by the petition for condonation of delay. However, there are two petitions for condonation of delay, C. M. P. No. 1032/99 and C. M. P. No. 1089/99. The first petition was filed on 18-2-1999 without any supporting affidavit and the second petition was filed on 22-2-1999 with an affidavit. If the time is calculated on the basis of C. M. P. No. 1089/99, there will be a delay of about seven years in filing the C. M. P. No. 1403 of 1993 for impleadment.

4. Article 120 of the Limitation Act is very relevant in the present context and hence it is reproduced hereunder.

"120 under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party (1908-Arts. 176, 177

Ninety days

The date of death of the plaintiff, appellant, defendant or respondent as the case may be."

It is significant to note that the above Article does not specify the provisions

under which the petitions for impleadment of legal representatives of the deceased are allowed to file under the Code. It only generally states "to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent made a party". That means when in substance an application is for impleadment of a legal representative of a deceased party to the suit or appeal it must be filed within the period of limitation provided under the Article. It may be by way of a petition for impleadment, or addition of parties or substitution. At any rate the period of limitation provided under this Article cannot be effaced by supplying different forms and shapes to such petitions.

5. Order XXII, inter alia, contains the procedure to be adopted in the case of death of parties to the suit. In view of Rule 11 thereof the provisions contained in this Order will apply to appeals. Rule 4(5) deals with an application for substitution of the legal representative of the defendant. In the present context, this sub-rule may be read as this : Where the appellant was ignorant of the death of a respondent and could not, for that reason, makes an application for substitution of the legal representatives of the respondent under the rule within the period prescribed in the Limitation Act, 1963 and the suit has in consequence abated and appellant applies after the expiry of the period specified therefore in the Limitation Act, 1963 for setting aside abatement and also for the admission of that application u/s 5 of that Act on the ground that he had by reason of such ignorance sufficient cause for not making the application within the specified period in the said Act, the court shall in considering the application under the said Section 5, have due regard to the fact of such ignorance if proved. This sub rule inserted by the CPC Amendment Act 104 of 1976 applies only in a case where the appellant was ignorant of the death of the respondent and hence he could not apply for the substitution in time. However the application seeking to set aside abatement and to condone the delay u/s 5 of the Limitation Act is necessary in such cases. The application u/s 5 shall contain "sufficient cause" for not making the application within the time by reason of such ignorance. If such ignorance is proved, the courts shall have due regard while considering the said application.

6. Before examining whether there is sufficient compliance of the requirement of Rule 4(5) of Order XXII in this case, we have to deal with C. M. P. No. 1403/93 filed under O. I. R. 10(2) of the C. P. C. praying to add respondents 2 to 6 therein as additional respondents 2 to 6 therein as additional respondents 2 to 6 in the appeal on the ground that they are the legal representatives of the deceased first respondent. This affidavit as observed earlier, has been filed by an Upper Division Clerk of the Collectorate, Thiruvananthapuram. We cannot countenance this practice of filing the affidavit by the Upper Division Clerk on behalf of the State. The affidavit ought to have been filed by an officer who is authorised to act on behalf of the State. Whatever that be, the question is whether O. I. R. 10(2) can be applied in this case particularly when there is specific provision in Order XXII, Rule 4(5) for substitution of the legal heirs of the dead person in the appeal. No, it cannot be applied for, the well known maxim of

interpretation "Generalia Specialibus non derogant", that is to say, general words do not derogate from special provisions, or special provisions will control general provisions, would apply in the present context.

7. The difference between the provisions contained in O. I. R. 10 and Order XXII, Rule 4 is apparent. Order I, Rule 10 does not deal with substitution of legal representatives of a deceased. It confers power on the court at any stage of the suit to implead or add a person as party or to strike down a person improperly joined if the Court finds it necessary for determination of the real matter in dispute. On the other hand, Order XXII, Rule 4 confers right on the plaintiff to bring on record the heirs and legal representatives of a deceased. If the right to sue does not survive, the suit shall come to an end and shall abate. This legal position has been precisely and vividly laid down by a Full Bench of the Allahabad High Court in Smt. Mahendra Kaur v. Hafiz Khalil, 1983 All LJ 1305. There the Full Bench said thus (para 11):

"The right conferred by O. I. R. 10, C. P. C. enables the Court to add a person as a party, O. I. R. 10 has a specific and limited purpose which is different from one contemplated by Rule 4 and 9 of Order XXII of the Civil P. C. The two provisions deal with different eventualities and contingencies. As already held above, it is one thing to file an application to implead certain persons as party to the suit in place of a deceased party under Order XXII, Rule 4, C. P. C. and it is entirely different to apply under O. I. R. 10, C. P. C. to add anew party. The main difference is that the rights of the parties in one case would be altogether different from those of the party in the other case. A legal representative has the same status and rights as that of the deceased, whereas the rights and obligations of a person impleaded under O. I. R. 10, C. P. C. would not be circumscribed, and that he would be entitled to take any plea which he is advised to do."

8. In the present case the respondent died after the judgment was pronounced. Therefore it cannot be argued that there was no abatement in view of Rule 6, of Order XXII which saves only the death that occurred between the conclusion of the hearing and pronouncing the judgment. The case of the appellant is that he was ignorant of the death of the respondent and hence he could not file the application for substitution of the legal representatives within the time prescribed under Article 120 of the Limitation Act. The period of limitation runs from the date of death and not from the date of knowledge of the death. For non-filing of any application for substitution within the aforesaid time, the appeal would abate. But at the same time the appellant can apply within a period of sixty days as allowed under Article 121 of the Limitation Act to have the abatement set aside and legal representatives substituted on proving that he was prevented by sufficient cause from taking steps. Thereafter the appellant has further extension of time u/s 5 of the Limitation Act on proving "sufficient cause" for condoning delay in filing the application for setting aside abatement. In the present case, C. M. P. No. 1403 of 1993 seeking substitution of legal heirs had been filed on

22-5-1993. Though there was 272 days delay after deducting the time allowed under Articles 120 and 121 of the Limitation Act in filing this petition to condone the delay. As there was no petition to condone the delay in impleading the legal representative of the deceased respondent, C. M. P. No. 1403/93 as originally filed does not deserve any consideration. In this background, it is arduous for this Court to hold that the appellant had complied with the provisions contained in Order XXII, Rule 4(5), C. P. C. in order to have the substitution of the legal representatives of the deceased respondent. That being so, the appeal L. A. A. No. 1063 of 1993 is liable to be declared incompetent.

9. Notwithstanding the above the question still remains whether the petition C. M. P. No. 1089 of 1989 for condonation of delay in filing the petition for impleadment would cure all material irregularities in complying with Rule 4(5) as discussed above and even if it is assumed so whether the "sufficient cause" is made out to condone the delay u/s 5 of the Limitation Act. Let us now examine the stage at which the application u/s 5 is to be filed. The said Section is as follows :

"5. Extension of prescribed period in certain cases.-

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

Explanation -- (Omitted.)

What is discerned from the above provision is that the Court is authorised to admit any appeal or application other than application under any of the provisions of Order XXI after the prescribed period provided the appellant or the applicant makes out "sufficient cause" to its satisfaction. That means a time-barred appeal or application shall be accompanied by a petition for condonation of delay and it is only after deciding the said petition, the question of admission of such appeal or application arises. In the present case, C. M. P. No. 1403/93 for impleadment has been filed without any petition for impleadment is liable to be rejected as time-barred.

10. As pointed out herein above, the appellant filed C. M. P. No. 1089/99 for condonation of delay in filing the petition for impleadment on 24-2-1999, that is to say, at the fag end of the hearing. It may be noticed in this context that by the time the rights of the parties have been crystallised. The Counsel for the appellant however pleads that the entertainment of this petition will efface the incompetent nature of the petition, C. M. P. No. 1403/95. Assuming it to be so the delay will have to be counted with reference to the date of filing of this petition. That means the petition for impleadment shall be deemed to have filed only on the date of filing of the petition for condonation of delay, in which case there would be a delay of about seven years as pointed out above. That is

because the petition for impleadment can be admitted only when it is accompanied by a petition for condonation of delay in view of the provisions contained in Section 5 of the Limitation Act.

11. Even assuming there is a proper petition for condonation of delay, then the question remains to be considered is whether "sufficient cause" has been made out to condone the delay in filing the petition for impleadment. C. M. P. No. 1403/93. In this context it is necessary to examine the averments contained in the affidavit in support of the petition for impleadment as well as the affidavit in support of the petition for condonation of delay. The case of the appellant as set out in the affidavit in support of the petition for impleadment is that the appeal was filed on 20-8-1992 but the legal representative of the deceased respondent was not impleaded in the appeal and hence they were sought to be impleaded in the appeal. It is also averred in the said affidavit filed by the Upper Division Clerk of the Collectorate that the notice issued to the original respondent, Madhava Kurup Ramachandran was returned stating that he was no more and on enquiry it was revealed that he died on 20-11-1991. The additional respondents filed a counter affidavit in that petition on 11-11-1997 contending, inter alia, that C. M. P. No. 1403/93 was barred by limitation. Even then there was no attempt on the part of the appellant to explain the delay in filing the petition for impleadment. It was also pointed out in the said counter affidavit that the appeal had been filed against a dead person and the appellant had sufficient notice regarding the death of the decree-holder and that the legal heirs of the deceased Ramachandran Pillai had filed execution petition E. P. No. 114/92 of 8-6-1992 pursuant to which the appellant had deposited Rs. 39,61,832/- towards the decree amount. No reply affidavit had been forthcoming from the appellant contradicting the said statements. In the affidavit now filed by the District Collector on 19-2-1999 though it is reiterated that the appellant was aware of the death of the original respondent only when the notice was returned, no explanation is forthcoming as to why the application for condonation was not filed at the earliest point of time.

12. The case of respondents 2 to 6 is that when they had filed the execution petition No. 114/92 on 8-6-1992 as legal representatives of the deceased respondent to execute the decree, the appellant was fully aware of the death of the respondent and therefore they could not plead ignorance. It was only after knowing fully the factum of death a portion of the decree amount was deposited. Therefore when the appellant filed the appeal on 20-8-1992 the legal heirs ought to have been made parties to the appeal. The stand now taken by the appellant in the present affidavit dated 19-2-1999 is that the notice in the E. P. was issued to Chief Secretary of the State and therefore there was no notice of the execution petition to the District Collector. This contention cannot be countenanced firstly for the reason that when notice is served on the Chief Secretary on behalf of the State the Collector who is also representing the State is estopped from contending that he has no notice. Secondly it is a common knowledge that the land acquisition cases filed in courts are not directly handled either by the Chief Secretary or by the District Collector and they are dealt with

and handled by the Land Acquisition Officers or any other officers authorised in that behalf. The authorities or officials functioning on behalf of the State were fully aware of the death of the original respondent and that was established beyond any reasonable doubt from the factum of deposit of partial decree amount in court when the legal heirs moved petition for execution of the decree.

13. According to the appellant, there is a delay of only 272 days in filing the petition for impleadment. That is also the case put forth in the latest affidavit filed on behalf of the appellant. We have already found that there was a delay of about seven years of filing the petition for impleadment. We are not satisfied with the explanation offered by the appellant in the affidavit dated 19th May, 1993 filed along with the petition for substitution and also the affidavit dated 22-2-1999 filed in support of the condonation of delay in filing the impleading petition, C. M. P. No. 1403/93. The Collector has not explained in her affidavit dated 22-2-1999 as to why the Upper Division Clerk had filed the affidavit in support of the impleading petition. So also no explanation is forthcoming as to why the delay occurred in filing the petition for impleadment within the time allowed either in the affidavit dated 19-5-1993 or in the affidavit dated 22-2-1999. No reason has been given in the latest affidavit as to why the petition for condonation of delay had been filed after about seven years. On a careful examination of the affidavits we are satisfied that no "sufficient cause" has been made out to condone the delay in filing the petition for impleadment.

14. In view of the reasons recorded above, we dismiss the petitions for condonation of delay, C. M. P. No. 1089 of 1999 and C. M. P. No. 1031/99 and also petition for impleadment, C. M. P. No. 1403 of 1993. Accordingly the appeal is dismissed as incompetent.