

State of Gujarat

Vs

Sayed Mohd. Baquir El Edross

Civil Appeal No. 353 of 1969

(A.D. Koshal, V.B. Eradi, R.B. Misra JJ)

01.09.1981

ORDER

1. The sole respondent in this appeal died on December 10, 1978. He was also arraigned as an appellant in the connected appeal (Civil Appeal No. 2132 of 1977) in which an application was made on February 20, 1979 stating the factum and the date of the demise. A copy of that application was delivered on the date last-mentioned to the clerk of learned counsel for the appellant State, who, however, took no step to move the Court for having the legal representatives of the deceased respondent brought on the record in the present appeal till August 29, 1979 when an application was made for that purpose, but without being accompanied by any affidavit containing averments as to why the inordinate delay in filing the application should be condoned. An affidavit of the type just mentioned was filed in Court on March 4, 1980.

2. It is common ground between the parties that on the death of the sole respondent to the appeal the right to sue survived to his legal representatives. No application having been made within 90 days of the death, the appeal abated on March 11, 1979 and an application for having the abatement set aside could have been made within the period of 60 days following that date (Article 121 of the Limitation Act). The application actually made in that behalf was thus time-barred by more than three months and a half. Mr. Phadke, learned counsel for the appellant does not dispute this proposition. He urges, however, that the delay in making the application last mentioned should be condoned and the abatement of the appeal set aside. No sufficient cause, however, for the condonation of the delay is made out from any material on the record. As pointed out earlier, the clerk of the learned counsel for the appellant was served with a copy of the application dated February 23, 1979 on that date itself and no reason, good, bad or indifferent is assigned for the failure of that counsel right from February 20, 1979 to August 29, 1979 to move the Court till August 29, 1979 either for having the legal representative of the deceased brought on the record or for having the abatement set aside after it had taken place. His knowledge of the death of the respondent must be attributed to the appellant State also and his negligence in not moving the Court in time must be deemed to be that of the appellant.

3. Mr. Phadke also contended that he had a strong case for the acceptance of the appeal on merits and that the same should be regarded as a very good reason for the condonation of the delay. The contention is wholly without substance. The abatement stands in the way of the appeal being heard on merits which cannot, therefore, be looked into.

4. No grounds for the condonation of the delay having been made out we refuse to set aside the abatement. The appeal is accordingly dismissed.

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