

Kyroon Bee and anr. Vs. the Administrator-general of Madras

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Court : Chennai

Decided On : Sep-07-1915

Reported in : AIR1916Mad869; 31Ind.Cas.38

Judge : Sadasiva Aiyar and ;Napier, JJ.

Appellant : Kyroon Bee and anr.

Respondent : The Administrator-general of Madras

Judgement :

1. The respondent's learned Counsel took a preliminary objection that no appeal lay as the order appealed against was not a judgment. We overrule the preliminary objection as we are satisfied that an order setting aside the abatement of a suit is a judgment as interpreted by the Full Bench in the case *Tuljaram Row v. Alagappa Chettiar* 8 Ind. Cas. 340 (1910) M.W.N. 696, though it may be, to use the words of the learned Chief Justice in the above case, an order on an independent proceeding 'which is ancillary to the suit.'

2. The respondent's learned Counsel concedes that till his client (the Administrator-General of Madras) obtained Letters of Administration in March 1914, his client was not the legal representative of the deceased plaintiff and that the deceased's widow and his two sons and his other children were his legal representatives. The suit abated six months after the plaintiff's death, that is, in May 1912. The present application was made by the Administrator-General in April

1914, more than 20 months after an application to set aside the abatement became barred. Section 5 of the Limitation Act, read with Order XXII, Rule 9, of the Civil Procedure Code, no doubt, empowers the Court to excuse this 20 months' delay if the applicant satisfies the Court that there was sufficient cause for not making the application before July 1912. The learned Judge held that the Administrator-General, so far as he personally is concerned, has shown sufficient cause why he did not make this application before April 1914. But it seems to us that the long delay of those persons who were the deceased plaintiff's legal representatives till the Administrator-General became such legal representative, ought to have been also explained satisfactorily before the abatement could be set aside so as to prejudice the defendants, and we could see nothing in the affidavit filed in support of the application to explain such delay, except the allegation that, two of the legal representatives of the plaintiff were quarrelling among themselves.

3. As regards the case of *Fulvahu v. Goculdas Valabdas* 9 B.K 275, relied on by the learned Judge, that was decided under the old Civil Procedure Code of 1877. Sections 366 and 368 of the old Code contemplated the passing of an order of abatement by the Court before the suit abated and for the setting aside of such an order by a second order. In that case the order of the Court that the suit shall abate and the second order setting aside the order of abatement were passed on the same day and hence no question of limitation in respect of the application to set aside the abatement arose. In the present case the abatement took place in May 1912 and even if under the new Code a first order that the suit shall abate is necessary before the abatement takes place, that order also had been passed several months before the application to set aside the abatement was filed. The case of *Fulvahu v. Goculdas Valabdas* 9 B.K 275, therefore, seems to have no application.

4. We are, therefore, constrained to set aside the order of the learned Judge and to direct that the application of the Administrator-General do stand dismissed. Costs of all parties except the heirs of the plaintiff under the Muhammadan Law are to come out of the estate.