

STATE OF GUJARAT

v.

SAYED MOHD. BAQUIR EL EDROSS

September 1, 1981

[A.D. KOSHAL, V. BALAKRISHNA ERADI AND R.B. MISRA, JJ.]

Civil Procedure Code, Order XXII read with Article 121 of the Limitation Act, 1963—Survival of right to sue—Legal representatives of deceased respondent not brought on record by appellant—State within prescribed time limit—Appeal abates.

Dismissing the appeal by special leave, the Court

HELD: The abatement stands in the way of the appeal being heard on merits. In the instant case, (a) on the death of the sole respondent to the appeal the right to sue survived to his legal representatives; (b) no application having been made within 90 days of the death, the appeal abated on the 11th of March, 1979 and an application for having the abatement set aside could have been made within the period of 60 days following that date, under Article 121 of the Limitation Act; and (c) the application actually made to set aside the abatement was time barred by more than three months and a half. The clerk of the learned counsel for the appellant was served with a copy of the application dated 23rd February, 1979 on that date itself and no reason, good, bad or indifferent is assigned for the failure of that counsel right from the 20th February, 1979 to the 29th August, 1979 either for having the legal representatives 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. [652 E-H, 653 A, B]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 353 of 1969.

From the judgment and decree dated the 19th/20th July, 1965 of the High Court of Gujarat at Ahmedabad in First Appeal No. 584 of 1960.

M. N. Phadké, S. C. Patel and R. N. Poddar for the appellant.

**A** *D.V. Patel, R.A. Shraff, Gopal Subramaniam and D.P. Mohanty*  
for the respondent.

The Order of the Court was delivered by

**B** KOSHAL, J. The sole respondent in this appeal died on the  
10th December, 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 the 20th February 1979 stating the factum  
and the date of the demise. A copy of that application was delivered  
**C** 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 the 29th August,  
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.  
**D** An affidavit of the type just mentioned was filed in Court on 4th  
March, 1980.

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 the 11th March, 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 3 months and a half.  
**E** 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  
**G** 23rd February, 1979 on that date itself and no reason, good, bad  
or indifferent is assigned for the failure of that counsel right from  
the 20th February, 1979 to the 29th August, 1979 to move the  
Court till the 29th August, 1979 either for having the legal repre-  
sentatives of the deceased brought on the record or for having the  
abatement set aside after it had taken place. His knowledge of the  
**H** 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. A

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.

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

S.R.

*Appeal dismissed.*