In view of the above observations, we do not find any force in these appeals which are accordingly dismissed. In the peculiar circumstances of the case, the parties are left to bear their own costs.

MEHAR SINGH, J.—I agree. The evidence in the case does not prove that according to the Customary Law of tehsil Jagraon of Ludhiana District there is prohibition of adoption of sister's son. Indeed there are instances to the contrary as have been referred to by my learned brother. This is enough for dismissal of the appeal.

B. R. T.

FULL BENCH.

Before G. D. Khosla, C.J., Tek Chand and Shamsher Bahadur, JJ.

FIRM DITTU RAM EYEDAN AND OTHERS,—*Appellants.*

versus

OM PRESS CO., LTD., AND OTHERS,—*Respondents.*

F.A.O. No. 81 of 1952

1959

Dec., 24th

Code of Civil Procedure (Act V of 1908)—Order 22 Rule 9—Setting aside of abatement—Ignorence of the death of the deceased defendant or respondent—Whether sufficient cause—Abatement—Effect of.

Held, that law casts a duty upon the plaintiff or the appellant, as the case may be, to bring the legal representatives of the deceased on the record lest a decree should be obtained against a dead person which is of no legal effect. The duty cannot be deemed to be discharged once notice is served on the respondent. A suit or appeal abates automatically after the expiration of ninety days of the death of the deceased defendant or respondent. The

abatement results in interruption of the suit, suspending its progress until new parties are brought before the Court, and if this is not done within the proper time, or the Court does not exercise its discretion in extending the time, the suit comes to an end for good. The law, therefore, imposes an obligation upon the party seeking resuscitation of his action after the lapse of the period of limitation to furnish grounds justifying condonation of the delay. If the applicant satisfies the Court that there was no want of diligence on his part, that he acted in good faith and not in a negligent manner, his inaction may not be visited with grave consequences. In other words, it is for him to allege and prove not only that he remained ignorant of the death of the deceased and thus could not bring his legal representatives on the record, but further to show that his ignorance could not be attributed to absence of negligence or want of sufficient vigilance. He may even rely upon the circumstances of the case from which want of negligence may be inferable. In a particular case, circumstances without direct proof may furnish sufficient ground for absolving the application from the consequences of his laches. The burden cannot be cast upon the opposite party who secures a valuable advantage by the lapse of period of limitation, to adduce proof of facts and circumstances showing negligence or want of good faith on the part of the applicant. In the absence of circumstances or proof of want of negligence a bald statement that the applicant was ignorant of the death cannot be deemed sufficient for revival of the suit or appeal. It is for the applicant to make out cogent grounds for excusing delay either by positive evidence led in this behalf or from the circumstances justifying such a conclusion.

First appeal from the order of the Court of Shri Ram Singh Bindra, Sub-Judge, 1st Class, Ferozepore, holding that the suit having abated as a whole, no further proceedings can be taken in the case.

Claim : For possession by way of partition of the property mentioned in schedule haraf Be in which the plaintiffs are entitled of 108½ share out of 262 and also claim for rendition of account in respect of income and profit, etc., as detailed in the heading of the plaint.

C. L. AGGARWAL, for Appellants.

F. C. MITTAL AND K. L. JAGGA, for Respondents.

JUDGMENT

TEK CHAND, J.—The question which has been referred to the Full Bench is "whether ignorance of the death of a defendant is a sufficient cause for setting aside the abatement when the application to bring the legal representatives of the deceased defendant on the record is made after the expiry of the period of limitation."

The facts and circumstances under which this question arose may be stated briefly. The plaintiffs who are 27 in number, had instituted a suit against 119 defendants besides the Union of India, who was defendant No. 120, claiming rendition of accounts in respect of income and profit etc., and also possession by way of partition of the property mentioned in the schedule attached to the plaint in respect of 108½ shares out of 262. The plaintiffs and defendants Nos. 2 to 119 (inclusive) were engaged in partnership business of pressing and baling cotton and wool in the town of Fazilka, district Ferozepur, in the name and style of Om Press Company in the year 1938. The plaintiffs owned 108½ shares out of a total of 262 shares in the concern. On 25th of April, 1938, a notice was received by the partners from the Registrar, Joint Stock Companies, pointing out that the partnership business could not be carried on unless their concern was got registered under the Indian Companies Act, 1913. Consequent upon the notice, the partners met and dissolved the partnership with effect from 4th of July, 1938, but at the same time they decided that with the assets of the dissolved partnership they should form a joint stock company. With this end in view, defendant No. 2 Shri Mukand Lal was entrusted with the work of preparing memorandum and articles of association and for taking steps and forming a

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limited liability company. It was alleged that Shri Mukand Lal, without consulting the plaintiffs as to the memorandum and articles of association, got the company registered in the name of Om Press Company Limited, Fazilka.

The plaintiffs felt dissatisfied with the terms of the articles and made an application to the High Court at Lahore seeking the removal of their names from the register of the members of the Company which was allowed, but the plaintiffs' prayer that the Company should be directed to pay them back the price of their share in the assets of the Company was rejected. The plaintiffs then applied for the winding up of the Company but the High Court rejected their application on 28th of June, 1944. The plaintiffs then lodged the present suit which was filed in the Civil Court at Fazilka on 5th of February, 1945.

The defendants, including the Company, resisted the plaintiffs' suit on several grounds and the trial Court framed seven preliminary issues. Some of these issues were decided against the plaintiffs who were required by the the Sub-Judge to amend their plaint. The defendants who were also aggrieved from the decision of the Sub-Judge on certain other preliminary issues, filed a revision against his order in the High Court at Lahore and further proceedings in the case were stayed. After the partition of the country, the revision petition of the defendants was dismissed by the High Court at Simla and Achhru Ram J. by his order dated 6th of October, 1948, sent back the case to the Sub-Judge, Fazilka, for disposal on merits.

When the revision was decided by Achhru Ram J., Bagha Ram defendant No. 57 had died on 21st of July, 1947, Prabh Dial defendant No. 55 had died on 8th of December, 1947, and Harden Mal

plaintiff No. 19 had died on 28th of July, 1947. At the time of the disposal of the petition of revision, no one knew of the deaths of the three persons named above.

The parties appeared before the trial Court on 18th of November, 1948, and the case was adjourned to 29th of November, 1948, in order to enable the plaintiffs to make an application under Order 1, Rule 8, Civil Procedure Code, and it was prayed that as there were numerous plaintiffs and defendants, plaintiffs Nos. 2, 3 and 10 might be allowed to sue and defendants Nos. 1 and 2 might be allowed to defend the suit. On 2nd of December, 1948, an application was made under Order 22, Rule 3, Civil Procedure Code, as Harden Mal, one of the plaintiffs had died. Another application was made under Order 22, Rule 4, for the appointment of legal representatives of Maluk Chand defendant No. 19, Bagha Ram defendant No. 57 and Prabh Dial defendant No. 55. It was stated in the applications that the plaintiffs had come to know of their deaths on the return of the file from the High Court to the trial Court at Fazilka. These applications were opposed by the defendants on the ground that the suit had long abated as the defendants had died in the years 1946 and 1947 and no steps had been taken to get the abatement set aside and to have the legal representatives of the deceased brought on the record within the period of limitation. The trial Court by its order dated 4th of April, 1952, came to the conclusion that the suit had abated as a whole, and that no proceedings could be taken in the case. From this order of the Sub-Judge, the plaintiffs preferred a first appeal to this Court and Harbans Singh J. by his order dated 28th of January, 1959, has referred the matter for decision of the Full Bench.

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On behalf of the plaintiffs it has been firstly urged that ignorance of the deaths of defendants is by itself a sufficient cause for setting aside the abatement in the absence of facts and circumstances showing negligence. It was further maintained that the view that the plaintiffs must keep themselves informed as to whether the defendants were living or have died, was erroneous. In the alternative, it was urged, that in the circumstances of this case, a case had been made out for setting side abatement as the plaintiffs were prevented for sufficient cause from continuing the suit by applying for the setting aside of abatement under Order 22, Rule 9, Civil Procedure Code.

The scheme of Order 22 is that an application to bring on the record the legal representatives of a deceased plaintiff or a deceased defendant must be made within ninety days from the date of the death of the deceased,—*vide* Indian Limitation Act, Schedule I, Articles 176 and 177. If no such application is made within the period prescribed, the suit abates in the case of a deceased plaintiff under Rule 3(2), and in the case of deceased defendant under Rule 4(3). In the event of abatement, the plaintiff or the person claiming to be the legal representative of a deceased plaintiff, as the case may be, may apply under Rule 9(2) for an order for setting aside the abatement. Such an application may be made within sixty days from the date of abatement as provided by the Limitation Act, Schedule I, Article 171. If no application is made within sixty days of the abatement or in all within 150 days of the death, the Court may admit the application on being satisfied that the applicant had sufficient cause for not making the application within that time.

The contention of the learned counsel for the defendants-respondents is that an abatement ought

only to be set aside when substantial grounds have been shown to exist for condoning the delay and the applicant has to satisfy that he was prevented by some sufficient cause from making the application to bring the legal representatives of the deceased on the record within ninety days from the date of the death under Rule 9(2) and for not making the application to set aside the abatement within sixty days from the date of abatement under Rule 9(3). Sub-rules (2) and (3) of Rule 9 of Order 22, Civil Procedure Code, are distinct and independent. In a large number of cases of the Lahore High Court cited at the Bar the view that has found acceptance is that mere ignorance of the death, *per se*, is not a sufficient cause for condoning delay. Delay may be excused in cases where ignorance of death was not due to negligence. There are, however, decisions of other High Courts in which a more liberal view has been taken. A careful examination of the various decisions of the High Courts suggests that the divergence of opinion is seeming rather than real and in allowing or refusing applications, Judges have been guided by the particular circumstances of a case, though in some cases a strict, and in others a liberal view has been taken.

The law casts a duty upon the plaintiff or the appellant, as the case may be, to bring on the record legal representatives of a deceased defendant or respondent where death takes place during pendency of the *lis* in order, that no decrees may be passed against deceased persons. If for failure to bring legal representatives on the record within ninety days, the suit or the appeal abates, it is for the applicant to get the abatement set aside, by making an application within sixty days on proof of sufficient cause. Where he allows a period of 150 days to expire from the death of the deceased, he has to satisfy the Court of the existence of

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circumstances contemplated by section 5 of the Limitation Act justifying condonation of delay. The reason is that a valuable right accrues to the party against whom suit has abated and the order of abatement should not be set aside as a matter of course or for very slight reasons. An applicant must, therefore, show that he had sufficient cause for not taking timely steps to continue his suit which has abated on account of the death of a party. In construing the expression "sufficient cause", the existence or otherwise, of negligence of the applicant is always a governing factor, and this is because of the omission to perform a duty cast upon him by law. If the applicant has been prevented from making an application due to circumstances beyond his control or despite reasonable diligence, the Courts in their desire to do substantial justice do ordinarily, condone delay. It is true that it will be an impossible test if the applicant were required to keep himself informed from day to day as to whether the respondent was dead or alive. On the other extreme, will be the case, where ignorance of death taken by itself should be considered a sufficient cause for setting aside abatement. The Court is entitled to know the cause of ignorance before determining whether such ignorance should be deemed to be a good cause for setting aside abatement in the circumstances of a particular case.

In *Sayed Mir Nawab* v. *Hardeo* (1), the plea of ignorance of the death of the respondent, until after the expiry of the period of limitation, was repelled by a Division Bench of the Punjab Chief Court. In that case the deceased lived only five or six miles away.

(1) 60 P.R. 1911

In *Bhani Ram* v. *Narain Singh* (1), the appellants, who lived 15 *kos* away from the village of the deceased, set up a plea of ignorance of the fact of murder of the respondent, and further alleged that the plaintiffs-appellants were absent on pilgrimage at the time of the death. The Division Bench held, that sufficient cause for delay in making the application for bringing on record the legal representatives of the deceased had not been shown. The application was made fifteen months after the date of the death.

In *Daya Singh* v. *Buta Singh* (2), the view taken by the Division Bench was that the plaintiff or the appellant was out of Court until he could satisfy the Court that he was prevented by any sufficient cause from continuing the suit; and, that under Order 22, Rule 9(2), the party must satisfy the Court that he had sufficient excuse for not applying in time. The ignorance of factum of death for more than six months, when the deceased owned land in the village of the applicant, was held to imply great negligence. Following *Sayed Mir Nawab* v. *Hardeo* (3) it was observed—

> "Ignorance of factum of death cannot by itself save a case."

Again in *Chuni al* v. *Kala Khan* (4), the Division Bench subscribed to the principle that mere ignorance of the factum of death was not a sufficient excuse under Order 22, Rule 9, Civil Procedure Code, and this statement of law was not quesioned in *Tirath Ram* v. *Mahammad Abdul Rahim Shah* (5). In the last mentioned case, however, out of the two applicants, one was a minor and the other a mere youth, who was absent, as he was

(1) A.I.R. 1915 Lah. 382
(2) 118 P.R. 1916
(3) 60 P.R. 1911
(4) A.I.R. 1922 Lah. 61 (1)
(5) A.I.R.. 1923 Lah. 546

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pursuing his studies at a different place, and in these circumstances, ignorance of death of the respondent was considered a sufficient cause.

In *Munshi Ram* v. *Radha Kishen* (1), application under Order 22, Rule 9, was made after three years in one case and after nearly nine months in the other. The cause alleged in the affidavit was that the parties were living in different districts and their residences were separated by a distance of about 200 miles, but it was not considered sufficient reason for excusing delay in making the application after such a long period. Similar view was taken in *Haji* v. *Janun* (2); *Chuni Lal Tulsiram* v. *Amin Chand* (3); *Nawab* v. *Rahim Dad* (4); and *Pir Bakhsh* v. *Kidar Nath* (5).

In *Mehr Singh* v. *Sohan Singh* (6), an application was made more than sixty days after the abatement of the appeal. In that case, a large number of parties and the appeal having remained pending for a long time, were considered good grounds for condoning the delay; and in *Radha Lal* v. *Fateh Mohammad* (7), the plaintiff was not held guilty of laches because the deceased defendant had no fixed residence.

In *Committee of Management of Banga Sarkar* v. *Sardar Raghbir Singh* (8), Kapur J. (with whom Soni J. agreed) observed that the mere fact of the ignorance of death of the respondent had never been held to be a sufficient cause, and whenever abatement was set aside there were always some facts or circumstances showing sufficient cause.

(1) A.I.R. 1924 Lah. 461 (D.B.)
(2) A.I.R. 1926 Lah. 37 (D.B.)
(3) A.I.R. 1933 Lah. 356(2) (D.B.)
(4) A.I.R. 1934 Lah. 934(1) (D.B.)
(5) A.I.R. 1935 Lah. 478
(6) A.I.R. 1936 Lah. 710 (S.B.)
(7) A.I.R. 1937 Lah. 454 (S.B.)
(8) A.I.R. 1951 Simla 257 (D.B.)

The only case of this Court in which seemingly a different view was taken is *Birbal* v. *Harlal Sadasukh* (1), in which Khosla J., as he then was, sitting with Soni J., said—

> "With regard to the question of abatement it is clear that abatement can be set aside even after the statutory period of sixty days has expired. Abatement takes place ninety days after the death of the defendant or respondent. So the opposite party is allowed a period of 150 days in which to apply for setting aside the abatement, but if for some reason he cannot move the Court in this respect he is entitled to extension under section 5 of the Limitation Act. The effect of abatement is not that a decree against a dead person is a nullity for all purposes but that the decree can be set aside and the legal representatives given an opportunity of representing their case before the Court. In this case the first point to consider is whether there was sufficient ground for not making an application within the statutory period of 150 days. The plaintiff's contention was that he did not know of Surja's death. He has stated this on oath and this statement was accepted by the learned District Judge.
>
> Now ignorance of the death of a party is a very good ground for not moving the Court to bring his legal representatives on record, for a person cannot think of making an application in this behalf

(1) A.I.R. 1953 Punj, 252 (D.B.)

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unless he knows that the party is dead. The defendants did not inform the Court and Surja's counsel continued to appear on his behalf. The plaintiff stated on oath that he did not know of Surja's death until much later. In the circumstances it seems to me that the plaintiff has shown sufficient cause for not making the application in time and the learned District Judge was justified in extending limitation in this respect."

In this case the Bench came to the conclusion that there were circumstances showing sufficient cause excusing delay, though undoubtedly there are observations which suggest that ignorance of the death is *per se* a good ground for not making an application in time.

I am, however, of the view that before ignorance of death can be deemed to be a good ground, there must exist good grounds for ignorance not attributable to negligence. When law imposes an death, will be insufficient to secure him against tives of deceased opponent on the record, within the prescribed period, mere want of knowledge of death, will be insufficient to secure him against consequences of abatement of his suit or appeal, he has further to show absence of want of care. When reasonable vigilance is a duty, unqualified ignorance cannot be deemed venial. Want of information may be overlooked if want was not induced by neglectful indifference or blameworthy remissness. Allowing oneself to remain in the dark can not be treated as a pursuasive ground for condonation of delay. The above observations with only a single exception find support in a long catena of the decisions of this Court and its predecessor the Chief Court of Punjab. The view that has received almost uniform acceptance

in Punjab is that ignorance of death *per se* does not furnish sufficient ground for setting aside abatement after the expiry of the periods mentioned in Articles 171 and 177 of the Limitation Act. If a different view were to be taken, that would open many avenues of fraud and it would not be easy in a large number of cases to say, whether the delay was due to negligence or for any want of care on the part of the applicant as he alone would, in a vast majority of cases, be in the know of the circumstances which led to his not filing the application within time. For no suit could ever abate so long as the applicant would be willing to make a categoric statement that he learnt of the filing of the application; except perhaps in very rare cases where direct evidence would be forthcoming showing applicant's awareness of the death of the deceased considerable time before he made an application. In all reasonableness it cannot be expected of the respondent to ascertain facts and circumstances contributing to the knowledge or ignorance of the applicant in a matter which is normally within the exclusive knowledge of the applicant himself.

I may now examine the decisions of other High Courts on the subject. A Single Judge of Allahabad High Court in *Lachmi Narain* v. *Muhammad Yusuf* (1), extended the time to bring the names of legal representatives of the deceased on the record, though the application was made more than six months after the death on the ground that the applicant was ill for a very long time.

A Division Bench of the same High Court in *Hanuman Dass* v. *Pirthvi Nath* (2), expressed the view that the term "sufficient cause" should be so construed as to advance substantial justice, and

(1) A.I.R. 1920 All. 284
(2) A.I.R. 1956 All. 677

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relied upon two Full Bench decisions reported in *Brij Mohan Das* v. *Mannu Bibi* (1), and *Shiv Dayal* v. *Jagannathe* (2), and in its view the negligence of a district lawyer or of his clerk might be enough to constitute sufficient cause for the failure to initiate proceedings within the prescribed period. Each case turned on its own facts and in that case the litigant had shown all the diligence expected of him, but the negligent conduct responsible for the delay was the conduct of the clerk of the lawyer and the delay was, therefore, condoned.

The view taken in Oudh is in consonance with the Punjab view that a mere plea of ignorance of the fact that the opposite party had died is not a sufficient cause for setting aside an order of abatement. Special circumstances which entitled the parties concerned to special indulgence must be proved. A party was expected to be active in prosecution of his appeal and to show vigilance and was under an obligation to keep himself informed as to the existence of his opponent,—*vide Sant Baksh* v. *Syed Nabban Saheb* (3); *Bhagwan Din* v. *Muru* (4); and *B. Jagadish Bahadur* v. *Mahadeo Prasad* (5).

In *Tejumal Bhawandas* v. *Murad* (6), following the observations of Sir Lawrence Jenkins, in *Bhau* v. *Raghunath* (7), to the effect that a successful decree-holder should not be deprived of the advantage which he had obtained on account of the expiry of the period of limitation, the Division Bench thought that those observations equally applied to an application under Order 22, Rule 9, Civil Procedure Code, and in all cases the burden

(1) I.L.R. 19 All. 348
(2) A.I.R. 1925 Oudh. 306(2)
(3) A.I.R. 1941 Oudh. 16
(4) 1940 O.P.N. 219
(5) A.I.R. 1941 Oudh. 16
(6) A.I.R. 1936 Sind. 169
(7) I.L.R. 30 Bom. 229

lay heavily on the person who claimed relief under section 5 of the Limitation Act, of adducing distinct proof of sufficient cause on which he relied.

The Calcutta High Court in *Sarat Chandra Sarkar* v. *Maihar Stone and Lime Co., Ltd.* (1), expressed the view that the plaintiffs should show that they had sufficient cause for not preferring the application within limitation. They thought that abatements are not to be set aside as a matter of course or lightly, the burden being on the plaintiffs to show cause as to the existence of a sufficient cause for not making the application in time.

In *Mehtab Chand* v. *Shriratan Mohta* (2), it was said—

> "What is sufficient cause is difficult and undesirable to attempt to define precisely. It depends on the circumstances of each case. But one thing is clear that though the Court does not apply too exacting a standard of diligence, if there is a delay, which in the circumstances of the case the Court thinks unreasonable, the Court does not exercise the discretion conferred on it under Order 22, Rule 9 sub-rule (2),. In this case in my view the plaintiff has not shown sufficient cause. In fact he has not shown any cause at all. He says that he was suffering from a chronic illness. That did not prevent him from continuing the suit. The delay, therefore, has not been explained at all and we are disposed to take the view that the plaintiff has been dilatory in the conduct of the suit."

(1) I.L.R. 49 Cal. 62
(2) A.I.R. 1953 Cal. 367

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In *Phulwati Kumar* v. *Maharaj Kumar Rao Maheshwari Prasad Singh* (1), a Division Bench of Patna High Court expressed similar view that the appellant must keep himself informed of any devolution of interest that may take place by reason of death of any of the respondents, and it was not sufficient merely to say that the appellant had no knowledge of the death of the respondent till many months later. The abatement of an appeal gave a very important right to the opposite party against whom the appeal abated and the Court should not set aside an abatement without sufficient reason.

In *Hari Saran Singh* v. *Syed Mohammad Eradat Hussain* (2), the Division Bench thought that it was not the duty of the appellant to be on the look-out and to be always inquiring as to whether the respondent in the appeal is dead or not, and if the appellant has done all that is necessary to bring the appeal to hearing, he cannot be punished for the ignorance of the death where there are no laches on his part so that it cannot be said that by the use of reasonable diligence, he could have come to know of the death earlier. In that case the deceased respondent was a *pardanashin lady* residing in the interior of a different district and this was considered to be a sufficient reason for delay in bringing her legal representatives on the record. This view also found favour with a Division Bench of Allahabad High Court in *Lakshmi Chand* v. *L. Behari Lal* (3).

In *Mir Wajid Ali* v. *Fagoo Mandal* (4), the view expressed was that when the appellant had already succeeded in serving the notice of the appeal on the respondent, he had done all that is

(1) A.I.R. 1924 Pat. 607
(2) A.I.R. 1925 Pat. 162
(3) A.I.R. 1932 All. 459
(4) A.I.R. 1938 Pat. 125

expected of him to do in connection with the appeal and he was not, therefore, bound to inquire from day to day as to the state of the health of the respondent or whether he was dead or alive, and reliance was placed upon *Nanoo* v. *Muni Lal* (1), and *Sadhu Saran Pandey* v. *Nand Kumar Singh* (2).

In *Ram Ranbijaya Prasad Singh* v. *Madho Turha* (3), it was said that the critical question in deciding whether an abatement should be set aside was whether sufficient cause had been shown and that was a matter for decision on the facts of each case, and that no hard and fast rule could be laid down as to what would constitute sufficient cause in each case.

In *Ratansi Agariya Bhate* v. *Jaysingh Dinkarrao Rajurkar* (4), the Division Bench, after citing authorities both for the liberal and the stricter views, preferred the former, and it was observed:—

> "In our judgment, each case must be decided on its own facts and it must be shown to start with that there is no negligence, want of diligence or good faith. If this is established, there is no reason why ignorance of the fact that death has taken place should not be held to be sufficient cause. We accept the ruling in *Mir Wajid Ali* v. *Fagoo Mandal* (5), as correct and dissent respectfully from the strict view expressed in the other cases. It was pointed out in *Mehtab-Chand Dhandia* v. *Shriratan Mohta* (6),

(1) A.I.R. 1929 Pat. 738
(2) A.I.R. 1926 Pat. 276
(3) A.I.R. 1939 Pat. 623
(4) A.I.R. 1954 Nag. 348
(5) A.I.R. 1938 Pat. 125
(6) A.I.R. 1953 Cal. 367

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that it is not necessary to set too exacting a standard in these matters and we entirely agree."

A Division Bench of Madras High Court in *Secretary of State* v. *Vinjamuri Kistnamacharyulu* (1), thought that it was not incumbent upon an appellant to make periodical inquiries as to whether the respondent was alive. Ignorance of the death of the respondent in the absence of any negligence or other act or omission, for which the appellant can be held responsible was sufficient cause to excuse delay in seeking to set aside abatement.

In *Maragani Ramalingam* v. *Maridu Koteswara Rao* (2), a Single Judge was of the view that the fact that the applicant seeking to set aside abatement was not aware of the death of the party whose legal representatives have to be brought on record constitutes a sufficient cause for excusing the delay in seeking to set aside the abatement.

The above is a representative, though not an exhaustive review of the case law expressing somewhat divergent views. On the one side through the wide gamut of judicial decisions three currents are noticeable. There is the extreme view which is to the effect that through lapse of time a valuable right is secured and it should not be extended in the absence of strong grounds and the burden lies heavily upon the person seeking indulgence, of showing sufficient cause justifying delay in bringing the legal representatives on the record within the period prescribed. On the other extreme is the view expressed in decisions of Patna, Madras and Nagpur High Courts that after notice has

(1) A.I.R. 1938 Mad. 218
(2) A.I.R. 1949 Mad. 624

been served on the respondent, appellant's duty comes to an end and he is not bound to inquire as to whether respondent is dead or alive. Neither of these views appear to be justified.

Law casts a duty upon the plaintiff or the appellant, as the case may be, to bring the legal representatives of the deceased on the record lest a decree should be obtained against a dead person which is of on legal effect. The duty cannot be deemed to be discharged once notice is served on the respondent. A suit or appeal abates automatically after the expiration of ninety days of the death of the deceased defendant or respondent. Under common law a right of action is said to "abate" on the death of a defendant, it does not simply mean its suspension or discontinuance; it means an extinguishment of the very right of action itself. The right of prosecuting the suit is effectually wiped out as if it had never existed. When a suit abates, it ceases, terminates or comes to an end prematurely. In the common law sense, therefore, when a suit abates it is absolutely dead but in equity a suit when abated was merely in a state of suspended animation and might be revived.

According to our law, abatement results in interruption of the suit, suspending its progress until new parties are brought before the Court, and if this is not done within the proper time, or the Court does not exercise its discretion in extending the time, the suit comes to an end for good. The law, therefore, imposes an obligation upon the party seeking resuscitation of his action after the lapse of the period of limitation to furnish grounds justifying condonation of the delay. If the applicant satisfies the Court that there was no want of diligence on his part, that he acted in

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good faith and not in a negligent manner, his inaction may not be visited with grave consequences. In other words, it is for him to allege and prove not only that he remained ignorant of the death of the deceased and thus could not bring his legal representatives on the record, but further to show that his ignorance could not be attributed to absence of negligence or want of sufficient vigilance. He may even rely upon the circumstances of the case from which want of negligence may be inferable. In a particular case, circumstances without direct proof may furnish sufficient ground for absolving the applicant from the consequences of his laches. The burden cannot be cast upon the opposite party who secures a valuable advantage by the lapse of period of limitation, to adduce proof of facts and circumstances showing negligence or want of good faith on the part of the applicant . In the absence of circumstances or proof of want of negligence a blad statement that the applicant was ignorant of the death cannot be deemed sufficient for revival of the suit or appeal.

Barring such decisions which have taken an extreme view, the controversy appears to be more notional than real. In our judgment, the view adopted by the Punjab decisions and taken by the Chief Courts of Oudh and Sindh and by the High Court of Calcutta and the two decisions of Allahabad High Court, appears to be more in consonance with the correct interpretation of Order 2, Rule 9, Civil Procedure Code, and Articles 171 and 177 of the Limitation Act. It is for the applicant to make out cogent grounds for excusing delay either by positive evidence led in this behalf or from the circumstances justifying such a conclusion. The question referred to the Full Bench, therefore, must be decided in the negative.

With a view to avoid remand, the next question, whether in this case there is sufficient evidence to show or there are circumstances of the case which indicate sufficient cause for condoning the delay may be considered. In this case the circumstances are, that the conditions resulting from the partition of the country were exceptional, as very large sections of population on both sides of the frontier were forced to migrate under unusual and unprecedented circumstances and it was humanly impossible for the plaintiffs in this case to kept trace of the defendants who had no settled abode, and were scattered all over the country without there being any clue or information of their whereabouts. Moreover, the revision filed by the respondents remained pending first in the High Court at Lahore and after 1947, in the East Punjab High Court for an inordinately long time. The petitioners before the High Court, in that revision, who were no other than the present respondents, did not bring the fact of the deaths of the deceased respondents to the notice of the High Court. Under these circumstances no reasonable vigilance on the part of the plaintiffs could have the result of dispelling their ignorance, particularly when it was not known, where the deceased respondents had settled at the time of their deaths. It has been sufficiently shown on the record of this case that the plaintiffs' conduct could not be held to be blameworthy or negligent. There are, in our opinion, sufficient reasons for setting aside the abatement.

In the result, the appeal is allowed and the order of the Subordinate Judge, Ferozepur, holding that the suit has abated as a whole and no further proceedings can be taken in this case, is set aside. The Sub-Judge is directed to proceed with the case after bringing the legal representatives of the deceased parties on the record. In

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view of the circumstances of the case, there will be no order as to costs.

G. D. KHOSLA, C.J.—I agree.

SHAMSHER BAHADUR, J.—I also agree.

B. R. T.

CIVIL MISCELLANEOUS

Before G. D. Khosla, C.J., and Tek Chand, J.

THE COMMISSIONER OF INCOME-TAX, SIMLA,—*Appellant*

versus

M/s KASHMIRI MAL-VASDEV, SIMLA,—*Respondent.*

Income Tax Reference No. 28 of 1953.

1959

Dec., 24th

Indian Income Tax Act (XI of 1922)—Sections 3 and 4(3)(vii)—Compensation received on account of cancellation of liquor contract—Whether revenue receipt or capital receipt—tests to determine.

The assessee-firm had advanced Rs. 1,25,000 to Koti Darbar out of which Rs. 80,000 had been repaid. With a view to liquidate its liability for the balance amount, Koti Darbar gave two liquor contracts for two years to the assessee. These contracts were, however, soon after cancelled by the Political Department of the Government of India. The assessee filed a suit for the balance amount of Rs. 48,000 and damages amounting to Rs. 50,000 resulting from the cancellation of the contracts. Koti Darbar paid Rs. 48,000 on account of the balance and the claim for damages including interest and costs was compromised at Rs. 40,000 which amount was paid in full settlement of the claim of the assessee. The Appellate Assistant Commissioner held that Rs. 15,040 out of Rs. 40,000 were on account of compensation for cancellation of the contracts and that this amount was assessable as revenue receipt. The Income-tax Appellate Tribunal held that the amount of Rs. 15,040 on account of compensation was in the