1970 KHC 58
Kerala High Court
V. R. Krishna Iyer, J.
MAHADEVA IYER v. KRISHNAMMAL
Crl. R. P. No. 572 of 1969
22 December, 1969

Criminal Procedure Code, 1898, S.488(6) Proviso. - Application to set aside exparte order -- Period prescribed runs from the date of order -- Natural Justice requires either actual or constructive communication of order to the party concerned -- Orders of Court and Administrative authorities – Distinction. (Para 3, 5)

1962 S Crl. L 581; 1967 MLJ (Crl.) 211; Referred to
AIR 1951 SC 467; Referred to
AIR 1961 SC 1500; AIR 1951 Mad. 204; Referred to
AIR 1966 AP 50; Referred to

Criminal Procedure Code, 1898, S.439 - Petition which is not time barred not entertainable as time barred was rejected wrongly -- Revisory power not to be exercised by High Court when there is no injustice (Para 8)

Criminal Procedure Code, 1898, S.558 - Court Language -- Vakalath is a proceeding and has to be made out ion the language recognized by Court -- Vakalath made out in Tamil whether liable to be rejected by Kerala Court -- Unreasonable restriction -- Rejection will violate the freedom of expression (Para 10, 12)

1962 KLT 216; Referred to
AIR 1959 MP 208; Referred to
AIR 1963 SC 812; AIR 1958 SC 956; Referred to

V. R. Venkita Krishnan; For Appellant
S. Neelakanta Iyer; S. Parameswaran; J. R. Kammath For Respondents

ORDER

1 The curious controversy this case reveals has linguistic overtones, constitutional hues and certain commonplace issues under the Criminal Procedure Code. A Tamil Nadu Brahmin married a woman of his caste from Kerala some thirty years ago, and after living as husband and wife for 7 years, but producing no offspring in the bargain, they began to live separately, the wife in Alleppey, her home town, and the husband in Madurai where he earned a living as a Sanskrit Pandit. Sometime after they began to live separately, the man married again another woman with whom he lives now and together they are parents of four children. More than two decades after they ceased to live jointly as man and wife, the neglected petitioner moved the District Magistrate's Court at Alleppey claiming maintenance under S.488 of the Criminal Procedure Code from the counter petitioner. The records reveal that the application was made on 6-3-1969 and notice thereof was duly served, after which the case was posted to 5-4-1969.

The husband was absent and the case was adjourned to 10-4-1969. The court ordered fresh notice on that date, presumably to be doubly sure whether there is wilful absence. This was served in due course and the case was posted to 28-4-1969. Finding the husband absent, the court proceeded to dispose of the case ex parte, examined the petitioner and adjourned the case for judgment to 30-4-1969. On that date, after considering the evidence adduced, the court awarded Rs. 100/- per mensem in favour of the petitioner. Subsequently, execution was taken out on 19-8-1969 and when the process of the court made its inconvenient impact on him the Sanskrit Pandit hastened to institute a proceeding under S.488(6) of the Criminal Procedure Code for setting aside the ex parte order passed against him. He did not go down to Alleppey, but forwarded his signed petition and a vakalath, executed by him and attested by a manigar (Village Officer), to his advocate Shri Sankaran Kutty who presented to court the petition together with the power in his favour. This Criminal Miscellaneous Petition (No. 748 of 1969) was posted to 17-9-1969 on which date the learned magistrate made short shrift of the matter by rejecting the vakalath on linguistic grounds and, more or less consequentially, dismissing the petition. The order on the vakalath reads:

"The Vakalath is in Tamil and it cannot be understood here. Advocate Shri Sankarankutty who presented this here states that he signed this Vakalath at Alleppey and that the party has not signed this in his presence. Under these circumstances this Vakalath cannot be accepted."

The order on the petition runs:

"The petitioner (counter petitioner in M. C. 2/1969) not present. No proper Vakalath filed. Petition not entertained (vide orders on Vakalath also)."

Counsel for the husband, aggrieved by what might be described as a refusal in limine even to entertain the application largely for the reason that the vakalath was in Tamil, pressed for a reversal of the order and an opportunity to be heard by the magistrate on the merits.

2 The brief order passed by the District Magistrate has a casual and indifferent tone and it strikes me that the ground relied upon for declining to entertain the petition was flimsy and untenable, suggestive of a disinclination to be bothered by proceedings instituted by aggrieved parties in court. Had matters stood thus, and had there been no other weighty circumstances such as were highlighted by counsel for the respondent, I would have had no hesitation in revising the order under attack and directing a fresh enquiry. But the revisional jurisdiction of the High Court has its springs in justice and equity, and need not be exercised where the order impugned does not inflict injustice and to upset the order would result in miscarriage of justice. Similarly, that jurisdiction is not meant to be exercised by way of interference for the sake of interference where there is some error or other but to be invoked only where there is a reasonable possibility of a modification of the original order when the case is sent back.

3 Three points have been discussed at some length. I must plead guilty to having persuaded counsel not to confine themselves to the narrow issue of the validity of the vakalath made out in Tamil and presented in a Kerala Court but to spread the canvass wider so that the larger issues, linguistic and other, involved in the case may be understood in their proper perspective. I may formulate, for facility of discussion, the points pressed before me:

(1) Is a vakalath made out in Tamil liable to be rejected by a Kerala Court for the reason that the magistrate is not able to read that language; and can he, in consequence, decline to entertain

the application, the advocate not being properly empowered by the vakalath and the party not being present?

(2) Assuming that there is a legal error in rejecting an application accompanied by a vakalath made out in a language alien to the court language, Is the High Court bound to interfere in revision if the petition before the magistrate was clearly barred by limitation and, therefore, for that reason not entertainable?

(3) Does the period prescribed under the proviso to S.488(6) of the Code commence to run from the date of the order awarding maintenance or only from the date of the counter petitioner's knowledge of the said order?

4 I will deal with the points set out above in reverse order. The order under S.488(1) of the Code was passed on 30-4-1969 and the application to set aside the said order under S.488(6) was filed on 9-9-1969, well beyond the period of 3 months specified in the proviso to S.488(6). But counsel for the revision petitioner has insisted in the absence, however, even of an averment in that behalf, that his application was made within three months of the date of knowledge of the order which is the correct terminus a quo. He placed reliance on a decision reported in Zohra Begum alias Aysha Begum v. Mohamed Ghouse Qadri Qadeeri (AIR 1966 AP 50) where Justice Jaganmohan Reddy J., as he then was, dissenting from a decision of the Madras High Court reported in Govindan v. Jayammal (AIR 1950 Mad. 153), took the view that limitation for setting aside begins not from the date of the passing of the order but from the date on which the aggrieved party came to know of it. Indeed, on a fair interpretation of the provision, using the language thereof for guidance, one may reasonably take the view that limitation runs from the actual date of the order and not from a later date on which the affected party became aware of the order. The proviso reads:

"*Provided that if the Magistrate is satisfied ..... within 3 months from the date thereof*."

In fact, a catena of cases has taken this view and by way of illustration I may cite for support the rulings reported in AIR 1950 Mad. 153, Hari Singh Ishar Singh Jat v. Mst. Dhanno Hari Singh (1962 (2) CriLJ 581) and Hyder Khan v. Safoora Bee (1967 MLJ (Criminal) 211), a Mysore decision. The contrary view, however, has found support only in AIR 1966 AP 50 already referred to. The ratio of this decision is that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person affected, as commencing from the making of the said order, the making of the order must be understood in a just and pragmatic way and construed to refer to the date of either actual or constructive communication of the said order to the party concerned. The principle so stated is sought to be rested on a ruling reported in Muthiah Chettiar v. Commissioner of Income Tax, Madras (AIR 1951 Mad. 204) and a decision of the Supreme Court reported in Haris Chandra v. Deputy Land Acquisition Officer (AIR 1961 SC 1500). If the Supreme Court has upheld the principle relied upon by the Andhra Pradesh decision, it is law declared by the Supreme Court under Art.141 of the Constitution and must bind me notwithstanding the rulings of other High Courts striking a different note.
Gajendragadkar J., as he then was, observed in the case just mentioned thus:

"Where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by this Collector under

S.12 of the Land Acquisition Act, 1894, either actual or constructive is an essential requirement of fair play and natural justice. Therefore the expression 'the date of the award' used in proviso (b) to S.18(2) of the Act must mean the date when the award is either communicated to the party or is known by him either actually, or constructively. It will be unreasonable to construe the words 'from the date of the Collector's award' used in the proviso to S.18 in a literal or mechanical way."

Rajamannar C. J., whose observations in AIR 1951 Mad. 204 found favour with the Supreme Court, had observed in that case:

"*if a person is given a right to resort to a remedy to get rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore must be presumed to have had the knowledge of the order."*

Jaganmohan Reddy J. felt that the reasoning in these two rulings applies equally to the wording of the proviso to Clause.6 of S.488. I demur, for reasons which I will briefly indicate.

5 The Supreme Court was dealing with an award made under the Land Acquisition Act by the Collector and the Madras High Court, whose decision is relied upon by the Supreme Court, was dealing with a case under the Income Tax Act. The judicial process which affects a man's right to life, liberty and property, functions in a fair way and, therefore, any statute which regulates legal procedure for redressal of wrongs or enforcement of rights must receive not a mechanical but a just and practical construction and application. Courts will remember the unwritten but paramount principles of natural justice while engaged in the construction of statutes. Viewed in that perspective, it is obvious that the remedy conferred by law cannot be taken away on the score of limitation counted from a time when the aggrieved party was not even aware of the act complained of. I am reminded of the emphatic language used in a different context by Bose J. in Harla v. The State of Rajasthan (AIR 1951 SC 467) where the learned Judge spoke thus:
"Natural Justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in son? recognisable way so that all men may know what it is; ..... The thought that a decision reached in the secret recesses of a chamber to which the public have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized man. It shocks conscience."
Similarly, an award passed by a Collector under the Land Acquisition Act or an order passed by a Commissioner of Income Tax cannot be allowed injuriously to affect an individual irreparably unless in a some recognisable way he has come to know about it and the sands of time have run out thereafter. It is more or less the same sense of natural justice which has persuaded Gajendragadkar J. to observe that the knowledge of the party affected by actual or constructive communication thereof is a sine qua non for the operation of limitation. However, what has been overlooked in the Andhra Pradesh ruling, if I may say so with the greatest deference, is the fundamental distinction between an administrative authority and a court in the manner of their functioning. A court acts in public and cannot act in any other way except in exceptional circumstances and its judgments and orders are always pronounced in public. An administrative authority even when exercising a quasi judicial power can, and often does, work in camera and pass orders without a public pronouncement thereof. That is why an award under the Land Acquisition Act has to be communicated "to such of the persons interested as are not present personally or by their representatives when the award is made." The position is not

different when an Income Tax Officer passes orders. A Judge gives notice of the pronouncement of his judgment and does pronounce it in open court (vide S.366 Cr. Pro. Code). An administrative authority makes his order and communicates it subsequently in the manner prescribed by law. Natural justice insists on "either actual or constructive communication of the order or of the said order to the party concerned". If actual knowledge does not exist, "an opportunity of knowing the order" is a good substitute from which the party concerned "must be presumed to have had knowledge of the order". When a court disposes of a case it acts in public and notice is invariably put up. Even a party who is absent has thus an opportunity of knowing the order or about it; and thus there is constructive communication thereof. There is, therefore, no further need for a personal communication of a judicial order of a court. Indeed, if limitation can begin in respect of setting aside of orders or decrees of courts only after they are communicated to the party, strange results will follow. And it is useful to notice that where the Limitation Law makes knowledge of the order of a court relevant, it says so. I, therefore, take the view that while secrecy is repugnant to public justice and notice of the adverse order is a facet of natural justice the cardinal distinction between a court and other authorities sufficiently justifies the conclusion that the date of the order is the crucial date.

6 If the view I have propounded above be correct, the petitioner has missed the bus because his application is considerably beyond time. Whether the court has any power to excuse the delay does not arise for consideration as there is no motion in that behalf. I may also mention that the petitioner has not stated in his application to the magistrate to set aside the ex parte decree that he came to know about the impugned order only within three months of his application. He has not even cared to state when he came to know of the order and why he could not move the court within three months of the date of the order as required by the proviso to S.488(6). It is surprising that he has not even formally averred that the return of the service on him was not correct or that he had not wilfully avoided service or wilfully neglected to attend the court. I certainly appreciate the point made by counsel for the petitioner that the wording of the proviso is so cautious that even if the person is served and has neglected to attend, it would not still be open to the magistrate to proceed ex parte unless he is satisfied further that there is wilful evasion or neglect in attending the court; only thereafter he can proceed to hear and determine the case. In the present case, twice summonses were served and twice the case posted for hearing after service without any response from the present petitioner. It is not possible for me, therefore, to say, on the record as it stands, that the magistrate acted illegally in proceeding ex parte. The ruling reported in AIR 1963 Mysore 239 is hardly helpful to the petitioner in this state of facts.

7 I am not called upon to consider the application of S.5 of the Limitation Act to the present situation as the petitioner, notwithstanding the obvious delay, has not cared to invoke that provision. Nor should the present order be construed as barring the consideration of any such motion, if made.

8 The open sesame of the revisional jurisdiction is the prevention of miscarriage of justice. The inner morality that informs the revisory power of the High Court inhibits its exercise where an injustice, as distinguished from a mere error of fact or law, is not manifest. In the present case I do not find any miscarriage of justice in the court having called upon a man, who makes his living on account of his Sanskrit scholarship but has not spent any anxious time over his first wife who spent seven married years in her bloom of life with him but has remained for 20 years in separation and far away from him, to pay a sum of Rs. 100/- per mensem for her maintenance. It is not the case of the gentleman that he has contributed anything at all towards the lady's upkeep in Alleppey, and where there is no grave injustice even on the admitted facts,

the discretionary power of revision cannot be called in aid. Even assuming that the vakalath of the petitioner has been wrongly rejected and the entertainment of the application wrongly declined, in view of the well grounded plea of limitation and the absence of injustice, T do not deem it proper to invoke the power of this court under S.439 Crl. P. C. No injustice, no revision is the simple motto under S.439 of the Code.

9 However, considerable argument has turned on the linguistic question which certainly has a wider import than may be felt in the present case. I shall, therefore, examine some aspects argued before me.

10 The lower court was probably in error in refusing to receive the vakalath, particularly when an advocate of the court had signed acceptance thereon and presented it in court. Even assuming that as a vakalath it is not admissible, it substantially complies with the requirements of a memorandum of appearance for which the signature of the party is unnecessary and a declaration by an advocate is enough. R.18A of the T. C. Rules of Practice and R.27 of the Madras Criminal Rules of Practice make it clear that an advocate appearing in any criminal proceeding need not file a vakalath but may file a mere declaration that he has been instructed to appear for a party. This memorandum cannot be rejected by the court and in the present case if the essential requirements of a memorandum of appearance have been complied with and a generous view has to be taken in this regard; a narrow view may spell hardship by refusing the right to be heard to a party there is no justification for the order passed. I should have thought that a magistrate, concerned to do justice and not to deny a party the right to be heard on technical grounds, would have postponed the case and called upon the advocate to file a regular memorandum of appearance or a fresh vakalath in terms of R.19 of the Criminal Rules of Practice instead of hurrying to hold that Tamil could not be understood "here" and the vakalath "cannot be accepted". The same criticism applies to the order on the petition by which the learned magistrate got rid of the proceeding before him.

11 However, a vakalath is a proceeding as has been ruled by this court in Parvathi Amma v. Krishnan (1962 KLT 216) and so, must be made out in the language recognised by the court. S.558 of the Crl. PC. empowers the State Government to determine what, for the purposes of the Code, shall be deemed to be the language of each court other than a High Court. It is stated before me no express text has been cited though alleged to exist that Malayalam is the language of the Alleppey court. S.356, 360,361 and 558 are some of the provisions dealing with the language problem in criminal courts. S.360 regulates the language in which the evidence is to be interpreted to the witness and S.361 stipulates the obligation of the court to interpret to the accused the evidence in the case given in a language not understood by him, in a language understood by him. S.356 prescribes the language for recording the evidence by the magistrate or the sessions judge. S.558, as earlier noted, relates to the court language which, I presume, means the language which a party has a right to use in a court. These provisions may perhaps lead to the result that a litigant has no right to be heard in a language which is not English or the court language, although the consequence of such a position in the Indian Republic may well be disastrous to the concept of national integration and the unity of the country so painfully sought to be preserved by the Articles of the Indian Constitution.

12 India is multi lingual polity which has 14 or 16 major languages which have received constitutional status and over 700 minor languages and dialects. Language, naturally assumed such surpassing importance in the Constituent Assembly because it touched every one. The language issue was also made real because it involved the cultural, historical pride of the linguistic groups in the country and even affected religious sentiments. The composite culture

of India, the theme of unity in diversity as India's keynote, were all reflected in the constitutional provisions settling the linguistic problem. While every section of the community at large having a distinct language has been given a fundamental right to preserve it and to establish and administer educational institutions of its choice, the President has been empowered to declare the use of any language spoken by a substantial portion of the population of a State to be recognised by that State officially (Art.347). A Special Officer for linguistic minorities is contemplated and he is expected to work out safeguards for linguistic minorities and report to the President (Art.350B). Again, the legislature of a State has the power to adopt any one or more of the languages in use in the State to be used for all or any of the official purposes of that State (Art.345). Above all, a great linguistic charter is contained in Art.350 which lays down that

"Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be."

Thus, it is obvious that the Constitution has expressed great concern for the languages of the people of India so as to avoid any sense of inferiority, disability or denial of opportunity for any language or linguistic group. The Criminal Procedure Code is a preconstitution law and its failures and shortcomings in not providing amply for linguistic minorities or language groups being heard in courts in their own tongue cannot be blamed on the framers of the Code. The constitutional provisions, particularly those I have adverted to above, are a facet of the cultural personality of free India and courts should view any problem of language arising in a legal proceeding in this wider context and in a spirit of latitude unfettered by an unduly narrow and literal meaning of the words used. Indeed, if each State refuses to recognise the language of its neighbouring States for official purposes of any sort, a threat to unity begins to fester. And such refusal to a language minority of the same State is perilously near linguistic over lordship by the majority group. Similarly, any Indian being denied the right to represent in an Indian court where decisions can be rendered affecting his life, liberty and property may well be deemed unreasonable restriction on his fundamental freedoms guaranteed under Art.19 of the Constitution. Likewise, a court which refuses to listen to a man or look into even a vakalath executed by him in a language different from the court language may virtually deny him equality before the law. Many a citizen who may not be familiar with the language of the court cannot even empower a pleader by a vakalath if such a narrow view is taken viz. that a vakalath is a legal proceeding and the court can insist on legal proceedings before it being in the court language and, therefore, the vakalath executed by the Indian citizen who is alien to the language of the court cannot be looked into. Under such circumstances is there not discrimination on the basis of language, particularly when the language involved is one recognised in the VIII Schedule to the Constitution? Remembering that a Constitution provides for a living and growing nation and itself is an organic document, I am inclined to interpret Art.350 of the Constitution in its wider sweep and truly national connotation. Every person is entitled to make a representation to any authority of the State in any of the languages used in the State. So, it follows that the minorities of Kerala viz., the Tamillans and the Kannadigas are entitled to ventilate their grievances and agitate their rights by representation before any authority within the State in their language because Kannada and Tamil are also used within the Kerala State by sizeable minorities. Solicitude for linguistic minorities will become a mockery and the liberty of language conferred by Art.350 will become meaningless and the freedom of expression under Art.19 truncated if we do not read into these provisions the right of any person to use any of the languages prevalent in that State at least, for redressal of grievances by the State. It need not be used by the majority community; it need not be the language of the court necessarily. It need only be a language used in the State. This is the great spirit of tolerance which India has shown over the periods of history, a, circumstance which should be reckoned

by courts. Representation for the redressal of grievances before any authority of the State must certainly include the institution of legal proceedings in courts, civil and criminal. The most important institution of the State created and empowered for the redressal of the citizens' grievances is the judiciary and the expression 'authority of the Union or a State' must, therefore, takes in courts of law and quasi judicial tribunals. Authority, according to the American College Dictionary, means "The right to determine, adjudicate, or otherwise settle issues or disputes; ..... a person or body with such rights".

13 I have gone into this question at some length only because counsel for the respondent cited before me a ruling reported in AIR 1959 MP 208 where the Nagpur Bench of that High Court took a different view. The learned Judges held, with reference to Madhya Pradesh Official Languages Act, that:
"The languages contemplated by Art.350 have obvious reference to the language specified in the Eighth Schedule of the Constitution which does not contain the English language. No person can, therefore, claim to make a representation in English by virtue of this Article. Moreover, the expression 'any officer or authority' is not intended to cover Courts of law since the Constitution has used the word 'Courts' when it intended to refer to Courts of law. (See for instance Art.227). This Article, therefore, does not deal with such legal matters as are covered by S.3 of the Madhya Pradesh Act, and consequently there is no repugnancy between the two provisions".
The Court went further to hold that neither Art.14 nor Art.19 was violated. A person, more so an Indian citizen, unfamiliar with the language of the court but familiar with one of the languages of the State entered in the Eighth Schedule to the Constitution may be discriminated against if a court refuses to hear him in that language. Even courts may violate the fundamental rights guaranteed under Part III of the Indian Constitution, is my humble view although I am aware that this is a moot point. A judicial decision is State action, in a certain sense and is not altogether immune to condemnation as unjust discrimination (Vide AIR 1967 SC 1). The Madhya Pradesh decision also took the view that freedom of speech and expression guaranteed in Art.19(1)(a) related only to "the expression of one's thoughts and the use of a language for this purpose is only an incidental matter. This Article, therefore, is not intended to cover the question of official languages which is separately dealt with under Part XVII of the Constitution from Art.343 onwards". I may state that the freedom of expression may be effectively violated if a citizen will not be heard by any of the agencies of the State when he expresses himself in the only language which he knows. The fundamental rights under the Indian Constitution are not mere paper rights or vaporous things. They are real and substantial and must be respected by the organs of the State in their practical manifestations. That fundamental rights are real and cannot be rendered illusory without being guilty of violation thereof is clear from the rulings of the Supreme Court, such as AIR 1963 SC 812 (815) and AIR 1958 SC 956 (985). Every specific guarantee in Part III has penumbras formed by emanations from that guarantee that help and give them life and substance and cannot be dismissed as incidental and inconsequential. The refusal to recognise these emanations is a refusal to respect the fundamental right itself.

14 I do not proceed to a decision on this matter although I am inclined to express my dissent from the Madhya Pradesh ruling. In the view I have already taken that the present revision petition does not merit interference I do not wish to pronounce finally on the language issue underlying the dispute in the case although I regard it too important to be omitted from this judgment. Had I been called upon to decide the issue I would have so read the provisions of the Code as to harmonise with the sensitive and expansive articles of the Constitution and upheld the linguistic right of the petitioner. The Code does not and cannot negative what the

Constitution confers, although it is useful to clarify the law of language in courts by an Official Language Act or by amendment of the extant Codes of Procedure.

I dismiss the Crl. RP.

A copy of the judgment will be sent to the State and Central Governments.
