

Manickam alias Chennappan Vs. Munuswamy and Another

Manickam alias Chennappan Vs. Munuswamy and Another

SooperKanoon Citation : sooperkanoon.com/1189524

Court : Chennai

Decided On : Jul-27-2016

Judge : K. Ravichandrabaabu

Appeal No. : Second Appeal SR.No. 4004 of 2012 & M.P.No. 1 of 2015

Appellant : Manickam alias Chennappan

Respondent : Munuswamy and Another

Judgement :

(Prayer in S.A.SR.No.4004 of 2012

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 19.11.2002 passed in A.S.No.60 of 2001 on the file of the Subordinate Court, Dharmapuri, in confirming the judgment and decree dated 20.12.2000 passed in O.S.No.224 of 1999 on the file of the District Munsif Court, at Pennagaram.

Prayer in M.P.No.1 of 2015

M.P.No.1 of 2015 has been filed under Order 23 Rule 1-A of C.P.C. To transpose the 2nd respondent in C.M.P.No.2 of 2012 in S.A.SR.No.4004 of 2012 and record the 2nd petitioner/ 2nd appellant as the legal representative of the deceased first appellant viz., Manickam alias Chennappan in C.M.P.No.2 of 2012 in S.A.SR.No.4004 of 2012.)

M.P.No. 1 of 2015 is filed under order 23 Rule 1A of Civil Procedure Code for transposing the 2nd respondent in C.M.P.No.2/2012 in S.A.SR.No.4004/2012 as the 2nd petitioner/ 2nd appellant and record him as legal representative of the deceased 1st appellant.

2. The brief facts of the case are as follows:

One Manickam @ Chinnappan filed a suit in O.S.No.224/1999 on the file of the District Munsif Court, Pennagaram, against one Rathna and Munusamy for declaration of his title to the suit property, for permanent injunction restraining the defendants therein from interfering with his peaceful possession and enjoyment and for injunction restraining the 2nd defendant therein from taking any further proceedings based on the decree obtained against the first defendant therein in O.S.No.70/1987 on the file of the Sub-Court, Krishnagiri. The said Ratna is the daughter of the said Manickam @ Chinnappan and the said Munusamy was the agreement holder who obtained the decree for specific performance against Ratna. The trial Court decreed the suit on 20.12.2000. The 2nd defendant namely Munusamy filed appeal in A.S.No.60/2001 on the file of Sub-Court, Dharmapuri. The plaintiff namely, Manickam @ Chinappan was shown as the 1st respondent and the said S.Rathna was shown as the 2nd respondent therein. The lower appellate Court, by its judgment and decree dated 19.11.2002, allowed the appeal and thus, dismissed the suit. Aggrieved against the judgment and decree of the lower appellate Court, the plaintiff preferred Second Appeal S.R.No.4004/2012 before this Court, however with a delay of 3260 days. For condoning such delay, M.P.No.2 of 2012 was filed and the same was dismissed on 17.08.2012 for non-prosecution. A petition to restore M.P.No.2 of 2012 was filed in C.M.P.No.3 of 2012 with the supportive affidavit of the junior counsel. However, in the mean time, the sole appellant died on 25.08.2012. The said Ratna who is the 2nd respondent in the second appeal (Petitioner in the present miscellaneous petition) filed two separate applications one to bring herself on record as the legal heir of the deceased appellant and the other one to transpose her as the appellant in the place of the deceased appellant. After filing these petitions and before its disposal, the restoration petition in C.M.P.No.3/2012 came up for hearing and the same was dismissed on 18.03.2015 on the reason that it was filed in the name of the dead

person, however, by granting liberty to the legal representatives of the deceased appellant to work out their remedies in this Second Appeal. Thereafter, the LR petition in M.P.No.1 of 2013 was taken up for hearing and though the said petition was ordered on 10.08.2015, by a subsequent order dated 27.10.2015, the learned Judge recalled the said order as the counsel for the petitioner sought permission to withdraw such LR petition since the other application to transpose the 2nd respondent as the appellant has already been filed and the same is pending. Accordingly, the learned Judge dismissed M.P.No.1/2013 as withdrawn. Thereafter, the present M.P.No.1/2015 is posted before me for hearing and disposal.

3. This application is opposed by the respondent by filing a counter affidavit.

4. Before answering the question as to whether the petitioner herein is entitled to be transposed as the appellant in the place of the deceased sole appellant, it is better to understand the nature of lis between the parties, in short. The deceased appellant Manickam @ Chinnappan is the father of the present petitioner. The suit property originally belonged to the deceased appellant. The daughter namely the petitioner herein, who claimed to have obtained title to the property by way of a gift from her father under a registered document dated 22.06.1976, entered into an agreement of sale with the respondent herein on 10.02.1987. As she did not execute the sale deed as per the terms of the agreement, the respondent herein filed the suit in O.S.No.70/1987 on the file of the Sub-Court, Krishnagiri for specific performance of the agreement of sale. The said suit was decreed in favour of the respondent herein on 15.07.1987 and the said decree has also become final, conclusive and binding on parties as no appeal was filed against the same. Consequent upon such decree, an execution petition was filed by the respondent herein and a sale deed was executed by the Court on 13.11.1992 in his favour. He was also put in possession of the suit property. Thereafter, the deceased Manickam @ Chinnappan filed the present suit in O.S.No.224/1999 for the relief as stated supra wherein one of the relief he sought was for an injunction against the respondent herein from acting upon the judgment and decree passed in the specific performance suit. However, the fact remains that in the mean time, the decree was already executed on 30.11.1992 and the respondent got the sale deed

executed in his favour and took possession of the property as well. In the suit filed by the deceased, the daughter namely, the petitioner herein was arrayed as the first defendant and the respondent herein was arrayed as 2nd defendant. The contention of the deceased appellant as the plaintiff in the said suit was that the defendants are not having any right or title over the suit property and both the defendants have colluded together and obtained the decree in the specific performance suit. The petitioner herein as the 1st defendant therein remained exparte, though the relief sought for in the said suit was against her interest as well. The trial court decreed the suit and the petitioner herein has not challenged the judgment and decree. On the other hand, the respondent herein who is the 2nd defendant alone filed the First Appeal. Though the petitioner herein was arrayed as the 2nd respondent in the First Appeal, she again remained exparte, so also the father (plaintiff) who was arrayed as the 1st respondent therein. The First Appellate Court allowed the appeal and set aside the judgment and decree of the trial Court. Thereafter, the present appeal is filed by the plaintiff, however, with an enormous delay of 3260 days. The orders passed in the condone delay petition and the other connected petitions are already stated in detail supra.

5. With the above factual background, let me consider the present petition filed by the petitioner seeking to transpose herself as the appellant and its maintainability.

6. Before answering the said question, it is better to know the scope and ambit of Order 23 Rule 1A of Civil Procedure Code which deals with transposing of Defendant as Plaintiff. It reads as follows:

Order XXIII Rule 1-A. When transposition of defendants as plaintiffs may be permitted.

- Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order I, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.

7. A perusal of the above said provision would show that the application for transposition of defendants as plaintiffs can be filed only where a suit is either withdrawn or abandoned by the plaintiff under Rule 1 of Order 23 C.P.C. Therefore, it is clear that transposition of defendants as plaintiffs cannot be sought for or ordered by the Court in all cases, except in a case, where such withdrawal or abandonment was made by the plaintiff as contemplated under Rule 1 of Order 23 CPC. Therefore, it is crucial to note as to what is contemplated under Order 23 Rule 1 CPC. It deals with withdrawal of suit or abandonment of part of claim by the plaintiff. The said Rule reads as follows:

Order XXIII Rule 1. Withdrawal of suit or abandonment of part of claim

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his Claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

8. A perusal of the above said Rule would clearly indicate that the plaintiff, at any time, after the institution of the suit, may abandon his suit or abandon part of his claim either as against all the defendants or any of the defendants, by making an application to that effect and that such permission may be granted by the Court with liberty to institute a fresh suit only when the Court is satisfied that the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. However, if the plaintiff either withdraws the suit or abandons part of a claim without getting such permission from the Court, he shall be liable for costs and also shall be precluded from instituting any fresh suit in respect of same subject matter or part of the claim so abandoned. Therefore, it is evident that transposition of defendants as plaintiffs contemplated under Sub Rule 1A of Order 23 CPC is to be preceded by an application made by such a plaintiff under Order 23 Rule 1 CPC followed by an order passed by the Court in such application. Without there being any such proceedings, transposition cannot be sought for either as a matter of independent action. In any event, it is evident that Rule 1 and 1A of Order 23 CPC are intended to be applied only under the above stated facts and circumstances and not in a situation where the plaintiff dies during the pendency of the suit.

9. Even a perusal of Order 1 Rule 10 CPC, which deals with a situation where the suit was instituted in the name of wrong plaintiff, also would indicate that the substitution or addition of parties could be done only when the Court is satisfied

that the suit has been instituted either in the name of a wrong person as plaintiff or it is doubtful as to whether the suit has been instituted in the name of the right plaintiff. Only under such circumstances, it can permit any other person to be substituted or added as plaintiff upon such terms as the court thinks just and proper.

10. For proper appreciation Order 1 Rule 10 CPC is extracted hereunder.

10. Suits in name of wrong plaintiff.- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through bonafide mistake, and that, it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) Court may strike out add parties: - The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended: - Where a defendant is added, the plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22 the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

11. Therefore, if a transposition of a defendant as the plaintiff is sought for under Sub Rule 1A of Order 23 CPC, it is necessary that compliance of proceedings under Sub Rule 1 of Order 23 CPC, as discussed supra, as a condition precedent has to take place first, apart from the fact that the person who wants to transpose himself as plaintiff should also satisfy the requirement of law as contemplated under Order 1 Rule 10 CPC.

12. Keeping the above principle in mind, let me examine as to whether the present application would come within the above said parameter of law.

13. In this case, it is evident that the deceased appellant has neither withdrawn the suit nor abandoned the part of claim, of course, in this case, at the stage of second appeal. On the other hand, the sole appellant who filed the suit against the present petitioner and the respondent died during the pendency of the present proceedings before this Court. At this stage the 1st respondent in this appeal wants to transpose herself as appellant. Under these circumstances, whether the petitioner can transpose herself as the appellant is thus the crucial question to be decided.

14. Certainly a defendant in a suit cannot transpose himself/herself as the plaintiff unless his/her interest and the original plaintiff's interest is common and they are sailing together. Needless to say that a person against whom the relief is sought for by the plaintiff in the suit cannot be a person having a common interest with the plaintiff or sailing with him/her. If there is an inter-se dispute between the defendants themselves arising out of the same cause of action as set out by the plaintiff and if such interse dispute can be agitated and decided in the same suit even in the absence of the plaintiff who either withdraws the suit or abandons a part of the claim, certainly, one of such defendant can make an application for transposition in order to avoid multiplicity of the proceedings. However, such a plea of interse dispute cannot be raised as the first time in the application filed under Order 23 Rule 1A CPC without making such plea in the main suit itself by

way of their pleadings viz., written statement.

15. In this case, the deceased plaintiff, in fact, contended that the petitioner herein and the respondent have colluded together and obtained a decree in the specific performance suit. His specific case is that his daughter, viz., the petitioner herein, has no right over the suit property. When such being the contention of the deceased plaintiff in the suit, it can never be said that the present petitioner is having an interest in common with the deceased plaintiff or that she was sailing with him. Needless to say that such a person cannot be transposed as the plaintiff in the place of the original plaintiff, since she cannot canvass the case of the plaintiff who, even otherwise, has neither withdrawn the suit nor abandoned the part of claim.

16. Further, it is to be noted that the petitioner remained *exparte* before the trial Court. No doubt, such absence of the petitioner may sometime be presumed as her acceptance of the claim made by the plaintiff. However, even such presumption is not possible in this case in view of the fact that the very same petitioner as the defendant in the specific performance suit, has chosen to remain *exparte* and allowed the suit to be decreed against her. She did not file any appeal also. Therefore, in that suit also, as she having not contested the same, presumption of her acceptance of the claim of the plaintiff therein (the respondent herein) is very much evident. Therefore, the conduct of the petitioner herein in both the proceedings would undoubtedly show that she lacks any bonafide and she is only trying to blow hot and cold before two proceedings in respect of the very same subject matter property. Such person who lacks absolutely bonafide cannot be shown any indulgence even assuming that the law permits such indulgence.

17. In so far as the scope of Order 23 Rule 1A of CPC is concerned, a decision of the Gujarat High Court reported in **AIR 1983 Gujarat 194 (Jethiben vs. Maniben and another)** is relevant to be quoted wherein at paragraph No.7 and 8 it has been observed as follows:

7. It is the submission of Mr. Barot that if transposition would have been allowed, it would have saved multiplicity of suits. In order to support his contention. Mr. Barot

relied on the decision of the Privy Council in *Bhupendra Narayan Sinha v. Rajeswar Prosad*, AIR 1931 PC 162. In that decision it has been held by the Privy Council that the course of adding pro forma defendants as co-plaintiffs should always be adopted where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. There can be no dispute with this principle, but it refers to pro forma defendants, meaning thereby, the defendants who are brought on record because they are necessary or proper parties without any relief having been sought against them and they are merely pro forma. It should be noted that in that case, suit was filed by the appellant for declaration of his ownership and possession of the sub-soil, and an injunction restraining the respondents from digging and removing the stones, earth and minerals, etc. Therein it was found that, all the members of the family were parties to the suit and were at least jointly entitled to the whole. The pro forma defendants asked that a decree should be passed in favour of the appellant. If there was a technical objection to that, the Court clearly had power at any stage of the proceedings to remedy the defect under O. 1, R. 10 of the Code by adding the pro forma defendants as co-plaintiffs with the appellant.

8. Mr. Barot also relied on the decision of the Madhya Pradesh High Court in *Sampatbai v. Madhusingh*, AIR 1960 Madh Pra 84. Therein it has been held that under O. 1. R. 10(2) of the Code the test is not whether the joinder of the person proposed to be added as a defendant would be according to or against the wishes of the Plaintiff or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the plaintiff. Though that decision pertained to adding of the defendant. Mr. Barot has relied on it because, according to him, if the question is to be decided by the Court in favour or against a person, he should be a party no dispute can be raised about that principle. But one thing cannot be ignored that to be transposed as a plaintiff, the defendant who claims to be transposed must have interest identical with the interest of the plaintiff. There are cases where plaintiff filed a suit who has interest in common to the person whom he makes pro forma defendant. In collusion with the contesting defendant, such a plaintiff may sometime decide to withdraw the suit. In order not to defeat the claim of pro forma defendant, who has an identical interest with the plaintiff by such a withdrawal, provision of O. 23. R. 1-A of the Code is made so that pro

forma defendant or the defendant can be transposed as a plaintiff and the suit as filed by the plaintiff can be effectively proceeded against the defendant who has remained on the record as defendant. This is what the spirit of O. 23. R. 1-A of the Code shows, because in such cases, the applicant (defendant applying to be transposed as Plaintiff) has a substantial question to be decided as against any of the remaining defendants. Though Courts lean against multiplicity of suits and therefore, this provision of transposition is made only to avoid another suit. Courts would not permit such transposition just to give a chance to a litigant to avoid filing a suit, or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by the original plaintiff. I am observing this specifically because the original plaintiff filed a suit for injunction against, the present petitioner and original defendant No. 2 from interfering with her possession of the suit property. It is true that if the present petitioner is transposed, she can claim that against the remaining defendant, i.e. defendant No. 1. But that would not be the same cause of action on which the original plaintiff has relied. That cause of action will be something different in the form of transaction between the petitioner and opponent No. 2 Babaldas. Transposition is normally permissible and necessary in suits between partners for accounts, possession of partnership property or for partition, where there are some pro forma defendants.

18. The said decision is subsequently relied on in a recent decision of the Bombay High Court reported in **2015 SCC Online Bombay 3431 (Maooli Land Developers v. Taukir Ahmed Mohammed Hanif Khan)** wherein at paragraph No.10, it has been observed as follows:

1. It is true that the provision of Order 23, Rule 1-A is new, but would that change the character and requirement of transposition? It merely permits that if the plaintiff withdraws the suit, the defendant can request the Court to transpose him as plaintiff if the substantial question has to be decided against the remaining defendant. But that is circumscribed by the position under Order 1, Rule 10 of the Code, meaning thereby, under what circumstances transposition can be permitted. This provision is added, as stated earlier, in order to facilitate a pro forma

defendant who has identical interest from being denied his right if he rested on the success of the plaintiff's suit and the plaintiff wanted to withdraw the suit. So, in that case if such a defendant is transposed as plaintiff, he can effectively get adjudication of his right. Courts even without this provision have considered as to what would be the position, when a plaintiff attempts to withdraw the suit on the rights of all other pro forma plaintiffs or pro forma defendants or defendants who have a cause of action identical to that of the plaintiff. In order to make a clear provision, this provision was added, though it was also considered on the same lines earlier irrespective of this provision. So, the normal consideration for transposition, that interest of the person to be transposed as plaintiff must be identical to the interest of the plaintiff who tries to withdraw, would not go away.

19. I am in respectful agreement with the above two decisions of the Gujarat and Bombay High Courts.

20. Therefore, the petitioner herein who claimed her right in the suit property by virtue of the registered gift deed executed by her father, cannot take up the case of the deceased plaintiff and contend that she does not have any right over the suit property as pleaded by the deceased plaintiff. Certainly, she cannot have two contradictory stand. Admittedly she suffered a decree in a suit for specific performance which has become final, conclusive and binding on the petitioner. She cannot now act against such decree by stepping into the shoes of her father indirectly under the guise of transposition to seek a decree against such specific performance decree. Though the learned counsel for the petitioner sought to contend that she can be transposed for the purpose of deciding as to whether the Deed executed by her father is a gift or Will, such issue cannot be permitted to be raised in these proceedings, when she has chosen to remain *exparte* not only in the present suit and also in the suit for specific performance and allowed the same to be decreed thereby accepting the contention of the agreement holder in the said suit who is the respondent herein.

21. Thus the entire facts and circumstances of the case as discussed *supra* would only disclose that both the father and daughter were trying to play hide and seek game in order to defeat the interest of the respondent who succeeded in the

specific performance suit and got the sale deed also executed in his favour.

22. Learned counsel for the petitioner relied on **AIR 1989 Patna 2 (Md.Muzahid vs. John Wilson Zedak)** wherein the defendant who claimed vested right in a suit property on the basis of the sale deed executed in his favour, sought to be transposed as the plaintiff therein when the original plaintiff has withdrawn the suit for specific performance. When that being the factual aspects of that case, I do not think that the said decision is applicable to present case on hand.

23. Another decision of this Court reported in **CDJ 2014 MHC 6219 (Sekar and others v. Poongavanathammal and others)** relied on by the learned counsel for the petitioner is also not applicable to the present case where also the question that arose was as to whether the husband of the deceased could be disqualified from inheriting the property, being the murderer, could be decided only after he is brought on record. It is observed in the said decision that the determination as to who is the legal representative under Order 22 Rule 5 C.P.C. will be for the limited purpose of representation of the Estate of the deceased for adjudication of that particular case.

24. Another decision reported in **CDJ 1972 SC 390 (Jagdish Chander Chatterjee and Others v. Sri Kishan Tandon and another)**, is relied on wherein the Apex Court observed at paragraph No.11 as follows:

11. Under sub-clause (ii) of R.4 of Order 22, Civil Procedure Code any person so made a party as a legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representative could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representatives from setting up also their own independent title, in which case there could be no objection to the court impleading them not merely as the legal representatives of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the independent title.

25. The above said decision was rendered while considering the scope of Order 22 Rule 4 C.P.C. wherein it was observed that the legal representative can also set up his own independent title. But certainly a distinction is to be drawn between the legal heirs to be brought on record afresh who are not on record already and the persons who are already on record and happened to be either one of the legal heir or only legal heir of the deceased. Therefore, new party brought on record as legal heir of the deceased can either continue to plead the case of the deceased or set up their own case. If any such circumstance arises, it is for the Court to decide the rights of the parties depending upon the facts and circumstances of each case and pass orders. Same yardstick is not available to the person already on record as the defendant against whom the relief is sought for, even though he may be one of the legal heirs of the deceased. In nutshell, one cannot blow hot and cold.

26. Even otherwise, the petitioner has not sought to be impleaded as the legal heir of the deceased appellant and in fact such application filed by her was already dismissed as withdrawn, as discussed supra.

27. Considering all these facts and circumstances, I find that the present petition filed under Order 23 Rule 1A of CPC is not maintainable both on law and on facts. Accordingly, this miscellaneous petition is dismissed. Consequently, Second Appeal SR. No.4004 of 2012 is dismissed as abated.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com