

**Gurumallappa Vs. Mallappa**

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**Court :** Karnataka

**Decided On :** Aug-28-1985

**Reported in :** ILR1985KAR3511

**Judge :** Kulkarni, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 1, Rule 10

**Appeal No. :** C.R.P. No. 3941 of 1983

**Appellant :** Gurumallappa

**Respondent :** Mallappa

**Advocate for Def. :** G.S. Visveswara, Adv.

**Advocate for Pet/Ap. :** M. Shivappa, Adv.

**Disposition :** Revision dismissed

**Judgement :**

ORDER

**Kulkarni, J.**

1. This is a defendant-1's revision against the order dated 22-7-1983 passed by the Munsiff Malavalli, in O.S.No.177 of 1980 allowing I.A.No.3 filed by the plaintiff under Order 6 Rule 17 read with Section 151 C.P.C. and Order 1 Rule 10 C.P.C.

2. The facts are as follows :

Defendant-1 and Doddegowda, father of defendants-2 and 3, borrowed Rs.2,000/- on 1-1-1975 from Mallappa, son of Malladevaru, and executed a pronote. They again borrowed another sum on 10-2-1975 and executed another pronote in favour of this very Mallappa, son of Malladevaru.

3. The plaint was filed in the Court showing the name of the plaintiff as Mallappa, son of Malladevaru. But it was signed by Veerappa, the brother of the plaintiff, and it was also verified by Veerappa, the brother of Mallappa. It is undisputed that the vakalath was signed by Veerappa himself and the vakalath was handed over to the lawyer.

4. Later on it was found that the description of the plaintiff as Mallappa, son of Malladevaru was incorrect as the said Mallappa had died some few years before the institution of the suit itself. Therefore the present Veerappa filed the present application I. A.No.3 under Order 6 Rule 17 read with Section 151 C.P.C. alleging that Mallappa had died some few years before the suit itself and that he was the legal representative of his deceased brother Mallappa and that the description of the plaintiff should be amended as Veerappa, son of Malladevaru and that the necessary consequential amendment in the body of the plaint stating that, wherever the word plaintiff occurred, his name Veerappa the brother of the plaintiff, should be substituted.

5. The defendants seriously resisted this amendment Petition.

6 Though the amendment Petition purports to be one filed under Order 6 Rule 17 read with Section 151 C.P.C. it may be also taken as an application filed under Order 1 Rule 10 C.P.C.

7. It is undisputed that Mallappa, son of Malladevaru, in whose favour the two suit pronotes were executed had died some few years before the suit. Thus it becomes clear that the said Mallappa, son of Malladevaru, was not alive on the date when the suit was filed.

8. According to the Learned Counsel Shri Shivappa, the suit has been instituted in the name of a dead person and therefore it was a nullity. According to the Learned Counsel Shri Visweswara appearing for Veerappa, the description of the plaintiff as Mallappa, son of Malladevaru, was a wrong description or at the most a misdescription of the plaintiff. According to the Learned Counsel Shri Visweswara, the plaint has been signed by the present Veerappa and has been verified by the said Veerappa and even the vakalath has been signed by Veerappa. Therefore, according to him, it is a plaint instituted or filed by Veerappa himself. In short, he urged that there was amis-description or wrong description of the plaintiff in the plaint and it was a suit filed by Veerappa himself.

9. The Learned Counsel Shri Shivappa referred me to Mulla's C.P.C. 14th Edition, page 873. It reads as :-

'Where a suit is brought against a person who is found to have died before its institution, the plaint cannot be amended by bringing his legal representative on the record, though the suit may have been filed in ignorance of his death. The reason is that a suit against a dead man is a nullity from the first. But if a suit is against several defendants one of whom is found to have died before its institution, the suit should not be dismissed. It should proceed against the other defendants and the legal representatives of the deceased should be joined if he was a necessary party. It has been held by the Madras High Court that where a suit is instituted against a person who was dead at that time the plaint could be amended by substituting his legal representatives if a fresh suit would not be barred on that date, (Vide Gopalakrishnayya -v.- Lakshmana Rao-A.I.R. 1925 Madras 1210) and that the decree passed in the suit is not a nullity and would be binding on the parties. (Vide K. Ismail -v.- Pavu Amma - : AIR1955 Mad644 ). An appeal preferred on behalf of a dead person is a nullity.'

Therefore the question that would arise in this case is whether the plaint in this case can be said to be instituted or filed by the deceased Mallappa or by his brother Veerappa. The plaint is said to be instituted or filed by a person who signs the pleading and who puts his signature before the verification and also who signs the vakalath given by him to the lawyer for presenting the plaint. Admittedly in this

case, Mallappa whose name is shown as the plaintiff in this case, could not have signed the plaint or put his signature below the verification or put his signature in the vakalath because he was not at all alive on that day. Therefore it becomes clear that he was not alive on the day when the plaint was presented. Therefore it cannot be said that it is Mallappa that instituted or filed the suit. Undisputedly it is this Veerappa who has signed the plaint and who has put his signature below the verification and who has also signed the vakalathnama in the case. Therefore the institution of the plaint in this case can be said to be only by Veerappa the brother of the deceased Mallappa.

10. Order 1 Rule 10 C.P.C. reads as :-

'Suit 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 a bona fide 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.'

Therefore Order 1 Rule 10 C.P.C. requires that a person who instituted the suit must be alive on the date of the presentation of the plaint. Thus it follows that if a suit is instituted by a person who was not alive on the date of the institution of the suit, it does not amount to an institution of the suit at all within the meaning of Order 1 Rule 10 C.P.C. Therefore if A files a suit in the name of B and B is not alive on the date of the institution of the suit, it will have to be taken that the suit is filed or instituted only by A. Therefore if the description of the plaintiff is given as B under such circumstances it would amount only to a wrong description or misdescription of the plaintiff. In such a case even though B might be dead, the institution of the suit will have to be taken only by A giving a wrong description of the plaintiff as B.

11. In A.I.R. Manual of C.P.C. 4th Edition, Vol.4, on page 225 it is stated as :-

'Where a suit is instituted in the name of a sole plaintiff or against a sole defendant who is dead at the time of the institution of the suit or where all the plaintiffs or all the defendants are dead at the time of the institution of the suit, the suit is a nullity and the plaint cannot be amended by bringing his legal representatives on the record.'

12. In *Bal Pani Vankar vs- Madhabhai Galabhai Patel* : AIR1953 Bom356 the Learned Chief Justice Chagla stated as:-

'A suit was filed by one Soma Parma, who was a minor, through his next friend. This suit was dismissed on 13-12-1950. By that time Soma had attained majority and he instructed his pleader on 21-1-1951, to prefer an appeal and he signed a vakalatnama in favour of the pleader on January 22. The pleader preferred the appeal on 29-1-1951. Prior to that date Soma died on 23-1-1951. On 16-3-1951, the present petitioner, who is the heir and legal representative of Soma applied to the District Court to substitute her name in place of Soma. That application was dismissed by the Learned District Judge, and it is from that order that this revision application is preferred.'

The Learned Chief Justice Chagla has further stated in para 2 as :-

'Now, apart from authorities, I should have said that the appeal that was preferred on 29-1-1951, was clearly a nullity. The appellant being dead, the pleader who preferred the appeal had no authority to prefer any appeal and the vakalatnama signed in his favour had come to a head.

Therefore, in this case, as Soma who had signed the vakalath had died prior to the institution of the appellant itself, the vakalatnama had ceased to be effective and therefore the lawyer in whose favour the vakalatnama had been given had ceased to have any power to file the appeal. An argument was sought to be advanced in the said Bombay case that there was no difference between the suit filed in the name of a dead person and a suit filed in the name of a wrong person. The said argument advanced was based on the decision reported in *Karimullah -v- Bhanu Pratab Singh* AIR 1938 Nagpur 458. The Learned Chief Justice held as:

'When a suit is filed in the name of a wrong person, there is a person alive who files the suit. He happens to be not the proper person by reason of misdescription or some other reason and the real person is brought on the record in substitution. But when a suit is filed by a dead person, there is no person before the Court at all who can be substituted.'

(underlining is nine).

Thus the said principles laid down by the Learned Chief Justice is that if the person who institutes the suit is not the proper person by reason of misdescription then such a misdescription can be allowed to be corrected. The principle underlying the said Bombay case is that if a person who institutes the suit is dead on the date of the institution of the suit, then the suit is a nullity. But if the person who has instituted the suit is alive on the date of the institution of the suit, but if there is a wrong description of the plaintiff in the suit, it cannot be said to be a suit instituted by a dead person. It is a suit instituted by the proper person wrongly describing the plaintiff. Therefore the said Bombay ruling would come into play only when a suit has been instituted by a dead person. If the institution of the suit is not by a dead person but if it is by some one else, the principle laid down in the said Bombay case will not be helpful to the Learned Counsel Shri Shivappa in the present case. As already stated above by me, the plaint in this case has been signed by Veerappa, the brother of Mallappa in whose favour the pronotes have been executed. It is this Veerappa that has put his signature below the verification in the plaint. It is this Veerappa who has signed the Vakalatnama and has thereby authorised the lawyer to institute the suit or present the plaint in the Court. Therefore, in my opinion, the suit has been instituted or the plaint has been presented in this case by Veerappa only giving a wrong description of the plaintiff as Mallappa.

13. Sri Shivappa then referred me to Amar Kaur w/o Ram Lal and others-v.-Sadbu Singh and others . The principle laid down in the said Punjab case is similar to the one laid down in the said Bombay case. If the institution is by a dead person, then the suit or the appeal instituted be-comes a nullity in law. But, as already stated above, if the suit is instituted by some person who was alive on the

date of the institution of the suit but wrongly giving description of the name of the plaintiff, it cannot be said to be a suit instituted by a dead person.

14. Sri Shivappa then referred me to The Temple of Shri Shantadurga Calangutcarina, Nanora and others -v.- Macario Francisco Jose Duarte and another AIR 1976 Goa 54. It was a case where a suit had been instituted against a sole defendant who was dead on the date of the institution of the suit. Therefore there was no question of misdescription of the defendant in the said Goa, Daman and Diu's case. Therefore the said Goa, Daman and Diu's case will not help the Learned Counsel Shri Shivappa in this case.

15. The Learned Counsel Shri Shivappa then relied on Chitradhar Gogoi and others -v.- Lalit Chandra Gogoi and others AIR 1974 Gauhati 2. It was a case where the appeal had been filed by an appellant who had died before the institution of the appeal. Therefore the said appeal was taken as having been instituted or filed by the dead person himself. Therefore the said Gauhati's ruling will not be of help to the Learned Counsel Shri Shivappa.

16. The Andhra Pradesh High Court has ruled in Rasetty Rajyalakshamma and others -v.- Rajamuru Kannaiah : AIR 1978 AP279 that a suit filed against a person dead at the time of its institution is not void ab initio and that the legal representatives can be impleaded even after expiry of limitation for filing the suit if the omission to implead them was due to bona fide mistake.

17. In Jai Jai Ram Manohar Lal vs . National Building Material Supply, Gurgaon : [1970]1SCR22 the Supreme Court has stated as :

'Where the plaintiff, M, who was the manager of a joint family, and was carrying on its business under a business name, and, when objection was taken by the defendant that the firm being an unregistered firm was incompetent to sue, applied for the amendment of the plaint stating that he himself had intended to file and had in fact filed the action on behalf of the family in the business name.

Held that the application could not be refused on the ground that there was no averment therein that the misdescription was on account of a bona fide mistake,

and on that account the suit must fail. There is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

The description of the plaintiff by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered as a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected. It should not be considered to amount to a description of a non-existent person.'

It has been further held by the Supreme Court in the said case as:

Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.'

Therefore in the said Supreme Court case though the suit was sought to be filed in the name of a business name or in the name of a joint family firm which was not registered, still the Supreme Court held that the amendment sought for to correct the misdescription of the plaintiff should be allowed.

18. It has been laid down in *M/s. Ganesh Trading Company -v.- Moti Ram* : [1978]2SCR614 that if a suit had been filed by a firm through a partner and if the firm had been dissolved, yet the description of the plaintiff can be corrected to indicate as though it was filed by one of the partners. On the date when the suit was filed, the firm was already dissolved. It was not at all in existence on the date

of the institution of the suit. Therefore the Supreme Court laid down that even though the firm was dissolved on the date of the institution of the suit, still the suit can be allowed to continue by correcting the description of the plaintiff showing that it was by a partner. The dissolution of the firm in a sense amounts to death of the firm itself. The Supreme Court in the said case did not take a narrow view of the matter. The Supreme Court said that though the firm might have been dissolved by the time of the institution of the suit and though the firm might not have been in existence by the time the suit was instituted, still the plaint should be allowed to be corrected by showing that the suit was by a partner.

19. In this case, as already stated above, the plaint has been signed by Veerappa, the brother of Mallappa in whose name the pronotes had been executed. The verification of the plaint has been signed by Veerappa. The vakalatnama given to the lawyer for institution of the suit or for presentation of the plaint, is signed by Veerappa himself. Therefore the suit will have to be said to have been instituted only by Veerappa but not by Mallappa. Therefore, in my opinion, it amounts to misdescription of the plaintiff, Therefore such a Misdescription can be allowed to be corrected under Order 1 Rule 10 and Section 151 C.P.C. The other amendments sought are only the result of the wrong name of the plaintiff being corrected. The Learned Counsel Shri Shivappa then urged that by the time the present amendment application was filed on 22-1-1983, the claim had already been barred by the law of limitation. In the case of mis-description of the name of the plaintiff, the question of bar of limitation does not arise, because what is done in such cases is only to correct the name of the plaintiff himself. Therefore the question of any right becoming vested in the defendant by bar of limitation, does not arise.

20. Therefore, the order passed by the lower Court allowing the amendment application, does not need any interference. The revision is dismissed.