

Balakrishna Variar and ors. Vs. Sheriffa and ors.

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SooperKanoon Citation : sooperkanoon.com/732647

Court : Kerala

Decided On : Feb-07-1994

Reported in : AIR1994Ker296

Judge : K.P. Balanarayana Marar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 22, Rules 4(5) and 9 - Order 43, Rule 1(K); [Limitation Act, 1963](#) - Sections 5

Appeal No. : S.A. 945 of 1988-D

Appellant : Balakrishna Variar and ors.

Respondent : Sheriffa and ors.

Advocate for Def. : M.R. Parameswaran and; N.M. Girija, Adv.

Advocate for Pet/Ap. : D. Krishna Prasad, Adv.

Disposition : Appeal allowed

Judgement :

K.P. Balanarayana Marar, J.

1. Second appeal arises from a suit for recovery of possession and for damages. The trial court dismissed the suit against which plaintiff preferred A. S. 74/ 1983 before Addl. Sub Court, Parur. During the pendency of the appeal the sole

defendant died. His legal representatives were not brought on record in time with the result that the appeal abated. Petitions were filed for impleading the legal representatives, to set aside the abatement and for condonation of delay in filing the petition for abatement. These petitions were heard together and the lower appellate court by order D/- 11-6-1986 dismissed those petitions. In consequence the appeal was also dismissed as abated. Plaintiffs have come up in second appeal. The substantial questions-of law formulated in the appeal memorandum are :

1. Whether, under the facts and circumstances of the case, the lower appellate court was right in dismissing I.A. Nos. 1093, 1094 and 1095 of 1985 and whether in doing so the lower appellate Court has applied the law in respect to such matters as declared by this Court and the Hon'ble Supreme Court of India correctly and
2. Whether under the facts and circum-stances of the case the decree and judgment of the trial court is sustainable.

The appeal was admitted on these questions.

2. Heard counsel on both sides.

3. At the hearing of the appeal learned counsel for the respondents argued that the case does not involve the questions of law formulated in the appeal memorandum. The contention is that the appeal happened to be dismissed consequent to the dismissal of the application to set aside the abatement and the petition to condone the delay in filing that petition. On the judgment of the lower appellate court no substantial question of law arises, according to counsel. But Section 100, C.P.C. enables this court to entertain a second appeal if this court is satisfied that the case involves a substantial question of law. What has to be looked into is whether a substantial question of law is involved in the case. The dismissal of the petition to implead the legal representatives of the defendant and the petition to set aside the abatement and the petition for condonation of delay resulted in the dismissal of the appeal. If the refusal to set aside abatement is the result of non-application of the relevant provisions of law, a substantial question of

law arises thereby and the case involves a substantial question of law. It is the specific contention of the appellants that the lower appellate court has not applied the law declared by this court and the Supreme Court of India while considering I. A. Nos. 1093, 1094 and 1095 of 1985. Question No. 1 formulated in the appeal memorandum precisely states the substantial question of law involved in this appeal.

4. That appellants can challenge the defect or irregularity in any order affecting the decision of the case in the appeal against the decree cannot admit of any doubt. Section 105, C.P.C. stipulates that no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction save as otherwise expressly provided in the Code. But where a decree is appealed from any error, defect or irregularity in any order affecting the decision of the case, that may be set forth as a ground of objection in the memorandum of appeal. Rule 1A of Order 43 introduced by the amendment of C. P. C. in 1976 makes an express provision enabling a party to appeal against any order made under the Code and thereupon a judgment is pronounced against him. In an appeal against the decree he can contend that such order should not have been made and the judgment should not have been pronounced. This position is sufficiently clear from Section 105 under which an interlocutory order which had not been appealed from either because no appeal lay or an appeal was not taken even though an appeal was maintainable could be challenged in an appeal from the final decree. That is what the appellants have done in the present appeal. That an appeal is provided for in Order 43, Rule 1(k) against an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of the suit will not disentitle the appellant from challenging the order refusing to set aside the abatement in an appeal from the decree. The second appeal is therefore maintainable and a substantial question of law is also involved in the appeal.

5. In this view I am supported by the decision of this Court in *Sankaran Menon v. Gourikutty Amma*, AIR 1978 Ker 211. A question arose whether the order refusing to set aside the abatement affects the decision of the case and whether it can be questioned in second appeal. Noticing that the effect of an order refusing to set aside abatement is to dismiss the suit, this court observed that it cannot be said

that such an order falls outside Section 105 and does not affect the decision of the case for it prevents the plaintiff from prosecuting his claim and obtaining a decision in his favour.

6. Assailing the order of the lower appellate Court dismissing the applications to implead legal representatives, to set aside abatement and to condone the delay, learned counsel for the appellants points out that no attempt was made by the court below to appreciate the purpose for introducing Rule 10-A of Order 22 and Sub-rule (5) of Rule 4 of Order 22. Rule 10-A imposes an obligation on the pleader of a party to communicate to the court the death of the party represented by him whereupon the court shall give notice of such death to the other party. For this purpose the contract between the pleader and the deceased party shall be deemed to subsist. This obligation has been imposed on the pleader with a view to reduce the complications that may arise by reason of plaintiffs ignorance of the death of the defendant. It is for the very same reason that Sub-rule (5) was introduced to Rule 4 of Order 22. That sub-rule reads:

'Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the [Limitation Act, 1963](#) (36 of 1963), and the suit has in consequence abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the [Limitation Act, 1963](#) (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.'

The fact of ignorance of death of a defendant has now been recognised as a sufficient cause for not making the application to set aside the abatement within the period prescribed in the Limitation Act. This sub-rule was inserted in the

context of the provisions contained in Rule 10A. The lower appellate Court has not adverted to the new provisions introduced in Order 22 by the C.P.C. Amendment of 1976. In this connection learned counsel for the appellants has cited the decision of the Supreme Court in *Gangadhar v. Ram Kumar*, AIR 1983 SC 1202. That also was a case where the appellant has failed to get the legal representatives of the respondent impleaded within the time prescribed by law. The applications to set aside abatement and for condonation of delay under Section 5 of the Limitation Act were dismissed. The Supreme Court observed that the High Court had failed to take note of an important change in law deliberately made to cater to the situation. It is observed that nowhere in the order the learned Judge has referred to Rule 10A of Order 22 and no attempt was made to appreciate what necessitated the introduction of this new provision. The Supreme Court held:

'Applying the well known test when a new provision is introduced in a statute prescribing procedure as to what was the mischief to remedy which the new provision was introduced in law: Rule 10A was specifically introduced to meet with the situation in hand.'

7. Viewed in the light of the principle enunciated by the Supreme Court in the aforesaid decision, the impugned order is unsustainable. The fact of death was reported to the Court only on 15-1-1985 though the death took place in Sept. 1984. The petition for impleadment of the legal representatives along with the petition to set aside abatement and for condonation of delay was filed on 1-4-1985. In the affidavit in support of those petitions sworn to by the third appellant, it is averred that the fact of death was known to the appellants only after the fact was reported to the court by the counsel for respondents. In other words, appellants were ignorant of the death of the respondent till that date. For that reason appellants could not make an application for the substitution of the legal representatives of the defendant within the period of 90 days prescribed under Article 120 of the Schedule to the Indian Limitation Act. Appellants had applied after that period for setting aside the abatement and also for the admission of that application under Section 5 of the Limitation Act alleging that appellants were ignorant of the fact of death. Sub-rule (5) of Rule 4 of Order 22, C.P.C. mandates

that the court shall, in considering the application under Section 5, have due regard to the fact of such ignorance, if proved. The lower appellate Court has overlooked this aspect of the matter and did not have due regard to the fact of such ignorance.

On the other hand, appellants have been found fault with for not explaining each day's delay. Mention is also seen made that no evidence was adduced in support of the averment that appellants had to collect the details regarding date of death of the respondent and the names and addresses of his legal representatives. The approach made by the lower appellate court is entirely wrong and the principles laid down by the Supreme Court in Gangadhar's case (*supra*) were not applied to the facts of the present case. Therein the respondent died on 19-4-1980 and the fact of death was reported only 1-7-1981. Thereafter enquiries were made about the heirs and legal representatives of the deceased respondent and the application for substitution was filed within two weeks. The Supreme Court observed that appellants were prevented by sufficient cause for substitution within the prescribed period of limitation and the delay deserves to be condoned. In the present case the petition for substitution was filed within 90 days of the reporting of the fact of death, but the suit had by that time abated since the substitution was not done within 90 days of the date of death. But it is alleged in the affidavit that appellants had to get the particulars of the legal representatives for getting them impleaded as parties to the suit. It has to be noted that the names and other details of the legal representatives were not furnished by the counsel for the respondent. Necessarily therefore appellants will have to make enquiries and gather those particulars which will take some time. It cannot be said that there was inordinate delay on the part of the appellants in making the application for impleading the legal representatives and to get the abatement set aside.

8. Learned counsel for the respondents drawing attention to Sub-rule (5) of Rule 4 of Order 22 contends that the fact of ignorance can be taken note of only if it is proved. It is pointed out that no evidence was adduced on the side of the appellants about which the lower appellate court has also made reference in the impugned order. One of the persons sought to be impleaded has filed a counter affidavit denying the averments in the affidavit in support of the petition. On a

persual of that affidavit it is noticed that there is only a bare denial of the averments. In the circumstances the lower appellate court should have relied on the averments in the affidavit in support of the petitions to hold that appellants were prevented from taking steps within the time prescribed by law on account of the ignorance of death. Such a view should have been taken since the fact of death was reported by the counsel only on 15-1-1985, about four months after the death of respondent. On a proper consideration of the facts and circumstances of the case I am of the view that appellants were prevented from making the necessary application for substitution of the legal representatives within the prescribed period due to the ignorance of the death of the respondent. The delay in filing the petition to set aside abatement has therefore to be condoned. The result is that the common order passed by the lower appellate court has to be set aside and I do so.

9. The appeal happened to be dismissed only because of the dimissal of the application for substitution of legal representatives. When that order has been set aside, the decree passed by the lower appellate court has also to be set aside.

For the aforesaid reasons the second appeal is allowed and the judgment and decree passed by the lower appellate court on 11-6-1986 are set aside. The common order passed on I.A. 1093,1094 and 1095 of 1985 is also set aside. All the three interlocutory applications are allowed. The respondents in those applications are impleaded as supplemental respondents 2 to 7 in the appeal. The appeal A.S. 74/1983 is remanded to the lower appellate Court for consideration on merits. Since the appeal is of the year 1983, it is expected that the lower appellate Court shall expedite the hearing on the appeal and dispose of the same as expeditiously as possible. Parties are directed to appear before the Addl. Sub Court, Parur on 15-3-1994.