

Ramjeewan Vs. Chand Mohammed

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Court : Rajasthan

Decided On : Aug-26-1975

Reported in : AIR1976Raj65; 1975()WLN423

Judge : J.P. Jain, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 153; [Limitation Act, 1963](#) - Sections 5

Appeal No. : Second Appeal No. 520 of 1973

Appellant : Ramjeewan

Respondent : Chand Mohammed

Advocate for Def. : Rajesh Balia, Adv.

Advocate for Pet/Ap. : H.M. Parikh, Adv.

Disposition : Application allowed

Judgement :

J.P. Jain, J.

1. This second appeal was filed against Chand Mohammed. Chand Mohammed had died during the pendency of the first appeal in the lower appellate Court and his legal representatives had been brought on record. By mistake the cause title in

the lower appellate Court was not amended and the decree-sheet drawn mentioned the name of Chand Mohammed as appellant instead of his legal representatives. This error resulted into filing the appeal by Mr. H.M. Parikh against Chand Mohammed, a dead person. Notice of this appeal was received by Seikh Mohammed son of the deceased Chand Mohammed, but it was stated that Chand Mohammed had died. On 26-3-1974 when the case was fixed in the office for service Mr. Parikh came to know of this fact. After inquiry from his client he filed an application on 27-3-1974 for deleting the name of Chand Mohammed and for impleading the names of his legal representatives as respondents in the appeal. The application under Section 5 of the Limitation Act was also submitted for condonation of delay. Mr. Parikh also submitted an affidavit in support of his contention that the name of Chand Mohammed had been shown as respondent on account of the decree-sheet supplied to his client by the lower appellate Court.

2. This application has been opposed. The contention on behalf of the legal representatives of the deceased is that the appeal against the dead man being a nullity this court has no jurisdiction to substitute the names of the legal representatives in place of Chand Mohammed. In support of this contention Mr. Balia has referred to the following decisions:--

(a) Veerappa Chetty v. Tindal Ponnen, (1908) ILR 31 Mad 86.

(b) Ramprataip Brijmohandas v. Gavrishanker Kashiram, AIR 1924 Bom 109.

(c) Bai Pani Vankar v. Madhabluu Gelabhai Patel, AIR 1953 Bom 356.

(d) Hindustan General Insurance Society Ltd. v. Kedamarayan, AIR 1956 Madh Bha 76.

(e) Municipal Council, Calicut v. Thazel Puthan Purayil Kunhipathumma, AIR 1933 Mad 454.

(f) Parameswara Iyer Krishna Iyer v. Krishna Iyer Venkitachalam Iyer, AIR 1953 Trav-Co 473.

(g) Abdul Wanad v. Shukdev Wasti, AIR 1963 Tripura 44.

3. On the other hand Mr. Parikh has placed reliance on the following decisions :

(h) Gopalakrishnayya v Adivi Lakshmana Rao, AIR 1925 Mad 1210 (FB).

(i) Alabhai Vajsurbhai v. Bhura Bhaya, AIR 1937 Bom 401.

(j) Doddamallappa Channabasappa Kari v. Gangappa Shiddappa Gulganji, AIR 1962 Mys 44.

(k) Jagarnath Raut v. Commr. of Buxar Municipality, AIR 1961 Pat 480.

4. I have carefully considered the rival contentions and the decisions cited at the bar. There is no manner of doubt that there has been a mistake in the decree-sheet as Chand Mohammed has been shown as the appellant therein. His legal representatives have not been mentioned though they were parties in the first appeal. Learned counsel for the appellant who was entrusted to file the appeal had no reason to doubt the correctness of the decree-sheet. Thus the second appeal came to be filed against Chand Mohammed a dead person. By having submitted the application on 27-3-1974 the appeal shall be deemed to have been filed on that date. If this amendment had been made in time there would have been no difficulty. This has now been done after the expiry of the prescribed period of limitation.

According to the submission of Mr. Balia this court has no jurisdiction to allow the appellant to amend the memo of appeal even if there is a sufficient cause. The case of Veerappa Chetty, (1908) ILR 31 Mad 86 has been referred to in support of this argument. Their Lordships in that case observed :

'There is nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted bona fide and in ignorance of the death of the defendant.'

Obviously the observations were made in the context of a suit. Section 5, Limitation Act has no application to the filing of a suit beyond the period of

limitation. That apart, the provisions of Section 153, Civil P. C. have not been considered in this decision.

5. In the Bombay case of Rampratap Brijmohandas, AIR 1924 Bom 109, the suit was against a firm which was of a sole proprietorship. Mulla J. held that where a suit was filed not merely against a wrong person but against no person at all there is no case of substitution at all. It is clearly a new case against new defendant. The reasons noticed against the Madras case (1908) ILR 31 Mad 86 referred to above fully apply to this case and it lends no assistance to Mr. Balia.

6. In Bai Pani Vankar. AIR 1953 Bom 356 the facts were entirely different. In this case the appeal was filed on behalf of a dead person. Chagla C. J. observed :

'An effective order under Order 1, Rule 10, can only be made provided there is an appeal before the Court, but if the appeal is a nullity such as when it is preferred by his pleader after his death, then any order made in that appeal is equally a nullity. The appeal thus being a nullity, an order for substitution of a legal representative in place of the deceased appellant cannot be made.'

7. The appeal itself was rightly held to be incompetent, and it could not be amended.

8. In Hindustan General Insurance Society Ltd. v. Kedarnarayan, AIR 1956 Madh Bha 76 the observations referred to are as follows :

'The substitution of the heirs of the deceased defendant in a suit or respondent in appeal, is permissible where the defendant or respondent was alive at the date of institution. A suit or appeal filed against a sole defendant or respondent who was dead on the date of institution is a nullity and the court has no jurisdiction to substitute the heirs of the deceased under Order 22, Rule 4, Civil P. C., or add their names in exercise of the powers conferred upon it by Order 1, Rule 10, Civil P. C.'

9. Their Lordships of Madhya Bharat High Court placed reliance on Rampratap Brijmohandas's case, AIR 1924 Bom 109, Bai Pani Vankar's case AIR 1953 Bom 356 and Parameswara Iyer Krishna Iyer's case AIR 1953 Trav-Co 473. The view

expressed by the Full Bench in Gopalakrishnayya's case AIR 1925 Mad 1210 was not followed.

10. The case of Municipal Council Calicut AIR 1933 Mad 454 was again a case where a suit was filed against those who were dead at the time of the presentation of the suit. Learned Judge dealing with this case placed reliance on Veerappa Chatty's case (1908) ILR 31 Mad 86. The view expressed by the Full Bench of the Madras High Court in Gopalakrishnayya's case AIR 1925 Mad 1210 was not brought to the notice of the court. Similarly Parameswara Iyer Krishna Iyer's case AIR 1953 Trav-Co 473 and Abdul Wahed's case AIR 1963 Tripura 44 do not help Mr. Balia inasmuch as provisions of Section 153, Civil P. C. were not considered in those cases. The Full Bench case of the Madras High Court AIR 1925 Mad 1210 was not brought to the notice of the learned Judges deciding the Travancore case, AIR 1953 Trav-Co 473. The learned Judicial Commissioner did not accept the view of the Full Bench expressed in case AIR 1925 Mad 1210. He even observed that Section 153, Civil P. C. does not apply to such a case. With all respect I am unable to accept this view.

11. The contention of Mr. Balia that the principle applicable to a suit equally governs an appeal, is not acceptable. As noticed earlier. Section 5, Limitation Act has no application to the filing of suits beyond time. Another argument that the present appeal being against the sole respondent, who was dead on the date of the presentation of appeal, becomes non-est is also not tenable. It is true that the appeal cannot proceed further, but the appellant has the right to file another appeal against the right persons, if he is able to show that he had sufficient cause to file the appeal late. If that is so, he can likewise be permitted to remedy the defect for properly constituting the appeal, if he can show good cause under Section 5, Limitation Act.

12. Section 153, Civil P. C. reads as follows :

'Section 153--The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend, any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.'

13. This section empowers the Court to allow any defect or error in any proceeding in a suit to be removed by an amendment. In the case of a suit the plaint can be allowed to be amended, if the amendment is made within the period of limitation. In the case of appeal, the amendment can be permitted even beyond limitation if the appellant can bring his case within the meaning of Section 5, Limitation Act.

14. In *Gopalakrishnayya v. Adivi Lakshmana Rao*, AIR 1925 Mad 1210 (FB) the Full Bench of the Madras High Court was dealing with the case of appeal presented against the person who had died prior to the presentation of the appeal. Their Lordships observed as follows :

'If an appeal is presented against a person who was dead at the date of presentation the Court may under Section 153 permit the cause title to be amended or may return the appeal memorandum for amendment and representation. Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceeding in a suit and as such has full power under Section 153 to direct an amendment of the appeal memorandum.'

15. In view of this decision this court is amply empowered to allow the appellant to constitute his appeal properly if it is satisfied that there has been a sufficient cause in filing the appeal in the first instance.

16. A Bench of the Bombay High Court in *Alabhai's case* AIR 1937 Bom 401 was faced with a similar question. Their Lordships held that where an appeal is presented against a dead person the court has power in order to prevent injustice being done to permit the amendment and to allow the appellant to add the legal representatives of the deceased. The *Veerappa Chetty's case* (1908) ILR 31 Mad 86 was dissented. To the same effect is the Mysore decision in *Doddamallappa Channabasappa Kari v. Gangappa Shiddappa Gulganji*, AIR 1962 Mys 44 where the learned Judge observed :

'Provisions of Section 153, Civil P. C. would be applicable to an appeal filed against a person who was dead at the time of the institution of that appeal and the Court can permit the appellant (defendant) to amend the memo of appeal so as to

bring on record the legal representatives of the original plaintiff when the plaintiff was dead at the time the appeal was filed.'

17. In the Patna case in Jagarnath Raut AIR 1961 Pat 480 their Lordships held that even in a suit which has been instituted against a dead person Section 153, gives sufficient authority to the court to allow amendment of the plaint if that has been done within the period of limitation. Full Bench view of the Madras High Court has been followed in these decisions. I am also inclined to accept the Full Bench view as it is more reasoned and advances, justice.

18. After a careful consideration of the facts and circumstances of the case I am clearly of the opinion that the appellant has been able to make out a sufficient cause for filing the appeal against Chand Mohammed who was dead on the date of appeal. 'The delay is accordingly condoned.

19. The application dated 27-3-1974 is allowed. The name of Chand Mohammed shall be deleted and the name of his legal representatives as mentioned in the application shall be treated as respondents. The learned counsel for the appellant shall submit an amended memo of appeal within a week from today.