

Elisa and Others Vs. A. Doss

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Court : Chennai

Decided On : Jan-07-1991

Reported in : AIR1992Mad159

Judge : Srinivasan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47, 50, 115 and 153 - Order 22, Rule 4(4) - Order 6, Rule 17; [Limitation Act, 1963](#) - Sections 5 and 21

Appeal No. : Civil Revn. Petn. No. 2441 of 1990

Appellant : Elisa and Others

Respondent : A. Doss

Advocate for Def. : R.S. Venkatachari, Adv.

Advocate for Pet/Ap. : S. Parthasarathy, Adv.

Judgement :

ORDER

1. Respondent herein filed O.S. No. 970 of 1989 against one Vincent for recovery of certain amount due on a promissory note. The suit was filed in April 1989. Summons was served on the defendant on 22-5-1989. The defendant did not enter appearance in the suit. He died on 16-8-1989. The suit was decreed ex parte on 1-9-1989. The respondent herein filed a petition on 20-9-1989 for execution of the

decree. In the execution petition, the petitioners herein were shown as respondents as the legal representatives of the deceased defendant. As soon as the notice in the execution petition was served on the petitioners, they filed an application under S. 47 of the Civil Procedure Code in E.A. No. 1732 of 1989 for dismissing the execution petition on the ground that the decree dated 1-9-1989 was null and void, and it was passed against a dead person. The executing Court has dismissed the application taking the view that the provisions of Order 22 Rule 4, CPC could be applied to the case. Aggrieved by the said dismissal, the present revision petition has been filed.

2. Order 22 Rule 4, CPC reads thus:

'(1) Where one of two or more defendants dies and the rights to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to this character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant,

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it,

has failed to appear and contest the suit at the hearing, and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) 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](#), 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](#), for setting aside the abatement and also for the admission of that application under S. 5 of the 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 S. 5, have due regard to the fact of such ignorance, if proved.'

3. It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of sub-rule (3). Sub-rule

(4) provides an exception to sub-rule (3). Under sub-rule (4), it is open to the Court to pass an order exempting the plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or if having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub-rule

(4) is clear enough to show that the Court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said rule, the Court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption, the defendant who died should have remained ex parte, either without filing the written statement or after filing the written statement. It is clear from the language of the said rule that the order of exemption shall be passed before a judgment in the case is pronounced. The relevant portion of the said rule reads that the Court 'may exempt the plaintiff and

judgment may, in such case pronounced. That part of the sub-rule says that the order of exemption should precede the judgment to be pronounced in the suit. Sub-rule

(5) provides for an application to set aside the abatement caused by the failure of the plaintiff to bring the legal representatives of the deceased defendant on record within the time prescribed by law. As stated already, under sub-rule (3), the suit shall abate. Sub-rule

(5) provides that even in cases where the suit has abated, it is open to the plaintiff to file an application to have the abatement set aside on the grounds mentioned in the said rule. Clause (a) of sub-rule

(5) provides for a situation where the plaintiff was ignorant of the death of the defendant and Clause (b) provides that where an application is filed after the expiry of the period specified therefor in the Limitation Act, S. 5 of the Limitation Act could also be invoked. Thus, Rule 4 of Order 22 is comprehensive enough to deal with a situation where the defendant died after the institution of the suit and before passing of the judgment.

4. This Rule will not apply to a case where the defendant was dead even at the time when the suit was instituted. This Rule can come into play only in cases where the defendant died subsequent to the institution of the suit, having been alive at the time of the institution. Learned counsel for the respondent contends that the proper interpretation of sub-rules (4) and (5) would be that even in cases where a decree had been passed in spite of one of the defendants being dead and without the legal representatives being brought on record, sub-rule (5) would enable the plaintiff to file an application to set aside the abatement and bring the legal representatives on record. I do not think it necessary or proper at this stage to express my opinion on that matter. In this case, I am only concerned with an application for executing being taken out implicating the legal representatives of the deceased defendant in the suit as parties. It is only in the execution petition, the legal representatives have been made parties. The question before me is, whether the decree, as it stands having been passed against a dead man, can be executed against the legal representatives, who have not been impleaded in the suit as

parties.

5. Learned counsel for the respondent contends that a decree which has been passed against a dead man is not a nullity, if he had been alive at the time of institution of the suit. There is no authority for this proposition. I do not agree with the contention of learned counsel for the respondent, It is too well settled that a decree against a dead man is a nullity and it has no force whatever in law. (Vide V. D. Modi v. R. A. Rehman : [1971]1SCR66) Even if the plaintiff is in a position to substitute the legal representatives of the defendant on record in the suit by filing a subsequent application in the suit to set aside the abatement and restore the suit to file, that would not make the decree valid as it stands today.

6. Learned counsel for the respondent invites my attention to the judgment of a Division Bench of Madhya Bharat High Court in Hindustan General Insurance Society Ltd. v. Kedarnarayan AIR 1956, Madhya Hharat 76. In that case, application for substituting the legal representatives of the deceased plaintiff was made by the defendants, who had preferred an appeal against the decree passed by the trial Court. It transpired that during the proceedings for effecting service of notice in the appeal on the plaintiff, he died. One of the contentions raised was that Order 22 Rule 4 would not apply to the case and that the appeal itself was not maintainable. That contention was rejected by the Bench holding that the substitution of the heirs of the deceased defendant in a suit or a respondent in an appeal was permissible, when the defendant or respondent was alive at the time of the institution. As the respondent in that case was alive at the lime of filing of the appeal, the court held that the substitution of the legal representatives in the appeal was permissible. A reference was made to the judgment of a Full Bench of this Court inGopal Krishnayya v. I.akshmati Rao AIR 1925 Mad 1210, in which case, an appeal was filed against a dead man and the Full Bench ordered amendment of cause title and pointed out that it was only an application for condonation of delay in presentation of the appeal against the legal representatives. The decision of the Full Bench was distinguished by the Madhya Bharat High Court. The decision of Madhya Bharat High Court has no bearing on the present case, for, it is not a case in which a decree was passed against a dead person. In that case, a decree was obtained by a person who was alive and before

he could be served in the appeal, he died. He was alive even at the time of filing of the appeal. Hence, the judgment will not support the contention of learned counsel for the respondent.

7. A similar question arose before this Court in *C. Ramainurthi v. Karuppusami* : (1979)1MLJ298 . The suit was filed on a promissory note on 14-11-1974. The defendant died on 5-10-1974 before the institution of the suit. The plaintiff was not aware of the death of the defendant. But, as soon as he came to know of the death of the defendant, he filed an application to bring on record the legal representatives of the defendant. The Court found that the plaintiff had taken action promptly as soon as he became aware of the death. Sathiadev, J. held that it was a case in which the Court could exercise its powers under Section 153, C.P.C. and S. 21 of the Limitation Act and hold that the suit as against the legal representatives should be deemed to have been instituted even on the date of original institution. That judgment has also no bearing on the present case.

8. Reliance was placed by learned counsel for the respondent on the judgment of Mohan, J. (as he then was) in *S. Sundarasa Mudaliar v. Mayavaram Financial Corporation Ltd.* : (1975)2MLJ376 . A consent decree was passed in that case on 10-2-1971. But, even before the decree was passed, a surety who was a party to the proceeding was dead and the decree was, therefore, not binding on him or his legal representatives. An application was filed for amendment of the cause title under Order 6, Rule 17, C.P.C. That application was ordered by the trial court. Applications were also filed for setting aside the abatement and to bring on record the legal representatives of the surety. But, strangely, the legal representatives were not impleaded as parties to the said application. In spite of that, the trial Court had allowed the application for amendment of cause title. It is the said order of the trial Court, which was challenged before this Court. Mohan, J. (as he then was) held that the decree was not binding on the legal representatives of the surety and that the procedure adopted by the trial Court was erroneous. He set aside the order and remanded the matter back to the trial Court for fresh consideration. He also, directed that the delay in impleading the legal representatives should be condoned by the trial Court. That judgment has also no relevance to the present case.

9. Learned counsel for the respondent invited my attention to the judgment of Andhra Pradesh High Court in *R. Raiya-lakshmamma v. R. Kanniah* : AIR 1978 AP279 . That was a case in which the defendant was dead even on the date of institution of the suit. The plaintiff filed the suit on 5-2-1973. But, the defendant died on 29-1-1973. The suit was posted for appearance of the defendant on 27-6-1973. The plaintiff filed an application for impleading the legal representatives on record on 28-6-1973. The application was opposed by the legal representatives contending that the suit against the dead person was a nullity and it had abated under Order 22, Rule 4, C.P.C. Learned Judge held that the Order 22 Rule 4 had no application to the case, as the defendant died even before the institution of the suit. However, the learned Judge took the view that the provisions of S. 21 of the Limitation Act could be applied and the application to bring on record the legal representatives of the defendant could be ordered with effect from the date of institution of the suit. That judgment will have no relevance in the present case.

10. Learned counsel for the petitioner invites my attention to the judgment of Natesan, J. in *Welappan Pillai v. Parappari Panicker* : AIR1969 Mad309 . The learned Judge after considering the provisions of Order 22 Rule 4(4) held that the said provision could be availed at any time before decree. The learned Judge pointed out that statutorily the automatic operation of sub-rule (3) was taken away when an exemption was granted under sub-rule (4). But, the exemption should be granted before the judgment in the suit. The said view was approved by a Division Bench of this Court in *Janabai Ammal v. T, A. S. Palani Mudaliar* : AIR1981 Mad62 . The Division Bench also referred to the other judgments similar to the judgment of Natesan, J. viz. *Lakshmanan v. Chidambaram* : AIR1935 Mad236 , *Jag Mohan v. Ramiah* AIR 1962 AP 165 and *Rahim v. Rajmma* : AIR1977 Kant20 . The Division Bench observed as follows : AIR1981 Mad62 :

'We are in full agreement with the views expressed by the Division Bench of this Court in *Lakshmanan v. Chidambaram* : AIR1935 Mad236 by Natesan, J., in *Velappan v. Parappan* : AIR1969 Mad309 and by the other High Courts in the decisions referred to above, and accordingly we grant exemption to the appellant-plaintiff from the necessity of substituting the legal representatives of the deceased fifth respondent in his place.'

11. In *Yog Raj v. Yogeshwar Raj* AIR 1982 Delhi 62, similar view was taken by J. D. Jain, J. The learned Judge also observed that on a plain reading of sub-rule (3) of Rule 4 of Order 22, which is imperative in nature, there can be no doubt that the abatement takes place automatically and no separate order therefore is necessary and that a decree passed in the face of such abatement will be a nullity so far as the legal representatives of the deceased defendant are concerned.

12. In this case, no doubt, the suit had not abated by the time decree was passed on 1-9-1989, But, the respondent herein did not choose to implead the legal representatives as parties to the suit. It is stated now at the Bar that an application has been filed recently before the trial Court to set aside the abatement and to bring the legal representatives on record. The said statement is contested by learned counsel for the petitioner. Whatever it may be, if there is an application for setting aside the abatement caused by the death of the defendant and to bring the legal representatives on record before the trial Court, the said application shall be considered by the trial Court on merits in accordance with law. That however will not make the decree a valid one in so far as it is a decree passed against a dead man.

13. Learned counsel for the respondent contends that in order to render justice in this case, this Court shall not exercise its jurisdiction under Section 115, C.P.C. According to him, if the petitioners take away the money payable to the deceased, the respondent will not have any remedy as against them. Such a contention could have been considered, but for the fact that the petitioners 2 and 3 are minors. When minors are sought to be made liable as legal representatives of the deceased defendant, justice requires that they should be heard before any decree is passed against them. Hence, I do not accept the contention put forward by learned counsel for the respondent.

14. The finding of the Court below that the decree is a valid one is clearly erroneous. The decree having been passed against a dead person is a nullity and it cannot be assented against the petitioners. In the circumstances, this revision petition is allowed and the order of the executing court in E.A. No. 1732 of 1969 is set aside and H.P. No. 704 of 1989 is dismissed as not maintainable in view of the

fact that the decree is a nullity. Both parties shall bear their own costs.

15. Revision allowed.

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