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

Rengathan, Vs. Santhanapakiammal

Rengathan, Vs. Santhanapakiammal

SooperKanoon Citation : sooperkanoon.com/799046

Court : Chennai

Decided On : Feb-18-2008

Reported in : (2008)4MLJ354

Judge : K. Mohan Ram, J.

Acts : Land Acquisition Act; Code of Civil Procedure (CPC) - Order 1, Rule 10 - Order 22, Rules 3 and 10

Appeal No. : Second Appeal No. 1511 of 1993 and C.M.P. No. 4214 of 2006

Appellant : Rengathan, ;rajangam, ;govindarasu and Elayaperumal

Respondent : Santhanapakiammal

Advocate for Def. : Hema Sampath, Sr. Adv. for ;R. Subramanian, Adv.

Advocate for Pet/Ap. : J. Ramakrishnan, Adv. for ;Sarvabhauman Associates

Disposition : Appeal dismissed

Judgement :

K. Mohan Ram, J.

1. The first respondent herein filed a suit in O.S. No. 922/1984 against the petitioners 2 to 4 (appellants 2 to 4) and one Elayaperumal (4th Appellant) for declaration and recovery of possession of the property measuring to an extent of

1.08 Acre in Survey No. 127-B/10, Chinnaparur Village, Vridhachalam Taluk. The said suit was decreed by the trial Court and the first appeal in A.S. No. 55 of 1991 was dismissed by the Sub Court, Vridachalam and as against that, the present second appeal has been filed and the same was admitted on 06.12.1993. Pending the second appeal, the fourth appellant Elayaperumal died on 02.10.1998 leaving behind the respondents 2 and 3 herein as his legal heirs and according to the petitioners, the respondents 2 and 3 are the only legal representatives of the deceased fourth appellant. Since the respondents 2 and 3 were not brought on record in time, the appeal abatted as far as the deceased Elayaperumal (4th appellant) is concerned. After a delay of 2261 days, the above petition has been filed by the first petitioner claiming to have purchased the suit property under three sale deeds dated 30.01.1984, 08.06.1994 and 09.07.1997 from the second petitioner, 4th petitioner and the respondents 2 and 3 respectively and as such, claims to have stepped into the shoes of the petitioners 2 to 4. According to the petitioner, the right to continue the proceedings has devolved on him and on that ground seeks to get himself impleaded as the 5th appellant in the above second appeal. The said petition is opposed by the 1st respondent.

2. In the counter affidavit filed by the first respondent it is contended as follows:

i)The fourth appellant Elayaperumal died on 02.10.1998 but no petition was filed in time to bring on record his legal representatives and hence the second appeal has abated on the expiry of 90 days from 02.10.1998. The decree passed in the suit is a joint decree against all the appellants and hence there is no second appeal pending as on today. Therefore, the above petition to implead the first petitioner is not maintainable.

ii)It is further stated that the first petitioner has not filed the copy of the sale deeds and even otherwise the said sale deeds do not convey the right of all the owners and as such he cannot seek to come on record as a matter of right as the right to sue does not survive to him.

iii)The legal representatives of the fourth appellant as well as the other appellants have lost interest in the litigation and they have not taken care to file any petition to set aside the abatement caused by the fourth appellant's death. When the original

defendants/appellants are not interested, the first petitioner claiming to be an alienee from the fourth appellant cannot be permitted to get himself impleaded. It is further stated that the long delay has not been properly explained.

3. Heard both sides.

4. The learned Counsel for the petitioner submitted that the first petitioner as the purchaser of the suit property during the pendency of the suit is entitled to be impleaded as a party to the second appeal.

5. In support of the said contention, he relied upon various decisions of the Apex Court. In a decision reported in : [1976]1SCR487 (Rikhu Dev v. Som Dass), the apex Court has observed that Order 22 Rule 10 is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the court. When a suit is brought by or against a person in a representative capacity and there is a devolution of the interest of the representative, the rule that has to be applied is Order 22, Rule 10 and not Rule 3 or 4, whether the devolution takes place as a consequence of death or for any other reason.

6. Further, he placed reliance on the decision reported in : [2001]3SCR1129 (Howrah Daw Mangla hat v. Pronab Kumar Daw) wherein it has been held that the person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or by colluding with the other side. A prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested. Further, he placed reliance on the decision reported in : AIR 2004 SC3942 (Shahazada Bi and Ors. v. Halimabi), and in that decision the Apex Court has held that the question as to whether the decree is joint and inseverable or joint and severable has to be decided, for the purposes of abatement, with reference to the fact as to whether the decree passed in the

proceedings vis-a-vis the remaining parties would suffer the vice of inconsistent decrees or conflicting decrees. A decree can be said to be inconsistent or contradictory with another decree only when two decrees are incapable of enforcement and enforcement of one would negate the enforcement of the other.

7. The learned Counsel for the petitioner further relied on a decision reported in : AIR 2005 SC626 (Bhanu Kumar Jain v. Archana Kumar and Anr.) wherein while considering the locus standi of an assignee to continue the proceedings, the Apex Court has observed that the appellant could have been substituted in place of plaintiff in terms of Order 22 Rule 10 and even if not substituted in terms of the same, an application under Order 1 Rule 10 would have been maintainable as the appellant became the legal representative of the original plaintiff. Further in a decision reported in 2005 (3) LW 728 (Amit Kumar Shaw and Anr. v. Farida Khatoon and Anr.) while considering the right of an alienee to get himself impleaded in a pending second appeal, the Apex Court has observed that the appellants who are transferees pendente lite should be made as parties to the pending Second Appeals as prayed for by them as the presence of the appellants are absolutely necessary in order to decide the appeals on merits.

8. Countering the said submissions made by the learned Counsel for the petitioner, Mrs. Hema Sampath, learned Senior Counsel submitted that since the appeal as against the 4th appellant had abated and the decree being a joint decree, the entire appeal had abated. The learned Senior Counsel further submitted that as on date as no suit is pending, the present petition to implead the first petitioner as 5th appellant is not maintainable. In support of her contentions, the learned Senior counsel placed reliance on the following decisions:

9. In : AIR1977 Ker83 (Full Bench) (Goutami Devi v. Madhavan Sivarajan), it is observed as under:

7. It seems to us to be plain from the scheme of Order XXII that an assignee can make an application for leave to continue the suit so long as there is a suit, so far it concerns the assignee, on the file of the court. In a suit which is not subsisting there is no scope for seeking continuance. It is only logical that in a case where the suit has abated the assignee cannot thereafter seek to be added as a party to

the action. That this is the scheme is evident from an examination of the Order XXII of the Code of Civil Procedure. If the assignee seeks to be impleaded in the proceedings before the suit abates and the legal representatives also seek to be impleaded whether the court would allow the assignee to come on record is a different question. That will depend upon consideration of many matters. But the assignee cannot claim to come on record as a matter of right since leave is not to be granted as a matter of course. We are not concerned with such a situation here and we need not got into this question further for the purpose of this appeal.

26. But the assignee can obtain leave only to continue a suit. If the suit has already abated, there is no suit which may be continued. The abatement terminates the suit and disposes of the plaintiff's claim as if the suit has been dismissed without a hearing. Leave to continue a suit cannot be given after the suit has terminated. It cannot be given if the suit has already been decreed or dismissed for default of appearance of the plaintiff. Similarly, leave cannot be given if the suit has already abated. The suit abates automatically in the absence of any application under Order XXII, Rule 3 within ninety days and a further order declaring that the suit has abated is not necessary. The assignee is bound by the abatement and by proceedings had in the suit before his intervention.

10. In : AIR1959 Cal368 (Kedarnath Kanoria and Ors. v. Khaitan Sons and Co.,) the Apex Court has observed as follows:

25. It is true that the death of the assignor plaintiff simpliciter does not take away the right of the assignee to apply under Order XXII, Rule 10 of the Code of Civil Procedure. By Order XXII, Rule 1 the death of the plaintiff of itself does not cause the suit to abate. Before the suit has abated the assignee may apply for and obtain leave to continue the suit. He may also, if he chooses, apply for substitution of the legal representative of the deceased plaintiff. In a proper case, the order for leave to continue the suit may be dated nune pro tune as of the date when the application was made. If necessary, the application for leave to continue the suit may be treated as being in substance a composite application for substitution of the legal representatives of the deceased plaintiff and thereafter of the applicant. On obtaining the necessary leave the assignee becomes the new plaintiff and the

suit cannot thereafter abate on account of the death of the original plaintiff.

26. But the assignee can obtain leave only to continue a suit. If the suit has already abated, there is no suit which may be continued. The abatement terminates the suit and disposes of the plaintiff's claim as if the suit has been dismissed without a hearing. Leave to continue a suit cannot be given after the suit has terminated. It cannot be given if the suit has already been decreed or dismissed for default of appearance of the plaintiff. Similarly, leave cannot be given if the suit has already abated. The suit abates automatically in the absence of any application under Order XXII, Rule 3 within ninety days and a further order declaring that the suit has abated is not necessary. The assignee is bound by the abatement and by proceedings had in the suit before this intervention...

11. In AIR 1936 Patn 123 (Gobardhan Muhkharji v. Saligram Marwari and Ors.) it is observed as follows:

Now comes the question as to whether the appellant can get leave to continue the suit under Order 22, Rule 10. The learned Subordinate Judge relying upon certain observations of the Privy Council in 1 Pat 581(1) and on the decision in 1925 (2) Mad 1166 has held that that rule applies to cases in which there has been an assignment by a party who is already on the record. The observations of the Privy Council do not apply very much to the facts of the present case, but the Madras decision which is of a Single Judge, is exactly in point and if I may say so, I entirely agree with the view taken there and in my opinion the learned Subordinate Judge has rightly rejected the application. R.10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The 'party' there obviously refers to a party already on the record. Now in this particular case there has been no substitution of the legal representative of the deceased plaintiff Matangini. Her daughter Priyasakhi seems, as I have said, to be unwilling to come up and prosecute the suit for reasons of her own. It will be defeating the object of the law if the legal representative of a deceased party, instead of coming forward and himself taking up the responsibility of the suit transfers his interest to another man and that man be permitted to continue the suit. This disadvantage will be obvious if we refer to the facts of this particular case. The appellant is

admittedly a beggar by profession. Priyasakhi is unwilling to come forward, and if the appellant be allowed to prosecute the suit, the defendants will be deprived of their costs. Assuming however that it was open to the learned Subordinate Judge to allow the appellant to prosecute the suit, the circumstances of this case were such in which the discretion ought not to have been exercised.

12. The learned Senior counsel further contended that when admittedly the respondents 2 and 3 who are said to be the legal representatives of the deceased 4th appellant are unwilling to come up and prosecute the appeal for reasons best known to them, it will be defeating the object of the law if the legal representatives of the deceased party, instead of coming forward and themselves taking up the responsibility of the suit transfer their interest to another man and that man can be permitted to continue the suit.

13. I have carefully considered the submissions made by the learned Counsel on either side.

14. A careful reading of the various decisions relied upon by the learned Counsel for the appellants makes it abundantly clear that a transferee pendente lite is entitled to be made as party to the pending Second Appeal as the presence of the transferee is absolutely necessary in order to decide the above second appeal on merits. It is also settled proposition of law that an assignee can make an application for leave to continue the suit so long as there is a suit, so far it concerns the assignee, on the file of the court. In a suit which is not subsisting there is no scope for seeking continuance. As observed by the Full Bench of the Kerala High Court in (Full Bench) (referred to supra) in a case where the suit has abated the assignee cannot thereafter seek to be added as a party to the action. If the assignee seeks to be impleaded in the proceedings before the suit abates and the legal representatives also seek to be impleaded, the court would allow the assignee to come on record depending upon the facts and circumstances of the particular case. The assignee cannot claim to come on record as a matter of right since leave is not to be granted as a matter of course. But if the suit has already abated, there is no suit which may be continued. The suit abates automatically in the absence of any application under Order 22 Rule 3 within 90 days and further

order declaring that the suit has abated is not necessary. The assignee is bound by the abatement. In this case, the main question to be considered is whether the appeal has abated only as against the fourth appellant or the appeal in its entirety has abated. After deciding that question, the further vital question to be decided is as to whether the decree that is passed in the suit is a joint and inseverable or joint and severable or separable.

15. In the decision reported in : [2002]SUPP5SCR350 (Sardar Amarjit Singh Kalra v. Pramod Gupta) a Constitution Bench of the Apex Court, after considering various decisions held, at p.305 SCC, that whether an appeal partially abates on account of the death of one or the other party on either side has to be considered depending upon the fact as to whether the decree obtained is a joint decree or a severable one. It was further held that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being carried with among or against those remaining parties other than the deceased. Finally, this Court held in para 34, at SCC pp. 307-08 as under:

34. In the light of the above discussion, we hold:

(1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of the defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceeding as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the

courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-?vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

16. Admittedly the suit has been filed by the first respondent herein for declaration of title and for recovery of possession of the suit property. The defence taken by the defendants/appellants is that the plaintiff/first respondent is not entitled to get a declaration as she is not the wife of the original owner and the defendants/appellants have perfected their title by adverse possession. Though a feable defence has been taken that the defendants have partitioned the suit property no details of the same have been furnished and it is not the specific case of the defendants that they are in possession and enjoyment of identifiable and separate properties and in the partition claimed by them the suit property was divided by metes and bounds. Therefore the abatement caused by the death of the fourth appellant has rendered the entire appeal as abated since the judgment/ decree passed in the proceedings vis-a-vis the remaining appellants would suffer

the vice of contradictory or inconsistent decrees. Because if the appeal is allowed as far as the remaining appellants are concerned, it would be contradictory or inconsistent with a decree that is passed against the deceased/fourth appellant as both the decrees could not be enforced and both the decrees would be mutually self-destructive and the enforcement of one would negate or render impossible the enforcement of the other. Therefore the contention of the learned senior counsel for the first respondent that the decree passed in these proceedings is joint and inseparable has to be accepted.

17. When this Court has come to the conclusion that the decree passed in the suit is joint and inseverable and since as against the fourth appellant the appeal has abated it has rendered the entire appeal incompetent for being further proceeded with. Therefore as pointed out above, leave to continue the proceedings cannot be given after the proceedings has terminated. The assignee is bound by the abatement. Further as rightly contended by the learned senior counsel neither appellants 1 to 3 nor the legal representatives of the deceased-the fourth appellant namely respondents 2 and 3 have evinced any interest to take steps to implead the legal representatives and set-aside the abatement caused by the death of the fourth appellant, but the assignee seeks leave to continue the proceedings which has admittedly abated long back. Therefore this Court is not inclined to entertain the above petition filed by the first petitioner claiming to be an assignee. In such view of the matter the above petition fails and the same is dismissed. For the above said reasons the second appeal itself is liable to be dismissed and accordingly dismissed. No costs.

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