

Ayisha Beevi and ors. Vs. Sheik Mydeen and ors.

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Court : Chennai

Decided On : Dec-23-2011

Judge : V.Ramasubramanian, J.

Acts : Code of Civil Procedure (CPC) - Sections 144, 47, 151; [Limitation Act, 1963](#)
- Section 5

Appeal No. : Civil Revision Petition (NPD)(MD) No.1123 of 2006 And M.P.No.2 of 2006

Appellant : Ayisha Beevi and ors.

Respondent : Sheik Mydeen and ors.

Advocate for Def. : Mr.Prabhu Rajadurai, Adv.

Advocate for Pet/Ap. : Mr.K.N.Thampi, Adv.

Judgement :

The civil revision petition arises out of an order passed by the Executing Court dismissing the application filed by the legal representatives of the judgment debtor, seeking restitution under Section 144, CPC.

2. Heard Mr.K.N.Thampi, learned counsel for the petitioners, Mr.G.Prabhu Rajadurai, learned counsel for the first respondent and Mr.A.Arumugham, learned counsel for respondents 2 and 3.

3. One Mr. Sheik Mytheen and his mother Mytheen Beevi filed a suit in O.S.No.420 of 1976 on the file of the District Munsif Court, Padmanabhapuram, against one Shahul Hameed, praying for a decree of recovery of possession, together with mesne profits. The plaint schedule described the property sought to be recovered as a Coffee Shop building located on the South-eastern portion of a land of an extent of 14. cents in Survey No.19/1, Thakkalai, situate on the North of Thuckalay-Thiruvananthapuram Road, on the West of Azhagiya Mandapam-Mekka Mandapam Road, on the East of Survey No.20 and on the South of Survey No.14.

4. By a judgment and decree dated 05.7.1977, the Additional District Munsif, Padmanabhapuram, decreed the suit, directing the defendant Shahul Hameed to vacate and deliver vacant possession of the suit property and also directing payment of arrears of rent.

5. The first appeal filed by the defendant Shahul Hameed in A.S.No.141 of 1977 was dismissed by the Sub Court, Padmanabhapuram, by a judgment and decree dated 16.7.1981. The second appeal filed by the defendant in S.A.No.1372 of 1981 was also dismissed by this Court by a judgment dated 09.11.1990.

6. Thereafter, the first plaintiff Sheik Mytheen filed E.P.No.140 of 1990 for the execution of the decree. In the Execution Petition, the Executing Court passed the following order:

“16.4.91:

cj;jut[

t!;Jit thH;tpj;J bgw ,k;kD jhf;fy; bra;ag;gl;L cs;sJ/ vjph;kDjhuh; I.A.30/91, O.S.179/89 vd;W kD bra;J cs;sjhf Vw;fdnt Twp cs;shh;/ I.A.30/91 Vw;fdnt 22/3/1991y; js;Sgo Mfptpl;J/ vdnt ,t;tHf;fpy; thH;tpg;g[bfhLg;gjpy; vt;tpj jila[k; ,y;iy/ vdnt deliver by - 29.4.91. Id/- P.D.M. 16.4.91. “

7. However, on 19.4.1991, a petition for advancing the hearing of the E.P., filed on behalf of the decree holder was allowed, the hearing of the E.P. was advanced from 29.4.1991 to 19.4.1991 and the Executing Court not only recorded delivery,

but also closed the execution petition.

8. After one year of the delivery being recorded, the judgment debtor Shahul Hameed filed an application in E.A.No.161 of 1992 before the Executing Court seeking re-delivery of the portion of the property allegedly taken possession in excess of the decree passed in the suit. This application was filed by the judgment debtor purportedly under Sections 47 and 151, CPC. Actually, the prayer made in E.A.No.161 of 1992 was “to declare the delivery effected in E.P.No.140 of 1990 as excessive and null and void”.

9. By an order dated 30.10.1992, the Principal District Munsif, Padmanabhapuram, dismissed the said application, holding that there was no excess delivery and that the judgment debtor failed to prove either his right or his possession of the portion of the property in respect of which he was seeking re-delivery.

10. As against the said order dismissing E.A.No.161 of 1992, the judgment debtor filed a revision petition in CRP No.3291 of 1992 on the file of this Court. The revision petition was allowed by this Court by an order dated 26.11.1997, with a direction to the decree holder to re-deliver the excess portion of the property other than the one for which the decree was passed. It must be noted that the decree holders did not appear in the civil revision petition and the order was passed in their absence. Paragraphs 5 to 7 of the order dated 26.11.1997 passed in CRP No.3291 of 1992, reads as follows: “5. I have gone through the entire pleadings and also the order included in this revision. I am unable to countenance the reasons given by the lower court in dismissing the petition. The lower Court has failed to note that under the decree, the decree holder was entitled to take delivery of the southern shop within a plot having an extent of 14. cents. The lower Court has overlooked that the Amin who gave the delivery of property to the decree holder took delivery of the entire 14. cents of land and six shops within the plot. Undoubtedly the case was one of excess execution and therefore as rightly pointed out by the learned counsel for the petitioner, the judgment debtor was entitled to get redelivery of the property which was delivered over unauthorisedly.

6. This apart, the delivery was effected without notice to the judgment debtor and that too on a holiday. The whole procedure was carried out in haste without giving

an opportunity to the judgment debtor to put forward his case. The C.R.P. therefore liable to succeed and accordingly the revision is allowed. The order of the lower court is set aside and E.A. 161/92 is allowed declaring that the delivery effected in E.P.No.140/90 in O.S.No.420/09 is excessive and is null and void.

7. In view of the order now passed, the respondent is directed to redeliver the rest of the portion other than one to which the decree is passed.”

11. But, it transpires that the judgment debtor Shahul Hameed, who filed CRP No.3291 of 1992 in the year 1992, died on 09.9.1993 itself and that this fact was either unknown and/or not brought to the notice of this Court. Therefore, the civil revision petition was allowed on 26.11.1997 in favour of the sole petitioner, who had died four years before the said order. His legal representatives were not brought on record and the abatement, if there was any, was not set aside. In other words, the order was actually an order in favour of a dead person and that too in the absence of the decree holder.

12. After four years of the order allowing the civil revision petition, the decree holder Sheik Mytheen came up with a miscellaneous petition in CMP No.3538 of 2001 praying for bringing on record, the legal representatives of the judgment debtor Shahul Hameed. But, the said petition was dismissed by this Court by an order dated 15.10.2003. Paragraph 3 of the said order, which alone contains the reasons for

dismissing the miscellaneous petition, reads as follows: “Be that as it may, now the only point for consideration is whether the petitioner herein who was the respondent in the main civil revision petition, admittedly did not participate in the civil revision petition proceeding since he was absent and therefore the civil revision petition had to be decided and unless the petitioner is able to overcome and explain his absence for all these years, further filing an application to nullify the said order on legal grounds, he cannot be permitted to file an application of this sort seeking to implead the legal representatives of the deceased petitioner. Further more, the order has gone in favour of the deceased person and therefore nothing wrong in the deceased person's legal representatives claiming the right as per their entitled in law. Only if the order has gone against the dead person, it is

bad in law and therefore, absolutely there is no justification on the part of the petitioner herein to have come forward to file the above civil revision petition.”

13. In the meantime, in pursuance of the original order dated 26.11.1997 passed in CRP No.3291 of 1992, the legal heirs of the judgment debtor Shahul Hameed, along with two persons by name Augustin and T.C.Joseph, filed a petition in E.P.No.201 of 2000, praying for restitution and re-delivery of the excess property from the decree holder. For reasons best known to them, the said petition was filed under Sections 144 and 151, CPC and the prayer was for re- delivery of the property to the 15th petitioner by name T.C.Joseph, on behalf of the 14th petitioner Augustin.

14. It is relevant to note at this juncture that the legal heirs of Shahul Hameed were the petitioners 2 to 13 in E.P.No.201 of 2000. It was stated in the petition that the 14th petitioner Augustin got a sale deed dated 02.11.1982 from the original judgment debtor Shahul Hameed, in respect of 7. cents out of the total of 14. cents and that he also purchased 5 cents under a Court sale and delivery in O.S.No.13 of 1992 on the file of the Principal District Munsif Court, thereby becoming the owner of 12” cents, out of the total extent of 14. cents. The 14th petitioner Augustin claimed that the 15th petitioner T.C.Joseph was appointed as his Power Agent, by a registered deed dated 04.8.1992. Therefore, the petitioners actually prayed in E.P.No.201 of 2000 for re-delivery from the decree holders, to enable them to hand over possession to the 15th petitioner T.C.Joseph.

15. By an order dated 18.10.2006, the Principal District Munsif, Padmanabhapuram, dismissed E.P.No.201 of 2000, on three grounds, viz. (i) that the petition was not maintainable inasmuch as the entire suit property in O.S.No.420 of 1976 had been shown; (ii) that the sale deed dated 02.11.1982 filed as Ex.P2, on the basis of which Augustin claimed title to the property was a fraudulent document; and (iii) that the petitioners had not come to Court with clean hands.

16. Aggrieved by the said order dated 18.10.2006 passed in E.P.No. 201 of 2000 in O.S.No.420 of 1976, the legal heirs of the original judgment debtor Shahul Hameed as well as persons claiming title under Shahul Hameed, viz., Augustin

and T.C.Joseph, have come up with the above civil revision petition.

17. The bone of contention of Mr.K.N.Thampi, learned counsel for the petitioners is that in the order passed in CRP No.3291 of 1992 dated 26.11.1997, a clear and unambiguous finding had been recorded to the effect that there was excess delivery and that the delivery was effected without notice to the judgment debtor on a holiday, in a hasty manner. Not stopping at recording such findings, this Court went to the extent of directing the decree holders to re-deliver the rest of the portion, other than the one for which the decree was passed in the suit. The attempt made by the decree holder Sheik Mytheen to get the order passed in CRP No.3291 of 1992 dated 26.11.1997 set aside, failed with the dismissal of CMP No.3538 of 2001. Therefore, it is the contention of the learned counsel for the petitioners that since the order passed in the civil revision petition had attained finality, it was not open to the executing Court to over reach the said order and annul its effect. By dismissing the execution petition on the grounds mentioned in para 15 above, the executing Court, according to the learned counsel for the petitioners, had virtually set aside the order of the High Court. Therefore, the learned counsel for the petitioners contended that the order under revision is vitiated by serious illegality and infirmity.

18. Under normal circumstances, the above contention of the learned counsel for the petitioners, is liable to be accepted as perfectly valid and justified. But, insofar as the case on hand is concerned, there is a hitch. The civil revision petition CRP No.3291 of 1992 was filed by the sole judgment debtor Shahul Hameed himself, in the year 1992. Admittedly, he died on 09.9.1993. The revision was allowed on 26.11.1997, without bringing on record, his legal representatives. Thus, the order passed in civil revision petition was actually in favour of a dead person. Therefore, the primary question to be considered in this civil revision petition is as to whether the said order dated 26.11.1997 in CRP No.3291 of 1992 is a nullity or not. If the order is actually a nullity, then the next question would be about the effect of the order dated 15.10.2003 passed in CMP No.3538 of 2001 in CRP No.3291 of 1992.

19. Therefore, let me now take up the first question as to whether the order passed in CRP No.3291 of 1992 is a nullity, on account of the fact that it was

passed in favour of a dead person.

20. Order XXII of the Code of Civil Procedure deals with the consequences of death, marriage or insolvency of parties to the proceedings before Court. I do not know whether it was the intention of the law makers to place death, marriage and insolvency on the same footing and whether the placement of all of them under one Order was actually a reflection of such an intention.

21. Be that as it may, the effect of Rules 1 to 12 of Order XXII, can be summarised as under:

(a) The death of a plaintiff or a defendant will not cause the suit to abate if the right to sue survives.

(b) If there are more plaintiffs than one or more defendants than one and one of them dies, with the right to sue surviving upon the other plaintiffs or defendants, the Court has to simply make an entry to that effect and proceed with the suit.

(c) If one of the several plaintiffs dies and the right to sue does not survive on the surviving plaintiffs alone, then, the legal representatives of the deceased plaintiff have to be brought on record, on an application made in that behalf. The same procedure applies where a sole plaintiff dies and the right to sue survives.

(d) If an application to bring on record the legal representatives of the deceased plaintiff is not made within the time prescribed by the law of limitation, then the suit will abate so far as the deceased plaintiff is concerned.

(e) If one of the several defendants dies and the right to sue does not survive against the surviving defendants alone, then, the legal representatives of the deceased defendant have to be brought on record, on an application made in that behalf. The same procedure applies where a sole defendant dies and the right to sue survives.

(f) If an application to bring on record the legal representatives of the deceased defendant is not made within the time prescribed by the law of limitation, then the suit will abate as against the deceased defendant. (g) However, the Court has a

discretion to exempt the plaintiff from the necessity of substituting the legal representatives of a deceased defendant, if such defendant had failed to file a written statement or if he had failed to appear and contest the suit at the time of hearing.

(h) The Court has the power under Section 5 of the [Limitation Act, 1963](#) to condone the delay in seeking to set aside the abatement caused due to the death of the defendant, if the plaintiff shows that he was ignorant of the death of the defendant and that as a consequence, he had sufficient cause for not making an application for substitution of the legal representatives, within the time prescribed.

(i) If a party who died during the pendency of the suit, had not left behind any legal representative, the Court may proceed further without any one representing the estate of the deceased. Alternatively, the Court may appoint the Administrator General or an Officer of the Court to represent the estate of the deceased.

(j) The Court has the power to decide the question whether any person is or is not the legal representative of a deceased plaintiff or defendant. If such question arises before an appellate Court, the appellate Court may direct the subordinate Court to try the question and record a finding and send it to the appellate Court.

(k) If the death of either party to the suit occurs, after the conclusion of the hearing, but before the pronouncement of the judgment, there will be no abatement, irrespective of whether the cause of action survives or not. Consequently, the Court can proceed to pronounce the judgment. (l) A suit shall not abate, merely on account of the marriage of a female plaintiff or defendant. A decree in favour of the wife can be executed on an application filed by the husband, if he is by law entitled to the subject matter of the decree. Similarly, if the husband is liable by law, for the debts of his wife, the decree against the wife can also be executed against the husband, with the permission of the Court.

(m) A suit which is maintainable by an assignee or receiver, for the benefit of the creditors of a plaintiff, will not abate on account of the insolvency of the plaintiff, unless the assignee or receiver declines to continue.

(n) If a suit abates or is dismissed under Order XXII, no fresh suit shall be brought on the same cause of action.

(o) The plaintiff or the person claiming to be his legal representative can seek to set aside the abatement or dismissal, by showing sufficient cause. The Court has the power to condone the delay in filing such applications. (p) If there is assignment or creation of devolution of any interest, during the pendency of a suit, the suit may be continued by or against the person to or upon whom such interest has devolved. But, it shall be done with the leave of the Court.

(q) A pleader appearing for a party to the suit, has a duty to inform the Court about the death of his client, if he comes to know about the death. Thereafter, the Court is obliged to give notice of such death to the other party.

(r) The provisions of Order XXII are applicable to appeals. While so applying, the words "plaintiff", "defendant" and "suit" shall be taken to include the words "appellant", "respondent" and "appeal". (s) The provisions of Rules 3, 4 and 8 of Order XXII, are not applicable to proceedings in execution of a decree or order. In other words, (i) the obligation under Rule 3 to bring on record the legal representatives of the deceased plaintiff; (ii) the obligation under Rule 4 to bring on record the legal representatives of the deceased defendant; and (iii) the consequences of the insolvency of a plaintiff indicated in Rule 8, are not applicable to the proceedings in execution of a decree.

22. A reading of Rules 1 to 12 of Order XXII would show that the provisions of Order XXII, primarily concern suits. Rule 11 gives a positive indication that all these provisions are also applicable to appeals. Rule 12 gives an indication, though in a negative form, that all the provisions of Order XXII, except those under Rules 3, 4 and 8, are applicable to proceedings in execution of a decree or order.

23. In the light of the manner in which and the language in which, the provisions of Rules 1 to 12 of Order XXII are framed, a contention was raised by Mr.K.N.Thampi, learned counsel for the petitioners that these provisions are not applicable to revisions under Section 115, CPC. According to the learned counsel for the petitioners, the revisional jurisdiction of the High Court, under Section 115,

CPC, is available both suo motu as well as upon an application by a party to the proceedings. Since the revisional jurisdiction of the High Court under Section 115 is only to correct an error of jurisdiction or a material irregularity, the principles underlying Order XXII, according to the learned counsel, would not apply to proceedings under Section 115. Therefore, in essence, it is the contention of the learned counsel that the death of Shahul Hameed (sole petitioner in CRP No.3291 of 1992), would not make the order passed therein, a nullity, on the basis of the principles enunciated in Order XXII.

24. But, the said contention was sought to be repelled by Mr.A. Arumugham, learned counsel for the respondents 2 and 3 on the ground that in view of Section 141, CPC, the procedure provided in the Code in regard to suits, shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. Similarly, Mr.G.Prabhu Rajadurai, learned counsel for the first respondent relied upon a few decisions and contended that the provisions of Order XXII would apply in all fours to revisions under Section 115 also.

25. Mr.K.N.Thampi, learned counsel for the petitioners, relied upon the decision of a learned Judge of the Gauhati High Court in Rahima Khatun v. Samser Ali [AIR 1985 Gauhati 40], a decision of M.Thanikachalam, J., in C.Manoharan vs. C.V.Subramaniam {2006 (4) MLJ 898} and a decision of the Supreme Court in P.Jesaya vs. Sub Collector {2004 (13) SCC 431}. In response, the learned counsel for the first respondent relied upon the following decisions in support of the contra view:

- (i) Pendyala Basawanjanayulu v. Lingamullu Ramalingayya [AIR 1938 Mad 115];
- (ii) Bibi Rahmani Khatoon v. Harkoo Gope [(1981) 3 SCC 173]; (iii) Surinder Nath Kapoor v. Union of India [AIR 1988 SC 1777]; (iv) Ganesan & five others v. Perumal Gounder & another [1995 (II) CTC 549]; and
- (v) Amba Bai v. Gopal [(2001) 5 SCC 570].

26. In Rahima Khatun, relied upon by Mr.K.N.Thampi, learned counsel for the petitioners, the Gauhati High Court was concerned with a case where a suit for

eviction was decreed by the Trial Court and confirmed by the Appellate Court. The tenant died after filing a revision under Section 115 CPC. The revision was dismissed on merits, one day after the death of the revision petitioner (tenant). In the execution proceedings, it was contended that the order passed in the revision was a nullity, since the revision petitioner had died before the order was passed. While rejecting the said contention, it was held by a learned Judge of the Gauhati High Court that the death of the revision petitioner did not in any way make the judgment of the High Court invalid, inasmuch as it was passed in a revision under Section 115, in which, the High Court could even suo motu call for the records and dispose it of, after examining them and satisfying itself that the order of the Subordinate Court did not suffer from any infirmity specified in Section 115 and that the death of the petitioner did not affect the revisional power of the High Court under Section

115.

27. The above view expressed by the Gauhati High Court, cannot be rejected outright, as an impossible view. Section 115 empowers the High Court to call for the record of any case, which has been decided by any Court subordinate to it, if such subordinate Court had exercised the jurisdiction not vested in it in law or failed to exercise a jurisdiction vested in it or acted in exercise of its jurisdiction illegally or with material irregularity. Therefore, the power of the High Court under Section 115 is actually supervisory in nature and hence, can be exercised both suo motu, as well as on application, by a party. The only restriction for the High Court under Section 115 is that it shall not vary or reverse any decision of the subordinate Court, without hearing the party likely to be affected by such variation or reversal. Therefore, the contention raised by the learned counsel for the petitioners merits an in-depth analysis. But, before venturing to do so, let me also take note of the other decisions relied upon by the learned counsel for the petitioner as well as the learned counsel for the respondents.

28. In *P.Jesaya*, relied upon by the learned counsel for the petitioner, the facts out of which the appeal went to the Supreme Court is not clearly borne out from the report {2004 (13) SCC 431}. All that could be seen from the said decision is that

the first respondent in the appeal before the High Court, died and his heirs were not brought on record. When it was contended that the appeal had abated, the Supreme Court held that when the counsel failed in his duty imposed under Order XXII, Rule 10 of the Code to inform the Court and the other side, the heirs of the defaulting party cannot be allowed to take advantage of their own fault.

29. In C.Manoharan, there were two plaintiffs, one of whom died and the other survived. Therefore M.Thanikachalam, J., held that though the decree passed against a dead person is a nullity as held by the Apex Court in Amba Bai vs. Gopal {AIR 2001 SC 2003}, the counsel was at fault in not bringing the death of his client to the notice of the Court. Therefore, the learned Judge followed the decision in P.Jesaya.

30. But the decisions in P.Jesaya and C.Manoharan, are not applicable to the facts of the case, since they do not deal with the question on hand directly. There is also one more reason. The focus in both these decisions, is on the failure on the part of the Pleader to perform his duties under Order XXII, Rule 10-A of the Code. In our case, who was at fault? It was the judgment- debtor's counsel, who was at fault. The judgment-debtor was the revision petitioner. His counsel argued the revision after 4 years of the death of his client. Therefore, the petitioners in this revision, who are the legal representatives of the petitioner in CRP No.3291 of 1992, whose counsel was at fault in terms of Order XXII, Rule 10-A, cannot take advantage of the fault on their own side. Moreover, the default on the part of Shahul Hameed, the petitioner in CRP 3291 of 1992, was of a more serious nature, in this case. From the pleadings made by Shahul Hameed's legal heirs and their successors, namely Augustin and T.C.Joeseph, it is clear that Augustin bought 7-1/2 cents out of the total of 14-1/2 cents under a Sale Deed dated 2.11.1982 itself. Therefore when Shahul Hameed filed CRP 3291 of 1992, seeking redelivery of excess portion, he was not even the owner. Therefore, when his counsel failed to take steps in terms of Order XXII, Rule 10-A, after the death of Shahul Hameed, the legal representatives of Shahul Hameed cannot be allowed to take advantage of the same. Hence, order XXII, Rule 10, cannot be put against the decree holder and his legal heirs. Therefore, out of the 3 decisions relied upon by the learned counsel for the petitioner, the decision of the Gauhati High Court

alone is of relevance to the case on hand.

31. Having discussed the 3 decisions cited by the learned counsel for the petitioner, let me now turn on to the decisions cited by the learned counsel for the first respondent.

32. The first decision cited by the learned counsel for the first respondent is in *Pendyala Basavanjanayulu*, (AIR 1938 Madras 115). In that case, a decree for money was passed against one Subba Rao. He filed a revision on the file of the High Court, challenging the decree (since the decree was passed on an award against which no appeal would lie). The revision was allowed on 10.5.1934 and the suit was remitted back to the Trial Court, for a retrial. But, the said order was passed without taking note of the death of the revision petitioner on 7.1.1934 itself. Consequently, the Trial Court held that the order of the High Court was invalid, as it was passed in favour of a dead person. This decision of the Trial Court was challenged on revision before the High Court. It was contended before the High Court that in the case of petitions under Section 115 CPC, it does not matter whether the parties are dead or alive at the time when the order is passed, since in such cases the matter is entirely one between the High Court and the Trial Court. But, the said contention was rejected by this Court in the aforesaid decision, holding that 'to admit such a principle would be to deny the fundamental right of parties to a litigation to be heard and that Order XXII has always been applied to petitions under Section 115.' Therefore, this Court held that the order of the Trial Court treating the order of the High Court passed in the first civil revision petition as a nullity and one passed without jurisdiction, was perfectly in order. But this decision in *Pendyala*, was overruled by a Division Bench, 11 years later. I shall refer to it later.

33. In *Bibi Rahmani Khatoon*, the Supreme Court pointed out in paragraph 10 of its decision that if a party to an appeal or revision dies and either the appeal or revision abates, it will have no impact on the judgment, decree or order against which the appeal or revision is preferred. But, this decision cannot be taken to be an authoritative pronouncement of law on the issue whether Order XXII will apply to proceedings under Section 115 CPC or not, since the Supreme Court was

actually concerned with the abatement of proceedings, under a special enactment known as Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956. However, what is stated in paragraph 10 of the decision in Bibi Rahmani Khatoon, is quoted with approval by a later decision of the Supreme Court in Amba Bai Vs. Gopal (2001 (5) SCC 570).

34. The decision in Surinder Nath, as well as the decision in Ganesan and five others (1995 (2) CTC 549), are also not on the point whether an order passed under Section 115 CPC in favour of a dead person is a nullity or not.

35. But in Amba Bai, relied upon by the learned counsel for the first respondent, a suit for specific performance was dismissed by the Trial Court, but the appeal was allowed. The defendant filed a second appeal and died before the second appeal was dismissed. The execution proceedings were resisted by the legal heirs of the judgment-debtor on the ground that the judgment in the second appeal was a nullity. The High Court agreed and the matter went to the Supreme Court. Allowing the appeal, the Supreme Court held that the judgment passed without the knowledge that the appellant had died, was a nullity. But since the legal representatives of the judgment-debtor did not take steps to get impleaded and to prosecute the second appeal, the second appeal abated and the decree for specific performance passed by the first Appellate Court attained finality. To come to such a conclusion, the Supreme Court held that the doctrine of merger would not apply to such a case.

36. Having seen the decisions cited on both sides and having taken note of the provisions of Order XXII, Rules 3, 4, 11 and 12 of the Code, let me now undertake a journey through the annals of time, to see how different Courts have viewed the issue in the past.

37. Since Order XXII, Rule 12, makes it clear that the provisions of Rules 3, 4 and 8 do not apply to proceedings in execution of a decree, the Courts were confronted with 2 different questions in the past. They are:- (i) Whether the bar under Order XXII, Rule 12, would apply to appeals arising out of execution proceedings also ?

(ii) Whether the bar under Order XXII, Rule 12, would apply to revisions arising out of execution proceedings also ?

38. On the first question, the opinion of the Courts has swung from one extreme to the other, as can be seen from the following:- (i) Mir Khan vs. Sharfu {AIR 1923 Lah. 560}

(ii) Avadai Ammal vs. Krishnan Chetti {1928 (55) MLJ 497 (DB)} (iii) Hakeem Syed vs. Fateh Bahadur {AIR 1929 Pat.565 (FB)} (iv) Changa Mal vs. Chaubey Ram {AIR 1933 All. 388 (DB)} (v) Cheda Lal vs. Aijaz Hussain {AIR 1936 Lah. 1022 (DB)} (vi) Madhaorao Ghatate vs. Baliram Narayan {AIR 1938 Nag. 502(DB)} (vii) Ajudhia Pershad Ram Pershad vs. Sham Sunder {AIR 1947 Lah. 13 (FB)} (viii) Trimbak vs. Gopal {AIR 1947 Bom. 480 (DB)}

(ix) Bishnu Bijoy vs. Chandra Bijoy {AIR 1955 Cal. 281 (DB)} (x) Balaram vs. Subodh Chandra {AIR 1956 Ass. 9 (DB)}

(xi) Surendranath vs. Dasarathi Dutta {AIR 1960 Ori. 14} (xii) Chandravati Bai vs. Chaganlal {AIR 1962 AP 308 (DB)} (xiii) Haji Abdul vs. Phir Gulam {AIR 1970 J&K 13 (DB)} (xiv) Hanumat vs. Phuna {AIR 1971 Raj. 43}

(xv) Kusun Samal vs. Banamali {AIR 1974 Ori. 105}

(xvi) Sher Singh vs. Paras Ram {AIR 1979 HP 39 (DB)}

I am not discussing the above cases in detail, since they address the question as to whether appeals arising out of execution proceedings would also abate or not. While some of the above decisions hold the view that Rule 11 has to be read with Rule 12, some Courts have taken a different view, holding that appeals arising out of the execution proceedings are not in any way different from appeals arising out of other proceedings. Since we are concerned in this case only with a revision arising out of execution petition, I am not discussing the ratio of the above decisions in detail.

39. Even on the second question whether the bar under Order XXII, Rule 12, would extend to revision petitions arising out of execution proceedings, the opinion

is divided. Let us now have a look at those decisions:- (i) In AIR 1949 Mad. 435 (DB) - Manickam v. Ramanathan it was held by a Division Bench of this Court that there can be no question of abatement but for the combined application of the provisions of Order 22, Rules 3 and 4 and the material articles of the Limitation Act. Overruling the decision of Stodart, J., in 'Pandyala' (AIR 1938 Mad. 115), the Division Bench held that as neither Order 22 of the Civil Procedure Code, nor the Limitation Act, applies to Civil Revision petitions, there can be no question of abatement of such petitions. (ii) In AIR 1953 Raj. 169 (FB) - Babulal v. Mannilal, it was held that Order 22 applies to suits and by virtue of Rule 11, also to the cases of appeals. It does not govern the cases of revision applications. Section 141 also does not make the provisions of Order 22 applicable to the cases of revisions as it applies only to the cases of proceedings of original nature. (iii) In AIR 1958 Punj. 171 - Jowala Singh v. Malkan, it was held that ordinarily the provisions of Order 22 govern the case of abatement during the pendency of the suit. This principle has been extended expressly by Rule 11 of Order 22 to the case of appeals, but there is no mention of its applicability to revisions. This is a case in which the maxim "inclusio unius est exclusio alterius" should apply and by restricting the application of the rule of abatement expressly to suits and appeals, the intention of the legislature was to exclude from its purview cases arising from proceedings in revision. Section 141 of the Code cannot be read in cases of abatement under Order XXII, so as to extend its scope to revisions.

(iv) In AIR 1971 Del. 65 (DB) - Union of India v. Ganga Datt it was held that the provisions of Order 22 have been made specifically applicable to appeals by virtue of Rule 11. It is not applicable to revisions and inherent power of the Court to substitute parties will be exercised only in the context of exercising judicial discretion in interfering with lower court's orders and not under Section 146 of the Code.

(v) In AIR 1972 All. 504 (FB) - Chandradeo Pandey v. Sukhdeo Rai, it was held that by virtue of Rule 11 of Order 22, the provisions of Rules 3 and 4 are made applicable to the appellants and the respondents in appeals as well. But these Rules, however, do not apply to revisions.

(vi) In AIR 1976 Goa, Daman & Diu 2 - Teotonio Nunes v. Maria Nunes, it was held, following the decision in AIR 1958 Pun. 171 and AIR 1963 Pun. 206 that the provisions of Order XXII of C.P.C. do not apply to revision petitions. (vii) But in AIR 1977 Cal. 241 (DB)- State Bank of India v. S.Wazir Singh, a Division Bench of the Calcutta High Court held that the provisions of Order 22 CPC apply in the case of revisional applications as well. The Division Bench took note of the decision of the Lahore High Court in AIR 1948 Lah. 186, the Full Bench decision of the Rajasthan High Court in AIR 1953 Raj. 169, the Full Bench decision of the Allahabad High Court in AIR 1972 All. 504 and also a decision of a single Judge of the Calcutta High Court itself in Md. Israil vs. S.M.Amiral Islam {1976 (1) Cal. LJ 492}. But nevertheless, the Division Bench of the Calcutta High Court took a different view in this State Bank of India case, after taking note of an earlier Division Bench decision of the Calcutta High Court in (1913) 18 Cal LJ 141 (DB) (Anandamoyi Dasi v. Rudra Mahanti). Interestingly, this earlier decision of the Division Bench of the Calcutta High Court was also taken note of by the Full Bench of the Lahore High Court, but the Lahore High Court considered the view expressed by Asutosh Mookerjee, J., in Anandamoyi Dasi, as obiter. But the Division Bench in State Bank of India did not agree with the Lahore Full Bench that the observations in Anandamoyi, were obiter. The relevant portion of the decision of the Division Bench in State of India case, is as follows:-

“This point came up for decision long ago before a Division Bench of our High Court in (1913) 18 Cal LJ 141 (DB) (Anandamoyi Dasi v. Rudra Mahanti). Sir Asutosh Mookerjee, J., relying on an earlier decision reported in (1912) 16 Cal LJ 571 (Deo Saran v. Syedunnesa) held that 'the principle recognised in Rule 3 of Order 22 of the CPC is applicable not only to suits, but also to proceedings in revision'.

The Division Bench of the Calcutta High Court in State Bank of India case, also took note of the observations made by the Supreme Court in Shankar Ramchandra v. Krishnaji AIR 1970 SC 1 to the effect: “When the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the C.P.C. circumscribes the limits of that jurisdiction but the jurisdiction

which is being exercised is a part of the appellate jurisdiction of the high Court as a superior court. It is only one of the modes of exercising power conferred by the statute basically and fundamentally it is the appellate jurisdiction of the high Court which is being invoked and exercised in a wider and larger sense". This view of the Supreme Court was based upon AIR 1932 PC 165 (Nagendra Nath Dey v. Suresh Chandra Dey) where the Judicial Committee opined "Any application by a party to an appellate court to set aside or revise a decree or order of a Court subordinate thereto is an appeal within the meaning of Art.182 (2) of Sch.1 of the Indian Limitation Act, 1908". (viii) In AIR 1979 Raj. 179 - Jamna Lal v. Khemraj Nathulal a learned Judge of the Rajasthan High Court, following the decision of the Division Bench of the same Court in Kanhiyalal {AIR 1953 Raj. 69} and the decision of the Full Bench of the same Court in Babulal {AIR 1953 Raj. 169} held that it is well settled that Order XXII does not apply to revision applications. (ix) AIR 1989 J&K 35 - Islamia College of Science and Commerce v. Hassan, a learned Judge of the Jammu and Kashmir High Court followed the Full Bench decision of the Allahabad High Court in Chandradeo Pandey v. Sukhdeo AIR 1972 All 504 (FB).

40. In Puran Singh Vs. State of Punjab (1996 (2) SCC 205), a question arose as to whether the provisions of Order XXII are applicable to proceedings under Articles 226 and 227. Till 1976, when an "Explanation" was inserted under Section 141 of the CPC, to exclude the proceedings under Article 226 from the definition of the expression "proceedings", there was a controversy as to whether the provisions of the Code would apply even to writ proceedings or not. But, the Explanation inserted by CPC (Amendment) Act, 1976 excluded the proceedings under Article 226, from the definition of the expression "proceedings" appearing in Section 141, CPC. Therefore, after taking note of the purpose for which the amendment was made, the Supreme Court held in paragraph 7 of its decision in Puran Singh that the provisions contained in Order XXII are not per se applicable to writ proceedings. While holding so, the Court also pointed out at the end of paragraph 7 that if the procedure prescribed in respect of suits in the Code are made applicable to writ proceedings, it may frustrate the extraordinary powers of the High Court under Articles 226 and 227.

41. However, after expressing the above view in paragraph 7, the Court posed a few questions in paragraph 8, such as whether the proceedings under Articles 226 and 227 could continue against a dead person and whether the Court will be empowered to pass an order without hearing the legal representatives of the deceased respondent, even when the right to sue survives against the legal representatives of the deceased respondent. After examining these questions, the Court held in paragraphs 11 and 12 as follows :

“When The Constitution has vested extraordinary power in the High Court under Articles 226 and 227 to issue any order, writ or direction and the power of superintendence over all Courts and Tribunals throughout the territories in relation to which such High Court is exercising jurisdiction, the procedure for exercising such power and jurisdiction have to be traced and found in Articles 226 and 227 itself. No useful purpose will be served by limiting the power of the High Court by procedural provisions prescribed in the Code. Of course, on many questions, the provisions and procedures prescribed under the Code can be taken up as guide while exercising the power, for granting relief to persons, who have invoked the jurisdiction of the High Court. It need not be impressed that different provisions and procedures under the Code are based on well- recognised principles for exercise of discretionary power, and they are reasonable and rational. But at the same time, it cannot be disputed that many procedures prescribed in the said Code are responsible for delaying the delivery of justice and causing delay in securing the remedy available to a person who pursues such remedies. The High Court should be left to adopt its own procedure for granting relief to the persons concerned. The High Court is expected to adopt a procedure which can be held to be not only reasonable but also expeditious.

As such even if it is held that Order 22 of the Code is not applicable to writ proceedings or writ appeals, it does not mean that the petitioner or the appellant in such writ petition or writ appeal can ignore the death of the respondent if the right to pursue remedy even after death of the respondent survives. After the death of the respondent it is incumbent on the part of the petitioner or the appellant to substitute the heirs of such respondent within a reasonable time. For purpose of holding as to what shall be a reasonable time, the High Court may take note of the

period prescribed under Article 120 of the Limitation Act for substituting the heirs of the deceased defendant or the respondent. However, there is no question of automatic abatement of the writ proceedings. Even if an application is filed beyond 90 days of the death of such respondent, the Court can take into consideration the facts and circumstances of a particular case for purpose of condoning the delay in filing the application for substitution of the legal representative. This power has to be exercised on well-known and settled principles in respect of exercise of discretionary power by the High Court. If the High Court is satisfied that delay, if any, in substituting the heirs of the deceased respondent was not intentional, and sufficient cause has been shown for not taking the steps earlier, the High Court can substitute the legal representative and proceed with the hearing of the writ petition or the writ appeal, as the case may be. At the same time, the High Court has to be conscious that after lapse of time a valuable right accrues to the legal representative of the deceased respondent and he should not be compelled to contest a claim which due to the inaction of the petitioner or the appellant has become final.'

42. In *Pranab Kumar Mitra vs. State of West Bengal* {AIR 1959 SC 144}, a question arose whether the revision filed under Section 431 of the Code of Criminal Procedure would abate, upon the death of the revisionist. The Supreme Court held that in hearing and determining cases under Section 439 of the Code, the High Court discharges its statutory functions of supervising the administration of justice on the criminal side and that therefore, the considerations applying to abatement of an appeal, may not apply to the case of revisional applications. However, a subsequent Bench of the Supreme Court clarified this position, in the decision in *Bondada Gajapathi Rao vs. State of A.P.* {AIR 1964 SC 1645}.

43. In *State of Kerala Vs. Narayani Amma Kamala Devi* (AIR 1962 SC 1530), the cashier of a bank was convicted by the Sub.Divisional Magistrate, of an offence of theft. He was sentenced to undergo rigorous imprisonment for one year and the car purchased by him was also sold under orders of Court and the sale proceeds were appropriated to the bank. The appeal filed by the convicted person was dismissed by the Sessions Court on 13.8.1959. Within a few hours of the pronouncement of the judgment, he died. His wife and two minor sons filed a

revision under Section 439, Cr PC on 11.11.1959. The High Court rejected the preliminary objection raised by the State of Kerala that the revision was not maintainable and thereafter, the High Court allowed the revision and set aside the conviction. The High Court also granted a certificate of appeal to the State of Kerala under Article 134(1)(c) of The Constitution.

44. After referring to the common law maxim 'actio personalis moritur cum persona', and after citing Salmond's observations in his Jurisprudence, the Supreme Court pointed out in paragraph 3 of its decision in the above case that there is a distinction between the commencement/ continuance of criminal proceedings against a person and an action taken on behalf of an accused person against whom a criminal proceeding has ended. The Court further pointed out that in such cases the common law maxim is of little use.

45. After holding so, the Court referred to the distinction maintained in the Code of Criminal Procedure, between the Appellate Jurisdiction and Revisional Jurisdiction of the High Court. An argument was advanced before the Supreme Court that by the express provisions of the Statute, a Revisional Court is empowered to do only what an Appellate Court can do. But, that argument was rejected in paragraph 6 of the said decision, on the ground that the conditions for the exercise of the power of revision are not to be confused with the extent of the power.

46. After pointing out distinction between the Appellate Jurisdiction and Revisional Jurisdiction, the Supreme Court also took note of a Full Bench decision of the Bombay High Court in Imperatrix Vs. Dongaji Andaji, (1878 ILR Bom 564), which was later considered by the Supreme Court in Pranab Kumar Mitra Vs. State of West Bengal, (1959 (1) SCR 63). In Pranab Kumar Mitra, the convicted person died pending a revision. But, it was held that the revisional jurisdiction remained untouched. Drawing analogy from the decision in Pranab Kumar Mitra, the Apex Court held in State of Kerala Vs. Narayani Amma that a revisional application could be entertained even after the death of the convicted person. Accordingly, the judgment of the Kerala High Court was upheld.

47. In Dhani Devi Vs. Sant Bihari Sharma, (AIR 1970 SC 759), the Supreme Court had an occasion to consider an identical question with respect to the Motor

Vehicles Act. It was held therein that Order XXII of CPC does not apply to proceedings under the Motor Vehicles Act.

48. As seen from the above discussion, there are only three decisions of this Court on the question as to whether the provisions of Order XXII would apply to revision petitions or not. The first is the decision in *Pendyala Basavanjanayulu* {AIR 1938 Mad. 115}, relied upon by Mr.G.Prabhu Rajadurai, learned counsel for the petitioner. But the said decision was overruled by a Division Bench, in *Manickam vs. Ramanathan* {AIR 1949 Mad. 435}. The third decision was the one in *C.Manoharan* {2006 (4) MLJ 898}. But this decision went on a different footing, as pointed out in para 29 above.

49. To my knowledge, the Supreme Court has not considered the issue so far, in relation to revisions arising out of execution proceedings. The High Courts of Rajasthan, Punjab, Delhi and Allahabad have taken a view that Order XXII does not apply to revisions. The Division Bench of the Calcutta High Court alone has taken a contra view.

50. But the decision of the Division Bench of our own High Court in *Manickam vs. Ramanathan* {AIR 1949 Mad. 435}, may not hold good any longer, in view of an important development that had taken place after the said decision was rendered. In that decision, the Division Bench pointed out that there is nothing in the Civil Procedure Code which makes the provisions of Order XXII applicable to revisions, though it is made applicable to suits and appeals. Not stopping at that, the Division Bench also pointed out that there was no provision even in the Appellate Side Rules of this Court to make Order XXII applicable to civil revision petitions.

51. The Division Bench was right when it rendered its decision in 1949. But subsequently, the position changed. In the Appellate Side Rules of the High Court, Madras, issued by the High Court in 1965, under the provisions of Section 122 of the Code, a specific provision has been incorporated under Order IV, Rule

25. It reads as follows:-

“The provisions of Order XXII of the Code and Indian Limitation Act, relating to abatement shall apply to civil revision petitions”

52. After the introduction of the above Rule, the decision of the Division Bench in Manickam vs. Ramanathan, may not hold good anymore. Therefore, the revision petition CRP No.3291 of 1992, actually got abated after the death of the sole revision petitioner on 9.9.1993. Consequently, the order passed on 26.11.1997 allowing the civil revision petition in favour of a dead person, is only a nullity.

53. Out of something which is only a nullity, nothing can sprout. Therefore, the dismissal of the application CMP No.3538 of 2001 filed by the decree holder, to resurrect the civil revision petition by bringing the legal heirs of the sole revision petitioner on record, is of no consequence. On the contrary, if that application had been allowed, there was a possibility for the legal heirs to seek to set aside the abatement. That was also lost.

54. Once the order passed in CRP No.3291 of 1992 is found to be a nullity, the order of the Executing Court dismissing E.A.No.161 of 1992 filed by the judgment-debtor attains finality. Therefore, no restitution can be ordered, directing the decree-holder to hand over the land allegedly taken possession in excess of the property ordered to be delivered.

55. I have already taken note of one important fact that the order impugned in the civil revision petition was dated 30.10.1992. The revision was filed in 1992. When the legal heirs of the judgment-debtor filed an execution petition in E.P.No.201 of 2000, two persons joined with them as petitioners 14 and 15. The 14th petitioner Augustin claimed to have purchased a portion of the property which the judgment-debtor sought to repossess, under a Sale Deed dated 2.11.1982 itself. He also claimed to have purchased another portion from the judgment-debtor under a Court Sale and delivery in O.S.No.13 of 1992. Therefore, all these facts should have been within the knowledge of Shahul Hameed, the judgment-debtor. But in the execution application E.A.No.161 of 1992 which the judgment-debtor filed for recovery of the excess delivery, he did not take along with him this Augustin. Therefore, the attempt now made on behalf of Augustin and his power agent, leaves a lot of questions unanswered. In such circumstances, the dismissal of the

application filed by the legal heirs of Shahul Hameed along with the persons claiming to be purchasers, cannot be found fault with.

56. In view of the above, the civil revision petition is dismissed. There will be no order as to costs. Consequently connected miscellaneous petition is also dismissed.

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