

(2012) 10 MAD CK 0099

In the Madras High Court

Case No : C.M.A. No. 2934 of 2008 and M.P. No. 1 of 2008

A. Sivaprakash

APPELLANT

Vs

Ammasaiathal @ Chinnammal (Deceased) and Others

RESPONDENT

Date of Decision : 05-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 97, Order 21 Rule 99, Order 22 Rule 10A, Order 22 Rule 11

Citation : (2013) 1 CTC 791 : (2012) 8 MLJ 566

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Advocate : P.L. Narayanan, for the Appellant; P.B. Balaji, for the Respondent

Judgement

Ms. Aruna Jagadeesan, J.—This Civil Miscellaneous Appeal is filed against the order dated 7.7.2008 made in E.A. No. 18 of 2007 in E.P. No. 83 of 2003 in O.S. No. 45 of 1999 by the learned Additional District and Sessions Judge (FTC-V) Coimbatore at Tiruppur, allowing the petition filed by the obstructor/3rd party under Order 21 Rules 97, 99 and 101 of CPC, thereby excluding the undivided 1/3rd share of the petitioner/obstructor from execution of the decree passed in E.P. No. 83 of 2003. The original suit in O.S. No. 457 of 1999 was instituted by the Appellant/decreed holder for specific performance of agreement of sale dated 16.0.1996 against the deceased 1st Defendant Subbaraya Gounder and his sons, Respondents 2 and 3 herein/Defendants 2 and 3. The registered sale agreement was executed by the deceased 1st Defendant and his sons Defendants 2 and 3 in favour of the Appellant. During the pendency of the suit, the father of the Defendants 2 and 3 died and an application in I.A. No. 1224 of 2001 was filed by the Appellant/Plaintiff in O.S. No. 457 of 1999 to amend the short and long cause title to add the word "died" after K. Subbaraya Gounder 1st Defendant in the suit and also for amendment by adding paragraph (3a) after paragraph (3) of the plaint that "subsequent to the filing of the suit, the 1st Defendant K. Subbaraya Gounder died on 7.3.2001, his legal heirs viz. the Defendants 2 and 3 are liable to execute the sale deed as per the suit agreement. The learned counsel, who

appeared for the Defendants 2 and 3 who were already on record, endorsed no objection in the said I.A. No. 1224 of 2001. The said application was allowed. Subsequently, the Defendants 2 and 3 remained ex parte and an ex parte decree was passed by the learned Subordinate Judge, Tiruppur on 28.8.2001. In execution proceedings in E.P. No. 32 of 2002 in O.S. No. 457 of 1999, filed by the appellant/decreed holder, sale deed was got executed by the Sub Court, Tiruppur in favour of the appellant/decreed holder on 29.7.2003. The appellant/decreed holder filed E.P. No. 87 of 2003 for getting delivery of possession from the Respondents/the Defendants 2 and 3.

2. The 1st Respondent/3rd party/obstructor filed an application in E.A. No. 18 of 2007 in E.P. No. 83 of 2003 against the delivery of the suit property to the appellant/decreed holder on the ground that she is the wife of the deceased 1st Respondent/1st Defendant Subbiah Gounder and she is entitled for 1/3rd share in the suit property after the death of her husband. The said petition was dismissed by the learned Additional District Judge (FTC-V) Coimbatore at Tiruppur on the ground that she can agitate her right in the suit filed by her in O.S. No. 458 of 2006 and in the event of her getting a decree in the said suit, the obstructor could invoke the provisions of Section 144 of CPC. Aggrieved against the said order, the 1st Respondent/obstructor filed a Civil Revision Petition in C.R.P. No. 1146 of 2008 and the same was allowed by this Court by order dated 29.4.2008, whereby this Court remanded the matter to the lower Court and directed the Court to consider the right of the 1st Respondent/obstructor in E.A. No. 18 of 2007 itself.

3. After remand, the Court below considered the rights of the parties and passed the impugned order holding that the ex parte decree is not binding on the 1st Respondent, in so far as her 1/3rd share is concerned and ordered to exclude her undivided 1/3rd share from the petition in E.P. No. 83 of 2003 filed for delivery. Aggrieved against the said order passed by the learned Additional District Judge (FTC-V) Coimbatore at Tiruppur, the present Civil Miscellaneous Appeal is filed.

4. Mr. P.L. Narayanan, the learned counsel for the Appellant challenged the impugned order as erroneous and contended that the Court below/executing Court failed to appreciate the doctrine of sufficient representation. The main contention of the learned counsel is that since the Respondents 2 and 3, the sons of the deceased 1st Defendant were on record, it was sufficient representation, as the estate of the deceased was sufficiently represented by the other heirs who were already on record. The learned counsel would submit that the 1st Respondent/obstructor will be bound by the result of the litigation, even though she was not impleaded, unless it is shown that the litigation was not properly conducted by the other party or they colluded with the adversary.

5. The learned counsel for the Appellant placed reliance on the decision of the Honourable Supreme Court in *Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others*, wherein it is held that if some of the heirs are omitted to be brought on record, in the absence of any fraud or collusion, such omission is

not fatal.

6. A decision of a three judge bench of the Honourable Supreme Court, reiterating the similar view, in the case of Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, was also relied upon, wherein it is held that unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir, there was a special case which was not and would not be tried in the proceedings, the heirs, who have applied for being brought on record, should be held to represent the entire estate including the interest of the heirs not brought on the record.

7. On the other hand, Mr. P.B. Balaji, the learned counsel for the Respondents supported the impugned order by pointing out that in the facts and circumstances of the case, the course adopted by the Court below was just and proper, especially when the decision by the Honourable Supreme Court in N. Jayaram Reddy and Another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool, stated that the basic principle underlying Rules 3 and 4 of Order 22 read with Rule 11 of CPC is a facet of natural justice or a limb of audi alteram partem rule and the principle that underlies these provisions is that the legal representative of a deceased who may be affected by the decision, must be afforded an opportunity of being heard before any legal liability is fastened upon him or her. The learned counsel for the Respondents, placing reliance on the decisions of the Honourable Supreme Court Sumtibai and Others Vs. Paras Finance Co. Regd. Partnership Firm Beawer (Raj.) Thru Smt. Mankanwar Chordia (Dead) and Others, and Shahazada Bi and Others Vs. Halimabi (since dead) by her LRs., contended that when the legal representatives of the deceased Defendant, prima facie, found to be co-owners of the property in dispute, they having semblance of title and are not mere busy bodies or inter polers and are entitled to file defence by way of Additional Written Statement, they should be brought on record.

8. I shall examine the submissions made on behalf of the parties with reference to the decisions cited by them in that regard.

9. Admittedly, the sons of the deceased 1st Defendant, who are the executants of the sale agreement along with their father (deceased 1st Defendant) are already on record. It is a case where two of the legal representatives of the deceased Defendant are on record and one of the legal representatives has been left out. In this regard, a few case have to be noticed. I shall refer to two Supreme Court cases, namely, Mahabir Prasad Vs. Jage Ram and Others, . The first case of the Honourable Supreme Court under Order 23 Rule 3 of CPC and the second was under Order 22 Rule 4 of CPC. In the first case, one of the Appellants was dead and some of his heirs applied for bringing themselves on record as his legal representatives. When an objection was taken regarding the absence of the other heirs and legal representatives and on that ground, an argument that the appeal had abated was pressed, it was observed by the Honourable Supreme Court that unless there was fraud or collusion or there were

other circumstances which indicated that there has not been a fair or real trial or that against the heirs there was a special case which was not and could not be tried in the proceedings, there was no reason why the heirs who had applied for being brought on record, could not be allowed to represent the entire estate, including the heirs not brought on record.

10. In the second case of the Honourable Supreme Court in *Makabir Prasad v. Jage Rams* (supra), one of the legal representatives of the deceased Respondent was already on record and no steps for substitution of the other heirs was taken. When an objection was taken, it was held that where in a proceedings a party dies and one of the legal representatives is already on the record in another capacity, it was only necessary that he should be described by an appropriate application made in that behalf that he is also on the record as an heir and legal representative. It was further made clear that even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act, the proceedings will not abate.

11. In the instant case, an application was filed in the suit that the Respondents 2 and 3 who are the sons of the deceased 1st Defendant are already on record and amendment was also allowed in I.A. No. 1224 of 2001 amending the short and long cause title to the effect that the 1st Defendant K. Subbaraya Gounder died and his legal representatives, the Defendants 2 and 3 are liable to execute the sale deed as per the suit agreement. It is to be noted that the learned counsel who appeared for the Respondents 2 and 3, namely, the Defendants 2 and 3, made no objection in the said amendment petition. It is pertinent to point out at this juncture that the attention of the Court was not drawn by any of the defendants to the fact that the wife of the deceased 1st Defendant was in existence and that she was also a legal heir. For the first time only in the execution proceedings, the existence of the 1st Respondent/wife of the deceased 1st Defendant has been shown, that too by an application filed by the 1st Respondent in E.A. No. 18 of 2007. The objection was raised on the ground that the widow had not been substituted or brought on record. The Respondents had kept silent over the matter all through while the suit was pending in the trial Court and in fact, the Respondents 2 and 3 who were already on record, did not contest the suit by filing a Written Statement. It cannot be said that the Respondents 2 and 3 were not aware of the existence of their mother.

12. In *Balgajan Rai and Others Vs. Sukhu Rai and Others*, , a Division Bench has held in a similar circumstance that the Appellant cannot obviously be allowed to raise the question of fact in respect of mother being alive at the relevant time for the first time during the course of the execution proceedings and the observations of the learned judges deciding the aforesaid case was to the following effect:

It would amount to putting a premium of fraud to hold that they were entitled to conceal certain facts from the Court and the, on the basis of these facts, to

assert that there had been an abatement of the appeal.

13. In another decision of the Patna High Court i Rambriksh Prasad Vs. Shyamsunder Prasad Sahu and Others, wherein the objection raised was that the appeal had abated, because of non substitution of two daughters of the deceased and other persons had been substituted, the learned judge made note of the fact that some of the Respondents represented the estate of the deceased Defendant and the order was passed in the presence of the parties and objection had not been taken thereto. The point raised before the learned Judge was that the real heirs had not been substituted. The point was not allowed to be raised.

14. The objections raised by the Respondents in the instant case could have certainly be taken at the earliest stage during the suit prior to the execution proceedings. Significantly the existence of the 1st Respondent, the mother of the Respondents 2 and 3 who was not a party on record was not disclosed by the Respondents in the trial Court. There is nothing to indicate that information was available about her and in spite of it, she was not impleaded. Had the attention of the Appellant had been drawn to the suit about the existence of their mother, there could not have been any difficulty for the Appellant to bring on record the 1st Respondent also in the suit.

15. It is the duty of the lawyer for the Defendant to supply the date of death of the deceased Defendant with the names of the heirs and legal representatives of the deceased defendant. Admittedly, in this case, no such information had been given. Order 22 Rule 10A of CPC, which has been added in Order 22 of CPC by the Amendment Act, 1976, provides that when a pleader appealing for a party to the suit comes to know about the death of the party, he shall inform the Court about it and the Court thereafter shall issue notice to the other party. This provision was introduced by the aforesaid amendment specially to mitigate the hardship arising from the fact that the party may not come to know about the death of the other party during the pendency of any civil proceedings. By this amendment, a duty has been cast upon the learned advocate appearing for the party who is dead to intimate the Court about the date of death of the party represented by him. For this purpose, this deeming fiction is introduced by the amendment to the effect that the contract between the dead client and the lawyer subsists to the limited extent after the death of the party.

16. In Gangadhar and Another Vs. Raj Kumar, it has been held that refusal to set aside abatement without considering Order 22 Rule 10A of CPC must be held to be bad in law. In the said decision, it was observed that in view of Order 22 Rule 10A of CPC, a duty is cast upon the pleader of the deceased to inform the Court or to the learned counsel for the Plaintiff about the date of death and also to supply the name of the heirs and legal representatives of the deceased. It appears from records that no such information has been furnished by the learned advocate who appeared for the Defendant. There was also no occasion for the Appellant to know about the existence of another legal representative, namely, the wife of the deceased 1st Defendant.

17. That apart, there was no objection from the Respondents 2 and 3 that one other heir was left out. In fact, the Respondents 2 and 3 did not contest the case and allowed the suit to be decreed ex parte. The case had been proceeded as if the estate of the deceased 1st Defendant was represented in full by the heirs already on record. There is no fraud or collusion alleged in this case nor is there anything to show that there had not been a fair or real trial nor can it be said that against the absent heir, there was a special case which was not and could not be tried in the proceedings in her absence. The learned counsel for the Respondents has not been able to show as to what other grounds of objections were available to the 1st Respondent which had not been available to the Respondents 2 and 3.

18. In view of the pronouncements of the Honourable Supreme Court in *Sital Prasad Saxena (Dead) by Lrs. Vs. Union of India (UOI) and Others*, and *Bhagwan Swaroop and Others Vs. Mool Chand and Others*, it cannot be disputed that if the estate of the deceased has got sufficient representation and even if one of the legal representatives of the deceased is on record, suit or appeal will not abate. In the present case, the estate of the deceased was sufficiently represented and the decree was obtained without fraud or collusion. It has to be pointed out that the substitution is to be made to enable the estate of the deceased Defendant to be represented in cases where the cause of action survives the death of the Defendant. As long as there is no collusion or fraud, failure to implead one or more of the several legal representatives would not affect the validity of the decree.

19. On the facts of this case, I am of the considered view that the principle of substantial representation of the estate would apply and the estate of the deceased was represented in full including the interest of the 1st Respondent by the Respondents 2 and 3 herein. Therefore, the impugned order passed by the Court below excluding the undivided 1/3rd share of the 1st Respondent from the execution of the decree is unsustainable and liable to be set aside.

20. It has been brought to the notice of this Court that the 1st Respondent died during the pendency of the civil miscellaneous appeal and the Respondents 2 and 3 have been brought on record as legal representatives of the 1st Respondent vide order dated 6.7.2012 in M.P. No. 1 of 2001 in C.M.A. No. 2934 of 2008. In view of my conclusions already drawn, this civil miscellaneous appeal is bound to succeed and is therefore, allowed. The impugned order dated 7.7.2008 made in E.A. No. 18 of 2007 in E.P. No. 83 of 2003 in O.S. No. 45 of 1999 by the learned Additional District and Sessions Judge (FTC-V) Coimbatore at Tiruppur is set aside. The Court below is directed to dispose of the E.P. No. 83 of 2003 as expeditiously as possible, preferably within a period of four months from the date of receipt of a copy of this order. No costs.