

(2006) 08 KAR CK 0082
In the Karnataka High Court
Case No : C.R.P. No. 89 of 2004

B.G. Thimmaiah dead by his Lrs. Ashwathamma and Others	APPELLANT
Vs	
K.A. Narayana Shetty	RESPONDENT

Date of Decision : 10-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 9, 104

Citation : (2007) 4 KarLJ 611

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : Vishwanath Shetty, for M.S. Subbarayappa, for the Appellant;
Madhava Reddy, Kenche Gowda and Harish Shetty, for the Respondent

Judgement

Jawad Rahim, J.—This is a revision u/s 115 of the Code of Civil Procedure, 1908, by the petitioners, who are plaintiffs in OS No. 188/87 on the file of the learned Civil Judge (Jr. Dvn.) & JMFC, Gowribidanur. They are aggrieved by the order passed by the learned Judge on 05-12-2003, dismissing the suit as abated accepting the memo filed by the respondent - defendant.

2. Heard Sri Vishwanath Shetty, learned Counsel appearing on behalf of Sri M.S. Subbarayappa, learned Counsel for petitioners and Sri Madava Reddy, learned Counsel for respondent.

3. The factual matrix which needs reference is :

A suit in OS 188/87 was filed by Sri B.G. Thimmaiah against Sri K. Narayana Shetty, seeking for a decree of permanent injunction to restrain the defendant from interfering with his possession in respect of immovable property described in the schedule to the plaint. In this regard he had also sought for an ad-interim order of injunction.

4. The defendant entered appearance and had resisted the suit. However, during the pendency of the suit B.G. Thimmaiah died and on application moved under

provisions of Order XXII Rule 1 and 2 of C.P.C. in all about 8 persons were substituted as plaintiffs to represent his estate, they are therefore, on record as legal heirs and contested the further proceedings. However, it transpired during the subsequent proceedings legal representative No. 7 by name, Sri B.T. Anantharaju, also died. His legal representatives were not brought on record within a period prescribed under the law of limitation. Later, applications came to be filed invoking the provisions of Order XXII Rule 3 and Order XXII Rule 9 CPC, to set aside abatement and to bring on record the wife and children of B.T. Anantharaju and to contest the proceedings.

5. The applications were resisted by the defendant. The learned trial Judge after referring to the grounds on which the applications were moved, the grounds on which the condonation of delay was sought, the grounds on which applicants sought to set aside the abatement and the grounds raised by the defendant, held that the delay in filing the applications was inordinate. The learned Judge notices that B.T. Anantharaju died on 28-07-1997 but the application was filed only 22-01-1998, which is beyond period of 90 days. Thus held that the evidence tendered by the applicants did not indicate or substantiate that they had no knowledge of the pendency of the suit and hence cause was not sufficient. In the result, it held that the abatement of suit against LR-7 of original plaintiff, namely, B.T. Anantharaju had to be sustained and there is no question for setting aside abatement.

6. After such an order was passed on 22-02-2003 dismissing the applications moved by LRs of B.T. Anantharaju, the defendant filed memo on 11-09-1993 requesting the court to dismiss the suit on the ground that the right to sue does not survive upon other LRs of the original plaintiff and doctrine of merger of lis gets applied. Though the memo was opposed by the Plaintiff, the learned Judge concluded that the death of one of the LR of the original plaintiff non-suits other LRs also as they had common interest and their right, title and interest remained undivided. Therefore, abatement of suit as against one of the LR of the original plaintiff affects the right of the other LR and hence their suit abates in its entirety. That order dated 05-12-2003 is impugned in this revision. How far that view of the trial judge is sustainable and as to whether the entire suit abates as a consequence of abatement of suit against only one LR is the point raised for consideration.

7. The learned Counsel Sri Madava Reddy, at the outset questions the maintainability of this revision. He would contend that as by virtue of the order impugned the suit is abated, it amounts to passing of a decree and once a decree is passed it is appealable under the scheme of CPC.

8. Per contra, learned Counsel Sri Vishwanatha Shetty appearing for the revision petitioners contends that the order impugned amounts to rejection of plaint or dismissal of suit and therefore, no decree could be said to have been passed or drawn and thus the order is revisable u/s 115 of CPC.

9. In view of serious question raised regarding maintainability of this petition, the following points arise for consideration:

1) Whether the order impugned is a "decree" as defined u/s 2(2) of CPC and is appealable u/s 96 of CPC?

OR

Whether the order impugned is an "order" appealable under provisions of Section 104 CPC and as provided under Order XLIII Rule 1(k) CPC?

2) If not, whether it is revisable u/s 115 CPC?

10. The CPC defines decree u/s 2(2) as follows:

"Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default,

From the extracted portion it is seen a decree is a formal expression of adjudication in a suit which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

11. The impugned order has to be tested by applying the definition of "decree" in the Code of Civil Procedure, 1908. The relevant facts would show that the original Plaintiff died and upon his death eight persons were brought into party array as the surviving legal heirs. The LR No. 7 died subsequent to being brought on record and there was delay in bringing his LRs on record. On facts, it is noticed that if at all the suit has to abate, it would have abated only so far as LR No. 7 - B.T. Anantharaju is concerned, as the other LRs having come on record they continue to pursue the proceedings in the original suit.

12. The reasoning assigned by the trial court to record that the entire suit as abated is as follows:

In the present case on hand, the LR of the plaintiff being impleaded as supplementary plaintiff have alleged that, they are the owners of the suit property and that the property has not yet been divided. When such being the case, all the LRs and also the LR of B.T. Anantharaju have common interest and common right as alleged by them. Under these circumstances, the case cannot be determined separately and distinctly while grant of relief. Under these circumstances, if any decree passed amounts decree in favour of death person, which amounts to nullity and leads to conflicting decree. Hence the decisions relied upon by Sri KHS applicable to the case on hand and in view of the citations ICC 2003(3) AP 254 being recent and passed by the Hon"ble Supreme Court, the

citations relied upon by Sri HVG are not applicable to the case on hand. Hence, I am of the considered opinion that on the death of B.T. Anantharaju being his LR not brought on record, the suit abated in its entirety. Accordingly I pass the following....

ORDER

The memo filed by the defendant is hereby allowed. Consequently, the suit is abated.

The extracted portion of the impugned order shows that the learned trial judge had formed an opinion that as upon the death of the original Plaintiff all legal representatives had common interest and undivided share in the subject matter of the suit, their rights cannot be determined separately and distinctly to grant the relief sought for. In other words, it was of the opinion that the abatement of suit against one of the LR non-suits other LRs who have come on record as any decree that would be passed would cover the LRs against whom the suit has abated and thus no decree could be passed in favour of other LRs, who are on record.

13. Thus, being of the opinion that any decree that would be passed would be nullity and leads to conflicting orders, it disposed of the suit as abated in its entirety. In other words, the suit has been virtually dismissed determining the rights of the parties conclusively with regard to or any other matters in controversy in suit.

14. Undoubtedly, it has an effect of determining the rights of the parties finally and such an order thus falls within the definition of decree as defined under the provisions of Section 2(2) of CPC. Had the learned trial judge not recorded any findings with regard to rights of the parties, it would have been only an "order" disposing of the suit as abated and would not have been a decree. But in view of specific finding recorded by it touching the rights of the parties and conclusively determining their rights with regard to all matters in controversy in the suit, it is a "decree".

15. Having tested the impugned order in the manner aforesaid there can be no doubt that the order impugned amounts to decree and thus becomes appealable under the provisions of Section 96 of CPC in the manner provided under Order XLI of the Code and Rules made thereunder. Even otherwise, while passing the impugned order if the trial court had not recorded any finding touching the rights of the parties and determining it finally, it would have been an "order" "dismissing the suit as abated", which order becomes appealable u/s 104 CPC as provided under Order XLIII Rule 1(k). For clarity the relevant provisions are extracted below:

Section 96. Appeal from original decree: (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall be from every decree passed by any Court exercising original

jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*,

(3) No appeals shall lie from a decree passed by the Court with the consent of parties,

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed three thousand rupees.

Order XLIII. (1) Appeals From Orders.- An appeal shall lie from the following orders under the provisions of Section 104, namely:

(a) xx xx xx

(b) xx xx xx

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

16. In the similar fact situation the Apex Court in the case of *The State of Punjab Vs. Nathu Ram*, , has observed thus:

(4) It is not disputed that in view of Order 22 Rule 4 CPC, hereinafter called the Code, the appeal abated against Labhu Ram deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion, in the application of the principle. It will serve no useful purpose to consider the case. Suffice it to say that when Order 22 Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore, to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

(5) The same conclusion is to be drawn from the provisions of Order 1 Rule 9 of the Code which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. It follows, therefore, that if the court can deal with the matter in controversy so far as regards the rights and interest of the appellants and the respondents other than the deceased respondent, it has to proceed with the

appeal and decide it. It is only when it is not possible for the court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore, dismiss it.

(6) The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore, no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may however, be stated that ordinarily the consideration which weigh with the court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and therefore, which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court; and (c) when the decree against the surviving respondents, if the appeal succeeds, would be ineffective, that is to say, it could not be successfully executed.

17. Taking note of the dictum of the decision of the Apex Court in the case cited *supra*, this Court in the case of *Vishnumoorthi Bhagwatha and Anr. v. Rudra Shedthi and Anr.* reported in 1973 Mys. LJ. 395, held as follows:

It is clear from the decision of the Supreme Court that if the Court comes to the conclusion that the right to sue does not survive in favour of the other defendants, the suit has to be dismissed for want of necessary parties before the Court. In such circumstances, it is not proper for the Court to declare that the suit has abated as against the other defendants. The situation in a case like this will be the same as in the suit "brought by the Plaintiff against one or some of the defendants, without impleading the necessary parties. If the necessary parties are not before Court in the suit filed by the Plaintiff, the decree that the court can make is to dismiss the suit for want of necessary parties. The same will be consequence that has to flow when the suit abates as a result of the death of one of the defendants and the right to sue not surviving in favour of the remaining defendants. If a suit is dismissed for want of necessary parties to the suit the said decision amounts to a decree, as it finally determines the rights of the parties and the said decree would be appealable u/s 96 CPC. The same would also be the position in a case like this, where the suit abates against the first defendant and the right to sue does not survive in favour of the remaining two defendants.

18. When the appeal is provided under the scheme of CPC as indicated above, it is obvious that revision petition would not be competent. In as much as, the High

Court can exercise its revisional powers u/s 115 CPC only in case in which no appeals lies to it either directly or indirectly.

19. However, taking note of all attending circumstances it needs to be observed that the petitioners cannot be held guilty of laches for approaching this Court instead of preferring an appeal to the first Appellate Court as provided under CPC. The very fact that by the impugned order the learned trial judge has allowed the memo filed by the defendant and dismissed the suit as "abated". It is likely that they have mis-lead themselves. I am, therefore, of the view that the petitioners cannot be rendered remediless or penalised for preferring revision petition instead of appeal.

20. It would be appropriate, therefore, to reserve their right to enable them to file an appeal before the Appellate Court and for which purpose it is hereby directed that the memorandum of revision petition be returned to the petitioners for being presented as Memorandum of Regular Appeal before the First Appellate Court as provided for to seek appropriate relief. Necessary endorsement be made by the Registry for return of memorandum of revision petition.

21. As the petitioners have pursued revision petition instead of filing the appeal, they will be entitled to make appropriate application seeking condonation of delay and it is hoped that such an application will be dealt with in accordance with law keeping in mind the peculiar facts and circumstances of the case.

22. With these observations the revision is disposed of.

In the circumstances, there shall be no order as to costs.