

(1960) 04 AP CK 0013

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1384 of 1958

C. Raju and Others

APPELLANT

Vs

Dinshaji Dadabhai Italia and Another

RESPONDENT

Date of Decision : 02-04-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 153

Citation : AIR 1961 AP 239

Hon'ble Judges : Umamaheswaram, J

Bench : Single Bench

Advocate : V.S. Ashoka, A. Anand Reddy and K. Pratapreddy, for the Appellant; Vasanta Rao Mukhedkhar, for Rai Sadguru Pershad and Ram Raj Saxena, for the Respondent

Final Decision : Dismissed

Judgement

Umamaheswaram, J.—This is an application to revise the order of the 4th Additional Judge, City Civil Court, Hyderabad allowing LA. No. 58 of 1953 in O. S. No. 120 of 1958 and directing the addition of defendants 3 to 7 as parties to the suit. The suit was originally instituted against defendants 1 and 2. The 1st defendant is the father and the 2nd defendant is the son.

The liability was incurred by the 1st defendant and the 2nd defendant was the surety. It transpires that before the institution of the suit, the 1st defendant died. So, an application was filed by the respondents to bring on record defendants 2 to 7 as the legal representatives of the 1st defendant. Subsequently, another application was filed under Order 1, Rule 10 C.P.C. to implead defendants 3 to 7 as parties to the suit.

Following the decision of the Madras High Court in Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others, , the learned Judge impleaded defendants 3 to 7 as parties to the suit, the 2nd defendant, one of the legal representatives of the 1st defendant, having already been made a party to the suit. As against

the order of the 4th Additional Judge, City Civil Court, Hyderabad, the Civil Revision Petition has been filed to this Court.

2. Sri V. S. Ashoka, the learned Advocate for the petitioners strenuously contended that, the decision of the Madras High Court in (S) Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others, is not correct and that, the suit having been instituted against a dead person, his legal representatives, defendants 3 to 7, ought not to have been impleaded as defendants in the suit either u/s 153 or Order I, Rule 10 C.P.C. The interesting question that arises for decision is whether either under the terms of Section 153 C.P.C. or under Order 1, Rule 10 C.P.C. the legal representatives of the deceased 1st defendant may be added as parties to the suit.

3. It is clear law that a suit cannot be instituted under the provisions, of the CPC against a dead person. Such a suit or memorandum of appeal filed against a dead person is a nullity. As early as 1869, it has been held by Sir Barnes Peacock and Mr. Justice Mitter in *Mohun Chunder Koondo v. Azeem Gazee Chowkeedar*, 12 Suth WR 45 that the Court has no jurisdiction to entertain a suit instituted against a dead person.

When a similar question arose for consideration, in *Veerappa Chetty v. T. Ponnai* ILR Mad 86, a Division Bench of the Madras High Court held that there was nothing in the CPC of 1852 to authorise the institution of a suit against the deceased person and that the Courts had no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased even when the suit was instituted bona fide and in ignorance of the death of the defendant.

In the particular case, there was only a single defendant. The observation in the course of the judgment that on the death of the defendant the action had abated appears, in my opinion, to be erroneous. No question of abatement arises when the suit had been instituted against a defendant who was dead prior to the institution of the suit. The question of abatement falls to be considered only if the defendant dies after the institution of the suit.

The law of limitation prescribes a period for bringing on record the legal representatives of the defendant who died subsequent to the institution of the suit. The decision referred to supra was followed by a subsequent bench of the Madras High Court in *Rasa Goundan v. Pichamuthu Pillai* AIR 1918 Mad 794(1). The correctness of the decision in ILR 51 Mad 86 was challenged before the Full Bench of the Madras High Court in *Gopalakrishnayya v. Lakshmanarao* ILR Mad 18 : 49 MLJ 590 : (AIR 1925 Mad 1210) (FB). One of the decisions referred to by Sri P. Bapiraju appearing on behalf of the respondent was the decision in ILR 31 Mad 86.

It appears from the report of arguments in 49 MLJ 590 that the decision was distinguished as having been rendered before the new Code i.e., before the introduction of Section 153 C.P.C. in the Code of 1908. Section 153 C.P.C enacts

that the Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error, in any proceeding in a suit and that all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

The question that arose for decision before the Full Bench was whether the cause title of the appeal presented against a dead person might be returned for amendment and representation. The decision in *Govinda Kaviraj Purohita Vs. Gauranga Saw and Others*, taking a contrary view was expressly overruled. The learned Judges made it clear that if the appeal against the legal representatives was out of time, the delay in representation might be excused under the terms of Section 5 of the Limitation Act.

There is no doubt no express reference to the decision in ILR Mad 86 in the body of the judgment. But I have no doubt that the decision in ILR Mad 86 cannot stand by the side with the decision of the Full Bench in ILR Mad 18 : (AIR 1925 Mad 1210) (FB), I am clearly of opinion that the Bench decision in ILR Mad 80 cannot be regarded as good law after the enactment of Section 153 in the new Code and is impliedly overruled.

The view taken by Ananthakrishna Iyer J. in *Chitambaram Chettiar v. Narayanaswamy Iyer*, 1928 Mad WN-240 that the decision in ILR 31; Mad 86 is still good law, is, in my opinion, erroneous. The terms of Section 153 C.P.C. are specifically applicable to suits and the Full Bench applied the terms of Section 153 C.P.C. read with Section 141 C.P.C, to an appeal filed against a dead person. Reference was next made to the full Bench decision of the Madras High Court in *Mahomed Yusuf v. Sadullah Badsha Sahib* ILR Mad 885 : (AIR 1929 Mad 733).

At p. 896 (of ILR Mad): (at p. 737 of AIR), reference is made to the decision in ILR 31 Mad 86. The proposition stated at p. 896 (of ILR Mad): (at p. 737 of AIR) that no suit can be instituted against a (dead person and that a plaint filed against a dead person is a nullity is unobjectionable. But the question is whether the legal representatives may not be added as defendants under the provisions of Section 153 C.P.C. All the decisions are exhaustively reviewed by Govinda Menon J. in (S) *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*, , and I am inclined to agree with his view.

The learned Judge rightly pointed out that 110 case has gone to the extent of holding that "If a fresh suit filed on the date when the amendment was made is not barred, still the court is deprived of the power of amending which results in making the suit a new one filed afresh". The decision in ILR Mad 86 was rightly "distinguished on the ground that it was prior to the enactment of Section 153 C.P.C,

I share his view that there is nothing which prevents the trial court from construing the plaint as if it was filed against new parties on the date the application for amendment was made. It is clear on the facts of this case that on the date when the application for adding defendants 3 to 7.

was filed, the suit against them was not barred by limitation,

4. Sri V. S. Ashoka, the learned Advocate for the petitioners, next relied on the decision of a single Judge of the Madras High Court, in *Municipal Council Vs. Thazhel Puthan Purayil Kunhipathumma and Another*, and certain observations in *Mura Mohideen Vs. V.O.A. Mohomed and Others*, . I am not inclined to follow that decision as no reference was made to the Full Bench decision of the Madras High Court in ILR 49 Mad 18: (AIR 1925 Mad 1210) (FB). The observations in (S) *Mura Mohideen Vs. V.O.A. Mohomed and Others*, that suits by or on behalf of dead persons might stand on a different category and that there is no question of misdescription in such suits are only obiter.

5. As to whether the decision in ILR 31 Mad 86 is still good law or has been overruled by the decision of the Full Bench in ILR 49 Mad 18: (AIR 1925 Mad 1210) (FB) there is a conflict of authority in the several High Courts. In *H.H. Darbar Alabhai Vajsurbhai Vs. Bhura Bhaya*, Bench of the Bombay High Court followed the decision of the Full Bench in ILR 49 Mad 18: (AIR 1925 Mad 1210) (FB) in preference to the decision in ILR 31 Mad. 86.

The Bench decision of the Bombay High Court was distinguished by Chagla C. J., in *Bai Pani Vankar Vs. Madhabhai Galabhai Patel*, . He preferred to follow the decision of the Bench in ILR Mad 86 to the Full Bench decision of the Madras High Court in ILR Mad 18 : (AIR 1925 Mad 1210) (FB). The reason given by him for distinguishing the Bench decision viz. that the appeal was filed as against two respondents is, in my view, a distinction without difference.

I am inclined to think that the view taken by the Bench of the Bombay High Court is correct and I am not inclined to follow the view of the learned Chief Justice in AIR 1953 Rom 356. The view taken by the Allahabad High Court in *Chatur Prasad-Bara Bacha and Others Vs. Baijnath Prasad and Another*, is in accordance with the view expressed by me. So far as the Calcutta, Lahore and Nagpur High Courts are concerned, there are divergent views taken on this question. It is unnecessary for me to deal with all the cases referred to by the learned Advocate for the petitioners in the view taken by me.

6. I am clearly of the view that the terms of Section 153 C.P.C. are sufficiently wide and it is open to the Court to implead the legal representatives as party defendants so long as the suit against them is not barred by limitation.

7. As regards the applicability of the terms of Order 1, Rule 10(1) C.P.C. there is again difference of opinion in the several courts. Some courts take the view that a Suit filed against a dead person is not a suit filed against a wrong person while oilier courts take a different view. Though, it is not necessary for me to give my final opinion, I am inclined to take the view that a suit instituted against a dead person cannot be regarded as a suit instituted against a wrong person.

8. Sri Vasant Ran Mukhedkar invited the provisions of Order 1, Rule 10(2) C.P.C. and contended that for the purpose of effectually adjudicating the rights of

parties, the legal representatives, defendants 3 to 7, might be impleaded as defendants to the suit. There is considerable force in this contention. As I am clear that u/s 153 C.P.C. they might be impleaded as parties, it is unnecessary for me to rest my judgment on the provisions of Order 1, Rule 10(2) C.P.C.

9. In the result, the Civil Revision Petition fails and is dismissed with costs.

10. Before concluding my judgment, I must express my indebtedness to Sri V. S. Ashoka and Sri Vasnt Rao Mukhedkar for having carefully looked into all the decisions and placed those authorities before me.