

(1988) 06 MAD CK 0010
In the Madras High Court

Chinna and Others

APPELLANT

Vs

N. Thiruviam and Others

RESPONDENT

Date of Decision : 23-06-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)

Citation : (1989) 2 LW 468 : (1989) 2 MLJ 20

Hon'ble Judges : Bellie, J

Bench : Division Bench

Judgement

Bellie, J.—This Letters Patent Appeal is directed against an order passed by Mohan, J. dismissing an application filed under Order I, Rule 10(2) of the CPC for impleading of parties in A.S. No. 81 of 1979. This suit was filed by six plaintiffs against six defendants in respect of 87 cents of land for declaration of title against the defendants and for possession from them. The suit was dismissed by the trial Court and as against that Appeal A.S. No. 81 of 1979 was filed in this Court by the six plaintiffs as six appellants against the six defendants as respondents. During the pendency of the appeal first defendant - first respondent of the name Palaian died on 24.1.1982. His Legal Representatives were not brought on record in time and therefore the appeal abated. After a long lapse of time the third appellant-third plaintiff filed three petitions one for setting aside the abatement I.A. No. 1557 of 1985, another for condoning the delay of 957 days in filing the petition for setting aside the abatement I.A. No. 1558 of 1985 and the third one to bring the Legal Representatives of first respondent-first defendant on record I.A. No. 1559 of 1985. All the three petitions were dismissed on 14.2.1985. Subsequently the third appellant-third plaintiff filed a petition I.A. No. 2730 of 1985 under Order 1, Rule 10(2) of the CPC praying to implead the said Legal Representatives as respondents 7 to 12 in the appeal. This petition also was dismissed on 14.3.1985. On the same day the learned Judge disposed of the appeal stating that the appeal has abated. Against this order disposing the appeal the Letters patent Appeal has been filed.

2. It is argued by the learned Counsel for the appellant herein third plaintiff that even though the earlier petitions, (1) for setting aside the abatement (2) for excusing the delay in filing the petition for setting aside the abatement and (3) for impleading the legal representatives were dismissed, the Court has power to order for adding the Legal Representatives as parties under Order I, Rule 10(2) of the CPC for effective decision of the appeal especially when the prayer in the suit is for joint declaration against the defendant and joint delivery of possession from them, it is necessary that the said Legal Representatives are added, and therefore in the interest of justice the petition should have been allowed. In support of this submission the learned Counsel cited a decision of the Supreme Court in Bhagwan Swaroop and Others Vs. Mool Chand and Others, was cited before the learned single Judge also. The learned Counsel would submit that the facts in the said decision are quite similar to the facts in the present case, but we do not think so. In that case the suit was filed by one Maharaj Swarup and 8 others against 2 defendants for partition and a preliminary decree was passed declaring the shares of the parties and giving some directions. Not satisfied with the decree the said plaintiff Maharaj Swarup preferred an appeal in the High Court. During the pendency of the appeal he died and his Legal Representatives were substituted. The first respondent in the appeal-first defendant also died. After some time the second respondent in the appeal (second defendant) filed an application stating that the first defendant died and his legal representatives had not been substituted for a long period and therefore the appeal had to be disposed of as abated. At that stage the appellants moved an application under Order 22, Rule 4 of the CPC for substitution of the Legal Representatives of the first respondent (first defendant). Before this application could be disposed of some persons claiming to be the legal representatives of the deceased first respondent-first defendant filed an application under Order 1, Rule 10, C.P.C. that they be impleaded as parties. To this the second respondent (second defendant) filed a counter. It appears the High Court in the appeal dismissed the application filed by the appellants under Order 22, Rule 4, C.P.C. for impleading the Legal Representatives and it also dismissed the petition filed by the alleged Legal Representatives under Order I, Rule 10, C.P.C. As a consequence the High Court disposed of the appeal as abated as a whole. As against that an appeal was preferred in the Supreme Court. In the appeal before the Supreme Court D. A. Desai, J. who delivered the main Judgment (A.N. Sen, J. delivering the concurrent Judgment) observed that the suit is for partition and the position of plaintiffs and defendants can be interchangeable, and each adopts the same position with the other parties and the one who could have made the most serious grievance about the failure of the appellants to substitute the heirs as legal representatives of the deceased first respondent is obviously the said heirs who had vital interest in the outcome of the appeal and they could have contended that the appeal against them had abated and their share had become unassailable, but on the contrary they wanted to be impleaded and substituted as heirs and legal representatives and they had absolutely no grievance about the delay in bringing them on record. The learned Judge further observed that it

was the second respondent who was fighting both the appellants and the first respondent who wanted to derive a technical advantage by a procedural lapse and if the trend was to encourage fair play in administrative law, it must all the more inhere in judicial approach. The learned Judge also observed that such applications had to be approached with that view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. The learned Judge said that the difficulty the High Court experienced in granting the application disclosed the hyper technical approach which may result in miscarriage of justice. With these observations the learned Judge allowed the appeal and set aside the Judgment of the High Court abating the first appeal. The learned Judge also allowed the application for impleading made by the appellants and also the application made by the alleged legal representatives for adding them as parties before the High Court and ordered condoning the delay in making the application for setting aside the abatement and adding the legal representatives as parties and directed the High Court to dispose of appeal on merits.

3. It may be noted that Sen, J. did not seem to agree with most of the above said observations of Dessai, J. but the learned Judge has however stated at the end that.

In the peculiar facts and circumstances of this case, bearing in mind that the appeal is from a preliminary decree in a partition suit in which the heirs and legal representatives of the deceased respondent had also made an application, though "misconceived, for being substituted and brought on record, I do not propose to press my doubts to the point of dissent. Hearing of the appeal on merits, in the instant case, cannot cause any irreparable prejudice to the Parties though there can be no doubt that partition proceedings will have to be unnecessarily prolonged.

With these observations, I agree with the order proposed by my learned brothers.

4. Thus it could be seen that the facts in the case of the Supreme Court are materially different from the facts in our case. While in that case the suit is for partition and a preliminary decree had already been passed, in the present matter the suit is for a declaration of title against the defendants and for joint delivery of possession. In the Supreme Court case the Legal Representatives of the first respondent, first-defendant themselves have filed the application under Order I, Rule 10, where as in the present matter the third appellant-third plaintiff has filed the application under Order 1, Rule 10, C.P.C. It is this third appellant-third plaintiff who filed the petition under Order 22, Rule 4, C.P.C. for impleading the Legal Representatives and a petition for excusing the delay of 957 days in filing the petition to set aside the abatement. Order 22, Rule 4 is a specific provision where as Order I, Rule 10 is a general provision. When the specific provision has been invoked by a party and having failed in it, the same party cannot be allowed to invoke the general provision to get the same order for which the petition under the specific provision was filed. To allow her petition

would be to enable her to circumvent the order passed in the petition under Order 22, Rule 4, C.P.C. Therefore the party's remedy will be only by way of an appeal or revision to the higher forum against the order passed under the Order I, Rule 10, C.P.C. The abovementioned observations of Desai, J. are not quite germane to the facts of the present case. Hence the learned single Judge is correct in dismissing the application and we do not see any merit to interfere with it. Accordingly the Letters Patent Appeal is dismissed with costs.