

(2013) 12 AP CK 0165

In the Andhra Pradesh High Court

Case No : CRP Nos. 11 and 12 of 2013

D. Venkata Reddy (died) by Lrs. and Others

APPELLANT

Vs

K. Ramachandra Reddy and Others

RESPONDENT

Date of Decision : 27-12-2013

Acts Referred:

Citation : (2014) 2 ALD 326 : (2014) 2 ALT 803

Judgement

K.C. Bhanu, J.—CRP No. 11 of 2013 is directed against the order, dated 6.9.2012 in IA No. 238 of 2011 in OS No. 906 of 2005 on the file of the I Additional Junior Civil Judge, Chittoor, whereunder and whereby, petition filed by the petitioners herein/proposed plaintiff Nos. 2 to 5 under Order XXII Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short, "C.P.C.") to set aside the abatement of the suit due to death of sole plaintiff and to receive the legal representative petition to implead them as legal heirs of the deceased sole plaintiff in the suit, was dismissed.

CRP No. 12 of 2013 is directed against the order, dated 6.9.2012 in IA No. 237 of 2011 in OS No. 906 of 2005 on the file of the aforementioned Court whereunder and whereby, petition filed by the petitioners herein/proposed plaintiff Nos. 2 to 5 under Order XXII Rule 4 read with Order VI Rule 17 C.P.C. to implead them as plaintiff Nos. 2 to 5 in the suit being the legal heirs of the deceased sole plaintiff as proposed parties in the suit, was dismissed.

The deceased sole plaintiff is the husband of petitioner No. 2 and father of petitioner Nos. 3 to 5. He filed OS No. 906 of 2005 on the file of the I Additional Junior Civil Judge, Chittoor against the respondents/defendants for permanent injunction. Pending suit, he died on 19.3.2011. The petitioners herein failed to file legal representative petition within 90 days from the date of death of the sole plaintiff and hence, the suit was abated. Hence, they filed the aforementioned applications and the same were dismissed only on the ground that the petitioners did not file petition u/s 5 of the Limitation Act, 1963 (for short, "the Act") for delay condonation. Challenging the same, the present revision petition is filed by

the petitioners.

2. In spite of service of notice on the respondents, none appears.

3. Learned Counsel for the petitioners contended that if the legal representative application is not filed within 90 days, as stipulated under Article 120 of the Act, the suit abates and thereafter, within 60 days, an application can be filed to set aside the abatement and if the abatement petition is not filed within 60 days, then only, filing of the petition u/s 5 of the Act comes into play and hence, he prays to set aside the impugned orders. For the said proposition, he relied upon a decision reported in Jatav Panchayat Committee, Etawah and another Vs. VIIth Additional District Judge, Etawah and others, , wherein it is held at Para Nos. 7 and 8 as under:

So far as the question of filing an application u/s 5 of the Limitation Act is concerned, Article 120 of the Limitation Act provides that unless the application for substitution is made within 90 days from the date of death, the suit abates. Such abatement can be set aside within 60 days after the expiry of 90 days. Thus, an application made after 90 days from the date of death, is an application for substitution upon setting aside abatement. The prayer for abatement being made within the period of limitation, the substitution would be made only after setting aside the abatement, and, therefore, no application explaining the delay would be necessary if such application is made with a prayer for setting aside abatement within 150 days from the date of death. Thus, the contention of Mr. Misra with regard to the necessity of filing application u/s 5 of the Limitation Act, cannot be acceded to.

But at the same time, the said application cannot be maintained without the prayer for setting aside abatement. If such application for setting aside abatement is made after 150 days, in that event definitely an application u/s 5 of the Limitation Act would be necessary. Inasmuch as in the said case the period of limitation for setting aside abatement would also expire after expiry of 150 days from the date of death necessitating explanation of the delay and the condonation thereof by means of filing an application u/s 5 of the Limitation Act.

4. The factual matrix is not in dispute. The sole plaintiff died on 19.3.2011. Within 90 days, legal representative application has to be filed under Article 120 of the Act. The time from which the period begins is the date of death of plaintiff or defendant or appellant or respondent as the case may be. If the legal representative application is not filed within 90 days, the suit abates. When the suit abates, for setting aside the abatement, the application has to be filed within 60 days from the date of abatement, as contemplated under Article 121 of the Act. So, before that, the question of filing any petition u/s 5 of the Act does not arise. If the party fails to file an application to set aside the abatement within 60 days from the date of abatement, then only, he has to file an application u/s 5 of the Act. Till then, the question of filing an application u/s 5 of the Act does not arise. Therefore, the impugned orders are set aside and the applications filed by

the petitioners are allowed.

5. Accordingly, the civil revision petitions are allowed setting aside the orders, dated 6.9.2012, in IA Nos. 238 and 237 of 2011 in OS No. 906 of 2005 on the file of the I Additional Junior Civil Judge, Chittoor. There shall be no order as to costs. Miscellaneous petitions pending, if any, in these civil revision petitions shall stand closed.