

(1950) 07 MAD CK 0020

In the Madras High Court

Case No : Second Appeal No. 386 of 1947

Irulappa Konar and Others

APPELLANT

Vs

Madhava Konar (died) and Others

RESPONDENT

Date of Decision : 28-07-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 22 Rule 11

Citation : AIR 1951 Mad 733 : (1951) 64 LW 291 : (1951) 1 MLJ 442

Hon'ble Judges : Raghava Rao, J

Bench : Single Bench

Advocate : S. Ramaswami Iyer and G.R. Jagadisa Iyer, for the Appellant; K.V. Srinivasa Iyer and S.K. Sundaram, for the Respondent

Final Decision : Dismissed

Judgement

1. In this second appeal the few facts which I have to state for the purpose of the decision are as follows: The suit was for damages for malicious prosecution which the trial Ct decreed with costs. On appeal taken by the defts the decree of the trial Ct was revised & the suit dismissed with costs. The pltf having thereafter died his legal representatives preferred this second appeal to this Ct. After the institution of the second appeal, the deft having died, the applts herein have brought the resps before me as legal representatives.

2. To the Rearing of this second appeal an objection "in limine" has been taken by the resps founded on the rule "actio personalis moritur cum persona". I have heard arguments not only on the objection but also on the merits of the second appeal. As regards the latter I may at once say that there is very little, if any, of substance in the argument for the applts. The report of the Comr appointed by the lower appellate Ct is said to be additional evidence taken in contravention of Order 41, Rule 27, C. P. C. by which the appellate judgment is vitiated. There is however other evidence in support of the findings of the lower appellate Ct on the question of the existence of malice & the absence of reasonable & probable cause which I am not therefore prepared to disturb.

3. Concerning the preliminary objection raised by him learned counsel for the resps has relied on AIR 1938 216 (Nagpur) While learned counsel for the applts has relied as against it on "Nga Kyet Sein v. Mi Kyin Mya", 34 I C 249 : AIR 1917 UB 14, a decision of the J. C. of the Upper Burma J. C's. Ct not as a decision citable to this Ct but for its reasoning which counsel seeks to adopt as his own. It is not disputed by counsel on both sides that the present case is sufficiently indistinguishable on facts from each of those cases, although there unlike here the original resp in the first appeal preferred a second appeal & died afterwards & the resp in the second appeal did not die during the pendency of the second appeal but remained alive & on record down to the decree of the second appellate Ct. It is not disputed therefore that the decision of the point must go in favour of the resps or the applts according as the one decision or the other is accepted by me as correct.

4. Before dealing with the two decisions it is necessary to ascertain the provisions of the C. P. C. which govern the situation. They are to be found in Order 22, Rules 1 & 11, C. P. C. Rule 1 is as follows:

"The death of a pltf or deft shall not cause the suit to abate if the right to sue survives."

Rule 11 is in the following terms:

"In the appln of this order to appeals, so far as may be, the word "pltf shall be held to include the applt, the word "deft" a resp, & the word "suit" an appeal."

"The right to sue" occurring in Rule 1 has been, in my opinion, rightly interpreted by Pulton J. in "Gopal v. Ramachandra", 26 Bom 597 : 4 Bom L R 325 as meaning the right to seek relief. Says the learned Judge at p. 603 of the Report:

"What, then, is the meaning of the words "right to sue" in that section? (Section 361 of Act XIV (14) of 1882). If the words are synonymous with "cause of action" as used in Or. L referred to in "Twycross v. Grant", (1878) 4 C P D 40: 48 L J C P 1, that decision may doubtless be appealed to in order to show that "cause of action" means the pltf's original cause of action. But they appear not to be synonymous. In Act VIII (8) of 1859 & Act X (10) of 1877 the words "cause of action" were used in Ss. 99 & 361 corresponding with Section 361 of the present Code, in which the words "right to sue" have been substituted. It seems useless, therefore, in regard to this point to refer to "Twycross v. Grant", (1878) 4 CPD 40: 48 LJCP 1, which depends on words which the Legislature has superseded. It is obvious how inconvenient the words "cause of action" would be in Section 362 after substituting "applt" & "resp" for "pltf & "deft". I have not been able to discover any judicial interpretation of the words "right to sue" in Section 361, but I venture to suggest that, as applied to appeal, they mean right "to seek relief". This construction seems to my mind to be in furtherance of justice & to be consistent with the etymology of the word "sue" which in Wheaton's Law Lexicon is defined as meaning "to prosecute by law, to claim a civil right by means of legal procedure". What may have been the precise object

of the Legislature in altering the phraseology we do not know. But the meaning must be sought in the words themselves, on which we must put a fair grammatical construction. In popular language, no doubt, the phrase "right to sue" is associated with the right to institute a suit, but when we come to deal with appeals the analogy fails. In the appeal, "it is the applt, whether pltf or deft, who is suing for relief & it would surely be anomalous if the representative of the deft were debarred from prosecuting an appeal against an erroneous decree because the pltf could not have obtained that decree if the deft had died during the course of the suit."

5. Applying the meaning of the words "right to sue" as given by Fulton J. in the Bombay case, "Gopal v. Ramachandra", 26 Bom 597: 4 Bom L R 325, above cited, the question first is, when the pltf resp in the lower appellate Ct died after the decree of that Ct, was there a right to seek relief in further appeal on the part of his legal representatives? When during the pendency of the second appeal, if competent, the deft resp died, the further question is, did the right to seek relief survive against the legal representatives of the resp?

6. These being the two questions for consideration I shall take them up in their order as indicated above. As regards the first I am clear the answer must be in the negative. With the decree of the lower appellate Ct in reversal of that of the trial Ct the pltf lost in appeal which he had gained in the Ct of trial. It is as if he were thereafter to agitate the matter with a clean slate, so to say, if he should file a second appeal, & if before he could file it he died, his legal representative could not file it after his death because with his death the cause of action personal to him died too. In the case in AIR 1938 216 (Nagpur) , which was a case of action for defamation this is what Gruer J. who decided the case says at p. 281:

"It is clear law that an action for defamation is a personal one, & if the deft had died during the course of the original trial the case would undoubtedly have abated. The question is whether this general principle is inapplicable because of the fact that the litigation reached the stage of the decision in two Cts. The matter is undoubtedly "transit in rem judicatum", but the first decree has been, wiped out by the appellate decree which grants no relief to the present applt & imposes no liability on him except-for payment of costs. There is good authority for holding that when a decree has been passed in favour of a party in such a personal suit he is entitled to execute it against the estate of the deft who may subsequently die, & also that if a decree has been passed against a party he is not precluded from appealing because of the death of his opponent. But there is also authority for distinguishing such cases from the present in which the applt is practically in the position in which he was before he started the litigation so far as his claim is concerned. In such a case there seems no valid reason why the litigation should not rest."

Reliance is placed by the learned counsel for the applt on two cases one in "Gopal v. Ramachandra", 26 Bom 597 : 4 Bom LR 325 (already referred to in

another connection) & the other in "Paraman Chetti v. Sundararaja Naik", 26 Mad 499. In the former the facts were as follows: In a suit for defamation the pltf obtained a decree for damages against the deft. & executed the decree. The deft filed an appeal, but died before the hearing. His son & legal representative was placed on record as applt. When the appeal came up for hearing before Candy & Fulton JJ., the resp objected that by the death of the deft the appeal has abated, & that the deft's son had no right to continue the proceedings. The two learned Judges differed, the former holding that the appeal did not abate & that the deft's legal representative had a right to continue the proceedings as applt, the latter holding the contrary. There was a reference to a third Judge, Crown J. who agreed with Fulton J. & disagreed with Candy J.

7. The case in "Paraman Chetti v. Sundararaja Naick", 26 Mad 499, was a similar case which however went upto the H. C. in second appeal. There, as the headnote bears:

"In a suit for damages for malicious prosecution the Dist Munsif decreed in pltf's favour & gave damages. Deft appealed to the Dist J., who confirmed the decree & dismissed the appeal. Deft preferred a second appeal, but died before it was heard. The appeal was prosecuted by deft's legal representative, when it was objected that inasmuch as the cause of action for damages for malicious prosecution could not survive after the death of the deft, his legal representative was not entitled to prosecute the appeal."

It was held that the legal representative was entitled to prosecute the appeal.

8. It will be seen that both the cases in "Gopal v. Ramachandra", 26 Bom 597: 4 Bom LR 325 & "Paraman Chetti v. Sundararaja Naick", 26 Mad 499, are distinguishable from the present on the ground referred to by Gruer J. in AIR 1938 216 (Nagpur) namely, that in the present case, as in the Nagpur case, AIR 1938 216 (Nagpur) , "the applt is practically in the position in which he was before he started the litigation so far as his claim is concerned." Learned counsel for the appls argues that this distinction made by Gruer J. is not just & that there is no reason to assume that the decree of the lower appellate Ct wiping out the decision of the trial Ct is necessarily correct. He places strong reliance on the reasoning of the case in "Nga Kyet Sein v. Mi Kyin Mya", 34 I C 249: A I R 1917 U B 14. There the pltf applt sued one Maung Chu Ni for damages for slander & obtained a decree for Rs. 100 & costs. On appeal this decree was set aside & the suit was dismissed. The pltf-applt then appealed to the Upper Burma J. C's. Ct, & after the appeal was filed, Maung Chu Ni died & his legal representatives were brought on the record. At the hearing of the second appeal the advocate for the resps took the preliminary objection that as the right to sue did not survive the appeal must abate. It was contended on the other hand that as the pltf applt obtained a decree in the Ct of first instance thereby potentially increasing his wealth, he must have the right to get rid of the decree of the lower appellate Ct which has deprived him of that benefit. Reliance was placed on "Gopal v. Ramachandra", 26 Bom 597: 4 Bom LR 325. The Ct observed in its judgment:

"In that case the position was revsd; the pltf having lost in the first Ct obtained a decree for damages in the lower appellate Ct. One of the Judges before whom the second appeal came was of the opinion that no distinction should be drawn between an appeal by a pltf & an appeal by a deft & that in the case of an action for slander an appeal must abate on the death of one of the parties whichever side appealed, but the majority of the Judges held that though in such a case an appeal by a pltf must abate, an appeal by a deft did not because his estate was affected by the decree.

It seems to me that though the position is reverse the same principle applies in the present case. If the deft had died during the pendency of the first appeal, his legal representatives would have been entitled to prosecute that appeal on the authority of the ruling above cited, which was followed in "Paraman Chetti v. Sundararaja Naick", 26 Mad 499 & on their succeeding the pltf-applt would undoubtedly have had a right to contest the correctness of the decision in this Ct, because if the right to continue the appeal in the lower Ct survived it could not be extinguished by the judgment. I am unable to see on what principle the fact that the deft died after the second appeal was filed & not during the pendency of the first appeal, can make a difference. In the "Bombay case", Fulton J., interpreted "the right to sue" as the "right to seek relief. If, therefore, the "right to sue" in the case of the first appeal meant the deft's right to appeal against a decree which affected his estate, I do not see why in the present appeal the words should refer back to the original cause of action. The pltf-applt is not now endeavouring to enforce his personal right of immunity from slander, but to recover the enefit which accrued, to his estate in consequence of the judgment of the Township Ct & of which he has been deprived by the judgment of the lower appellate Ct."

9. To my mind this reasoning of the Upper Burma J. C's. Ct seems fallacious. It does not take note of the distinction between the two classes of cases. Gruer J. in the Nagpur case, " AIR 1938 216 (Nagpur) rightly makes that distinction & I accept his view as correct. I may also refer in this connection to a case in "Marwadi Mothiram v. Samnaji", 31 MLJ 772: AIR 1918 Mad 1100 cited for the resps. In that case a suit for damages for malicious prosecution was dismissed, & the pltf died during the pendency of an appeal preferred by him against the dismissal of the suit. It was held that the appeal abated & his legal representatives had no right to prosecute it. Referring to "Gopal v. Ramachandra", 26 Bom. 597: 4 Bom LR 325 & "Paraman Chetti v. Sundararaja Naik", 26 Mad 499, Krishnan J. delivering the judgment of the Ct consisting of himself & Abdur Rahim O. C. J. observes at p. 773 of the report thus:

"The case of "Gopal v. Ramachandra", 26 Bom 597: 4 BomLR 325, & "Paraman Chetti v. Sundararaja Naik", 26 Mad 499, following the view of the majority in the Bombay case have no application here as in both these cases a decree for damages had been obtained before the wrong-doer died; the legal representative was allowed to prosecute the appeal to save the estate which had devolved on

him from loss by the execution of the decree. In the present case, as the lower Ct dismissed the Motiram's suit without costs, he was in the appeal, in the position of a person claiming damages not yet decreed. Both the cases cited recognise the rule that personal actions so long as they remain unconverted into decrees abate on death. Fulton J. in his judgment observes, "Now it need not be doubted that to a suit for libel the maxim "actio personalis moritur cum persona" applies. If previous to decree the deft dies, the pltf can no longer prosecute his suit for damages. The same rule would apply in the appeal, if the pltf having failed in the lower Ct were seeking to obtain a decree for damages in the Ct of appeal".

The circumstances that the lower appellate Ct's decree in the present case was a decree of dismissal of the pltf's suit with costs & not of dismissal "simpliciter" does not, in my opinion, make any difference to the competency of the present second appeal. That is the view of this Ct in "Tiruvengadachariar v. Sami Iyengar", 34 Mad 76: 5 I C 937 which Gruer J. in the Nagpur case AIR 1938 216 (Nagpur) also adopts. In "Tiruvengadachariar v. Sami Iyengar", 34 Mad 76 : 5 I C 937 in a personal action for an injunction a decree was given for the deft with costs. Pltfs appealed, & during the pendency of the appeal the deft resp died It was held that the right to prosecute the appeal against the resp's legal representative did not survive to the applt. It was further held that if an action failed as a result of the application of the rule "actio personalis moritur cum persona" what is incidental namely, the matter of the costs directed to be paid by one party to the other, also failed. The Ct observes at p. 79 of the report:

"..... .It appears to us that if the appeal abates because the applt can no longer claim the injunction he prayed for against the deceased second deft, the costs he was made liable to pay as a consequence of the dismissal of his suit could not form the subject matter of a continuing appeal. It was said that an appeal might be preferred for costs alone. But this is not as of course, for no such appeal on a mere question of costs is ever entertained unless there is a legal principle involved. And if the applt cannot prosecute his appeal for the injunction, he cannot be allowed to show that the decree refusing the injunction was wrong for the mere purpose of getting rid of the directions as to costs."

10. Turning then to the question whether, when during the pendency of the second appeal, if competent, the deft resp died, the right to seek relief survives against the legal representatives of the resp, here again, I am clear that the applt is faced with an equally insurmountable difficulty. As observed by Bowen Lord Justice in "Phillips v. Homfray", (1883) 24 Ch D 439 : 52 L J C 833 in a passage which has been accepted by this Ct in the case in "Thiru-vengadachariar v. Sami Iyengar, 34 Mad 76: 5 I C 937,

"It is of the essence of the rule, viz., "actio personalis moritur cum persona", that claims which are indeterminate in their character shall not be pursued against the estate of a person after his death. If the claim is one for unliquidated damages & has not been perfected by judgment" at the time of the death of the

deft, the rule applies."

In the present case after the wiping out of the trial Ct's decree by the lower appellate Ct's the position is that there is merely an outstanding claim in the second appeal indeterminate in character on the part of the legal representatives of the pltf against the resp after whose death the claim cannot be pursued against his estate since it is only an unliquidated claim which has not been perfected by judgment at the time of the death of the deft. As pointed out in Chitale & Rao's Commentary on C. P. C., Edn. 4 at p. 2427

"the maxim "actio personalis moritur cum persona" is, as a general rule, applicable to actions in respect of torts &, therefore, on the death of "either" party to such an action, the right to sue will be extinguished."

The right to seek relief in appeal too must stand similarly extinguished on the same principle where the claim is indeterminate in character & has not yet taken the shape or form of a decree or judgment of Ct.

11. For the reasons indicated I am clearly of opinion that this second appeal fails on the preliminary objection of the resps as well as on the merits & must accordingly be dismissed with costs. No leave.