

(2003) 08 KAR CK 0015
In the Karnataka High Court
Case No : C.R.P. No. 1527/00

Jugraj Sethia

APPELLANT

Vs

M. Ramaiah and Others

RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, 153
Small Causes Courts Act, 1882 — Section 18

Citation : (2003) 3 CivCC 468 : (2003) ILR (Kar) 3739

Hon'ble Judges : K. Bhakthavatsala, J

Bench : Single Bench

Advocate : G.B. Nandish Gowda and R.B. Sadashivappa, for the Appellant;
served, for the Respondent

Final Decision : Dismissed

Judgement

Bhakthavatsala, J.—This is plaintiff revision petition filed u/s 18 of the Small Causes Court Act directed against the judgment and decree dated 22-1-2000 passed in S.C.No. 5047 of 1998 on the file of the III Additional Judge, Court of Small Causes, Bangalore, dismissing the suit as barred by limitation.

2. When the case had come up for admission, the learned Single Judge of this Court admitted the case and issued notice to the respondents. Notice on respondent No. 2 / Defendant No. 2 was served but he remained unrepresented. Three times notices were sent to Respondent No. 1/Defendant No. 1 but they were returned with a postal shara that "there was no such person in the address".

3. Subsequently, when the notice was issued to respondent No. 1 by way of substituted service viz., by affixture, the same was returned with a shara "that the respondent No. 1 / Head Constable with P.C. Buckle No. 1595 expired on 23.5.1999". Thereafter on 3-9-2001, when the case was listed for orders regarding steps to respondent No. 1, the learned Single Judge of this Court granted time till 18.9.2001 to take steps . On 5-10-2001, the revision petitioner filed I.A. 11/2001 under Order I Rule 10 read with Section 151 CPC to permit the

revision petitioner to bring the opponents on record in place of the deceased first respondent. Notices were issued to the LR's of the deceased first respondent but they were returned with postal shara stating that "address is insufficient". Therefore, on 9-8-2002, I.A.I/2002 was filed under Order V Rule 10 of CPC praying to issue notice to the LR's of the first respondent by way of substituted service namely by "affixture" was allowed and accordingly served on LR's of first respondent, but they remained absent. Therefore, I.A.I/2002 was allowed and LR's of the Respondent No. 1 were brought on record.

4. When the case was listed for final hearing, the learned Counsel appearing for the revision petitioner submitted his arguments both on the point of maintainability and on merits of the case. The following decisions were cited on the point of maintainability of revision petition:

1. Jaswant Vs. The Financial Commissioner and others,)

It is held that in a case where an application for impleading the legal representatives of a person who had died prior to the institution of Writ Petition, law permits to substitute for the same on such dead person, the name of any other person who is found to be a proper party to the suit in place of the dead person, whether it is done under Order I Rule 10 of CPC, which certainly appears to provide for such eventuality or done u/s 153 which obviously covers such a situation. Therefore, an application filed under Order I Rule 10 of CPC was competent even if the matter falls within the provisions as contained under Order XXII Rule 4 of CPC.

2. State of Kerala Vs. Sridevi and Others,)

In this case it was held that there was no need to invoke any of the Rules in Order XXII as there was no question of abatement since death of the sole respondent had taken place only after the judgment was delivered by the Sub-Court. The error, which had crept in, is that the appeal was filed against a person who was not then alive. In such case Order 1 Rule 10 has to be invoked. There is no specified period of limitation for making an application in the aforesaid Rule and hence, if at all any application is necessary the same could be filed within three years under Act. 137 of the Limitation Act.

3. Karuppaswamy and Others Vs. C. Ramamurthy,)

It is on the point of applicability of proviso to Section 21(1) of Limitation Act, 1963 with reference to a suit filed against dead person and the plaintiff becoming aware of the defendant's death from remark on written summons and therefore, seeking impleadment of Legal representatives of the defendant, promptly thereafter held entitled to invoke proviso to Section 21(1). It was further held that omission to implead M as defendant was due to a mistake. The mistake was made in good faith and hence the proviso to Sub-section (1) of Section 21 of the Act would apply and the suit deemed to have been filed on 29-1-1978 against M and thus it would be within time as required by Article 97. It was also opined

that M being a necessary party had to be impleaded under Order 1 Rule 10 of CPC to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

5. The Lower Court records were summoned and they are before this Court.

6. For the purpose of convenience, the revision petitioner and respondents No. 1 and 2 are referred to as "the plaintiff, "the Debtor" and "the Guarantor", respectively.

7. It is necessary to state the brief facts of the case of the revisions petitioner/plaintiff leading to the filing of this revision petition:

It is the case of the revision petitioner/plaintiff that the Debtor purchased a Videocon Colour TV for a sum of Rs. 12,985 /- from the plaintiff under a Hire Purchase scheme and the second respondent stood as the guarantor (co-obligant). Further the Debtor made payment of Rs. 1975/- at the time of purchasing the TV and agreed to repay the balance price in monthly installments at rate of Rs. 367/- p.m. in 30 months. It is averred that payment of installments were not regular and there was balance amount of Rs. 8,141/-. In spite of the demand made by the plaintiff to the defendants, they did not pay the amount. Therefore, the plaintiff filed a suit in S.C. No. 5047 / 1998 on the file of Court of small Causes, Bangalore for a judgment and decree against the defendants for recovery of a sum of Rs. 14,003/- in all viz., Rs. 8,141/- towards the balance price of the TV, a sum of Rs. 5,862/- towards interest at the rate of 24% on the outstanding installments.

8. Before the Court below both the defendants remained absent. Therefore, the Trial Court placed them *ex parte*. Though the case was listed for plaintiff's evidence, no evidence was adduced on 21-1-2000, and the case was posted for judgment on 22-1-2000, and on which date the Trial Court dismissed the suit holding that the claim is barred by limitation. This is impugned in this revision petition.

9. It is crystal clear from the Lower Court records that both defendants remained absent and therefore they were set *ex parte*. The defendant No. 1 / Debtor died on 23-5-1999 but the plaintiff had no knowledge as to the death of the Debtor till 3-9-2001. The suit was dismissed on 22-1-2000 on the ground that it was barred by limitation. The present revision petition came to be filed on 15-4-2000. The revision petitioner / plaintiff came to know the death of the Debtor only on 3-9-2001 when the case was listed for orders for steps to LRs of the Debtor. Therefore, a question is raised whether the suit is abated. In this regard, I refer to Order XXII Rule 4 of CPC.

10. Sub-rule (4) and (5) of Order XXII Rule 4 of CPC were inserted in 1976 amendment. According to Sub-rule (4) of Rule 4 of Order XXII CPC,

"The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant was failed to file a

written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before the death took place."

Sub-Rule (5) of Rule 4 of Order XXII CPC states that:

The Court shall have due regard to the fact of the plaintiff's ignorance of death of defendant while considering the application u/s 5 of the Limitation Act for condonation of delay in respect of an application for setting aside the abatement.

11. I refer to the decision reported in (SPENCER, O. C.J., KUMARASWAMY SASTRI AND KRISHNAN, JJ (ADUSUMILL) GOPALAKRISHNAYYA AND ANR. v. ADIVI LAKSHMANA RAO AIR 1925 MAD 1210.

In the above said case, the full Bench of the Madras High Court has held that:

"An appeal which is presented against a person who was dead at the date of presentation, the Court may u/s 153 CPC, permit the cause title to be amended or may return the appeal memorandum for amendment and representation."

It was further held that

"Although the appeal may be incompetent owing to the wrong person being named as respondent, the Court which deals with it is acting in a proceedings in a suit and as such has full power u/s 153 to direct an amendment of the appeal memorandum".

The decision cited by the learned Counsel for the revision petitioner as well as Full Bench decision of the Madras High Court are in favour of the revision petitioner on the point of maintainability of the revision petition by bringing the legal representatives of the deceased first respondent on record taking recourse under Order I Rule 10 of CPC, instead of filing an application under Order 22 Rule 4 of CPC. It is not out of place to mention that the Revision Petitioner could have filed an application under Order 22 Rule 4 of CPC to bring the LRs. of the deceased Respondent No. 1 on record, but he has done so taking recourse under Order 1 Rule 10 of CPC. But, in the facts and circumstances of the case, it is not just and proper to hold that the Revision Petition is not maintainable.

12. With regard to the merits of the case is concerned, the first defendant/ Principal Debtor has confirmed the balance amount of Rs. 8,441 / - on 5-2-1992 and again on 23-9-1994. In the statement of accounts pertaining to the case of defendant No. 1 produced by the plaintiff shows that as on 5-12-1997 there was an outstanding balance amount of Rs. 8,441/- and on 7-1-1998, a sum of Rs.300/ - has been credited and thus, there was a balance of Rs. 8,141/-. According to the plaintiff, last payment was made by the first defendant on 7-1-1998, and therefore, the suit filed on 9-11-1998 is well within the period of limitation but the learned Trial Judge erred in dismissing the suit as barred by limitation.

13. Admittedly, the plaintiff has not produced the Voucher to establish that defendant No. 1 infact deposited a sum of Rs 300/-on 7-1-1998. The learned Counsel appearing (or the revision petitioner submitted that without affording an opportunity to the plaintiff to adduce evidence, the Trial Court passed the judgment and dismissed the suit as barred by limitation. The order sheet of the Lower Court Records shows that the case was posted for plaintiff's, evidence on 23-6-1999 and when the case was posted for plaintiff's evidence finally on 15-12-1999, the learned Advocate appearing for the plaintiff filed an application under Order 17 Rules 1 and 2 r/w Section 151 CPC to adjourn the case for evidence by one month and that the case was adjourned for plaintiff evidence finally on 6-1-2000. Again on 21-1-2000, the plaintiff did not bother to adduce oral evidence. Therefore, the learned Trial Judge considered the documents placed on record and disposed of the suit in accordance with law. Therefore, it cannot be said that the Court below has not afforded an opportunity to the plaintiff to adduce evidence. It is not out of place to mention that even in this revision petition, the revision petitioner has not produced the voucher alleged to be used while the alleged deposit of Rs. 300/- was made by the Debtor on 7-1-1998 in the account so as to establish that the suit was not barred by limitation.

14. In view of the facts on record, the Trial Judge was justified in dismissing the suit as barred by limitation. I see no illegality or infirmity in the impugned judgment and decree passed by the Trial Court. Hence, I pass the following Order:

The revision petition fails and the same is hereby dismissed.