

(2003) 08 KAR CK 0088
In the Karnataka High Court
Case No : Civil Revision Petition No. 1527 of 2000

Jugraj Sethia

APPELLANT

Vs

M. Ramaiah (Deceased) by L.Rs and Another

RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, 151, 153
Limitation Act, 1963 — Section 5
Small Causes Courts Act, 1882 — Section 18

Citation : AIR 2003 Kar 517 : (2003) 5 KarLJ 394 : (2003) 4 KCCR 2942

Hon'ble Judges : K. Bhakthavatsala, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

K. Bhakthavatsala, J.—This is plaintiffs 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 2/defendant 2 was served, but he remained unrepresented. Three times notices were sent to respondent 1/defendant 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 1 by way of substituted service viz., by affixture, the same was returned with a shara "that the respondent 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 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 LA.

No. II of 2001 under Order 1, Rule 10 read with Section 151 of the CPC to permit the revision petitioner to bring the opponents on record in place of the deceased first respondent. Notices were issued to the legal representatives of the deceased first respondent but they were returned with postal shara stating that "address is insufficient". Therefore, on 9-8-2002, I.A. No. I of 2002 was filed under Order 5, Rule 10 of the CPC praying to issue notice to the legal representatives of the first respondent by way of substituted service, namely by "affixiture" was allowed and accordingly served on legal representatives of first respondent, but they remained absent. Therefore, LA. No. I of 2002 was allowed and legal representatives of the respondent 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 maintain ability of revision petition:

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 1, Rule 10 of the 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 1, Rule 10 of the CPC was competent even if the matter falls within the provisions as contained under Order 22, Rule 4 of the 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 22 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 Article 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 the 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 the 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 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 revision 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. 1,975/- 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 of 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 plaintiffs 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 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 legal representatives of the debtor. Therefore, a question is raised whether the suit is abated. In this regard, I refer to Order 22, Rule 4 of the CPC.

10. Sub-rules (4) and (5) of Order 22, Rule 4 of the CPC were inserted in 1976 amendment. According to Sub-rule (4) of Rule 4 of Order 22 of the CPC:

"The Court whenever it thinks fit, may exempt the plaintiff from the necessity of

substituting the legal representatives of any such defendant who has 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 22 of the CPC states that:

The Court shall have due regard to the fact of the plaintiffs 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 in (Spencer O., C.J., Kumaraswamy Sastri and Krishnan, JJ.) *Gopalkrishnaya 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 of the 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 proceeding in a suit and as such has full power u/s 153 to direct an amendment of the appeal memorandum".

The decisions 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 1, Rule 10 of the CPC, instead of filing an application under Order 22, Rule 4 of the CPC. It is not out of place to mention that the revision petitioner could have filed an application under Order 22, Rule 4 of the CPC to bring the legal representatives of the deceased respondent 1 on record, but he has done so taking recourse under Order 1, Rule 10 of the 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 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. 300A 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 1 in fact deposited a sum of Rs. 300/- on 7-1-1998. The learned Counsel appearing for 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 plaintiffs evidence on 23-6-1999 and when the case was posted for plaintiffs evidence finally on 15-12-1999, the learned Advocate appearing for the plaintiff filed an application under Order 17, Rules 1 and 2 read with Section 151 of the CPC to adjourn the case for evidence by one month and that the case was adjourned for plaintiffs 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.