

(1996) 03 MAD CK 0126

In the Madras High Court

Case No : C.M.P. No's. 17112 to 17115 of 1994, 2298 and 2299 of 1996

Nachimuthu Gounder (died) Bakkiam and Others	APPELLANT
Vs	
Manikavalli and Others	RESPONDENT

Date of Decision : 29-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 151, 153

Citation : (1996) 1 CTC 532

Hon'ble Judges : Jagadeesan, J

Bench : Single Bench

Advocate : M. Thiyagarajan, R.P. Arthipan and R. Ravi, for the Appellant; T.P. Manoharan, M. Sahadevan and N.V. Karnakaran, for the Respondent

Judgement

Jagadeesan, J.—C.M.P.17112 of 1994 is to excuse the delay of 959 days in filing the application to bring the legal representatives of the deceased appellant.

2. C.M.P.17113 of 1994 is to set aside the abatement caused due to the death of the appellant.

3. CM.P.17114 of 1994 is to bring the legal representatives of the deceased appellant.

4. C.M.P.17115 of 1994 is for stay of the operation of the decree of the lower court.

5. The case of the petitioners is that one Nachimuthu Goundar filed the appeal against the judgment and decree in O.S. No. 237 of 1987 on line file of Sub-Court, Udumalpet in respect of "B" schedule property alone. He died on 4.9.91. He had executed a Will dated 9.4.90 by which the petitioners are the legal representatives who are entitled for the properties. Hence they are the persons interested in the proceeding.

6. The said suit was filed by the respondents herein for partition and a preliminary decree was passed by the trial court. The respondents filed I.A.1748

of 1990 seeking for passing of final decree. After the death of the said Nachimuthu Gounder, the respondents filed necessary applications in the final decree proceedings to bring the legal representatives on record. The petitioners came to know about the proceedings only on receipt of notice in the L.R petition filed by the respondents in the final decree proceedings. Thereafter the petitioners contacted their counsel and ascertain the stage of the proceedings and on coming to know about the pendency of the appeal, these petitions have been filed. The delay in filing these petitions is bona fide.

7. Though no counter has been filed, the counsel for the respondents took an objection stating that the lower court disposed of the suit on 21.8.90 and the appeal had been preferred on 13.9.91. The said Nachimuthu Gounder died on 4.9.91. Hence the appeal was presented only after the death of the said Nachimuthu Gounder and hence there is no proper presentation of the appeal and the appeal is liable to be rejected.

8. To get over the objection, the petitioners filed C.M.P. No. 2298 of 1996 to amend the prayer in C.M.P. No. 17112 of 1994 as "to excuse the delay of 959 days in filing the appeal in proper representation instead of excuse the delay in bringing on L.Rs of the deceased appellant" and C.M.P. No. 2299 of 1996 to amend the cause title by treating the petitioners as appellants.

9. The counsel for the petitioners contended that the suit was disposed of by the trial court on 21.8.90 and the deceased Nachimuthu Gounder instructed his counsel to take necessary steps for filing the appeal. On such instructions, the papers had been sent to the counsel at Madras in the first week of August, 1991. On the basis of the instructions, the counsel at Madras had filed the appeal on 13.9.91. In the meanwhile the said Nachimuthu Gounder died on 4.9.91. As the petitioners were not aware about the filing of the appeal, they could not instruct their counsel at Madras properly. Hence it is only a bona fide mistake and as such the petition filed for amendment has to be allowed. He also relied upon a judgment reported in Union of India (UOI) and Another Vs. K. Abborvam (Deceased) and Others, . In that case petitions have been filed for condonation of delay of 851 days in seeking to set aside the abatement caused by the death of the first respondent in the appeal and set aside the abatement and bring the legal representatives of the deceased first respondent on record. The first respondent therein died on 24.5.90. Whereas the appeal was presented on 11.6.90 against the first respondent aa if he was alive. The learned Judges have held as follows:

"In such a case, the procedure to be followed by the appellant has been prescribed by a Full Bench of this Court in Alusumillis Gopala Krishnayya and Anr. v. Alivi Lakshmana Rao, AIR 1925 Mad 1210. The remedy of the appellant is to seek amendment of the cause title of the appeal by showing the names of the legal representatives of the deceased respondent and also applying for condonation of delay in filing the appeal. Even when these applications were filed there was a delay of 851 days. No doubt, in the affidavit filed in support of the

applications it is stated that the petitioners were not aware of the death of the death of the respondent. That could have been so before the return of the notice issued by the Court in the appeal. But, the appellants cannot plead ignorance of the death of the respondent after the notice issued by this court in the first appeal returned unserved and a notification was published on the notice board that the respondent was dead and steps should be taken to bring the legal representatives on record. But the applications were filed only on 19.2.1993. There is no explanation for the delay after the return of the notice and the notification of the registry thereof. Hence there is no justification for condoning the delay in filing these petitions."

The counsel for the petitioner relies upon the above judgment only for the purpose of the maintainability of the C.M.Ps. No. 2298 and 2299 of 1996 seeking to amend the prayer and for condoning the delay in filing the appeal for proper presentation.

10. Per contra, the counsel for the respondents contended that the appellant Nachimuthu Gounder died on 4.9.91; whereas the appeal has been filed on 13.9.91, as if the appellant was alive. An appeal filed in the name of the person, who was dead on the date of the institution, is a nullity and cannot be permitted to continue the proceedings by the legal representatives. Further the vakalat executed in favour of the counsel automatically seized to operate immediately on the death of the person who executed the vakalat. Hence on 13.9.91 the counsel has no authority to present the appeal, since the said Nachimuthu Gounder died on 4.9.91. He relied upon the case reported in Bai Pani Vankar Vs. Madhabhai Galabhai Patel, in which the Division Bench of Bombay High Court has held as follows:

"Now, apart from authorities, I should have said that the appeal that was preferred on 29.1.1951, was clearly a nullity. The appellant being dead, the pleader who preferred the appeal had no authority to prefer any appeal and the vakalatnama signed in his favour had come to an end. If the appeal was a nullity, no order could be made in that appeal which would be an effective order, and therefore the learned District Judge was right in refusing to direct that the petitioner should be substituted in place of the deceased appellant. An effective order under Order 1, Rule 10, can only be made provided there is a suit or an appeal before the Court, but if the suit or the appeal is a nullity, then any order made in that suit or appeal is equally a nullity, and the learned Judge rightly relied on the decision of Mr. Justice Mulla in- "Rampratab v. Gourishankar AIR 1924 Bom. 109(A). In that case the learned Judge was dealing with a suit filed by the plaintiff against the firm of the defendant's father. The defendant's father was the sole owner of the firm and he had died before the institution of the suit and Mr. Justice Mulla held that the suit instituted was not merely against a wrong person but against no person at all and he points out at page 111 that any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed

against him is also a nullity."

In the case reported in *Mura Mohideen Vs. V.O.A. Mohomed and Others*, a Division Bench of the Madras High Court has held as follows:

"In our opinion the questions set out correctly express the law in India also. If however imperfectly and incorrectly a party is designated in a plaint the correction of the error is not the addition or substitution of a party but merely clarifies and makes apparent what was previously shrouded in obscurity by reason of the error or mistake. The question in such a case is one of intention of the party and if the court is able to discover the person or persons intended to sue or to be sued a mere misdescription of such a party can always be corrected provided the mistake was bona fide Order 1, Rule.10, C.P.C. Such an amendment does not involve the addition of a party so as to attract Section 22(1) Limitation Act. Suits by or on behalf of dead persons stand in a different category. The principle that a misdescription could be corrected by amendment could not obviously be applied to such a case but this is far from saying that merely because the law does not recognise the firm as being a legal entity, the firm name could not indicate or designate the individuals comprising the firm."

The case reported in *Amar Kaur and Others Vs. Sadhu Singh and Others*, is also a case where the appeal has been preferred in the name of a dead person. Similar arguments were advanced. The Division Bench has held as follows:

"Shri Harbans Singh Gujral, the learned counsel for the appellants, in assailing the order of the learned single Judge has not disputed the fact that the execution appeal was filed in the name of a dead person as Ram Lal, appellant, had died a few days earlier on 27.10.1956. He has however, urged that since an appellate court has all the powers of the original court, as laid down in Section 107, C.P.C., the learned Judge acting under Order 1, Rule 10, C.P.C., should have allowed the names of Shrimati Amar Kaur and Sohan Singh to be substituted for the deceased appellant Ram Lal, being his legal representatives, as it was on account of sheer ignorance of the death of Ram Lal that the appeal was filed in his name and not that of his legal representatives. In support of this contention he relies upon *H.H. Darbar Alabhai Vajsurbhai Vs. Bhura Bhaya*, , *Mehar Singh v. Labh Singh*, AIR 1932 Lah 305, and *Karimullah Khan v. Bhanu Pratap Singh*, AIR 1938 Nag. 458.

I, however, find that even the decisions of the Bombay, Lahore and Nagpur Courts are conflicting and an appeal filed in the name of a dead person being a nullity cannot be resuscitated either under Order 1, Rule 10, or Sections 151 and 153, C.P.C. In *Mehar Singh v. Labh Singh*, AIR 1932 Lah 305, *Johnstone, J.*, relying upon *A. Gopala Krishnayya v. Lakshmana Rao*, ILR 49 Mad. 18 : AIR 1925 Mad 1210, held that in an appeal filed against a dead person his legal representatives could be substituted and the delay in such substitution must be excused in exercise of general powers of amendment that vested in a civil court u/s 153, C.P.C. The decision of a Division Bench of the Lahore High Court

reported as *Roop Chand v. Sardar Khan*, AIR 1928 Lah. 359 was distinguished on the ground that it related to the question of abatement. An earlier decision of that court reported as *Mt. Boondu v. Moti Chand*, AIR 1923 Lah. 652(1), was not cited before Johnstone J."

After referring to some of the judgments, the learned Judges have held as follows:

"In my opinion the powers under Order 1, Rule 10, C.P.C. cannot be exercised to substitute a different person for a dead plaintiff or appellant. The "person" referred to in this rule means a person in existence who may, of course, be either a human being or a legal person capable of suing or being sued, but it does not include a fictitious person or a person who having died is no longer in existence on the date of the institution of the suit or appeal. A person who is dead has no existence, either in fact, or in law, and he is incapable of instituting a suit or an appeal or performing any act. For the same reason no attorney or counsel of his would be competent to file an appeal or institute a suit, as none can act for, or on behalf of, a person who is dead and has lost his existence.

The mistakes of identity that can be corrected under Order 1, Rule 10, C.P.C are those where through inadvertence or bona fide mistake a wrong person is made a party in place of the one who is the real party. By substituting the name of the correct party the court merely permits the person wrongly impleaded to walk out and his place to be taken by the right one. But where an appeal or a suit has been instituted in the name of a person who is not in existence, the very act of instituting the suit or lodging the appeal is a nullity and thus there can be no question of putting in his place another as a plaintiff or an appellant.

The view that I have expressed above was accepted in some decisions of the courts from which the appellant has cited the above noted authorities. In AIR 1934 55 (Nagpur) it was held that the expression "wrong person" used in Order 1, Rule 10, C.P.C, does not mean a dead person and before Order 1, Rule 10, C.P.C. can be applied the plaint or the memorandum of appeal must be in existence and the legal representatives of the appellant who is dead at the time of the institution of the appeal cannot be substituted.

In a recent decision of the Bombay High Court reported as *Bai Pani Vankar Vs. Madhabhai Galabhai Patel*, , Changla, C.J, has expressed the same view, dissenting from *Gopalakrishayya v. Lakshman Rao*, ILR 49 Mad 18 : AIR 1925 Mad 1210, *Karimullakhan v. Bhanu Pratabsingh*, AIR 1938 Nag 458 and *Mehar Singh v. Labh Singh*, AIR 1932 Lah 305. His Lordship preferred the view taken in *Rampratab v. Gourishankar*, AIR 1924 Bom 109, *Veerappan Chetty v. Tindal Ponnem*, ILR 31 Mad 86, and *Sudhir Kumar De v. Amritlal Seal*, ILR 1946 Cal 611, and observed:

"An effective order under Order 1, Rule 10, can only be made provided there is a suit or an appeal before the Court, but if the suit or the appeal is a nullity, then any order made in that suit or appeal is equally a nullity."

From the above referred judgments, it is clear that the appeal filed in the name of a dead person is a nullity and the same cannot be continued by the legal representatives by substituting them in the place of the deceased appellant.

11. The learned counsel for the respondents having filed the C.M.P.2298 and 2299 of 1996 seeking for amendment of the prayer and amendment of the cause title placed his reliance on the judgment reported in Union of India (UOI) and Another Vs. K. Abborvam (Deceased) and Others, . The relevant portion had been extracted supra. It is the case where the appeal has been filed against the dead person i.e., the respondent. There the court held that it is open for the appellant to file the amendment petition. Even there on the ground of delay the application has been dismissed. There is a short distinction between the appeal filed in the name of a dead person and an appeal filed against a dead person. In fact the Full Bench judgment relied upon in Gopala Krishnayya v. Lakshmana Rao, AIR 1925 Mad 1210, relied upon by the Division Bench judgment reported in Union of India (UOI) and Another Vs. K. Abborvam (Deceased) and Others, had been discussed by the Division Bench in Amar Kaur and Others Vs. Sadhu Singh and Others, wherein the learned Judges had held as follows:

"Since all the decisions cited on behalf of the appellants are based upon the Full Bench decision of the Madras High Court in Gopala Krishnayya v. Lakshmana Rao, ILR 49 Mad 18 : AIR 1925 Mad 1210, it is necessary to refer to that case. It was again a case in which the appeal had been instituted by a person who was alive but the respondent was dead at the time of the Institution. Subsequently on discovering the mistake the appellant made an application for substitution of the legal representatives of the respondent which was allowed. Upholding that order the learned Judges constituting the Full Bench observed:

"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 suit and as such has full powers u/s 153, C.P.C to direct an amendment of the appeal memorandum."

Hence I am in entire agreement with the above view. In this case, the appeal has been filed nine days subsequent to the death of the appellant. Hence the appeal itself is a nullity and cannot be proceeded with by either substitution of the legal representatives or by way of amendment of cause title.

12. Hence the petitions are dismissed.