

(2002) 01 MAD CK 0022

In the Madras High Court

Case No : Second Appeal No's. 896 and 897 of 1996

P. Ramakrishna Pillai

APPELLANT

Vs

Palaniammal, V. Balasundaram, M. Balakrishnan and V.
Narayanasamy

RESPONDENT

Date of Decision : 25-01-2002

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (2002) 01 MAD CK 0022

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : K. Subramanian, for the Appellant; C.R. Prasanan, for the Respondent

Final Decision : Dismissed

Judgement

V. Kanagaraj, J.—Second Appeal No.896 of 1996 is directed against the judgment and decree dated 25.4.1996 rendered in A.S.No.70

of 1993 by the Court of II Additional Subordinate Judge, Coimbatore thereby reversing the judgment and decree dated 16.3.1993 rendered in

O.S.No.899 of 1983 by the Court of III Additional District Munsif, Coimbatore.

2. The other Second Appeal No.897 of 1996 is directed against the decree and judgment dated 25.4.1996 rendered in A.S.No.83 of 1993 by

the Court of II Additional Subordinate Judge, Coimbatore thereby confirming the judgment and decree dated 16.3.1993 rendered in

O.S.No.3080 of 1981 by the Court of III Additional District Munsif, Coimbatore.

3. Both the parties have filed the suits against each other. The appellant in both the above appeals had filed the suit in O.S.No.3080 of 1981

against the respondents for declaration and injunction, while the first respondent

in the said suit/Palaniammal had filed the other suit in O.S.No.898 of 1983 against the appellant herein for declaration, possession and for mesne profits. The suit property involved in both the suits are one and the same. The trial Court, having framed a number of issues in both the suits, had conducted a joint trial allowing parties to record their evidence in O.S.No.3080 of 1981, wherein on the part of the plaintiff, he would examine himself as PW1 for oral evidence and would mark 44 documents as Exs.A1 to A44 and on the part of the defendants, who are the plaintiffs in the other suit in O.S.No.898 of 1983, they would examine five witnesses for oral evidence as DWs.1 to 5 and they would mark 47 documents for documentary evidence as Exs.B1 to B47, and besides these evidence, four documents would also be marked as court documents Exs.C1 to C4.

4. In consideration of all the pleadings and the evidence placed on record, the trial Court would dismiss both the suits. Aggrieved, the plaintiffs in the respective suits have preferred first appeals respectively in A.S.Nos.70 and 83 of 1993, and the first appellate Court also, since the subject matter and the parties involved in both the appeals are one and the same, having heard both the appeals would pass a common judgment, thereby reversing the judgment and decree rendered by the trial Court in O.S.No.899 of 1983, further confirming the judgment and decree rendered in O.S.No.3080 of 1981. Aggrieved against the common judgment, the appellant herein has come forward to prefer both the above second appeals and this Court has admitted both the above second appeals for determination of the following substantial questions of law :

1. Whether, in law, have not the Courts below failed to see that the appellant has been in possession and enjoyment of the property right from 1965 onwards as admitted by D.W.1 and as seen from Exs.A.2, A.9 and A35, A12 to A.25 and consequently the appellant has prescribed title by adverse possession?

2. Whether, in law, have not the Courts below omitted to see that the suit filed by the respondents for recovery of possession is not maintainable in the absence of notice terminating the tenancy as contemplated u/s 106 of the Transfer of Property Act?

5. Today, when the above matters were taken up for consideration, the learned

counsel for the respondents submitted that when the first appellate

Court has reserved its verdict, the first respondent in both the above appeals viz., Palaniammal had died on 21.1.1996 and without impleading the

legal representatives of the deceased respondent, the judgment had been passed in her favour on 25.4.1996.

6. The learned counsel appearing on behalf of the appellant in both the appeals would submit that the said decree passed in favour of the dead

person is a nullity and unenforceable. The learned counsel would continue to say that both the above appeals have also been preferred without

knowledge of the fact that the judgment and decree in both the first appeals have been passed by the first Appellate Court after the death of the

respondent. The second appeals filed against the same dead person would equally become liable to be declared as vitiated in law.

7. On the part of the learned counsel for the respondent in both the above second appeals, he would attempt to draw a distinction between a

decree passed against the dead person and a decree passed in favour of the dead person, on the date of deciding the suit or appeal, without

knowledge of the fact that the party is dead. The learned counsel would clarify that if the decree ends against the dead person, it would

undoubtedly become a nullity. But if a decree is passed in favour of the dead person, in such circumstances, it cannot be said to have become

nullity and it would become executable one, since no prejudice is caused to the other side because of the death of the party, prior to passing the

decree.

8. The learned counsel in consumption of this argument would also cite a decision reported in Abdul Azeez Sahib Vs. Dhana-bagiammal and

Others, wherein, a learned single Judge of this Court has held as follows:

In the instant case, as the defendants have not chosen to challenge the decree either by way of appeal, revision or review, or to have it set aside in

the suit itself by appropriate proceedings, it is not open to the executing Court to refuse execution of the decree on the ground that the decree has

been passed in favour of a dead person. As the decree passed in ignorance of the death of the plaintiff is a mere irregularity and cannot have the

effect of making the decree as one without jurisdiction, the lower appellate Court's finding that the decree is void abinitio is clearly erroneous.

9. Contra to the above judgment, another judgment would be cited on the part of the respondents to the effect that in such circumstances, the decree passed in respect of a dead person without impleading the legal representatives is a nullity, as it comes to be seen from the judgment reported in *Mrs. Gladys Coutts Vs. Dharkhan Singh and Others*, wherein the Division Bench of the Patna High Court dealing with the subject has held as follows:

There must, in my opinion, be some machinery to deal with the application of the appellant for setting aside abatement and bringing the heirs of Gudar Singh into the record; otherwise the second appeal of the appellant is bound to fail on the ground of incompetency. Such an application for setting aside abatement can only be dealt with by the court of appeal below, where the abatement occurred, and the court of appeal below can have no jurisdiction unless the decree is set aside and the court has seisin of the case.

Where, however, the case cannot proceed in the absence of one of the parties to the action, a decree passed in respect of a dead person must be held to be a nullity; and when an application is made for setting aside abatement and substituting the heirs of the deceased party on the record, such application must be dealt with by the Court in which the abatement occurred. The same view was expressed in *Amarsingji Indrasingi Vs. Desai*

Umed, 1925 Bombay 290 AIR V 12 (H) a decision which was approved of in the Letters Patent Appeal in *Ram Saran Ahir and Others Vs.*

Prithvi Nath Singh and Another,

On a consideration, therefore, of the cases cited before us, I am of the opinion that the proper procedure to follow in the present case is the

procedure which was followed in *Ram Saran Ahir and Others Vs. Prithvi Nath Singh and Another*, I would accordingly allow the appeal, set aside

the decree passed by the Court of appeal below and remand the appeal for a fresh hearing in accordance with law. The application which the

appellant has filed in this Court for setting aside abatement and substituting the heirs of Gudar Singh should be sent to the court of appeal below for

disposal according to law.

10. Yet another judgment delivered long back also seems to have occupied the territory of this legal consideration reported way back in AIR 1932

Mad 193 (VYTHILINGA PANDARASANNADHI VS. BOARD OF CONTROL, THIAGARAJASWAMI DEVASTHANAM), wherein the

Division Bench of this High Court has held that

A decree holder need not be a party to the decree. It is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it.

11. This judgment is in conflict with the earlier Division Bench Judgment reported in 1956 Patna 373 while the Judgment cited in Abdul Azeez

Sahib Vs. Dhana-bagiammal and Others, would some what go in consonance with the earlier judgment of the Madras High Court reported in

1932 Madras 193. The Division Bench Judgment of the Madras High Court of the year 1932 would bluntly say that a decree holder need not be a

party to the decree and it is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it.

12. So far as this judgment is concerned, it may hold good regarding whom some rights have been conferred by the decree and in such event,

according to the judgment even without being a party to the proceedings, the person in whose favour the decree has been passed will have the

right to execute the same. In the single judge's judgment of the Madras High Court reported in Abdul Azeez Sahib Vs. Dhana-bagiammal and

Others, , it seems that in the said case, the party against whom a decree had been passed had not chosen to challenge the decree either by way of

appeal or revision or review, or to have it set aside in the suit itself by appropriate proceedings. In such context, the learned single Judge has

observed that it is not open to the executing Court to refuse execution of the decree on the ground that the decree has been passed in favour of a

dead person. So far as this observation is concerned, the focal point is, once the decree is passed, whether right or wrong, the Court of execution

cannot refuse to execute such decree on ground that the judgment had been passed in favour of the dead person. Therefore, this observation is

confined only to the execution Court. But the learned Judge goes still further and observes that as the decree passed in ignorance of the death of

the plaintiff is a mere irregularity it cannot have the effect of making the decree as one without jurisdiction and the lower appellate Court's finding

that the decree is void ab initio is clearly erroneous. This observation needs

discussion in the context of the facts of the case in hand as to whether it could be so easily concluded as a mere irregularity and cannot have the effect of making the decree without jurisdiction or even declared to be a decree void ab initio.

13. If this decree is left as it is in the case of a decree passed as against the dead person as it is in the case in hand, in cases of executable decrees

the question that would arise is as to who is to execute the same, since the party is dead without the legal heirs being impleaded as parties? In the

event a second appeal has been preferred as it is in the case in hand, who is to defend the case? It is the duty of the Court, where the case is

pending or during the pendency of which proceeding the party is dead should entertain the application for impleading the legal representatives and

pass orders properly either impleading or refusing to implead the legal representatives for reasons to be recorded. This legal obligation can neither

be complied with by the execution Court nor even by the appellate Court wherein without the knowledge of the death of the party, appeals have

been preferred by the other side, based on the decree passed on a dead person. There is no gainsaying that the decree survives without the

beneficiary of the decree enjoying the fruits of the same or having none to execute the same and therefore, we have to seek recourse to the

Division Bench's judgment of Patna High Court reported in 1956 Pat 373 (MRS. GLADYS COUTTS VS. DHARKHAN SINGH AND

OTHERS). It is always desirable to rely on the stand taken by the Division Bench of the Patna High Court cited herein.

14. Again the question will arise as to what is the next course open for the parties to revive and continue the proceeding. The answer lies in the

judgment of the Division Bench of the Calcutta High Court reported in Kanailal Manna and Others Vs. Bhabataran Santra and Others, wherein it

has held as follows:

Where one of the plaintiffs dies even before the appeal filed against a joint decree passed in their favour is heard by the lower appellate Court and

the Court in ignorance of the death, dismisses the appeal and passes a decree, the decree abates and cannot be considered in law to be effective in

any way. The High Court in appeal against such a decree cannot itself set aside the abatement nor it can affirm the decree passed by the trial

Court. The proper procedure to be followed by the High Court is to set aside the ineffective decree and remand the case to the Court where

abatement has taken effect, keeping it open to the parties to move that Court for an opportunity to have the abatement set aside if the parties could

satisfy it that they are so entitled in law. (1947) 51 CWN 654 Overruled. Case law discussed.

15. In such a situation, the only course that is to be adopted is more clearly ascertained by the judgment of the Division Bench of Calcutta High

Court rendered in the case reported in Kanailal Manna and Others Vs. Bhabataran Santra and Others, as extracted above and therefore, this

Court is of the firm view that it is the case wherein setting aside the decree and judgment passed by the first appellate Court, the case has to be

remanded back to the first appellate Court with direction to entertain the application, if filed by the legal representatives of the deceased

respondent therein and with sufficient opportunity for them to be heard, not only decide the question of legal representatives and on impleadment of

such legal representatives, the first appellate Court with further hearing, shall pass the judgment on merits and in accordance with law, so as to be

binding on proper parties in a legal manner.

16. In result,

1.both the above second appeals vitiate on illegalities and they are dismissed;

2.The common judgment and decree dated 25.4.1996 made in both A.S.Nos.79 and 83 of 1993 by the Court of II Additional Subordinate

Judge, Coimbatore are hereby set aside as nullity;

3.The cases are remanded back to the first appellate Court for fair opportunities to be given to file such petitions for impleading the legal

representatives of the deceased respondent and to set aside the abatement, provided they come forward to file such applications within six weeks

from the date of receipt of this order by the lower Court.

4.The lower Court is further directed to decide the appeals and dispose them of with further opportunities for the parties to be heard within three

months from the date of filing the application as indicated above.

5.No costs.