
(1924) 01 MAD CK 0005
In the Madras High Court

Seshamma

APPELLANT

Vs

Yeeranki Peda Venkata Rao and Others

RESPONDENT

Date of Decision : 18-01-1924

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 1924 Mad 713 : (1924) 19 LW 608

Hon'ble Judges : Wallace, J

Bench : Division Bench

Judgement

Wallace, J.—This appeal is against the order of the Additional Subordinate Judge of Cocanada setting aside an abatement of a suit, the

order appealed against being passed under Order 22, Rule 9. In ordinary circumstances no appeal lies against such an order, but in the

circumstances of this case it is contended that the order appealed against was passed without jurisdiction and vitiated by material irregularity.

2. The plaintiff who is the respondent in this appeal, sued one M. Narayana Rao in the Court of the District Munsif of Peddapur on a mortgage and

on 27-11-1918 obtained a preliminary decree. It since transpired that the judgment-debtor died on the morning of 27-11-1918 before the decree

was passed. The plaintiff admits that, not long after the decree, he came to know of the fact of the death of the judgment-debtor, but not of the

actual date of it and assumed that he had died after the decree and that therefore the decree was valid. He took no steps to bring on the legal

representatives until 27-8-1920 when he filed E.A. No. 2411 of 1920 under Order 34, Rule 5 wherein, while setting out that the judgment-debtor

bad died and entering his widow (the present appellant) as the defendant in the petition, he asked merely that a final decree be passed. The present

appellant in here counter-petition pointed out that tin judgment-debtor had died before preliminary decree was passed, that no petition to bring on

the legal representative on record had been put in time, tin t therefore the suit had abated, and that the date of limitation for bringing on the legal

representatives had passed. Even after this allegation the plaintiff did nothing until 23-3-1921 when he put in E.A. No. 911 of 1921 in which he

asked that the delay in bringing on the legal representatives be excused, and that a final decree be passed. In his affidavit to that petition, he

persisted in saying that the defendant judgment-debtor died after the decree and that the allegation that he died before the decree was not true.

3. The District Munsif dismissed both the petitions. The Additional Subordinate Judge on appeal held that the application, E.A. No. 2411 of 1920,

may be treated as one for setting aside the abatement of the suit and that the excuse for the delay in filing such an application is reasonable and he

set aside the abatement of the suit and directed the District Munsif to take it on file and proceed with it.

4. It is not now disputed that the judgment-debtor died before the preliminary decree was passed, that therefore the preliminary decree was a

nullity, and that no steps to bring on the legal representative were taken within six months of 27-11-1918 as required by the Limitation Act then in

force. It follows that the suit abated on 26-5-1919. The plaintiff no doubt contends that in Order 22, Rule 4 the phrase "right to sue" does not

apply after a preliminary decree is passed and that therefore there is no limitation to the period within which he was bound to apply to have the

legal representative brought on: but, apart from the fact that the law is at present against him on this point. See Subbarayudu v. Ramadasu 1923

Mad. 237 there is the obvious rejoinder that there was in fact no valid preliminary decree and therefore the suit has not even reached the stage of a

preliminary decree. Clearly then the suit abated on 26-5-1919.

5. The first point to be noted is that, though the plaintiff has never asked that the abatement be set aside, the Lower Court, nevertheless, chose to

treat his E.A. No. 2411 of 1920 as a prayer for that relief. That E.A. as already pointed out, was not put in under Order 22 at all but under Order

34. Not only that; when the present appellant's rejoinder to it pointed out that the suit had abated, the plaintiff evidently without asking any enquiry,

chose to take the stand-point that the suit had not abated and maintained that standpoint in his second petition E.A. No. 911 and never even then

asked for the abatement to be set aside. It is true that E.A. No. 911 purports to have been put in, inter alia under Order 22 Rule 4 and 9, but even

then, he did not pray for the abatement being set aside nor does the Lower Appellate Court make any reference to that E.A. in the body of its

order. Had it been pleaded before it that E.A. No. 911 impliedly contained a prayer for the abatement being set aside, we cannot see why he

should have thought it necessary to fall back on E.A. No. 2411 of 1920 in order to discover such an implied prayer for that relief. Even in his

grounds of appeal before the Lower Appellate Court, the plaintiff styles E.A. No. 911 merely as a petition to excuse the delay in bringing the legal

representative on record. We must hold that technically there was not before the District Munsif or the Lower Appellate Court any prayer under

Order 22 Rule 2 to set aside the abatement, and therefore the Lower Appellate Court had no jurisdiction to set it aside.

6. There is a further technical difficulty in the plaintiff's way. E.A. No 911 was dismissed by the District Munsif under a separate order, and no

copy of that order seems to have been put in, in the Lower Appellate Court and no petition asking to excuse the omission to file it has been filed.

There was therefore no proper appeal against that order filed in the Lower Appellate Court. This may be the reason why the Lower Appeal Court

ignores E.A. No. 911 altogether in its judgment. Here also, we must hold that the Lower Appellate Court had not before it any legal appeal against

the order in E.A. No. 911 and had therefore no jurisdiction to set that order aside. Technically it remains in force and is a legal bar to the present

appellant being brought on record as the legal representative of the deceased judgment-debtor.

7. Now, when it is necessary, in order to do substantial justice, to brush aside technicalities, the Court will not be too scrupulous in enforcing them;

but when, as we find in this case, there are no merits in the plaintiff's favour and the merits are on the appellant's side, the Court will not go out of

its way to clear from the plaintiff's path technical obstacles. He already pointed out, although the plaintiff knew of the death of the judgment-

debtor, he did not make any enquiry as to when it had occurred or make any attempt to have the legal representative brought on record within the

legal period of six months. He did not even in E.A. No. 2411 ask the legal representative to be brought on record and he did not do so until 23-3-

1921, nearly two years after the last day for bringing on the legal representative; and even though it had been pointed out to him on 4-12-1920 by

the appellant's counter that the suit had abated, he omitted or refused to make any enquiry, categorically said that that allegation was not true, and

refused to believe that there had been any abatement, and that there should be a petition to set it aside, so that even now up to date there is no

petition to set aside the abatement. The Lower Appellate Court's reasons for indulging the plaintiff are based wholly on unsupported surmises; that

the plaintiff's pleader might have been ignorant of the law or that the plaintiff had this or that mistaken idea in his head. He announces a general

plenary indulgence to parties to take their own time for applying for a final decree and that the "usual procrastination of plaintiffs" is a good ground

for calling in aid Section 5 of the Limitation Act. Such a principle is subversive of that Act altogether. We cannot see any ground for granting any

indulgence to such a dilatory, negligent and mendacious party and we are not prepared to override the technical difficulties in the plaintiff's way.

8. We hold therefore that the Lower Appellate Court's order is without jurisdiction, first because it had before it no prayer to set aside the

abatement and no substantive motion under Order 22, Rule 9, and secondly because that it had no jurisdiction to revise the order on E.A. No. 911

which was not properly before it. It follows that his order, though technically one under Order XXII, Rule 9 and technically not appealable under

that Order, was not really passed under that order because it was passed without jurisdiction and is therefore appealable or at least open to

revision on the ground that it was without jurisdiction. We, therefore, set it aside and restore that of the District Munsif with costs of the appellant

throughout.