

(1998) 01 AP CK 0028
In the Andhra Pradesh High Court
Case No : C.R.P. No. 1750 of 1997

Sugui Bai @ Shakuntala Bai and Others APPELLANT
Vs
Rafat Ali RESPONDENT

Date of Decision : 02-01-1998

Acts Referred:

Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 — Section 10(2), 22
Civil Procedure Code, 1908 (CPC) — Section 115, 151
Constitution of India, 1950 — Article 133

Citation : (1998) 1 ALD 693 : (1998) 1 ALT 359 : (1998) 1 APLJ 154

Hon'ble Judges : N.Y. Hanumanthappa, J

Bench : Single Bench

Advocate : Mr. K.G. Krishna Murthy, for the Appellant; Mr. Mahmood Ali, for the Respondent

Judgement

This Judgment has been overruled by : Rafat Ali Vs. Sugni Bai and Others, AIR 1999 SC 283 : (1998) 8 JT 157 : (1999) 123 PLR 437 : (1998) 6 SCALE 221 : (1999) 1 SCC 133 : (1998) 3 SCR 20 Supp : (1998) AIRSCW 3802 : (1998) 8 Supreme 555

Gangadhara Rao, J.—This Civil Revision Petition has come up before us on a reference made by our learned brother Justice Obul Reddi (as he then was) on the ground that the question of law involved in this case is of importance which should be decided by a Bench.

2. The plaintiff is the petitioner, he filed a Small Causes Suit No. 1109 of 1970 in the Court of the Additional Chief Judge, City Small Causes Court, Hyderabad against one Ghulam Mohiuddin the 1st defendant alleging as follows:

The defendant borrowed from him Rs. 750 on 30-12-1965 and executed a promissory note and also a receipt in his favour. Subsequently the defendant paid Rs. 25 on 15-11-1965 and made an endorsement of payment on the back of the promissory note. He was still due in a sum of Rs. 725 which he did not pay in

spite of repeated demands. Hence the suit was filed for recovery of Rs. 725 on 16-11-1970.

Subsequently when he came to know that the sole defendant died on 12-11-1970 i.e., four days before the suit, he filed I.A. No. 1515/70 on 10-12-1970 to bring the legal representatives of the deceased defendant as defendants 2 to 5 on record and it was allowed by the lower court on 1-4-1971. Defendants 2 to 5 in their written statement denied the truth of the suit, and contended that the suit was not maintainable since it was filed against a dead person and also there are three more legal representatives of the defendant who were not impleaded and hence the suit was bad for non-joinder of parties. They further contended that the plaintiff is a money lender and since she did not possess a licence, she cannot maintain the suit u/s 9 (2) of the Hyderabad Money Lenders Act.

3. The lower court while holding that the original debt and part payment were true, dismissed the suit on these grounds. Firstly, the suit was originally instituted against a dead person. Therefore, it was void arbitrary into and it could not be continued subsequently against the legal representatives of the deceased defendant. Secondly that two more daughters and son of the deceased defendant were not impleaded as parties and, therefore, the suit was bad for non-joinder of necessary parties. Thirdly, the plaintiff was a money lender and since she did not possess a licence, she could not file the suit.

4. The learned counsel for the petitioner Md. Mukarramuddin in a neat and brief argument has assailed the findings of the lower court. He contended that though originally the suit was filed against a dead person, still his legal representatives were brought on record before the period of limitation expired, and, therefore, the suit is maintainable against defendants 2 to 5. In this connection, he relied upon Section 153, CPC and the decisions reported in Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others, C. Raju v. D.D. Italia, AIR 1961 Andh Pra 230 and Jagarnath Raut Vs. Commissioners of Buxar Municipality and Others, .

5. Section 153, Civil P.C. says :

"The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

This section is new. It confers a general power on the court to amend the defects and errors in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real question or issue between the parties in the suit. So when a suit is filed against a dead person the plaint can be amended by substituting the legal representatives of the deceased defendant, but the suit should be treated as instituted on the date of the application for amendment. If on that date the suit is not barred by limitation it will be in effect a suit validly

instituted against the legal representatives of the deceased defendant. In the case reported in Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others, the facts are that a suit O.S.No. 1150/44 was filed against two defendants and after summons were taken out, it was discovered that both the defendants were dead. Thereafter, by an Interlocutory Application the legal representatives of the two defendants were brought on record, and the suit was decreed.

Subsequently another suit O.S. No. 1170/45 was filed to set aside the decree in O.S. No. 1150/44 on the ground that it was void because both the defendants in that suit were dead at the time when the suit was filed and the court had no jurisdiction to bring on record the legal representatives of the persons who were dead before the institution of the suit for the reason that plaintiff filed against dead person cannot be considered to be in existence at all and the whole proceedings are arbitrary initio void and illegal.

Both the lower courts held that the entire proceedings in O.S. No. 1150/44 were void from the very inception and decreed the suit. They relied upon the decision reported in Veerappa Chetty v. T. Ponnen, I L R (1908) Mad 86 which held that a plaintiff filed against a dead person is non est and that there are no proceedings that can be deemed to be pending in the court by the filing of such a plaintiff as there is nothing in the CPC which authorises the institution of such a suit against a deceased person. It was further held that there is no jurisdiction in the Court to allow the plaintiff in such a case to be amended by substituting the names of the representatives of the deceased person even when the suit was instituted bona fide and in ignorance of the death of the defendant. Adverting to this decision, Justice Govinda Menon observed as follows:--

"It has to be mentioned that Sen 153, C.P.C. was not in existence at the time of the decision in Veerappa Chetty v. T. Ponnen, (1908) Mad 86. Supposing the plaintiff in O.S. No. 1150/44 when apprised of the fact of the death of the persons impleaded as defendants in the plaintiff before the filing of the suit, took return of the plaintiff and by using the same stamps scored out the names of the existing defendants and in their place had the proper persons impleaded and presented the plaintiff as a fresh one can it be said that such a plaintiff cannot be treated as instituted on the day on which the fresh presentation was made. In my opinion there is nothing wrong in that procedure. All the cases in which it has been held that the court has no power to amend the plaintiff filed against a deceased person by substituting the names of representatives of the deceased person arose out of the applications for amendment of the plaintiff made at a time when the suit if instituted would have become barred. The result of the amending would put back the suit to the date of the original presentation of the plaintiff and thereby save the period of limitation. No case had been cited before me at the bar in which it has been held that even if a fresh suit filed on the date when the amendment was made is not barred, still the court is deprived of the power of amending which results in making the suit a new one filed afresh."

6. The learned Judge further held that in that decision there is no consideration of the correctness or otherwise of the proposition regarding the validity of the amendment if the amended plaint were to be considered as having been filed on that date when the amendment was sought for and when the suit against the persons newly impleaded would not be barred. He also referred to the earlier decisions of the Madras High Court reported in *Mallikarjuna v. Pullayya*, I L R (1893) Mad 319; *Rasa Goundan v. Bichamuthu Pillai*, AIR 1918 Mad 794 , *Arunachalam Chettiar in Re.* AIR 1915 Mad 440. *Municipal Council Vs. Thazhel Puthan Purayil Kunhipathumma and Another*, *Chidambaram Chettiar v. Narayanaswami Iyer* 1928 Mad WN 240 ; and *Gopalakrishnayya v. Lashmanarao*, AIR 1925 Mad 1210 .

The case reported in *Gopalakrishnayya v. Lakshman Rao*, AIR 1925 Mad 1210 is a case of an appeal and the Full Bench held that "if an appeal is presented against a person who is dead at the date of presentation the Court may u/s 153, C.P.C. permit the cause-tittle to be amended or may return the appeal memorandum for amendment and representation. If the appeal memorandum is not allowed to be amended, the party may apply for refund of the spoiled stamp and may present afresh appeal. But if the appeal is out of time against the legal representative, the court has always power to excuse the delay in presentation before it can proceed to hear the appeal but it is a matter for its discretion whether it would excuse the delay."

Justice Govinda Menon observed that the principles laid down in the Full Bench case apply to the facts of the case he was dealing with and that Section 153, C.P.C. in so many words speaks of an amendment by a Court of first instance and this can be extended so far as the appellate court is concerned, by the operation of Section 141, C.P.C. That being the case there is nothing that prevents the trial court from considering the plaint as if it was filed against the new parties on the date the application for amendment was made.

7. In the case of our High Court reported in *C. Raju v. D.D. Italia*, AIR 1961 A P 230 the facts are that a suit was originally filed against father and his son as surety, and it subsequently transpired that the father was dead before the institution of the suit. So an application was filed by plaintiff to bring on record, defendants 2 to 7 as the legal representatives of the 1st defendants and it was allowed by the trial court, a revision was filed in the High Court *Umamaheswaram J.*, on a review of the entire case reported in *Veerappa Chetty v. T. Ponnen*, I L R (1908) Mad 86 cannot be regarded as good law after the enactment of Sen. 153 of the new Code.

He agreed with the view of Justice Govinda Menon reported in *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*, and held that there is nothing which prevents the trial court from construing the plaint as if it was filed against new parties on the date the application for amendment was made so long as the suit against them was not barred by limitation. The learned Judge disagreed with the new taken in *Bai Pani Vankar Vs. Madhabhai Galabhai Patel*, but followed the

decision reported in H.H. Darbar Alabhai Vajsurbhai Vs. Bhura Bhaya, . He finally held that the terms of Section 153, C.P.C. are sufficiently wide and it is open to the Court to implead the legal representatives as party defendants so long as the suit against them is not barred by limitation

8. We respectfully agree with the reasoning of Justice Govinda Menon in Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others, and of Justice Umamaheswaram in C. Raju and Others Vs. Dinshaji Dadabhai Italia and Another, . This is also the view of the Patna High Court vide Jagarnath Raut Vs. Commissioners of Buxar Municipality and Others, . Ultimately all was of procedure should be so interpreted as to advance justice but no to defeat it on technical considerations.

9. Mr. Jahangir Ali the learned advocate for the respondents has relied upon the decision reported in Veerappa Chetty v. Tindal Ponnen, (1908) Mad 86 and the subsequent decision of the Madras High Court reported in In Re: A.L.A.R.R.M. Arunachalam Chettiar, Zamindar of Devakottah through his Agent, D. Minakshisundaram Aiyar, Rasa Goundan v. Pichamuthu Pillai, AIR 1918 Mad 794 Municipal Council Vs. Thazhel Puthan Purayil Kunhipathumma and Another, and Chidambaram Chettiar v. Narayanswamy Iyer 1928 Mad WN 240 which followed Veerappa Chetty v. Tindal Ponnen, (1908) Mad 86. For the reasons stated supra we hold that the decisions reported in Veerappa Chetty v. Tindal Ponnen I L R (1908) Mad 86 is no longer good law.

In Municipal Council Vs. Thazhel Puthan Purayil Kunhipathumma and Another, the primary question was whether Section 14 of the Limitation Act was applicable when the Court wrongly allows an application to bring the legal representatives on record and the plaintiff seeks to deduct the period between the filing of the plaint and the order of the court allowing that application. The decision reported in Chidambaram Chettiar v. Narayanaswamy 1928 Mad WN 240 does not show whether the petition bring the legal representatives of the deceased defendant on record was filed before the period of limitation has expired. Sri Mohd. Jahangir Ali has also argued that Section 153 C.P.C. does not apply when there is a sole defendant and he dies before the institution of a suit within the meaning of that section." We are unable to appreciate that distinction.

He also tried to distinguish C. Raju and Others Vs. Dinshaji Dadabhai Italia and Another, on the ground that in that case there were two defendants and only one defendant died and the other defendant was alive. We do not see how it makes any difference. He referred to a decision reported in Mura Mohideen Vs. V.O.A. Mohamed and Others, . But there the facts are altogether different. Where a foreign firm instituted a suit in its firm's name which it cannot do in view of Order 30, Rule 1 and when the maintainability of the suit was objected to on that ground the plaint was amended by the substitution of the names of the partners. In this connection it was held that there was no addition of new plaintiffs but merely a clarification of the individual already on record and as such Section 22 of the Limitation Act was not attracted to the case.

He also referred to the decisions reported in *Bejoy Chand v. Amulya Charan* AIR 1914 Cal 895; *Bai Pani Vankar Vs. Madhabhai Galabhai Patel*, and *Karachi Municipality v. Baradio* AIR 1946 Sind 20. They followed *Veerappa Chetty v. Tindal Ponnen*, I L R (1908) Mad 86. But they did not consider the question whether the suit would still be bad if the legal representatives of the deceased defendant are brought on record before the period of limitation has expired. In the result we do not agree with the view of the lower court that the suit as instituted was arbitrary initio void and it could not be continued by the legal representatives of the deceased defendant when admittedly they were brought on record before the period of limitation for the suit had expired.

10. The next question is whether the suit is bad for the non-joinder of three of the legal representatives of the deceased defendant. Admittedly defendants 2 to 5 are the legal representatives of the deceased defendant. It is stated that the deceased defendant had left being him two more daughters and a son besides defendants 2 to 5. But we find from the order of the Additional Chief Judge that while allowing the petition i.e. impleading the defendants 2 to 5 as legal representatives under Order 22, Rule 4, C.P.C. it was observed by the then learned Judge that the other daughters and the son need not be impleaded. Apart from that u/s 52, C.P.C. it is the estate in the hands of the defendants that would be liable for satisfaction of the decree. It has been held by the Supreme Court in *N.K. Mohammad Sulaiman Vs. N.C. Mohammad Ismail and Others*, as follows;

"Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice, if there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the her is known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion."

11. In view of this pronouncement of the Supreme Court we do not agree with the lower Court that the suit is bad for non-joinder of some of the necessary parties.

12. The third question is whether the plaintiff who is a money lender cannot file the suit because she did not obtain the licence under the Hyderabad Money Lenders Act. The lower Court has found on evidence that the plaintiff is a money lender who collects interest at the rate of 36% per annum. Her usual mode of lending monies is by way of taking a sale deed with an agreement to recover the property and to recover the interest calling it as rent. The advocate for the plaintiff has not chosen to canvass this finding of fact and we have no reason to disagree with this conclusion of the lower court.

13. The next question is whether in the absence of a licence the plaintiff's suit for recovery of the amount in question should be dismissed. Loan is defined u/s 2 (4) of the Hyderabad Money Lenders Act (V of 1349) as a loan secured or unsecured advanced on interest in cash or in kind, and shall also include every transaction which is in substance a loan, but shall not include the following : We are not concerned with the other clauses of the section. Section 2 (7) defines money lender as a person including a pawn-broker, who within the meaning of this Act, only advances loan in the ordinary course of his business or does so along with other business, and shall also include the legal representative.

Section 9 (2) says that if it is proved that the plaintiff is a money lender as defined in sub-section (7) of Section 2, but does not hold a licence granted u/s 3, the Court shall dismiss his suit. So it will not be a loan if it is not advanced on interest in cash or in kind. Admittedly in this case no interest was stipulated nevertheless they had to pay interest. They have not also adduced any evidence in this regard. Therefore, the suit transaction is not a loan as defined in the Act and consequently the plaintiff need not have a licence to file this suit. This is also the view taken in *Dandiba v. Narsinga*, ILR (1956) Hyd 690 and *Dwarakadas v. Habib Mohammad Jaffer*, (1962) 1 Andh WR 144. Therefore, we disagree with the finding of the lower Court that since the plaintiff did not hold a licence the suit should be dismissed.

14. In the result, we allow the Civil Revision Petition and decree the Small Causes Suit No. 1109 of 1970 on the file of the Additional Chief Judge, City Small Causes Court, Hyderabad in a sum of Rs. 725 to be recovered from out of the assets of the deceased defendant in the hands of the defendants 2 to 5. The plaintiff is entitled to her costs in the Small Causes Suit but not in this Revision.

15. Petition allowed.