

(1969) 01 MAD CK 0041

In the Madras High Court

Case No : C.R.P. No"s. 1402 of 1967 and 707 and 708 of 1968

T.A. Rahim Sahib

APPELLANT

Vs

Syed Imam Sahib and others

RESPONDENT

Date of Decision : 09-01-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141, 142, 153
Limitation Act, 1963 — Section 5

Citation : (1969) 01 MAD CK 0041

Hon'ble Judges : Ramaprasada Rao, J

Bench : Single Bench

Advocate : S. Nainar Sundaram, for the Appellant;

Final Decision : Allowed

Judgement

Ramaprasada Rao, J.—These three civil revision petitions are connected and the petitioner is the same person. The relevant facts are as follows. In C.M.A. No. 12 of 1965 on the file of the court of the District Judge of Dharmapuri, which was an appeal against an order against the grant of an injunction in favour of the plaintiff (first respondent therein) in I.A. No. 588 of 1956 in O.S. No. 346 of 1955 on the file of the Court of the District Munsif, Krishnagiri, a joint endorsement is said to have been made whereby an order by consent appears to have been obtained from the court. The third defendant in the suit who now avers that no valid consent was taken authorising his counsel to make the joint endorsement, filed on 9th September, 1966 an application (I.A. No. 118 of 1966) for review of the order in C.M.A. No. 12 of 1965. He also filed an application (I.A. No. 117 of 1966) on the same day under S. 5 of the Limitation Act of 1963, for excusing the delay in filing the application for review, as by then the prescribed time limit for such an application expired. These applications were filed against the plaintiff as the first respondent and others as respondents 2, 3 and 4. The petitioner (3rd defendant) thereafter came to know that the first respondent was dead on 9th March, 1966, and hence he filed on 14th November, 1966, the third application

(I.A. No. 164 of 1966) to bring on record the legal representative of the first respondent, as respondents 5, 6 and 7. It is common ground that the day when the review application was filed, the first respondent was dead. The learned District Munsif was of the view that the application for review was incompetent for three reasons: (1) as the order sought to be reviewed was made on a joint endorsement of the parties concerned, (2) as the review application was out of time and was filed after the death of the first respondent and (3) the application having been filed against a dead person, it should be deemed to be void and unremediable. Reliance was sought on *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*, . A consolidated order was passed in I.A. No. 164 of 1966 and on the basis of the same I.A. No. 117 and 118 of 1966 were dismissed along with I.A. No. 164 of 1966. As against these orders of dismissal, the present civil revision petitions are filed. C.R.P. No. 1402 of 1967 is against the order of dismissal of I.A. No. 164 of 1966 which was an application filed under O. 22, C.P.C., C.R.P. No. 707 of 1968 is against the order in I.A. No. 117 of 1966 which was filed under S. 5 of the Limitation Act, for excusing the delay in filing the application for review. C.R.P. No. 708 of 1966 is against the order in I.A. No. 118 of 1966 which was an application filed under O. 43, C.P.C. Unfortunately the respondents are not represented in this court. The main reason which prompted the learned District Judge to dismiss the applications before him was that the ratio in *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*, compelled him to do so. The learned District Judge, relying on the general observations of Govinda Menon, J. in the said case, who in turn referred to the unexceptionable proposition of law in *Veerappa Chetti v. Tindal Ponnai* 31 Mad. 86 held that he had no jurisdiction to entertain the application for review. The lower court, however, did not delve into the effective ratio of this court in *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*, but apparently applied it superficially. As a well established legal proposition, the ratio in *Veerappa Chettiar v. Tindal Ponnai* 31 Mad. 86 is no doubt an authority for the position that a suit laid against a dead person is nullity and there are no proceedings that can be deemed to be pending in court by the filing of such a plaint. The learned Judges there were not concerned with an application for review, which application is undoubtedly in a pending proceeding and which proprio vigore is a civil proceeding involving determination of rights of parties. In the instant case, the application for review was filed on 9th September, 1966 together with an application under S. 5 of the Limitation Act for excusing delay. After being made aware of the fact that the first respondent was dead, an application to bring on record the legal representatives of the deceased was filed on 14th November, 1966, which is effectively an application to amend the cause title in the application for review. The question, therefore, which has to be considered is whether the delay in filing the review application till 14th November, 1966 would be justified, as this is the crucial date when the cause title in the review petition was sought to be amended by substituting the names of the legal representatives of the deceased respondent in his place. Two primary questions, therefore, arise for consideration : (1) whether, in the circumstances,

the court has jurisdiction to entertain the application to add the legal representatives of the deceased respondent and (2) whether the delay ought to be excused. The court below considered only the first question and failed to advert itself to the second question. Even on the first question, the conclusion of the learned District Judge is incorrect.

2. For a proper appreciation of the legal contentions of Sri Nainar Sundaram, it is necessary to consider the true scope of a few provisions of the C.P. Code. O. 47, R. 1 (1) (b) C.P.C. provides for an application for review by a person aggrieved, against an order from which no appeal is allowed. In the instant case the order sought to be reviewed *prima facie* appears to be an order by consent in C.M.A. No. 12 of 1965 on the file of the court of the District Judge, Dharmapuri. The petitioner however sought to challenge the order on the ground that there was no valid consent given by him to enable the counsel to submit to the joint endorsement. *Prima facie*, he could not prefer an appeal and therefore he set O. 47, C.P.C., into motion. There is therefore obviously nothing irregular in the procedure adopted.

3. S. 141, C.P.C., dealing with miscellaneous proceedings, lays down:--

The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings, in any court or civil jurisdiction.

4. We have now to consider the consent and effect of S. 153, C.P.C., which is to the following effect :

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.

5. The term "proceeding" in this section is generic in its signification. Legal proceedings involving determination of rights or the obtaining of legal reliefs or where it is to remedy an error in an earlier proceeding, are all terminologically proceedings envisaged by the section. The object of the section is to avoid multiplicity of proceedings to render ready and equitable justice and avoid bare technicalities. The basis of the review petition in this case is the alleged consent order in C.M.A. No. 12 of 1965 passed, when the first respondent was alive and which was recorded in an appeal against an order in an interlocutory application for the grant of an injunction. Thus the petitioner not having the right to appeal, has come with an application for review under O. 47, C.P.C. to correct what according to him is an error, which has crept therein. If this much is conceded, as it ought to be then the Civil Court under S. 153, has jurisdiction at any time and on terms to be fixed by it, to amend any error in an earlier proceeding--in this case the order in C.M.A. No. 12 of 1965. The application for review itself is again a miscellaneous proceeding coming within the meaning of S. 141 C.P.C. and therefore all the provisions of the Code including S. 153 would apply to it. Further, the right to seek a review is not lost in this case, since no alternative

remedy is available. The order sought to be reviewed is not intimately connected with the individuality of the first respondent who is dead. Thus the right to ask for review is available to the petitioner and he can avail of the beneficial provisions of the Code in Ss. 142 and 153 thereof. Incidentally and for completion of procedure, the petitioner has invoked S. 5 of the Limitation Act, 1963, to rescue him from the bar of limitation. I do not think that the application under S. 5 of the Limitation Act is necessary at all in view of the language of S. 153 C.P.C. which provides that the court may at any time correct a defect or error in a proceeding. But generally one such independent application is always made by way of caution to obtain an order for excusing the delay in the presentation of the proceeding involved. The above observation of mine that such a proceeding can be filed at any time is of course subject to certain limitations in case the application is to correct an error in a proceeding wherein one or the other of the opposite party is dead.

6. Having noticed the relevant provisions of the C.P. Code, the complexity which has arisen in this case due to the death of the first respondent in the proceedings before the lower court on the date when the application for review was filed has to be unravelled and a solution if possible obtained.

7. It is by now well established that a suit cannot be filed against a dead person and if filed the plaint should be treated as non est. In such a case an amendment of the said plaint is not possible, as the court has no jurisdiction to consider such a non-existing plaint for any purpose. This appears to be the ratio in *Veereppa Chettiar v. Tindal Ponnai* 31 Mad. 86, But this decision was rendered when S. 153 C.P.C. was set there in the statute. As pointed out by Govinda Menon J. in *Kannangara Ismail Vs. Palayat Kappadakkal Pavu Amma and Others*,

In that case 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 the date when the amendment was sought for and when the suit against the persons newly impleaded would not be barred.

8. There was considerable divergence of opinion on this question. Only the Full Bench of our Court set at rest the controversy in *Gopalakrishnayya v. Lakshmana Rao* 49 Mad 18, The opinion expressed by the Full Bench ran in these terms:

If an appeal is presented against a person, who is dead, at the date of presentation, the court may, under S. 153 C.P.C. permit the cause title to be amended, or may return the appeal memorandum for amendment and re-presentation. If the appeal Memorandum is not allowed to be amended the party may apply for a refund of the spoilt stamp and may present a fresh appeal. In any case the court will if the appeal is out of time against the legal representative, have 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.

9. No doubt, the Full Bench was dealing with an appeal and not the original suit. But the principle set in unequivocal terms appears to be that the courts have jurisdiction to amend the cause title in cases where proceedings were filed against a dead person, provided the cause of action against the parties to be substituted was alive on the date when the application for amendment or bringing on record the legal representatives is made. The learned Judges who also unhesitatingly say that if there is a delay in the filing of an application for amendment it should be excused. The salient and equitable exception as it were to the rule in *Veerappa Chetti v. Tindal Pannan* (1), has to be given effect to. S. 153 C.P.C. is the provision which vests the civil court with such jurisdiction. In the instant case, there is neither an original suit against a dead person or an application for review of an order originally passed against a person by impleading his legal representatives after his death. It has to be noted that this application was filed beyond the prescribed time.

10. No doubt, the order sought to be reviewed was passed when the first respondent (plaintiff) was alive. The petitioner, for reasons stated in the affidavit in support of his application for review, desired to correct an error which according to him has crept into the order. This is a case which is clearly distinguishable from the one decided in *Veerappa Chetty v. Tindal Pannan* 31 Mad. 86. It was mainly on the basis of the decision in *Veerappa Chetty v. Tindal Pannan* (1) that the learned District Judge acted. The ratio in *Gopalakrishnayya v. Lakshman Rao* 49 Mad. 18 and *Ismail v. Pavu Ammal* 1955-II M.L.J. 184 = 68 L.W. 500, has already been considered. The law appears to be that even though a civil proceeding is initially filed against a dead person, the defect can be cured under S. 153 C.P.C. by amending the cause title by substituting the legal representatives of the deceased provided the cause of action survives and the application is in time as against the proposed parties. No doubt, the application for review as already stated, was filed beyond the time prescribed for filing a review application. But as the review petition is primordially intended to correct an error in an alleged consent order, the period denoted for filing a review application fades into insignificance, if it is remembered that S. 153 C.P.C. prescribes no time limit at all for such a correction. The section says that such a correction of the error can be made at any time. I have already noticed that the purpose of S. 153 is to avoid unnecessary subsequent courses of litigation. That being so, it appears to me that the application to excuse the delay in filing the application for review which was obviously made by way of abundant caution ought to have been allowed by the lower court. If the error has to be corrected for purposes of determining the real issue raised in the proceeding, then the courts can amend the defect or error at any time and in fact, the learned Judges of the Full Bench in *Gopalakrishnayya v. Lakshman Rao* (2) say that the delay if any should be excused. In my view, the learned District Judge erred in dismissing I.A. 117 of 1966 which is an application filed for excusing the delay in the presentation of the review application without any discussion. This is certainly wrong.

11. The other aspect which is closely allied to the above discussion is whether the application for review is a proceeding within the meaning of Ss. 141 and 153, C.P.C. It is. A review petition is closely connected with the earlier proceeding, (C.M.A. 12 of 1965) which had been validly and properly instituted when the plaintiff was alive. It was only to remedy an alleged defect therein that the review petition was filed. In one sense a review application is a continuation of the earlier proceedings, on the other it is a contiguous proceeding which is availed of under a stated set of circumstances. In *Gopalakrishnayya v. Lakshman Rao* (2) the amendment was held to be possible under S. 153 C.P.C. apparently on the principle that an appeal is a continuation of the suit. We have already noted that the same decision imposes more or less an obligation on courts to excuse the delay, if there is one, in the presentation of the application for amendment. Though the nomenclature used there is amendment of the cause title in the appeal, yet it is virtually to bring on record the legal representatives of the deceased person. On the same analogy, an amendment of the cause title in a review application can be made under S. 153 C.P.C. in case the respondent is the said application was dead on the date of its presentation. I have held that an application for review is a proceeding touching the earlier order sought to be reviewed and hence a contiguous proceeding. Whilst therefore the cause title in the review application can be amended and the delay in filing the same ought to be excused, I am of the opinion that the delay in the proper presentation of the application for review has to be excused. The petitioner has taken the precaution of filing an application under S. 5 of the Limitation Act for the purpose. Even otherwise, the court has the power to excuse such a delay under S. 153 C.P.C. which power is available to courts by necessary implication when dealing with an application comprehended in that section. The allegation of the petitioner is that he was not effectively a party to the compromise and therefore the order in C.M.A. 12 of 1965 has to be set aside. He pleads that he had knowledge of the death of the first respondent only when he was notified about it by respondents 2, 3 and 4. There appears to be, therefore, sufficient cause for excusing the delay in the filing of the application for review.

12. S. 141 C.P.C. enables the court to attract the other provisions of the Code including S. 153, when and where any miscellaneous proceeding before the court involves the determination of rights of parties. Here the application is for review of an earlier order. This application prima facie involves the determination of such rights and indeed it would be necessary for the court to decide it, for the purpose of determining the real question in the proceeding. Having already held that the application for review is entertainable and the delay in filing the same excusable, the learned Judge, therefore, ought to have allowed I.A. 164 of 1966 on his file and amended the cause title to the petition for review by adding the proposed parties as legal representatives of the deceased plaintiff as respondents 5, 6 and 7 before him.

13. The lower court therefore erred in not excusing the delay and not bringing the legal representatives of the first respondent as prayed for and in not

amending the cause title to the petition for review. Applns. Nos. 117 and 164 of 1966 have been dismissed without proper appreciation of law. Even so it follows that the order of dismissal of I.A. 118 of 1966 without considering the merits of the same should be set aside.

14. In the result C.R.P. 707 of 1968 is allowed subject to the condition that the petitioner deposited in the District Court, Dharmapuri, within a month hereof a sum of Rs. 25 to be paid over to respondents 2, 3 and 4. C.R.P. 1402 of 1967 is allowed and the proposed parties shall be added as respondents 5, 6 and 7, to the application for review. G.R.P. 708 of 1966 is allowed and I.A. 118 of 1966 is directed to be restored to the file of the District Judge, Dharmapuri and disposed of on its merits in accordance with law. There will be no order as to costs in this batch of civil revision petitions.