

(1914) 09 MAD CK 0010
In the Madras High Court

Venkateswara Iyer

APPELLANT

Vs

Cherrseri Madathil Ravunni Nair

RESPONDENT

Date of Decision : 01-09-1914

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 151

Citation : AIR 1915 Mad 461 : 25 Ind. Cas. 597

Hon'ble Judges : Seshagiri Aiyar, J

Bench : Single Bench

Judgement

Seshagiri Aiyar, J.—Original Suit No. 369 of 1905 was instituted by a next friend of the petitioner who was then a minor. Some time after,

the next friend died; on the 25th October 1906 the Munsif declared that the suit abated in consequence of his death. On attaining majority, the

petitioner moved in 1912 to set aside this order of abatement. The petition was dismissed on the ground that it was barred by limitation. The

present suit was instituted for the same reliefs as those prayed for in Original Suit No. 369 of 1905. The Subordinate Judge dismissed this suit on

the ground that the order of abatement precluded the filing of a fresh suit. This petition is against that decision.

2. There can be no doubt that the order directing the suit to abate was illegal. There is no provision of law which enables a Court on the death of

the next friend to dismiss the suit. It was the duty of the Court to see that a new friend was appointed or to allow the suit to be pending till the

minor attained majority. The order of the 25th October 1906 was a nullity and can have no effect upon the rights of the plaintiff. The Subordinate

Judge is, therefore, wrong in holding that that order precluded the filing of the present suit. Mr. Menon, who appeared for the counter-petitioner,

rightly conceded that that conclusion of the Subordinate Judge could not be supported. But he argued that as the petitioner had chosen to apply to

set aside the abatement order and as that application had been rejected, he was estopped "from pleading that the original order was of no effect. I

cannot agree with this contention. If the petitioner misconceived the effect of an order which was legally of no force, he was not estopped from

pleading subsequently that it was not necessary for him to set aside that order. The result of holding that the first order. was a nullity and that the

proceedings taken to set it aside did not affect the rights of the parties, is that Original Suit No. 369 of 1905 is still pending. Mr. Menon contended

that as the suit had not legally terminated it was not open to the petitioner to file a fresh suit and that the order of the Subordinate Judge dismissing

it could be sustained upon this ground. I was at first inclined to agree with this argument. But on considering the matter more fully I have come to

the conclusion that the order of the Subordinate Judge was wrong. The CPC provides two remedies to a person who is being harrassed for the

same relief more than once. Section 10 enables the defendant to plead that the matter is *Us pendens* and that the suit should not be proceeded a to

trial. In other words, he can claim that the relief claimed against him is sub judice and that he should not be put to the necessity of defending the

claim twice over. The other remedy is given by Section 11. If a matter has once before been adjudicated upon, the defendant can say that the

matter is *res judicata* and that there should not be a second trial. In neither of these cases can he plead that the suit ought not to have been

instituted. Both the pleas above referred to pre-suppose the existence of a suit on the file of the Court. The only provision of law in the CPC which

bars the institution of suits is that contained in Section 12 which precludes a party from filing a suit in respect of a matter which by the rules he is

debarred from enforcing by a suit. The present case is not governed by Section 12.

3. Since the case was heard Mr. Menon has drawn my attention to the decisions reported as *Meckjee Khetsee v. Kesowjee Deva Chund* 4

C.L.R. 282 and *Balkishan v. Kishan Lal* 11 A. 148 : A.W.N. (1889) 42 : 13 Ind. Jur. 309 and *Nemagauda v. Paresha* 22 B. 640 which contain

dicta to the effect that Section 10 (corresponding to Section 12 of the old Code) does not bar the institution of suits, but only their trial. The

learned Counsel, however, argued that the change in the language of Section 10 indicated that the suit could be struck off. at once. I am unable to

see any substantial difference between the language of the new and old Codes.

4. The point which I reserved for consideration related to the wording of Section 151 of the Code of Civil Procedure. It is a new provision and has

been inserted to enable Courts to deal effectually with attempts to abuse the process of the Courts To a certain extent it introduces into this country

the principles underlying 59&60 Vic. c.51, entitled the "" Vexatious Actions Act."" Section 1 of that Act deals with the abuse of the process of the

Court, but it presupposes that the person seeking the aid of the Court is habitually and persistently instituting suits. Lord Hals-bury points out in

Reichel v. Magrath 14 A. C. 665 : 59 L.J.Q.B. 159 : 54 J.P. 196 that ""it would be a scandal to the Administration of Justice if, the same question

having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

Therefore in order that the litigant may be shut out from setting up the same case over again, the first case must have been disposed of. In the, view

I have taken, Original Suit No. 369 of 1905 is still pending. If that is so, although the present suit is against the same party and for the same relief

and is based;upon the same cause of action, I cannot hold that it would be an abuse of the process of the Court to allow the plaintiff to carry on the

present litigation until the previous one comes to a legal termination. It may be that the first suit may fail on some technical ground and if I were to

direct that that suit be struck off the file, I may be denying the plaintiff his just rights. After giving my most careful consideration to the points

involved, I have come to the conclusion that the only course open to the defendant is to move that the trial of the present suit be stayed u/s 10 of

the CPC Mr. Menon drew my attention to the fact that immediately after the death of the next friend a guardian was appointed by the District

Court of the person and property of the minor. But there are no materials before me to show whether this guardian prosecuted Original Suit No.

369 of 1905. If he did so and if the suit came to an end, that may be a bar to the present suit. That is a matter to be decided by the Subordinate

Judge on the merits.

5. For these reasons I hold that the order of the Subordinate Judge dismissing

the suit in limine cannot be upheld. I reverse his order and direct him to re-take the case to his file and dispose of it according to law. The costs will abide the result.