

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.212 of 2016

ORDER:

The unsuccessful 3rd party-petitioner filed this civil revision petition under Section 115 of the Code of Civil Procedure, 1908, ('the Code', for short), assailing the order dated 06.01.2016 of the learned V Senior Civil Judge, City Civil Court, Hyderabad, passed in EA.no.261 of 2015 in EP.no.64 of 2015 filed under Section 47 read with Section 151 of the Code requesting to declare the decree, dated 23.01.2015, in OS.no.1417 of 2013 obtained by the respondent-decree holder against the defendant/late father of the petitioner-3rd party as a nullity and unenforceable, as it was passed against a dead person.

2. I have heard the submissions of Sri Rama Sharma, learned counsel appearing for the revision petitioner-3rd party and of Sri B. Vijay Sen Reddy, learned senior counsel appearing for the respondent-decree holder. I have perused the material record.

3. The parties shall hereinafter be referred to as the petitioner and the plaintiff/ Dhr for convenience and clarity.

4. The case of the petitioner and the submissions made on his behalf in support of his claim that the decree under execution, which was obtained against a dead person, is a nullity and unenforceable, in brief, is as follows:
"On 24.04.2015, he was informed by a neighbouring shop owner that a person claiming to be a Bailiff of the Court came to the suit schedule property at about 09:00 AM and took photographs of the schedule property. On enquiries made with the said person (bailiff) by the neighboring shop owner, Jayanthilal Jain, the said person (bailiff) told him that he is the Bailiff of the Civil Courts and that he has come to execute the warrant in pursuance of a decree dated 23.01.2015 passed in the suit, OS.No.1417 of 2013, against the deceased father

of the petitioner. The said person (bailiff), before leaving the property, further told the said neighboring shop owner that since the schedule shop was closed, the neighboring shop owner, who was present at the time of visit of the Bailiff, was considered as a witness. After the bailiff left, the said neighboring shop owner, on phone, immediately informed the petitioner about the said facts. On such information received by the petitioner, he made enquiries through the counsel and came to know about the filing of the suit by the plaintiff against his father for eviction from the suit schedule property and other reliefs and that his father was set *ex parte* and that thereafter his father filed an application for setting aside the *ex parte* order and that during the pendency of the said application filed by his father, his father expired and that thereafter a memo, dated 27.06.2014, was filed by the counsel on record for his father before the trial Court enclosing the Death Certificate of the father of the petitioner, but, the plaintiff did not take steps for bringing on record the legal heirs of the deceased father of the petitioner, who is the defendant in the suit. Hence, the petitioner was advised that the decree thus obtained by the plaintiff-DHr is a nullity, unenforceable and not executable. The petitioner is not aware of the suit proceedings till he came to know of the same on 24.04.2015 and until he made enquiries through his counsel. The Bailiff of the Court submitted a report to the Court that the door of the suit schedule premises was locked. After the death of his father, the petitioner is carrying on business in the schedule property by paying a monthly rent of Rs.8,500/- to the DHr/ plaintiff. There was no practice of issuing receipts. Rents were paid upto March, 2015. Rents were thus collected; and at no point of time, this petitioner was informed about the pending suit proceedings and the execution proceedings. The acts of the plaintiff/ DHr are *mala fide*. Since this petitioner is the son of the deceased-defendant he is entitled to resist the execution proceedings including the execution of the delivery warrant issued against the dead person. This petitioner who is in possession of the schedule property

cannot be evicted. As there is every possibility of the plaintiff/ DHr trying to evict this petitioner from the property in pursuance of the decree obtained against a dead person, he is constrained to file the subject application for declaring the decree as a nullity and unenforceable.”

5. Per contra, the case of the plaintiff/ DHr and the submissions made by the learned senior counsel on his behalf, in brief, are as follows:

The material allegations made by the petitioner in his affidavit filed in support of the petition are all false. They are denied. The petitioner and his father late N. Nagabhushanam, JDr, were together running business in Kirana and General Stores in the suit schedule property for the last 20 years under the name and style ‘Satyanarayana Kirana and General Stores’. Originally the said Nagabhushanam, the defendant, obtained two shops from the father of the plaintiff/ DHr on lease. From time to time, the rents were enhanced. Lease deeds were also executed. He is a chronic defaulter. Since five years prior to the suit, he was unable to run his business and he was irregular in payments of rents and committed defaults in payments of rents for several months. During the last ten years prior to the suit he used to pay rents through account payee cheques; and on several occasions, the cheques bounced. His bank account statement discloses the said facts. He was not even opening the shops (suit schedule property) for the last two years and did not either pay the rents or vacate the shop despite requests made by the DHr-landlord. The petitioner, who is associated in the business of his father, defendant, did not pay rents. A legal notice was issued terminating the tenancy by the end of June, 2013, and calling upon the defendant to vacate the property on or before 01.07.2013. The notice was duly served. The deceased defendant got issued a reply through his counsel on 20.06.2013; but, did not vacate the property. Thereafter, the suit for eviction was instituted. The petitioner falsely pleaded that he is ignorant of the pendency of the suit and the passing of the decree in

the suit and filed the present petition under Section 47 of the Code with a *mala fide* intention to delay the execution proceedings and eviction from the suit schedule property. The defendant, having entered appearance in the suit, failed to file his written statement. He was set *ex parte* and the suit was posted to 05.03.2014 for the Dhr's/Plaintiff's evidence. With an intention to drag on the proceedings, the defendant filed IA.no.163 of 2014 under Order IX Rule 7 of the Code to set aside the *ex parte* order. Later the counsel for the defendant filed a memo stating that the defendant died on 17.04.2014. No information about the legal representatives/legal heirs of the deceased defendant was furnished. Later the legal heirs of the deceased defendant did not intentionally file an application for their impleadment as petitioners in IA.no.163 of 2014 and no steps were taken by them to come on record as legal heirs of the deceased defendant. As the legal representatives made no efforts to participate in the proceedings of the suit, upon seeing the attitude of the family members of the deceased defendant, the trial Court mindful of factual position consciously allowed the plaintiff in the suit to proceed further as per the provision of Order XXII Rule 4 (4) of the Code and decreed the suit. The petitioner watched through the counsel, all these proceedings and kept quiet until the warrant of delivery of possession was issued in the execution proceedings. The petitioner kept the premises under lock and key and obstructed the due execution of the delivery warrant and conveniently filed the present application alleging falsely that the decree was passed against a dead person and that it is a nullity and cannot be executed. The petition is devoid of merit and is liable to be dismissed with exemplary costs.

6. The learned counsel for the petitioner and the learned senior counsel appearing for the Dhr advanced arguments in line with the pleadings of the respective parties. The submissions are also extracted supra, while narrating the pleadings, in detail.

7. The vital and material facts which emerge from the contentions and submissions made on behalf of the parties, in brief, are as follows:

The DHr/Plaintiff brought the suit against the defendant, N. Nagabushanam, who is the father of the petitioner, for eviction from the suit schedule property (shops) and for recovery of money, that is, arrears of rent and damages. The said defendant having entered appearance did not file his written statement even after the expiry of the time allowed under law for filing the written statement. Therefore, the defendant was set *ex parte* in the suit on 24.02.2014. While so, he filed IA.no.163 of 2014 under Order IX Rule 7 of the Code requesting to set aside the *ex parte* order. However, the counsel for the defendant filed a memo on 27.06.2014 stating that the defendant died on 17.05.2014. The legal representatives of the deceased defendant, including the petitioner, did not seek their impleadment in the suit after the death of the sole defendant. Nor did the DHr/plaintiff file an application to bring on record the legal representatives of the deceased defendant. Since the defendant having entered appearance failed to file his written statement and remained *ex parte* and as the application filed by him for setting aside the *ex parte* was not pursued to its logical end due to his death during the pendency of the said application, the trial Court having invoked the provision of XXII Rule 4 (4) of the Code granted exemption to the plaintiffs for substitution of the legal heirs of the deceased sole defendant and proceeded with the suit against the deceased defendant and recorded the evidence of the plaintiff and decreed the suit. Thus the suit was decreed despite the fact the sole defendant died and his legal representatives are not on record. Subsequently, the DHr/plaintiff filed the execution petition in EP.no.64 of 2015 for delivery of possession and sought the relief of delivery of the decree schedule property. Even the said EP was filed against deceased defendant, though he died even before the suit was decreed. Thus, the execution petition filed against a dead person without impleading his legal representatives even at the stage of

execution is not maintainable as any order passed against a dead person would be a nullity. However, despite the fact that the execution petition was filed against a dead person, the executing Court issued a delivery warrant to the Field Assistant of that Court. When the Field Assistant/ Bailiff went to the property along with the delivery warrant, he found the property locked and made enquiries with the neighboring shop owner and informed him the details of his visit considering the said neighboring shop owner as a witness. The said neighboring shop owner furnished information to the son of the deceased defendant-JDr, that is, the petitioner herein. At that stage, the petitioner, who is the son of the said defendant, filed the subject application contending, *inter alia*, that the decree obtained by the plaintiff-DHr against a dead person is a nullity and is unenforceable. The plaintiff-DHr filed a counter and resisted the application of the petitioner. On merits and by the order impugned in this revision, the Court below dismissed the said petition of the petitioner. Hence, the petitioner is before this Court.

8. It is to be first noted that there is no dispute that in an application under Section 47 of the Code the question that a decree is not executable being a nullity can be raised and that the executing Court is obligated to decide the said question. It is also well settled that a decree which is a nullity is no decree in the eye of law and that even on consent of the parties such a decree cannot be executed. (See: Kiran Singh v. Chaman Paswan: AIR 1954 SC 340). It is also true that the Court of execution can entertain the objection that a decree is a nullity either on the ground that the Court which passed it has no inherent jurisdiction to pass it or on the ground that it was passed against a dead person.

8.1 In this setting of facts and submissions, it is necessary to first refer to Order XXII Rule 4 of the Code, which reads as under:

4. Procedure in case of death of one of several defendants or of sole defendant—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant not withstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

8.2 It is apt to also to refer to the following decisions relied upon by the learned senior counsel in support of the case of the Dhr/ plaintiff.

(i) In Mata Prasad Mathur (dead) by LRs v. Jwala Prasad Mathur And Others¹, the short question that arose for determination in the appeal before the Supreme Court is whether the suit filed by the Plaintiffs-Respondents seeking a decree for declaration, partition and injunction against the Appellants abated on the failure of the Plaintiffs to file an application for substitution of the Legal Representatives of Virendra Kumar one of the Defendants. While answering the said question the Supreme Court having referred to history of amendment of Order XXII Rule 4 of the Code held that in the absence of any compelling reason to the contrary the Courts below could and indeed ought to have exercised the power vested in them to avoid

¹ (2013) 14 SCC 722

abatement of the suit by exempting the Plaintiff from the necessity of substituting the legal representative of the deceased Defendant-Virendra Kumar and that the view taken by the First Appellate Court and the High Court that, failure to bring the legal representatives of deceased Virendra Kumar did not result in abatement of the suit can be more appropriately sustained on the strength of the power of exemption that was abundantly available to the Courts below under Order XXII Rule 4(4) of the Code of Civil Procedure.

It is important to note that in this cited decision the facts reflect that the legal representatives of Virendra Kumar, deceased therein, have already been brought on record in the place of Devendra Kumar, their uncle (Virendra Kumar's brother) who died issueless and therefore, they represented the estate left behind by both Virendra Kumar and Devendra Kumar; and hence, the Supreme Court held that the exemption in that view is only a matter of maintaining procedural rectitude more than any substantial adjudication of the matter in controversy. Thus the Supreme Court also held that it has at any rate adopted a liberal approach in setting aside abatement of suits.

(ii) In *Sushil K. Chakravarthy (D) thr. L.Rs. v. Tej. Properties Pvt., Ltd.*², the facts disclose that the Defendant Sushil K.C. entered appearance in CS (OS) No. 2501 of 1997 and filed a written statement on 6.3.1998. Thereafter, Sushil K.C. stopped appearing in the said civil suit. He was also not represented through counsel thereafter. It seemed, that the High Court had proceeded with the matter under Order XXII Rule 4(4) of the Code of Civil Procedure, 1908, whereunder, it is open to a court to exempt the Plaintiff from the necessity of substituting the legal representatives of a deceased Defendant, who having filed the written statement, has failed to appear and contest the suit. In the said factual background it was held that in such a case, a court may pronounce its judgment, notwithstanding the death of such Defendant and that such judgment, would have the same force as it would have, if the same had

² 2013 (4) ALD 89 (SC)

been pronounced before the death of the Defendant. The facts of the case show that the said Sushil K.C. was not survived by any Class-I heir. The Supreme Court finally held as follows:

“When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C., it was done on the court's satisfaction, that it was a fit case to exempt the Plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole Defendant Sushil K.C. (the Appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the Code of Civil Procedure, stood complied.”

8.3 I have carefully read the provision of law and gone through the decisions cited by the learned counsel for the plaintiff/ Dhr. In the case on hand, the petitioner who is the son of the deceased-sole defendant is contending that the decree is a nullity as it was passed against his father after his father's death during the pendency of the suit and despite the fact that the plaintiff failed to bring on record the legal representatives of the deceased defendant.

8.4 The fact of the matter is that the sole defendant had remained *ex parte* after having not filed the written statement despite the lapse of the time allowed under law for filing the written statement. The Court passed a specific order setting him *ex parte*. The defendant did not keep quiet after he was set *ex parte*. He filed an application under Order IX Rule 7 of the Code for setting aside the *ex parte* order. He died on 17.05.2014, that is, during the pendency of the said application. Therefore, it cannot be said that having failed to file a written statement and having remained *ex parte*, he has failed to appear before the Court. It is not a case where the defendant was not set *ex parte* despite his absence after entering his appearance. In contrast, after the defendant was set *ex parte*, he appeared before the trial Court and filed an interlocutory application to set aside the *ex parte* order with an intention to contest the suit and was duly prosecuting his said application till his death. It

appears that along with his said application, the defendant also filed his written statement. On his death during the pendency of the said petition, his death was reported to the trial Court on 27.06.2014. The learned counsel for the petitioner contends that since the sole defendant, who filed the application seeking to set aside the order setting him *ex parte* in the suit, died, the question of his legal representatives prosecuting the said application does not arise for consideration for the reason that they are not party defendants to the suit and that it is the obligation of the plaintiff to bring on record the legal representatives of the deceased defendant. Further, the plaintiff without taking any steps for bringing on record the legal representatives of the deceased defendant, kept quiet. The Court even without an explicit request from the plaintiff proceeded with the further proceedings in the suit despite the fact that the death of the sole defendant was specifically brought to its notice and the legal representatives of the deceased sole defendant were not brought on record. The suit that proceeded accordingly was ultimately decreed against the deceased defendant. The trial Court indeed passed an order *suo motu*, on 29.11.2014, stating that as per the provision of CPC under Order XXII Rule 4(4) the plaintiff is exempted from substituting the legal representatives of the defendant in the circumstances and permitted to proceed with the matter. The trial Court proceeded with the suit and recorded the evidence of the plaintiff and decreed the suit against the defendant with the knowledge that the sole defendant died and that his legal representatives were not brought on record. There is one more aspect to be adverted to in this matter which is peculiar to the facts of the case. After the death of the defendant on 17.05.2014, the plaintiff filed IA.no.21 of 2015 under Order VI Rule 17 read with Section 151 of the Code for amendment of the plaint and the trial Court permitted the plaintiff to amend the plaint as prayed for and seek additional reliefs. In the original plaint, apart from the other reliefs, damages were claimed @ 20,000/- per month for the period from 01.07.2013 to

16.09.2013 only but, in the amended plaint the said damages were claimed from 16.04.2013 to 01.07.2013 with interest 18% per annum and in addition future damages/ mesne profits @ Rs.20,000/- per month from the date of the suit till date of eviction were also claimed. Even before the filing of the petition for the amendment of the plaint, the defendant died and his legal representatives were, however, not brought on record. Despite permitting the amendment of the plaint, the plaintiff was not directed to bring on record the legal representatives of the deceased defendant. Therefore, this is not a case where after the death of the defendant the suit proceeded on the same averments and for the same reliefs originally claimed in the plaint. Further, the suit is not a suit for recovery of money simpliciter. In a suit for recovery of money exclusively due from the sole defendant, in case of his death, his legal heirs, would not be liable personally for the suit debt as per common law but the estate of the deceased defendant in the hands of his legal heirs would only be liable to the extent of the suit debt. But, in the case on hand, admittedly, the deceased defendant was a tenant in the suit schedule property and the relief of recovery of eviction was also sought. Even in the counter of the DHR filed in the Execution Application, it is averred that defendant's son, that is, the present petitioner, is the associate in his father's business, which is being carried on in the plaint schedule property. As per common law, the tenancy rights are heritable. Therefore, on the death of the father of the petitioner, the petitioner, who is his son and on whom the tenancy rights devolved is entitled to continue as a tenant in the property till an order of eviction is legally obtained against him. Therefore, in the considered view of this Court, the petitioner has a right to be heard and is entitled to contest the suit so far as the relief of eviction and other reliefs under facts and in law.

8.5 The Supreme Court in deed held that exemption of substituting the legal representatives of the deceased defendant could be granted only on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the

Code stood complied. In the light of the facts of the case, aforesaid reasons and the ratio in the decision, in the considered view of this Court, Order XXII Rule (4) of the Code is not applicable to the case on hand and that therefore the decree passed in the suit by the Trial Court against the deceased defendant, is a nullity and cannot be permitted to be executed. On the above analysis this Court holds that the impugned order of the executing Court is liable to be set aside.

9. In the result the Civil Revision Petition is allowed. As a sequel, the order of the executing Court passed in EA.no.261 of 2015 in EP.no.64 of 2015 is set aside and as a sequel the said EA is allowed and the decree, dated 23.01.2015, in OS.no.1417 of 2013 on the file of the Court of the learned V Senior Civil Judge, City Civil Court, Hyderabad, is declared as a nullity and is not executable.

Miscellaneous petitions pending, if any, also shall stand dismissed. There shall be no order as to costs.

17th January, 2017
Vjl

M. SEETHARAMA MURTI, J