

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.5695 of 2016

ORDER:

This Civil Revision Petition by the 5th defendant, under Article 227 of the Constitution of India, is directed against the docket order, dated 15.09.2016, passed, in O.S.No.31 of 2012, by the learned IX Additional District Judge, Wanaparthi, Mahabubnagar District.

2. I have heard the submissions of *Sri J.Prabhakar*, learned counsel for the petitioner, of *Sri K.Goverdhan Reddy*, learned counsel appearing for the 1st respondent/plaintiff, of *Sri M.Pratap Singh*, learned counsel for the 3rd respondent and of *Sri Manu*, learned counsel appearing for the 5th respondent. None appeared for the 2nd respondent. I have perused the material record.

3. The parties in this revision shall hereinafter be referred to as arrayed in the suit before the trial Court for convenience and clarity.

4. The introductory facts, which are required to be stated as a preface to this order, in brief, are as follows:

The plaintiff/1st respondent herein brought the suit against the defendants including the revision petitioner/5th defendant for a declaration that the plaintiff is entitled to a 1/4th share in the plaint schedule properties and also a 1/4th share out of the 1/4th share of the deceased-M.S.Chandraiah in the suit properties as per the bequests in the Will executed by the said deceased Chandraiah; and, accordingly claimed that the plaintiff is entitled to a 5/16th share in the plaint schedule properties and prayed for passing a preliminary decree in favour of the plaintiff in respect of the said share in the plaint schedule properties and for mesne profits. Some of the defendants are resisting the suit. While so, the 3rd defendant, M.S.Thirumalamma, i.e., the 4th respondent herein died during the pendency of the suit. Instead of taking steps

appropriately either for bringing on record her legal representatives, if any, or for recognizing some of the parties on record as her legal representatives, the plaintiff got filed a memo, dated 24.08.2016, before the trial Court stating that the said 3rd defendant, Thirumalamma, died without leaving any issues behind her and that the plaintiff and the defendants 1 and 2, who were already on record, are her legal heirs and as such, the memo may be recorded. The 5th defendant/ revision petitioner herein filed detailed objections to the said memo *inter alia* contending as follows: 'The contents of the memo of the plaintiff that the plaintiff and defendants 1 and 2 are the legal heirs/ representatives of the deceased 3rd defendant are false. The 5th defendant is the adopted son of late Chandraiah and the 3rd defendant and the said fact was admitted by the 3rd defendant in her written statement already filed in the suit and that the 3rd defendant and the said Chandraiah had initially taken the 5th defendant in adoption and that thereafter, they had also taken the 4th defendant in adoption and treated both the 5th defendant and the 4th defendant as their sons and that the plaintiff has no *locus standi* or right to deny the said facts when the 3rd defendant, who is the adoptive mother of the 5th defendant, has admitted the said facts in her written statement filed during her life time in the suit and that therefore, it is false to say that the 3rd defendant died issueless; and that in fact, the 3rd defendant also executed a Will and that, therefore, she did not die intestate and that the 5th defendant is contemplating to take appropriate steps in the matter at the appropriate stage based on the said Will of the deceased 3rd defendant and that the deceased 3rd defendant being the wife of Chandraiah is his Class I legal heir and that after the death of Chandraiah and the death of the 3rd defendant, the 5th defendant has become her class 1 legal heir and, therefore, the memo filed by the plaintiff stating that the plaintiff and the defendants 1 and 2 are legal heirs of the deceased 3rd defendant as the 3rd defendant did not leave behind her any issues cannot be recorded and hence, the plaintiff's memo is liable for rejection directing the plaintiff to file

appropriate application under Order XXII of the Code of Civil Procedure, 1908, ('the Code', for short) either for bringing on record the legal representatives or for recognition of the legal representatives of the deceased 3rd defendant as per the procedure and law.' Having so contended, the 5th defendant sought for rejection of the memo filed by the plaintiff.

5. In the above stated background of facts, it became essential for the trial Court to decide as to who are the legal representatives of the deceased 3rd defendant. The plaintiff on one hand is contending that the deceased 3rd defendant did not leave behind her any issues and that the plaintiff and the defendants 1 and 2 are her legal heirs/ representatives. The plaintiff also filed a memo with the above contents and requested the trial Court to record the said memo. On the other hand, the 5th defendant having filed objections to the said memo of the plaintiff would contend that he and the 4th defendant are the adoptive sons of late Chandraiah and the deceased 3rd defendant and that she had already admitted the said fact in her written statement already filed in the suit and that she also executed a Will and did not die intestate. Nonetheless, without deciding the claims and rival claims of the parties on the aspect as to who amongst the parties are the legal heirs/ legal representatives of the deceased 3rd defendant, the trial Court, passed the impugned orders on the memo filed by the plaintiff *inter alia* observing verbatim as follows:

'The objections taken by the 5th defendant to the memo of the plaintiff not maintainable as per the principle of Doctrine of Dominus Litis as the plaintiff being the master of his case can select any person as a party and that if the plaintiff fails to follow the procedure laid down under Order XXII of the Code, he would be the ultimately affected person and the suit of the plaintiff will be abated for not impleading the right persons as legal representatives of the deceased 3rd defendant and the objection of the 5th defendant is not sustainable. It does not mean that the 5th defendant has no remedy at all to raise this point and that he can establish during the course of

trial, the mistake, if any, committed by the plaintiff for not taking steps against the deceased 3rd defendant for bringing on record the legal representatives of the deceased 3rd defendant and that the 5th defendant can also take advantage of it.'

Having so observed in its Docket Orders, the trial Court closed the memo, even without either recording the memo filed by the plaintiff or deciding on the objections of the 5th defendant. Therefore, the aggrieved 5th defendant is before this Court.

6. The learned counsel for the 5th defendant having brought to the notice of the Court the chronology of events, the rival contentions and also the contents of the impugned order, which are adverted to supra, would further contend as follows: When there is a claim and a rival claim as regards the aspect as to who amongst the parties are the legal heirs/legal representatives of the deceased 3rd defendant, who died during the pendency of the suit, the trial Court ought to have rejected the memo filed by the plaintiff claiming that the plaintiff and the defendants 1 and 2 are the legal heirs/legal representatives of the deceased 3rd defendant and the trial Court ought to have directed the plaintiff to file an appropriate application under Order XXII of the Code and ought to have given an opportunity to the contesting defendants to file counter(s) in the said application and ought to have decided the crucial aspect by passing a comprehensive and speaking order in that application instead of closing the memo filed by the plaintiff and leaving open the issue for determination after conclusion of the trial. As per settled law, the Court is obligated to decide as to who are the legal representatives of the deceased 3rd defendant before proceeding further with the trial of the suit. And, as per the well settled position of law, the trial in the suit cannot be proceeded with till the said issue is decided by the trial Court, more particularly, when there is a dispute as to who are the legal representatives of the deceased 3rd defendant.

The trial Court is not competent to postpone the decision on the issue as to who amongst the parties are the legal representatives of the deceased 3rd defendant. In support of the said contentions, he placed reliance on the decision of the Supreme Court in Jaladi Suguna (Dead through L.Rs) v. Satya Sai Central Trust¹.

7. Per contra, the learned counsel for the plaintiff/ 1st respondent would contend that the trial Court considered the submissions of the plaintiff as well as of the 5th defendant and that the trial Court while holding that the plaintiff is the *dominus litis* and is entitled to choose the parties against whom the plaintiff wants to litigate had *inter alia* observed to the effect that if the plaintiff failed to follow the procedure under Order XXII of the Code, the 5th defendant can take advantage and that simply because, the plaintiff claimed in the memo that the plaintiff and the defendants 1 and 2 are the legal representatives, that does not mean that the 5th defendant has no remedy at all and that the trial Court has also further observed that the 5th defendant can take advantage of the fact that the plaintiff has not taken any steps for bringing on record the legal heirs/representatives of the deceased 3rd defendant and thus, a perusal of the order of the Court below would show that the matter is left open to be decided, along with other issues, after conclusion of the trial and that therefore, no prejudice has been caused to the 5th defendant by the order impugned in this revision and, therefore, this revision can be disposed of confirming the orders of the trial Court.

8. In support of the contentions of the plaintiff and the order of the trial Court, the learned counsel for the plaintiff placed reliance on the decision of the Supreme Court in Kirpal Kaur v. Jitender Pal Singh².

¹ AIR 2008 SUPREME COURT 2866

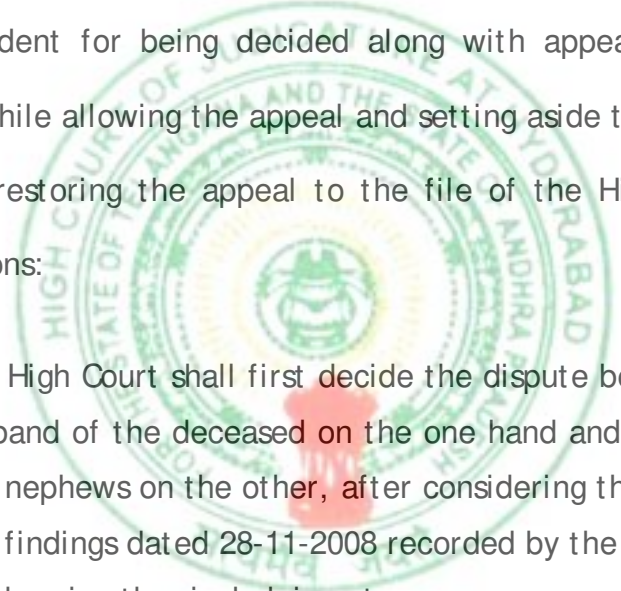
² (2015) 9 Supreme Court Cases 356

9. I have bestowed my attention to the facts. I have given earnest consideration to the submissions. I have carefully perused the material record and gone through the decisions cited.

9.1 Now that the facts and the chronology of events relevant to the aspect are already stated supra, in detail, it is now necessary to briefly summarize the core facts and deal with the legal position before adverting to the question- 'whether the trial Court before taking up further trial proceedings ought to have first decided the question as to who amongst the parties are the legal representatives of the deceased 3rd defendant, who died during the pendency of the suit, instead of postponing the decision on the said question to a later stage after the conclusion of trial?'. In a suit for partition filed by the sole plaintiff/ 1st respondent herein, the 3rd defendant died during the pendency of the suit. The plaintiff did not file an application under Order XXII of the Code for either bringing on record her legal representatives, if any, not already on record or for recognition of the legal representatives of the deceased 3rd defendant, who are already on record. The plaintiff simply filed a memo stating that the plaintiff and the defendants 1 and 2 are the legal representatives of the deceased 3rd defendant, who had no issues. The 5th defendant contends that the 5th defendant was first adopted by the deceased 3rd defendant and her husband Chandraiah and that later they both adopted the 4th defendant also and that the 5th and 4th defendants are the adopted children of the deceased 3rd defendant and that the 3rd defendant admitted the said fact in her written statement already filed into Court and that therefore, the claim of the plaintiff is incorrect and that the 3rd defendant had already executed a Will and did not die intestate. Thus, there are claims and rival claims in regard to the aspect as to who amongst the parties on record are the legal representatives of the deceased 3rd defendant. The trial Court did not decide the said claim and rival claim and left open the said issue and directed the parties to proceed with the trial *inter alia* observing that the said aspect

would be considered at the appropriate stage after the conclusion of the trial and closed the memo filed by the plaintiff.

9.2 In the decision in *Jaladi Suguna* (1 supra), the Supreme Court dealt with the definition of 'legal representative' under Section 2(11) of the Code and also the procedure to be followed in case of death of one of the several defendants to the suit and the effect of filing of an application to bring on record the legal representatives on record. In that cited decision, the facts disclose that there was a dispute as to who is the legal representative. The rival claimants to the estate of a deceased are the husband, nephew and nieces. The High Court postponed the decision on the issue as to who is the legal representative of the deceased respondent for being decided along with appeal on merits. The Supreme Court while allowing the appeal and setting aside the judgment of the High Court and restoring the appeal to the file of the High Court gave the following directions:

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- (i) The High Court shall first decide the dispute between the husband of the deceased on the one hand and her nieces and nephews on the other, after considering the evidence and findings dated 28-11-2008 recorded by the Trial Court and hearing the rival claimants.
 - (ii) After such determination, the persons determined to be the person/s entitled to represent the estate of the deceased shall be brought on record as the legal representatives of the deceased.
 - (iii) Thereafter, the appeal shall be heard on merits and disposed of in accordance with law.

Before giving that direction, the Supreme Court summarized the legal position as follows:

Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the Court should consider it and decide whether the persons named therein as

the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the Court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order XXII Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property, which is the subject matter of the suit, vis-à-vis other rival claimants to the estate of the deceased. The provisions of Rules 4 and 5 of Order XXII are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal without deciding who will represent the estate of the deceased, and proceed to hear the appeal on merits. The Court cannot also postpone the decision as to who is the legal representative of the deceased respondent, for being decided along with the appeal on merits. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased respondent, such question shall be determined by the Court. The Code also provides that where one of the respondents dies and the right to sue does not survive against the surviving respondents, the Court shall, on an application made in that behalf, cause the legal representatives of the deceased respondent to be made parties, and then proceed with the case. Though Rule 5 does not specifically provide that determination of legal representative should precede the hearing of the appeal on merits, Rule 4 read with Rule 11 made it clear that the appeal can be heard only after the legal representatives are brought on record.

9.3 Further, in Kirpal Kaur (2nd supra) the facts disclose that the 1st respondent died during the pendency of the proceedings. The 2nd respondent claimed that certain property (schedule B property) devolved upon him by virtue of a gift deed executed by the Respondent No. 1 in favour of Respondent No. 2. The Supreme Court noted that the said pleaded gift attracts Section 52 of the Act, 1882, because it was executed during the pendency of the proceedings and before the expiry of the period of limitation for filing an SLP. Further, the fact regarding the will/ gift deed was brought to the notice of the Supreme Court by the learned senior Counsel on behalf of the Plaintiff only at the time of concluding his submissions in the appeal, at the stage of final disposal of the SLP. The said fact has not been disclosed by the second Defendant before Supreme Court and he has also not requested for a leave before Supreme Court by filing an application as required under Order XXII Rule 10 of the Code to defend his claim that the schedule 'B' property devolved upon him on the basis of the said gift deed. Therefore, the Supreme Court directed the defendants' counsel to produce the copy of the Will/ gift deed, alleged to have been executed after the passing of the impugned judgment by the First Appellate Court, in favour of the second defendant by the deceased first Defendant in respect of the schedule 'B' property and before the filing of Special Leave Petition by the Plaintiff. The same was produced by the Defendants' counsel by way of compilation of the documents including the copy of the alleged 'Will', dated 1.10.2004, along with the gift deed, dated 08.02.2011, purported to have been executed by the deceased-first defendant in favour of the second defendant in respect of the suit schedule 'B' property. The learned Counsel for the defendants has also furnished copies of the judgments upon which she has placed reliance in support of the case of the Defendants. In that setting of the facts, the Supreme Court held as follows:

The factum of the said alleged gift deed was not made known to this Court by the second Defendant who is the beneficiary of the said gift

deed till the last stage of conclusion of submission by the learned Counsel. Reliance has been placed upon the decision of this Court in the case of *Dhurandhar Prasad Singh* [(2001) 6 SCC 534] at paras 6, 7 and 8 with regard to the above said proposition of law, the relevant paras from the above judgment are extracted hereunder:

6. In order to appreciate the points involved, it would be necessary to refer to the provisions of Order 22 of the Code, Rules 3 and 4 whereof prescribe procedure in case of devolution of interest on the death of a party to a suit. Under these Rules, if a party dies and right to sue survives, the court on an application made in that behalf is required to substitute legal representatives of the deceased party for proceeding with a suit but if such an application is not filed within the time prescribed by law, the suit shall abate so far as the deceased party is concerned. Rule 7 deals with the case of creation of an interest in a husband on marriage and Rule 8 deals with the case of assignment on the insolvency of a Plaintiff. Rule 10 provides for cases of assignment, creation and devolution of interest during the pendency of a suit other than those referred to in the foregoing Rules and is based on the principle that the trial of a suit cannot be brought to an end merely because the interest of a party in the subject-matter of the suit has devolved upon another during its pendency but such a suit may be continued with the leave of the court by or against the person upon whom such interest has devolved. But, if no such step is taken, the suit may be continued with the original party and the person upon whom the interest has devolved will be bound by and can have the benefit of the decree.....

7. Under Rule 10 Order 22 of the Code, when there has been a devolution of interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against persons upon whom such interest has devolved and this entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite or suitor or any other person interested, to apply to the court for leave to continue the suit. But it does not follow that it is obligatory upon them to do so. If a party does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the Plaintiff on record, and yet, as pointed out by Their Lordships of the Judicial Committee in *Moti Lal v. Karrabuldin* he will be bound by the result of the litigation even though he is not represented at the hearing unless it is shown that the litigation was not properly conducted by the

original party or he colluded with the adversary. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit, for, as Lord Kingsdown of the Judicial Committee said in *Prannath Roy Chowdry v. Rookea Begum*, a cause of action is not prolonged by mere transfer of the title. It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.

8. The effect of failure to seek leave or bring on record the person upon whom the interest has devolved during the pendency of the suit was the subject-matter of consideration before this Court in various decisions. In the case of *Saila Bala Dassi v. Nirmala Sundari Dassi T.L. Venkatarama Aiyar, J., speaking for himself and on behalf of S.R. Das, C.J. and A.K. Sarkar and Vivian Bose, JJ. laid down the law that if a suit is pending when the transfer in favour of a party was made, that would not affect the result when no application had been made to be brought on the record in the original court during the pendency of the suit.*

(Emphasis laid by Supreme Court)

The legal principles laid down in the aforesaid paragraphs from the judgment referred to supra would clearly go to show that this Court has laid down the legal principle to the effect that the absence of any leave sought by the second Defendant on the ground that his interest has devolved upon the schedule 'B' property of the deceased-first Defendant, would not affect the relief sought by the Plaintiff during the pendency of the proceedings before this Court when no application has been submitted either by the Plaintiff or by the second Defendant in this regard.

Thus, whenever there is devolution of interest in the property involved in the *lis* either by death of a party to the *lis* or a document *inter vivos* executed by the deceased party in favour of another party, the said aspects shall be brought to the notice of the Court and necessary application/s either for bringing on record the legal representatives of the deceased party or for leave to continue the suit in view of the devolution of interest, as the case may be, shall be filed by the parties and the said applications shall be decided at the appropriate earliest stage and the decisions on the said aspects cannot be allowed to be

postponed and shall not be allowed to be brought to the notice of the Court at the final stage of adjudication. Thus, the ratios in the decisions postulate that either the parties or the Court cannot postpone the decision as to who is the legal representative of the deceased party. The Code clearly provides that where a question arises as to whether any person is or is not the legal representative of a deceased party; such question shall be determined by the Court. The Code also provides that where one of the parties dies and the right to sue does not survive against the surviving parties, the Court shall, on an application made in that behalf cause the legal representatives of the deceased party to be made parties, and then proceed with the case.

9.4 From the legal position, it is clear that the decision on the issue as to who are the legal representatives of the deceased party shall not be postponed for being decided at a later final stage along with the other issues but shall be decided before proceeding with the trial and the trial Court cannot proceed with the trial till a dispute as to who is the legal representative is decided.

10. On the above analysis of the facts and on carefully considering the legal position obtaining, this Court finds that the impugned order of the trial Court is contrary to the settled legal position and that therefore, the same is unsustainable and is liable to be set aside.

11. Resultantly, the Civil Revision Petition is allowed and the docket order, dated 15.09.2016, of the trial Court impugned in this revision is set aside and to meet the ends of justice, the plaintiff is given liberty to file an appropriate application under the relevant rules of the Order XXII of the Code seeking leave either for recognition of the legal representatives of the deceased-3rd defendant from amongst the parties already on record or for bringing on record the legal representatives of the deceased 3rd defendant including others, if any, who are not already parties to the suit as such exercise is necessary for the true legal representatives to represent the estate of the deceased.

Needless to mention that if any such application comes to be filed by the plaintiff, the same shall be decided by the trial Court after giving an opportunity of hearing to the defendants and also to file counters, if they so desire.

No costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

20th March, 2017
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