

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2018

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.R.P.(NPD).No.1040 of 2013
and
M.P.No.1 of 2013

1.B.T.Munichikkanna Reddy
2.B.C.Rajagopal Reddy
3.M.Krishna Reddy
4.M.Radhakrishna Reddy
5.M.Nagarajan
6.Devendar
7.M.Shyla

.. Petitioners

..Vs..

Siddappa Reddy

.. Respondent

Prayer: Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the fair and decretal orders of learned Subordinate Judge of Hosur dated 31.10.2011 in I.A.No.269 of 2011 in I.A.No.166 of 2010 in O.S.No.60 of 2007.

For Petitioners

: Mr.N.B.A.Dinesh

For Respondent

: Mr.M.A.Mudimannan

ORDER

The instant Civil Revision Petition has been filed challenging the Order dated 31.10.2011 passed in I.A.No.269 of 2011 in I.A.No.166 of 2010 in O.S.No.60 of 2007 by the learned Subordinate Judge, Hosur.

Brief facts leading to the filing of the instant revision:

2. The petitioners are the defendants 2 to 8 in the suit O.S.No.60 of 2007 pending on the file of the learned Subordinate Judge, Hosur. The suit was filed by one Puttamma against Muniyamma seeking partition of the suit schedule properties. The suit O.S.No.60 of 2007 was dismissed for default on 06.01.2010. I.A.No.166 of 2010 was filed by the Advocate of Puttamma seeking to restore the suit which was dismissed for default on 06.01.2010. Thereafter, I.A.No.269 of 2011 was filed by the respondent claiming to be the sole legal heir of the deceased Puttamma, under Order 1 Rule 10 of CPC seeking to implead himself as second petitioner in I.A.No.166 of 2010. A counter was also filed by the petitioners in I.A.No.269 of 2011 wherein they have contended that I.A.No.269 of 2011 is not maintainable, since at the time of filing of

I.A.No.166 of 2010 by the Advocate seeking restoration of the suit, the plaintiff Puttamma was dead. The Trial Court by its order dated 31.10.2011 in I.A.No.269 of 2011 in I.A.No.166 of 2010 in O.S.No.60 of 2007 allowed the said application.

3. Aggrieved by the order dated 31.10.2011 passed in I.A.No.269 of 2011 in I.A.No.166 of 2010 in O.S.No.60 of 2007, the instant Civil Revision Petition has been filed by the petitioners who are the defendants 2 to 8 in the suit.

Submissions of the learned counsels:

4. Heard Mr.N.B.A.Dinesh, learned counsel for the petitioners and Mr.M.A.Mudimannan, learned counsel for the respondent.

5. According to the learned counsel for the petitioners, I.A.No.269 of 2011 filed by the respondent is not maintainable, in view of the fact that the plaintiff Puttamma died on 08.10.2009 and I.A.No.166 of 2010 was filed on 05.02.2010 by her Advocate seeking restoration of suit which was dismissed for default on 06.01.2010 without bringing the legal

representatives of the deceased Puttamma on record. According to him, when the plaintiff Puttamma is dead, the application filed by her advocate to restore the suit which was dismissed for default on 06.01.2010 is not maintainable. He drew the attention of this Court to the following Judgments passed by this Court:

a) *Nachimuthu Goundar (died) Bakkiam & two others vs. Manikavalli and two others* reported in **1966 (1) CTC 532**;

b) *V.P.Nagarajan vs. Prabhavathi* reported in **1989 (1) LW 543**

Relying upon the above said Judgments, the learned counsel for the petitioners would submit that an Advocate cannot file an application on behalf of his client seeking for restoration of suit which was dismissed for default and further contended that when the application for restoration of suit is not maintainable, an application cannot be filed by the legal representative of the deceased Puttamma under Order 1 Rule 10 of CPC to implead himself as petitioner in the application filed by the Advocate seeking to restore the suit which was dismissed for default.

6. Per contra, learned counsel for the respondent would submit that under Order 1 Rule 10 of CPC, being a bonafide mistake and for the

effective determination of the real controversy in the dispute, technical objections like that which has been raised by the petitioners ought to be summarily rejected and the Trial Court has rightly rejected the same under the impugned Order. He drew the attention of this Court to the findings of the Trial Court and submitted that the Trial Court has rightly observed that the technical flaws should not stand in the way of granting substantial justice which is the settled position of law. He also drew the attention of this Court to Order 1 Rule 10 (2) of CPC wherein the Court has got the power to strike out or add parties to enable the Court to effectually and completely adjudicate the dispute between the parties.

Discussion:

7. The suit filed by Puttamma against the defendants is a partition suit. The first defendant in the suit is the sister of the plaintiff and the plaintiff claims half share in the suit schedule property. The first defendant died during the pendency of the suit and the petitioners are the legal representatives of the deceased Muniyamma (first defendant). The suit was dismissed for default on 06.01.2010. The plaintiff (Puttamma) died on 08.10.2009. I.A.No.166 of 2010 was filed by the

Advocate of the deceased plaintiff on 05.02.2010 seeking to restore the suit which was dismissed for default on 06.01.2010. Subsequently, I.A.No.269 of 2011 was filed by the respondent claiming to be the sole legal representative of the deceased plaintiff seeking to implead himself as second petitioner in I.A.No.166 of 2010 and the said application was filed under Order 1 Rule 10(2) of CPC. A counter was also filed by the petitioners raising objections regarding the maintainability of I.A.No.166 of 2010 filed by the Advocate on the ground that as on date, when the application was filed, the petitioner Puttamma was dead and they have also stated that the application filed under Order 1 Rule 10 of CPC is also not maintainable, due to the death of plaintiff Muniyamma.

8. Order 1 Rule 10 of CPC enables the Court to add any person as a party at any stage of the proceedings, if a person whose presence in Court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision. If the Court is satisfied that it is necessary for the determination of the real matter in controversy to substitute the party in the suit, it can be done under Order 1 Rule 10 CPC. When the court finds

that in the absence of the persons sought to be impleaded as party to the suit, the controversy raised in the suit cannot be effectively and completely settled, the court would do justice by impleading such persons. Order 1 Rule 10(2) of the code gives wide discretion of court to deal with such a situation which may result in prejudicing the interest of the affected party if not impleaded in the suit, and where the impleadment of the said party is necessary and vital for the decision of the suit. Under Order 1 Rule 10(2) CPC even without an application the court may at any stage add or strike out the parties to the suit. Ultimately, the courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined or it can add anyone as a plaintiff or defendant if it finds that such person is a necessary or proper party. The court under Order 1 Rule 10(2) will of course act according to reason and fair play and not according to whims and caprice. Hypertechnical approach which may result in the miscarriage of justice cannot be adopted while deciding an application under Order 1 Rule 10 CPC.

9. In the case on hand, the respondent claims to be the son and the legal representative of the deceased plaintiff who has filed a suit for partition against the deceased first defendant who is her sister. The suit was filed for partition by the deceased plaintiff claiming half share in the suit schedule property. Without the respondent, the suit cannot be effectively adjudicated upon. As observed earlier, the power of the court to implead persons under Order 1 Rule 10(2) is very wide for the effective adjudication of the dispute. Even though an advocate cannot file an application to restore a suit which was dismissed for default after the death of the plaintiff, this does not bar the respondent who claims to be the legal representative of the deceased plaintiff to file an application I.A.No.269 of 2011 under Order 1 Rule 10(2) CPC to implead himself as second petitioner in I.A.No.166 of 2010 in O.S.No.60 of 2007 filed by the advocate of the deceased plaintiff seeking restoration of the suit which was dismissed for default.

10. Paragraph 16, 19 & 20 of the Judgment of the Hon'ble Supreme Court in the case of ***Pankajbhai Rameshbhai Zalavadiya vs. Jethabhai***

Kalabhai Zalavadiya (Deceased) reported in ***(2017) 9 SCC 700*** reads as follows:

“16. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 CPC, in order to do justice between the parties. Merely because of the non-mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add anyone as a plaintiff or defendant if it finds that such person is a necessary or proper party. The

Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice.

....

19. As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. Defendant 7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased Defendant 7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hypertechnical approach which may result in the miscarriage of justice. As the heirs of the

deceased Defendant 7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice.

20. Having regard to the totality of the narration made supra, there is no bar for filing the application under Order 1 Rule 10, even when the application under Order 22 Rule 4 of the Code was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 of the Code read with Section 151 of the Code subject to the plea of limitation as contemplated under Order 7 Rule 6 of the Code and Section 21 of the Limitation Act, to be decided during the course of trial.”

As seen from the above observations, the Hon'ble Supreme Court held that there is no bar for filing an application under Order 1 Rule 10 CPC even when the application under Order 22 Rule 4 of the Code of Civil

Procedure was dismissed as not maintainable under the facts of the case. The legal heirs of the deceased person in such a matter can be added in the array of parties under Order 1 Rule 10 CPC read with Section 151 of the code subject to the plea of limitation as contemplated under Order VII Rule 6 of the Code and Section 21 of the Limitation Act, 1963 to be decided during the course of trial.

11. In the light of the above observations, the Trial Court has rightly allowed I.A.No.269 of 2011 considering the wide scope of Order 1 Rule 10 CPC to implead parties for the effective adjudication of the dispute . This Court does not find any infirmity in the order passed by the Trial Court. However, it is made clear that allowing the impleading application will not bar the petitioner to raise the plea of limitation as contemplated under Order 7 Rule 6 of the Code of Civil Procedure as well as under Section 21 of the limitation Act, 1963 in the pleadings as well as during Trial.

Conclusion:

10. In the result, the instant Civil Revision Petition is dismissed. However, it is made clear that allowing the impleading application will

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not bar the petitioner to raise the plea of limitation as contemplated under Order 7 Rule 6 of the Code of Civil Procedure as well as under Section 21 of the limitation Act, 1963 in the pleadings and during Trial. Consequently, connected miscellaneous petition is closed. No costs.

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Index:Yes/No

Internet:Yes/No

Speaking/Non-Speaking orders

To

The Subordinate Judge,
Hosur

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ABDUL QUDDHOSE, J.

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26.11.2018