

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED : 12.01.2018  
CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

S.A.No.1207 of 2000

1.Kannaiya Nadar (Deceased)  
2.Thrisangu Nadar  
3.K.Balaraman  
4.K.Natarajan  
5.K.Amirthalingam  
6.S.Rajalakshmi

(Appellants 3 to 6 are brought on record  
as legal representatives of the deceased  
1<sup>st</sup> appellant vide order of Court dated  
11.01.2007 made in  
C.M.P.No.10742 of 2006) ... Appellants

Vs.

1.Perumal Nadar  
2.Shanmuga Nadar  
3.Dakshinamurthy Nadar ... Respondents

Prayer:

Second Appeal filed under Section 100 of C.P.C. against  
the judgment and decree made in A.S.No.17 of 1999 on the file of  
the Court of Additional District Judge, Nagapattinam dated  
20.09.1999 in confirming the judgment and decree made in  
O.S.No.81 of 1997 on the file of the Court of Principal  
Subordinate Judge, Mayiladuthurai dated 25.01.1999.

For Appellants : Mr.Muthukumar

For Respondents: No Appearance for R1 and R2

J U D G M E N T

The learned counsel appearing for the appellants submitted  
that the first respondent died. However, till date the  
appellants have not taken any steps to bring the legal  
representatives of the deceased first respondent on record.

2.The suit is for partition. The second appeal is filed by  
the defendants 1 and 2 against the preliminary decree passed by  
the lower Court as well as the lower Appellate Court. Since the  
preliminary decree is under challenge and it is an indivisible

decree, the said decree cannot be sustainable in respect of other respondents unless the legal heirs of the deceased first respondent is brought on record.

3. In support of his contentions, the learned counsel appearing for the appellants relied upon the following decisions:

(i) The decision of the Hon'ble Apex Court reported in (2003) 3 SCC 272 (Sardar Amarjit Singh Kalra (Dead) by Lrs. and others vs. Pramod Gupta (Smt) (Dead) by LRs. and others), the relevant portion of which reads as follows:

"30. The question, therefore, as to when a proceeding before the Court becomes or rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side has been always considered to depend upon the fact as to whether the decree obtained is a joint decree or a severable one and that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being proceeded with among or against those remaining parties other than the deceased. As observed in Nathu Ram's case (supra) itself, the code does not itself provide for the abatement of the appeal against the other respondents even where, as against one such it has abated but it is only the Courts which have held that in certain circumstances the appeal also would abate against a co-respondent as a result of abatement against the deceased respondent. The same would be the position of an appeal vis-a-vis the appellants, as in the other cases. Order 22 Rule 4 also was considered not to provide for abatement of the appeal(s) against the co-respondents of the deceased respondent and it was specifically observed therein that to say that the appeals against them also abated in certain circumstances is not a correct statement. It was held that the appeals against such other respondents cannot be proceeded against and, therefore, had to be dismissed, in certain circumstances."

(ii) The decision of this Court reported in 1973 (1) MLJ 351 (Muthuswamy alias Dronan, Journalist and another Vs. V.Venugopalan), the relevant portion of which reads as follows:

"9. One of us had to deal with a similar question in Innasi Udayar v. Chinnasami Raju. In that case, the suit for possession of certain lands was laid against 24 defendants, of whom the name of one was struck off during the pendency of the suit. The relief was claimed jointly against all the defendants without specifying which defendant was to surrender possession of which portion. The Trial Court decreed the suit directing the defendants on record to put the plaintiff in possession of the suit properties. The appeal preferred against that decree was dismissed and the decree of the trial court was confirmed by the first appellate court. Some of the defendants came up in second appeal to this court. During the pendency of the second appeal two of the appellants died, and their legal representatives were not brought on record within time, with the result, the appeal as against them had abated. The plaintiff-appellant took out an application praying for an order directing that the second appeal had abated and should, therefore, be dismissed. Having regard to the fact that the decree was joint and indivisible against all the defendants and as the decree did not provide that each of the defendants should put the plaintiff in possession of any particular portion of the suit land, it was held that the appeal by the other appellants could not be proceeded with as the appeal had abated against two of the appellants.

10. The question whether, consequent on the abatement of the appeal so far as one appellant is concerned the entire appeal should be held to have abated, has to be decided with reference to the nature of the relief claimed and the terms of the decree. If the decree is joint against several defendants and if the decree has become final so far as one defendant is concerned on account of abatement on his death, the appeal by the other defendants should necessarily be held to be not maintainable because the success of the appeal would lead to the court

coming to a decision which would be inconsistent with the decision between the deceased appellant and the respondent and that would lead to the court passing a decree which would be contrary to a decree which has already become final in respect of the same subject-matter between the deceased appellant and respondent. We have already pointed out that in the instant case the decree is joint both with regard to damages and injunction. It may be that the decree can be satisfied by executing it against the surviving first defendant so far as the money portion of the decree is concerned. That aspect, on which reliance was placed by the counsel for the first defendant, does not conclude the question, for, the other relief of injunction cannot be satisfied unless it is executed against both the defendants. As we have already pointed out, if the first defendant were to succeed in the appeal, such success can only be on the basis that there was no infringement of the plaintiff's copy right. Such a position would be contrary to the decision that has become final so far as the second defendant and the plaintiff are concerned. Such a conflict of decisions should not be permitted. This case satisfies the test No.(a) laid down by Raghubar Dayal, J., in State of Punjab V. Nathu Ram, the relevant portion of which we have extracted in paragraph 5 supra.

11. The counsel for the first appellant sought to contend before us that there is no common defence in this case and the second appellant can be held liable only if it is established that he had knowledge of the infringement of the copyright in relation to the publication of the drama in the journal. As we have pointed out already, the common defence of defendants 1 and 2 was that there had been no infringement of the copyright at all. Nowhere in the written statement of the second defendant it was contended that he had no knowledge of the infringement of the copyright, when the drama was published in his journal in series and there had been no issue to that effect. From what we have extracted from a portion of the decree passed in this case, it will be clear that the

entire trial proceeded on the common defence  
between defendants 1 and 2.”

4.Since the appeal is against the preliminary decree against  
partition and one of the sharers/ the first respondent is dead  
and the appellants have not taken any steps to bring on record  
the legal representatives of the deceased first respondent and  
in view of the decisions cited supra, the second appeal is  
dismissed as abated. No costs.

Sd/-  
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge, Nagapattinam.

2.The Principal Subordinate Judge, Mayiladuthurai.

copy to

The Section Officer  
VR Section,  
High Court, Madras

+1 cc to M/s.A.Muthukumar Advocate sr 2812

+1 cc to M/s.S.Sounthar Advocate sr 2918

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