

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2018

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

**C.R.P. (NPD) No.771 of 2014
and M.P.Nos.1 & 2 of 2014**

Judgment reserved on 14.02.2018	Judgment pronounced on 13.03.2018
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B.K.Basha ... Petitioner / Judgment Debtor

Vs

1.Mohamed Ali ... Respondent / Decree holder

2.Sherrif ... Respondent / Judgment Debtor

3.Umar ... Respondent / Judgment Debtor

Prayer : Civil Revision Petition is filed under Section 151 of CPC against the order dated 30.10.2013 made in E.A.No.3675 of 2011 in E.P.No.1421 of 2008 in O.S.No.2859 of 2004 on the file of the IX Asst. Judge, City Civil Court, Chennai.

For Petitioner : Mr.Sudharshana
for M/s.K.Shahul Hameed

For Respondents : Mr.T.P.Sankaran for R1
Not ready in notice Reg. R2 & R3

ORDER

This Civil Revision Petition is filed against the order dated 30.10.2013 made in E.A.No.3675 of 2011 in E.P.No.1421 of 2008 in O.S.No.2859 of 2004 on the file of the IX Asst. Judge, City Civil Court, Chennai.

2. The petitioner is respondent in E.P.No.1428 of 2008. He is one of the legal heirs of the deceased defendant who is the first respondent in E.P. He has filed E.A.No.3675 of 2011 under Section 47 CPC contending that E.P. is not executable and nullity. According to the petitioner, the first respondent filed suit against his father as sole defendant for declaration of title and recovery of possession. The petitioner's father had filed written statement on 05.08.2004 and was contesting the suit. After the first respondent let in evidence and closed his side, the suit was posted for evidence on behalf of the sole defendant. The sole defendant took adjournments and subsequently, filed proof affidavit stating that he could not appear before the Court for marking the documents and for cross examination as he was bed ridden. Subsequently, he died on 29.02.2008. The judgment and decree was passed on 26.03.2008, after the death of the sole defendant without impleading the

legalheirs of the sole defendant and the decree obtained by the first respondent is nullity and it is not executable.

2(a) The first respondent/decreed holder filed counter and submitted that the death of the sole defendant was not intimated to the court by the learned counsel for the defendant or by the legalheirs of the defendant. The petitioner was contesting the case alongwith his father. The advocate for the deceased defendant did not inform about the death of the defendant till the decree was passed. Even after the death of sole defendant, the vakalat of the advocate is valid. The petitioner has deliberately not informed the death of his father which is illegal and therefore, the petitioner is not entitled to maintain the application under Section 47 CPC. The decree is valid and enforceable as per law under Section 50 of CPC.

3. Before the learned Judge, the petitioner examined himself as PW1 and marked two documents as Exs.P1 & P2. On behalf of the first respondent, one Mohamed Abdul Rashid was examined as RW1 and marked three documents as Exs.R1 to R3. The learned Judge, considering the affidavit of the petitioner, Order XXII Rules 1, 4 (4) and 10-A of CPC, dismissed the application holding that the application under Section 47 CPC is not maintainable and

the remedy available to the petitioner is only by way of appeal.

4. Against the said order of dismissal dated 30.10.2013 made in E.A.No.3675 of 2011 in E.P.No.1421 of 2008 in O.S.No.2859 of 2004, the present Civil Revision Petition is filed by the petitioner.

5. The learned counsel for the petitioner contended that after setting the sole defendant exparte, judgment was delivered after the death of the sole defendant. The first respondent did not file any application to bring the legalheirs on record. In the absence of any order bringing the legalheirs of the deceased sole defendant, the judgment delivered is against a dead person and the same is a nullity.

6. Per contra, the learned counsel for the first respondent contended that deceased sole defendant, after filling the written statement, contested the suit till the evidence of first respondent was completed. After that he did not contest the suit and he was set exparte. The sole defendant did not contest the suit and in such circumstances, even if the legalheirs are not impleaded, the judgment will not be a nullity. Judgment in question delivered after

setting sole defendant exparte and after his death deems to have been exempted bringing the legalheirs on record.

6(a) The sole defendant was represented by learned counsel. As per Order XXII Rule 10(a) CPC, the learned counsel for the defendant is liable to inform the court about the death of the defendant and furnish the particulars of the date of death as well as the legalheirs of the deceased defendant. Even after the death of the deceased defendant, the vakalat holds good and the learned counsel for the defendant is bound to furnish the details to the court.

6(c) The learned counsel for the first respondent relied on the following judgments in support of his contention.

(i) AIR 1983 SC 1202 [Gangadhar & anr. v. Shri Raj Kumar]

3. Now the fact remains that admittedly the appellants claim that they came to know about the death of the deceased-respondent when the present respondent moved an application for substitution. Rule 10-A which has been added in Order XXII of the CPC by the [Amending Act](#) of 1976 provides that when a pleader appearing for a party to the suit comes to know of the death of the party, he shall inform the court about it and the court thereafter shall issue notice to the other party. In the case of an appeal, the word "suit has to be read as "appeal". This provision

was introduced specifically to mitigate the hardship arising from the fact that the party to an appeal may not come to know about the death of the other party during the pendency of the appeal but when it is awaiting its turn for being heard. The appeal lies dormant for years on end one cannot expect the other party to be a watch dog for day to day survival of the other party. When the appeal on being notified for hearing is activated, knowledge occasionally dawns that one or the other party has not only died, but the time for substitution has run out and the appeal has abated. In order to see that administration of justice is not thwarted by such technical procedural lapse, this very innovative provision has been introduced, whereby, a duty is cast upon the learned Advocate appearing for the party who comes to know about the death of the party to intimate to the court about the death of the party represented by the learned Counsel and for this purpose a deeming fiction is introduced that the contract between dead client and lawyer subsists to the limited extent after the death of the client.

(ii) 2006 (4) CTC 757 [G.S.Gopalakrishnan & anr. v. Govt. of Tamil Nadu & ors.]

11. It is true that as a general principle of law, proceedings against dead persons are null and void. But this principle is not without exception. Order 22 of the Code of Civil Procedure which deals with the procedure to be followed in the case of death, marriage and insolvency of parties, carves out one such exception to the said principle under Sub-rule (4) of Rule 4, which reads as follows:

(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

notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

13. Thus it could be seen that even under *the Code* of Civil Procedure where the rigours of impleading necessary and proper parties and service of notice are more pronounced than in proceedings under special enactments, it is not made an universal rule that such proceedings against dead persons are null and void.

(iii) 2017 (1) LW 750 [V.Veeranan and Ors. v. Varadharajan and Ors.]

11. From the materials available on record, it is seen that the first defendant did not contest the suit and she was set *ex parte* on 27.07.1993 itself and she died on 16.09.1993. The first defendant filed a Memo, dated 24.09.1997 and by order dated 26.09.1997, the said Memo was recorded and the first defendant was exonerated. It is not in dispute that the trial was conducted and written arguments were also filed by the petitioners and the respondents 7 and 8. At that stage, the respondents 1 to 6 have filed an application for impleading themselves as parties in the suit. The learned District Munsif has allowed the application on the ground that it is the duty of the petitioners/plaintiffs 2 and 3 to implead the legal heirs of the deceased. Even after taking note of the fact that the respondents 1 to 6 have filed the petition to implead them after several years of death of their mother, the learned District Munsif allowed the petition in order to avoid further complication. The learned District Munsif failed to consider Order 22 Rule 4(4) C.P.C.

12. It is relevant to extract Order 22 Rule 4(4) C.P.C.

4. Procedure in case of death of one of several defendants or of sole 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.?

13. In the present case, it is not in dispute that the first defendant, mother of the respondents 1 to 6 remained ex parte and in addition to that, she was exonerated on 26.09.1997. Therefore, the learned District Munsif committed an irregularity in allowing the application, as she failed to consider Order 22 Rule 4(4) C.P.C. and also the fact that the first defendant was set ex parte on 27.07.1993.

(iv) 2004 (13) SCC 431 [P.Jesaya v. Sub-Collector]

3. The only contention take up in this appeal is that the first respondent, in the appeal before the High Court had died during the pendency of that appeal. It is contended that his heirs were not brought on record and, therefore, the appeal before the High Court had abated. In support of this contention reliance is placed on Order 22 Rule 4 of the Code of Civil Procedure as well as the judgments of this Court in the case of Mithailal Dalsangar Singh v. Annabai Devram Kini and in the case of Amba Bai v. Gopal. It is submitted that as the appeal had abated, the judgment delivered by the High Court is non est and cannot be enforced.

4. Though the arguments are attractive one must also keep in mind Order 22 Rule 10 of the Code of Civil Procedure. It is obligatory on the pleader of a deceased to inform the court and the other side about

the factum of death of a party. In this case, we find that no intimation was given to the court or to the other side that the first respondent had died. On the contrary a counsel appeared on behalf of the deceased person and argued the matter. It is clear that the attempt was to see whether a favourable order could be obtained. It is clear that the intention was that if the order went against them, then thereafter this would be made a ground for having that order set aside. This is in effect to an attempt to take not just the other side but also the court for a ride. These sort of tactics must not be permitted to prevail. We, therefore, see no reason to interfere. The appeal stands dismissed. There will be no order as to costs.

(v) 2006 (4) MLJ 898 [C.Manoharan v. C.V.Subramaniam & Ors.

18. Mr.T.R.Rajagopalan, learned senior counsel for the contesting respondents, drawing my attention to Order 22, Rule 10-A CPC, supported by a decision of the Apex Court in *P.JESAYA (DEAD) BY LRS. vs. SUB-COLLECTOR AND ANOTHER* [(2004) 13 SCC 431], would submit that the pleader for the parties not having discharged his duty to inform the Court and other parties, of the death, and continued to plead matter, L.Rs. of respondent were bound and in this view, it should be held, appeal had not abated. In the case involved in the above decision, a similar situation like the one in the case on hand had arisen. The Apex Court, considering the amended provisions of the Code of Civil Procedure, under Order 22 Rule 10-A CPC, as well as the duty of the Pleader, came to the conclusion, that the decree passed cannot be treated as nullity, even referring the decision relied on by the counsel for the appellant in *Ambabai* case. Therefore, as per the ratio laid down by the Apex Court in *P.Jesaya* case, it is to be held, that the decree passed in A.S.No.59 of 1993 is binding upon the L.Rs. of the first plaintiff also and the decree cannot be treated as a nullity. Because of this reason also, as indicated above, in the grounds of appeal, when appeal is preferred by only the second plaintiff, it is specifically stated, cause of action survives and this

being the admitted position, even by the appellant, the submission made by the learned senior counsel for the appellant, in my considered opinion, is erroneous, liable to be rejected. Thus holding, the decree in A.S.No.59 of 1993 is valid, now it is to be seen as per the Substantial Question of Law framed, whether that could be sustained or not, on merits.

7. Heard the learned counsel for the petitioner as well as first respondent and perused the materials available on record.

8. The points for consideration in this Civil Revision Petition are -

(i) whether the decree passed after the death of the sole defendant without impleading the legalheirs of the deceased defendant is valid and executable ;

(ii) whether a decree passed against a dead person in ignorance of his death is void abinitio or valid till the same is set aside in Appeal, Revision or Review.

Points (i) & (ii)

8(a) It is an admitted fact that in the suit filed by the first respondent for declaration of title and recovery of possession, the deceased defendant filed written statement and was contesting the suit till the first respondent let in evidence and closed his side. After

that stage, the deceased defendant did not appear before the Court but filed proof affidavit. The learned Judge posted the case on 12.02.2008, 19.02.2008, 26.02.2008, 03.03.2008 and 11.03.2008 for appearance of the sole defendant before the Court. However, the deceased defendant did not appear before the court. The learned Judge, after hearing the arguments of the learned counsel for the first respondent, adjourned the case to 24.03.2008 and pronounced the judgment on 26.03.2008. The first respondent/decree holder filed E.P against the deceased defendant. The notice sent to the sole defendant was returned with endorsement as dead. The first respondent impleaded the legalheirs of the deceased defendant.

8(b) The objection taken by the petitioner is that the judgment and decree passed against the deceased defendant, his father is nullity as the same was passed after the death of the deceased defendant, without impleading the legalheirs of the deceased defendant. The learned Judge, rejected the said contention of the petitioner on the ground that as per Order XXII Rule 4(4) CPC, when the defendant failed to file written statement or after filing the written statement failed to contest the suit, the court can pass the judgment without impleading the legalheirs. The

learned Judge also held that as per Order XXII Rule 10-A, the learned counsel for the party shall inform the court about the death of the party and court shall give notice to other parties about the death. In the present case, the learned counsel for the deceased defendant failed to inform about the death of the deceased defendant.

8(c) As far as Order XXII Rule 10-A is concerned, the Advocate who filed vakalat on behalf of the defendant deemed to be holding the vakalat even after the death of the defendant for the purpose of informing the court about the death of the party. In the present case, the sole defendant was contesting the suit almost till the completion of Trial as after first respondent closed his side the sole defendant filed proof affidavit but failed to appear subsequently. The first respondent contended that petitioner was accompanying his father during hearing and was assisting him. The petitioner and other legal heirs as well as the learned counsel for defendant failed to comply with provisions of Order XXII Rule 10(A) CPC. Having failed to inform the court the death of sole defendant and particulars of legal heirs, the petitioner's contention that decree passed against sole defendant is nullity is without merits. A decree passed against a dead person without the knowledge of his death is

not a nullity. It may be construed as nullity and not void abinitio. It is valid till the same is set aside in Appeal, Revision or Review.

9. This issue has been considered in the following decisions -

(i) AIR 1983 MAD 5 [Abdul Azeez Sahib v. Dhanabagiammal & Others]

3. The learned counsel for the petitioner relying on the two decisions reported in *Himangshu Bhusan Kar V. Manindra Mohan Baha*, and *Raddulal Bhurmal v. Mahabirprasad Bisesar Kalwar*, , contended that a decree passed in favour of a dead person is not a nullity, and the fact of death not brought to the notice of the court when it passed the decree is only an irregularity and it cannot have the effect of making the decree void abinitio and the decree is executable. Where the Court proceeds with the case in ignorance of the fact of death of person and passes a decree, that decree cannot be treated as a nullity. It may no doubt, be a wrong decree, but it will have to be set aside by taking appropriate proceedings like appeal, revision or review. Generally speaking, a decree passed in favour of a dead person is not a nullity, though a decree passed against a dead person can be construed as a nullity. Even if there is abatement of the suit, that would make the decree passed in the suit as one without jurisdiction and executing Court is not entitled to refuse to execute the decree on the ground that the plaintiff was not alive on the date when the decree was passed in his favour.

(ii) 2003 (3) RCR (Civil) [Jarnail Singh and Ors. v. Saudagar Singh]

7. It has been held in *Abdul Azeez Sahib v. Dhanabagiammal and Ors.* A.I.R. 1988 Madras 5 relying upon judgments of Calcutta and Bombay

High Courts that the decree passed in favour of a dead person is not nullity and the fact of death not having brought to the notice of the court when it passed the decree is only an irregularity and cannot have the effect of making decree void ab initio.

"Where the Court proceeds with the case in ignorance of the fact of death of a person and passes a decree, that decree cannot be treated as a nullity. It may no doubt be a Wrong decree, but it will have to be set aside by taking appropriate proceedings like appeal, revision or review. Generally speaking, a decree passed in favour of a dead person is not a nullity though a decree passed against a dead person can be construed as a nullity. Even if there is abatement of the suit, that would not make the decree passed in the suit as one without jurisdiction and the executing court is not entitled to refuse to execute the decree on the ground that the plaintiff was not alive on the date when the decree was passed in his favour."

10. As a matter of fact the Division Bench of Bombay High Court has relied upon a judgment reported in 1924 P.C. 198 counsel wherein it has been held that after a decree has been made, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside.

(iii) Order of this Court dated 30.04.2010 in Rev.Aplc.No.48 of 2010 in SA No.398 of 2003 [Ramasamy Udayar & anr. v. Karuppayee Ammal]

9. The learned Senior Counsel appearing for the respondent, in support of her contention relied upon a

judgment reported in AIR 1983 MADRAS 5 (Abdul Azeez Sahib v. Dhanabagiammal and others) wherein, this Court held that a decree passed in favour of a dead person is not a nullity, though a decree passed against a dead person can be construed as a nullity. Even if there is abatement of the suit, that would not make the decree passed in the suit as one without jurisdiction and the executing court is not entitled to refuse to execute the decree on the ground that the plaintiff was not alive on the date when the decree was passed in his favour.

11. Though the review applicants had stated that the respondent/appellant had died on 23.10.2007 itself, even in the present review application, they have not impleaded the legal representatives of the deceased respondent/appellant as parties. The review application has been filed only as against the deceased respondent/appellant. When the Second Appeal was taken up for hearing, neither the learned counsel for the appellant nor the learned counsel for the respondents informed this Court about the death of the sole appellant. Under Order 22 Rule 10A of CPC., learned counsel appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it. In the case on hand, the death of the appellant was not brought to the notice of this Court though he died as early as on 23.10.2007.

10. In the above decisions, this Court and High Court of Punjab & Haryana held that a decree passed in ignorance of death of defendant is only an irregularity and executing court cannot refuse to execute the decree. By passing a decree, a party acquires a right and the same cannot be taken away except by setting aside, modifying or varying the decree in Appeal, Revision or Review. In the present case, the petitioner has not sought to modify, vary or

set aside the decree by filing Appeal or Review or Revision. In such case, the judgments relied on by the learned counsel for the first respondent and the three judgments referred to above are squarely applicable to the facts of the present case. The learned Judge, considering the materials on record and relevant provisions, dismissed E.A.No.3675 of 2011 in E.P.No.1421 of 2008 in O.S.No.2859 of 2004 by giving cogent and valid reason. There is no irregularity or illegality in the impugned order warranting interference by this Court.

11. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

13.03.2018

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Index : Yes

Speaking / Non-speaking order

To

The IX Asst. Judge,
City Civil Court,
Chennai.

V.M.VELUMANI, J.

rgr



**Pre-delivery Order in
C.R.P. (NPD) No.771 of 2014**

13.03.2018

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