

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.475 OF 2011

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, questioning the orders in I.A.No.172 of 2010 & I.A.No.168 of 2010 in A.S.No.22 of 2004 dated 28.09.2010 passed by the Additional District Judge, Hindupur.

The petitioners who are the defendants 5 & 6 in A.S.No.22 of 2004 and they filed I.A.No.172 of 2010 under Order XXII Rule 4 and Order XLI Rule IV r/w Section 151 C.P.C. to dismiss the suit by allowing the appeal, since the suit is abated as a whole, after expiry of 90 days from 04.11.1999, D-7 died, who is said to be one of the owners of A & C schedule properties along with the plaintiff, even by the date of pronouncement of judgment before the Trial Court.

It is the case of the petitioners, that petitioner/second appellatant/D-6 is the first respondent/plaintiff filed the suit against the petitioners/appellants/D5 & D6 and also against the defendants 1 to 4. It is alleged in the plaint that the defendants 7 to 10 are the owners of the suit properties along with the plaintiff. The plaintiff filed the suit on their behalf also in O.S.No.57 of 1997 on the file of Senior Civil Judge, Hindupur and the said suit was decreed on 11-10-2004. Against the said decree and judgment, they preferred the present appeal. It is further stated that the 6th respondent (D-7) died on 04.11.1999 leaving behind his sons and daughters. The plaintiff was aware of the death of the 6th

respondent (D7) on 04.11.1999 itself and the plaintiff did not choose to bring the legal heirs of the 6th respondent (D7) with ulterior motive. Hence, the suit got abated *ipse jure* on the expiry of 90 days from 04.11.1999 as 6th respondent (D7) died and prayed to dismiss the suit by allowing appeal, as the suit was abated as a whole, since the legal heirs of the 6th respondent (D7) were not brought on record within the time stipulated by law.

The first respondent filed counter, denying material allegations, *inter alia* contending that the petition is not maintainable either in law or on facts and the petition is liable to be dismissed in limini. It is stated that 7th defendant in the suit was set exparte along with D-8 to D-10 before the Trial Court itself. The allegation that the 6th respondent (D7) died on 04.11.1999 and the death extract sought to be marked in I.A.No.168 of 2010 is fabricated document for the purpose of the case. Therefore, failure to implead the legal heirs of the deceased, 6th respondent (D7) in the suit would not automatically abate and prayed to dismiss the petition.

Aggrieved by the order of the Court below, the present civil revision petition is filed, mainly on the ground that the 6th respondent (D7) died during pendency of the appeal. Unless the legal representatives are brought on record, the proceedings cannot be prosecuted. But, the Court below did not take into consideration the impact on the pending suit or appeal, the death of the 6th respondent (D7) died on 04.11.1999, but, deliberately the plaintiff did not implead the legal representatives of the deceased 6th respondent (D7) and the Appellate Court did not consider the

impact on the disposal of the appeal, pending before it without bringing on record, the legal representatives of the 6th respondent (D7) and committed a serious error and prayed to set-aside the order dismissing the suit as abated for failure to bring the legal representatives of the deceased 6th respondent (D7) within 90 days time period permitted by law.

The petitioners/appellants/D5 & D6 who are the unsuccessful petitioners before this Court, have filed an appeal A.S.No.22 of 2004, aggrieved by the decree and judgment passed by the Trial Court in O.S.No.57 of 1997 passed by the Senior Civil Judge, Hindupur dated 11.10.2004. The only contention before this Court is that, when the legal representatives of the deceased 6th respondent (D7) were not impleaded, the suit is deemed to have been abated and the appeal is to be allowed, setting aside the decree and judgment passed by the Court below.

When the appeal is preferred by these petitioners and when 6th respondent (D7) allegedly expired on 04.11.1999, it is the obligation of the appellant to bring the legal representatives of the deceased 6th respondent (D7) in the appeal. But, it is their contention that the suit was decreed on 11.10.2014 and whereas, death took place on 04.11.1999 i.e. before pronouncement of decree and judgment by the Trial Court.

As seen from the material on record, 6th defendant remained exparte in the Trial Court and question of impleading the legal representatives of the deceased 6th respondent (D7) does not arise, in view of Order XXIII Rule 4 Clause (4) C.P.C.

Order XXIII Rule 4 C.P.C deals with procedure in case of death of one of several defendants or of sole defendant and according to Clause (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 filed 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.

From Clause (4) of Rule 4 of Order XXII C.P.C, the plaintiff may obtain an exemption from impleading the legal representatives from the Competent Court. But, here, in this case, the defendant died during pendency of the suit itself and allowed to pass a decree by the Trial Court by these petitioners, the decree cannot be set-aside on the sole ground by allowing the interlocutory application and it is for the Court to decide whether the suit is deemed to have been abated in view of failure to implead the legal representatives of the deceased 6th respondent (D7). Therefore, failure to implead the legal representatives of the 6th respondent (D7) in the appeal who remained exparte before the Trial Court by itself is not a ground to reverse the judgment and decree passed by the Court below and such question cannot be decided in an interlocutory application.

Learned counsel for the petitioner, in support of his contention brought to the notice of this Court, judgment of the

Supreme Court in **Municipality, Faridkot through its Administrator v. M/s Chander Bhan and others**¹, where the Apex Court had an occasion to decide the legality in filing an appeal and held that appellant filing first appeals before District Judge but under a bonafide though mistaken impression that all the appeals arose out of a common judgment, filing only one copy of the decree, District Judge as well as High Court not justified in dismissing the appeal without going into the merits on the technical ground of bar of limitation.

But, the principle laid down in the above judgment has no application. However, leaving it open to the Appellate Court, if any plea is raised about abatement of the suit, the Appellate Court can examine such issue at the end of hearing and at the time of pronouncement of judgment and if the Court finds that suit is deemed to have been abated, despite Order XXII Rule 4 Clause (4) C.P.C, the Court can pass appropriate order, but at this stage, the appeal cannot be allowed, by setting aside the decree and judgment, by allowing the application.

Hence, the orders in I.A.No.172 of 2010 & I.A.No.168 of 2010 in A.S.No.22 of 2004 dated 28.09.2010 passed by the Additional District Judge, Hindupur, is free from any illegality, warranting interference of this Court, since such question cannot be decided at this stage, in an interlocutory application. Consequently, I find no ground to interfere with the findings recorded by the Court below, while permitting the petitioners to raise all such contentions

¹ (1982) 1 Supreme Court Cases 479

at the time of hearing of the appeal, directing the Appellate Court to decide the issue of abatement, notwithstanding the observations or findings recorded, if any, by this Court.

With the above direction, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:14.03.2018

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