

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

C.R.P.Nos.3180 and 7427 of 2017

Date: 03.08.2018

Between:

Koilakandal Purushotham Kumar,
S/o.Sri K.N.Acharyulu,
Aged about 41 years, Advocate
R/o.D.No.4-130, Middle Street,
Simhachalam,
Visakhapatnam and another ... Petitioners

And

Koilakandal Narayana Kumar,
S/o.Sri K.N.Acharyulu, Hindu,
Aged about 53 yars, Advocate
R/o.D.No.4-130, Middle Street,
Simhachalam,
Visakhapatnam and six others

Counsel for the Petitioners : Mr.A.S.C.Bose

Counsel for the Respondents: None appeared for R1 to R6

Mr.G.Rama Gopal for R7

The Court made the following:

Common Order:

The short issue that arises for consideration in these civil revision petitions is whether the Court below is justified in partly dismissing I.A.No.895 of 2015, filed to set aside the dismissal order dated 10.08.2015 and restoration of the suit *qua* Defendant Nos.1, 2 and 6 and I.A.No.896 of 2015 filed under Order XXII Rule 4 (4) of C.P.C., for exemption from bringing on record, the legal heirs of the said defendants.

2. Respondent/Defendant Nos.1 and 6 have died before the filing of the civil revision petitions. Notice sent to respondent No.2/defendant No.2 has returned with the endorsement 'expired'. Though notice was served on respondent No.4 and on the counsel for respondents No.3 and 5, no one entered appearance on their behalf. I have heard Mr.A.C.S.Bose, learned counsel for the petitioners and Mr.G.Rama Gopal, learned counsel for respondent No.7.

3. For convenience, the parties are referred to as they are arrayed in the suit. Plaintiff Nos.1 and 2 and defendants No.1 and 3 are the sons of defendant No.2. The plaintiffs filed the suit for partition. It is their pleaded case that on 12.07.1970, the maternal grandfather of the plaintiffs and defendants No.1 and 3, executed a will and got it registered, creating life interest in defendant No.2 and vested remainder in favour of plaintiffs and defendants No.1 and 3.

Defendant No.2 filed a written statement, wherein he has averred that he along with defendant No.1, sold the suit schedule property to defendants No.4 to 6 for family necessities. Defendant No.2 died after filing the written statement. Defendant No.1 did not contest the suit and as a result thereof, he was set *ex parte*. On 02.06.2012, Defendant No.1 died. On 10.12.2014, Defendant No.2 also died. In the year 2012, counsel for defendant No.6 filed a memo., informing that his client has died. On 13.06.2012, the plaintiffs filed a memo., seeking particulars of the L.Rs. of defendant No.6 from the latter's counsel.

4. It is an admitted case that no such details were furnished by counsel for defendant No.6. By order dated 10.08.2015, the lower Court has dismissed the suit *qua* defendant Nos.1, 2 and 6 as abated. Immediately thereafter, the petitioners have filed the aforementioned I.As., namely, I.A.No.895 of 2015, to set aside the dismissal order and restore the suit and I.A.No.896 of 2015 under Order XXII Rule 4 (4) C.P.C., for exemption from bringing on record the legal representatives of Defendant Nos.1, 2 and 6. The lower Court partly allowed both the I.As. to the extent of Defendant No.1 only, while dismissing both the applications in respect of Defendant Nos.2 and D6.

5. As regards the applications *qua* defendant No.6, it is not disputed by the learned counsel for Defendant No.7 that on coming

to know about the death of defendant No.6 through the memo. filed by his counsel, the plaintiffs' counsel filed Memo. dated 13.06.2012, seeking particulars of L.Rs. of the deceased defendant No.6 and that no particulars were furnished to the counsel for the plaintiffs.

6. Under Order XXII Rule 10A of C.P.C., a duty is cast on the counsel to communicate to the Court, the death of a party. This provision reads as under:

“Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist”.

7. In the instant case, the counsel far from discharging the duty cast upon him under the above extracted rule, has not even furnished the details, at least when the counsel for the plaintiffs have filed a memo., requesting for furnishing such details. The observation of the lower Court that the mere statement that a memo. was filed by the counsel for the plaintiffs on 13.06.2012, seeking furnishing of particulars of legal representatives, would not exempt the plaintiffs from bringing on record the legal heirs of defendant No.6, runs contrary to Order XXII Rule 10A. When the counsel for the deceased party did not take steps to furnish the details of the legal representatives, he did not discharge his duty. The adversary party i.e. plaintiffs are not expected to gather the particulars on their own and implead them. Indeed, clause (4) of Order XXII Rule 4 vests power in the Court to exempt the plaintiff from the necessity of substituting

the legal representatives of any defendant, evidently, to cover a situation of this nature. I am, therefore, of the opinion that the lower Court has committed a patent error in dismissing I.A.No.896 of 2015 filed for exemption *qua* defendant No.6.

8. As regards defendant No.2, admittedly, apart from the plaintiffs, defendants No.3 is also the legal representative of the said defendant.

In **MAHABIR PRASAD VS. JAGE RAM AND OTHERS**¹, the Supreme Court dealing with similar situation, held as under:

“Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained”.

9. The ratio that could be culled out from the judgment in **Mahabir Prasad** (supra) is that, the suit would not abate, where one of the legal representatives is already on record, albeit in another capacity, if the remaining legal representatives of the deceased are not brought on record within the period of limitation. This however, does not mean that the plaintiffs are entitled to seek exemption from impleading the remaining legal heirs forever. The limited protection plaintiffs would have is, against dismissal of the suit as abated, only

¹ AIR 1971 SUPREME COURT 742

for the reason that the L.Rs. were not brought on record within the period of limitation.

10. On the analysis as above, I am of the opinion that while the plaintiffs are entitled for exemption from bringing on record the legal representatives of Defendant No.6, the suit is not liable to be dismissed merely because the remaining L.Rs. of Defendant No.2 are not brought on record. The plaintiffs are however granted eight weeks time to bring on record, the remaining L.Rs. of defendant No.2 on record. Subject to this condition, I.A.No.895 of 2015 is allowed in toto and I.A.No.896 of 2015 is allowed, subject to the condition stipulated above.

11. In the result, the order of the Civil Court dated 30.03.2017 in I.A.Nos.895 of 2015 and 896 of 2015 in O.S.No.116 of 2009 on the file of VI Additional District Judge, Visakhapatnam, is set aside. Civil Revision Petitions are, accordingly, allowed to the extent indicated above.

12. As a sequel to the disposal of the civil revision petitions, I.A.No.1 of 2017 (C.R.P.M.P.No.4190 of 2017) is disposed of as infructuous.

(C.V.Nagarjuna Reddy, J)

Date: 03rd August, 2018

msb

