

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.10.2019

CORAM

THE HON'BLE MR.JUSTICE R. SURESH KUMAR

C.R.P.No.1941 of 2019
and C.M.P.No.12717 of 2019

C.Naveen Kumar

... Petitioner

-Vs-

S.Chandrasekar (Deceased)

1.T.N.Gopalakrishnan

... Respondent

Prayer : Civil Revision Petition under Article 227 of the Constitution of India against the fair and decreetal order dated 29.04.2019 passed in I.A.No.2 of 2019 in C.M.P.No.922 of 2018 in A.S.No.14 of 2018 by the learned Principal Judge, City Civil Court, Chennai.

For Petitioner : Mr.S.Anbazhagan

For Respondent : Mr.P.B.Balaji

O R D E R

This revision has been filed against the fair and decreetal order dated 29.04.2019 passed in I.A.No.2 of 2019 in C.M.P.No.922 of 2018 in A.S.No.14 of 2018 on the file of the learned Principal Judge, City Civil Court, Chennai.

2. Before the first appellate Court, A.S.No.14 of 2018 was filed by the plaintiff, who partially lost the suit against the father of the present petitioner herein, one Naveen Kumar, who is admittedly the legal heir of the deceased S.Chandrasekar, who was the defendant in the suit.

3. Since the said Chandrasekar is no more, the plaintiff / appellant before the first appellate Court seems to have filed a petition to implead or bring the Legal Representative of of the said Chandrasekar, and the said petition was allowed and accordingly amendment was carried out in the first appeal.

4. Only at that stage, the said I.A.No.2 of 2019 was filed by C.Naveen, whose original name is C.Naveen Kumar, who is the petitioner herein, to set aside the said order dated 21.12.2018 passed exparte in C.M.P.No.922 of 2018 in A.S.No.14 of 2018, by and under which he has been impleaded as the legal representative of the said Chandrasekar, who was the defendant

in the suit. The said I.A.No.2 of 2019 was dismissed on 29.4.2019 which is the order impugned herein.

5. Heard Mr.Anbazhagan, learned counsel for the petitioner and Mr.P.B.Balaji, learned counsel for the respondent.

6. The point in issue in this revision is as to whether, the revision petitioner, though admittedly the legal heir of his father Chandrasekar, who was the original defendant before the trial Court, is the legal representative within the meaning of Section 2(11) of Civil Procedure Code, in view of the issue raised by him that, he has not inherited the estate of the deceased Chandrasekar, though he is the legal heir of him.

7. In deciding the said issue, the learned Judge of the first appellate Court, in the impugned order, has passed the following order.

"3. The present petitioner is the legal heir of the deceased Chandrasekar is an admitted fact. The learned counsel for the petitioner contended that the petitioner need not be added as a party to the appeal, since he has not inherited any property. No doubt, the suit is for money. For the money borrowed by the parents, children cannot be held personally liable. On the other hand, the decree has to be executed against the estate of the deceased inherited by the legal heirs. However, for deciding the appeal, legal heir has to be impleaded. Behind the back of the legal heir, appeal cannot be disposed. In such circumstances, impleading the petitioner as respondent in the appeal is inevitable. Having allowed the petition (CMP No.922/2018) to be allowed and after 4 months filing of the present petition to set aside the exparte order that too after amendment of the appeal, appears to be a delaying tactics. The petitioner is at liberty to agitate his turn at the time of execution. That being so, this Court finds no merits in this application and the petition is liable to be dismissed.

4. In the result, this petition is dismissed. No costs."

8. Assailing the said order, the learned counsel for the petitioner has taken this Court to Section 2(11) of C.P.C., as well as Order XXII Rule 4A and 5. For better appreciation, the relevant Section as well as the Order and Rule referred to above, are hereby extracted.

"Section 2(11) : "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

Order XXII Rule 4A : Procedure where there is no legal representative:-

(1) If in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person or may by order appoint the Administrator General or an officer of the Court or such other person as he thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court -

(a) may require notice of the application for the order to be given to such (if any) of the persons having an interest in the estate of the deceased person as it thinks fit; and

(b) shall ascertain that the person proposed to be appointed to represent the estate of the deceased person is willing to be so appointed and has no interest adverse to that of the deceased person.

5. Determination of question as to legal representative -

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Provided that where such question arises before an Appellate Court, that Court, may before determining the question, direct any subordinate Court to try the question and to return the records together with evidence if any, recorded at such trial, its findings and reasons therefore, and the Appellate Court may

take the same into consideration in determining the question."

9. On perusal of the aforesaid provisions, this Court finds that, Section 2(11) makes it clear that 'legal representative' means, a person who in law represents the estate of the deceased person. So, 'legal heir' need not be a 'legal representative' unless and until he represents the estate of the deceased person.

10. In this context, if at all any dispute arises or that ground is raised by the legal heir of any deceased party, that too particularly before the appellate Court, the procedure to be followed by the appellate Court is, as has been contemplated under Order XXII Rule 5 of C.P.C. Rule 5 of Order XXII makes it clear that, where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court. That means, the issue raised by the legal heir of either plaintiff or defendant, has to be first decided as preliminary issue even at the appellate stage.

11. The proviso to Rule 5 of Order XXII further makes it clear that the appellate Court, in deciding the said question, may direct any subordinate Court to try the question and to return the records together with evidence if any, recorded at such trial, its findings and reasons.

12. The word "such trial" also makes it clear that in order to find out the answer for the question raised by the legal heir of the plaintiff / defendant, trial has to be conducted, where evidences have to be let in and it has to be decided by the Court. That is the reason why this Court feels that, under the proviso to Rule 5 of Order XXII, it has been obligated that the appellate Court can send the matter to the subordinate Court with a direction to try the question and return the records altogether with evidences recorded in the trial.

13. In view of the mandatory requirement, as has been provided under Order XXII Rule 5 of CPC, it becomes obligatory on the part of the appellate Court to act upon under the said Rule to decide the question as to whether, a particular person being the legal heir, whether can be construed as a legal representative to be impleaded to represent the estate of the deceased. Herein, in the case on hand, the defendant is no more. Therefore, the plaintiff, who filed the appeal before the first appellate Court, because he partially lost the suit before the trial Court, had taken steps to implead the present revision

petitioner as the legal representative of the defendant's estate. However, though such an order was passed, of course in exparte, the revision petitioner has filed the present I.A., to set aside the order on the ground that he may be a legal heir of the deceased, but not legal representative, since he has claimed to be not inherited the estate of the deceased.

14. Therefore, certainly a question arises in this case to decide as to whether, the revision petitioner is a legal representative of the deceased ie., the defendant and that question has to be determined under Order XXII Rule 5 and in this context, it is for the first appellate Court to remand the matter with a direction to the trial Court to determine that issue by recording the evidence in the trial Court and based on such evidence to be recorded by the trial Court, the ultimate decision has to be made by the first appellate Court and that is the scheme of Order XXII Rule 5.

15. This legal position is not in controversy as per Mr.Balaji, learned counsel for the respondent, who has fairly made a submission that when a procedure is contemplated under the C.P.C., the same has to be scrupulously followed by the Court concerned.

16. In that view of the matter, this Court has no hesitation to hold that the present impugned order, rejecting the I.A., filed by the revision petitioner before the first appellate Court, is unsustainable and accordingly the said order is liable to be interfered with.

17. In result, the impugned order is set aside and the matter is remanded back to the first appellate Court with a direction to invoke Rule 5 of Order XXII and send the matter back to the trial Court concerned with a direction to record the evidence on the issue on legal representative, as raised by the present revision petitioner and after recording the evidence, the records along with the findings and reasons, can be forwarded by the trial Court to the first appellate Court, based on which the first appellate Court can decide the issue of legal representative, and accordingly act upon further in accordance with law.

18. In view of this cumbersome process, which has to be necessarily undertaken by the Courts below, three months time is fixed by this Court, within which the first appellate Court has to get the evidence recorded from the trial Court and decide the issue under Order XXII Rule 5 of C.P.C., as indicated above. With the above observations and direction, the present Civil

Revision Petition is ordered accordingly. No costs.
Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

KST

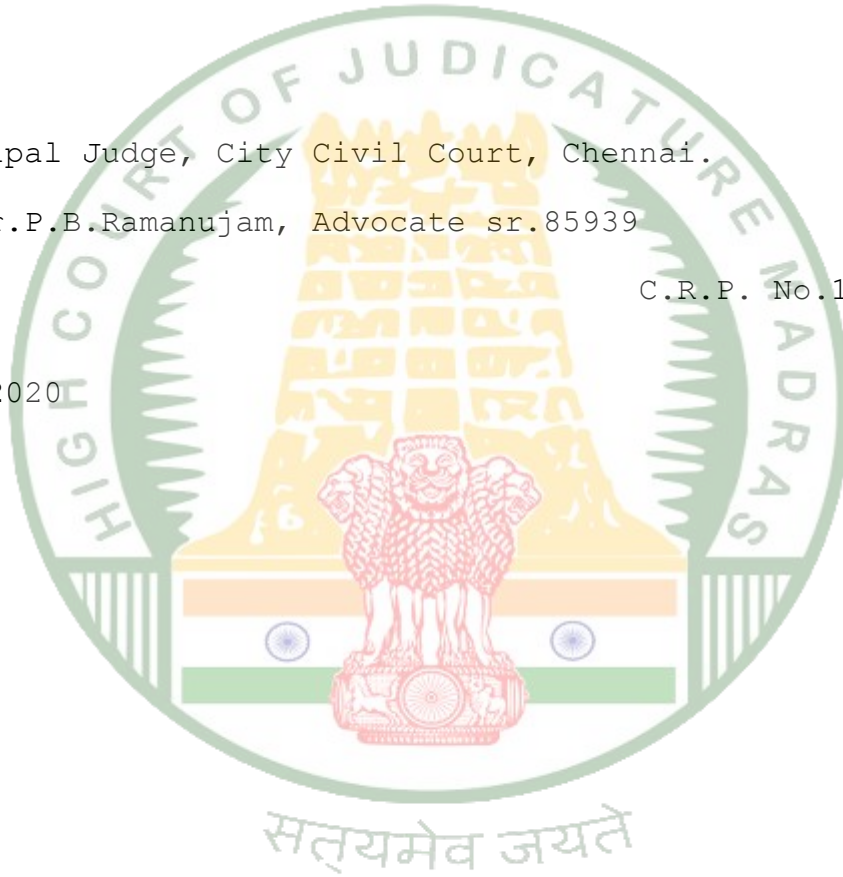
To

The Principal Judge, City Civil Court, Chennai.

+1cc to Mr.P.B.Ramanujam, Advocate sr.85939

C.R.P. No.1941 of 2019

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