

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.04.2022

CORAM :

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

REVIEW APPLICATION NO.10 OF 2020

&

C.M.P.NO.833 OF 2020

AGAINST

S.A.NO.1076 OF 1992

N.Kamatchi Mudaliar (died)  
(sole respondent in Second  
Appeal No.1076 of 1992)

K.Balakrishnan  
S/o.Kamatchi Mudaliar

... Applicant/Respondent

.Vs.

A.Pankajam

... Respondent/Applicant

PRAYER:-

Review Application filed under Order 47 Rule 1 R/w 114 CPC praying to review and set aside the judgment and decree rendered in S.A.No.1076 of 1992 dated 21.04.2003 and to allow this Review Application.

PRAYER IN S.A.NO.1076 OF 1992:-

Second Appeal filed under Section 100 of C.P.C., against the Judgment and Decree dated 23/04/1991 in A.S.No.3 of 1991 on the file of the Principal Subordinate Judge, Coimbatore confirming the Judgment and Decree dated 12/11/1985 in O.S.No.72 of 1995 on the file of the Additional District Munsif, Coimbatore.

For Petitioner : Mr.T.Murugamanickam  
Senior Counsel  
For M/s.P.T.Ramadevi

For Respondent : Mr.P.Dinesh Kumar

## JUDGMENT

The petitioner in this Review Application is the legal heir of N.Kamatchi Mudaliar, respondent in S.A.No.1076 of 1992.

2. The respondent in the present Review Application filed a suit in O.S.No.72 of 1985 before the District Munsif Court, Coimbatore, for a declaration of her title to the suit property and for recovery of possession.

3. The trial court, after full contest, decreed the suit in favour of the plaintiff.

4. Aggrieved over the same, Kamatchi Mudaliar (deceased)/defendant in O.S.No.72 of 1985 filed an appeal in A.S.No.3 of 1991 before the Principal Subordinate Court, Coimbatore. The Principal Subordinate Judge, upheld the findings of the trial court only with regard to the title over the suit property and further held that the plaintiff is not entitled for recovery of possession.

5. Thereafter, the plaintiff preferred a second appeal in S.A.No.1076 of 1992. This court, after hearing both sides, modified the decree and judgment of the lower appellate court/Principal Subordinate Court, Coimbatore, vide its decree and judgment dated 21.04.2003 and held that the appellant/plaintiff is entitled for a decree of declaration and also for recovery of possession from the respondent/defendant. In other words, the decree and judgment of the trial court was restored.

6. Thereafter, the present petitioner filed a Special Leave Petition in SLP No.10334 of 2003 before the Hon'ble Supreme Court of India and the following orders were passed on 06.02.2004.

## "ORDER

According to the petitioner, the appeal before the High Court had abated for failure to bring on record the legal representative of the sole respondent therein. If that be so, the petitioner is at liberty to invite the attention of the High Court setting the fact and invite a finding on the abatement of the appeal. That remedy being available to the petitioner, permission to file the petition for special leave is refused."

7. Heard Mr.T.Murugamanickam, learned Senior Counsel, assisted by Ms.P.T.Ramadevi, learned counsel for the petitioner and Mr.P.Dinesh Kumar, learned counsel for the respondent.

8. The learned counsel for the petitioner contended that based on the directions of the Hon'ble Supreme Court, the present Review Application has been filed. His specific contention is that Kamatchi Mudaliar, respondent in S.A.No.1076 of 1992 died on 14.11.1998 i.e., before the disposal of the second appeal. According to him, without impleading the legal heirs of the deceased respondent, the decree passed by this court has become a nullity and therefore, the same cannot be executed. It is also his contention that the appeal is deemed to have been abated since the appellant did not file any application within the time prescribed under law. He relied on the following decisions in

1) Amba Bai and others vs. Gopal and others reported in (2001) 5 Supreme Court Cases 570.

2) Gurnam Singh (dead) through legal representatives and others vs. Gurbachan Kaur (dead) by legal representatives reported in (2017) 13 Supreme Court cases 414

and contended that where during the pendency of second appeal if the sole appellant or the respondent dies and his legal heirs were not brought on record, the decree passed in the second appeal by the High Court would be a nullity. In such cases, the decree and order of the first appellate court would become final. It is also his contention that on the death of a party to appeal, if no application is filed within 90 days, the appeal would stand dismissed as abated and any decree passed thereafter would be without any jurisdiction.

9. Per contra Mr.P.Dinesh Kumar, learned counsel for the respondent in the instant petition contended that the sole defendant in S.A.No.1076/1992 was represented by a counsel and as per Order XXII Rule 10 (A) of the Code of Civil Procedure, the learned counsel for the defendant should have informed the court about the death of the defendant and furnish the details of the legal heirs of the deceased defendant. It is his further contention that even after the death of the deceased defendant, the vakalat filed by the counsel for the defendant holds good for the purpose of furnishing details of legal heirs to the court. In the instant case, the respondent in S.A.No.1076 of 1992 was represented by a counsel and he did not inform the court about the death of his client and on the contrary argued the case. Therefore, the decree passed in the second appeal would be binding on the legal heirs of the deceased Kamatchi Mudaliar. In support of his contention, he relied on the following decisions.

1) P. Jesaya by Lrs vs. Sub-Collector and another reported in 2004 13 SCC 431.

- 2) C. Manoharan vs. C.V. Subramaniam and others reported in 2006 4 MLJ 898.

10. In the instant case, it is pertinent to point out that the respondent/defendant did not file any second appeal when the first appellate court held that the plaintiff has established her title over the suit property. He did not also file any cross appeal in S.A.No.1076 of 1992 filed by the plaintiff. Both the courts below had concurrently held that the plaintiff has established her title over the suit property and the single Judge of this Court had held that the plaintiff has valid title over the suit property and she is also entitled for recovery of possession from the defendant.

11. In the decision in P. Jesaya by Lrs vs. Sub-Collector and another cited supra, it has been held thus.

3. The only contention taken 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 [(2003) 10 SCC 691] and in the case of Amba Bai v. Gopal [(2001) 5 SCC 570] . 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 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.

In the decision in C. Manoharan vs. C.V. Subramaniam and others reported in 2006 4 MLJ 898 cited supra, it has been held thus.

"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."

12. The objection taken by the petitioner is that the decree and judgment passed by this Court against his deceased father (defendant in S.A.No.1076 of 1992) is a nullity as the same was passed after his death without impleading his legal heirs. Order XXII Rule 10 (A) of the Code of Civil Procedure stipulates that 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. It is also seen from the records that the defendant was represented by a counsel and he also argued the entire case and at this stage, the petitioner cannot contend that the decree passed by this Court is a nullity especially when he has not challenged the decree and judgment passed by the first appellate court, where the title of the appellant/plaintiff was held to be valid. As per the ratio laid down in the above decisions relied on by the counsel for the respondent, the decree passed by this Court in S.A.No.1076/1992 cannot be treated as nullity.

13. For the reasons aforesaid, this Review Application fails and is dismissed. No costs. Consequently connected Civil Miscellaneous Petition is dismissed.

Sd/-  
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

bga

To

1. The Principal Subordinate Judge,  
Coimbatore.
2. The Additional District Munsif,  
Coimbatore.

Copy To:-

The Section Officer,  
V.R. Section,  
High Court, Chennai.

+1cc to M/s.P.T.Ramadevi, Advocate, S.R.No.24843

REVIEW APPLICATION NO.10 OF 2020 &  
C.M.P.NO.833 OF 2020 AGAINST  
S.A.NO.1076 OF 1992

SJ(CO)  
PBS/12/05/2022