



C.R.P. (MD) No. 44 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.07.2024

CORAM

THE HON'BLE MRS. JUSTICE L.VICTORIA GOWRI

C.R.P. (MD) No.44 of 2020

S.Rajarathinam

... Petitioner

-VS-

Simon (Died)

1.D.Mary @ Parisuthamary

2.Solomon Mary

3.S.M.Thathanathan

4.M.Leema Rose

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, praying to call for the records in I.A.No.921 of 2018 in I.A.No.626 of 2018 in AS.SR.No.563 of 2014 on the file of the learned Sub-Judge, Lalgudi and set aside the fair and decreetal order made therein dated 12.09.2019.

For Petitioner : Mr.B.Ramananthan,
for Mr.M.Siddharthan

For R-1 : Mr.K.S.Kathiravan,
for Mr.C.Gobinath

For R-2 : Dismissed vide
Court dated 10.10.2022



C.R.P. (MD) No. 44 of 2020

For R-3 & R-4 : No Appearance

ORDER

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This Civil Revision Petition came to be filed assailing the order passed by the learned Single Judge at Lalgudi in I.A.No.921 of 2018 in I.A.No.626 of 2018 in AS.SR.No.563 of 2014, dated 12.09.2019.

2. For the sake of clarity and convenience, the parties are hereinafter referred as per the ranking in the original suit.

3. An Original Suit in O.S.No.247 of 2004 came to be filed on the file of the learned Additional District Munsif, Tiruchirappalli. The suit was one for bare injunction filed by a cultivating tenant requiring the trial Court to pass an order of permanent injunction restraining the subsequent owner who had been the second defendant from interfering with the peaceful possession and enjoyment of the suit property by him, except in accordance with the procedure established by law. Later, the suit came to be dismissed on 07.08.2013. An appeal was filed before the Subordinate Court, Trichirappalli, with a delay of 29 days. In view of the same, I.A.No.190 of 2014 came to be filed seeking to condone the delay of 29 days in filing the Appeal Suit. Along with the said Interlocutory Application another Interlocutory Application in I.A.No.626 of 2018 was also filed by the plaintiff under Order I Rule 10 (2) CPC.



C.R.P. (MD) No. 44 of 2020

4. In due course of time, the said case was transferred to the file of the learned Single Judge at Lalgudi, wherein, the said I.A.No.626 of 2018 came to be renumbered as I.A.No.921 of 2018. The petition in I.A.No.921 of 2018 came to be filed, because the first defendant, who was the original owner of the plaint schedule property passed away on 07.10.2013. For the purpose of impleading his legal heirs, an application under Order I Rule 10 of the Code of Civil Procedure, 1908, was filed by the plaintiff before the First Appellate Court. However, the First Appellate Court dismissed the said Interlocutory Application on two grounds, viz.,

I). The application ought to have been filed under Order XXII Rule 4 instead of Order I Rule 10 (2) CPC.

II. The application is bereft of the details as to in what way the legal heirs of the first defendant interfered with the possession of the cultivating tenant with respect to the plaint schedule property, since the suit is one for bare injunction. On the said basis, the said Interlocutory Application came to be dismissed by the order of the First Appellate Court on 12.09.2019. Assailing the same, the appellant is before me.



5. Mr.B.Ramanathan, learned counsel appearing for the appellant submitted that the mistake of the counsel in preferring an Interlocutory Application under the incorrect provision should not burden the litigant. It was only the mistake of the counsel who had filed an application under Order I Rule 10 (2) CPC instead of Order XXII Rule 4 CPC. In which, he relied upon the Judgment of the Hon'ble Supreme Court reported in **2017 (6) CTC 54** in the case of **Pankajbhai Rameshbhai Zalavadia Vs. Jethabhai Kalabhai Zalavadiya (Deceased) Through his legal heirs and others**. The Hon'ble Apex Court has dealt with an application under Order I Rule 10 CPC and the relevant portion in the said Judgment is extracted hereunder:

“14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 of the CPC, in order to do justice between the parties. Merely because of the non- mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities.”



C.R.P. (MD) No. 44 of 2020

Relying upon the said Judgment, the learned counsel submitted that the First Appellate Court has dismissed the said Interlocutory Application merely on technicalities and relying on the same, he pressed for allowing the Civil Revision Petition.

6. Per contra, Mr.K.S.Kathiravan, learned counsel appearing for the second defendant opposed the Civil Revision Petition on two grounds, i.e., the said Interlocutory Application was barred in the eye of law for having been filed under the wrong provision of law precisely the same ought to have been filed under Order XXII Rule 4 CPC. He further opposed on the ground that there is no cause of action at all as against the parties, who are proposed to be impleaded when the suit is one for bare injunction.

7. Heard the learned counsel on either side. Carefully perused the materials available on record.

8. The Hon'ble High Court of Bombay has dealt with a similar matter in the case of *Jayalaxmi Janardhan Walawalkar and Others Vs. Lalchand Laxmichand Kapasi and Others* reported in *MANU/MH/0423/1998* and the relevant portion of the same is extracted hereunder:



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“6. Abatement of a suit takes place of its own force by the passage of time and no specific order is required to be passed. In other words, legal consequence of abatement takes place if a party to a suit dies and application for substitution is not made in time. Such legal consequence cannot be set at naught indirectly by invoking either provision of Order 1, Rule 10 or Section 151 of the Code of Civil Procedure by applying for impalement of legal representatives of deceased party at any time after the suit has abated and the said abatement has not been set aside. What has not been directly be seeking substitution and bringing on record the legal representatives under Order XXII, Rule 3 or 4 as the case may be or for setting aside the abatement under Order XXII, Rule 9, a party cannot be permitted to invoke the C.P.C. indirectly.

9. Adopting the same, the High Court of Bombay has passed yet another judgment in this regard and the same is reported in **MANU/MH/0698/2013** in the case of **Madhukar Ramchandra Keni Vs. Vasant Jagannath Patil and Others**, in which, the High Court has held that the wide powers given to the Court under Order I Rule 10 (2) are not intended to override the specific provision of Order XXII, Rule 3 or 4 or 9 CPC.

10. The Hon'ble Apex Court has dealt with a similar matter in the case of **Bhagwan Swaroop and Others Vs. Mool Chand and Others** reported in



(1983) 2 SCC 132 and the relevant paragraphs in the said judgment are extracted hereunder:

“14. Civil Procedure Code requires that in the event of death of a particular party, heirs and legal representatives of the deceased have to be brought on record within a particular period, provided the cause of action survives. If the legal representatives are not brought on record within the stipulated period, certain consequences follow and the action abates either wholly or partially depending on the facts and circumstances of a particular case. The Code further provides that an application may be made for setting aside the abatement within a stipulated period. It is now well settled that an abatement can be set aside at any time even beyond the period prescribed for making an application for setting aside the abatement, if sufficient cause is shown explaining the delay in the making of the application. If, irrespective of the provisions of the Code and the merits of the case, abatements are to be set aside as a matter of course merely on the ground that abatement is only a consequence of non-compliance of law of procedure and substantial justice is denied to the parties, the result may really amount to a denial of justice and in an indefinite prolongation of a litigation.

15. The provision fixing a particular time for making an application for bringing legal representatives on record with the consequence of the suit or appeal abating if no application is made within time, have been enacted for expeditious disposal of cases in



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the interest of proper administration of justice. It is further to be borne in mind that when a suit or an appeal abates, is very valuable right accrues to the other party and such a right is not to be ignored or interfered with lightly in the name of doing substantial justice to the party, as depriving a party of a lawful right created in the interest of administration of justice in the absence of good grounds results in injustice to the party concerned. For doing justice to the parties, the Courts have consistently held that whenever sufficient cause is shown by a party at default in making an application for substitution, abatement will have to be set aside as the good cause shown for explaining the delay in making the application is sufficient justification, to deprive the other party of the right that may accrue to the other party as a result of the abatement of the suit or appeal. The Courts have also consistently ruled that laches or negligence furnish no proper grounds for setting aside the abatement. In such cases, a party guilty of negligence or laches must bear the consequences of his laches and negligence and must suffer. In appropriate cases, taking into consideration all the facts and circumstances of a case, the Court may set aside the abatement, even if there be slight negligence or minor laches in not making an application within the time provided an overall picture of the entire case, requires such course for furthering the cause of justice. When negligence and laches are established on the part of the party who seeks to set aside the abatement, the application of such a party should be entertained only in the rarest of cases for furthering the ends of justice only and on proper terms.



16. In the present case, the appeal has been filed against a preliminary decree in a partition suit. A partition suit stands on a peculiar footing. In a partition suit any of the party can claim transposition from the category of the defendant to the category of the plaintiff and vice-versa. With the passing of the preliminary decree, shares of the parties are declared and rights of the parties pending the passing of the final decree are to an extent determined. As a result of the passing of the preliminary decree, certain rights do accrue to the parties subject to the results of the appeal filed. There is no doubt that there has been some amount of negligence on the part of the appellant in not making the application for substitution within time. The appellant had full knowledge of the death of the respondent who was a near relation of the appellant. The application made by the heirs of the deceased for substitution under Order 1, Rule. 10 of the CPC is indeed misconceived and has been rightly held to be so by the High Court. To my mind, it cannot be said that the High Court had acted improperly or illegally in the facts and circumstances of this case in refusing to set aside the abatement.”

11. Though the learned counsel for the appellant relied upon the case reported in **2017 (6) CTC 54**, I am of the considered view that the same is not applicable to the facts and circumstances of the case, because the same was all about a situation which was vice versa in which an interim application came to be filed under Order XXII Rule 4 CPC instead of having filed an application under Order I Rule 10 CPC.



C.R.P. (MD) No. 44 of 2020

12. However, in the instant case, the plaintiff has filed an application seeking to implead the legal heirs of the deceased first defendant under Order I Rule 10 (2) CPC. Fully fortified by the various judgments extracted supra, I am of the considered view that after abatement of the suit, the Court cannot substitute the legal heirs in an application seeking impleadment of legal heirs of deceased as necessary parties under Order I Rule 10 CPC. or by invocation of inherent jurisdiction under 151 CPC indirectly when there is a specific provision under Order XXII Rule 3 or 4 or 9 CPC for the said purpose.

13. Accordingly, the Civil Revision Petition fails and the same stands dismissed. No costs.

15.07.2024

Index : Yes/No

Internet : Yes/No

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To

1. The Sub Judge, Lalgudi.

2. The Section Officer, Vernacular Section,

Madurai Bench of Madras High Court, Madurai.



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C.R.P. (MD) No. 44 of 2020

L.VICTORIA GOWRI, J.

TSG

C.R.P.(MD).No. 44 of 2020

15.07.2024