

A.C. Shanmugam Vs Malathi Devi (Died) Sudha

Court: Madras High Court

Date of Decision: March 11, 2013

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 22 Rule 1, Order 22 Rule 11, Order 22 Rule 3(2), Order 22 Rule 4, Order 22 Rule 4
Limitation Act, 1963 – Section 5

Citation: AIR 2013 Mad 142

Hon'ble Judges: T. Mathivanan, J

Bench: Single Bench

Advocate: P. Valliappan, for the Appellant; Chitra Sampath, for Mr. T.S. Baskaran, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

T. Mathivanan, J.

This civil miscellaneous petition has been filed u/s 5 of the Limitation Act, 1963 to condone the delay of 813 days in

filing an application to restore the appeal in A.S. No. 287 of 1994 on the file of this Court. The petitioner herein has preferred the present appeal in

A.S. No. 287 of 1994, before this Court, challenging the Judgment and Decree dated 01.10.1992 and made in O.S. No. 4192 of 1983, on the

file of the learned IV Additional Judge, City Civil Court, Chennai.

2. The petitioner appears to have filed two suits viz., O.S. Nos. 3777 of 1983 and 4192 of 1983 on the file of the learned IV Additional Judge,

City Civil Court, Chennai. The suit in O.S. No. 3777 of 1983 was filed as against the deceased respondent Malathi Devi and one Venugopal

Naidu seeking the relief of permanent injunction as well as mandatory injunction. Another suit in O.S. No. 4192 of 1983 was filed as against the

deceased respondent seeking the relief of specific performance.

3. Both suits were contested by the defendants therein and ultimately in a common Judgment dated 01.10.1992 they were dismissed. No reference

is available on record to show as to whether the petitioner herein has preferred any appeal as against the dismissal of the suit in O.S. No. 3777 of

1983.

4. The petitioner has contended that the appeal in A.S. No. 287 of 1994 was dismissed for default on 24.10.2009. The sole respondent Malathi

Devi had died and hence the petition in C.M.P. No. 13578 of 1994 to bring on record the respondent/proposed respondent as the legal

representative of the deceased respondent Malathi Devi was filed and pending.

5. Earlier in the Order dated 01.10.2009, this Court has directed the petitioner to take steps to bring the legal representatives of the deceased

respondent on record and that failure on the part of the petitioner would result in dismissal of the appeal.

6. Further, he has also contented that he had entrusted the appeal to one Advocate by name Mr. K.S. Gurumurthy and after his death no one

seemed to have represented his case. Since the petitioner is very old and suffering from various ailments, he was not intimated by the Office of his

counsel.

7. The petitioner has also maintained that in order to restore the appeal an application ought to have been filed on or before 23.11.2009. But, it

was filed only on 13.02.2012 with a delay of 813 days and in the interests of justice the delay of 813 days might be condoned, otherwise, the

petitioner would be put into irreparable loss, hardship and injury.

8. On the other hand, the respondent/proposed respondent has contended in her counter affidavit that the sole respondent Malathi Devi had died

on 21.05.1994. The petitioner had filed a civil miscellaneous petition in C.M.P. No. 13578 of 1994, to bring the respondent/proposed respondent

on record as the sole legal heir, on 08.08.1994. But, the petitioner had failed to take steps to serve notice on the proposed party and after a lapse

of two years this Court on 21.06.1996 had passed the Order as under:

Two days time is granted for compliance. In case the defects are not complied with, the petition will automatically stand dismissed.

9. The respondent has also contended that the appeal stood abated for the non-impleadment of the legal heir of the deceased respondent on

account of expiry of the required period of limitation i.e., 150 days as on 18.10.1994. As per the Order of this Court dated 21.06.1996, the

impleading petition in C.M.P. No. 13578 of 1994 stood dismissed for default as early as on 23.06.1996. Hence, after the dismissal of the petition

to bring on record the legal representative, no further orders remained to be passed for dismissal of the appeal as it already stood abated. Hence,

the present petition which is filed to set aside the Order dated 24.10.2009 is not at all maintainable in law or on facts.

10. On careful perusal of the averments of the affidavit filed in support of the petition as well as the averments of the counter affidavit filed by the

respondent/proposed respondent, the following point has arisen for the consideration of this Court:

Whether the civil miscellaneous petition in C.M.P. No. 388 of 2012 is not maintainable?

11. Heard Mr. P. Valliappan, learned counsel appearing for the petitioner and Ms. Chitra Sampath, learned senior counsel, appearing for Mr. T.S.

Baskaran, learned counsel, who is on record for the respondent/proposed respondent.

12. The sole respondent Malathi Devi had admittedly died on 21.05.1994 during the pendency of the appeal. Thereafter, it appears that the

petitioner had filed an application in C.M.P. No. 13578 of 1994 on 08.08.1994 under Order XXII Rule IV of the CPC to bring the

respondent/proposed respondent on record as her legal representative.

13. As admitted by the petitioner, he had not taken steps to serve notice on the respondent/proposed respondent and therefore after a lapse of

two years, this Court on 21.06.1996 has passed an Order saying that "Two days time is granted for compliance. In case the defects are not

complied with, the petition will automatically stand dismissed."

14. It is apparent from the face of the records that within the two days time granted by this Court, the petitioner never chosen to take steps to

serve notice on the respondent/proposed respondent. Strictly speaking the petition in C.M.P. No. 13578 of 1994 was automatically dismissed on

23.06.1996 in view of the Order passed by this Court dated 21.06.1996.

15. In this connection, Ms. Chitra Sampath, learned senior counsel has pointed out that the appeal itself stood abated for non-impleadment of the

legal representative of the deceased respondent upon the expiry of the required period of limitation i.e., 150 days as on 18.10.1994 and that after

the dismissal of the application in C.M.P. No. 13578 of 1994 to bring on record the legal heir, no further orders remained to be passed for

dismissing the appeal as it had got abated already.

16. It is manifested from the records that on 01.10.2009, this Court happened to pass an Order as under:

None appears for the petitioner/appellant.

Issue fresh notice to the proposed respondent returnable by 22.10.2009. Private notice is also permitted.

It is made clear that failure on the part of the petitioner to take steps against the legal representatives of the sole respondent would entitle dismissal

of the appeal on the next hearing. Post on 22.10.2009.

17. Despite the direction of this Court, the petitioner had not chosen to take steps to serve notice on the respondent within that period. The appeal

along with the petition in C.M.P. No. 13578 of 1994 came up for hearing on 23.10.2009. On that date, this Court has observed in it's Order

saying that:

In the last hearing, on 01.10.2009, an order was passed directing the appellant to take fresh notice to the proposed respondent, as the sole

respondent died and private notice was also permitted and an order was passed that in the event of failure on the part of the petitioner to take such

steps to bring the legal representatives of the sole respondent would entitle dismissal of the appeal on the next hearing. In spite of this order, no

steps have been taken and none appeared for this case even today. Hence post the case for dismissal on 24.10.2009.

On 24.10.2009, this Court has dismissed the appeal for non-prosecution.

18. In this connection, Ms. Chitra Sampath, learned senior counsel, has indicated the following two points:

a. In view of the Order passed by this Court on 21.06.1996, the petition in C.M.P. No. 13578 of 1994 was automatically dismissed on

23.06.1996 as the petitioner had not complied with the direction of this Court within two days reckoning from 21.06.1996;

b. Even though the petition in C.M.P. No. 13578 of 1994, to bring on record the respondent/proposed respondent as the legal representative of

the deceased respondent Malathi Devi, was filed in time, it stood dismissed for default as early as on 23.06.1996. After the dismissal of the

petition to bring on record the legal representative of the deceased respondent, no further orders remained to be passed for dismissing the appeal

as abated as it already stood abated upon the expiry of the required period of limitation i.e., 150 days as on 18.10.1994.

19. According to the learned senior counsel, after the expiry of 150 days the appeal automatically stood abated as no legal representative was

impleaded and therefore no separate order is required to dismiss the appeal as abated as it already stood abated.

20. This Court has given it's careful consideration to the submissions made by the learned senior counsel.

21. On perusal of the counter affidavit filed by the respondent/proposed respondent, this Court finds some force in the arguments advanced by the

learned senior counsel. Based on the submissions of the learned senior counsel, this Court is of view that the present petition seeking relief of

condoning the delay of 813 days in filing the petition to restore the appeal in A.S. No. 287 of 1994 is not at all maintainable.

22. On perusal of the affidavit filed in support of the petition, this Court is also able to find that the petitioner has misconstrued the facts as well as

the relevant provisions of law. Otherwise, the present petition would not have been filed u/s 5 of the Limitation Act.

23. It is significant to note here that though this Court in it's Order dated 24.10.2009 has stated that the appeal was dismissed for non-

prosecution, infact on 24.10.2009, the appeal in A.S. No. 287 of 1994 was not in subsistence. It was already abated as on 18.10.1994 after the

expiry of the period of limitation i.e., 150 days. The petitioner was under the wrong impression that the appeal was in subsistence till 24.10.2009.

24. It is obvious to note here that though the petition in C.M.P. No. 13578 of 1994 was dismissed as early as on 23.06.1996 in view of the Order

passed by this Court on 21.06.1996, unfortunately the said petition had also been travelling along with the appeal till 24.10.2009 on which date

this Court happened to pass an Order as if the appeal was dismissed for default.

25. Admittedly, the deceased respondent Malathi Devi had passed away on 21.05.1994.

26. As contemplated under Article 120 of the Limitation Act, 1963, under the CPC (5 of 1908) to have the legal representative of a deceased

plaintiff or appellant or of a deceased defendant or respondent made a party, the prescribed time is 90 days. The period of 90 days starts from the

date of death of the plaintiff, appellant, defendant or respondent as the case may be.

27. Insofar as the present case is concerned, the petition in C.M.P. No. 13578 of 1994 appears to have been filed on 08.08.1994 i.e., within the

period of 90 days.

28. Having been filed this petition to implead the legal representative of the deceased it is imperative on the part of the petitioner to take steps to

serve notice on the proposed respondent. But, even after the lapse of more than two years, the petitioner had not chosen to take steps. Even in

spite of a direction given by this Court, the petitioner had never chosen to comply with the order.

29. Since the petitioner has not taken any steps to issue notice to the proposed respondent in the petition in C.M.P. No. 13578 of 1994, he

himself had voluntarily allowed the appeal to be abated as 90 days had passed by that time. Mere filing of the petition for impleadment within the

time will not give any licence for the petitioner to keep the appeal alive as he had failed to take steps to serve notice on the proposed respondent.

30. Even after completion of 90 days, still the limitation law appears to be more benevolent by providing another 60 days to set aside the order of

abatement. As contemplated under Article 120 of the Limitation Act, the application under Order XXII Rule 4 of the CPC should have been filed

within 90 days to bring the proposed respondent on record as the legal representative of the deceased respondent.

31. Since no notice was served on the proposed respondent, 90 days had already expired. Even though a suit or appeal or any petition has got

abated that could be set aside within 60 days by invoking the provisions of Article 121 of the Limitation Act.

32. In this connection, Ms. Chitra Sampath, learned senior counsel has pointed out that the Order dated 24.10.2009 could not give a new cause

of action to file the present application as it merely recorded the earlier orders and was a formal expression for administrative purposes.

33. She has also adverted to that the Order dated 24.10.2009 itself had recorded the fact that the petitioner had not taken any steps to prosecute

the appeal.

34. In this regard, this Court would like to quote the decision in Goutami Devi v. Madhavan Sivarajan, reported in AIR 1977 Kerala 83 (FB) as a

reference, wherein it has been held that:

In view of the Scheme of Order 22 an assignee can make an application for leave to continue the suit so long as there is a suit, so far as it concerns

the assignee, on the file of the court. In a suit which is not subsisting there is no scope for seeking continuance. Therefore, in a case where the suit

has abated the assignee cannot thereafter seek to be added as a party to the action. The assignee cannot claim to come on record as a matter of

right since leave is not to be granted as a matter of course.

35. In an unreported Judgment of the Honourable Apex Court in Mangluram Dewangan vs. Surendra Singh and others, His Lordship Honourable

MR. JUSTICE R.V. RAVEENDRAN has held that:

A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of

the deceased plaintiff to be brought on record and proceed with the suit.

(b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.

(c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by

law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party

under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.

(d) Abatement occurs as a legal consequence of

(i) court holding that the right to sue does not survive; or

(ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not

dependant upon any formal order of the court that the suit has abated.

The observations made by His Lordship Honourable R.V. RAVEENDRAN, J., has absolutely been made applicable to the instant case on hand.

36. In the present case, though the application in C.M.P. No. 13578 of 1994 was filed within the time, since no steps were taken to serve notice

to the proposed respondent, it was automatically dismissed on 23.06.1996 in view of the Order passed by this Court dated 21.06.1996. Even

prior to 23.06.1996 i.e., as on 18.10.1994, the appeal itself got abated on account of expiry of the required period of limitation i.e., 150 days as

envisaged under Articles 120 and 121 of the Limitation Act, 1963.

37. Though the right to sue survives for the petitioner on account of laxity and acquiescence on his part, the appeal itself got abated as per Rule

4(3) of Order XXII of the Code of Civil Procedure.

38. Rule 11 to Order XXII of the CPC contemplates that the word "defendant" find a place in Rule 4 shall be held to include the word

"respondent".

39. It is more relevant to be noted here that without understanding the actual happenings in this appeal, the petitioner has filed the present

application to condone the delay of 813 days in filing the petition to restore the appeal in A.S. No. 287 of 1994.

40. As discussed in the foregoing paragraphs, virtually the appeal was not at all dismissed for default. The appeal has got itself abated automatically

on the expiry of the period of limitation of 150 days. Since the appeal itself stood abated automatically, no formal order is required to declare that

the appeal has got abated as the abatement occurs as the legal consequence and it does not require any formal order.

41. As observed by His Lordship Honourable Mr. JUSTICE R.V. RAVEENDRAN in an unreported decision Mangluram Dewangan vs.

Surendra Singh and others (cited supra), even though a formal order declaring the abatement is not necessary when the suit abates, as the

proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order recording

that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

42. Here, in the present case on hand, the learned counsel appearing for the petitioner has misconstrued the fact as if the appeal was dismissed for

default and that is why the present petition came to be filed u/s 5 of the Limitation Act to condone the delay of 813 days in filing the application to

restore the appeal.

43. Even if it is viewed in that angle, the present petition is not at all maintainable u/s 5 of the Limitation Act to condone the delay as no application

is filed to set aside the order of dismissal dated 23.06.1996, which appears to have been made on the application in C.M.P. No. 13578 of 1994.

44. Therefore, the entire arguments advanced by Mr. P. Valliappan, learned counsel appearing for the petitioner, is not able to be countenanced

and the decision in Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others, reported in AIR 1987 SC 1353 relied upon by

him to support his contention is also not able to be considered. Because, the condonation of delay is not the issue in this case.

45. Having regard to the above observations, this Court is of view that the civil miscellaneous petition is deserved to be dismissed. In the result, the

civil miscellaneous petition is dismissed. No costs.