# Nachammal and Others Vs Marathakatha Ammal and Others

## C.R.P. 1673/90

**Court:** High Court Of Kerala

**Date of Decision:** Jan. 9, 1991

**Acts Referred:**
Civil Procedure Code, 1908 (CPC) â€" Order 22 Rule 1, Order 22 Rule 3, Order 22 Rule 3(1), Order 22 Rule 4, Order 22 Rule 4(3)

**Citation:** (1991) 1 KLJ 724

**Hon'ble Judges:** P. Krishnamoorthy, J

**Bench:** Single Bench

**Advocate:** V. Chitambaresh, for the Appellant; K. Usha and Mathew G. Vadekkel, for the Respondent

## Judgement

P. Krishnamoorthy, J.
The only question involved in this revision by Defendants 5 to 7 is as to whether the court has jurisdiction to pass an

order under Order XXII, Rule 4(4) CPC after the suit has abated as against the deceased Defendant under Order XXII, Rule 3.

2. The suit is for partition of properties left behind by the husband of the 5th Defendant and father of Defendants 6 and 7. Plaintiff and Defendants

1 to 4 are brothers and sisters of the deceased. The 4th Defendant was ex parte in the suit and he died on 24th October 1988 leaving behind his

widow and son. Plaintiff filed two applications on 12th May 1990; I.A. No. 1478/90 for exempting her from impleading the legal representatives

of the 4th Defendant, under Order XXII, Rule 4(4) and I.A. No. 1479 for consequential amendment of the plaint. These were objected to by the

revision Petitioners on the ground that such an order cannot be passed after the suit had abated as against the 4th Defendant. This objection was

overruled and exemption granted by the trial court. Revision is against the above order.

3. As stated earlier, the only question is as to whether the court has jurisdiction to pass an order under Order XXII, Rule 4(4) after the time for

impleading the legal representatives under the Limitation Act is over. There is a conflict of opinion among the High Courts on this question. Order

XXII, Rule 4(4), so far as Kerala is concerned, came in to force only by the CPC Amendment Act, Act 104 of 1976. But in some other states

even before the Central amendment, there were local amendments by which a similar provision was incorporated in the respective Code of Civil

Procedure. Counsel for the revision Petitioners relied on the decisions in Lakshmi Charan v. Satyabadi AIR 1664 Ori 39, Annapurna Debi Vs.

Sm. Harsundari Dassi and Others, and ILR 1974 Gau 289 for the position that an order under Order XXII, Rule 4(4) cannot be passed after the

suit had abated as against the deceased Defendant. Counsel for the 1st Respondent relied on the decisions in Velappan v. Parappan AIR 1969

Mad 309, S.A. Rahim v. Rajamma AIR 1977 Karn 20, Nepal Chandra v. Rebati Mohan AIR 1979 Gau 1, and Janabai Ammal Vs. T.A.S.

Palani Mudaliar, The question is as to whether the court has jurisdiction to grant exemption under Order XXII Rule 4(4) after the suit has abated.

4. After hearing Counsel for the Petitioners and the 1st Respondent, I have no hesitation to hold that the court has, in appropriate cases,

jurisdiction to exercise the power under Order XXII, Rule 4(4) even after the time limited for making the application for impleading the legal

representatives is over. Order XXII, Rule 1 provides that where one of two or more Defendants dies and the right to sue survives the court can,

on an application made in that behalf, cause the legal representative of the deceased Defendant to be made a party and proceed with the suit.

Rules 3 and 4 of Order XXII which are relevant are to the following effect:

(3) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate as against the deceased Defendant.

(4) The Court whenever it thinks fit, may exempt the Plaintiff from the necessity of substituting the legal representatives of any such Defendant who

has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, such case, be

pronounced against the said Defendant notwithstanding the death of such Defendant and shall have the same force and effect as if it has been

pronounced before death took place.

The contention of the Counsel for the revision Petitioners is that the power under Rule 4(4) cannot be exercised when the suit had abated under

Order XXII Rule 3, in other words, it can be done only when the suit is alive. As stated earlier, the decisions which are relied on by him are

Lakshmi Charan Panda and Another Vs. Satyabadi Behera and Others, , and Annapurna Debi Vs. Sm. Harsundari Dassi and Others, and in both

cases it was held that it cannot be done after the suit has abated as against a particular Defendant. But this question was considered by Malimath,

J. (as he then was) in AIR 1977 Karn 20. After dissenting from the decision in Lakshmi Charan Panda and Another Vs. Satyabadi Behera and

Others, , his Lordship observed as follows:

If the court, in exercise of its discretion, grants exemption to the Plaintiff from the necessity to substitute the legal representatives of the concerned

Defendant, the court can proceed to dispose of the suit and pronounce judgment against such Defendant notwithstanding the fact that the legal

representatives of such Defendant have not been brought on record. When such judgment is pronounced, Sub-rule (4) expressly provides that it

shall have the same force and effect as if it had been pronounced before the death took place. In other words, a legal fiction is introduced to the

effect that though the judgment is pronounced after the death of the deceased Defendant, the same shall be deemed to have been pronounced

before his death. It, therefore, follows that when a judgment is pronounced in a suit against the deceased Defendant after according necessary

exemption under Sub-rule (4) no abatement as such shall be deemed to have taken effect. As the judgment itself is deemed to have been

pronounced during the lifetime of the deceased Defendant, it is obvious that abatement shall not be deemed to have taken effect. As, in law, it has

to be deemed that no abatement has taken effect, it is not possible to accede to the contention of Shri Murlidhar Rao that the power of exemption

conferred by Sub-rule (4) cannot be exercised by the Court after 90 days from the date of death of the deceased after the abatement has taken

effect. Besides, it appears to having regard to the language of Sub-rule (4) which provides that the power of exemption under Sub-rule (4) can be

exercised by the Court whenever it thinks fit, no such limitation on the power of the Court in the matter of granting exemption can be inferred. The

Court is empowered by the express language of Sub-rule (4) to exercise the power of exemption whenever it thinks fit before the disposal of the

suit. It is, therefore, not possible to accede to the contention of Shri Murlidhar Rao that the Court of first instance had no competance to exercise

its discretion in granting exemption under Sub-rule (4) after 90 days after the death of the deceased 5th defendant.

I am in respectful agreement with the above view expressed by the Karnataka High Court. From the wording of Sub-rule (4) it is clear that a legal

fiction is introduced by which even though the judgment is pronounced after the death of the deceased Defendant, it shall be deemed to have been

pronounced before his death. If that is the presumption, it has to be deemed that the Defendant is alive on the date of the judgment, even though

the judgment was after his death. By a legal fiction the effect of an abatement under Order XXII Rule 3 is effaced by the deeming provision

contained in Sub-rule (4) of Rule 4, Order XXII. Once the court grants exemption a judgment can be passed even against the deceased Defendant

and by virtue of the deeming provision the position is as if the judgment was pronounced before his death and if so, there cannot be any question of

abatement. In other words, it is clear that Sub-rule (4) is in effect an exemption to Sub-rule (3) and in that view of the matter, any court in a given

circumstance has jurisdiction to exempt the Plaintiff from impleading the legal representatives of an. ex parte Defendant at any time before the

judgment is pronounced. The same view was taken by the Madras High Court in Velappan Pillai Vs. Parappan Panickar and Others, . In AIR

1979 Gau 1, the Gauhati High Court has also taken the same view and after considering the matter, I prefer to fall in line with the view taken by the

Karnataka, Madras and Gauhati High Courts in preference to the view expressed by the Orissa and Calcutta High Courts.

5. Nothing is shown before me to take a view that lower court has exercised the jurisdiction improperly in exempting the Plaintiff from impleading

the legal representatives of the 4th Defendant. The suit is for partition and the 4th Defendant did not file any written statement and was ex parte.

The lower court was right in allowing the application for exemption under Order XXII Rule 4 and I do not find any reason to interfere with the

order of the lower court.

6. The C.R.P. is without any merit and it is accordingly dismissed. No costs.