(2017) 172 AIC 552 : (2017) 2 CivCC 135 : (2017) 1 ICC 518 : (2017) 1 ILRKerala 539 : (2017) 1 KerLJ 225 : (2017) 1 KLT 50

High Court Of Kerala

Case No: Writ Petition (C) No. 28128 of 2009 (O) and OS. NO.360 of 2006

Indian Bank APPELLANT

Vs

Sambasivan RESPONDENT

Date of Decision: Nov. 22, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10
- Constitution of India, 1950 - Article 226
- Limitation Act, 1963 - Section 21

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Hon'ble Judges: Mr. K. Ramakrishnan, J.

Bench: Single Bench

Advocate: Smt. Valsamma Kurian Jose, Advocate, for the Respondent Nos.1 to 3 and 5 to 7; Sri. K.N. Sivasankaran and Sri. Sunil Shanker, Advocates, for the Petitioner

Final Decision: Disposed Off

Judgement

Mr. K. Ramakrishnan, J. - The plaintiff in OS.No.360/2006 of the Third Additional Sub Court, Ernakulam is the petitioner herein. The petitioner as plaintiff filed Ext.P1 suit originally against the 4th respondent and one Thankappan as OS.No.360/2006 on the allegation that the first defendant, who is the fourth respondent herein had availed a loan of Rs.70,000/- with the second defendant as guarantor on 22.9.2000. The second defendant apart from executing a personal guarantee, created an equitable mortgage in respect of his properties as security for the transaction. Since they have committed default in payment of the amount, the plaintiff filed the above suit against the above two persons on the bona fide belief that both were alive at that time. The second respondent entered appearance and filed a written statement stating that the second defendant died on 18.3.2002. The suit was filed on 29.6.2006. After making enquiries, the plaintiff filed

IA.No.7030/2006 to implead Mrs. Valsala, wife of deceased second defendant as additional third defendant in the suit as the legal heir of the original second defendant, guarantor in the transaction on the bona fide belief that she is the only legal heir known to them at that time. That application was allowed and she was impleaded as additional third defendant. The matter was referred for Adalath and at that time, it was revealed through the third defendant that the second defendant has other legal heirs apart from the third defendant and they collected the particulars from her and filed IA.No.1993/2008 to implead the present respondents 1 to 3 and 6 and 7 as additional defendants 4 to 8 in the suit evidenced by Ext.P2. Respondents 1 to 3 entered appearance and filed objection to the same evidenced by Ext.P3. The court below allowed the application for impleading as per order dated 30.9.2008. Subsequently, respondents 1 to 3 filed IA.No.7968/2008 to review the order dated 30.9.2008 in IA.No.1993/2008 evidenced by Ext.P4. The petitioner filed Ext.P5 objection to the same. The court below by Ext.P6 order allowed the application and dismissed IA.No.1993/2008 as it is not maintainable on the ground that the suit was filed against a dead person and subsequent petition to implead the legal heirs is not maintainable relying on the decisions reported in Municipal Council, Calicut v. Thazhed Puthan Purayil Kunhipathumma and another (AIR 1933 Madras 454), Krista Das Law and others v. Khirada Kant Roy and others (AIR 1919 Calcutta 257), Karam Singh v. Mt. Maya Wanti and others (AIR 1932 Lahore 592) and Rampratab Brijmohandas and others v. Gavrishankar Kashiram (AIR 1924 Bombay 109). Aggrieved by the same, the present petition has been filed by the petitioner challenging the above order.

2. Heard Sri. K.N. Sivasankaran, learned counsel appearing for the writ petitioner and Smt. Valsamma Kurian Jose, learned counsel appearing for respondents 1 to 3 and 5 to 7. No appearance for the 4th respondent.

3. Learned counsel appearing for the writ petitioner submitted that at the time when the suit was filed, the plaintiff bank was not aware of the fact that the second defendant was no more and on the bona fide belief that he was alive, the suit was filed. Only when the written statement filed by the first defendant, it was revealed that he died in 2002 itself. Immediately they filed IA.No.7030/2006 to implead the wife of the deceased as the third defendant on the bona fide belief that she is the only legal heir of second defendant. Later when the matter was referred for Adalath, they came to know that there are other legal heirs and so they filed an application to implead other legal heirs also as IA.No.1993/2008 and that was allowed earlier. Later at the instance of respondents 1 to 3, an application was filed as IA.No.7968/2008 for review the order and that was allowed by the impugned order which is not correct. Further, he had also submitted that the suit was filed on the basis of the mortgage created by the deceased second defendant and all the legal representatives were impeaded within time for filing the suit for mortgage created by the second defendant. So it cannot be said that the suit against them is barred as well.

4. On the other hand, learned counsel appearing for the respondent submitted that there was no valid reason given for non impleading the legal heirs in time and the suit was filed against a dead person which is not valid in the eye of law. So the court below was

perfectly justified in reviewing the order and dismissing the application for impleading.

5. It is an admitted fact that the suit was filed against the second defendant, who is the guarantor and the person who created the mortgage in respect of the property by deposit of title deeds as security for the loan granted for the first defendant, on the premises that he was alive at that time. It is also an admitted fact that the first defendant entered appearance and filed written statement in the year 2006 in which it was mentioned that the second defendant died on 18.3.2002 itself. Immediately on making enquiry, the plaintiff bank filed IA.No.7030/2006 to implead the wife of the second defendant as additional third defendant stating that on their enquiry they came to understand that she is the only legal heir and seeking leave to implead others later if it was revealed that there are other legal heirs. That petition was allowed and the third defendant was impleaded. She did not object the impleading. Later it was revealed that there are other legal heirs for the deceased second defendant and they collected the details of the legal heirs from the third defendant, the wife of the deceased second defendant and thereafter they filed IA.No.1993/2008 explaining these facts for non impleadment of the present persons earlier and accordingly additional defendants 4 to 8 were impleaded as per order in IA.No.1993/2008 dated 30.9.2008. It is thereafter that respondents 1 to 3 herein filed IA.No.7968/2008 to review the order in IA.No.1993/2008 dated 30.9.2008 on the ground that the suit was filed against a dead person and subsequent impleadment is not permissible. The court below accepted the same and allowed the application, which is under challenge.

6. Order 22, Rule 4 will apply in cases where either the plaintiff or defendant died during the pendency of the proceedings and not in respect of persons who died prior to the institution of the proceedings. The provision which is applicable in such cases is Order 1, Rule 10 which reads as follows:

"10. Suit in name of wrong plaintiff: (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties: The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant , or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended:- Where defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the [Indian Limitation Act, 1877 (15 of 1877)], Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

7. Order 1, Rule 10 (5) says that subject to the provisions of Indian Limitation Act, 1987, section 22, the proceedings as against the person added as defendant shall be deemed to have begun only on the service of summons. Section 22 of the Indian Limitation Act, 1877 which is now substituted by section 21 of the Limitation Act, 1963 reads as follows:

"21. Effect of substituting or adding new plaintiff or defendant:-(1) Where after the institution of a sit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the Court is satisfied that the Commission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply 7 to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

8. Section 21(1) of the Limitation Act says that where after the institution of suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. So a discretion has been given to the court to implead the newly added party as though he was implead even at the time of filing of the suit by virtue of the proviso to section 21 of the Limitation Act if the court is satisfied that omission to include such person was due to bona fide mistake and not a deliberate one.

9. This aspect has been considered by the Apex Court in the decision reported in Karuppaswamy v. C. Ramamurthy (1993 (4) SCC 41). That was a case where the suit was instituted by the plaintiff against the sole defendant within the limitation period but the summons issued was returned with the endorsement that he was dead six weeks prior to

the filing of the suit. An application was filed by the plaintiff under Order 22, Rule 4 of the Code of Civil Procedure after the expiry of limitation period for impleading the legal heirs of the deceased defendant. A counter statement was filed by the legal heirs sought to be impleaded stating that the suit against the dead person was nonest. The High Court taken the view that the mistake of suing against a dead person was in good faith and hence proviso to section 21(1) is attracted and held that they are to be impleaded in the suit and impleading the legal heirs will be deemed to have been filed on the date of filing the original plaint and as such within the limitation period.

10. In the decision reported in Indu Bhushan Chakravarty v. Hareram Narayan Deo and other (AIR 1972 Patna 229), the Patna High Court has held that where on account of the addition of the defendant, the plaint was amended, the question arose as to whether how the limitation has to be considered and it was held that limitation in relation to claim as against such defendant commences from the date of service of summons on him and order allowing amendment not making the amendment subject to limitation is immaterial based on the principles of Section 21 of the Limitation Act (old section 22 of the Limitation Act, 1908).

11. In the decision reported in Ganapathi (Padala) Suryakumari v. Dr. Erra Ramadevi and another (AIR 2007 Andhra Pradesh 118), it has been held that :

"There is a clear distinction between the original parties to the suit and parties who are added subsequently. So far as the parties original to the suit are concerned, the date of institution of the suit should be treated as the date of actual institution of the suit, and so far as the parties subsequently added may be plaintiffs or defendants are concerned, the date of institution of the suit should be reckoned as the date on which the order is passed by the Court allowing the application filed under Order 1, Rule 10 C.P.C. The order of the Court allowing a party to the suit to bring some third party as a party to the suit would come into effect not actually from the date of ordering but from the date of taking out summons. Therefore, from the very language incorporated under sub-rule (5) of Rule 10 Order 1 CPC, read with Section 21 of the Limitation Act, it is abundantly clear that the impleadment in ordinary course would be from the date of order passed by the Court subject to the exception as provided in the proviso of Section 21 of the Act and further subject to the service of summons".

12. In the decision reported in Kannangara Ismail v. Palayat Kappadakkal Pavu Amma and others (AIR 1955 Madras 644), it has been held that:

"A suit was filed against certain defendants who were dead at the time of filing it. The Court in ignorance of that fact and on the assumption that they were alive on the date of the suit ordered their legal representatives to be brought on record on the application of the plaintiff. The suit was not time-barred as against the legal representatives on the date of application for impleading them as legal representatives. A decree was passed against these new defendants it was held that the plaint could be considered as freshly instituted against the new defendants on the date when the application for impleading them was filed and hence the decree could not be said to be void ab initio."

13. In the decision reported in Murali Mohan Naidu and others v. Iskala Nadi Ramanna and another (AIR 2004 Andhra Pradesh 156), it was held that the suit was filed only against the daughter of the deceased who executed promissory note in favour of the plaintiff and subsequently two other defendants were impleaded as parties as to represent estate of deceased in light of stand taken by plaintiff that document "B" is the last testament executed by deceased in relation to properties left by him. In such circumstances, the court held that it can be said that non impleadment of other defendants is only a bona fide mistake and in view of proviso to section 21 of the Limitation Act if the court is satisfied it was a bona fide mistake then court can implead them as deemed to have been impleaded on the date of the institution of the suit itself and can hold that the suit is not barred by limitation as against them.

14. It is clear from the above dictums that if one of the defendants was dead even prior to the filing of the suit but it is not within the knowledge of the plaintiff and that suit was filed within limitation and subsequent impladment of the legal representatives, if the court is satisfied that non impleadment of the legal heirs of the deceased defendant was a bona fide mistake, then court has got power to implead them invoking Order 1, Rule 10 of the Code of Civil Procedure and section 21 of the Limitation Act, 1963. It is also clear from the above dictums that if the legal representatives were impleaded within the period of limitation for enforcing the liability of the deceased on them, merely because they were impleaded after some time of the death of the deceased defendant was shown in the plaint as a living person under bona fide mistake, then also court has got power to implead them invoking section 21 of the Limitation Act as the suit was instituted as against them on the date of filing of the suit.

15. There is no dispute regarding the fact that the suit in this case was filed against the original second defendant within limitation as the suit was for enforcement of mortgage and the mortgage was created in the year 2000 and the suit was filed in the year 2006 within the limitation period. None of the parties to be impleded have a case that the bank was aware of the fact of death of the second defendant and knowing that fact and suppressing the fact, they have filed the suit with him on party array. It is also seen from the application to implead the third defendant that immediately when the death of the second defendant was known to them from the pleadings of the first defendant, they have, in the year 2006 itself, filed an application to implead the wife of the deceased namely one of the legal heirs and that was allowed and she did not object the impleading. Further, she did not disclose the name of other legal heirs also raising a plea of non joinder as well. It is only when the case was referred for Adalath for settlement, it was revealed for the bank that there are other legal heirs and the particulars were obtained from the third defendant and it is thereafter that IA.No.1938/2008 was filed to implead other legal as additional defendants 4 to 8. It was specifically mentioned in the application itself that they were not aware of the particulars of other legal heirs which they could

collect from the third defendant only during the period at which it was referred for Adalath and immediately they have made application that was made in the year 2008, even as against them, the suit is within time for enforcing the mortgage created by their predecessor. So the impleading was made within limitation and the suit cannot be said to be barred against them. It cannot be said to be a wilful omission on the part of the bank in not impleading them. So the proviso to section 21 of the Limitation Act will be applicable in such cases and the court below relying on the old decisions without applying the correct principles laid down in the decision reported in Karuppaswamy v. C. Ramamurthy (1993 (4) SCC 41), allowed the application for reviewing the order impleading the supplemental defendants 4 to 8 and dismissed the application, IA.No.1993/2008. The order passed by the court below is unsustainable in law in view of the dictum laid down in Karuppaswamy v. C. Ramamurthy (1993 (4) SCC 41) by the Apex court and so it is liable to be set aside.

So the writ petition is allowed and the order dismissing the application IA.No.1993/2008 by passing an order in IA.No.7969/2008 is set aside and the order in IA.No.1993/2008 passed by the court below impleading additional defendants 4 to 8 is hereby restored.

The writ petition is allowed and disposed of accordingly. Registry is directed to communicate a copy of this judgment to the court below at the earliest.