

## Gainedi Gajapathi Rao Vs Velal Indiramanamma and Another

**Court:** Andhra Pradesh High Court

**Date of Decision:** Dec. 29, 2003

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

**Citation:** (2004) 2 ALT 281

**Hon'ble Judges:** P.S. Narayana, J

**Bench:** Single Bench

**Advocate:** Padala Vijay Kiran, for the Appellant; Subhash Chandra Bose, for the Respondent

**Final Decision:** Dismissed

### Judgement

@JUDGMENTTAG-ORDER

P.S. Narayana, J.

Heard Sri Padala Vijay Kiran, the counsel representing the review petitioner and Sri Subhashchandra Bose, the counsel representing the first respondent.

2. In view of the facts and circumstances explained, the delay in filing the review CMP is hereby condoned, and C.M.P. No. 21012/2003 is

ordered accordingly.

3. Both the counsel made elaborate submissions on the merits and demerits of the review CMP. The petitioner in the review CMP filed the same

as against the judgment and decree made in S.A.No. 692 of 1994 dated 25-2-2003 on the ground that the second appellant died, about three

years ago on 8-3-1996 and no steps were taken by the appellants and thus the appeal stands abated. As the first appellant being the wife of

deceased-second appellant cannot plead ignorance of the death of her husband and hence the order of remand made by this court would cause

irreparable loss and consequently a request is made to review the said judgment and decree made in S.A.No. 692 of 1994 dated 25-2-2003.

4. The petitioner in the review CMP filed O.S.No. 427 of 1987 on the file of Principal District Munsif, Srikakulam, against the first respondent and

her husband praying for the relief of perpetual injunction. The court of first instance dismissed the suit and aggrieved by the same, A.S.No. 45 of

1990 on the file of Additional Subordinate Judge, Srikakulam, was preferred, which was allowed and aggrieved by the same, this second appeal

was filed. It is stated that during the pendency of appeal, the second appellant, husband of first appellant in the second appeal, died on 8-3-1996

and the same was intimated to her Advocate Sri Umamaheswar Rao at Srikakulam. Subsequent thereto, the said Advocate also died and that she

has been under the bonafide impression that the said Umamaheshwar Rao had conveyed the information of death of her husband to her counsel at

Hyderabad. It is further stated that after the disposal of the second appeal only, she came to know that her Advocate at Srikakulam had not

intimated about the death of her husband and it is a bonafide mistake. Even otherwise, it is stated that the suit property is registered in her name

only by registered sale deed dated 16-9-1985.

5. The facts are not in controversy. The relationship between the first appellant and the second appellant is that of wife and husband and evidently

to avoid the remand order, the present review CMP was thought of by the petitioner. It is also not in controversy that the suit property is registered

in the name of the wife only. Even otherwise the wife is already on record representing the estate. Serious contention was advanced by Sri Vijay

Kiran that inasmuch as it is an indivisible cause of action it should be taken that the appeal as a whole abated for non-bringing of the legal

representatives of the deceased-appellant No. 2 on record. The suit for perpetual injunction in ordinary legal parlance is understood as a mere

personal action. Even otherwise, on facts, it is clear that the suit property is registered in the name of wife only by virtue of registered sale deed

dated 16-9-1985.

6. In *Amba Bai and Others Vs. Gopal and Others*, where a judgment in a second appeal was passed without the knowledge that the appellant had

died and the same being a judgment passed against a dead person and it being a nullity, the Apex Court while dealing with the aspect of abatement

in relation to the appeal held:

Where during pendency of second appeal, the appellant died and his LRs were not brought on record, but the High Court disposed of the second

appeal without knowing of the death of the appellant, the said second appeal abated and judgment and decree of the first appellate court became

final and in such case, there cannot be merger of the judgment and decree made in second appeal with that passed in first appeal.

7. Strong reliance was also placed in *Regi Gorge v. Bhaskaran Nair* 1998(4)CCC 607(Ker.). In *Santosh Kumar Mondal and Others Vs.*

*Nandalal Chakrapani and Others*, the full Bench of Calcutta High Court held:

Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the

plaintiffs or to all the defendants and all or several of the plaintiffs or defendants appeal against the decree, the appellate court can, in view of the

provisions of O.41 R.4, proceed with the appeal and reverse the decree of R.4, proceed with the appeal and reverse the decree of the trial court

in spite of the omission to bring on the record the heirs of one of the appellants who dies during the pendency of the appeal.

8. In Collector of 24 Parganas and Others Vs. Lalith Mohan Mullick and Others, while dealing with review and O.22 R.4 of the CPC and

Supreme Court Rules, 1996, the Apex Court held:

Where appeal was decided on merits by Supreme Court and some of the respondents died during pendency of appeal and their estates however

were sufficiently represented plea that appeal had abated and judgment on merits need to be set aside, is untenable.

In Mahabir Prasad Vs. Jage Ram and Others, it was held:

Jurisdiction of appellate court under O.41 R.4, C.P.C. is open when other persons who were parties to the proceeding before Subordinate court

and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as

parties to appeal or are impleaded as respondents"".

9. Here is a case where the husband died and the wife in whose name the document stands is alive. The remedy of perpetual injunction prayed for

is a personal action. Apart from this aspect of the matter, the estate, as such, is represented by the wife being at least as one of the legal heirs of the

deceased-husband.

10. Hence, in view of the peculiar facts and circumstances, I am not inclined to agree with the submissions made by the learned counsel for the

review petitioner on the ground that by virtue of non-bringing on record the legal heirs of the deceased-husband, the resultant effect would be total

abatement of the appeal as such.

11. Hence, I do not see any merit in review CMP and accordingly the same shall stand dismissed. No order as to costs.