

# ANDHRA PRADESH HIGH COURT

Khaja Begum

Vs.

Gulam Mohiuddin

Civil Revn. Petn. No. 1215 of 1972

(Alladi Kuppuswami and Gangadhara Rao, JJ.)

09.04.1975

## JUDGMENT

### **Gangadhara Rao, J.**

1. This Civil Revision Petition has come up before us on a reference made by our learned brother Justice Obul Reddi (as he then was) on the ground that the question of law involved in this case is of importance which should be decided by a Bench. \]

2. The plaintiff is the petitioner, he filed a Small Cause Suit No. 1109 of 1970 in the Court of the Additional Chief Judge, City Small Causes Court, Hyderabad against one Gulam Mohiddin the 1st defendant, alleging as follows:

The defendant borrowed from him Rs. 750 on 30-12-1965 and executed a promissory note and also a receipt in his favour. Subsequently the defendant paid Rs. 25 on 15-11-1968 and made an endorsement of payment on the back of the promissory note.

He was still due in a sum of Rs. 725 which he did not pay in spite of repeated demands. Hence the suit was filed for recovery of Rs. 725 on 16-11-1970. Subsequently when he came to know that the sole defendant died on 12-11-1970 i.e., four days before the suit, he filed I. A. No. 1515/70 on 10-12-1970 to bring the legal representatives of the deceased defendant as defendants 2 to 5 on record and it was allowed by the lower court on 1-4-1971. Defendants 2 to 5 in their written statement denied the truth of the suit debt, and contended that the suit was not maintainable since it was filed against a dead person and also there are three more legal representatives of the defendant who were not impleaded and hence the suit was bad for non-joinder of parties. They further contended that the plaintiff is a money lender and since she did not possess a license, she cannot maintain the suit under Section 9 (2) of the Hyderabad Money Lenders Act.

3. The lower court while holding that the original debt and part payment were true, dismissed the suit on three grounds. Firstly, the suit was originally instituted against a dead person. Therefore, it

was void *ab initio* and it could not be continued subsequently against the legal representatives of the deceased defendant.

Secondly that two more daughters and son of the deceased defendant were not impleaded as parties and, therefore, the suit was bad for non-joinder of necessary parties.

Thirdly, the plaintiff was a money lender and since she did not possess a licence, she could not file the suit.

4. The learned counsel for the petitioner Md. Mukarramuddin in a neat and brief argument has assailed the findings of the lower court. He contended that though originally the suit was filed against a dead person, still his legal representatives were brought on record before the period of limitation expired, and, therefore, the suit is maintainable against defendants 2 to 5. In this connection, he relied upon Section 153, Civil Procedure Code and the decisions reported in *K. Ismail v. Pavu Amma*<sup>1</sup>, *C. Raju v. D. D. Italia*<sup>2</sup>, and *Jagarnath v. Commrs. of Buxar Municipality*<sup>3</sup>,

5. Section 153, Civil P. C. says:

"The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit: and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."

This section is new. It confers a general power on the court to amend the defects and errors in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real question or issue between the parties in the suit. So when a suit is filed against a dead person the plaint can be amended by substituting the legal representatives of the deceased defendant, but the suit should be treated as instituted on the date of the application for amendment. If on that date the suit is not barred by limitation it will be in effect a suit validly instituted against the legal representatives of the deceased defendant. In the case reported in *K. Ismail v. Pavu Amma*<sup>4</sup>, the facts are that a suit O.S. No. 1150/44 was filed against two defendants and after summons were taken out, it was discovered that both the defendants were dead. Thereafter, by an Interlocutory Application the legal representatives of the two defendants were brought on record, and the suit was decreed. Subsequently another suit O.S. No. 1170/45 was filed to set aside the decree in O.S. No. 1150/44 on the ground that it was void because both the defendants in that suit were dead at the time when the suit was filed and the court had no jurisdiction to bring on record the legal representatives of the persons who were dead before the institution of the suit for the reason that a plaint filed against dead person cannot be considered to be in existence at all and the whole proceedings are *ab initio* void and illegal. Both the lower courts held that the entire proceedings in O.S. No. 1150/44 were void from the very inception and decreed the suit. They relied upon the decision reported in *Veerappa Chetti v. T. Ponnen*<sup>5</sup>, which held that a plaint filed against a dead person is non est and that there are no proceedings that can be deemed to be pending in court by the filing of such a plaint as there is nothing in the Civil Procedure Code which authorises the institution of such a suit against a deceased person. It was further held that there is no jurisdiction in the Court to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased person even when the suit was instituted *bona fide* and in

<sup>1</sup> AIR 1955 Mad 644

<sup>3</sup> AIR 1961 Pat 480

<sup>5</sup>(1908) ILR 31 Mad 86

<sup>2</sup> AIR 1961 And Pra 239

<sup>4</sup> AIR 1955 Mad 644

ignorance of the death of the defendant. Adverting to this decision, Justice Govinda Menon observed as follows: -

"It has to be mentioned that Section 153, Civil Procedure Code was not in existence at the time of the decision in *Veerapaa Chetti v. T. Ponnen*<sup>6</sup>, Supposing the plaintiff in O.S. No. 1150/44 when apprised of the fact of the death of the persons impleaded as defendants in the plaint before the filing of the suit, took return of the plaint and by using the same stamps scored out the names of the existing defendants and in their place had the proper persons impleaded and presented the plaint as a fresh one can it be said that such a plaint cannot be treated as instituted on the day on which the fresh presentation was made.

In my opinion there is nothing wrong in that procedure. All the cases in which it has been held that the court has no power to amend the plaint filed against a deceased person by substituting the names of the representatives of the deceased person arose out of the applications for amendment of the plaint made at a time when the suit if instituted would have become barred.

The result of the amending would put back the suit to the date of the original presentation of the plaint and thereby save the period of limitation. No case has been cited before me at the bar in which it has been held that even if a fresh suit filed on the date when the amendment was made is not barred, still the court is deprived of the power of amending which results in making the suit a new one filed afresh."

6. The learned Judge further held that in that decision there is no consideration of the correctness or otherwise of the proposition regarding the validity of the amendment if the amended plaint were to be considered as having been filed on the date when the amendment was sought for and when the suit against the persons newly impleaded would not be barred. He also referred to the earlier decisions of the Madras High Court reported in *Mallikarjuna v. Pullayya*<sup>7</sup>, *Rasa Goundan v. Bichamuthu Pillai*<sup>8</sup>, *Arunachalam Chettiar in Re*<sup>9</sup>, *Calicut Municipal Council v. Kunhipathumma*<sup>10</sup>, *Chidambaram Chettiar v. Narayanswami Iyer*<sup>11</sup>, and *Gopalakrishnayya v. Lakshmanarao*<sup>12</sup>, The case reported in *Gopalakrishnayya v. Lakshman Rao*<sup>13</sup>, is case of an appeal and the Full Bench held that " if an appeal is presented against a person who is dead at the date of presentation the Court may under Section 153, Civil Procedure Code permit the cause-title to be amended or may return the appeal memorandum for amendment and representation. If the appeal memorandum is not allowed to be amended, the party may apply for refund of the spoiled stamp and may present a fresh appeal. But if the appeal is out of time against the legal representative, the court has always power to excuse the delay in presentation before it can proceed to hear the appeal but it is a matter for its discretion whether it would excuse the delay." Justice Govinda Menon observed that the principles laid down in the Full Bench case apply to the facts of the case he was dealing with and that Section 153, Civil Procedure Code in so many words speaks of an amendment by a Court of first instance and this can be extended so far as the appellate court is concerned, by the operation of Section 141, Civil Procedure Code

<sup>6</sup>(1908) ILR 31 Mad 86

<sup>8</sup> AIR 1918 Mad 794 (1)

<sup>10</sup> AIR 1933 Mad 454

<sup>7</sup>(1893) ILR 16 Mad 319

<sup>9</sup> AIR 1916 Mad 440

<sup>11</sup>1928 Mad WN 240

<sup>12</sup> AIR 1925 Mad1210 (FB)

<sup>13</sup> AIR 1925 Mad 1210 (FB)

That being the case there is nothing that prevents the trial court from considering the plaint as if it was filed against the new parties on the date the application for amendment was made.

7. In the case of our High Court reported in *C. Raju v. D. D. Italia*<sup>14</sup>, the facts are that a suit was originally filed against father and his son as surety, and it subsequently transpired that the father was dead before the institution of the suit. So an application was filed by the plaintiff to bring on record, defendants 2 to 7 as the legal representatives of the 1st defendants and it was allowed by the trial court. Questioning the validity of that order, a revision was filed in the High Court. Umamaheswaram J. on a review of the entire case law on the subject held that the case reported in *Veerappa Chetti v. T. Ponnen*<sup>15</sup>, cannot be regarded as good law after the enactment of Section 153 in the new Code. He agreed with the view of Justice Govinda Menon reported in *K. Ismail v. Pavu Amma*<sup>16</sup>, and held that there is nothing which prevents the trial court from construing the plaint as if it was filed against new parties on the date the application for amendment was made so long as the suit against them was not barred by limitation. The learned Judge disagreed with the view taken in *Bai Pani Vankar v. Madhabhai Galabhai*<sup>17</sup>, but followed the decision reported in *Alabhai Vajsurbhai v. Bhura Bhaya*<sup>18</sup>, He finally held that the terms of Section 153. Civil Procedure Code are sufficiently wide and it is open to the Court to implead the legal representatives as party defendants so long as the suit against them is not barred by limitation.

8. We respectfully agree with the reasoning of Justice Govinda Menon in *K. Ismail v. Pavu Amma*<sup>19</sup>, and of Justice Umamaheswaram in *C. Raju v. D. D. Italia*<sup>20</sup>, This is also the view of the Patna High Court vide *Jagarnath v. Commrs. of Buxar Municipality*<sup>21</sup>, Ultimately all laws of procedure should be so interpreted as to advance justice but not to defeat it on technical considerations.

9. Md. Jahangir Ali the learned advocate for the respondents has relied upon the decision reported in *Veerappa Chetty v. Tindal Ponnen*<sup>22</sup>, and the subsequent decisions of the Madras High Court reported in *In Re A. L. A. R. R. M. Arunachalam Chettiar*<sup>23</sup>, *Rasa Goundan v. Pichamuthu Pillai*<sup>24</sup>, *Calicut Municipal Council v. Kunhipathumma*<sup>25</sup>, and *Chidambaram Chettiar v. Narayanaswamy Iyer*<sup>26</sup>, which followed *Veerappa Chetty v. Tindal Ponnen*<sup>27</sup>, For the reasons stated supra, we hold that the decisions reported in *Veerappa Chetty v. Tindal Ponnen*<sup>28</sup>, is no longer good law. In *Calicut Municipal Council v. Kunhipathumma*<sup>29</sup>, the primary question was whether Section 14 of the Limitation Act was applicable when the Court wrongly allows an application to bring the legal representatives on record and the plaintiff seeks to deduct the period between the filing of the plaint and the order of the court allowing that application. The decision reported in *Chidambaram Chettiar v. Narayanaswami*<sup>30</sup>, does not show whether the petition to bring the legal representatives of the deceased defendant on record was filed before the period of limitation has expired. Sri Mohd. Jahangir Ali has also argued that Section 153, Civil Procedure Code does not apply when there is a

<sup>14</sup> AIR 1961 And Pra 239

<sup>15</sup>(1908) ILR 31 Mad 86

<sup>20</sup> AIR 1961 And Prad 239

<sup>21</sup> AIR 1961 Pat 480

<sup>26</sup>1928 Mad WN 240

<sup>27</sup>(1908) ILR 31 Mad 86

<sup>16</sup> AIR 1955 Mad 644

<sup>17</sup> AIR 1953 Bom 356

<sup>22</sup>(1908) ILR 31 Mad 86

<sup>23</sup> AIR 1916 Mad 440

<sup>28</sup>(1908) ILR 31 Mad 86

<sup>29</sup> AIR 1933 Mad 454

<sup>18</sup> AIR 1937 Bom 401

<sup>19</sup> AIR 1955 Mad 644

<sup>24</sup> AIR 1918 Mad 794 (1)

<sup>25</sup> AIR 1933 Mad 454

<sup>30</sup>1928 Mad WN 240

sole defendant and he dies before the institution of the suit, "for there is no proceeding in a suit within the meaning of that section". We are unable to appreciate this distinction.

He also tried to distinguish *C. Raju v. D.D. Italia*<sup>31</sup>, on the ground that in that case there were two defendants and only one defendant died and, the other defendant was alive. We do not see how it makes any difference. He referred to a decision reported in *Mohideen v. V. O.A. Mohommed*<sup>32</sup>, But there the facts are altogether different. Where a foreign firm instituted a suit in its firm's name which it cannot do in view of Order 30, Rule 1 and when the maintainability of the suit was objected to on that ground, the plaint was amended by the substitution of the names of the partners. In this connection it was held that there was no addition of new plaintiffs but merely a clarification of the individual already on record and as such Section 22 of the Limitation Act was not attracted to the case. He also referred to the decisions reported in *Bejoy Chand v. Amulya Charan*<sup>33</sup>, *Bai Pani v. Madhbhai*<sup>34</sup>, and *Karachi Municipality v. Baradio*<sup>35</sup>, They followed *Veerappa Chetty v. Tindal Ponnen*<sup>36</sup>, But they did not consider the question whether the suit would still be bad if the legal representatives of the deceased defendant are brought on record before the period of limitation has expired. In the result we do not agree with the view of the lower court that the suit as instituted was *ab initio* void and it could not be continued by the legal representatives of the deceased defendant when admittedly they were brought on record before the period of limitation for the suit had expired.

10. The next question is whether the suit is bad for the non-joinder of three of the legal representatives of the deceased defendant. Admittedly defendants 2 to 5 are the legal representatives of the deceased defendant. It is stated that the deceased defendant had left behind him two more daughters and a son besides defendants 2 to 5. But we find from the order of the Additional Chief Judge that while allowing the petition i.e. impleading of defendants 2 to 5 as legal representatives under Order 22, Rule 4, Civil Procedure Code it was observed by the then learned Judge that the other daughters and the son need not be impleaded. Apart from that under Section 52, Civil Procedure Code it is the estate in the hands of the defendants that would be liable for satisfaction of the decree. It has been held by the Supreme Court in *Mohd. Sulaiman v. Mohd. Ismail*<sup>37</sup>, as follows:

"Ordinarily the Court does not regard a decree binding upon a person who was not impleaded *eo nomine* in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased, there is yet an other exception which is evolved in the larger interest of administration of justice.

If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after *bona fide* enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate.

The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the court.

The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward.

Where however on account of a *bona fide* error, the plaintiff seeking relief

<sup>31</sup> AIR 1961 And Pra 239

<sup>33</sup> AIR 1914 Cal 895

<sup>35</sup> AIR 1946 Sind 20

<sup>32</sup> AIR 1955 Mad 294

<sup>34</sup> AIR 1953 Bom 356

<sup>36</sup>(1908) ILR 31 Mad 86

<sup>37</sup> AIR 1966 SC 792

institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principal applies to all parties irrespective of their religious persuasion."

11. In view of this pronouncement of the Supreme Court we do not agree with the lower Court that the suit is bad for non-joinder of some of the necessary parties.

12. The third question is whether the plaintiff who is a money lender cannot file the suit because she did not obtain the license under the Hyderabad Money Lenders Act. The lower Court has found on evidence that the plaintiff is a money lender who collects interests at the rate of 36% per annum. Her usual mode of lending monies is by way of taking a sale deed with an agreement to recovery the property and to recover the interest calling it as rent. The advocate for the plaintiff has not chosen to canvass this finding of fact and we have no reason to disagree with this conclusion of the lower court.

13. The next question is whether in the absence of a licence the plaintiff's suit for recovery of the amount in question should be dismissed. Loan is defined under Section 2 (4) of the Hyderabad Money Lenders Act (V of 1349) as a loan secured or unsecured advanced on interest in cash or in kind, and shall also include every transaction which is in substance a loan, but shall not include the following: We are not concerned with the other clauses of the section. Section 2 (7) defines money lender as a person including a pawn-broker, who within the meaning of this Act, only advances loan in the ordinary course of his business or does so along with other business, and shall also include the legal representative. Section 9 (2) says that if it is proved that the plaintiff is a money lender as defined in sub-section (7) of Section 2, but does not hold a licence granted under Section 3, the Court shall dismiss his suit. So it will not be a loan if it is not advanced on interest in cash or in kind. Admittedly in this case no interest was stipulated nevertheless they had to pay interest. They have not also adduced any evidence in this regard. Therefore, the suit transaction is not a loan as defined in the Act and consequently the plaintiff need not have a license to file this suit. This is also the view taken in *Dondiba v. Narsinga*<sup>37</sup>, and *Dwarakadas v. Habib Mohammad Jaffer*<sup>38</sup>, Therefore, we disagree with the finding of the lower Court that since the plaintiff did not hold a license the suit should be dismissed.

14. In the result, we allow the Civil Revision Petition and decree the Small Causes Suit No. 1109 of 1970 on the file of the Additional Chief Judge, City Small Cause Court, Hyderabad in a sum of Rs. 725 to be recovered from out of the assets of the deceased defendant in the hands of the defendants 2 to 5. The plaintiff is entitled to her costs in the Small Cause Suit but not in this Revision.

Petition allowed.

<sup>37</sup> ILR (1956) Hyd 690

<sup>38</sup>(1962) 1 Andh WR 144