

ANDHRA PRADESH HIGH COURT

R. Rajyalakshamma

Vs.

R. Kannaiah

Civil Revn. Petn. No. 1223 of 1977

(Chennakesav Reddy, J.)

25.01.1978

ORDER

Chennakesav Reddy, J.

1. This revision petition raises two questions of interest and perhaps of some importance : (1) Whether a suit instituted against a sole defendant who had died prior to the institution of the suit itself is non est, and the plaintiff cannot be permitted to bring on record the legal representatives of the deceased defendant in an application filed under Order 22 Rule 4 and Section 151 C. P. C.; (2) what is the true scope and object of Section 21 of the Limitation Act.

2. The facts are not complicated and lie in a narrow compass. The respondent- plaintiff filed a suit O.S. No. 58 of 1973, before the Principal, District Munsiff, Tirupathi, on 5-2-1973, on the foot of a promissory note against the defendant Rasetti Radhakrishnaiah. He had died on 29-1-1973. The last date of limitation for filing the suit was 5-2-1973. The suit was posted for the appearance of the defendant to 27-6-1973. The suit summons sent for service of the defendant were returned unserved with the endorsement that the defendant was dead. Then the plaintiff filed a petition I. A. No. 637 of 1973, out of which this civil Revision Petition, arises on 28-6-1973, to add the legal representatives of the deceased as defendants 2 to 6 in the suit. The application was opposed on behalf of the legal representatives contending *inter alia* that the suit against a dead person is a nullity and that in any case the suit itself abated under Order 22 Rule 4 C. P. C., on 28-4-1973. since no application for bringing the legal representatives of the deceased defendant was filed till 28-6-1973. It was also further urged that no application was also filed to set aside the said abatement. The learned District Munsiff allowed the application holding the suit filed against a dead defendant was not *ab initio* void and it could be continued against the legal representatives of the deceased defendant if they were brought on record before the expiry of the period of limitation for the suit. He, however, held that although the application filed by the plaintiff in this case after the period of limitation for the suit, Section 21 (1) of the Limitation Act was applicable to the facts of this case since the omission to add the legal representatives was due to a *bona fide* mistake as to the death of the defendant. The application was therefore, allowed on certain terms. This revision petition is therefore filed by the legal representatives of the deceased defendant.

3. The first submission of the learned counsel for the petitioners is that the suit filed against a dead person is a nullity and substitution of legal representatives cannot be made. In support of his submission, great reliance was placed on a decision of the Orissa High Court in *Cuttak Municipality v. Shyamasundar Behera*¹, No doubt, this decision lends all support to the contention of the learned counsel. The learned Judge after referring to the several rulings on the point summed up at page 138 :

" On the authorities cited above, it is clear that a suit filed against a dead person is a nullity and that no substitution can be made in place of the original defendant who was dead on the date of the institution of the suit."

But a division Bench of this High Court, which is binding on me, expressed a contrary opinion, in *Khaja Begum v. Gulam Mohiuddin*², Gangadhara Rao, J. speaking for the Division Bench observed after a review of the case law on the question that the suit filed against the sole defendant who was dead even by the date of institution of the suit was not void *ab initio* and could be continued against the legal representatives of the deceased-defendant if their substitution was made within the period of limitation for the suit. Therefore, it must be held that the suit filed against the defendant on 5-2-1973, who had died even on 29-1-1973, was not a nullity. But in this case the period of limitation for filing the suit itself expired on 6-2-1973. The present application for bringing the legal representatives of the deceased-defendant on record was filed on 28-6-1973, long after the expiry of the period of limitation for the suit. Therefore the decision of this Court in *Khaja Begum's* case does not govern the facts of this case.

4. The question then that arises is whether the application filed to bring the legal representatives of the deceased defendant after the period of limitation for the suit can be successfully maintained under Section 21 of the Limitation Act of 1963. Section 21 of the Limitation Act, 1963, reads :-

" 21. Effect of substituting or adding new plaintiff or defendant :- (1) Where after the institution of the 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 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 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.

The section is applicable to suits only and not to appeals. The object of the section is primarily to protect the right a party may have, but action was not originally constituted properly but was defective. In case of such defective action at the commencement itself, a new plaintiff or defendant can be substituted or added under this section and the suit as against such substituted or added party shall be deemed to have been instituted when he

¹ AIR 1977 Orissa 137

² AIR 1976 And Pra 65

was so made a party A proviso, however, has been added to Sub-section (1) so that any omission to include a person due to a mistake made in good faith does not deprive a party of his rights against that person if the court is satisfied in that behalf. By the proviso, power is conferred on the court in such circumstances to direct that the suit as regards to the plaintiff or defendant shall be deemed to have been instituted at any earlier date. This proviso is obviously added for making Section 21 consistent with Sections 14 and 17 (1) (c) which lay down that a *bona fide* mistake is a valid ground for extending the period of limitation in cases where the suit or application is for relief from the consequences of such *bona fide* mistake. The applicability of the Section is specifically excluded however to a case where the suit was properly instituted originally but became defective due to assignment or devolution of any interest during the pendency of the suit.

5. It is the contention of the learned counsel for the petitioners that the Section cannot be properly invoked in this case since devolution of interest was during the pendency of the suit. This contention undoubtedly is not supported even by the admitted facts of this case. The suit admittedly, was filed on 5-2-1973; but the defendant was dead even by 29-1-1973, even prior to the institution of the suit. Devolution of interest on the legal representatives of the deceased-defendant was undoubtedly prior to the institution of the suit itself. Therefore Section 21 can be invoked. The facts of this case also clearly justify the exercise of power conferred under the section. The admitted facts are: The plaintiff is a resident of Tirupathi. The deceased-defendant was a resident of Kalahasthi. The suit was filed on 5-2- 1973. The defendant had died on 29-1-1973. The plaintiff could not be expected reasonably to know about the death of the defendant. The plaintiff filed the suit against the deceased person believing in good faith that the defendant was alive. The plaintiff derives no benefit by filing the suit against the dead defendant. I have therefore no hesitation in holding that the omission to implead the legal representatives of the deceased-defendant when the suit was instituted was due to a *bona fide* mistake. Therefore under the proviso to sub section 1 of Section 21 of the Limitation Act, the legal representatives of the deceased defendant shall be deemed to have been included as defendants on the date of the original institution of the suit i.e., 5-2-1973. The suit must therefore be held to have not abated. The revision petition therefore fails. It is accordingly dismissed, but in the circumstances without costs.

Petition dismissed.