

Andhra High Court

Nehra Chits (P) Ltd. vs B. Ramachandra Reddy And Ors. on 4 July, 2003

Equivalent citations: AIR 2003 AP 486, 2004 (1) ALT 493, III (2004) BC 145

Author: C Ramulu

Bench: C Ramulu

ORDER C.V. Ramulu, J.

1. This Civil Revision Petition is directed against an Order elated 6-9-2001 passed in I.A. No. 1174 of 1999 in O.S. No. 34 of 1999 on the file of the Court of Principal Senior Civil Judge at Warangal.

2. The said application filed under Order XXII, Rule 9 of the Code of Civil Procedure to set aside the abatement of the suit against the 1st defendant was dismissed as barred by limitation along with I.A. No. 38 of 2000, which was filed for impleading the legal representatives of the deceased 1st defendant. The petitioner herein-Nethra Chits (P) Limited is the plaintiff and applicant in the above suit and interlocutory Applications respectively. He laid the suit for recovery of certain money against defendants 1 to 4. The notice sent to the 1st defendant-B. Ramachandra Reddy was returned unserved on 26-3-1999 with an endorsement that the party died. However, appearance was filed on behalf of defendants 2 to 4 and the case was posted for taking steps for adding legal representatives of the deceased-1st defendant and for filing the written statement of defendants 2 to 4. Thereafter, defendants 2 to 4 filed their written statement.

3. In the affidavit filed in support of I.A. No. 1174 of 1999, the petitioner-plaintiff had stated that he had filed the suit for recovery of money against the respondents/defendants and on 25-6-1999 when the suit was posted for written statement of defendants 2 to 4, it was learnt that summons sent to defendant No. 1 were returned on the ground that he died on 5-5-1998 leaving behind him, his widow, two sons and a daughter. Thus, he came to know about the death of the 1st defendant only on 25-6-1999 and as such, prayed for setting aside the abatement against the 1st defendant and also to implead the legal representatives of the deceased 1st defendant whose description is given in the petition as defendants 5 to 8 in the suit, in the interests of justice. Except this, no other reason was furnished.

4. A counter-affidavit has been filed on behalf of the proposed respondents wherein it was stated that the suit was filed on 1-12-1998 and the petitioner-plaintiff failed to file the application within 60 days from the date of abatement as per Article 121 of the Limitation Act, 1963. The admitted facts disentitle the petitioner-plaintiff to seek the relief of setting aside the abatement of the suit, without the petition for condonation of delay. The same counter is also filed in I.A. No. 38 of 2000. Thus, both the I.As. were disposed of by a common order.

5. It was noticed by the Court below that the 1st defendant died on 5-5-1998 much before the filing of the suit on 15-2-1999. Thus, the suit itself was laid against a dead person. The summons were returned on 26-3-1999 stating that the 1st defendant died. Thereafter, the suit was posted for taking steps for adding the legal representatives of the 1st defendant. The petitioner filed the I.As. on 14-10-1999 stating that there is no delay in filing the petitions, as it came to know the death of the 1st defendant only on 25-6-1999 and as such, the petitions are within limitation. However, the Office

of the lower Court had returned the said I.As. for filing a petition under Section 5 of the Limitation Act, 1963. The same was represented by the petitioner stating that as per the Limitation Act, 1963, the petitions are within time; hence, the petition under Section 5 of the Limitation Act is not necessary. After examining Order XXII, Rules 4 and 9 of CPC, the Court below held that the petitioner failed to file the petition to set aside abatement within 150 days of the death of the 1st defendant and had also not filed the petition under Section 5 of the Limitation Act and, therefore, dismissed the applications as barred by limitation. Aggrieved by the said order, the present Civil Revision Petition is filed.

6. For proper appreciation of the controversy involved in this lis, it is necessary to examine the provisions under which the said applications are filed i.e. Rules 4 and 9 of Order XXII of CPC, which read as follows :

"Rule 4. Procedure in case of death of one of several defendants or of sole defendant:--(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(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, in 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.

(5) Where,--

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963, and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963, for setting aside the abatement and also for the admission of that application under Section 5 of the Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.

Rule 9. Effect, of abatement or dismissal,--(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (XV of 1877), shall apply to application under Sub-rule (2). (Explanation.-- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order.)"

7. It is also relevant to extract Articles 120 and 121 of the Limitation Act, 1963.

Description of suit Application Period of Limitation Time from which period begins to run

120. Under the Code of Civil Procedure, 1908, (5 of 1908) to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent made a party.

Ninety days The date of death of the plaintiff, appellant, defendant or respondent as the case may be.

121. Under the same Code for an order to set aside an abatement-

Sixty days The date of abatement.

8. Rule 4 of Order XXII of CPC states that where the plaintiff was ignorant of the death of a defendant and could not for that reason make an application for substitution of the legal representatives of the deceased defendant within the period specified in the Limitation Act, the suit stands abated. The said Rule also states that if the plaintiff applies for setting aside the abatement after expiry of the period of limitation, he has to file an application under Section 5 of the Limitation Act on the ground that he had, by reason of ignorance, could not make the application within time and the Court shall, in consideration of such application, have due regard to the fact of such ignorance, if proved. Article 120 of the Limitation Act, 1963 stipulates that an application to have the legal representative of a deceased plaintiff or appellant or defendant or respondent shall be filed within ninety (90) days from the date of death of the said party. As already stated above, if an application to being the legal representatives of a deceased party is not filed within the period stipulated, the suit stands abated as against the party who died as per Rule 4(3) of Order XXII of CPC. Under Article 121 of the Limitation Act, an application to set aside the order of abatement shall be filed within sixty days from the date of abatement.

9. In the instant case, the fact that the 1st defendant died on 5-5-1998 came to light when the summons sent to him were returned on 26-3-1999, Therefore, the application for setting aside the abatement has to be filed by the petitioner within 150 (90 + 60) days of the date of death of the 1st defendant, as per the said Articles 120 and 121 of the Limitation Act. As the petitioner failed to file the applications within the above stipulated time and without the petition under Section 5 of the Limitation Act, though insisted to be filed by the Office of the lower Court, the Court below rejected the petitions as barred by limitation.

10. Admittedly, in the case on hand, even after the return of the petitions asking the petitioner-plaintiff to file an application under Section 5 of the Limitation Act, the same was represented without making any application as required under Section 5 of the Limitation Act. On the other hand, it was submitted that there was no necessity to file such an application. A bare look at Clause (5) of Order XXII, Rule 4, CPC makes it clear that the application under Section 5 of the Limitation Act is necessary even if there is ignorance and it is a sufficient cause for condoning the delay. But, filing of an application under Section 5 of the Limitation Act is mandatory and thereafter, the Court will examine whether the cause shown for the delay is sufficient or not. Under those circumstances, the Court below has rightly observed that under Order XXII, Rule 4 of CPC the petitioner-plaintiff may apply for setting aside the abatement order within the period of limitation and if the period of limitation is over, he can even file an application under Section 5 of the Limitation Act for condoning the delay.

11. The learned counsel for the petitioner contended that the petitioner came to know about the death of the 1st defendant only on 25-6-1999 and. therefore, the petition filed by the revision petitioner to set aside the abatement is not barred by limitation and the limitation can only be taken from the date of knowledge. In support of his contention, he relied upon a judgment of this Court reported in *R. Rajyalakshamma v. R. Kannaiah*, and submits that a suit against a person dead at the time of its institution is not void ab initio and the legal representatives can be impleaded even after the expiry of the period of limitation, if the omission to implead them was due to bona fide mistake. Absolutely, there is no dispute about the proposition laid down in the said decision. But, in the instant case, there is a delay in filing the petition to implead the legal representatives and though the Court below insisted for filing of an application under Section 5 of the Limitation Act, the petitioner did not even file the same. On the other hand, the petitioner stated that there was no necessity for filing such application.

12. The counsel for the petitioner also relies upon a judgment of the Apex Court reported in *Karuppaswamy v. C. Ramamurthy*. wherein the said decision of this Court in *Rajyalakshamma's* case (supra) was considered. It was observed that normally, if the plaintiff had known about the death of defendant, he would have filed the suit in the first instance against his heirs and legal representatives and that the High Court too recorded a finding that there was nothing to show that the plaintiff was aware of the death of the defendant and yet knowing well about it, he would persist in filing the suit against a dead person and held that since the plaintiff had taken prompt action and had acted in good faith, the Proviso to Section 21(1) of the Limitation Act could be invoked in his favour and the legal representatives of the deceased defendant could be impleaded, Here also, there is no dispute about the ratio laid down in the said case.

13. In both the said cases, the defendant died just before the institution of the very suit and steps were taken for bringing the legal representatives on record as required under Order XXII, Rule 4, CPC within the period of limitation. However, in those cases there was no adjudication as to what would happen if the petitions for impleadment of legal representatives and set aside the abatement was filed beyond the period of limitation fixed under the Limitation Act, 1963.

14. In the instant case, the main question is whether the applications to bring the legal representatives on record and to set aside the abatement have to be accompanied by a petition under Section 5 of the Limitation Act when they are filed beyond the period of limitation prescribed under Articles 120 and 121 of the Limitation Act?

15. Article 120 of the Limitation Act stipulates that the application to have the legal representative of a deceased plaintiff or appellant or defendant or respondent has to be filed within ninety days of the date of death of the said party. It is not in dispute, in the instant case that the suit was instituted on 15-2-1999 and the summons were returned against the 1st defendant with an endorsement that, the person died and even according to the petitioner the summons were returned on 26-3-1999, but the application for bringing the legal representatives on record was filed on 14-10-1999 on the ground that he came to know about the death of the 1st defendant on 25-6-1999 when the suit was posted for written statement of defendants 2 to 4. In spite of there being a specific provision in the CPC as noted above and even after the Court below insisted upon filing of such application, the petitioner has not availed the opportunity. The date when the petitioner-plaintiff gets the knowledge about the death of the 1st defendant is irrelevant under Article 120 read with Order XXII, Rule 4 of CPC. As, in the instant case, the application to bring the legal representatives on record was not filed within the above stipulated time of 90 days, the suit as against the deceased 1st defendant automatically abated, as per Sub-rule (3) of Rule 4 of Order XXII of the Code of Civil Procedure, 1908. In this connection, it is relevant to refer the decision in *Jatav Panchayat Committee v. VII Addl. District Judge, Etawah*, AIR 2000 All 253, wherein it was held (para 7) ;

"An application made after 90 days from the date of death, is an application for substitution upon setting aside abatement. The prayer for abatement being made within the period of limitation the substitution would be made only after setting aside the abatement and, therefore, no application explaining the delay would be necessary, if such application is made with a prayer for setting aside abatement within 150 days from the date of death. But at the same time, the said application cannot be maintained without the prayer for setting aside abatement. if such application for setting aside abatement is made after 150 days, in that event, definitely an application under Section 5 of the Limitation Act, would be necessary....."

16. From the above discussion, this Court is of the view that the limitation for a petition to bring the legal representatives of a deceased party on record runs from the date of death of such party. However, if a petition to bring the legal representatives on record is not filed within a period of 90 days as prescribed under Article 120 of the Limitation Act, the suit stands abated automatically as against, the deceased defendant. Thereafter, the plaintiff has to file the application for setting aside the abatement within 60 days from the date of abatement, as per Article 121 of the Limitation Act. If the applications for abatement and to implead the legal representatives are filed thereafter, i.e. after

150 days (90 + 60), the plaintiff can very well file a petition under Section 5 of the Limitation Act and plead for the ignorance of the fact of death of the defendant. The Court may examine the merits of that petition and may condone the delay in filing the petitions for abatement and impleadment and then proceed with the suit. But, if no petition for condoning the delay as required under Section 5 of the Limitation Act is filed, the Court can very well reject the applications for abatement and impleadment. In fact, it is not the date of knowledge that is important, it is the date of death of a party, which is, important and from that date the limitation runs. In the case on hand, it is for the petitioner to prove that he was ignorant and came to know of the death of the 1st defendant only on 25-6-1999 and pray the Court to condone the delay. But, without there being a petition under Section 5 of the Limitation Act, the abatement cannot be set aside and the legal representatives of the deceased party cannot be brought on record. This view of mine is fortified by the following decisions :

(i) Punjab State v. Kabul Singh, and

(ii) S.R. Gaitonde v. J.J. Fonseca, AIR 1976 Goa 11.

17. For the aforesaid reasons, the findings of the Court below cannot be faulted. The applications filed by the petitioner were rightly rejected by the trial Court. Absolutely, there are no grounds to interfere with the order passed by the lower Court.

18. The Civil Revision Petition fails and is accordingly dismissed. No order as to costs.