

KERALA HIGH COURT

Hon'ble Justice V R Krishna Iyer

Stella Pereira Blaizue Pereira vs Adima Abdul Latheef on 1 November, 1968

ORDER

V.R. Krishna Iyer, J.

1. This Civil Revision petition attacks orders passed in proceedings which, right from the start, seem to have stemmed from a confusion.

2. A suit for recovery of possession was filed by the sole plaintiff in a suit who died pendente lite. On his death the present revision petitioners filed a petition to get themselves impleaded as plaintiffs 2 and 3 and to get 3 other heirs impleaded as defendants 3, 4 and 5 because those 3 persons were outside the country and their signatures could not be obtained for getting them impleaded as co-plaintiffs. Notice was being taken from time to time by the petitioners to the 3 others and there was considerable neglect in renewing the notices. The Court ultimately said that no further adjournment would be granted and on the adjourned date again there was default and so the Court dismissed the suit for default. The revision petitioners thereupon filed a petition for restoration of the suit, which again was considered by the trial Court and on finding that the suit had been dismissed rightly for default, it declined to restore the suit. A Civil Miscellaneous Appeal was filed against this order which also ended in dismissal and now this revision petition has been filed by the same petitioners to see if the suit could be restored to file and continued.

3. When a sole plaintiff dies the proper procedure is to take steps under Order XXII Rule 3 C. P. C. Till they are impleaded as per that provision there is no additional party and if steps are not taken to get the legal representatives impleaded in time the suit abates. The learned Subordinate Judge has no doubt pointed out, in the C. M. A., that the suit should not have been dismissed for default because the legal representatives had not yet come on record as parties and an order passed against a dead person would be a nullity. Both sides and the trial Court appear to have proceeded on the footing that there was a default on the part of the co-plaintiffs and as such the suit had to be dismissed for default. The fact was that the petitioners had not become co-plaintiffs yet and till they were impleaded there was no case of the suit being continued by them or the suit being dismissed for their default. Again, the suit, if dismissed, could not be restored by resort to a proceeding under Order IX C. P. C. or by inviting the jurisdiction of the Court under Section 151 C. P. C. The entire proceedings for restoration were as misconceived as the order of the Court dismissing the suit for default. Since this serious error in the procedure had not been discovered till the Subordinate Judge pointed out the correct procedure one cannot find fault with

the petitioner for his having chosen to move for restoration of the suit, misled, as he was, by the order of the Court that the suit was dismissed for default. However, at the stage when the Subordinate Judge pointed out that the course open to the party was to get the abatement set aside he need not have come up to this Court. Anyway, since the Subordinate Judge also elaborately considered the question of default the party has pardonably approached the revisional Court. There is no doubt that the dismissal of the suit for default was not correct in law; but, has the suit abated by efflux of time ?

4. Under Order XXII Rule 3 C. P. C. when a plaintiff dies all that the person desirous of proceeding with the case has to do is to make an application bringing to the notice of the Court who the legal representatives of the deceased plaintiff are, whereupon the Court brings them on record as parties and proceeds with the suit. A Full Bench of the Mysore High Court (AIR 1954 Mysore 65) took this view and went on further to hold that where an application to bring on record the legal representatives has already been filed, there is no further duty cast on the litigant to remind the Court of its obligation to make him a party. Dealing with the death of a plaintiff and the duties of parties and Courts thereupon, as well as the legality of the dismissal of such a suit before bringing the legal representatives on record, Barman J. held in Padmacharan Mahanty v. Moti Dei, AIR 1963 Orissa 88 as follows -- The head-note is a good enough summary of the legal position for the present purposes:

"An order dismissing a suit for default passed against the plaintiff who by then is dead, is a nullity and there is no question of the finality of a decree which on the face of it is nail and void.

In such a case, the legal representative of the deceased plaintiff in whom the right to sue survives, has to file an application under Order 22 R. 3 informing the Court about the death of the original plaintiff. The further acts are left to the Court and the Court cannot reject the application merely for default of appearance of the legal representative. Where no order is passed by the Court and the applicant also does not press the need for formal order, the omission on the part of the applicant will not take away his right to proceed with the case as there is no duty cast on him by the rule to remind the Court of observance of the rules.

All subsequent proceedings in the absence of the legal representative who is not substituted by mistake of Court are, of no effect."

5. In that case it was held that Section 151 C. P. C. provided an appropriate remedy and the Court could correct the mistake inadvertently made in dismissing the suit.

6. In an earlier decision, Bhandari J. has ruled Abdul Samad v. Masal, AIR 1957 Raj 302 on a similar point in similar strain. "Once the Court is made aware of the persons who are in the position to prosecute the suit, it is left to it to make them a party"

and Order XXII Rule 3 (1) C. P. C. is purposely worded in sufficiently wide language and if the names of the legal representatives are brought to the notice of the Court it becomes the duty of the Court to array them as party whether as plaintiffs or defendants.

7. The principles that we can decoct from the above decisions appear to me to justify an interference in revision in this case. The dismissal of the suit is unwarranted and illegal once the only party on record as plaintiff is stated to be dead. Similarly, there cannot be an abatement once an application has been filed under Order XXII Rule 3 C. P. C. within the time limited. Since such an application has been filed in this case all that remained to be done was for the Court to take steps to ascertain whether the persons mentioned as legal representatives before it were really so. It could not have dismissed the application for impleading the legal representatives without discharging this duty. Of course, an opportunity should have been given to the defendants on record to establish that the persons who desired to come on record as legal representatives were not competent to represent the deceased.

8. There is no doubt that parties were labouring under a confusion as to the true legal position and so all the fight about the restoration of the suit has been going on fruitlessly. In the circumstances of the case, interests of justice require that I should set aside the order passed on C. M. P. No 216 of 1963 which is the application for impleading the legal representatives and direct the trial Court to go into the question as to who are the legal representatives after giving due opportunity to the defendants to present their case on the matter. The dismissal of the suit has to be set aside and I do so. Since the application for impleading the legal representatives had been put in within the time allowed, there cannot be any abatement of the suit and an application to get the abatement set aside is therefore unnecessary.

9. The revision petitioners agree to take prompt steps to take out notices to the three respondents in C. M. P. 216 of 1963. They will be given an opportunity to do so. The order of dismissal of the suit by the trial Court appears to be based upon a serious misconception that once a Court adjourns a case stating that no further adjournment would be granted it exhausts itself of all further powers of adjournment unless the order is reviewed and "sanction" obtained. There is no meaning in this word "sanction" or in the procedure to obtain sanction by reviewing the earlier order. If a Court grants an adjournment and indicates that no further adjournment would be granted it does not lose its jurisdiction, on a proper cause shown, to postpone the case still further. There is neither need for review of the earlier order nor propriety in doing so on account of subsequent happenings.

10. In the result, I allow the Civil Revision Petition, set aside the dismissal of the suit and direct the trial Court to dispose of C. M. P. No. 216 of 1963 according to law. No costs.