

THE HON'BLE SRI JUSTICE V.GOPALA KRISHNA RAO

APPEAL SUIT No.3356 OF 2003

AND

CROSS OBJECITONS (SR) No.6296 OF 2004

COMMON ORDER: -

Head Sri M.V.S. Suresh Kumar, learned Senior Counsel appearing on behalf of the appellant in the main appeal proceedings and respondents in Cross Objections and heard Smt. Nimmagadda Revathi, learned counsel for the respondents/plaintiffs in the main appeal (Cross Objector).

2. The undisputed facts of both parties are preliminary decree of partition is passed by the trial Court with a specific finding that the plaintiff, 4th defendant and the legal heirs of late Kusuma Kumari, eldest daughter of Subba Rao and Sarva Lakshmi i.e., defendant Nos.2, 3, 6 to 8 are entitled to 1/3rd separate share in the plaint 'A and B' schedule properties and no preliminary decree is passed against the other parties. The Cross Objections are filed by the 1st respondent/plaintiff. The 4th defendant in the main suit filed the first appeal before this Court.

3. Sri M.V.S. Suresh Kumar, learned Senior Counsel for respondents in Cross Objections i.e., appellant in the main appeal, would contend that the estate of the 5th defendant was not at all represented by the surviving defendants and there was a total abatement of suit. It is a fact that 5th defendant died before the trial Court and no decree is passed against 5th defendant.

4. Learned Senior Counsel for respondents in Cross Objections (appellant in the main appeal) relied on case of **Budh Ram and others vs. Bansi and others** ¹ wherein the Apex Court held as follows:

¹ (2010) 11 Supreme Court cases 476

“Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of LRs of the defendants/respondents would abate the appeal in toto or only qua the deceased defendants/respondents, depend upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decree passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.”

5. The learned Senior Counsel for respondents in Cross Objections placed another reliance in **Sunkara Lakshminarasamma (dead) by Legal Representatives vs. Sagi Subba Raju and others**² wherein the Apex Court held as follows:

“Order 22 Rule 4 CPC lays down that where within the time limited by law, no application is made to implead LRs of a deceased defendant, the suit shall abate as against a deceased defendant. This rule does not provide that by the omission to implead LR of a defendant, the suit will abate as a whole. If the interests of the co-defendants are separate, as in the case of co-owners, the suit will abate only as regards the particular interest of the deceased party. In such a situation, the question of the abatement of the appeal in its entirety that has arisen in this case depends upon general principles. If the case is of such a nature that the absence of LRs of the deceased respondent prevents the court from hearing the appeal as against the

² (2019) 11 Supreme Court Cases 787

other respondents, then the appeal abates in toto. Otherwise, the abatement takes place only in respect of the interest of the respondent who has died. The test often adopted in such case is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same suit with respect to the same subject-matter. The court cannot be called upon to make two inconsistent decrees about the same property, and in order to avoid conflicting decrees the court has no alternative but to dismiss the appeal as a whole. If on the other hand, the success of the appeal would not lead to conflicting decrees, then there is no valid reason why the court should not hear the appeal and adjudicate upon the dispute between the parties.”

6. The learned Senior Counsel for respondents in Cross Objections placed another reliance in **Gurnam Singh (dead) through Legal Representatives and others vs. Gurbachan Kaur (dead) by Legal Representatives**³ wherein the Apex Court held as follows:

“It is fundamental principles of law laid down by this Court in *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340 that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a “nullity”.

7. The learned Senior Counsel for respondents in Cross Objections placed another reliance in **Venigalla Koteswaramma vs. Malampati Suryamba and others**⁴ wherein the Apex Court held as follows:

³ (2017) 13 Supreme Court Cases 414

⁴ (2021) 4 Supreme Court Cases 246

“The Court observed in that case, *inter alia*, as under: (*Nathu Ram Case*, AIR pp.90-91, paras 4-6 & 8)

“4. It is not disputed that in view of Order 22 Rule 4 Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram, deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when Order 22 Rule 4 does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

Admittedly, in the case on hand, the preliminary objection is raised by the respondent/4th defendant in Cross Objections i.e., appellant in main appeal. In the main appeal the appellant filed I.A.Nos.6, 7, 8 and 9 of 2024 respectively to condone the delay of 688 days in filing a petition to set aside the abatement proceedings against 7th respondent. Those applications are pending before this Court for hearing. Likewise, I.A.No.10 to 18 of 2024 are filed in Cross Objections (SR) No.6296 of 2004 to condone the delay of 649 days in filing a petition to set aside the abatement proceedings against 3rd respondent; 9169 days in filing a petition to set aside the abatement proceedings against 5th respondent and 649 days in filing a petition to set aside the abatement proceedings against 7th respondent respectively. Those applications are pending before this Court for hearing. All the aforesaid applications filed by both side parties pending for hearing. At this stage, the preliminary objection is raised by respondent in Cross Objections/appellant in the main appeal, merits and demerits in those

applications have to be decided by this Court. Pending disposal of the first appeal, preliminary objection is raised by the appellant in the main appeal/4th defendant in Cross Objection.

8. The learned counsel for the Cross Objector/plaintiff placed a reliance in **Shahazada Bi and others vs. Halimabi (since dead) by her LRs⁵** wherein the Apex Court held as follows:

“The most clinching fact was that defendant No.4 had died during the pendency of the suit. Defendant No.4 was in possession of a room leased out to defendant No.5 for rent. Taking into account the above circumstances, the trial Court was right in holding that the suit against defendant No.4 alone stood dismissed as abated. The trial Court was, therefore, right in decreeing the suit of the plaintiffs as prayed for only against defendant Nos.1 to 3. Order 22 Rule 4 CPC lays down that where within the time limited by law, no application is made to implead the legal representatives of a deceased defendant, the suit shall abate as against a deceased defendant. This rule does not provide that by the omission to implead the legal representative of a defendant, the suit will abate as a whole. What was the interest of the deceased defendant in the case, whether he represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party. [See *Masilamani Nadar v. Kuttiamma*] reported in 1960 (4) Kerala Law Journal 936]. In the case *Sant Singh & Anr. v. Gulab Singh* reported in [AIR 1928 Lahore 573], it has been held that under Order 22 Rule 4 (3) read with Order 22 Rule 11 CPC where no application is made to implead the legal representative of the deceased respondent, the appeal shall abate as against the deceased respondent.

⁵ (2004) 7 Supreme Court Cases 354

The ratio laid down in the aforesaid case law is relates to suit for partition.

9. In a case of **Sardar Amarjit Singh Kalra (dead) by LRs. and others vs. Pramod Gupta (Smt.) (dead) by LRs. and others**⁶, the Constitutional Bench of the Apex Court held as follows:

“The question, therefore, as to when a proceeding before the Court becomes or rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side has been always considered to depend upon the fact as to whether the decree obtained is a joint decree or a severable one and that in case of a joint and inseverable decree if the appeal abated against one or the other, the same cannot be proceeded with further for or against the remaining parties as well. If otherwise, the decree is a joint and several or separable one, being in substance and reality a combination of many decrees, there can be no impediment for the proceedings being proceeded with among or against those remaining parties other than the deceased.”

10. In a case of **Mahabir Prasad vs. Jage Ram and others**⁷ the Apex Court held as follows:

“Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he 'is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding Will not abate. On that ground also the order passed by the High Court cannot be, sustained.”

⁶ (2003) 3 Supreme Court Cases 272

⁷ AIR 1971 Supreme Court 742

In the case on hand, admittedly, no preliminary decree of partition was passed against defendant Nos.1, 5 and 9 and during the pendency of the suit, defendant Nos.1, 5 and 9 died intestate. The 9th defendant died issueless and the same was recorded by the trial Court and defendant Nos.2 to 9 are the legal heirs of 1st defendant, who are already on record. It is also a fact that the death of 5th defendant was also recorded before the trial Court and no decree was passed against 5th defendant. The learned counsel for the Cross Objector represented that the deceased 5th respondent was not representing entire 1/3rd share of his mother late Kusuma Kumari, but only the extent of his part of share and other daughters and sons of late Kusuma Kumari are already on record and therefore there was no abatement in a partition suit when other legal heirs are already on record.

11. In a case of **Delhi Development Authority vs. Diwan Chand Anand and others**⁸, the Apex Court held as follows:

“After referring to the decision of this Court in the case of Nathu Ram (supra), in the case of *Vennigalla Koteswaramma vs. Malampati Suryamba and Others*, MANU/SC/1214/2022 : (2003) 3 SCC 272, it is observed by this Court that the nature and extent of the abatement in a given case and the decision to be taken thereon will depend upon the facts of each case and, therefore, no exhaustive statement can be made either way and that the decision will ultimately depend upon the fact whether the decree obtained was a joint decree or a separate one. It is further observed that this question cannot and should not also be tested merely on the format of the decree under challenge or it being one or the manner in which it was dealt with before or by the Court which passed it.

Thus, as observed and held by the Court:

⁸ (2022) 10 SCC 428

(i) The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives;

(ii) If there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants (Order 22 Rule 2);

(iii) 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. Where within the time limited by law no application is made under sub-rule 1 of Order 22 Rule 4, the suit shall abate as against the deceased defendant;

(iv) the provision of Order 22 shall also apply to the appeal proceedings also.

As observed and held by this Court in the aforesaid decisions while considering whether the suit/appeal has abated due to non-bringing the legal representatives of plaintiffs/defendants or not, the Court has to examine if the right to sue survives against the surviving respondents. Thereafter the Appellate Court has to consider the question whether non-bringing the legal representatives of some of the defendants, the appeal could have proceeded against the surviving respondents. Therefore, the Appellate Court has to consider the effect of abatement of the appeal against each of the respondents in case of multiple respondents.”

12. Learned counsel for the respondent in Cross Objections placed reliance of *Gurnam Singh's case* (3 supra) wherein the Apex Court held as follows:

“In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased

persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.”

In the case on hand, admittedly, in the Cross Objections the Cross Objector filed several applications to bring the LRs on record. In the main appeal also the learned counsel for the appellant/4th defendant filed applications vide I.A.Nos.6, 7, 8 and 9 of 2024, those are pending for hearing, and those applications have to be decided on hearing both sides. At this stage, the preliminary objection was raised by the respondent/4th defendant in Cross Objections i.e., appellant in the main appeal. The primary objection taken by the learned counsel for the respondent/4th defendant in Cross Objections (appellant in main appeal) is pending suit the defendant Nos.5 and 9 died, their LRs are not brought on record and the estate of 5th defendant was not at all represented by surviving defendants and therefore it is a total abatement of the suit. In the case on hand, no decree is passed against defendant Nos.5 and 9, more so, it is a first appeal filed by 4th defendant in the year 2003 in which Cross Objections are laid by the respondent/plaintiff in the year 2004.

13. The provision under Order-XLI Rule 31 of the Code of Civil Procedure says as follows:

31. Contents, date and signature of judgment.- The judgment of the appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled,

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

In view of the provision under Order XLI Rule 31 of the Code of Civil Procedure, since this Court being a 1st appellate Court has to verify whether the plaintiffs in a suit are entitled main relief of partition in respect of the shares of the other parties and in deciding the first appeal, the 1st appellate Court has to discuss the evidence adduced in the trial Court by both parties and more so, no preliminary decree is passed against defendant Nos.5 and 9 by the learned trial Judge, therefore, the objections taken by the learned counsel for the respondent in Cross Objections i.e., appellant in main appeal are not sustainable and the same is overruled.

Therefore, for the aforesaid reasons, the preliminary objection raised by the respondent/4th defendant is overruled.

V. GOPALA KRISHNA RAO, J

Date: 04.12.2024
PGR