

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice

BAI PANI VANKAR (ORIGINAL APPLICANT), PETITIONER *v.* PATEL
MADHABHAI GALABHAI (ORIGINAL OPPONENT), OPPONENT.*

1952

Dec. 2

Civil Procedure Code (Act V of 1908), O. I, r. 10—Appeal filed on behalf of dead person—Application by legal representative of deceased to be substituted as appellant—Whether application is competent.

An appeal preferred on behalf of a dead person being a nullity no order can be made in the appeal for substituting the legal representative of the deceased in place of the appellant.

Rampratap v. Gavrishankar,⁽¹⁾ *Verrappa Chetty v. Tindel Ponnen*,⁽²⁾ and *Sudhir Kumar De v. Amritlal Seal*,⁽³⁾ followed.

Gopala Kristnayya v. Lakshamana Rao,⁽⁴⁾ *Karimullah v. Bhanu Pratap Singh*,⁽⁵⁾ and *Mehar Singh v. Labh Singh*,⁽⁶⁾ dissented from.

Alabhai Vajsurbhai v. Bhura Bhaya,⁽⁷⁾ distinguished.

CIVIL REVISION APPLICATION against the order passed by B. C. Vakil, Esquire, District Judge at Ahmedabad on an application made in Appeal No. 70 of 1951 on his file.

M. P. Sethana, for the petitioner.

B. G. Thakore, for the opponent.

Chagla C. J. A suit was filed by one Soma Parma, who was a minor, through his next friend. This suit was dismissed on December 23, 1950. By that time Soma had attained majority and he instructed his pleader on January 21, 1951 to prefer an appeal and he signed a *vakalatnama* in favour of the pleader on January 22. The pleader preferred the appeal on January 29, 1951. Prior to that date Soma died on January 23, 1951. On March 16, 1951 the present petitioner, who is the heir and legal representative of Soma, applied to the District Court to substitute her name in place of Soma. That application was dismissed by the learned District Judge, and it is from that order that this revision application is preferred.

Now, apart from authorities, I should have said that the appeal that was preferred on January 29, 1951, was clearly a nullity. The appellant being dead, the pleader who preferred the appeal had no authority to prefer any appeal and the

* Civil Revision Application No. 160 of 1952.

⁽¹⁾ (1922) 25 Bom. L. R. 7.

⁽²⁾ (1907) 31 Mad. 86.

⁽³⁾ [1946] 2 Cal. 611.

⁽⁴⁾ (1924) 49 Mad. 18 (F. B.).

⁽⁵⁾ [1938] A. I. R. Nag. 458.

⁽⁶⁾ [1932] A. I. R. Lah. 305.

⁽⁷⁾ (1937) Bom. 602, s. c. [1937] A. I. R. Bom. 401.

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vakalatnama signed in his favour had come to an end. If the appeal was a nullity, no order could be made in that appeal which would be an effective order, and, therefore, the learned District Judge was right in refusing to direct that the petitioner should be substituted in place of the deceased appellants. An effective order under O. I, r. 10 can only be made provided there is a suit or an appeal before the Court, but if the suit or the appeal is a nullity then any order made in that suit or appeal is equally a nullity, and the learned Judge rightly relied on the decision of Mr. Justice Mulla in *Rampratab v. Gavrishankar*.⁽¹⁾ In that case the learned Judge was dealing with a suit filed by the plaintiff against the firm of the defendant's father. The defendant's father was the sole owner of the firm and he had died before the institution of the suit, and Mr. Justice Mulla held that the suit instituted was not merely against a wrong person but against no person at all and he points out at p. 11 that any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also nullity.

Mr. Sethna has relied on a judgment of the Madras High Court in *Gopala Kristnayya v. Lakshmana Rao*.⁽²⁾ That judgment of a Full Bench, but before we turn to that judgment it is necessary to draw attention to an earlier judgment of that Court in *Veerappa Chetty v. Tindel Ponnen*.⁽³⁾ In that case Mr. Justice Wallis and Mr. Justice Miller took the view that there was nothing in the Code of Civil Procedure to authorise the institution of a suit against a deceased person and the Courts have no jurisdiction to allow the plaint in such a case to be amended by substituting the names of the representatives of the deceased, even when the suit is instituted *bona fide* and in ignorance of the death of the defendant. With respect, I entirely agree with this view. What is said here about a plaint also applies to an appeal. Turning to *Gopala Kristnayya v. Lakshman Rao*,⁽²⁾ the Full Bench took the view that when there is an appeal presented against a person who is dead at the date of presentation, the Court has jurisdiction under s. 153 to permit the title to be amended. When we turn to the judgment, with great respect, no reason is given why a view different from the view expressed in *Veerappa Chetty v. Tindel Ponnen*⁽³⁾, has been taken and the decision in *Veerappa Chetty*

⁽¹⁾ (1922) 25 Bom. L. R. 7.⁽²⁾ (1924) 49 Mad. 18 (F. B.).⁽³⁾ (1907) 31 Mad. 86.

v. *Tindel Ponnen*,⁽¹⁾ is not even expressly overruled. What is overruled is another case reported in *Govindu Kaviraj v. Gauranga Sāw*.⁽²⁾

The other case relied on by Mr. Sethna is a judgment of the Nagpur Court in *Karimullah v. Bhanu Pratap Singh*.⁽³⁾ In that case Mr. Justice Niyogi held that O. I, r. 10, only contemplates that the suit should have been filed in the name of a wrong person irrespective of whether he is living or a dead person, and that there is no difference between a suit filed in the name of a dead plaintiff and one filed in the name of a wrong person as plaintiff, and according to the learned Judge both the cases come within the ambit of O. I, r. 10 and the defect is capable of being cured if the mistake is shown to have occurred in good faith, provided that in permitting the amendment no injustice results to the defendant, and Mr. Justice Niyogi relies on *Gopala Kristnayya v. Lakshmana Rao*.⁽⁴⁾ With respect to the learned Judge, in my opinion, there is a fundamental difference between a suit filed in the name of dead person and a suit filed in the name of a wrong person. When a suit is filed in the name of a wrong person, there is a person alive who files the suit. He happens to be not the proper person by reason of misdescription or some other reason and the real person is brought on the record in substitution. But when a suit is filed by a dead person there is no person before the Court at all who can be substituted. The Lahore High Court also has taken the same view in *Mehar Singh v. Labh Singh*.⁽⁵⁾ That was a case where an appeal was filed against a dead respondent and the Court allowed the legal representative to be substituted and the time for such substitution to be excused and the learned Judge in that case, Mr. Justice Johnstone, also followed *Gopala Kristnayya v. Lakshmana Rao*.⁽⁴⁾ As against this there is the judgment of the Calcutta High Court in *Sudhir Kumar De v. Amritlal Seal*,⁽⁶⁾ and Mr. Justice Khundkar in that case held that the provisions as to the substitution of the heirs of a deceased defendant in a suit, being applicable only to a case where the defendant was alive at the date of the institution of the suit, a Court has no jurisdiction to substitute the heirs of a defendant who had died previous to the institution of the suit and to decree the suit against the heirs of the deceased defendant.

⁽²⁾ (1923) 45 Mad. L. J. 231.

⁽³⁾ [1932] A. I. R. Lah. 305.

⁽⁴⁾ [1946] 2 Cal. 611.

⁽⁵⁾ [1938] A. I. R. Nag. 458.

⁽⁶⁾ [1933] A. I. R. Lah. 305.

⁽¹⁾ (1907) 31 Mad. 86.

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Mr. Sethna has strongly relied on a judgment of a division Bench of this Court in *Alabhai Vajsurbhai v. Bhura Bhaya*.⁽¹⁾ It seems that there an appeal was presented against several respondents. Some respondents seem to have died before the appeal was presented and others died pending the appeal, and the main question that arose was whether the appeal had abated. In this connection Mr. Justice Wassoodew in his judgment relied on *Gopala Kristnayya's case*⁽²⁾ and expressed the opinion that the view expressed by that decision was the correct view. Mr. Justice Wadia in his concurring judgment has not referred to this point at all.

Now, the Bombay case is clearly distinguishable because that was not a case of an appeal being preferred against a sole respondent who was dead at the date when the appeal was preferred. That was a case where the appeal was preferred against several respondents and the appeal was properly instituted against some of the respondents who were alive at the date when the appeal was instituted. Therefore, it could not be said that the appeal was a nullity. There was a proper and effective appeal before the Court and really the question of bringing the legal representatives of the respondents who had died before the appeal was preferred was not so much a question of substitution as a question of adding to the respondents who were already before the Court, and there can be no doubt that if a suit or an appeal is effectively before the Court the question of addition of parties is regulated by O. I, r. 10. Further, it appears from the judgment of Mr. Justice Wassoodew that the reason why the appeal was not preferred with regard to some of the respondents against the legal representatives was that certain orders passed by the Court had not been duly carried out and what particularly weighed with Mr. Justice Wassoodew was that the record should be amended and should be brought in conformity with the orders of the Court passed on various applications. Therefore, in my opinion, the judgment of the Division Bench on which Mr. Sethna relies is not directly in point and it does not in any way impair the authority in *Rampratab v. Gavri Shankar*⁽³⁾ on which the learned District Judge relied.

In my opinion, the view expressed in *Veerappa Chetty's case* and *Sudhir Kumar Dey's case* and also in *Ram Pratab's case*⁽⁴⁾ and in *Sudhir Kumar Dey's case* and also in *Ram*

⁽¹⁾ [1937] Bom. 602.

⁽²⁾ (1924) 49 Mad. 18 (F.B.)

⁽³⁾ (1922) 25 Bom. L. R. 7.

⁽⁴⁾ [1946] 2 Cal. 64.

Pratap's case is the better view and I prefer it to the view expressed in *Gopal Kristnayya's case* in *Karimallah v. Bapu* and in *Mehar v. Labh* and also the observations of Mr. Justice Wassoodew in *Alabhai v. Bhura*⁽¹⁾ to which I have made reference. I am, therefore, of the opinion that the learned District Judge was right in dismissing the application made by the petitioner.

The result is that the revision application fails. Rule discharged with costs.

Rule discharged.

M. W. P.

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APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

DHONDI TUKARAM MALI, AND ANOTHER, (ORIGINAL DEFENDANTS
NOS. 1 AND 2), APPELLANTS *v.* HARI DADU MANG, AND OTHERS,
(HEIRS OF ORIGINAL PLAINTIFF), RESPONDENTS.*

1952

Dec. 8

Bombay Tenancy and Agricultural Lands Act (LXVII of 1948), ss. 29, 70, 85, 89—Plaintiff suing for possession of agricultural lands—Defendant contending that he was a protected tenant—Whether Civil Court has jurisdiction to try the suit—Whether jurisdiction of Civil Courts is ousted by s. 85 in respect of pending proceedings—Construction—Bombay General Clauses Act (I of 1904), s. 7.

In a suit filed by the plaintiff to recover possession of agricultural lands the defendant contended that he was a protected tenant. On the question whether the Civil Courts had jurisdiction to try the suit,

Held, (1) that since under s. 70 (b) of the Bombay Tenancy and Agricultural Lands Act, 1948, it is the duty of the Mamlatdar to decide whether a person is a tenant or a protected tenant and s. 85 of the Act provides that the questions left for determination by the Mamlatdar under s. 70 cannot be tried by a Civil Court, the Civil Court had no jurisdiction to try the suit,

Trimbak Sopana v. Gangaram Mhatarba,⁽²⁾ relied upon.

(2) that the proper procedure for the Civil Court in such cases is not to dismiss the suit but to direct the party who raises the plea of tenancy under the Bombay Tenancy and Agricultural Lands Act, 1948, to obtain a decision from the Mamlatdar within a reasonable time; and if the decision of the Mamlatdar is in favour of the said party the suit for possession has to be dismissed; if, on the other hand, the

* Second Appeal No. 1381 of 1949.

⁽¹⁾ (1937) A. I. R. Bom. 401.

⁽²⁾ [1953] Bom. 586.