

SMT. RATNA @ RATNAVATI

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v.

SYNDICATE BANK AND ORS.

NOVEMBER 24, 1994

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

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Code of Civil Procedure, 1908/Limitation Act, 1963—Sections 52, 151, Order Rule 10, Order 22 Rules 1 and 2/Articles 120, 121—Suit—Bringing on record the legal representatives of deceased party—Held; No need to move an application within the period of limitation as provided under Articles 120 and 121 of the Limitation Act.

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The father of the petitioner was the 2nd defendant in a suit filed under Order 34 Rule 4 for the recovery of the money due under a hypotheca. A preliminary decree was passed in the suit on the basis of a joint memo filed by the parties. Thereafter the second defendant/surety died. The plaintiff filed an application for final decree. He also filed an application to bring the petitioner as legal representative of the deceased second respondent. It was opposed on the ground that such application was barred by limitation and the preliminary decree itself had abated after the expiry of 90 days from the date of death of defendant 2. An objection was also raised that the petitioner was not liable to pay the amount of decree unless the principal debtor was proceeded against. On revision, the High Court left open the second question and upheld the order of the trial Court. Hence this appeal.

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Dismissing the SLP, this Court

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HELD : 1. The High Court was right in its conclusion that there is no need to make an application within the period of limitation as provided under Articles 120 and 121 of the Limitation Act to bring the LRs. of deceased defendant on record and to seek to set aside the abatement after the expiry of 90 days. [77 C]

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2. A decree passed confers rights and imposes liabilities which are fixed until the decree is reversed or varied in appeal. The preliminary decree declares rights of the plaintiff and liabilities of the respective defendants and they become final. The suit would not abate between the date of preliminary decree and final decree. [76 F]

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A 3. Section 52 CPC adumbrates that a money decree passed against
the legal representative of the deceased defendant, out of the property
of the deceased in his hands, may be executed by attachment or sale of
that property. If the legal representatives fail to satisfy the court that
he duly applied the property to discharge the debt or the court is not
satisfied of his so doing, the court would proceed against the legal
B representatives personally and to apply the property by sale to satisfy
the decree debt. At the time when the application for passing the final
decree is filed, it is enough if the legal representatives are impleaded, all
or any of the legal representatives of the deceased defendant-judgment
debtor to represent the estate of the deceased. If death of defendant
C takes place pending passing of final decree they may be brought on
record under section 151 CPC or Order 1 Rule 10 CPC. [76 H, 77 A, B]

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No.
22705 of 1994.

D From the Judgment and Order dated 19.4.94 of the Karnataka High
Court in C.R.P. No. 782 of 1994

N.S. Hegde, G.V. Chandrashekhar and P.P. Singh for the Petitioner.

The following Order of the Court was delivered :

E Delay condoned.

The father of the petitioner was the 2nd defendant in O.S. No. 232/86
filed in the Court of Civil Judge at Udupi. The suit had been filed under
Order 34, Rule 4 for the recovery of the money due under a hypotheca. A
preliminary decree was passed in the suit on June 28, 1989 on the basis of a
F joint memo filed by the parties. Thereafter, Muthu Marakala, the second
defendant/surety, died. An application No. 316/91, to pass final decree,
when was filed by the plaintiff, it also made an application to bring the
petitioner as legal representative of deceased second respondent, which was
opposed on the ground that such application was barred by limitation and
the preliminary decree, itself, had abated after the expiry of 90 days from
G the date of death of defendant-2. An objection had also been raised that the
petitioner was not liable to pay the amount of the decree unless principal
debtor, defendant was proceeded against. That application was allowed by
the trial court. On revision, while leaving open and second question, the
High Court of Karnataka by its impugned order dated 19.4.94 made in CRP
H No. 782/94 upheld the order of the trial court.

Shri Santosh Hegde, learned senior counsel for the petitioner, contended that though a preliminary decree had been passed by the trial court, it, by itself, was not executable unless final decree thereon was passed. In making the final decree, an adjudication on issues which arise, needs to be made. Therefore, the legal representatives of the deceased defendant-2 should have been brought on record within 90 days from the date of his death under Article 120 and if 60 days' time expires after the expiry of 90 days, an application for setting aside abatement under Article 121 of Schedule to Limitation Act 1963 should be made. Since such applications had not been filed within the periods of limitation, the preliminary decree itself, stood abated. The trial court and the High Court were not right in directing to implead the legal representative of the second defendant. We find no force in the contentions.

It is seen that the decree in question is a consent decree, which had become final. The preliminary decree made under Order 34, Rule 4 CPC clearly mentions in Clause (1) that "the defendants jointly, severally and personally do pay to the plaintiff a sum of Rs. 7,31,984.10 with future interest on Rs. 3,45,461.55 (loan account Sl. No. 1,3,4 of the 'C' Schedule) at the rate mentioned therein." It is, thereby, clear that the adjudication of and fastening the liability on the respective defendants became conclusive.

Clause (5) of the preliminary decree mentioned:

"And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendants for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court, may give such directions as it thinks fit."

From this, it is contended that a further adjudication needs to be made and that, therefore, it is necessary to bring the legal representatives within the limitation prescribed under Articles 120 and 121 of Schedule to the Limitation Act, 1963. It is seen that Clause (1) determined a personal liability against each individual defendant. But since suit is based on hypotheca, a preliminary decree was passed. Several clauses are introduced

A for diverse steps to be taken. Rule 4 of Order 34 provides that the court should pass a preliminary decree in terms of clauses (a), (b), (c) and (i) of sub-rule (1) of Rule 2. It further directs that in default of the defendant paying the amount as mentioned therein, the plaintiff shall be entitled to apply for a final decree directing that the hypotheca or sufficient part thereof to be sold and the proceeds of the sale (after deducting therefrom the expenses of the sale) to be paid into court and applied in payment of what has been found or declared under or by the preliminary decree as due to the plaintiff together with such amount as may have been "adjudged" in the appeal against preliminary decree etc. due in respect of subsequent costs, charges, expenses and interest. The balance, if any, be paid to the defendant or other persons entitled to recover the same. Clause (5) says that

C "in the event of non-payment and the decree debt remains unrealised, for such balance amount due, plaintiff has been empowered to apply for a personal decree against the defendant. It would be in terms of the mortgage and is not barred by any law. The defendant(s) is/are required to pay the money within the time specified in the preliminary decree and in default,

D the plaintiff was directed to proceed against the defendant(s) in terms of final decree. Thereafter, the decree-holder is entitled to proceed against the judgment-debtors individually, severally and jointly.

Order 22 Rule 1 says that "the death of plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 2 says that in case

E of multiple plaintiffs or defendants, if any of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs/defendants, the court shall cause an entry to that effect made and shall proceed with the suit under Rule 4, if the right does not survive against the surviving defendants alone, on an application made, the court shall cause the legal representative substituted and shall proceed with the suit. A decree passed confers rights

F and imposes liabilities which are fixed until the decree is reversed or varied in appeal. The preliminary decree declares rights of the plaintiff and liabilities of the respective defendants and they become final. The suit would not abate between the date of preliminary decree and final decree. In this view of the matter, the question which emerges is whether it is not necessary for the decree holder to make an application within the limitation prescribed under Article 120 of the Schedule to the Limitation Act, 1963 to have the legal representatives brought on record. Section 52 CPC adumbrates that a money decree passed against the legal representative of the deceased defendant, out of the property of the deceased in his hands, may be executed by attachment or sale of that property. If the legal

G representatives fail to satisfy the court that he duly applied the property to

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discharge the debt or the court is not satisfied of his so doing, the court would proceed against the legal representatives personally and to apply the property by sale to satisfy the decree debt. At the time when the application for passing the final decree is filed, it is enough if the legal representatives are impleaded, all or any of the legal representatives or one of the LRs. of the deceased defendant-judgment debtor to represent the estate of the deceased. If death of defendant takes place pending passing of final decree they may be brought on record under section 151 CPC or Order 1 Rule 10 CPC.

Considered from this perspective, we are of the considered view that the High Court was right in its conclusion that there is no need to make an application within the period of limitation as provided under Articles 120 and 121 of the Limitation Act to bring the LRs. of deceased defendant on record and to seek to set aside the abatement after the expiry of 90 days.

The special leave petition is dismissed accordingly.

G.N.

Petition dismissed.