

T. GNANAVEL

v.

T.S. KANAGARAJ AND ANR.
(Civil Appeal No. 1259 of 2009)

FEBRUARY 25, 2009

[TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.]

Code of Civil Procedure, 1908:

Order XXII Rule 4 Sub Rule 4 – Civil Court passing a decree in ignorance of the death of defendant – Exemption obtained thereafter for bringing the legal representatives of the sole defendant on record – Whether the decree passed becomes a nullity – Held: Yes, as rightly held by the High Court the order of the High Court was a nullity.

Order XXII Rule 10(A) – Applicability of – Question not raised before High Court – Cannot be permitted to raise the question for the first time before the Supreme Court.

In the appeal, the appellant has challenged the interpretation given by the High Court that once the sole defendant dies and the civil court passes a decree in ignorance of the same and thereafter even there being any exemption obtained under Order XXII Rule 4 Sub-Rule 4 of the CPC to bring the heirs and legal representatives of the sole defendant on record, the ex parte decree passed in favour of the plaintiff/appellant becomes a nullity.

Dismissing the appeal, the Court

HELD:1.1. A plain reading of Order XXII Rule 4 (4) of the CPC would clearly show that the Court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant

A who has failed to file a written statement or who, having
filed it, had failed to appear and contest the suit at the
time of hearing of the same, but such an exemption can
only be granted before the judgment is pronounced and
in that case only, it can be taken against the said
B defendant notwithstanding the death of such defendant
and such a decree shall have the same force and effect
as it was pronounced before the death had taken place.
[Para 13] [459-D-F]

1.2. If exemption, which is provided under Order XXII
C Rule 4(4) of the CPC is obtained from the Court before
the delivery of the judgment, in that case, it would be
open to the Court to exempt the plaintiff from bringing
on record the heirs and legal representatives of the
D defendant even if, the defendant had died during the
pendency of the suit as if the judgment was pronounced
by treating that the defendant was alive notwithstanding
the death of such defendant and shall have the same
force and effect as if it was pronounced before the death
had taken place. That being the position, and that since
E in this case, admittedly, exemption was obtained after the
judgment was pronounced, the provision of Order XXII
Rule 4(4) of the CPC would not be attracted. [Para 14]
[460-E-G]

F *Zahirul Islam vs. Mohd. Usman and Others*, 2003 (1)
SCC 476, distinguished.

Elisa and others vs. A. Doss, AIR 1992 Mad. 159,
referred to.

G 2. The High Court had rightly interpreted the
provision of Order XXII Rule 4 (4) of the CPC and
accordingly held that the decree passed by the trial court
on 20th of December, 2002, in O.S. No.3946 of 1999 was
a nullity in the eye of law as the defendant had died
H during the pendency of the suit for specific performance

of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced. [Para 17] [462-C-E]

3. The conditions laid down in Order XII Rule 10(A) of the CPC are clear to the effect that the exemption to be granted by the court has to be obtained before the judgment is delivered and not after it. Further, the respondents had disputed the fact that they had not intimated the information relating to the death of the defendant to the appellant. This Court is not entitled to go into the question of determining the veracity of the statements made by either party. It is also an admitted position that the appellant had not raised the question regarding the applicability of the provision under Order XXII Rule 10(A) of the CPC before the High Court and, therefore, he cannot be permitted to raise such question for the first time in this Court. [Para 18] [462-H; 463-A-B]

Case Law Reference:

2003 (1) SCC 476 distinguished Para 13

AIR 1992 Mad. 159 referred to Para 16

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1259 of 2009.

From the Judgment & Order dated 12.4.07 of the High Court of Madras in Civil Revision Petition (PD) No's 1453 & 1454 of 2005 and in Civil Revision Petition (PD) No. 62/2006.

Ranjit Kumar, P.R. Kovilan Poongkuntran, Sri Dhar Reddy and Naresh Kumar for the Appellants.

Siddhartha Dave and Vibha Datta Makhija for the Respondent.

A The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 12th of April, 2007 of the High Court of Madras at Chennai in Civil Revision Petition (PD) Nos. 1453 & 1454 of 2005 and in Civil Revision Petition (PD) No. 62 of 2006, whereby the High Court, by a common judgment, had dismissed the Civil Revision Petition (PD) Nos. 1453 & 1454 of 2005 filed by the appellant herein and allowed the Civil Revision
B Petition (PD) No. 62 of 2006 filed by the respondents.
C

3. The question that needs to be decided in this appeal relates to the interpretation of Order XXII Rule 4[4] of the Code of Civil Procedure

D [for short 'the CPC'].

4. The interpretation given by the High Court in the impugned judgment is that once the sole defendant dies and the civil court passes a decree in ignorance of the same and thereafter even there being any exemption obtained under
E Order XXII Rule 4 Sub-Rule 4 of the CPC to bring the heirs and legal representatives of the sole defendant on record, the ex parte decree passed in favour of the plaintiff/appellant becomes a nullity.

F 5. At this stage, we may now narrate the facts of this case.

The appellant was a plaintiff in a suit for specific performance of contract for sale which was filed in the Court of City Civil Judge, Chennai against the sole defendant, since
G deceased (hereinafter referred to as 'the defendant'). The father of the appellant had entered into an agreement with the defendant to purchase the property, namely, Thiruvalluvar Street, Rajaram Metha Nagar, Chennai-29 (hereinafter referred to as the 'suit property') at a sale consideration of Rs.60,000/
H - and paid the entire sale consideration. In view of the refusal

to execute the deed in favour of the father of the appellant, the
aforesaid suit for specific performance of the contract for sale
was filed by the appellant on the death of his father. In order
to evict the appellant from the suit property, the defendant also
filed an eviction petition against the appellant on the ground of
willful default treating him as a tenant. In the suit for specific
performance, the defendant had filed a written statement
denying the material allegations made in the plaint but finally
had failed to appear and contest the suit. Be it mentioned
herein that during the pendency of the suit for specific
performance of the contract for sale, the defendant died. The
death of the defendant, however, was not brought on record
by the plaintiff-appellant. Thereafter, without the knowledge of
such death, the trial Court passed an ex parte decree for
specific performance of the contract. The respondents, who
are the heirs and legal representatives of the defendant, after
pronouncement of the judgment in the aforesaid suit for specific
performance of the contract, filed an application for causing
abatement of the same on 23rd of March, 2005, from which
the plaintiff/appellant came to know that the defendant had
died. The appellant thereafter filed an application in the suit
before the trial court praying for exemption from bringing the
heirs and legal representatives of the defendant and the same
was allowed by the trial court.

6. It may be mentioned herein that the suit for specific
performance was filed after the aforesaid civil revision case
for eviction of the appellant was dismissed by the High Court.

7. The execution petition filed by the defendant was
thereafter disposed of ex-parte. Thereafter, the appellant filed
an application praying for setting aside the ex parte order and
for stay of execution of warrant. By an order dated 20th of
April, 2000, the Executing Court rejected the aforesaid
application filed by the appellant for default. As noted herein
earlier, during the pendency of the suit for specific performance
and also the execution proceeding, the defendant died on

A 10th of August, 2001. In the execution proceeding, the heirs and legal representatives of the defendant, who are now respondent Nos. 1 and 2 in this appeal, filed an interlocutory application praying for impleading them in the suit for specific performance for sale. As noted herein earlier, by an order
B dated 12th of February, 2004, the executing court had allowed their application for impleadment on the death of the defendant namely, respondent Nos. 1 and 2 in the execution proceeding. As noted herein earlier, the trial court allowed the said application filed by the appellant under Order XXII Rule 4[4] of
C the CPC. In the month of June 2005, the appellant filed an execution petition to execute the decree for specific performance of the contract for sale in which objection under Section 47 of the CPC contending that the decree was inexecutable, was raised. However, the objection raised under
D Section 47 of the CPC on the question of decree being inexecutable was dismissed by the executing court by an order dated 14th of September, 2005. Being aggrieved by the dismissal order passed by the executing court in the eviction proceedings holding that it was incorrect to say that the order of eviction passed by the Rent Controller was inexecutable in
E view of the decree passed by the civil court in the suit for specific performance of the contract for sale, the appellant filed civil revision petitions, namely, CRP Nos. 1453 and 1454 of 2005 before the High Court. By an order dated 15th of
F November, 2005, the trial court, in the suit for specific performance of the contract, held that the decree passed in the suit for specific performance of the contract for sale was not a nullity and being aggrieved by the said order of dismissal, the respondents also filed a revision petition being CRP No. 62 of 2006. All the three revision petitions filed by the appellant
G and the respondents were taken up analogously by the High Court and the High Court by the impugned order held that once the defendant had died and the civil court passed a decree in ignorance of the same and thereafter without there being any exemption obtained by the plaintiff/appellant under
H Order XXII Rule 4[4] to bring the heirs and legal representatives

of the defendant on record before the judgment was pronounced, the ex parte decree so passed in favour of the plaintiff/appellant became a nullity. In view of the aforesaid order, the High Court dismissed the civil revision cases filed by the appellant and allowed the civil revision case filed by the respondents. It is against this common judgment of the High Court that a Special Leave Petition was filed before this Court, which on grant on leave was heard by us in the presence of the learned counsel appearing on behalf of the parties. A B

8. We have heard the learned counsel appearing on behalf of the parties and perused the materials on record. The issue, which is to be decided in this appeal, whether the decree passed by the civil court in ignorance of the death of the defendant, without granting any exemption to the appellant before the judgment was pronounced, as required under Order XXII Rule 4(4) of the CPC, is sustainable in law. C D

9. Order XXII Rule 1 of the CPC deals with the question of abatement on the death of the plaintiff or of the defendant in a civil suit. Order XXII Rule 2 relates to procedure where one of several plaintiffs or defendants dies and right to sue survives. Order XXII Rule 3 of the CPC deals with procedure in case of death of one of several plaintiffs or of sole plaintiff. Order XXII Rule 4 of the CPC; however, deals with procedure in case of death of one of several defendants or of sole defendant. For understanding the issue raised before us in this appeal, it would be convenient at this stage to reproduce Order XXII Rule 4 of the CPC, which runs as under :- E F

“(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. G H

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

B (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.

C (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.”

D

E 10. A bare perusal of the provisions under Order XXII Rule 4(3) of the CPC would clearly show that where within the time limited by law, no application is made under sub-rule 1, the suit shall abate as against the deceased defendant. It is not in dispute in the present case that the plaintiff appellant admittedly did not file any application for substitution on the death of the defendant. Therefore, on the death of the defendant, the suit automatically abates after the time prescribed to bring on record the heirs and legal representatives of the defendant expires.

F

11. However, this is subject to Order XXII Rule 4(4) of the CPC which runs as under :-

G “Order 22 Rule 4 (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

H

defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before the death took place.”

12. It was argued by Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the appellant, that in view of Order XXII Rule 4(4) of the CPC and in view of the admitted fact that exemption was obtained by the appellant from bringing on record the heirs and legal representatives of the defendant in the trial court and, therefore, question of bringing on record the heirs and legal representatives of the defendant would not arise as Order XXII Rule 4(4) of the CPC clearly says that if such exemption is granted by the Court, the effect of such death would be taken as if the decree was pronounced before the said death had taken place.

13. As noted herein earlier, a plain reading of Order XXII Rule 4 (4) of the CPC would clearly show that the Court is empowered to exempt a plaintiff from the necessity of substituting the heirs and legal representatives of any such defendant who has failed to file a written statement or who, having filed it, had failed to appear and contest the suit at the time of hearing of the same, but such an exemption can only be granted before the judgment is pronounced and in that case only, it can be taken against the said defendant notwithstanding the death of such defendant and such a decree shall have the same force and effect as it was pronounced before the death had taken place. Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the appellant relying on a decision of this Court in the case of *Zahirul Islam vs. Mohd. Usman and Others*, [2003 (1) SCC 476], argued that since an application from exempting the plaintiff/appellant from bringing on record the heirs and legal representatives of the defendant was filed in the present case but in view of the fact that exemption under Order XXII Rule 4 (4) was not allowed in the above mentioned decision and in the aforesaid decision, no such permission was sought or granted by the Court, the

A High Court was in error in holding that the decree passed in the suit for specific performance of the contract by the trial court was a nullity. We are unable to accede to this submission of Mr. Ranjit Kumar, the learned senior counsel appearing on behalf of the appellant for the simple reasons viz. (1) on the abatement caused on the death of defendant, the suit automatically abated in view of the provisions under Order XXII Rule 4(3) of the CPC and (2) from the decision in the case of *Zahirul Islam vs. Mohd. Usman and Others*, (supra), it would be evident that no exemption was sought or granted under Order XXII Rule 4(4) of the CPC in the aforesaid decision. In any view of the matter, Order XXII Rule 4(4) of the CPC clearly says that such exemption to bring on record the heirs and legal representatives of the deceased could be taken or granted by the court only before the judgment is pronounced and not after it.

14. In view of our discussions made hereinabove and after going through the provisions under Order XXII Rule 4(4) of the CPC, as discussed herein earlier, and in view of the principles laid down by the aforesaid decision, it is, therefore, clear that if exemption, which is provided under Order XXII Rule 4(4) of the CPC is obtained from the Court before the delivery of the judgment, in that case, it would be open to the Court to exempt the plaintiff from bringing on record the heirs and legal representatives of the defendant even if, the defendant had died during the pendency of the suit as if the judgment was pronounced by treating that the defendant was alive notwithstanding the death of such defendant and shall have the same force and effect as if it was pronounced before the death had taken place. That being the position, we are, therefore, of the view that since in this case, admittedly, exemption was obtained after the judgment was pronounced, the provision of Order XXII Rule 4(4) of the CPC would not be attracted.

15. In our view, the aforesaid decision in the case of

Zahirul Islam (Supra) can also be distinguished on facts. As noted herein earlier, in that decision, the plaintiff did not seek permission of the Court under Order XXII Rule 4(4) of the CPC and in that view of the matter, this Court held that the legal representatives of the deceased defendant was entitled to be brought on record in the suit. Admittedly, in our case, after the judgment was pronounced, the permission was sought to exempt the plaintiff from the necessity of substituting the heirs and legal representatives of the defendant and not before it. That being the position, we do not find any ground to rely on this judgment of this Court as sought by Mr. Ranjit Kumar, learned senior counsel appearing for the appellant.

16. This view has also been expressed by Madras High Court in a decision reported in *Elisa and others vs. A. Doss*, [AIR 1992 Mad. 159], in which the Madras High Court in paragraph 3 had observed as follows :-

"It is seen from the rules that an application to bring the legal representatives on record shall be made within the time limited by law and if no application is made within the said period, the suit shall abate as against the deceased defendant. That is the effect of sub rule 3. Sub-rule (4) provides an exception to sub-rule (3). Under Sub-Rule (4), it is open to the court to pass an order exempting the plaintiff from the necessity of bringing on record the legal representatives of any defendant, who had failed to file a written statement or having filed the written statement, failed to appear and contest the suit at the hearing. But, the language of sub rule (4) is clear enough to show that the court must pass an order exempting the plaintiff from the necessity of substituting the legal representatives. Of course, it is not necessary for the plaintiff to file a written application seeking such exemption, as the rule does not require one. Under the said rule, the court must apply its mind and think it fit, in the facts and circumstances of the case, to grant the exemption. For granting such exemption,

A the defendant who died should have remained ex parte,
either without filing the written statement or after filing the
written statement. *It is clear from the language of the said
rule that the order of exemption shall be passed before
a judgment in the case is pronounced. The relevant
B portion of the said rule reads that the court 'may exempt
the plaintiff' and 'judgment may, in such case
pronounced.'* That part of the sub rule says that the order
of exemption should precede the judgment to be
pronounced in the suit....." (emphasis supplied)

C 17. For the reasons aforesaid, we are of the opinion that
the High Court had rightly interpreted the provision of Order
XXII Rule 4 (4) of the CPC and accordingly held that the decree
passed by the trial court on 20th of December, 2002, in O.S.
No. 3946 of 1999 was a nullity in the eye of law as the defendant
D had died during the pendency of the suit for specific
performance of the contract for sale and no exemption was
sought at the instance of the plaintiff/appellant to bring on record
the heirs and legal representatives of the defendant before the
judgment was pronounced.

E 18. There is another submission that needs to be
considered at this stage. The learned counsel appearing on
behalf of the appellant had contended that the respondents
were duty bound under the provisions of Order XXII Rule 10
F (A) of the CPC to intimate the knowledge of the death of the
defendant to the court as well as to the appellant, which they
had failed to do and therefore, the trial court was correct in law
to grant exemption to the appellant from bringing on record
the heirs and legal representatives of the defendant after the
decree was passed. As had already been mentioned above,
G the conditions laid down in the above mentioned rule are clear
to the effect that the exemption to be granted by the court has
to be obtained before the judgment is delivered and not after
it. Therefore, we are not in a position to accept the contention
of the appellant to this effect. Further, the respondents had
H

disputed the fact that they had not intimated the information relating to the death of the defendant to the appellant. This Court is not entitled to go into the question of determining the veracity of the statements made by either party. Before parting with this aspect of the matter, it is also an admitted position that the appellant had not raised the question regarding the applicability of the provision under Order XXII Rule 10(A) of the CPC before the High Court and, therefore, we also cannot permit the appellant from raising such question for the first time in this Court.

19. In view of the discussions made herein above and the decisions considered by us in this appeal, it is amply clear that the High Court had rightly held that the order of the trial court was a nullity and thus the same was liable to be set aside. We therefore find no infirmity in the impugned judgment. The appeal is accordingly dismissed. There will be no order as to costs.

G.N.

Appeal dismissed.