RAMASWAMI v. PEDAMU-NAYYA.

AYLING AND HANNAY, JJ.

In these circumstances therefore we hold that the right to sue in this case survived on the death of Peramma to the plaintiffs Nos. 2 to 5 as leagl representatives and that the plaintiffs Nos. 2 to 5 were therefore rightly added as plaintiffs on the death of Peramma.

The second appeal is dismissed with costs.

[*See Venkatanarayana Pillai* v. *Subbammal*(1) as regards some of the observations in the above judgment as to continuing a suit for a declaration—Ed.]

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1914. December 10 and 22.

P. M. A. M. VELLAYAN CHETTY (APPELLANT IN APPEAL NO. 235 OF 1911 ON THE HIGH COURT), PETITIONER,

v.

JOTHI MAHALINGA AIYAR (SECOND RESPONDENT), RESPONDENT.*

ALAGIA SUNDARAM PILLAI AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE DECEASED SECOND RESPONDENT), RESPONDENTS.†

ALAGIA SUNDARAM PILLAI (PROPOSED GUARDIAN OF THE MINOR LEGAL REPRESENTATIVES OF THE DECEASED SECOND RESPONDENT), RESPONDENT. ‡

ALAGIA SUNDARAM PILLAI AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE DECEASED SECOND RESPONDENT AND ASSIGNEE—DECREE HOLDER), RESPONDENT. §

Appeal, parties to an—Death of one of the respondents, decree passed in ignorance of Appellant not entitled to rehearing.

The death of one of the defendants or respondents does not abate a suit or appeal.

Duke v *Davies* (1890) L.R., 2 B., 260, referred to.

An unsuccessful litigant has no right, therefore, to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing.

(1) (1915) I.L.R., 38 Mad., 406 at pp. 412 and 413 (P.C.).

* Civil Miscellaneous Petition No. 1792 of 1914.

† Do. No. 1793 of 1914.

‡ Do. No. 1794 of 1914.

§ Do. No. 1795 of 1914.

Dictum in Goda Coopoosamier v. *Soordarammall* (1913) I.L.R., 33 Mad., 107, approved.

PETITION praying that the High Court will be pleased—

(1) to rehear Appeal No. 235 of 1911 filled against the decree of S. MAHADEVA SASTRIAR the acting temporary Subordinate Judge of Ramnad, in Original Suit No. 75 of 1910 after bringing the legal representatives of the deceased second respondent, in Appeal No. 235 of 1911 on the file of the High Court, Madras,

(2) to bring on record the names of the respondents herein as the legal representatives of the deceased second respondent in the abovesaid appeal,

(3) to appoint Alagia Sundaram Pillai as guardian *ad litem* of the minor second and third legal representatives of the deceased second respondent in the abovesaid appeal, and

(4) to bring on the record of the abovesaid appeal the name of Chellam Aiyar as the assignee of the decree in Original Suit No. 36 of 1908 on the file of M. MUNDAPPA BANGERA, the Subordinate Judge of Trichinopoly.

The facts appear from the judgment.

The Honourable Mr. *F. H. M. Corbett,* the Advocate-General and *T. Rangaramanujachariar* for the petitioner.

K. V. Krishnaswami Ayyar for the respondent.

The following JUDGMENT of the Court which was delivered by SESHAGIRI AYYAR, J.:—

Civil Miscellaneous Petition No. 1792 *of* 1914.

This is an application by the appellant for an order to rehear the appeal under the following circumstances :—

Two days before the appeal came on for hearing, the second respondent had died. Neither the appellant's vakil nor the vakil who filed a vakalat on behalf of the second respondent was aware of this. The appeal was heard and we delivered judgment dismissing it with costs. The legal representatives of the second respondent do not ask us to hear the appeal on the ground that they have been prejudiced by the disposal of the case. The learned Advocate-General who appears for the appellant on the present occasion contends that the judgment passed without bringing the legal representatives of the deceased respondent on the record is a nullity and should be set aside. The question involved is one of considerable importance

VELLAYAN CHETTY v. MAHALINGA AIYAR.

AYLING AND SESHAGIRI AYYAR, JJ.

regarding practice. We have come to the conclusion that the appellant has no claim to a rehearing of the appeal. Under the Code of Civil Procedure, the death of one of the defendants (the same rule applies to respondents) does not abate a suit. Under Order XXII, rule 4, clause (3), it is provided that if the legal representative of the deceased defendant is not brought on the record within the time limited by law, the suit shall abate against such defendant, thereby indicating that the suit can proceed against the other parties on the record. Further if a defendant has not been served owing to the default or neglect of the plaintiff, it is open to him to elect to abandon the suit as against the unserved defendant and to proceed to trial with the suit as against the other. The law also makes provision for the legal representatives of a deceased defendant themselves applying to be brought on the record under certain circumstances. The object of these various provisions is to ensure that no party shall be prejudiced by a hearing in his absence. No rule of law has been quoted to us which enables a party who has had the benefit of a full hearing to take advantage of the absence of a party on the record. The dictum of BENSON and SANKARAN NAIR, JJ., in *Goda Coopooramier* v. *Soondarammall*(1), is against such a contention. All the decided cases are reconcileable with the principle that it is only a party who has not been heard that can claim a rehearing on the ground that he has been prejudiced. The reasoning in *Janardhan* v. *Ramchandra*(2) may appear at first sight to point the other way. The statement that under section 571 of the old Code the Courts are bound to hear both the parties is not conclusive of the point. *Janardhan* v. *Ramchandra*(2), *Monee Lall* v. *Kazee Fuzul Hossein*(3) and *Ramacharya* v. *Anantacharya*(4) are all cases in which the party prejudiced was granted a rehearing.

The rules of practice in England on which our Code is based are to the same effect. The decision of BOWEN, L.J., in *Duke* v. *Davies*(5) lends strong support to the view we have taken. The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned;

(1) (1910) I.L.R., 33 Mad., 167.
(2) (1902) I.L.R., 26 Bom., 317.
(3) (1870) 14 W.R., 337.
(4) (1897) I.L.R., 21 Bom., 314.
(5) (1893) L.R., 2 Q.B., 260.

and that any disposal of the case, notwithstanding the death of one of the parties will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

In the interests of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. The affidavit in this case does not say in what manner the appellant was prejudiced in the conduct of the appeal before us by the fact that the second respondent was dead at the time. We must decline to rehear the appeal. The petition will be dismissed with costs.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Tyabji.

1915. February, 2

RAMASAMI MOOPPAN (PLAINTIFF), APPELLANT,

v.

SRINIVASA IYENGAR (SECOND DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46 and 54—Attachment of usufructuary mortgagee's right under Order XXI, rule 54 and not under rule 46, illegal—Sale, consequent, invalid.

Attachment of the interest of a usufructuary mortgagee in a certain property should be in the manner provided by Order XXI, rule 46, Civil Procedure Code, for the attachment of a debt and not in the form provided for the attachment of immoveable property. Where, therefore, there was an attachment of the usufructuary mortgagee's right in the manner prescribed for attachment of immoveable properties and the mortgagor who did not receive from Court any order prohibiting him from making payment of the usufructuary mortgage debt discharged the same by payment and obtained from the mortgagee a release of his rights some time prior to the actual sale thereof in Court auction,

Held, that the sale of the mortgagee's right in Court auction was invalid and that the purchaser acquired nothing by the purchase as against the mortgagor who had redeemed the mortgage by payment.

The fact that on the date of the payment the mortgagee could not have got a personal decree against the mortgagor for the payment of the mortgage debt on account of limitation, is immaterial as limitation does not put an end to the debt and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount.

* Second Appeal No. 1691 of 1913.