

**THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

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**C.C.C.A.No.14 of 1994**  
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**JUDGMENT:**

Defendant Nos.12 to 16 in O.S No.108 of 1978 on the file of the learned V Additional Judge, City Civil Court, Hyderabad, preferred this appeal against the impugned judgment and decree, dated 18.08.1993 passed against the defendants therein, including the appellants herein.

2. The appellants were defendants Nos. 12 to 16 before the trial Court. The first respondent was the plaintiff and other respondents were the defendants. For the sake of convenience, the parties hereinafter will be referred to as appellants and respondents.

3. The Syndicate Bank represented by its Manager, Pathargatti Branch, Hyderabad, filed a suit for recovery of Rs.22,504.40ps basing on the mortgage of 'A' & 'B' schedule properties against defendant Nos. 1 to 5 initially, and later, some of the defendants died and the legal heirs of the deceased were impleaded as defendants. The appellants herein were the legal heirs of defendant No.5, who died during pendency of the suit. The deceased-defendant No.1 obtained loan of Rs.15,000/- from the first respondent bank for the purpose of publication of a book, titled as "Constitutional Law Vs. Legislature", and he executed an agreement on 24.07.1975 incorporating the usual terms and conditions of loan. The original defendant Nos. 2 to 5 stood as co-obligants and executed an agreement along with the deceased-defendant No.1 holding joint and several liability for repayment of

the debt due.

4. The deceased-defendant No.1, during his lifetime, created a mortgage by depositing title deeds pertaining to the 'A' & 'B' schedule property as a security for the loan amount, due to the first respondent bank. The deceased-defendant No.1 did not repay the loan amount as per the terms of agreement, despite several demands. Whatever the payments made by defendant No.1 were given credit to his account. As on 31.12.1977, an amount of Rs.22,504.40ps was due and defendant No.1 is liable to pay penal interest on the over due amount at the rate of 21%p.a. up to 30.06.1976, and at 18 ½ % p.a. from 01.07.1976 as per directions of the Reserve Bank of India. A notice was issued demanding payment of the debt due by the first respondent bank, but no purpose was served and the debt remained un-discharged. Hence, the suit.

5. The second respondent filed his written statement admitting execution of agreement along with defendant No.1 and other defendants, as sureties for due payment of the amount lent to deceased defendant No.1 by the first respondent/plaintiff bank, and finally contended that valuable property was mortgaged with the first respondent herein as security for due payment of the debt due and prayed to dismiss the suit against him.

6. Other defendant Nos. 3 to 5 filed a Memo adopting the written statement filed by defendant No.2.

7. After impleading the legal heirs of defendant No.1, defendant Nos.7 and 3 in the amended plaint, filed their written statements denying the contents of the plaint *inter alia* contending that the plaint 'A' & 'B' schedule property is the ancestral property,

as such, defendant No.1 alone had no exclusive right and titles over the said property, and thereby, the mortgage in favour of the first respondent bank is not valid since defendant Nos. 6 and 7 have got equal right along with defendant No.1. Therefore, their share is not liable for payment of debt due and prayed for dismissal of the suit.

8. Defendant No.6, who is added in the original plaint as one of the legal heirs of defendant No.1, filed a Memo adopting the written statement.

9. The legal representatives of defendant No.4, who are defendant Nos. 8 to 11, filed their common written statement pleading ignorance about the transaction and the bank is not entitled to claim any penal interest. They also denied the execution of any agreement in favour of the first respondent bank by Sunnam Sathaiah-defendant No.4, and prayed to dismiss the suit.

10. Whereas, defendant Nos. 12 to 16, the appellants herein filed separate written statements contending that Malkaji Narayana Rai-defendant No.5 never stood as surety for the loan obtained by defendant No.1 and that the claim against Malkaji Narayana Rai, the original defendant No.3 died on 04.09.1986, and on 05.06.1991, a petition was filed to implead the legal heirs of deceased No.3 without filing any application for condonation of delay, and as a result, the petition in IA No.228 of 1991, ought to have been dismissed and finally contended that the trial Court has no pecuniary jurisdiction, and therefore, prayed to dismiss the suit.

11. Basing on the above pleadings, the trial Court was framed the following issues and additional issues:

1. *Whether the 1<sup>st</sup> defendant is liable to pay interest at the rate claimed in the suit?*
2. *whether defendants 2 to 5 are necessary and proper parties to the suit?*
3. *whether the suit is bad for mis-joinder of parties?*
4. *whether defendants 6 and 7 are liable to pay the suit claim?*
5. *to what relief.*

*Additional issues:*

1. *whether the suit against defendants 12 to 16 is barred by time?*
2. *whether the Court has no territorial and pecuniary jurisdiction to try the suit?*
3. *whether defendant No.5 stood as surety?*

12. During the course of the trial, on behalf of the plaintiffs, B. Narayana Rao was examined as P.W.1 and got Exs.A1 to A10 were marked. On behalf of the defendants, K.M.Venkateswra Rao was examined as DW.1 and no documents were marked on their behalf.

13. Upon hearing both the counsel, the trial Court decreed the suit with costs with personal liability against defendant No.4-Laxmanachary and defendant No.11-Ch.Lingaiah, and against the assets of defendant No.1-late P.Sanyasi Raju, defendant No.5-Malkaji Narayana Rai and defendant No.6-Sunnam Sathaiah, in the hands of their legal heirs of defendant Nos.2 and 3, defendant Nos. 7 to 10 and defendant Nos. 12 to 16-appellants for recovery of the

suit amount of Rs.22,405.40ps with subsequent interest @ 12% p.a on the principle amount of Rs.15,000/- from the date of suit till the date of decree, and thereafter @ 6% p.a. till realization.

14. Aggrieved by the impugned judgment and decree of the trial Court, the appellants, who are the legal heirs of defendant No.5-Malkaji Narayana Rai, preferred this appeal on various grounds. The gist of the grounds of the appeal is as follows:

- a) *The suit is already abated against Malkaji Narayana Rai, since his legal heirs were not brought on record within the specified time. Therefore, no decree can be passed against the appellants herein.*
- b) *The trial Court did not appreciate the evidence of DW.1 with regard to date of death and the date of impleading of the legal heirs in proper prospective and committed an error in passing a decree though it is abated against Malkaji Narayana Rai.*
- c) *It is further contended that grant of interest @ 12% p.a. is against the principles of law, and apart from that, mortgage property is available to be proceeded for realization of the debt, but the decree is passed against the estate of the deceased Malkaji Narayana Rai in the hands of the appellants herein and committed an error.*

15. During the course of the arguments, the learned counsel for the appellants would submit that the suit against Malkaji Narayana Rai is already abated since the legal heirs were not brought on record within the specified time, and that too, no petitions either to condone the delay nor to set aside the abatement, were filed. In such case, impleading the appellants as legal heirs of the deceased-Malkaji Narayana Rai is against the provisions of law, and on this ground alone, the suit is liable to be

dismissed. It is further contended that the property of Malkaji Narayana Rai in the hands of the appellants is not liable for discharge of the debt since the suit is based on mortgage of 'A & 'B' schedule properties. Therefore, the appellants are not liable to pay any debt due to the first respondent bank and prayed to allow the appeal by setting aside the impugned judgment and decree, so far as it attaches the liability against the appellants herein.

16. The learned counsel for the respondents did not appear and did not advance any arguments on behalf of contesting respondents.

17. Considering the material available on record and the contentions of counsel for the appellants, the points are that arisen for determination are as follows:

- 1). Whether the property of Malkaji Narayana Rai in the hands of the appellants is liable for discharge of the debt in view of the delay in impleading the legal heirs of Malkaji Narayana Rai?
- 2). Whether the decree be passed against the estate of the deceased-Malkaji Narayana Rai, though a decree is sought for against the 'A' & 'B' schedule property by the first respondent herein, if so, the decree and judgment passed by the trial court be sustained?

**POINT NO. 1:**

18. According to the admitted facts, the said Malkaji Narayana Rai executed a loan agreement in favour of the first respondent bank for the amount borrowed by the deceased-defendant No.1-P.Sanyasi Raju. During pendency of the suit, the said Malkaji Narayana Rai, the original defendant No.5 died, leaving behind the appellants herein as LRs., who succeeded the estate of Malkaji Narayana Rai. However, according to the

appellants, Malkaji Narayana Rai died long back, and there is delay of five years in impleading the LRs of the said Narayana Rai. But, the trial Court without considering the objection as to impleading the appellants as legal heirs of deceased-Narayana Rai, allowed the application filed under Order 22 Rule 4 of CPC.

19. In support of his contention, DW.1 was examined and he testified that his father defendant No.5 died on 04.09.1986. But, a petition was filed to implead the legal heirs, after a lapse of 5 years. No doubt, there is a delay in filing the petition to implead the legal heirs of deceased-defendant No.5-Narayana Rai, and that a part, duty is cast upon the advocate on record, appearing for defendant No.5 to intimate the death of Narayana Rai to the plaintiff under Order 22 Rule 10 (a) of CPC, but obviously, for different reasons, the advocate for defendant No.5, before the trial Court, did not inform the death of defendant No.5-Narayana Rai to the Court and maintained silence.

20. The first respondent herein the plaintiff in the suit being a bank, is not supposed to know the date of the death, unless it is intimated, being a financial institution. However, the limitation to implead the legal heirs, starts from the date of death and not from the date of intimation given, as required under Order 22(10)(a) of CPC. Therefore, there is obviously delay in filing petition to implead the LRs of the deceased-Narayana Rai, and by the date of filing of the petition to implead legal heirs of Narayana Rai by the appellants herein. The suit against defendant No.5 was already abated by operation of law, but no steps were taken to condone the delay in filing petition to set aside the abatement order under Section 5 of Limitation Act and to set aside the abatement as required under Order 22 Rule 9 CPC. However, a notice was

ordered in the petition filed under Order 22 Rule 4 CPC to the appellants herein, and only upon serving notice, the petition was allowed by the trial Court. If really, there was a delay in filing petition to set aside the abatement order under Order 22 Rule 9 CPC, and to set aside the abatement order, the appellants would have objected, contesting the petition filed under Order 22 Rule 4 of CPC, having maintained silence and permitting the Court to allow the petition filed under Order 22 Rule 4 CPC, for the first time, during the trial, the objection regarding abatement of suit against defendant No.5 was raised basing on the evidence of DW1. If really, the appellants herein are aggrieved by the order passed by the trial Court in a petition filed under Order 22 Rule 4 CPC, atleast on receipt of the suit notice from the trial Court, they would have preferred a revision before the Revision Court, challenging the order passed by the trial Court in filing an application under Order 22 Rule 4 CPC. Admittedly, as per the evidence of DW.1, they came to be known about the transaction only in the year 1992, when DW.1 received notice. Thus, the appellants have got knowledge about impleading them as legal heirs of defendant No.5-Narayana Rai, but no revision is preferred even atleast from the date of knowledge of passing of an order in a petition under Order 22 Rule 4 CPC. Hence, it is not open to the appellants to challenge the order passed under Order 22 Rule 4 CPC before the trial Court for the first time during the trial or in this appeal.

21. Learned counsel for the appellants would contend that when the suit is abated against defendant No.5, no decree shall be passed. In support of his contention, he placed reliance on the judgment reported in ***Morasa Anjaiah Vs. Kondragunta***



***Venkateswarlu (died) and others***<sup>[1]</sup>, wherein, the Division Bench of their lordships ***Justice Syed Shah Mohammed Quadri and Justice M. Ranga Reddy***, held that where a party to a suit died during pendency of the appeal without taking steps to implead the legal heirs on record, as contemplated under Order 22 Rule 4 of CPC, an application under Order 1 Rule 10 to implead the legal representatives of the deceased party under the specific provisions of CPC, cannot be entertained. This legal position is not in quarrel. No such petition was filed under Order 1 Rule 10 of CPC to implead the legal heirs of Malkaji Narayana Rai, but filed a petition under Order 22 Rule 4 CPC as per the material on record. Therefore, the above decision would not come to the aid of the appellants.

22. Even before the trial Court, the counsel for defendant Nos. 12 to 16/appellants herein had placed reliance on a decision reported in ***Doddappa Maritammappa Basaput and another Vs. Brappa Mudakappa Navalli and others***<sup>[2]</sup>, wherein, the Karnataka High Court held that the limitation only starts from the date of death not from the date of intimation under Order 22 Rule 10 (a) of CPC. This legal position is not in dispute and this principle is also would not come to the aid of the appellants, for the reasons that the order in Interlocutory Application filed under Order 22 Rule 4 of CPC was not challenged and allowed to attain finality.

23. When the appellants did not challenge the order, passed in petition filed under Order 22 Rule 4 of CPC, and allowed to attain finality, contested the suit, the same cannot be questioned in this appeal, therefore, the first ground urged by the

learned counsel for the appellants i.e., the abatement of suit against defendant No.5 is not a ground to reverse or to set aside the impugned judgment and decree passed against the appellants herein.

24. In view of my foregoing discussion, I find that the contention of the appellants' counsel is without subsistence and on that ground, the appeal cannot be allowed setting aside the impugned judgment, and accordingly, the point is answered against the appellants and in favour of the respondents.

**POINT NO.2 :**

25. The second contention of the counsel for the appellants is that when the property was mortgaged as a security for discharge of debt, for due payment of debt due under the loan agreement, no personal decree can be passed. In support of his contention, he placed reliance on the judgment reported in ***Pawan Kumar Jain Vs. Pradeshia Industrial and Investment Corporation of U.P.Ltd., and others***<sup>[3]</sup>, wherein, the Apex Court held in para-8 and 9 as follows:

8. *In our view, the above-set-out provisions of the U.P.Act are very clear. Action against the guarantor cannot be taken until the property of the principal debtor is first sold off. As the appellant has not sold the property of the principal debtor, the action against the appellant cannot be sustained. We, therefore, set aside the recovery notice.*
9. *We, however, clarify that it will be open to the 1<sup>st</sup> respondent to proceed against the appellant before the Debts Recovery Tribunal in accordance with principles laid down in Unique Butyle Tube case.*

26. The principle laid down by the Apex Court is not in

controversy, but the suit is filed for recovery of amount basing on the mortgage and sought both personal reliefs against the defendants and also a decree against the mortgaged 'A' & 'B' schedule property. But, the trial Court passed personal decree against defendant No.4-Lakshmana Chary, defendant No.11-Ch.Lingaiah, and against the assets of defendant No.1-late P.Sanyasi Raju, defendant No.5-Malkaji Narayana Rai and defendant No.6-Sunnam Sathaiah in the hands of their legal representatives, defendant Nos. 2 and 3, defendant Nos.7 to 10 and defendant Nos. 12 to 16 in the operative portion of the judgment at para-25 clearly shows that no decree was passed against 'A' & 'B' schedule properties. No specific reason was assigned for not passing any decree against the property for realization of the decree debt though it is allegedly mortgaged. In such a case the question of proceeding against 'A' & 'B' schedule properties allegedly mortgaged by defendant No.1 with the first respondent herein does not arise.

27. In any view of the matter, the appellants being the legal heirs, are not personally liable for payment but the property if any succeeded by them from their father Malkaji Narayana Rai same is liable for discharge of the debt. Hence, the contention that when the property was mortgaged, the first respondent bank cannot proceed against the estate of deceased-Narayana Rai in the hands of the appellants, is without subsistence and this contention is not sustainable, and in any view of the matter the appellants being legal heirs of deceased-Narayana Rai if succeeded any property from their father, their liability is joint and several along with the deceased-defendant No.1, alone is liable and first respondent is not entitled to proceed against the personal property.

28. In view of my foregoing discussion, I find that the contention of the appellants would not stand to any legal scrutiny and the same is turned down. Accordingly, the point is answered against the appellants and in favour of the respondents.

29. The other issues were already held in favour of the first respondent/plaintiff and against the defendants in the said suit and they were not challenged in this appeal by filing Cross Objections and by filing a separate appeal, and the findings on other issues were not even challenged in the present appeal. Thus, the findings of the trial Court on the issues originally framed attained finality. Thereby, this court need not interfere with the findings on the other issues.

30. In view of my foregoing discussion, and findings on point Nos.1 and 2, I find that the appeal is devoid of merits and deserves to be dismissed.

31. In the result, the appeal is dismissed confirming the impugned judgment and decree in O.S No.108 of 1978 on the file of the learned V Additional Judge, City Civil Court, Hyderabad, dated 18.08.1993. There shall be no order as to costs.

31. Miscellaneous Petitions pending, if any, shall stand closed.

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**JUSTICE M. SATYANARAYANA MURTHY.**

Date : 14-11-2013

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**THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY**

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**C.C.C.A.No.14 of 1994**

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**Date : 14-11-2013**

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[\[1\]](#) 1993(1) ALT 57 (DB)

[\[2\]](#) AIR 1982 Karnataka, page-191

[\[3\]](#) (2004) 6 Supreme Court Cases 758