
(2011) 09 AP CK 0087

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 4685 of 2010

Akella Surya Prakasa Rao

APPELLANT

Vs

Akella Prabhakaram And eleven others

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2, Order 18 Rule 3A, Order 20 Rule 18

Evidence Act, 1872 — Section 102

Citation : (2012) 2 ALT 604

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : P.S. Rajasekhar, for the Appellant; T.V.S. Prabhakara Rao, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Sri Justice V.V.S. Rao

1. The second defendant in O.S.No. 50 of 2001 on the file of the Court of Senior Civil Judge, Amalapuram, is the petitioner herein. During the trial, when the third respondent/third defendant offered to give evidence as D.W.5, the petitioner filed memo of objections praying the trial Court to disallow the evidence of the third defendant by an order dated 23.08.2010. The objections were overruled. Being aggrieved, the petitioner filed the present Civil Revision Petition.

2. The first respondent (hereinafter, plaintiff) and defendants 1 to 3 are sons and defendants 4 and 5 are daughters of one Venkata Krishna Chainulu, who died leaving behind considerable extents of properties - agricultural lands and houses. The plaintiff instituted suit for partition of plaint "A" schedule properties, which are agricultural lands. He also alleged that suit schedule "A1" property is in exclusive possession of the third defendant, who perfected title by adverse possession. For this reason, he sought partition of only suit schedule "A" properties.

3. During the trial, the evidence of P.W.1 was completed on 03.07.2009. The plaintiff's evidence was closed on 29.10.2009. The second defendant (petitioner herein) gave evidence in October 2009 and the matter was coming for further evidence of defendants. At that stage, the third defendant/third respondent herein, who is sailing with the plaintiff, filed affidavit in lieu of chief examination as D.W.5 when the petitioner unsuccessfully raised objections. The counsel for the petitioner would submit that the plaintiff is setting up the third defendant as D.W.5 only to render the evidence of D.W.1 (petitioner herein) ineffective by filling up of gaps in his evidence. He would urge that such a course of action is not permissible under the Code of Civil Procedure, 1908 ("CPC" for brevity). He placed reliance on M. Hymavathi and Another Vs. M. Koteswararao and Others,

4. In the Civil Revision Petition, the petitioner made the plaintiff and the third defendant alone as contesting respondents mentioning in the cause title that respondents 5 to 12 are not necessary parties in the petition. Though notice is served, the plaintiff did not appear through a counsel. The counsel for the third respondent/third defendant would submit that when the suit is filed for partition of suit schedule "A" properties in which the third defendant has also got a share, even if he comes as D.W.5 after the evidence of the contesting defendant as D.W.1, the same does not cause any prejudice to the second defendant.

5. The Rules contained in Order XVIII CPC regulate the hearing of the suit and examination of the witnesses. It is always invariably the plaintiff, who got the right to begin the trial, but if defendant admits the facts alleged by the plaintiff and disputes the plaintiff's entitlement to any part of the relief, the defendant shall have right to begin. In either case, as per Rule 3-A of Order XVIII CPC, where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined unless the Court, for the reasons to be recorded, permits him to appear as his own witness at a later stage. Except these Rules with regard to the right to begin, the trial and the order of examination of witnesses, there are no other Rules in CPC to regulate the order of the witnesses on behalf of the defendants. If the plaintiff, who has right to begin the case, does not examine himself as a witness, and proceeds with the trial by examining either party witnesses or non-party witnesses, such plaintiff is precluded from appearing as witness at a later stage. However, if he applies to the Court and seeks permission to appear at a later stage, it is always open to the plaintiff to appear after examining other witnesses.

6. In a suit for partition, unless otherwise proved/disproved the plaintiff's and defendant's stand in similar position insofar as the rights and obligations are concerned. Therefore, except any compliance with the rule of burden of proof, there can be interchangeability in the order of examining witnesses on behalf of the plaintiffs or the defendants and vice versa. Indeed, Order XX Rule 18 CPC mandates that the Court shall pass a decree for partition of property or for the separate possession of a share therein declaring the rights of "the several parties" interest in the property" and give such further directions as may be

required. The civil Court is empowered even to apportion a share in the property to those persons who are not parties to the proceedings before it. Insofar as burden of proof is concerned, Section 102 of the Indian Evidence Act, 1872, casts the burden of proof on that person, who would fail if no evidence at all were given on their side. It is settled law that the presumption about the existence of a joint Hindu family does not extend to drawing inference of existence of joint Hindu family properties. The burden is always on the person, who alleges that a particular item is a joint Hindu family property.

7. In this case, though the plaintiff alleges that suit schedule "A" properties are joint Hindu family properties, he did not dispute that suit schedule "A1" property is exclusive property of the third defendant. It is the second defendant, who is denying the allegation. In such an event, the burden of proving that suit schedule "A1" property is also joint Hindu family property squarely lies on him. When he is already examined as D.W.1, even if the third defendant is allowed to depose as D.W.5, the same does not cause any prejudice nor the second defendant can have any apprehensions that the evidence of the third defendant would dilute his deposition.

8. In *M. Hymavathi*, in a suit for specific performance of agreement of sale, defendants 4 and 6 supported the case of the plaintiff and other defendants opposed the suit. After closure of evidence of contesting defendants, defendants 4 and 6 wanted to lead their evidence, which was objected to by the first defendant by filing a memo. The trial Court upheld the objection holding that defendants 4 and 6 therein had no right to adduce evidence. Dismissing the Civil Revision Petition, this Court observed that though under Order XVIII Rule 2 CPC, the Court has power to permit a party to the proceedings to examine any witness at any stage, but only after recording reasons, the defendants, who are fully supporting the case of the plaintiff, ought to have led their evidence before the beginning of evidence of contesting defendants.

9. A perusal of the above judgment would show that by giving reasons the Court can permit any party to examine any witness at any stage. In this case while rejecting the objections raised by the petitioner, the trial Court has given convincing and cogent reasons. Further, even as per the array of the parties, the third defendant would have order of precedence to lead evidence only after the second defendant closed his evidence. As observed by the trial Court, if only the second defendant had any suspicion about the third defendant deposing in support of the plaintiff's case, he would have raised an objection. He did not do so. Only when the third defendant filed affidavit in lieu of chief examination, the second defendant raised objection. This aspect of the matter has been well considered by the trial Court.

10. The Civil Revision Petition is devoid of any merit and is, accordingly, dismissed. No costs.