
(2007) 07 OHC CK 0078
In the Orissa High Court

B. Lalita Pradhanuni

APPELLANT

Vs

Jasoda Padhununi and Others

RESPONDENT

Date of Decision : 04-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)

Citation : (2007) 104 CLT 843 : (2007) 2 OLR 343

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.K. Parichha, J.—This is a plaintiff's appeal against the composite judgment and decree passed by the learned Additional District Judge, Ganjam-Boudh, Berhampur in T.A. Nos. 75 of 1980 (93/77) GDC) and 76/80(97/77 GDC) reversing the judgment and decree of the learned Munsif, Berhampur passed in T.S. No. 7 of 1975.

2. The appellant-plaintiff filed the suit for partition of the Schedule "A" and "B" properties mentioned in the plaint. Her simple case was that the suit properties belonged to one Kantaru Pradhan, who had three sons, namely, Narayan, Jagabandhu and Baraja. Baraja died when he was a child. So, after the death of Kantaru, the remaining sons, Narayan and Jagabandhu inherited the suit properties. Jagabandhu died in the year 1970 leaving his widow, the plaintiff and a daughter, namely, Ratna. Since the plaintiff was not given anything out of the joint family property, she demanded partition and on refusal of the same by Narayan, she filed the suit seeking half share in the property.

3. Narayan, Defendant No. 1 in his written statement challenged the maintainability of the suit on the ground that there was a previous partition by metes and bounds in the year 1954. He also challenged the suit on the ground that the daughter of the plaintiff and the alienee of a portion of the suit property were not made parties. Learned trial Court on assessment of the evidence of the

parties concluded that there was no prior partition by metes and bounds and that the suit was not bad for non-joinder of the daughter and the alienee as the interest of such persons were not adversely affected and accordingly decreed the suit in part allowing 1/2 share to the plaintiff in the suit properties except the properties mentioned in item No. 1 of schedule "A" of the plaint. Aggrieved by denial of share in item No. 1 of Schedule "A" of the plaint, the plaintiff filed T.A. No. 75 of 1980. Defendant No. 1 also challenged the decree for partition in T.A. No. 76 of 1980. Both the appeals were heard analogously and disposed of by common judgment. In the said judgment, learned first appellate Court confirmed the finding of the learned trial Court that there was no prior partition of the suit properties by metes and bounds, but reversed the finding that the suit does not suffer from non-joinder of necessary parties. Learned 1st appellate Court on discussion of the evidence and law came to hold that the daughter of the plaintiff and the alienee of a part of the suit properties were necessary parties and in their absence the suit was not maintainable. Accordingly, the appeal of defendant No. 1 was allowed and the suit of the plaintiff was dismissed. The said judgment and decree is under challenge in this appeal.

4. Though this Second Appeal was admitted on several grounds, Mr. Goutam Mishra, learned Counsel for the appellant raises only one legal question, namely, whether it was legally proper on the part of the 1st appellate Court to dismiss the suit of the plaintiff for non-joinder of daughter of the plaintiff and the alienee instead of giving opportunity to the plaintiff to bring those persons on record ? According to Mr. Mishra, in view of the provisions of Order 1, Rule 9 and Order 1, Rule 10(2), C.P.C. the Court should not dismiss a suit on the ground of mis-joinder or non-joinder of parties without affording opportunity to the plaintiff to bring the necessary parties on record by way of amendment or otherwise. In support of his submission, he cited the cases of Smt. Uma Dei v. Gokhei Parida and Ors. 1972(1) CWR 638, Sabasthi Nadar v. Savurimuthu Nadar (2)1998 CLT 403, Jamal Mohammad and Anr. v. Saukat Ara and 28 Ors. 74(1992) CLT 963. Despite service of notice, respondents 1(a) to 1(e) did not appear to contest the appeal.

5. At the outset, it will be worthwhile to indicate that the appellant during the stage of Second Appeal prayed the Court for deletion of the property mentioned under item No. 1 of Schedule "A" of the plaint and this prayer was not objected to by any one and therefore, it was allowed. Since Title Appeal No. 75 of 1980 was against the finding of the learned trial Court in respect of item No. 1 of Schedule "A" of the plaint, after deletion of the item, the said appeal legally becomes non-existent and the finding of that appeal goes out of consideration in the present appeal. However, the judgment being a composite one, this appeal would remain alive so far as the judgment and decree passed in T.A. No. 76 of 1980 is concerned.

6. Admittedly, the plaintiff had two sons and two daughters through Jagabandhu, out of them three died unmarried and only one daughter Ratna is alive and she is

married. This daughter has certainly got a right over the suit property being one of the legal heirs of late Jagabandhu. Similarly, some of the lands noted in Schedule "A" have been sold to an outsider, yet the property, was included in hotchpotch and partition was sought for. When the alienee was admittedly in possession of the property purchased by him, he was a necessary party to the issue of partition. Therefore, the learned 1st appellate Court was legally justified in saying that these two persons were necessary parties and the suit for partition was not maintainable in their absence. Mr. Mishra, learned Counsel for the appellant admits the legal position that the daughter of Jagabandhu and the alienee of part of the suit properties are necessary parties. He, however, claims that in view of the protection given under Order 1, Rule 9 of the C.P.C., the suit should not have been dismissed. Order 1, Rule 9, C.P.C. reads thus:

No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it; provided that nothing in this rule shall apply to non-joinder of a necessary party.

The rule clearly says that the protection does not extend to non-joinder of necessary party. Since the daughter of the plaintiff and the alienee are necessary parties, the benefit of Order 1, Rule 9, C.P.C. was not available to the plaintiff-appellant. At this juncture, Mr. Mishra argues that even if the benefit of Order 1, Rule 9 C.P.C. cannot be extended, yet for the sake of justice, the Court can take recourse to the provisions of Order 1, Rule 10(2), C.P.C. by allowing the plaintiff to bring the necessary parties on record or by suo motu adding such necessary parties.

Order 1, Rule 10(2), C.P.C. reads thus:

10.(2) Court may strike out or add parties- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

The provision, thus says that whenever it appears to the Court to be just, it can order that any of the necessary parties can be joined or any of the parties can be struck down from the pleading. The question is whether in the present case, this benefit can be extended to the plaintiff-appellant. Before deciding this, it will be worthwhile to take stock of the observations made by this Court and other Courts in this regard. In the case of Sabasthi Nadar and Anr. (supra) the Madras High Court while dealing with the issue of non-joinder of necessary parties, made the following observations:

12. I am unable to agree that these decisions could be pressed into service to

contend that the findings as well as the decree granted by the Courts below have to be sustained and that the unimpleaded parties can be ordered to be impleaded so that they can take part in the final decree proceedings. It has to be borne in mind that in the very decision of the Kerala High Court relied upon by the learned Counsel reported in *Neelakantha Pillai Ramachandran Nair Vs. Ayyappan Pillai Kumara Pillai*, , it is specifically emphasized that the impleadment of parties after the passing of the preliminary decree is possible only on the basis that none of the questions already settled by the preliminary decree would have to be reopened by the Court as a consequence of such impleadment and that the impleadment could be only on the condition that further proceedings will be only on the basis of the preliminary decree already passed. This decision would only make it obvious that it will be an injustice to the unimpleaded parties, if the Court does not dismiss the suit for non-joinder of parties. This is what was emphasized in the *A. Ramachandra Pillai v. Valliamal* 100 LW 486, cited earlier. If co-sharer who is entitled to raise his pleas on the merits of the suit is to be deprived of his defence for no fault of himself and if the plaintiff could be put on premium for not having impleaded a necessary party, it would spell clear injustice, and it would only lead to multiplicity of proceedings.

13. On the other hand, the decision of the learned Single Judge of this Court reported in *Swayamprakasam alias Chidambaranathan Vs. R. Vijayarangam*, is more practical as it holds that Order 1 Rule 10(2) of the CPC gives power to the Court to implead parties at any stage of the proceedings in a partition suit. The proceedings do not come to an end till the passing of the final decree and therefore at the stage of final decree proceedings also, parties can be impleaded. Similarly the judgment of the Division Bench of the High Court of Andhra Pradesh reported in *Ramader Appala Narasingha Rao v. Chundrur Sarada* AIR 1976 A.P. 226, is also to the effect that a party who was impleaded only after passing of the final decree, can seek for setting aside the preliminary decree and the Court in appropriate cases can set aside the preliminary decree to do substantial justice between the parties having regard to the circumstances of the case.

In the case of *Jamal Mohammad and Anr. (supra)*, the Division Bench of this Court ruled that the object of Order 1, Rule 10(2), C.P.C. is to enable the Court to try and determine all material questions between the parties and third parties and not merely the questions between the parties to the suit and that the Court is primarily concerned with the questions whether the presence of the proposed party would advance complete and satisfactory adjudication of the subject matter in controversy. It was said that the Court has a wide discretion to implead a party if it considers the presence of such a party is essential or even desirable in the interest of justice. It was further observed that instead of dismissing the suit in its entirety for non-joinder of necessary parties, in appropriate circumstances, the plaintiff can be given opportunity to bring those necessary parties on record and this exercise can be undertaken even at the stage of appeal. This view finds support from the decision reported in *Ramader Appala Narasinga Rao v. Chunduru Sarada* AIR 1976 A.P.226. So, law is settled that the Court is

empowered under Order T, Rule 10(2) C.P.C. to implead necessary parties at any stage of the proceedings in a partition suit and also at the stage of appeal or final decree proceeding.

7. From the impugned judgment, it is apparent that during pendency of the title appeal, the plaintiff-appellant orally prayed to the Court to give her opportunity to implead the daughter and alienee as defendants in a suit. But that prayer was ignored and the suit and the appeal of the plaintiff were dismissed. It has been held concurrently by the Courts below that the suit property was inherited by the two sons of the original owner and one of them was husband of the plaintiff and that the property is still joint. So, the plaintiff and her daughter would naturally inherit the interest of Jagabandhu in the family property. So even the suit for partition is now dismissed for non-joinder of parties, the plaintiff can again bring a fresh suit impleading all the necessary parties. Such situation will give rise to multiplicity of proceeding, which should always be avoided.

8. That being the position, dismissing the suit for partition on the ground of non-joinder of the daughter and the alienee without giving the plaintiff an opportunity to implead those persons was not just or in the best interest of justice. Therefore, considering the power under Order 1, Rule 10(2), C.P.C. and taking support of the observation of the Division Bench of this Court in the case of Jamal Mohammad and Anr. (supra) as well as view taken by the Madras High Court in Sabasthi Nadar (supra) and the Andhra Pradesh High Court in the above noted cases, I feel it just and proper to give the plaintiff-appellant an opportunity to bring the necessary parties on record.

9. The judgment and decree of the learned 1st appellate Court is accordingly set aside and the matter is remitted back to the learned trial Court to decide the suit afresh after giving the plaintiff an opportunity to bring the necessary parties, namely, the daughter and the alienee on record. Needless to say that after such amendment, the defendants would be at liberty to file additional written statement and the parties would be at liberty to lead additional evidence.

10. The appeal is accordingly allowed. No cost.