
(2004) 07 AP CK 0094

In the Andhra Pradesh High Court

Case No : SA No's. 962 and 963 of 1998

Balireddy Appalanarasaiah (died) and Others

APPELLANT

Vs

Balireddy Saddhu and Others

RESPONDENT

Date of Decision : 14-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 101

Citation : (2004) 5 ALD 308 : (2004) 3 APLJ 121

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : D. Ramalingaj Swamy, for the Appellant; M.S.R. Subrahmanyam, for the Respondent

Judgement

V. Eswaraiah, J.—These two appeals can be disposed of by a common judgment as the parties and dispute involved in both the appeals are one and the same.

2. The Appellants No. 1 and 2 are the plaintiffs in O.S. No. 38 of 1986 on the file of the Principal Subordinate Judge, Visakhapatnam and the said suit was filed for declaration of their title to the plaint schedule property and consequential relief of permanent injunction. The respondents herein are the defendants in the said suit O.S. No. 38 of 1986.

3. The respondents herein filed suit in O.S. No. 289/86 on the file of the Principal Subordinate Judge, Visakhapatnam for partition of the suit schedule properties shown as Schedules "A" and "B" properties.

4. The Trial Court by its judgment and decree dated 21-12-1992 dismissed the suit in O.S. No. 38 of 1986 and decreed the suit for partition in O.S. No. 289 of 1986.

5. Aggrieved by the said judgment and decree the unsuccessful plaintiffs in O.S. No. 38 of 1986 who are defendants in O.S. No. 289 of 1986 preferred an appeal in A.S. No. 31 of 1993 and A.S. No. 46 of 1993 on the file of the IV Additional District Judge, Visakhapatnam. The lower Appellate Court dismissed the said

appeals by its common judgment dated 8th September, 1997.

6. During the pendency of the appeal the 1st plaintiff in O.S. No. 38 of 1986 who is the 1st defendant in O.S. No. 289 of 1986 died and therefore his legal representatives were brought on record.

7. For the sake of convenience the parties hereinafter be referred to as they are arrayed in the original suit in O.S. No. 289 of 1986.

8. The appellants herein are the defendants in the said suit. It is the case of the plaintiffs in O.S. No. 289 of 1986 that the plaintiffs and the defendants are the grand children of Balireddy Sanyasi @ Sannemma Dora. Balireddy Sanyasi had five sons namely Vissanna, Muthyalu, Narasimhulu, Narasanna and Chinnappadu. Vissanna is the eldest son. The defendants are the sons of Vissanna. 1st plaintiff is son of Muthyalu, Narasimhulu had no issues. Plaintiffs 2 and 3 are the sons of Narasanna. 4th plaintiff is the son of Chinnappadu. Sanyasi had agricultural lands in Manidilova and Darbam Villages shown as "A" and "B" schedule. They are ancestral properties. Sanyasi @ Sannemmadora was the Village Munsiff and after his death about 40 years ago his eldest son Vissanna has become village Munsiff by way of hereditary right. Sanyasi was the Manager of the joint family of himself and his four sons and after his death his eldest son Vissanna acted as Manager of the family comprising of his family members as well as four brothers. All the lands stood registered in the village records in the name of Sanyasi and later in the name of his elder son Vissanna. The cultivable lands of the family were partitioned i.e., Ac. 0-96 cents to each about 20 years ago and since then all of them are enjoying the same separately. However, the plaint schedule lands were not fit for cultivation, they were not partitioned and kept joint and the same are in joint possession and enjoyment of the plaintiffs and the defendants. Subsequent to the partition Vissanna and all the brothers died, leaving behind the plaintiffs and defendants as their respective heirs. While so, about four years prior to the suit, the 1st defendant proposed that he would give Item No. 3 of the plaint schedule property on lease on hiring system for the purpose of raising casuarinas tope with a promise that after realizing the proceeds he would divide among the sharers. However, when the casuarinas tope became ripe for cutting, the defendants entertained an evil idea of taking away the entire share to themselves without paying the amount to the plaintiffs and filed a misconceived suit in O.S. No. 38 of 1986 on the file of the Additional Sub-Court, Visakhapatnam and obtained an injunction against the plaintiffs. Subsequently, under the guise of the injunction tope was cut and removed and sold away and the defendants took away the entire share to a tune of Rs. 10,000/-. The defendants are taking advantage of the fact that the lands were registered in the name of their father and the patta was also granted in his name, being the manager of the joint family has set up title in respect of "B" schedule land. Even after filing O.S. No. 38 of 1986, the plaintiffs demanded for partition in order to maintain cordial relationship among the family members. But, the defendants refused for partition of the said properties. Therefore, the plaintiffs filed the suit

for partition of the same by metes and bounds into four equal shares and to allot one such share to the 1st plaintiff and another to the Plaintiffs 2 and 3 jointly, 3rd share to the 4th plaintiff and 4th share to the defendants jointly.

9. The Defendants 1 and 2 filed a written statement admitting the relationship and stated that the Inam title deed No. 2490 belongs to their late father and it has been in possession since more than 60 years. The defendants father Vissanna died 12 years back leaving behind him his widow Jogulamma and his four daughters and two sons i.e., defendants. Defendants are managing the properties and they had been in possession and enjoyment of the same on behalf of the mother and sisters also. Inam land was not useful for regular cultivation, but only to raise topes like casuarinas. During the life time of Vissanna he raised casuarinas tope on sharing system. In the year 1980 plaintiffs herein entered into an agreement with Gandreddi Appadu and another at the first instance and later as one of the party withdrew from the agreement, entered into a fresh agreement with Gandreddi Appadu and Grandhi Varahalu and they raised a tope. After the tope became ripe for cutting, the defendants, Gandreddi Appadu and Varahalu sold the tope to another person for an amount of Rs. 10,500/-. While the said Vissanna was cutting the tope on 16-2-1986 the plaintiffs herein without any manner of right obstructed him on 18-2-1986. When the same was obstructed the defendants made questioned to the plaintiffs claiming the right of the said property. All the brothers of Vissanna were separated long back and even before the birth of the defendants and all of them died more than 50 years back. Since, the plaintiffs claimed title and a cloud is cast over the defendants' title, the defendants filed O.S. No. 38 of 1986 for declaration of title and for consequential injunction. Injunction was granted on 22-1-1986 and suppressing the said application, the plaintiffs filed the suit for partition and also obtained the injunction.

10. On the said pleadings, the Trial Court framed the following issues:

- (1) Whether the plaintiffs are entitled for the partition as prayed for ?
- (2) Whether the suit is not maintainable?
- (3) Whether the suit lands have been in possession and enjoyment of the defendants and their father since more than 50 years?
- (4) To what relief ?

11. It is the case of the plaintiffs in O.S. No. 38 of 1986 that "B" schedule properties in suit for partition belonged to their father Vissanna and the said property is a personal Inam Land covered by Inam Land title deed No. 2490 which has been in possession and enjoyment of the Vissanna father of the plaintiffs and later plaintiffs were in possession since last 60 years. Vissanna died 12 years back, leaving the plaintiffs in the said suit O.S. No. 38 of 1986. Plaintiffs alone are in possession and enjoyment of the said property on behalf of their mother and sisters.

12. Defendants filed written statement taking the same plea of the plaint filed by them in O.S. No. 289/1986. It is further stated that the defendants i.e., plaintiffs in O.S. No. 289/86 being the co-owners of the land along with the plaintiffs, as such no injunction can be granted against the defendants and ultimately sought for dismissal of the suit.

13. The issues that were framed in O.S. No. 38 of 1986 are as follows:

(1) Whether the defendants are co-owners of the suit property along with the plaintiff ?

(2) Whether the plaintiff is entitled for declaration as prayed for ?

(3) Whether the plaintiff is entitled for injunction as prayed for ?

(4) To what relief ?

14. Both the suits are clubbed and the parties were referred as they are arrayed in O.S. No. 289 of 1986.

15. While dealing with Issue Nos. 1 and 3 in O.S. No. 289 of 1986 and Issue No. 1 in O.S. No. 38 of 1986 the Trial Court held that "A" schedule property is the joint family property. But, it is not self acquired property of the defendants. With regard to "B" schedule properties are concerned, the Trial Court held that it is also a joint family property and it is not self acquired property of the defendants. The Trial Court having held that "A" and "B" schedule properties were being the joint family properties, though the female heirs of brothers were not impleaded in the suit, no prejudice is caused to them as long as the share is being represented by the proper persons and the property is divided among particular branches, each party is entitled to share. It was held that the plaintiffs and defendants represented four branches namely Branch of Vissanna, Mutyalu, Narasanna and Chinnappadu. The third son of Sanyasi i.e., Narasimhulu died and therefore the property of Sanyasi have to be divided among the four sons who are alive. Accordingly, it is held that the property has to be divided into four shares and each branch is entitled to one share. The Plaintiffs 2 and 3 were sons of Narasanna are entitled to one share and the 4th plaintiff who is son of Chinnappadu is entitled to one share and the Defendants 1 and 2 who are sons of Vissanna are entitled to one share representing the branch of four brothers of Vissanna.

16. In view of the aforesaid findings the other issues are held against the defendants rejecting their claim that the said property was self acquired property of Vissanna and accordingly dismissed the suit in O.S. No. 38 of 1986 and decreed the suit O.S. No. 289 of 1986 granting preliminary decree directing the division of the property into four shares as stated supra.

17. Aggrieved by the said judgment and decree, the defendants i.e., plaintiffs in O.S. No. 38 of 1986 filed A.S. No. 31 of 1993 against the judgment and decree in O.S. No. 289 of 1986 and A.S. No. 46 of 1993 against the judgment in O.S. No.

38 of 1986. The lower appellate Court dismissed both the appeals confirming the judgment and decree of the Trial Court. Aggrieved by the said judgment and decree of the lower appellate Court, these second appeals have been filed contending that the Trial Court has failed to appreciate properly the documentary evidence Exs. B-1 to B-14 and also Ex. A-1 and erred in decreeing the suit for partition and dismissed the suit for injunction.

18. The learned Counsel appearing for appellants urged that the following are the substantial questions of law that arise for consideration.

(1) Whether partial partition pleaded by respondents/defendants is true valid and binding on the appellants where law presumes, that there was entire partition and separate possession and enjoyment also presumes ownership of the property?

(2) Whether the adverse possessory rights claimed by the appellants coupled with documents marked on appellants side entitles declaration of title and injunction to appellants?

(3) Whether all the coparceners are necessary parties in a partition suit?

19. Insofar as the said Questions 1 and 2 are concerned, there is no dispute with regard to the partial earlier partition long back among each branches of the sons of late Sanyasi. The only question that arises for consideration as to whether "A" and "B" schedule properties are the joint family properties kept jointly without any partition.

20. A perusal of Ex. A-1 clearly goes to show that Sanyasi is entitled for the grant of ryotwari patta in respect of Ac. 07-04 cents in Survey Nos. 97 and 102 situated at Dabanda and Vissanna the elder son of Sanyasi has been cultivating the land and the records shows that the said land is in sub-divided Survey No. 2490 of Dabanda Village and it is owned by Vissanna as landlord and he is entitled to the ryotwari patta. The said proceedings was issued by the Additional Assistant Settlement Officer, on 10-1-1957. The preamble of the said proceeding clearly goes to show that Balireddi Vissanna was entitled for the ryotwari patta as Sanyasi died long back, as such the ryotwari patta was granted in favour of the eldest son. Therefore, it clearly goes to show that "B" schedule properties are the joint family properties and all the sons of Sanyasi are entitled for the equal shares.

21. The total extent of "B" schedule property is Ac. 07-04 cents which is covered by Ex. B-1 document which goes to show that it is a joint family property as Sanyasi was entitled to ryotwari patta and Sanyasi died long back and as such the ryotwari patta was granted to the elder son of Sanyasi, who is Vissanna. Therefore, I am of the view that both the Courts below are right in holding that "B" schedule property is joint family properties. But, not the personal property of Vissanna.

22. Insofar as "A" schedule property is concerned, the Trial Court held that

except a bald written statement that the property is self acquired property of the father of the defendants, no material has been filed in support of the claim and admittedly, when there is joint nucleus and when there is evidence to show that "A" schedule property was not partitioned earlier, the Trial Court rightly held that "A" schedule property is joint family property which was rightly confirmed by the lower Appellate Court.

23. The third question arises for consideration is whether all the co-parcenor are necessary parties to the suit?

24. It is the case of the defendants that Sanyasi @ Sannamma Dora had five sons and two daughters. The first son Vissanna got four daughters and two sons. The second son Mutyalu had got son and daughter, the third son Narasimhulu died issue less and his wife also died prior to filing of the suit. Fourth son Narasanna have got one daughter and two sons and his wife alive. Fifth son Chinnappadu got only son. It is the case of the defendants that admittedly Vissanna got four daughters and Mutyalu got a wife and daughter and Narasanna got wife and daughter and Chinnappadu got wife. Though the property is being divided among four sons of Sanyasi, but the daughters of each branch are also entitled for their share in the joint family properties and without impleading them, the suit cannot be decreed. As the daughters of each branch are also necessary parties and insofar as this contention is concerned it is submitted that under Order 1, Rule 9 of C.P.C. no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

25. Provided that nothing in this rule shall apply to non-joinder of a necessary party.

26. It is stated that necessary party is different from the connotation as party in Rule 9, a person who is having a share in the joint family property is undoubtedly a necessary party and therefore the suit shall defeat if necessary parties are not made as parties to the suit.

27. On the other hand, the learned Counsel appearing for the plaintiffs submits that under Order 1, Rule 13 which reads thus;

"that all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived"..

28. It is stated that Order 1, Rule 13 has application with regard to the defect of non-joinder or mis-joinder of the parties alone, but not the non-joinder of the necessary parties to the suit.

29. Therefore, the wording in Order 1, Rule 13 as non-joinder or mis-joinder of

parties is used. It is not stated as necessary parties in Rule 13 and therefore Order 1, Rule 13 has no application to cure the defect for non-joinder of necessary parties in the suit.

30. The learned Counsel for the appellants submits that suit filed by them in O.S. No. 38 of 1986 a specific plea was taken that they are managing the properties on behalf of the mother and sisters and in the written statement filed in the suit for partition, it is stated that the defendants " father died 12 years ago, leaving behind his widow Jogulamma and his four daughters apart from two sons. The defendants are managing the property and they have been in possession and enjoyment of the same on behalf of their mother and sister also. Apart from taking the said plea, it is stated that they have taken a plea that the other wives and sisters of other branches are alive. In the cross-examination of PW-1 in O.S. No. 289 of 1986 PW-1 admitted that late Sanyasi had two daughters namely Musalamma and Sannamma. Vissanna i.e. eldest son has two sons and four daughters namely Muthyalamma, Kamma, Chilkamma and Sanyasamma. It is suggested that the daughters" names are not correctly mentioned. It is contended that admittedly all the sons of Sanyasi died and the suit for partition filed by the sons of the three branches against the other branch leaving their own sisters and cousin sisters and therefore, the suit for partition is bad for non-joinder of necessary parties. Apart from taking a plea and adducing oral evidence, it is also stated and an argument was also advanced before the Trial Court that the suit is bad for non-joinder of necessary parties. The Trial Court also adverted to the said contention and held that there is no dispute that some of the female sharers of brothers are not included in the suit. But, the defendants are not entitled to raise such a plea at this stage and even otherwise, so long their share is being represented by the proper persons, no prejudice will be caused even if any other sharers are not impleaded. It is also stated that there is no issue in this regard. It is true that the defendants have stated about the existence of their four sisters and mother. But, they have not stated about the existence of sisters of the plaintiffs. But, there is oral evidence that the plaintiffs have got sisters and admittedly, the plaintiffs are not impleaded either their own sisters or sisters of the defendants in the suit for partition. After examining the parties, merely because the issue of setting about the necessary party is not made, Order 14, Rule 5 provides that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed. It is stated that inspite of the evidence available on record to show that the defendants have got four sisters and mother and the plaintiffs have got sisters and they were not impleaded and the suit is bad for non-joinder of necessary parties. But, the lower Court has failed to frame additional issues and also failed to deal with the issues properly.

31. In support of his contention, the learned Counsel for the appellants relied on a judgment of Apex Court in a case of Kanakarathanammal Vs. V.S. Loganatha

Mudaliar and Another, , wherein the Supreme Court in Para 15 of the judgment held as follows:

"It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession u/s 12 of the Act. That, in fact, is the conclusion which the Trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the CPC no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, Sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In AIR 1931 229 (Privy Council) the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that "they are unable to hold that the said rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India".

32. The Honourable Supreme Court held that the parties are not joined are not only proper or necessary parties to the suit, the infirmity in the suit is bound to be fatal.

33. Under Order 1, Rule 10 Sub-rule (2) necessary parties to be joined. This being a suit for partition, the question of limitation would not run and therefore, I am of the view that the principles laid down in the aforesaid judgment of Supreme Court equally applies to the instant case and it is essential for the plaintiffs to make their sisters and the sisters of the defendants and living mothers as parties to the suit.

34. The learned Counsel further relied on a judgment in a case of Uppu Jhansi Lakshmi Bai Vs. J. Venkateswara Rao, , held that;

"when necessary party to the appeal was not impleaded in the appeal. The appeal is liable to be dismissed on that ground alone".

35. Though the provision of Order 1, Rule 9, which reads thus:

"no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it," but the proviso makes it clear that nothing in this rule shall apply to non-joinder of a necessary party.

36. Therefore, if necessary party is not impleaded in the suit it has to be dismissed on that ground.

37. On the other hand, the teamed Counsel appearing for the plaintiffs submits that the said aforesaid judgment has no application to the suit for partition and he relied on a case of Bishambar Das v. Kanshi Parshad, AIR 1932 Lahore 641, it was held that:

"in a suit for partition, the necessary parties are heads of the each branch of the family and it is not obligatory on the plaintiffs to implead all the members of all the branches. The suit can be proceeded on the representation of heads of the each branch, which will be binding on their descendants."

38. In view of the aforesaid two reasons, I am unable to agree with the said contention and the ruling of the Lahore High Court. When there is specific provision in the C.P.C providing joining of proper and necessary parties, the suit shall fail, as held by the Apex Court in the aforesaid judgment.

39. Accordingly, insofar as the findings of the both the Courts below that "A" and "B" schedule properties in O.S. No.289 of 1986 are joint family properties and all the sons of late Sanyasi are entitled for the share in the said properties are concerned, I confirm the same. When all the sons of Sanyasi are entitled, the grandsons and grand daughters of Sanyasi and daughter-in-laws are entitled for the share and therefore the sisters and mother of the plaintiffs and the sisters of the defendants and the mother of defendants are also proper and necessary party to the suit for partition.

40. Admittedly, there was a joint nucleus and only cultivable lands were divided long back and it is asserted by the plaintiffs that the plaint schedule properties were not divided as they were not cultivable lands. There is evidence to show that the father of Vissanna namely Sanyasi was entitled for patta of the said land and at the time of granting patta the grand father of the plaintiffs died and the father of defendants being the eldest son, he was succeeded to the post of village patwari, the patta was granted in his name. There is no evidence whatsoever to establish that the said properties are self acquired properties of

father of the defendants. Therefore, I am of the view that both the Courts below rightly held that Plaint "A" and "B" schedule properties are joint family properties.

41. It is contended by the learned Counsel for the defendants that if shares were divided among four branches, there cannot be any objection for the other co-sharers of the respective branches for partition. Admittedly, the sisters of the plaintiffs and the sisters of the defendants are entitled for individual shares in respect of each individual branch and they cannot be kept out of this litigation for claiming their right by filing a separate suits and when joint family properties are liable to be partitioned, the said partition must be among all the share holders. Therefore, in view of the aforesaid judgment of the Supreme Court, I am of the opinion that all the persons to the respective branches are proper and necessary parties to avoid multiplicity of the proceedings.

42. For the aforesaid reasons the judgment and decree of the Trial Court in O.S. No. 289 of 1986 as upheld by the Appellate Court is set aside and remanded back to the Trial Court, so as to enable the plaintiffs to implead the necessary parties and on impleadment of the necessary parties, the Trial Court may dispose of the suit as expeditiously as possible. Accordingly, the Second Appeal 962/98 is allowed, setting aside the judgment and decree of the Trial Court and the matter is remitted back to the Trial Court, so as to enable the plaintiffs to implead the proper and necessary parties. Whatever, oral and documentary evidence already lead will hold good and only it is remitted back for the purpose of impleading the proper and necessary parties, representing the estate. If any of the female members wants to lead any evidence, it may open for them to do so. No order as to costs.

43. Insofar as other suit i.e., O.S. No. 38 of 1986 filed for injunction which was dismissed by the Trial Court and upheld by the lower Appellate Court is concerned, as the properties covered in the said suit are held to be joint family properties and therefore they are not entitled either for declaration of title or consequential injunction and accordingly, the Second Appeal No. 963 of 1998 is dismissed. No order as to costs.