

(2004) 03 AP CK 0107
In the Andhra Pradesh High Court
Case No : LPA No. 235 of 1999

Bandari Pushpamma	Vs	APPELLANT
Bandari Krishna and Others		RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9

Citation : (2004) 2 ALD 712

Hon'ble Judges : E. Dharma Rao, J;B.S.A. Swamy, J

Bench : Division Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; N.V. Jagannath, for the Respondent

Final Decision : Allowed

Judgement

E. Dharma RAO, J.—This Letters Patent Appeal is directed against the order dated 5-8-1999 passed by a learned Single Judge of this Court in Review C.M.P. No. 16820 of 1998 in A.S. No. 2619 of 1996. The said petition was filed by the respondents herein to set-aside the order dated 17-7-1998 passed by the learned Single Judge in the appeal and to restore the appeal. The learned Single Judge by the impugned order instead of passing orders in the said CMP disposed of the appeal itself by allowing it.

2. The facts leading to the filing of this appeal may briefly be stated as under:

3. The appellant herein is the plaintiff. The Respondents 1 and 2 herein are Defendants 1 and 2 and they are the brothers of the plaintiff, while the third respondent-defendant is the sister of the plaintiff. Originally, the appellant-plaintiff filed the suit in O.S. No. 63 of 1988 on the file of the Additional Subordinate Judge, Saroornagar, Ranga Reddy District for partition of the suit scheduled property and for allotting her 1/4th share on the ground that the suit scheduled properties are the self-acquired properties of their father and after the death of their father on 24.8.1980 she is entitled to her 1/4th share in the

property.

4. The suit was contested by the respondents-defendants by filing the written statement inter alia stating that the appellant-plaintiff was not in possession of the suit scheduled property and that they constructed the Cinema theatre with their own funds. It was further contended that even if the plaintiff is entitled to a share, she is entitled for 1/5th share, but not 1/4th share, as the mother of the parties was alive.

5. Basing on the respective pleadings of the parties, the Trial Court framed appropriate issues. During trial, three witnesses were examined and Ex.A1 to Ex.A7 were marked on the side of the appellant-plaintiff. On behalf of the respondents-defendants, two witnesses were examined and Ex.B-1 to Ex.B6 were marked.

6. Upon considering the evidence both oral and documentary on record, the Trial Court held that since the mother of the plaintiff and Defendants 1 to 3 was alive, she is also entitled for equal share with the plaintiff and Defendants 1 to 3 and accordingly decreed the suit in favour of the plaintiff holding that the plaintiff is entitled for 1/5th share. Aggrieved by the judgment and decree of the Trial Court, the respondents-defendants carried the matter in appeal before this Court in A.S. No. 2619 of 1996. Along with the appeal, they filed a miscellaneous petition in CMP No. 15983 of 1996 seeking stay of all further proceedings pursuant to the judgment and decree in O.S. No. 63 of 1988 on the file of the Additional Subordinate Judge, Saroornagar, and Rangareddy, This Court by order dated 1-11-1996 granted stay of all further proceedings pursuant to the decree in O.S. No. 63 of 1988 on the file of the said Court, except passing of the final decree. However, during the course of final decree proceedings before Trial Court, the appellant-plaintiff filed an interlocutory application in I.A. No. 1381 of 1997 before the Trial Court for appointment of a Commissioner to determine her share in the properties and upon hearing both sides, the Trial Court appointed a Commissioner to partition the properties as per the decree. Questioning the said appointment, the respondents-defendants filed C.M.P. Nos.13412 of 1998 and 13413 of 1998 before this Court seeking a direction to the Court below to recall the warrant issued to the Commissioner. The two C.M.Ps. were disposed of by a learned Single Judge of this Court on 17-7-1998 holding that it was open for the respondents-defendants to file their objections before the Commissioner as well as before the Court below. However, having disposed of the petitions, the learned Judge inadvertently observed, "accordingly, the appeal is disposed of. No costs." It is common understanding between the parties that the Court has disposed of both the Civil Miscellaneous Appeals, but in the order it was found that the appeal was disposed of. Therefore, they thought that it is a mistake that crept in, in the order. Accordingly to rectify the said mistake, the respondents-defendants filed C.M.P. No. 16820 of 1999 to review the order of this Court and to correct the mistake in the order. When the said petition came up for hearing on 5-8-1999 before the learned Single Judge of this Court, instead of passing orders

in the Review C.M.P., disposed of the main appeal itself by allowing it on the ground that the point of limitation was not raised by the respondents-defendants in their written statement and therefore, they are precluded from arguing that point without raising any such plea and also on the ground that the mother of the parties was not impleaded as a party to the suit, even though she was alive and accordingly dismissed the suit filed by the appellant-plaintiff by allowing the appeal.

7. Questioning the said orders of the learned Single Judge, present Letter Patent Appeal is filed by the plaintiff contending that in the written statement, no specific plea was raised that the suit was liable to be dismissed for non-joinder of parties and no issue was framed to that effect as contemplated under Order 1 Rule 13 CPC. It is contended that since the respondents-defendants did not take any objection with regard to the maintainability of the suit due to non-joinder of necessary parties at the earliest point of time, they have waived the plea available to them and even otherwise, Trial Court having noticed that the mother of the parties was alive, protected her interest by allotting 1/5th share in the suit schedule property and in that view of the matter dismissing the suit by the learned Single Judge on the ground of non-joinder of necessary party is not justified. Nextly the Counsel contended that the suit was filed seeking partition, even if all the parties are not covered as parties, their interests can always be protected by allotting a share to them. It is also contended that even if it is assumed that there was any defect in not impleading the mother a party to the suit, the said defect can be cured at the appellate stage. In the present case since the mother died on 29-5-1998 during the pendency of the appeal before this Court the defect stood cured, since all her legal heirs are before the Court and the plaintiff being the legal heir is entitled for 1/4th share in the suit scheduled property, the decree of the Trial Court shall have to be modified accordingly.

8. The learned Counsel for the appellant-plaintiff in support of his contention that the defect of non-joinder of necessary party can be corrected even at the appellate stage, relied on a Division Bench judgment of this Court in Srinivas Kumar Mowle Vs. Chandrasekhar Mowle and others, , wherein it was held that the defect of non-joinder of parties can be corrected even at the appellate stage.

9. Relying on the above judgment of this Court, the learned Counsel for the appellant contends that the mother of the parties died on 29-5-1998 pending appeal before the High Court, the defect of nonjoinder of the mother as a necessary party to the suit was cured and therefore, the appellant-plaintiff became entitled for her 1/4th share in the properties. It is also contended that the learned Single Judge was not justified in dismissing the suit while adjudicating the review application and therefore, the order of the learned Single Judge is liable to be set-aside and the appeal be allowed by granting 1/4th share to the plaintiff.

10. On the other hand the learned Counsel for the respondents-defendants

contends that the Review application was filed to review the order passed by the learned Single Judge dated 17-7-1998 in CMP Nos. 13412 and 13413 of 1998 and that in the review application the appellant-plaintiff nowhere stated that there was any error apparent on the face of the record while passing the interim orders in C.M.P. Nos. 13412 and 13414 of 1998, and the learned Single Judge considering the material placed before him has rightly dismissed the suit of the plaintiff on the ground that the mother of the parties who is a necessary party to the suit has not been impleaded as party to the suit and in view of the same it cannot be said that the learned Single Judge has not committed any illegality in dismissing the suit of the appellant-plaintiff.

11. It is further contended that either in L.P.A. or in the second appeal, only substantial questioning of law have to be raised, but in the entire Memorandum of Grounds of Appeal of the L.P.A. the appellant has not raised any question of law much less any substantial question of law and therefore the L.P.A. is liable to be dismissed in limine.

12. It is also contended that Section 3 of the Limitation Act ordains that whether the plea of limitation is taken as a defence or not, the Court has to consider the question of limitation and in the present case, since the appeal filed by the respondents-defendants was allowed and the suit of the plaintiff was dismissed, there was no necessity for the respondents-defendants to file cross-objections and they are permitted under law to raise the question of law of limitation in this Letter Patent Appeal, without filing any cross-objections. It is contended that in fact the respondents-defendants raised the question of limitation in the Memorandum of Grounds of Appeal before the learned Single Judge.

13. The learned Counsel for the respondents-defendants further contended that Order 47, Rule 1 CPC provides for review of the order passed by a Court, if there was any error apparent on the face of the record, and in the present case since there was an error apparent on the face of the record, the learned Single Judge reviewed the earlier passed by him and accordingly allowed the appeal.

14. The learned Counsel for the respondents-defendants relied on various judgments of the Apex Court and this Court and other High Courts in *Syed Dtagir v. T.R. Gopala Krishna Setty* 1999 (6) SCC 3371, *Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another*, *Ali Amad represented by L. Rs. Vs. Sindhi Ebrahim Kasam and Others*, *S.K. Saldi Vs. General Manager, U.P. State Sugar Corporation Ltd. and another*, *Kotamida Ramayya v. Chinna Chennarayappa* 1973 APHN 120, *Lakshamma v. Someshwer Rao* AIR 1953 Hyd. 170, *E. Thilavulu Ammal v. Pethakkal* AIR 37 Mad. 390, AIR 1925 49 (Privy Council); *Gomati Devi Vs. Ram Prasad Prabhudayal and Others*, *N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh*, *Sabasthi Nadar v. Savurimuthu* 1999 (2) CC 60, *Kamini Bewa Vs. Srimati Dei and Others*, and also on a Division Bench Judgment of this Court in *Srinivas Kumar Mowle v. Chandra Shekhar Mowle* referred to (*supra*).

15. In the suit, the Trial Court basing on the respective pleadings of the parties, framed the following two issues; viz., (1) to whether the plaintiff is entitled for partition of 1/4th of suit schedule properties (2) whether the plaintiff is in joint possession of the suit schedule properties and (3) Court fee paid is sufficient.

16. Considering the oral and documentary evidence adduced on either sides and in view of the stand taken by the respondents-defendants in their written statement, the Trial Court held that since the mother is alive, she is also entitled to a share along with the plaintiff and D1 to D3 and accordingly held that the plaintiff is entitled to only 1/5th share in the properties available for partition at the time of filing of the suit.

17. As regards the second issue, the Trial Court found that the plaintiff was not in joint possession of the suit scheduled properties with D1 and D2 and as such the Court fee paid is not sufficient and directed the plaintiff to pay the deficit Court and ultimately decreed the suit holding that the plaintiff was entitled to 1/5th share in the suit schedule properties available for partition as on the date of filing of the suit. Aggrieved by the judgment and decree of the Trial Court, the respondents-defendants preferred appeal before this Court in A.S. No. 2619 of 1996.

18. It is pertinent to note here that, though it was mentioned in the written statement that the mother of the plaintiff and defendants was alive the respondents-defendants have not taken any steps to file a petition before the Trial Court to frame an issue with regard to the maintainability of the suit. The appeal filed by the respondents-defendants was admitted and on 1-11-1996, and this Court granted stay of all further proceedings pursuant to the decree in O.S. No. 68 of 1988 on the file of the Trial Court, except passing of the final decree. However, during the final decree proceedings, on an interlocutory application filed by the appellant-plaintiff, a Commissioner was appointed to determine the share of the appellant-plaintiff and aggrieved by the said order of the Trial Court, the defendants filed miscellaneous petitions in CMP Nos. 13412 and 13413 of 1996 before this Court to recall the warrant issued to the Commissioner and the learned Single Judge disposed of those applications on 17-7-1998 observing that he is not inclined to adjudicate the proceedings as the final decree proceedings are stayed by this Court. However, the learned Single Judge observed that it is open for the respondents-defendants to file objections before the Commissioner as well as the Court below on these aspects and the same shall be considered in accordance with law. The said order was passed even in the absence of the Counsel for the appellant. Thereafter the respondents-defendants filed CMP No. 20120 of 1998 contending that when two applications are filed to recall the warrant issued to the Commissioner for ascertaining the partition as the warrant was not issued according to the judgment, the learned Single Judge directed the respondents-defendants to file objections before the Commissioner and also before the lower Court, as passing of final decree has already been stayed by this Court. It is submitted that the above order should have been typed only on

dockets of the above CMPs, but this order was typed on the main appeal itself stating that "accordingly the appeal is disposed of. It is further contended that even though the learned Counsel for respondents-defendants was not present, the learned Single Judge was pleased to give the above directions and hence sought for review of the above order.

19. It is pertinent to note here that two interlocutory applications in CMP Nos. 13412 and 13413 of 1998 were filed before this Court to recall the warrant issued to the Commissioner by the Court below, but however, since this Court stayed the final decree proceedings, the respondents-defendants were directed to file their objections before Commissioner as well as before the lower Court. Instead of rectifying the mistake and disposing of the interlocutory applications, the learned Single Judge disposed of the main appeal by allowing it on the ground of maintainability of the suit for non-joinder of necessary party relying on the judgments of the Apex Court in *Kanakarathnammal's case (supra)*. Aggrieved by the same, the present appeal is filed by the plaintiff.

20. It is pertinent to mention here that when it was brought to the notice of the learned Single Judge that the order was to be passed on the interlocutory applications and not on the main appeal, the learned Judge at the first instance should have confined his order in the review petition on the CMPs and should have restored the appeal to the file. Instead of doing so, without reviewing the earlier passed by him, he has taken up the appeal and disposed of the same by allowing it on the ground of not impleading the mother as a defendant since, she is a necessary party in the suit. In view of the same, instead of sending the matter back to the learned Single Judge for decision again, we thought it appropriate to dispose of the appeal in the light of the Division Bench Judgment of this Court in *Srinivas Kumar Mowle v. Chandrasekhar Mowle and others (supra)* and heard the arguments on either side. In the above decision, a Division Bench of this Court, considered the aspect of impleading of necessary party and held that in a suit for partition, the daughter who was admittedly a sharer was originally impleaded but subsequently she was given up during trial and the Trial Court did not decide the question as to the maintainability of the suit in her absence. But in appeal, subsequent to her death, her legal representatives got themselves impleaded and the matter was decided in their presence. In such circumstances the Court held that non-joinder of daughter does not affect the maintainability of the suit inasmuch as the defect of non-joinder of necessary party can be cured even in the appellate stage.

21. The above judgment was rendered by the Division Bench following the judgment of the Supreme Court in *Kanakarathanammal's (supra)*, which the respondents-defendants are relying, wherein the Apex Court held that if there is a defect of non-joinder of necessary party in a suit it can be corrected even in the appellate stage. In view of this judgment, we thought it appropriate not to consider the various other judgments relied on by the parties.

22. In the present case though the mother of the parties was not impleaded as a

party to the suit, her interest was protected and the Trial Court held that she was entitled for equal share with the plaintiff and defendants. Though there was ample opportunity to the respondents-defendants, they did not take any steps to get an additional issue framed with regard to the maintainability of the suit on the ground of non-joinder of necessary parties i.e., the mother of the parties in the suit, but the issue was raised in the appeal. Now as the matter is before the Bench, after going through the merits and considering the submissions made by the learned Counsel on either side and following the judgment of the Division Bench of this Court in Srinivas Kumar Mowle's case (supra), we are of the considered opinion that though the mother was not impleaded as party in the suit filed for partition, the Trial Court has taken a judicial notice that the mother of the parties was alive and accordingly protected her interest and held that she was also entitled for equal share with the plaintiff and defendants. Now since the mother of the parties died during the pendency of appeal before this Court, defect of not impleading the mother of the parties as a necessary party to the suit is cured since all the legal representatives are before this Court. Therefore, it cannot be said that the suit is liable to be dismissed for nonjoinder of the necessary party now.

23. Accordingly, this Letters Patent Appeal is, allowed and the order of the learned Single Judge dated 5-8-1999 in Review C.M.P. No. 16820 of 1999 in A.S. No. 2619 of 1996 is hereby set aside and consequently the judgment and decree of the Trial Court is restored and the Trial Court is directed to proceed with the final decree proceedings. No order as to costs.