
(1978) 10 AP CK 0007

In the Andhra Pradesh High Court

Case No : A.A.O. No. 382 of 1977 and C.R.P. No's. 2231 of 1976 and 219 of 1977

Chakrala Venkateswaralu

APPELLANT

Vs

Golla Anjaiah (Died) L.R. Golla Kondiah

RESPONDENT

Date of Decision : 06-10-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 22 Rule 10

Citation : AIR 1979 AP 162

Hon'ble Judges : Punneya, J

Bench : Single Bench

Advocate : P.V.R. Sarma, for the Appellant; S. Satyanarayana Prasad, for T. Veerabhadrayya, for the Respondent

Judgement

1. The appellant in C.M.A. No 382/1977 is the petitioner in C. R. Ps. 2231/76 and 219/77 He is the decree-holder in O. S. No 69/1964 a the file of the Subordinate Judge Kavali.. An extent of 62 cents was purchased by the 5th defendant from the plaintiff's ancestor. 5th defendant sold it to 16th defendant under a sale deed The petitioner (appellant) filed the suit O. S. No. 69/64 in the Court of the Subordinate Judge Kavali against defendants 5, 16 and the other defendant Possession and profits in respect of A schedule property. That suit was decreed. After the decree was passed on 13-3-1967. 16th defendant issued a registered notice though his Advocate on 5-7-1967 informing the decree-holder that he is accepting the decree dated 13-3-1967 and hence he is notable for profits. 5th defendant along with some other preferred appeal A.S No.1/1968 While A S. No. 1/1968 was pending, the petitioner decree-holder filed I. A No. 232/67 for ascertainment of mesne profits. Ultimately, the appeal was allowed on 28-10-1970 Consequently the Decree in O. S. No. 69/64 was set aside and the suit was dismissed. As the suit was dismissed. I.A. No. 232/67 was closed since the question of determining mesne profits did not arise in a suit which was dismissed. On 28-12-1970 i.e., two months after the judgment and decree in A S. No. 1/68, 16th defendant died. The plaintiff in the suit preferred L.P.A. No. 97/

1971. In this L.P.A., the 16th defendant's legal representatives were not impleaded. Finally L.P.A. was followed. Consequently, the decree of the trial Court was restored. Then the decree-holder filed I. A. No. 499/72 for revival of final decree proceedings. That petition was showed on 20-3-1976. Accordingly, T. A. No. 232/67 which was filed for determining mesne profits and for passing final decree proceedings was restored one of the judgment-debtors preferred revision petition C. R. P. No. 1024/76 in the High Court, but it was dismissed on 4-4-1977. After I. A. No. 232/67 was revived 8th respondent's (18th defendant's) legal representatives were not brought on record. The decree-holder filed I. A. No. 500/72 on 11-10-1972 to bring the legal representatives of the 8th Respondent on record, He also died I. A. No. 501/72 for setting aside the abatement, At the time of filing these petitions, the decree-holder did not file the petition for condonation of delay in filing the petition for setting aside the abatement, as he thought that the limitation would start from the date of his knowledge, and as at the time of the death of the 8th respondent he was at Secunderabad and he was, therefore, not aware of the death of the 8th respondent. But later he filed a petition I. A. No. 93/74 for condonation of delay in filling the petition for setting aside the abatement. These petitions were opposed. The lower Court dismissed I. A.No.93/74.

Consequently, he dismissed I A Nos. 500 and 501 of 1972

2. Against the order of dismissal of I. A. No. 93/74 the decree-holder filed C. R. P, No. 2231/76. Against the order of dismissal of I. A No. 500/72 the decree holder filed C. M. A No.382/77. Against the order of dismissal of I. A. No. 501/72 the decree-holder filed C. R.P

No. 219/77.

3. Sri P. V. R. Sarma, the learned counsel for the appellant in C. M. A No. 382/77 and the petitioner in C. R. Ps contends that if the petition for condonation of delay is allowed, consequently the petition I. A No. 500/72 for bringing on record the legal representatives of 8th respondent could have been allowed and consequently the petition I. A No. 501/72 for setting aside the abatement of the main petition could have been allowed. He, therefore, contends that the petition for condonation of delay thus assumes importance. He also con-

tends that there is no period of limitation for bringing on record the legal representatives of the deceased in I. A. No. 232/67 which is a petition for mesne profits and for passing the final decree. According to him, a petition for mesne profits can also be treated on par with a final decree proceeding and if one of the defendants died after a preliminary decree was passed, the legal representatives of the deceased defendants can be brought on record in the final decree proceedings at any time as such a case is governed by R. 10 of O. 22 and consequently the legal representatives of 16th defendant can be brought on record.

4. The learned counsel for the respondent, on the other hand, contends that it is

false for the petitioner to say that he was at Secunderabad at the time of the 8th respondent and in fact he was visiting Kaveli Sub-Court and Gudur very often in connection with the suit and he knew the death of 8th respondent even on the day when the 8th respondent died and hence the delay should not be condoned and the learned Subordinate Judge has rightly refused to condone the delay and dismissed the petition L A.No. 93/74 and as the legal representatives cannot be brought on record within the prescribed time, the petition I A No. 232/67 stands abated. He further contends that the petition I. A, No 232/67 is for ascertainment of mesne profits and it cannot, therefore, be treated on par with the final decree proceedings and it. 10 of O. 22 does not apply and it is rule 4 of Order 22 that is applicable and hence the petitioner's contention that the question of limitation does not arise cannot be accepted. He also contends that the legal representatives of 8th respondent were not impleaded in L. P. A, No, 97/11 though the 8th respondent died after the Judgment and decree passed in A. 6. No. 1168 and hence the decision in L P. A. No. 97/71 does not bind the legal representatives of the 8th respondent and consequently the decree in O. S, No. 69/64 does not bind the legal representatives of the deceased 8th respondent though the effect of the decision in L. P. A No 97/71 is the restoration of the decree in O. S. No, 69/64. He argues that when the decision in L P A No. 97/71 does not bind the legal representatives of the 8th respondent because of the fact that they were not brought on record in the said L P.A. the decree-holder cannot proceed against the legal representatives of the 8th respondent for ascertainment of mesne profits under I. A. No. 232/187

5. From the material facts stated above, it is clear that while the appeal A, S. No. 1/68 was pending, I, A, No. 232/67 for ascertainment of mesne profits was filed and then the Court also appointed the Commissioner and the Commissioner filed his report after enquiry. But no final orders were passed in I, A. No 232/187, as the appeal A. S, No, 1/68 was allowed by the High Court resulting in the dismissal of the suit. Consequently, the judgment and decree in O. S. No, 69/61 were set aside. Because the suit was dismissed, the Court felt it necessary not to pass any final order in I. A. No, 232/67 and dismissed (it) on 15-12-1971. As the decree-holder filed L. P.A. No, 97/71 in the High Court against the judgment in A. S No. 1188 and it was allowed, the decree passed in O, S. No, 69/61 was restored. Because the decree was restored the decree-holder is entitled to file I. A No.- 499/72 for restoration of IA No. 232/ 67 for mesne profits,

6. It is not in dispute that the 8th respondent who was the 8th defendant in the suit died after A S, No, 1/68 was allowed. But his legal representatives were not impleaded in L. P. A. No. 97/17.

7. When the legal representatives of 8th respondent were not impleaded in L P. A. No. 97/71 what does it follow?. I have already stated above that by virtue of the judgment and decree in A. S. No. 1/68, the judgment and decree passed in O. S. No, 69/64 were set aside. 16th defendant died after the disposal of the appeal. Though the plaintiff knew the death of 16th defendant, he did not choose

to implead the legal representatives of the deceased-16th defendant in the L P. A. No. 9711971 filed by him against the judgment and decree in A. S. No. 111968. As the legal representatives of the 16th defendant (who died after the disposal of the appeal) are not brought on record in the Letters Patent Appeal after it was allowed, the decree in L. P. A. would be treated as nullity as against the dead person i.e., 16th defendant. If that be so, the petition I. A. No. 232/1967 as against the legal representatives of the 16th defendant is not maintainable:

8. But Sri Sarma contends that because the 16th defendant died after the decree was passed in the suit and because the decree was restored as a result of the decision in L. R. A. No.97/1971, the question of abatement does not arise and the legal representatives of the 18th defendant can be brought on record in i. A. No. 232/1967,

9. Sri Sarma relies upon the ruling of Division Bench of this Court in K. Venkata Rao v. P. Papa Rao (1977) 1 A WR 373 and the decision in Perumel Pillay v. Perumal Chetty AIR 51 Mad. 701:(AIR 1928 Mad 914). Priyabala Dassi and Another Vs. Sarajubala Choudhurani and Others, Bhushan Chandra v. Chhabimoni Dassi AIR 1948 Cal 363 and Pooranchand and Others Vs. Shriram and Others, in support of his contention.

10. In K. Venkata Rao v. P. Papa Rao (1977) 1 A W. R. 373 the Division Bench of this court held that impleading of the legal representatives of the deceased-defendant in the final decree proceedings is a legal formality. but It should be necessarily complied with delay in impleading legal representatives of the deceased-defendant does not operate abatement of the suit. But merely because abatement does not operate even though there is delay in impleading legal representatives of the deceased-defendant it cannot be said that there is no necessity for impleading them in the final decree proceedings The Division Bench followed the Full Bench decision of the Madras High Court in Perumal Pillai v. Perumal Chetty AIR 51 Mad 701:(AIR 1928 Mad 914) in which it was held that in their opinion O 22 pr. 3 and 4, CPC do not apply to a case where the deceased-defendant died after the preliminary decree was passed and it is R.10 of O. 22 that is applicable to it and (if) that be so, the legal representatives of the deceased defendant can be brought on record in the final decree proceedings even at a belated stage, as abatement does not operate even if the delay was caused in bringing the legal representatives of the deceased-defendant in the final decree proceedings.

11. In Priyabala Dassi and Another Vs. Sarajubala Choudhurani and Others, t was held that where a preliminary decree has been passed directing ascertainment of mesne profits and some of the plaintiffs died after it: the suit does not abate by reason of the don-substitution of the legal representatives of the deceased plaintiffs within the time limited by law.

12. In Bhushan Chandra v. Chhabimoul Dasi, AIR 1948 Cal 383 it was held that

where in a suit for partition and accounts, one of the defendants dies after the passing of preliminary decree and his heirs are not brought on record within limitation, the suit will not abate with regard to such defendant by reason of O. 22 R. 4 as the provisions of that rule cannot apply to such a case, To such a case the provisions of O. 29 R. 10 will apply and the suit can be continued at any time after bringing on re. cord the heirs of the deceased defendant with the leave of the court. The phrase "right to sue"? in Order 22 Rule 4 indicates that the rule contemplates the stage of a suit before the decree is passed After a decree has been passed it cannot be said that the plaintiff has still a right to sue. for, on the making of the decree the rights of the parties are settled and defined by the decree. They acquire rights on the basis of a decree or incur liabilities fixed by the decree and those rights and liabilities remain unless and until the decree is varied or set aside. If, however, the case does not come within the terms of O. 22, R 4 it would come within the terms of O. 22 R. 10. The relevant portion of that rule was as follows :-

"In other cases,,,,...of devolution of any interest during the pendency of a suit, the suit may, by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved".

The words "other cases" occurring in that rule mean cases other than provided for in Rr. 3, 4 and 8 of that Order, The period of limitation for making an application under R 4 of O. 22 is 90 days from the death Sub -rule (3) of R 4 runs as follows:-

"Where within the time limited by Law no application is made under sub rule (1), the suit shall abate as against the deceased defendant".

13. The learned Judges observed that this rule contemplates the stage of suit before the Decree is passed That is indicated by the phrase "right to sue", After a decree has been passed it cannot be said that the plaintiff has still a right to sue, for, on the making of the decree, the rights of the parties are set fled and defined by the decree They acquire rights on the basis of the decree or incur liabilities fixed by the Decree and those rights and liabilities remain unless 4 until the decree is varied or set aside. The learned judges further observed that when a preliminary decree has been passed it is quite in appropriate to talk about the "right to sue" surviving, which is the phrase used in sub-rule (1) of O. 22 R. 4. On that view of the matter the learned Judges held that the cases referred to before them do not come within the provisions of O. 22 R. 4 and for the same reason within the provisions of O. 22 R. 3. According to the language of O. 22 it. 10 where death occurs after the preliminary decree must come within that rule, viz., R. 10 and there is no period of limitation fixed with regard to matters coming under the said rule. This view, the learned Judges further observed, expressed by them would not create any inconsistency where the death of a party occurs during the pendency of an appeal, for. in that case, the words "right to appeal" will have to be substituted by reason of the provisions of rule 11 in the place of the words "right to sue" occurring in Rr. 3 and 4. The learned Judges

also observed that the view they were taking is the view that has been adopted in all the High Courts except the ALLAHABAD High Court in Mahabir Singh Vs. Narain Tewari and Others at P r197). The point was considered by the Full Bench of the Madras high Court in AIR 51 Mad 914:(AIR 1928 Mad 914), by Division Bench of the Bombay (High Court) in Dawarali Jafarali Saiyad Vs. Bai Jadi and Others, by the Rangoon high Court in AIR 11 Rang. 446: (AIR 1933 Rang 318), by the Nagpur High court Full Bench) in AIR 1929 142 (Nagpur) by the Lucknow High Court in AIR 1927 561 (Oudh) by the Lahore High Court in AIR 1930 Leh 329 and by the Patna High Court in Babuie Shanti Devi Vs. Khodai Prasad Singh and Others,

14, In Pooranchand and Others Vs. Shriram and Others, the appellants are brothers, Between the years 1936 and 1939 their mother obtained loans from one Ramdhan father of respondents 1 and 2 and executed four mortgage deeds on different dates. Ramdhan brought a suit for recovery of the entire mortgage money secured by all the said documents, against the present appellants on 14-3-1946 in the court of sub-Judge, Aimer. That suit was at the request of the parties, referred by the court to the arbitration of two persons. The arbitrators gave their award on 21-12-1949. Against the said award two separate applications were presented by the defendants under S. 30 of the Arbitration Act, 1840 for getting it set aside. These applications were dismissed on 3-12-1951, On appeal to the Court of Judicial Commissioner. Ajmer it was held that the Procedure adopted by the lower court was irregular and so the case was remanded on 19-11-1953. The Sub Judge after recording evidence and hearing the parties again rejected the defendants objections on 30-12-1954. The defendants again appealed to the court of judicial Commissioner and the order of the Sub Judge was again set aside and again the matter was remanded to the Sub Judge on 9-1-1956. After hearing the parties again the Senior Civil Judge dismissed the defendants objections on 10-12-1956 and passed a decree in favour of the plaintiffs in terms of the award dated 21-12-1949. Against the order dated 10-12-1956 refusing to set aside the award, the defendants filed three separate appeals which were heard by a Division Bench of this court and all those appeals were dismissed by one judgment on 3-7-1961. During the pendency of the appeals before the High Court, the original plaintiff died on 10-2-1959. The Appellants moved an application under O, 82 R 4 of the Civil P. C. for substitution of the respondents as legal representatives of the deceased plaintiff. The application was allowed and they were substituted as legal representatives of the deceased Ramdhan in appeal Nos. 5, 6 and 11 of 1957 "While the said appeals were pending in the High Court an application for final decree under order 34 Rule 5 CPC and for directing the sale of the mortgaged property was filed. Another application under O. 22 Rr. 3 and 10 CPC was also filed praying that the present respondents be impleaded as legal representative of the deceased Ramdhan The applications were dismissed on 31-12-1960, on the ground that Sri Mukund Ram was not properly appointed as a counsel and, therefore, they were not maintainable Thereafter the respondents filed three

applications in the court of Senior Civil Judge on 14-9-1960. One of them was filed for obtaining final decree under O. 34 R. 5. Another one was filed under O 22 R. 10 and the third under Ss. 5 and 14 of the Indian Limitation Act for condonation of the delay. All the three applications were disposed of by the learned Senior Civil Judge in favour of the respondents. Against that judgment and decree an appeal was filed before the High Court.

15. The learned Judges held that because the plaintiff Ramdhan had filed a suit for mortgage money by sale of the mortgaged property and he having obtained a preliminary decree it was no longer open to him to file another suit on the same cause of action. After the preliminary decree was passed in his favour, the right to sue did not survive and so the language of O. 22 R. 3 could not apply in terms. The learned Judges observed that they agreed with the view taken by the learned Judges of the Bombay High Court in *Dawarali Jafarali Saiyad's case* (AIR 1940 Bom 318). The learned Judges observed that it may be pointed out that the same view has been consistently held by the learned Judges of the Patna High Court in *Babuie Shanti Devi Vs. Khodai Prasad Singh and Others*, *Raghunandan Sahu v. Badri Pandey* (WR 1945 Pat 380) and the same view was followed by the learned Judges of the Nagpur High Court in *Eknath Rardjiwanji v. Hanmanthram Raghunath* (AIR 1947 Nag. 751 and also by the Calcutta High Court in *Tara Pada Ray Vs. Shyama Pada Ray and Others*. The learned Judges then observed that in view of the consensus of opinion of the learned Judges of the High Courts of Bombay, Patna, Calcutta and Nagpur they find themselves unable to follow the view of the Allahabad High Court in *Ammolsingh's case* (AIR 1930 AIR 779),

16. From these rulings it is clear that O. 22 R 10 applies to the legal representatives to be brought on record in the final decree proceedings if one of the plaintiffs or the defendants dies after the preliminary decree was passed and in such a case there will not be any period of limitation for bringing the legal representatives on record in that final decree proceedings and they can be brought on record at any time before the final decree was passed.

17. It is now well settled that in a suit for possession and mesne profits the decree-holder after obtaining the decree for possession and for profits is entitled to file a petition for ascertainment of mesne profits. After the ascertainment of the mesne profits, the Court has to pass final decree in accordance with the procedure laid down in O. 20. R. 12, C. P. C. Till the decree is passed in accordance with the procedure laid down in O.20, R. 12, C. P. C the suit should be deemed to be pending and hence the decree that was obtained in the suit shall, therefore be taken as preliminary decree. If that be so the proceedings for the ascertainment of mesne profits will take the form of the final decree proceedings, In such a case, the legal representatives of the deceased defendant can be brought on record at any time in the petition for ascertainment of mesne profits if any defendant died after the preliminary decree was passed in view of the above cited rulings. Accordingly, the legal representatives of the 16th

defendant can, therefore, be brought on record in I, A. No. 232/1967.

18. But the matter does not stop with this. The learned counsel for the respondent contends that the 16th defendant's legal representatives were not impleaded in L.P.A. No. 97/1971 and as such the decision in the L.P. A. does not hind the legal representatives of the 16th defendant though he was impleaded in A. 5. No, 1/1968

19. It h not in dispute that the 16th defendant died after the judgment and decree were passed in A.S. No 1/68. It is also not H dispute that as a result of the decision in R S. No. 1/1968, the judgment and decree passed in O. S No 69/64 were set aside. The decree set aside by the decision in A. S. No 1/1988 was restored by the decision in L.P.A No. 97/71, Hence the decree in LP.A. No. 97/71 was nullity in so far as 16th defendant was concerned as he was dead by the date of the decree in the L.P.A.

20. Sri Sarma relies upon the decision of the Supreme Court in Mangai Singh v, Rattno AIR 1967 SC 1786 and contends that the failure to implead the legal representatives of 16th defendant in the L.P.A. does not affect the decree In O. S. No. 69/64, in the Supreme Court case, the plaintiffs suit for possession of land against defendants 1 to 4 was dismissed by trial Court. The plaintiff, therefore, preferred appeal against defendants 1 to 3 and the 4th defendant was impleaded as pro forma respondent, That appeal was decreed against the defendants 1 to 3 Then defendants 1 to 3 preferred an appeal in the High Court impleading 4th defendant as pro forma respondent That appeal was dismissed by the High Court. Then defendants 1 to 3 preferred appeal to the Supreme Court, impleading plaintiff and defendant No. 4 as respondents. During the pendency of the appeal one of the defendants appellants died and his legal representatives were brought on record as appellants Smt. Rattno also died and her legal representatives were impleaded as respondents. Later, 4th defendant Ishar Singh who was respondent in the appeal also died. The application to bring his legal representatives on record was dismissed by the order of the Supreme Court on 14-9-1965 in C. M. P. No. 1589/ 65. In view of this order a preliminary objection was raised at the time of hearing the appeal by the legal representatives of Smt. Rattno. The objection was that the appeal had abated on account of the failure of the appellants to implead the legal representatives of 4th defendant Their Lordships held that though the plaintiff has come forward with the allegation that she had been dispossessed by the four defendants 1 to 4. 4th defendant in his written statement repudiated the claim and put forward the plea that he had not dispossessed the plaintiff and further supported the claim of the plaintiff by pleading that there had been no Karewa marriage between them. The suit was dismissed by the trial Court. It was decreed by the first appellate Court only against defendants 1 to 3, treating 4th defendant as a pro forma defendant. In those circumstances it is obvious that when the case came up before the High Court, the dispute was confined between Smt, Rattno, the legal representatives of the original plaintiff on the one side end defendants 1 to 3 on the other side

Defendants 1 to 3 sought vacation of the decree for possession which had been granted against them in favour of Smt. Rattno. 4th defendant against whom the suit had not been decreed at all thus became an unnecessary party. In these circumstances even if 4th defendant had not been impleaded as respondent in the High Court relief claimed by defendants 1 to 3 in the Court against Smt. Rattno could have been granted without bringing into effect any contradictory decrees. In the appeal in the Supreme Court also 4th defendant was an unnecessary party and consequently the failure to implead his legal representatives as respondents in the appeal after his death does not affect the right of defendants 1 to 3 to claim the relief for which they have come up to the Supreme Court in appeal. Thus their Lordships rejected the preliminary objection.

21, I do not think that this decision helps the plaintiff-decree-holder. In that case, 4th defendant was actually impleaded in the appeal before the Supreme Court and the Supreme Court refused to permit the legal representatives of the 4th defendant to be brought on record after the death during the pendency of the appeal on the ground that 4th defendant was a pro forma respondent in the appeal and there was no decree against the defendant and he was sailing with the plaintiff.

22. In the case on hand there "decree against 16th defendant and was set aside in A. S.No. 1/68. As a result of the decision in A. S. No. 1/68 there was no decree against 16th defendant. But as a result of the decision in L. P.A. No. 97/11, the decree was in O.S. No. 69/64. By the date of the decree passed in the L.P.A. 16th defendant was dead. Hence the decree in the L.P. A, against the 16th defendant should be deemed to be nullity as against the 16th defendant and hence the petition. I.A No. 232/67 which was filed on the basis of decree in O. S No.69/64 after the decision in the L. P. A should be deemed to stand abated as against 16th defendant. Consequently, the legal representatives are entitled to plead that they are not bound by the decision in the L,P.A. and the decree in the L P. A. was nullity as against 16th defendant. Under these circumstance petition I. A. No.232/1967 is not maintainable as against the legal representatives of the 16th defendant since the decision in the L. P. A. does not bind them and is nullity as against the 16th defendant. Hence the petition L A. No. 232/67 is dismissed as against the legal representatives of the deceased 16th defendant.

23. In the result, the Civil Misc. Appeal as well as Civil Revision Petition are dismissed, but without costs,

24. Appeal and Petition dismissed.