

(2002) 09 AP CK 0003

In the Andhra Pradesh High Court

Case No : CMP No. 3348 of 2002 and Rev. CMP (SR) No. 67080 of 2001 in LPA No. 98 of 2001

Dasari Uma Maheswara Rao and Another

APPELLANT

Vs

Somasi Venkata Ramachandra Murthy and Others

RESPONDENT

Date of Decision : 06-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1

Citation : (2002) 6 ALD 767 : (2003) 2 ALT 135

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; Party in person, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayan, J.

1 Heard Sri M.V.S. Suresh Kumar, learned Counsel representing the review petitioner and Sri S.V. Ramachandra Murthy, party-in-person. For the reasons explained in CMP No. 3348 of 2002 the delay in representation of review application is hereby condoned.

2. The matter initially came up before Honourable Dr. Justice Motilal B. Naik and myself inasmuch as the other learned Judge Hon''ble Sri Justice B. Subhashan Reddy, who is a party to the judgment delivered in the aforesaid LP.A. at present is not sitting Judge of this Court and was transferred as the Hon''ble Chief Justice of High Court of Madras. When the matter came up before the Division Bench consisting of Hon''ble Dr. Justice Motilal B. Naik and myself on 12.7.2001 at the stage of hearing the review CMP, it was brought to our notice that as provided under Order 47, Rule 5 of the Code of Civil Procedure, the review petition is to be heard only by such of those Judges who are party to the decision, provided if one of them is retired or transferred and the other continues, if there is no embargo

for the Judge who still continues to hear the review application. Order 47, Rule 5 of CPC reads as follows:

"Application for review in Court consisting of two or more Judges:

3. Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same".

4. In view of the said provision the Division Bench further observed that as laid down under Order 47, Rule 5 of CPC one of the members of the Division Bench which rendered the said decision, Brother Justice P.S. Narayana, as a Judge of this Court, in our considered view, this review petition has to be placed before Brother Justice P.S. Narayana, for consideration. Accordingly, the Registry was directed to place the matter before the Hon'ble the Chief Justice for posting this review CMP before me.

5. Before going to the other details the parties had filed two application CMP No. 14315 of 2002 and CMP No. 14316 of 2002 for impleading certain parties under Order 1, Rule 10 of the Code of Civil Procedure. Sri Suresh Kumar, learned Counsel representing the review petitioner with all vehemence had contended that there are several irregularities and illegalities which will definitely amount to errors apparent on the face of the record and hence the review CMP has to be heard on merits. The learned Counsel while elaborating the submissions had pointed out that the very cross-objections filed by party-in-person were not sustainable and even otherwise without filing an application to bring on record the legal representatives of the deceased 5th respondent herein, the deceased was straightaway shown and in view of the altered shares this is a serious matter to be considered which goes to the very root of the matter. The learned Counsel further had pointed out that the judgment in LPA requires reconsideration inasmuch as the decree in AS No. 106 of 1994 preferred by the plaintiffs 2 to 4 had attained finality and thus there are two inconsistent judgments, one holding that plaintiffs 2 to 4 have no share in the property and the other holding that they have 1/7th share in the property. The learned Counsel further had commented for 1/7th share was negated by the trial Court and confirmed by 1st appellate Court and had not preferred any LPA, the judgment in AS No. 106 of 1994 operates as res judicata and hence this is an error apparent on the face of the record which may have to be rectified. The learned Counsel also had contended that inasmuch as both the appeal AS No. 2682 of 1993 by defendants 1 and 2 and cross objections filed by the 1st plaintiff were dismissed by the 1st appellate Court and the question of filing cross-objections by the 1st plaintiff in LPA No. 98 of 2001 filed by the defendants 1 and 2 does not arise and if the 1st plaintiff had filed an independent appeal, he would now be entitled to the

alteration of shares in the absence of an appeal by the plaintiffs 2 to 4 against AS No. 106 of 1984 or atleast in the absence of plaintiffs 2 to 4 being made as parties in LPA 98 of 2001. It was also further contended that inasmuch as the truth and validity of Ex.A1 will executed by the father of the plaintiffs was upheld by the trial Court and the said decree of the trial Court was affirmed by the appellate Court and issue with regard to the will could not have been a point for adjudication in LPA without there being an appeal by the plaintiffs 2 to 4 against AS No. 106 of 1994. The learned Counsel further contended that at any rate, the parties who are interested in an action for partition are not before the Court and this is definitely fatal to the very maintainability of the suit for partition and in that context the learned Counsel pointed out that unless the applications filed by him for impleading these parties are allowed, the question of further proceeding with the final decree proceedings may not arise at all and hence it is a fit case where stay has to be granted and review application to be heard on merits after ordering notice to all the other parties who are on record.

6. Sri S.V. Ramachandra Murthy, the party-in- person who had opposed the review application with all vehemence had made the following submissions. The main grievance of Sri Ramachandra Murthy is that this is a long drawn litigation and the review petitioners intend to procrastinate the proceedings by enjoying the properties to his total exclusion and the review application is only a device to continue in possession of the property by preventing the original Court from farther proceeding with the final decree proceeding. The said party-in-person Sri Ramachandra Murthy also further contended that from the material available on record it is unknown whether the parties had further taken the matter to the Apex Court or not and this itself shows that the application for review is not a bona fide one. The learned Counsel further contended that there is in-ordinate delay and even after the judgment in LPAs had been delivered, and in the final decree proceedings it is being repeated by these parties that a review application is pending disposal and in that way the review is coming in the way of the trial Court in further proceeding with the final decree proceedings. While further making his submissions Sri Ramachandra Murthy had taken me through the findings which had been recorded in the common judgment while disposal of LPAs and had also submitted that to defeat the judgment and decree made in this letters patent, several technical objections are being raised now relating to maintainability of the cross-objections and the non-bringing of legal representatives on the ground that a particular finding became final and it operates as res judicata. Sri Ramachandra Murthy while explaining the scope of the letters patent jurisdiction had commented that the letters patent jurisdiction is of wider scope and while disposing of the letters patent appeal the substantial rights of the parties are to be worked out and in substance that is what had been actually done while deciding the matter. The said party-in-person also had drawn my attention to certain of the findings recorded to the effect that the learned single Judge while deciding the matter had not gone into validity of the will and the learned single Judge had not laid much stress on Ex.A1 will. It was also

pointed out that the Division Bench had taken note of the fact that Ex.A1 is only an unregistered will and the same was not proved in accordance with law and the same is surrounded by suspicious circumstances and in view of the same the Division Bench had arrived at the correct conclusion while granting the shares. The party-in-person while making his submissions had drawn my attention to Order 47, Rule 1 of the CPC and had contended that none of the grounds raised in the review application fall within the ambit of Order 47, Rule 1 of the Code of Civil Procedure. It was further contended that these are matters arising out of common judgment and two LPAs had been filed and they were disposed of by common judgment. Several other aspects relating to the judgment delivered by the original Court and also the learned single Judge had been pointed out that at any rate in view of the different provisions relating to the appellate powers which are applicable even while disposing LPAs like Order 41 Rule 4, Order 41, Rule 22 and Order 41, Rule 33 of the Code of Civil Procedure, it cannot be said that judgment made in LPA is not in accordance with law. At any rate there is no error apparent on the face of the record. No doubt the party-in-person also fairly submitted that if all these purchasers are aggrieved their remedy is elsewhere not by way of review application. The said party-in-person had also explained that who can be an aggrieved party and what is actually a legal injury and what can be said to be an error apparent on the face of the record, it was also further submitted that as far as these applications to implead the parties are concerned prima facie it appears that bypassing Order 22 of the Code of Civil Procedure, the provisions of Order 1, Rule 10 of the CPC had been invoked. Further to substantiate his contentions reliance was placed on Puthiya Purayil Puthanpurayil Ussain Vs. Pavayi Kunhiraman and Others, , Cheladma Venkata Ram Rao Vs. Engu Narayana and Others, , Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., , Baij Nath and Another Vs. Ram Bharose and Others, , Dhangir v. Madan Mohan AIR 1998 SC 54, V. Ramakrishna v. N. Sarojini AIR 1993 AP 148, M/s. Marshall Sons and Co. (I) Ltd. Vs. M/s. Sahi Oretans (P) Ltd. and Another, , Subbaraya v. Seetha Ramaswami, AIR 1933 Mad. 664, P. Satyanarayana Vs. The Land Reforms Tribunal and Others, .

7. Heard the learned Counsel representing the review petitioners and also Sri Rama Chandra Murthy, party-in-person and I had perused the common judgment delivered in LPA No. 98 of 2001 & cross objections and LPA No. 131 of 2001. Even before advertng to the respective contentions of the learned Counsel Sri M.V.S. Suresh Kumar, and also party-in-person Sri Ramachandra Murthy, it was recorded by the Division Bench that the learned single Judge while deciding the judgment had not gone into the validity of the will on the ground that plaintiffs who are legatees had entered into an agreement with the 1st plaintiff. Further the Division Bench had gone Into this unregistered will and the failure on the part of the parties to establish the will or to explain the suspicious circumstances surrounding the will after discussing all these details taking the facts and circumstances into consideration. It was held that in view of the disproof of Ex.A1, as a necessary corollary it was held that the heirs of late Seetaramaiah

(D3, D4, D5 and plaintiffs 1 to 4) are entitled for partition and separate possession of 1/ 7th share each. Since the 3rd defendant died, his legal representatives who are brought on record are entitled to the extent of share of their father.

8. In the light of this factual background, it may have to be appreciated whether the grounds raised by review petitioners can be said to be sufficient grounds so as to maintain the review of the judgment in the LPAs. Several contentions were raised by Sri M.V.S. Suresh Kumar. Most of those contentions are more concerned with procedure and technicalities. But however, at any rate I do not want to express any opinion in the review application relating to these procedure technicalities, but suffice for me to state that as far as these grounds are concerned these cannot be said to be an error apparent on the face of the record so as to fall under any of the grounds specified under Order 47, Rule 1 of the Code of Civil Procedure. I need not further comment or further say anything relating to the remedy available to the parties which may be elsewhere and not by way of review application in any event. No doubt Sri Ramachandra Murthy, placed reliance on several decisions to substantiate his contentions that in the facts and circumstances of the case the remedy by way of review application is a misconceived remedy. Several decisions had been cited to explain the scope and ambit of the appellate powers which can be exercised in view of Order 41, Rule 4, Order 41, Rule 22 and also Order 41, Rule 33 of the Code of Civil Procedure. In *Sitapati Rao v. Sitabayamma* AIR 1993 Mad. 662, it was held that a Court has jurisdiction to decide a point of law wrongly as well as rightly and a review cannot be granted merely because the judgment or order proceeds on an incorrect exposition of law. In *Puthanpurayil's case* (supra) it was held that if a Court ignores or does not decide a case on the principle of "res judicata", it cannot be stated that such an error is one apparent on the face of the record. In *V. Ramakrishan's case* (supra) while dealing with the powers of the appellate Court in letters patent jurisdiction the Division Bench had observed as follows:

"The object of Order 41, Rule 33 of the CPC is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case, it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice being defeated. The language of employed in the rule is explicit of the same. Having regard to the wide language of the rule, it is not expedient to lay down any hard and fast rule regarding its true scope involving as it does an exercise of judicial discretion. The question whether Court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. May be, that the said power cannot be exercised arbitrarily or to abrogate the other provisions of the Code. Further, the powers of the appellate Court are also not limited, only if there is an interference with the decree or order under appeal."

9. Strong reliance was placed on *Marshall Sons & Co. 's case* (supra) to explain the delay in Court proceedings and ascertainment of mesne profits. In *Dhangir's*

case (supra), the Apex Court while dealing with the powers under Order 41, Rules 33 and 22 of the Code of Civil Procedure, observed as follows:

"Rule 22 and Rule 33 are not mutually exclusive. They are closely related with each other. If objection cannot be urged under Rule 22 against co-respondent. Rule 33 could take over and come to the rescue of the objector. The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require the words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. The only constraint on the power are these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal."

10. Reliance was also placed on Venkata Ram Rao's case (supra) and Baij Nath's case (supra) to explain the scope, ambit and powers of the appellate Court. The party-in-person had also drawn my attention to the decision of the Apex Court Sushil Kumar Mehta's case (supra).

11. On the overall consideration of the facts and circumstances of the case and after going through the several grounds raised and the elaborate arguments which had been advanced by learned Counsel for review petitioners, I am of the considered opinion that several of the grounds are matters to be decided, if the judgments of the Division Bench in this letters patent are questioned before the regular forum and not by filing the review application at any rate in view of the limitations imposed by law under Order 47, Rule 1 of the Code of Civil Procedure.

12. I am of the considered opinion that absolutely there are no grounds to review the judgment delivered by this Court. Accordingly, the review application is bound to fail and the same is dismissed without costs.