
(2003) 10 AP CK 0042

In the Andhra Pradesh High Court

Case No : Rev. CMP No. 20816 of 2003 in AS No. 174 of 1990

Datla Chandraiah (died) by LR

APPELLANT

Vs

Kothalanka Durgavara Prasada Rao and Others

RESPONDENT

Date of Decision : 14-10-2003

Acts Referred:

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

Citation : (2004) 4 ALD 396 : (2004) 5 ALT 378

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

Bench : Single Bench

Advocate : S. Surya Prakasa Rao, for the Appellant; T.S. Anand, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The present Review Civil Miscellaneous Petition is filed by the second petitioner, who was brought on record, as the legal representative of the deceased first petitioner.

2. The relief prayed for in the present Review Petition under Order 47, Rule 1 of the CPC (hereinafter referred to as the Code in short) is to review the judgment and decree made in A.S. No. 174 of 1990 dated 3.7.2002.

3. The facts in nutshell are as under:

The legal representative of the first appellant, who was brought on record in the appeal and who should have been added as a party to the suit as a necessary party, and who, in fact had not been added as a party, raised an objection relating to the validity and binding nature of the judgment and decree so far as it relates to plaint "A" schedule property in O.S. No. 52 of 1982 on the file of the Court of Subordinate Judge, Bhimavaram.

4. The other factual aspects in detail may not be necessary in the light of the elaborate common judgment delivered in A.S. No. 174 of 1990 and C.R.P. No.

1685 of 2002 by this Court. Suffice it to state that for the present purpose, while answering point (E), this Court had stated as follows:

"In the light of the findings, which had been recorded in detail above, the judgment and decree in O.S. No. 52/82 on the file of Subordinate Judge, Bhimavaram, so far as they relate to plaint A schedule property is concerned, are liable to be set aside and inasmuch as the 2nd appellant already had been brought on record, no doubt in a different capacity as a legal representative of the 1st appellant in the appeal, in the fitness of things the Trial Court shall add the 2nd appellant being a necessary party as a party defendant to the suit and give opportunity to the parties concerned and decide the matter afresh and inasmuch as already suit O.S. No. 72/96 had been instituted by the 2nd appellant on the file of Senior Civil Judge, Bhimavaram, it is but reasonable that the matter be clubbed with the said O.S. No. 72/96 and both the suits be disposed of after giving opportunity to all the parties concerned, in accordance with law. Hence, the judgment and decree in O.S. No. 52/82 so far as they relate to the plaint A schedule property is concerned, are hereby set aside and the matter is remanded to the Trial Court to be tried along with O.S. No. 72/96 after impleading the 2nd appellant as a party defendant to the suit and after affording proper opportunity to the said party also to contest the litigation.

Accordingly, the appeal is allowed to the extent indicated above and the Civil Revision Petition is dismissed as not maintainable. However, in the peculiar circumstances of the case, no order as to costs."

5. Sri S. Suryaprakash Rao, the learned Counsel representing the petitioner, in a systematic way, had made the following submissions:

The learned Counsel in a meticulous way had taken this Court through the findings, which had been recorded and had pointed out that the direction given by this Court to implead the second appellant, as a party, had resulted in grave injustice. Several important questions relating to the question of limitation, question of adverse possession and other legal aspects and the advantage relating thereto had been lost by the petitioners.

6. The learned Counsel also had pointed out that an order of remand should be in conformity with Order 41, Rules 23 and 23-A of the Code and virtually by giving a direction to implead a party, the scope of the suit itself had been enlarged.

7. The learned Counsel elaborately narrated the subsequent events, which had happened before the learned Subordinate Judge, Bhimavaram in the pending suit and contended that the pendency of other, suit cannot be a ground to make an order of remand and when this Court is satisfied that in the facts and circumstances of the case, the order of remand should not have been made in the interest of justice, that can be a ground for review. The learned Counsel explained the distinction between a necessary party and proper party and also had drawn the attention of this Court to Order-1, Rule-9 of the Code and also

Section 99 of the Code and to Order 41, Rules 23 and 23- A of the Code. Strong reliance was placed on *Kanakarathanammal v. S. Loganatha Mudaliar and Anr.*, AIR 1965 SC 27, *Naba Kumar Hazra and Anr. v. Radhashyam Mahish and Ors.*, AIR 1931 PC 229, *P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.*, , *Abdul Sami and Another Vs. Mohammad Noor*, , *Chuba Temso Ao v. Nangponger*, AIR 1994 Gau. 110, *Ali Nawaz Khan and Another Vs. Smt. Frzana Khatoon and Others*, and *Mir Sardar Ali Khan and Ors. v. Special Deputy Collector, Land Acquisition (Industries), Hyderabad and Ors.*, AIR 1973 AP 298.

8. The learned Counsel while concluding the submissions, had stated that this is a grave and fundamental mistake committed by this Court, by virtue of which grave injustice had been caused to the parties and hence the same has to be rectified by reviewing the said judgment and decree.

9. Per contra Sri T.S. Anand, the learned Counsel representing the respondents had contended that after remand, much water had flown. The learned Counsel also submitted that in substance the stand taken by the other side is that by virtue of an order of remand, the rights which had accrued to the parties otherwise had been lost and this cannot be a ground for review. The learned Counsel also pointed out that relating to non-joinder of necessary party only a vague plea was taken. At any rate, these are all matters concerned with merits and demerits of the matter and hence this cannot be said to be a ground for review at all. The learned Counsel also had explained the distinction between a person being brought on record as legal representative and a person being added as a party to the litigation. While concluding, the learned Counsel submitted that as far as the result and consequences flowing out of remand are concerned, these cannot be raised at this stage and there is no question of expanding the scope of the suit and even otherwise the parties are at liberty to contest all these aspects in the suit itself.

10. Heard both the Counsel and also perused the material available on record.

11. The judgment under review *Datla Chandraiah (died) by Datla Chandraiah (died) by LR and Another Vs. Kothalanka Durga Vara Prasad Rao and Others*, , it is also brought to the notice of this Court that on 5.8.2003 the learned Subordinate Judge, Bhimavaram made a docket order in I.A. No. 185 of 2003 in O.S. No. 52 of 1982, to the effect that the point for consideration is whether there are grounds to permit the petitioner/plaintiff to add fifteenth defendant and having stated so, in view of the judgment of this Court, the application was allowed.

12. The main grievance ventilated by the learned Counsel for the review petitioners is that several questions which could have been agitated, cannot be now raised by the review petitioners by virtue of the direction issued by this Court while making an order of remand. In other words, the very direction issued by this Court is beyond the scope of the order of remand and at any rate the order of remand itself is bad in the facts and circumstances of the case. It is

needless to say that impleadment of a party is something different from the questions to be agitated or the defences available to the parties. When a party is brought on record, the other parties who will be affected by such impleadment, definitely are at liberty to take all the pleas available to them and it is also needless to observe that the Court concerned is expected to settle the necessary issues in this regard and proceed with the matter in accordance with law.

13. Be that as it may, now the question is whether the contentions or the grounds raised can be the grounds for reviewing the judgment and decree, in question. It is no doubt true that taking into consideration the dual capacity, in which a party can be brought on record as a legal representative and also as an independent party to the litigation, this Court taking all the facts and circumstances into consideration, had issued such a direction. Elaborate submissions were made relating to the scope and ambit of an order of remand and also Order 41, Rules 23 and 23-A of the Code. Strong reliance was placed on P. Purushottam Reddy and Anr. v. Pratap Steels Limited (supra). There cannot be any quarrel about the parameters and limitations of an order of remand that can be made. Reliance was also placed on Kanakarathanammal v. S. Loganatha Mudaliar and Anr. (supra), where the Apex Court had observed at Page 276 as under:

"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 Naba Kumar Hazra v. Radhashyam Mahish, AIR 1931 PC 229, 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."

14. In *Naba Kumar Hazra and Anr. v. Radhashyam Mahish and Ors.* (supra), their Lordships of the Privy Council held that a request to be allowed an opportunity of joining some necessary parties to the suit where such a course would necessitate a commencement of the proceedings de novo was disallowed by the Board. Order 1, Rule 9 has no application to an appeal before the Privy Council 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. In *Abdul Sami v. Mohammad Noor* (supra), it was held that a remand would not be justified in the interest of justice where the suit was filed more than three years ago and it would not be fair to either party to delay the decision much longer and moreover when the entire evidence consisted of the oral testimony of both the parties and was read before the High Court. Strong reliance was also placed on *Mir Sardar Ali Khan and Ors. v. Special Deputy Collector, Land Acquisition (Industries), Hyderabad and Ors.* (supra) and also *Ali Nawaz Khan and Anr. v. Smt. Farzana Khatoon and Ors.* (supra). Section 99 of the CPC reads as under:

"No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder (or non-joinder) of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

15. It is pertinent to note that the proviso to Section 99 of the CPC was introduced by the Amendment Act 104/76 and the proviso specifies that "provided that nothing in the section shall apply to non-joinder of a necessary party". It is no doubt true that elaborate submissions had been made by the learned Counsel representing the petitioners relating to Order 1, Rule 9 and Section 99 of the Code and also Order 41, Rules 23 and 23-A of the Code. Virtually, these submissions will amount to rehearing of the appeal and this Court is afraid that it is not permissible to re-hear the appeal while considering a review application.

16. In *Mottai Goundan v. P.S. Ramaswami Ayyangar and Ors.* AIR 1933 Mad. 290, it was held that Order 47, Rule 1 of the Code, cannot possibly cover a case where the actual issue has been fully tried by the Court, and afterwards one of the parties discovers an argument which he might have raised, based either on fact or law, and asks the Court to review its order.

17. In *B.F. Pushpaleela Devi Vs. State of A.P. and Others*, a Larger Bench of this Court while dealing with mistake or error apparent on the face of record, held as under:

"A review may be granted, whether on any ground urged at the original hearing of the suit or not, whenever the Court considers that it is necessary to correct an evident error or omission and it is immaterial how the error or omission occurred. Thus, a review was granted where an error on a point of law was apparent on the face of the judgment, namely, failure to apply the law of limitation to the facts found by the Court or failure to consider as particular section of a provision of law part thereof. A review may also be granted where there is an error of procedure apparent on the face of the record. The words "for any other sufficient reason" must be one sufficient to the Court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence or the occurrence of a mistake or error apparent on the record. The ground of review must be something, which existed at the date of the decree, and the rule does not authorize the review of a decree, which was right when it was made, on ground of the happening of some subsequent event. Further, it is a condition precedent that no superior Court should have been moved for selfsame relief before filing a review petition. The error must be one which strikes one on merely looking at the record and which would not require any long drawn process of reasoning on a point where there may conceivably be two opinions. An applicant seeking for review cannot raise a ground not taken in the original proceeding. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant for review must show that he could not have produced the evidence in spite of due diligence. He should show that he did not have custody of the document or that he had been deprived of the documents. If an appeal has already been filed before the review is applied for and the appeal is still pending, review cannot be made. If an application for review is already filed then the review application can be heard and disposed of provided the appeal is not disposed of before the review application is taken up for disposal. It is competent to a party against whom an ex parte decree or order is passed to apply for a review if the circumstances bring the case within Order 47, Rule 1 CPC. But, however, it has been held by the Courts that a party whose appeal has been dismissed for want of appearance has no remedy by way of review. The words the Court which passed the decree or order in Order 47, Rule 1 include a transferee Court by virtue of Section 150 CPC. When no fresh facts are brought out by way of discovery of new and important evidence justifying a reconsideration of the earlier decision, which was given after the most careful consideration, review is not permissible. The mere admission of an application for review and the issue of a rule therein does not in itself, disturb the finality of the judgment or the proceeding. It only means that the Court is tentatively satisfied about the merits of the application, but after hearing the parties, the Court can reaffirm its earlier judgment and reject the application. It is only when the

application is allowed that the proceeding is reopened and the earlier judgment put in jeopardy. After an appeal has been preferred from a decree, no application can be made for review of that decree. Power of review will not be exercised where the review petition is based on the same ground as had been already considered in the original proceeding. Where it appears to the Court that there is no sufficient ground for a review, it shall reject the application and no such application shall be granted without previous notice to the opposite party. It is a condition precedent to the exercise of jurisdiction under this rule that notice should be given as provided therein."

18. In view of the limitations imposed on this Court, in exercise of review jurisdiction, this Court is thoroughly satisfied that all the submissions made by the learned Counsel for the petitioners on the grounds raised in review application are all grounds touching the merits of the matter and at any rate this will not fall either under error apparent on the face of record or another like cause or reason within the meaning of Order 47, Rule 1 of the Code and hence this Court is fully satisfied that the review civil miscellaneous petition is devoid of merits and accordingly the same shall stand dismissed. However, in the peculiar facts and circumstances of the case, this Court makes no order as to costs.