
(1998) 09 AP CK 0020

In the Andhra Pradesh High Court

Case No : C.M.P. No. 19573 of 1997 and LPA (SR) No. 66451 of 1997

Eddu Mallaiah and others

APPELLANT

Vs

Eddu Balaiah and others

RESPONDENT

Date of Decision : 14-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 15, Order 32 Rule 3, Order 32 Rule 3(1), Order 32 Rule 4(1)

Citation : (1998) 6 ALD 121 : (1998) 5 ALT 460

Hon'ble Judges : Ramesh Madhav Bapat, J; P. Venkatarama Reddi, J

Bench : Division Bench

Advocate : Mr. K. Rama Rao, for the Appellant; Mr. Krishna Mohan Rao N., for the Respondent

Judgement

RAMESH MADHAV BAPAT, J

1. The appellants herein were the plaintiffs in OS No.327 of 1983 which was filed in the Court of the Principal Subordinate Judge, R.R. District at Saroomagar. The respondents herein were the defendants in the aforesaid suit. The said suit was filed by the plaintiffs for partition and for accounts and also for separate possession of suit properties. Both the parties led evidence in the suit and the suit was decreed in favour of plaintiff No. 1 with costs allotting the plaintiff No. 1 one-third share in S.Nos.258, 266, 272 and 273 and the house situated at Chandanagar village. Defendants No. 1 and 4 were also allotted one-third share each in the said suit lands and the house.

2. Aggrieved by the aforesaid judgment and decree of the trial Court, the defendants in the suit carried the matter in appeal to the High Court by filing AS No. 129 of 1989 which was decided by the learned single Judge of this Court who allowed the appeal in the following terms:

"(1) The Will Ex.B 1 does not suffer from any infirmity. Consequently the property covered by that Will is ordered and directed to be subjected to

disposition in accordance with the" Will;

(2) the remaining suit schedule property shall be subjected to partition between the heirs in accordance with law; and

(3) before drawing a preliminary decree, the trial Court shall cause guardian ad litem of the first plaintiff to be appointed, in accordance with law, to look after the interest of the 1st plaintiff in the Will as well as in the partition".

3. Aggrieved by the said judgment and decree passed by the learned single Judge of this Court, the unsuccessful plaintiffs 1 to 3 seek to prefer this appeal. As the first appellant is a person of unsound mind, an application is filed to permit the 2nd appellant (2nd plaintiff) to act as Guardian of the appellant No.1 in the L.P.A. and all other subsequent proceedings.

4. It can be seen from the averments made in the plaint that plaintiff No. 1 is of unsound mind and plaintiff No.2 is the wife of plaintiff No.1 and plaintiff Nos.3 and 4 are their children. It is averred by the plaintiffs in the plaint that late Eddu Chittari had ancestral joint family properties. The other members of the joint family were his two sons plaintiff No. 1 and defendant No. 1. They constituted a joint family. Eddu Chittari died about 10 years back. Plaintiff No.1 is the elder son and defendant No. 1 is the younger son of Eddu Chittari. The widow of late Chilian was Pentamma who died about a year earlier prior to the filing of suit. Defendants 2 and 3 are the sons of first defendant. The plaintiffs have described the joint family properties. It was further pleaded by the plaintiffs that the first plaintiff is not worldly wise and he is a man of unsound mind and not able to understand the matters relating to the properties. Taking advantage of the said fact, the younger brother of plaintiff No.1 i.e., first defendant intended to grab the property depriving the first plaintiff of his legitimate share. It is further pleaded that the second plaintiff is looking after the first plaintiff and the first defendant refused to give any share in the property to the plaintiffs. Therefore, the plaintiffs were constrained to file a suit.

5. The defendants on appearance filed a written statement. The first objection was raised by the defendants stating that the plaintiffs 2 to 4 have no locus standi to file the suit. Plaintiff No.2 was divorced by the plaintiff No.1 about 20 years prior to the date of filing of the written statement in accordance with custom prevailing in Golla community. It was also disputed by the defendants that Chilian had any ancestral property in his hands. It was specifically pleaded by the defendants that all the properties mentioned in the plaint were self acquired of late Chittari. He had executed a Will bequeathing certain property to his wife and remaining properties to the first defendant. The wife (mother of D1) sold away the land in S No.159 during her life time with the consent of D1. It was farther contended by the defendants that the suit is not maintainable as no permission was sought by the plaintiff No.2 to represent the first plaintiff as his guardian or his next friend as plaintiff No. 1 is of unsound mind. It was also contended by the defendants that as the plaintiff No.2 was divorced by the first

plaintiff and she has been living separately, the present suit has been filed by her to grab the property of the first plaintiff. It was contended that plaintiff No.1 was never looked after by the plaintiff No.2 and the plaintiff No.1 has been residing with the first defendant and he is taking care of him. With these averments, the defendants prayed that the suit be dismissed.

6. Defendant No.4 who happens to be the sister of plaintiff No. I and defendant No. 1 filed her separate written statement. She supported the first defendant and pleaded that there was no ancestral property in the hands of their father, but only house was available for partition. She also claimed to have a share in the said house. With this contention, it was prayed by Defendant No.4 that the suit of the plaintiff be dismissed.

7. As stated earlier, the suit filed by the plaintiffs was decreed by the trial Court holding that the properties covered by the Will are self acquired properties of late Chittari and genuineness of the Will Ex.BI set up by the defendants was not established. It was also held that the land in S No.159 which was sold to various persons, is liable to be deleted from the suit schedule property as purchasers were not added as parties. Remaining survey numbers and the house mentioned in the suit schedule properties were held to be available for partition. A preliminary decree was passed allotting one-third share each in favour of defendants 1 and 4.

8. As regards the additional issue No. 1, the learned trial Judge held that permission ought to have been sought under Order XXXII to appoint next friend for plaintiff No.1 who is a person of unsound mind. However, as no objection was taken by the defendants and the trial was allowed to be proceeded with, the irregularities cannot be taken advantage of by the defendants. It was observed that although plaintiffs 2 to 4 have no right in the suit properties, yet, plaintiffs 1 to 4 together have locus standi to file the suit.

9. As already noted, the learned single Judge allowed the appeal. The learned Judge held that the execution and genuineness of the Will was established by cogent evidence. The learned Judge affirmed the findings of the lower Court that properties in question were self acquired properties of late Chittari. As regards the maintainability of the suit, the learned appellate Judge while agreeing with the trial Court that on the question of maintainability of suit in the background of defendants not raising the objection, however, observed that the trial Court should have thought of appointing a guardian ad litem even at the stage of passing preliminary decree, so that he may look after the interests of plaintiff No. 1 till the final decree is passed. It was also observed that no prejudice has been caused so far to the first plaintiff on account of the guardian not having been appointed. While filing the LPA, the appellants i.e., the plaintiffs have also filed an application seeking the leave of the Court to appoint the 2nd appellant as the guardian of the 1st appellant for the purpose of prosecuting this LPA and in all subsequent proceedings. Arguments were advanced by the learned Counsel for the appellants on the question of genuineness of the Will by assailing the

correctness of the findings arrived at by the learned single Judge in reversal of the findings reached by the trial Court in this regard. Inter-alia, it was contended that the Will was not produced at the earlier opportunity and the same having been produced only at the commencement of the trial, 5 or 6 years subsequent to the filing of the suit and that the evidence of alleged attestors does not inspire any confidence at all. It was also contended that late Chittari would not have omitted to make a provision to the 1st plaintiff while bequeathing the properties. We do not propose to decide the merits of the contentions advanced in the proposed appeal, as we are of the view that the application for leave to appoint the 2nd appellant as guardian/next friend of the 1st appellant is to be rejected for the reasons hereinafter mentioned.

10. Sri K. Rama Rao, learned Counsel for the appellants submitted at the Bar that admittedly, plaintiff No. 1 was of unsound mind and therefore the petition has been filed under Order XXXII Rules 3 and 15 to appoint the plaintiff No.2 as a next friend and the said application has to be granted for the reason that plaintiff No.2 is protecting the interest of plaintiff No. 1. Plaintiff No.2 is his wife and did not act adversely or against the interest of her husband's property as alleged by the defendants. It was also contended by the learned Counsel for the appellants that the trial Court has decided that the plaintiffs are entitled to maintain the suit. The learned Counsel Mr. K. Rama Rao has also submitted that issue No.6 was not challenged in the Memorandum of grounds of appeal before the learned single Judge. In support of his contention, the learned Counsel relied upon a ruling of Madras High Court in Parameswaram Pillai Velayudham Pillai represented by next friend Neelamma Pillai Lakshmi Pillai Vs. Parameswaram Pillai Narayana Pillai, alias Kesava Pillai, . While considering the legal aspect under Order XXXII Rules 3(1) and 15, their Lordships of Madras High Court held that permission has to be granted to a next friend whose interest does not conflict with that of a person of unsound mind. Their Lordships observed as follows:

"Before we deal with the main point in this case, we shall briefly deal with a point raised by Mr. Sarangapani Aiyangar, learned Counsel for the defendant-respondent, that the suit was not properly framed because on the finding that the next friend was not the legally wedded wife of the lunatic plaintiff, she could not file the suit on his behalf. It was difficult for us to follow the argument. Undoubtedly, any person who is of sound mind and has attained majority may act as next friend of a minor or a lunatic for the suit, provided that the interest of that person is not adverse to that of the minor or the lunatic.

It was not alleged that the next friend of the plaintiff in this case was not of sound mind or that she was not a major. Mr. Sarangapani Aiyangar contended that the interests of the next friend were adverse to those of the lunatic plaintiff. At first sight, the contention appeared very old but subsequently, we discovered the argument to be that the interest of the next friend should be deemed adverse because she wanted to put herself forward as the legally wedded wife of

the plaintiff, so that she could knock away the properties of the lunatic plaintiff.

The contention has got to be only stated to be rejected. The proviso to Order 32 Rule 3(1) read with Rule 15 in the case of lunatics has reference to adverseness of interest regarding the subject-matter. It is nobody's case that the next friend would be interested in seeing that the suit was dismissed. On the other hand, even according to Mr. Sarangapani Aiyangar she would only be too anxious to obtain a decree on behalf of the lunatic. In such circumstances, it cannot be held that the interests of the next friend were in any way adverse to those of the lunatic plaintiff. The suit was properly framed."

11. The learned Counsel Mr. Rama Rao also relied upon a decision of Calcutta High Court in Keshav Deo Tulshan Vs. Jagadish Prasad Tulshan, , in which Ramendra Mohan Datta, J., held as under:

"The principle involved in the procedure laid down under Order 32 of the CPC is that when a decree is passed against the minor it goes to affect his rights and would prejudice his interest, but if a guardian would be there such prejudice is removed because his interest is being properly looked after or watched by the guardian. But in the case of a minor plaintiff who is to institute a suit the alternatives are that either he gets a decree in the suit in which case he is benefited or he loses by the dismissal of the suit in which he is likely to be saddled with costs. Rule 2 has been enacted to safeguard the interest of the defendant against such a minor plaintiff."

12. While rebutting the aforesaid arguments of the learned Counsel for the appellants, Mr. M. Ramachandra Rao, Counsel appearing for the respondents-defendants submitted at the Bar that the decree passed without appointing a next friend for 1st plaintiff who is of unsound mind is null and void. It is contended that a minor or unsound person who is a party to the suit is considered to be under the protection of the Court and it is the duty of the Court to see whether very institution of the suit is for the benefit of the minor/unsound minded person and as this protection is based on public policy, the question of waiver or acquiescence does not arise. The learned Counsel opposed the grant of leave inviting our attention to the deposition of DW1. The learned Counsel for the respondents relied on a decision of the Kerala High Court in Narayani Amma Vs. Bhaskaran Pillai and Others, . At paras 13 and 16, it is observed as under:

".... I respectfully agree with the above observation, which is only a statement of the provision contained in Order 32 Rule 4(1) of the Civil Procedure Code. But the question for decision in the instant case is whether a person, who has no interest at all in the benefit of the minors and who has been put forward by another person for achieving his own objects, is entitled to act as a next friend of the minors, and maintain a suit in the name of the minors. It appears to me that no person has a right to act as a next friend of a minor, and institute a suit for the minor, by reason of the mere fact that he is not of unsound mind, he is a major, and he has no adverse interest to the minor. Rule4(1) contains only an

enabling provision. Unsound mind, non-attaining of majority and adverse interests are disqualifications, which prevent a person from acting as next friend of a minor. Absence of these disqualifications does not give him the right to act; but it only qualifies him to act. Whether a person can be permitted to act as next friend of a minor is a matter to be decided by the Court; and the decision must depend upon the sole question whether it is a bona fide action instituted for the benefit of the minor."

.....

It is only at this juncture that the present suit has been filed; and in this suit the 10th defendant has set up a false case that he is a lessee of the said property. The next friend is the 10th defendant's own brother. He is a person who is not possessed of any means and a dependent of the 10th defendant.

His evidence shows that he is not concerned with the interest of the minors, and that he knows very little about them. It is abundantly clear that this is a litigation, which has been instituted by the next friend at the instance of the 10th defendant and really prosecuted by him, in total disregard of the interest of the minors and with the sole object of wreaking his vengeance against the members of the plaintiffs toward and the 12th defendant, who purchased the property and if possible to establish his false claim of lease to the said property. It would be an abuse of the process of Court, if the next friend and the 10th defendant are allowed to maintain this action in the name of the minor plaintiffs. I hold that the suit has been instituted mala fide, that it is not for the benefit of the minors, and that it is liable to be dismissed on that sole ground."

13. Considering the rival contentions raised at the Bar in the present set of facts, question is whether permission can be given to plaintiff No.2 to prosecute the L.P.A. as a guardian of plaintiff No. 1. As stated earlier, plaintiff No.2 in her evidence stated that she has been looking after the interest of her husband. In her cross-examination, she made no secret of the fact that her husband (appellant No.1) is not residing with her at present and whenever, he used to visit her residence at Hyderabad, he was made to sleep in the garage. She also admitted that DI performed the marriage of her daughter. It has been the specific case of DI in his evidence that he has been looking after the plaintiff No.1 for years together. DI categorically stated that when plaintiff No.2 left the village, plaintiffs 3 and 4 were quite young and thereafter she never looked after plaintiff No.1. Looking to the conduct of the plaintiff No.2 who seeks leave to file this appeal as a guardian of plaintiff No.1, a logical inference can be drawn that the second plaintiff/second appellant has no love and affection for her husband-1st appellant. We have no hesitation in holding that the second appellant is not interested in the welfare of the first appellant and she has no legitimate right to be appointed as guardian or next friend of the first appellant. We feel that it is not just and proper to exercise our discretion for grant of leave to the petitioner/second appellant to file this Letters Patent Appeal. We are of the view that the decision of the Madras High Court in Parameswaram (supra) has no application in

the present set of facts. It was held therein that there should not be conflicting interests between the person who seeks to be appointed as guardian as against the person for whose benefit the application is made. Absence of conflicting interest is no doubt an essential requirement under Order XXXII Rule 3(1). But, it is not the only criteria as pointed out by the Kerala High Court in the case of *Namyani Amma* (supra). If a person has adverse interest, that is a disqualification against acting as next friend. But, whether a person can be permitted to act as a next friend of a lunatic has to be decided by the Court on a consideration of over all facts and circumstances appearing on record.

14. The result is leave application is dismissed. Consequently, the L.P.A. stands dismissed. No costs.

15. Before closing the case, we would like to refer to the contention of the learned Counsel for the appellants that even if second appellant cannot be permitted to file the L.P.A. as the guardian of the first appellant, still appeal is maintainable at the instance of the third appellant (plaintiff No.3) who is the daughter of the appellants 1 and 2. It is the contention of the learned Counsel for the appellants that she will be entitled to a share in the property if the Will is disbelieved. We fail to understand as to how she will be entitled to inherit the property which could fall to the share of her father so long as the father is alive. We therefore reject this contention.