
(2002) 04 AP CK 0084
In the Andhra Pradesh High Court
Case No : CRP No. 4650 of 1999

Edubilli Appamma

APPELLANT

Vs

Idubilli Ramulu and Others

RESPONDENT

Date of Decision : 12-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (2002) 5 ALD 64 : (2002) 6 ALT 542 : (2002) 2 APLJ 328

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : D. Ramalinga Swamy, for the Appellant; M. Bhaskara Laxmi, Counsel, for the Respondent

Final Decision : Dismissed

Judgement

J. Chelameswar, J.—One Smt. Balaga Bangaramma, second respondent herein, died during the pendency of appeal in AS No. 7 of 1990 on the file of learned Senior Civil Judge, Bobbili, who filed OS No. 143 of 1968 for partition of the suit schedule property. The first respondent herein was the second defendant in the said suit along with certain other defendants who are not parties to the present revision petition. Admittedly, the suit was decreed. Thereafter, IA No. 1033 of 1975 was filed by the decree-holder for a final decree and the same was also allowed. Aggrieved by the said decree, the first respondent herein carried the matter in appeal in AS No. 54 of 1978 on the file of learned Subordinate Judges Court, Parvathipuram. It is pertinent to mention that subsequently, the appeal came to be transferred to the Court of the Subordinate Judge, Bobbili and renumbered as AS No. 7 of 1990. It appears that the decree holder died during the pendency of the first appeal. Thereafter, the sixth defendant herein i.e., Smt. Reddi Narayanamma @ China Narayanamma filed IA No. 34 of 1983, wherein she claimed that she is the legatee of the deceased decree-holder and in order to enforce the decree obtained by the deceased second respondent herein, the appeal is required to be dismissed on the ground it abated. In the said

interlocutory application, the applicant never sought any relief that she should be brought on record in the appeal as the legal representative of the deceased-decree holder. Shortly there after another interlocutory application came to be filed in IA No. 67 of 1983 by the petitioner herein purporting to be one under Order 1, Rule 10 of the CPC (for short "CPC") to implead her as a respondent to the appeal on the ground that she was the adopted daughter of the deceased decree-holder Smt. Balaga Bangaramma. By an order dated 28-7-1984 the appeal was dismissed as abated. It is a common order passed in the above mentioned interlocutory application and by virtue of the said order, LA. No. 34 of 1983 was allowed and IA No. 67 of 1983 was dismissed so also dismissed AS No. 54 of 1978. Aggrieved by the same, the petitioner herein preferred three revision petitions viz., C.R.P.Nos. 3104,3105 and 3106 of 1984 to this Court. C.R.P.No. 3104 of 1984 was preferred against the order of dismissal of appeal on the ground of abatement. The other two or revision petitions were directed against that part of the common order, by which, the other interlocutory applications were disposed of, as indicated above. This Court by common order dated 23-9-1986 in the revision petitions held as follows:

"These revision petitions are against the orders dismissing the appeals on the ground that they abated. It is stated that the legal representatives of the 1st respondent in the appeal have not been brought on record. The learned Counsel for the petitioner states that the Will executed by the 1st respondent is not genuine and the petitioner himself is the legal heir to the 1st respondent. The learned Counsel for the respondent contends that the legal representatives should have been brought on record as the respondents are legatees and a petition also has been filed stating that the 1st respondent executed a Will. In view of these rival contentions, the appellate Court should have considered as to who are the legal representatives. The order of the lower appellate Court is set aside and the appellate Court is directed to consider as to who are the legal representatives of the 1st respondent i.e., Balaga Bangaramma. C.R. Ps. allowed. No costs."

2. By the date of the abovementioned order, all the proceedings pending by then before the Court of the learned Subordinate Judge, Parvathipuram, stood transferred to the Court of the learned Subordinate Judge, Bobbili. The abovementioned IA No. 34 of 1983 and I.A.No.67 of 1983 came to be re-numbered as IA Nos. 181 of 1990 and 182 of 1990. However, by an order dated 16-9-1998, learned Senior Civil Judge, Bobbili dismissed the main appeal in A.S.No. 7 of 1990 basing on an office note. Aggrieved by the same, the first respondent herein once again preferred a revision in CRP No. 4630 of 1998. This Court by order dated 22-1-1999 allowed the said revision petition. In the meanwhile, on 19-6-1998, learned Counsel for the applicant in IA No. 34 of 1983, which was renumbered as IA No. 181 of 1990, made an endorsement to the effect that the interlocutory application is not pressed on the ground that the appeal itself abated. It is difficult to explain his endorsement but any way. I am not concerned with such endorsement at this stage. The fact remains that the

said IA No. 181 of 1990 was dismissed. However, it appears, another application in IA No. 146 of 1999 was filed by the 6th respondent herein i.e., the petitioner in the abovementioned petition - IA No. 181 of 1990, to restore the abovementioned I.A.No. 181 of 1990 and the same is said to be allowed. I say so because a copy of the order is not placed before me. At any rate, I am not concerned with the said order for the present.

3. In the background of the abovementioned facts, the 6th respondent herein filed IA No. 147 of 1999 purporting to be one under Order 1, Rule 10 CPC praying that she be impleaded as party respondent to the abovementioned appeal -A.S.No.7 of 1990. By the impugned order dated 28-8-1999, the said interlocutory application was allowed. Hence the present revision petition.

4. Learned Counsel for the petitioner Mr. D. Ramalinga Swamy argued that the 6th respondent, who claims to be the legatee of the deceased decree-holder -- second respondent herein -- if she is interested in contesting the appeal, she would have made an application under Order XXII, Rules 4 and 9 of the CPC to bring her on record as legal representative of the deceased decree-holder. However, she never choose to file such an application and she was only content with an application filed in IA No. 181 of 1990 referred to earlier, wherein the prayer is only to dismiss the appeal as abated. Having not pressed the said interlocutory application, it is not open to the 6th respondent to file the present interlocutory application under Order 1, Rule 10 CPC praying that she be brought on record in the appeal as respondent, as allowing such an interlocutory application would virtually amount to permitting the 6th respondent to circumvent the procedure prescribed under Order XXII of the CPC by bringing the legal representatives of the deceased party on record to the proceedings. Learned Counsel relied on the decision of a learned Division Bench of Patna High Court in *Munshi Singh and Others Vs. Babulal Singh and Others*, and also the decision of a learned single Judge of Calcutta High Court in *Surendra Nath Sarkar and Others Vs. Manatab Monian and Others*, . The first of the two judgments, it is stated that the principle of *res judicata* is applicable even to the interlocutory orders. But whereas, in the second judgment, the question was whether an application under Order 1, Rule 10 CPC could be maintained in a case, where one of the parties to the litigation dies during the pendency of the litigation and unsuccessful attempt was made by the applicant, who tiled the application under Order 1, Rule 10 CPC on an earlier occasion to come on record as legal representative of the deceased parry. Learned single Judge of the Calcutta High Court in *Surendra Nath's case (supra)*, in the background of the abovementioned facts, held as follows:

"6. It appears that such power can be exercised when a party, whose presence before the Court may be considered necessary is not joined at all as a parry in the proceedings. The provisions do not in my opinion apply when by operation of other provisions of the Code the suit has abated in respect of a party properly joined and attempt to bring his heirs and legal representatives on record has

failed by an order of Court. It cannot be said that provisions of Rule 10(2) override other provisions of the Code. The decisions refer to the case where there has been an abatement but no steps have been taken for setting aside abatement by inaction of the plaintiff and not to cases where the Court has refused to set aside abatement on merits.

7. The position in respect of partition or administration suits has unique feature in the sense that every party in such suits has an interest in the property and can be deemed as plaintiffs seeking adequate relief against others and there may be no question of limitation involved in such proceedings as also in redemption suits for all practical purposes. While the interest of any of the parties in the suit property in partition and administration suits is not affected by any abatement nor there is any prejudice caused to the other side in any of the aforementioned cases."

5. On the other hand, learned Counsel for the respondents Smt. M.Bhaskara Laxmi relying upon of a decision of a Division Bench of this Court in Morasa Anjaiah Vs. Kondragunte Venkateswarlu (died) and others, , argued that the principle enunciated in the above referred decision of the Calcutta High Court in Surendera Nath's case (supra), has no application to a partition suit, as the present suit happens to be one filed for the partition of the suit property and therefore, the application filed under Order 1, Rule 10 CPC would still be maintained. In M. Anjaiah's case (supra), the Division Bench of this Court considered the respective scope of application under Order 1, Rule 10 CPC and application under Order XXII, Rules 4 and 9 CPC. Their Lordships have reviewed the earlier decisions of this Court on this subject, apart from other decisions and also taking note of the principle enunciated in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, that:

"16. Now a code of procedure must be regarded as such. It is "procedure", something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of Sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to "both" sides) lest the very means designed for the furtherance of justice be used to frustrate it.

17. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large and subject to that proviso, our laws of procedure should be construed wherever that is reasonably possible, in the light of that principle."

and their Lordships have laid down the following principles in M. Anjaiah's case (supra):

"27. From the above discussion, the following principles can be deduced:-

(1) Where any of the parties to a suit/appeal dies during the pendency of the suit/appeal, steps to bring his legal representatives on record have to be taken in terms of the provisions of Order 22 of the Code of Civil Procedure.

(2) Where no steps are taken to bring the legal representatives on record under Rule 3 or 4 of Order 22 and the suit/ appeal has abated and/or where the attempt to have the order of abatement set aside and bring the legal representatives of the deceased party on record failed, the defaulting party has to take the consequences mentioned in Rule 9 of Order 22 and he cannot be allowed to have recourse to the general provisions of Order 1, Rule 10 CPC for impleading the legal representatives of the deceased party by circumventing the provisions of Order 22.

(3) An application under Order 1, Rule 10 CPC to implead a necessary party including a legal representative of a deceased party to the suit appeal which has abated due to not bringing on record the legal representatives of the deceased party can be filed in a suit appeal to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, provided the proposed party has an independent right or obligation de hors his position as legal representative of the deceased defendant.

(4) An administration/partition suit does not abate as a whole due to not bringing on record the legal representative of a deceased party (co-sharer/co-owner) as each party is in the position of the plaintiff and the heir of the deceased co-sharer co-owner is a necessary party to the suit he can come on record on his application under Order 1, Rule 10 CPC."

6. Learned Counsel for the respondent argued that the Principle No. 4 is an exception to Principle No. 2 as their Lordships dealt with, under the abovementioned fourth principle, exclusively about the administration partition suits. Principle No. 2 deal with a situation of abatement of a suit or appeal, where no steps have been taken under the relevant provisions of Order XXII of CPC to bring the legal representatives of the deceased party or where such an attempt was made, but failed, and as a consequence of which, the suit abated, the defaulting party is precluded from having recourse to the general provisions of Order 1, Rule 10 CPC.

7. The expression "defaulting party" requires an examination. The provisions of Order XXII of CPC. Rules 3 and 4 thereof, deal with the bringing on record the legal representatives of the deceased party to the suit or appeal, as the case may be. Though these two Rules provide as to the consequences emanating from the application to bring the legal representative or representatives of a deceased party on record and the consequences of failure to file such application, these

two Rules do not specify as to who can make such an application. Therefore, the only possible inference is that any one of the surviving parties to the suit/appeal or even a third party, who has an interest to come on record as the legal representative of the deceased, to make such an application. Therefore, reading "defaulting party" as observed by their Lordships could mean any one of the abovementioned persons. But in the context of consequence of such "default" stipulated under Rule 9 of Order XXII of CPC, the expression employed by their Lordships "defaulting party" must be understood only to mean that party to the suit, who would suffer by virtue of the abatement of the suit or appeal, as the case may be, that is, in the case of a suit, if the suit abates, the defaulting party, would be the plaintiff, who is seeking the relief from the Court and in the case of an appeal, the "defaulting party" would be the appellant, who is contesting the decree, which he had already suffered. Because it is stipulated under Rule 9 of Order XXII CPC wherever a suit abates no fresh suit shall be brought on the same cause of action, in which case, the "defaulting party" would even be debarred from bringing the fresh suit on the basis of same cause of action, which formed the basis of the abated suit.

8. The persons, who are third parties to the suit, but who claim to have an interest in the subject-matter of the suit, through the deceased party, stand on a different footing. Such persons may or may not have depending, on the facts and circumstances of each case, knowledge of the pendency of the suit or appeal, either by or against the deceased person. Such third parties, who have no knowledge of the pendency of such proceeding, in my view, cannot be called as "defaulting parties". But if they happened to have the knowledge of the pendency of the proceedings and ignored or did not take necessary steps to protect their rights, they would certainly once again fall under the category of "defaulting party". Such persons will not be permitted to circumvent the procedure contained under Order XXII CPC by resorting to Order 1, Rule 10 CPC. In the present case the 4th respondent clearly falls within the principle No. 2 if the suit were to abate.

9. The 4th principle laid down by their Lordships of the Division Bench is, in fact, not an exception to the principles laid down in Rule 2 as explained above. But it deals with a totally different situation. Their Lordships held that there cannot be any question or abatement of a suit for partition as a whole due to the death of only one of the parties, interlocutory, other suits. In fact, in *Surendem Nath* "s case (supra) deals with this aspect of the matter also at para 7. While taking note of the legal position in such a situation in so far as it concerns the partition or administration suit, the Court held as follows:

"7. The position in respect of partition or administration suits has unique feature in the sense that every party in such suits has an interest in the property and can be deemed as plaintiffs seeking adequate relief against others and there may be no question of limitation involved in such proceedings as also in redemption suits for all practical purposes. While the interest of any of the parties in the suit

property in partition and administration suits is not affected by any abatement nor there is any prejudice caused to the other side in any of the aforementioned cases."

10. But, however, the matter before the Court was not a suit for partition, but a suit for declaration of title.

11. In the circumstances and in view of the fact that there cannot be any abatement of a suit for partition on the whole. I do not see any reason to interfere with the impugned order.

12. However, the dispute in the present revision petition is one between the persons claiming interest in the suit schedule property through the deceased decree-holder. Their interests" conflict, are claiming to be a legatee and the other as an adopted child of the deceased decree-holder. Except for the rival claimants, none of the other parties to the appeal entered appearance and contested the revision petition. It was suggested during the course of arguments by the learned Counsel for the 6th respondent that the claim of the petitioner is untenable or the 6th respondent has a better claim over the estate of the deceased-decree holder. In view of an observation made by the learned single Judge of this Court earlier while disposing of CRP Nos. 3104, 3105 and 3106 of 1984 by a common order dated 23-9-1986, it is argued that the inter se disputes between these two rival claimants is also required to be adjudicated in the present appeal. This submission, which I am afraid, cannot be accepted. Though the revision petition is dismissed in view of my above discussion, it is made clear that the 6th respondent will be entitled to defend the decree obtained by the deceased plaintiff-decree-holder, but cannot have the dispute between the petitioner and the 6th respondent herein as to who exactly is entitled to succeed to the estate of the deceased decree-holder adjudicated. That dispute is required to be settled in an appropriate proceeding in accordance with law.

13. Accordingly, the revision petition stands dismissed. No costs.