
(2007) 09 AP CK 0101

In the Andhra Pradesh High Court

Case No : C.M.A. No. 1130 of 2006 and A.S. No. 15 of 2007

G. Bharathi and Others

APPELLANT

Vs

G. Prameela and Others

RESPONDENT

Date of Decision : 11-09-2007

Acts Referred:

Andhra Pradesh Family Rules, 1964 — Rule 46(5)
Andhra Pradesh Revised Pension Rules, 1980 — Rule 47, 48, 49
Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, Order 41 Rule 27
Criminal Procedure Code, 1973 (CrPC) — Section 125
Hindu Marriage Act, 1955 — Section 16
Succession Act, 1925 — Section 213, 383
Tirumala Tirupati Devasthanams Employees Service Rules, 1989 — Rule 4

Citation : (2008) 2 ALD 444 : (2008) 1 ALT 319

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : M. Chandraiah Naidu, for the Appellant; D. Seehadri Naidu, for the Respondent

Judgement

C.Y. Somayajulu, J.—Since these two proceedings arise out of a common judgment passed in a suit and a petition for probate of a Will, they are being disposed of by a common judgment.

2. For the sake of convenience, I will refer to the parties as they are arrayed in O.S. No. 4 of 2001, out of which A.S. No. 15 of 2007 arises.

3. Plaintiffs filed the aforesaid suit seeking a declaration that they alone are entitled to the death-cum-retirement benefits of G. Sreenivasulu (the deceased) and also the amounts detailed in the plaint schedule, and for a decree of permanent injunction restraining defendants 1 to 3 from recovering the death-cum-retirement benefits of the deceased, inter alia alleging that the deceased married the first plaintiff about 27 years prior to the suit as per sastric rites and begot plaintiffs 2 and 3 out of the wedlock, but subsequently, it came to light that the deceased married the first defendant and gave birth to defendants 2 and

3 and had deserted the first defendant about 28 years back, after giving customary divorce to her as per the caste custom and married the first plaintiff and lived with her till his death on 02.12.1999. The deceased, who was working as a driver in the fourth defendant devasthanam, nominated the plaintiffs as the persons entitled to the death-cum-retirement benefits in his Service Register. As the deceased had on 15.02.1999 executed a Will in a sound disposing state of mind bequeathing the death-cum-retirement benefits to the plaintiffs, they informed the Executive Officer of the fourth defendant Devasthanam to release the death-cum-retirement benefits of the deceased to them, whereupon, he directed the plaintiffs to obtain a succession certificate to enable him to take further action. They filed the suit because the defendants are making efforts to recover the death-cum-retirement benefits of the deceased.

4. First defendant filed her written statement, which was adopted by defendants 2 and 3, contending that the deceased married the first defendant about 35 years prior to his death at Thiruchanoor and begot defendants 2 and 3 out of the wedlock. They i.e. the first defendant and the deceased lived happily for seven years. Subsequently, as their relationship got strained, first defendant filed M.C. No. 16 of 1990 seeking maintenance from the deceased, which ended in a compromise. As the deceased executed a Will on 24.09.1999, in a sound disposing state of mind, bequeathing all the benefits due to him from the fourth respondent devasthanam to the defendants, plaintiffs have no right over the death-cum-retirement benefits of the deceased.

5. The Executive Officer of the fourth respondent devasthanam filed the written statement inter alia contending that an amount of Rs. 2,000/- was paid for performing obsequies of the deceased. The first defendant, as per the Service Register of the deceased, was his wife. But later the name of the first defendant stood corrected as G. Bharathi i.e. first plaintiff, without any proper attestation by any competent authority. The deceased produced an order in M.C. No. 16 of 1990, dated 15.5.1993 whereunder he was directed to pay Rs. 4,000/- per month to the first defendant towards her maintenance and had also submitted a registered Will dated 15.02.1999 in which he nominated the first plaintiff to receive the pensionary benefits along with her sons. Even then, the plaintiffs were directed to produce a succession certificate for paying the death-cum-retirement benefits of the deceased to them.

6. Basing on the above pleadings, the trial Court framed the following issues for trial:

(1) Whether the plaintiffs are entitled to the death-cum-retirement benefits and also amounts mentioned in the plaint schedule?

(2) Whether the plaintiffs are entitled to permanent injunction?

(3) To what relief?

7. Defendants filed O.P. No. 219 of 2001 u/s 276 of the Succession Act, for

probating the will dated 24.09.1999 executed by the deceased, in which the plaintiffs filed a counter contesting the claim on the ground that the defendants are not entitled to any probate and that they only are entitled to receive the death-cum-retirement benefits of the deceased, as the Will relied on by the defendants is not a genuine document.

8. Basing on the said pleadings, the trial Court framed one issue i.e., whether the defendants are entitled to the probate.

9. On a petition filed for that purpose, the suit and the petition for probate were clubbed and common evidence was recorded. In support of the case of the plaintiffs, five witnesses were examined as P.Ws. 1 to 5 including the first plaintiff as P.W. 1 and Exs.A-1 to A-10 were marked on their behalf. In support of the case of the defendants, four witnesses were examined as D.Ws. 1 to 4 including the first defendant as D.W. 1 and Exs.B-1 to B-22 were marked on their behalf. Ex.X-1 was marked through D.W. 1. The trial Court by disbelieving both the Wills relied on by the plaintiffs and the defendants held that plaintiffs 2 and 3 are each entitled to 1/5th share and defendants 1 to 3 are each entitled to 1/5th share in the death-cum-retirement benefits of the deceased and that defendants are also entitled to succession certificate in respect of that share and partly decreed the suit and partly allowed the O.P. for probate. Aggrieved by the trial Court granting succession certificate in favour of the defendants and negating their claim, the plaintiffs filed these two appeals.

10. The points for consideration are:

(1) Which of the two Wills relied on by the parties is true and valid?

(2) To what relief the parties are entitled to?

Point No. 1:

11. The contention of the learned Counsel for the plaintiffs is that the trial Court was in error in disbelieving the registered will executed by the deceased in, spite of the plaintiffs adducing the evidence of the scribe and attesor, who clearly spoke about the due execution and attestation of the Will in their favour by the deceased, though nothing useful was elicited during their cross-examination. The contention of the learned Counsel for the defendants is that even assuming that the Will relied on by the plaintiffs is true, it cannot be given effect to, in view of Rule 4 of the Tirumala Tirupati Devasthanam Employees Service Rules, 1989, which reads

the Tirumala Tirupati Devasthanams employees shall be governed by the following rules and such of the orders and clarifications issued on these rules by Government of Andhra Pradesh in respect of the employees of State Government from time to time insofar as they are not inconsistent with the Act and the Rules made thereunder.

(i) The Fundamental Rules and the Subsidiary Rules issued thereunder,

(ii) The Andhra Pradesh Leave Rules, 1933:

(iii) The Andhra Pradesh Manual of Special Pay and Allowances including Travelling Allowances Rules and the Subsidiary Rules issued there under.

(iv) The Andhra Pradesh Pension code and the Andhra Pradesh Liberalised Pension Rules, 1961, A.P. Family Rules, 1964 and A.P. Revised Pension Rules, 1980.

(v) Andhra Pradesh Civil Services (Conduct) Rules, 1964

(vi) Andhra Pradesh Civil Services (Classification Control and Appeal) Rules (1991) (G.O. Ms. No. 138, Revenue (Endts. III) Department, dated 11-3-1998)

(vii) Andhra Pradesh State and Subordinate Service Rules:

(viii) Andhra Pradesh Financial Code

(ix) Any other executive instructions and Government orders that are issued from time to time by the Government in respect of their employees which are not inconsistent with the Act and Rules made there under.

and so the provisions of Andhra Pradesh Revised Pension Rules, 1980 apply to all the employees of the fourth defendant, and as Rule 49 of the Andhra Pradesh Revised Pension Rules, 1980 forbids or prohibits a Government servant, having family, nominating persons who are not the members of his family, even assuming that the Will relied on by the plaintiffs is true, since the marriage of the first plaintiff with the deceased, during the subsistence of the marriage of the deceased with the first defendant, is void, plaintiffs would not become the members of the family of the deceased, and so the first plaintiff, in any event, is not entitled to any share in the death-cum-retirement benefits of the deceased and placed strong reliance on B. Agnis Marry Vs. Kanaparthi Jamima Raja Kumari and Another, and Jodh Singh Vs. Union of India (UOI) and Another, in support of her contention.

12. In reply, the contention of the learned Counsel for the plaintiffs is that inasmuch as the marriage between the deceased and the first plaintiff took place after a customary divorce between the deceased and the first defendant, the marriage between the first plaintiff and the deceased is not void and even otherwise also Jodh Singh Vs. Union of India (UOI) and Another, does not apply to the facts of this case because that case relates to the pension payable to the Air Force personnel, and contended that inasmuch as the Apex Court in Rameshwari Devi Vs. State of Bihar and others, clearly held that children of void marriage also would be legitimate in view of Section 16 of Hindu Marriage Act, plaintiffs 2 and 3 would be the legitimate children of the deceased and as the property of a male Hindu dying intestate, as per the Hindu Succession Act, 1956 devolves on his widow and children, in any event plaintiffs 2 and 3 are entitled to share the family pension, death-cum-retirement benefits and gratuity payable to the deceased. He contended that, that deceased though may not be having a

right to nominate an outsider in his service register, he has a right to execute a Will in respect of the family benefits, and so, the first plaintiff is also entitled to a share in the family pension because of due execution of the Will is proved by the plaintiffs, because the Apex Court in Deokinandan Prasad Vs. The State of Bihar and Others, held that right to pension is a valuable right vested in a Government Servant and that it is not a bounty payable at the sweet will and pleasure of the Government, and so, the same would be the personal property of the deceased entitling him to bequeath it to anybody of his choice. He also relied on Rasala Surya Prakasarao and others Vs. Rasala Venkateswararao and others, in support of his contention that the plaintiffs have a share in the personal property of the deceased. Relying on Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, , Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, , H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , Prof and Dr. D. Venkayya Chowdary Vs. Paruchisti R. Katrak, and B. Venkatamuni v. C.J. Ayodhya Ram Singh 2007 (2) ALD 35 (SC) he contended that in view of the evidence adduced by the plaintiffs, it cannot but be held that the execution of the Will relied on by the plaintiffs is duly proved. Relying on Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, he contended that the nominee under a Will would not in any event become absolutely entitled to the death-cum-retirement benefits and all his legal heirs would be entitled to share the amount of pension etc. and contended that inasmuch as the fourth defendant failed to produce the letter addressed by the deceased to the Executive Officer of the fourth defendant, in spite of a notice issued by him to the counsel for the fourth defendant in the appeal, an adverse inference has to be drawn.

13. I would like to consider the last contention of the learned Counsel for the plaintiffs in the first instance. Though appeal is a continuation of the suit, it does not mean that all the provisions in C.P.C. relating to production, discovery and inspection of documents etc., which have to be invoked at the time of the trial of the suit, would not apply to appeals. An appeal has to be decided on the basis of the material available on record. If additional evidence is sought to be introduced in an appeal, it can do so as per Rule 27 of Order 41 CPC. So, question of drawing any adverse inference due to the failure of a party to an appeal failing to produce documents in pursuance of a notice issued under Rule 8 of Order 12 CPC during the pendency of an appeal does not arise. In fact, even if the document is produced in response to a notice under Rule 8 of Order 12 CPC issued during the pendency of an appeal, that document cannot be taken into consideration for deciding the appeal unless it is brought on record as evidence by taking recourse to Rule 27 of Order 41 CPC. Be that as it may, inasmuch as plaintiffs do not derive any advantage by the Court drawing an adverse inference against the fourth defendant, who in fact is neither a necessary nor proper party to the suit, no useful purpose would be served in drawing an adverse inference against the fourth defendant and it would not in any way further the case of the plaintiffs also. In fact, the written statement filed on behalf of the fourth defendant

supports the case of the plaintiffs with regard to execution of a Will in their favour by the deceased, because it is clearly alleged therein that the deceased produced a registered Will dated 15.02.1999 in which he nominated the first plaintiff to receive the pensionary benefits along with her sons, so it is easy to see that the deceased admitted the execution of the Will dated 15.02.1999, and he himself had in fact produced that Will before the fourth defendant. When the deceased himself admitted execution of the Will dated 15.02.1999 in favour of the plaintiffs, it cannot but be said that the trial court erred in disbelieving the Will dated 15.02.1999 in favour of the plaintiffs. Inasmuch as the relations between the defendants and the deceased were strained and as the first defendant filed a petition for maintenance against the deceased and as the deceased and the defendants 1 to 3 admittedly were living apart from several years and as the deceased started living with the first plaintiff and begot plaintiffs 2 and 3, it is difficult to believe that the deceased would have executed a Will in favour of the defendants 1 to 3. So, the trial Court rightly disbelieved the Will relied on by the defendants 1 to 3. That finding of the trial court relating to the Will relied on by defendant Nos. 1 to 3 has become final, as defendant No. 1 did not question the said finding by filing cross-appeal or cross-objections. So, that finding of the trial Court needs no interference in these appeals.

14. The contention that there was a customary divorce between the deceased and the first defendant and thereafter the deceased married the first plaintiff cannot be believed or accepted firstly, because there is no reliable evidence on record relating to the customary divorce in the caste to which the parties belong to, and secondly, because even the Will relied on by the plaintiffs does not disclose the alleged divorce between the deceased and the first defendant, and thirdly because question of the first defendant filing a petition for maintenance u/s 125 Cr.P.C. would not have arisen had there been a divorce between the deceased and the first defendant. So, the marriage, if any, between the deceased and the first plaintiff would be a void marriage, because the deceased admittedly married the first defendant much earlier thereto. So, the first defendant (sic. plaintiff) does not attain the status of the wife of the deceased, even assuming that the factum of the deceased and the first plaintiff living together entitles a presumption of their being husband and wife being drawn, such presumption would be only for the purpose of legitimizing their children i.e. plaintiffs 2 and 3, but it would not make the first plaintiff, the legally wedded wife of the deceased, because there is no possibility of a person having two legally wedded wives after the advent of Hindu Marriage Act, 1955, and inasmuch as marriage between a man and woman, who has a spouse living, after the coming into force of that Act, would be null and void. It is not the case of plaintiffs that the deceased and the first plaintiff were living together even prior to the coming into force of the Hindu Marriage Act, 1955. So, the status of the first plaintiff can only be that of a concubine, but not the wife of the deceased. Since a concubine cannot be elevated to the status of a wife, first plaintiff cannot be treated as the wife of the deceased.

15. As per Rule 49 of the Revised Pension Rules, 1980, a Government servant can, on his appointment, make a nomination in favour of a person or persons to receive the death-cum-retirement benefits payable under Rule 47, and such nomination shall not be in favour of any person or persons other than the members of his family. As per Sub-rule (5) of Rule 46 of the said Rules, "family" in relation to Government servant for the purpose of this Rule and Rules 47, 48 and 49 means-

- (i) wife or wives, in the case of a male Government servant;
- (ii) Husband in the case of a female Government servant;
- (iii) Sons including step-sons, posthumous sons, and adopted sons (whose personal law permits such adoption);
- (iv) Unmarried daughters including step daughters, posthumous daughters and adopted daughters (whose personal law permits such adoption);
- (v) Widowed daughters including stepdaughters and adopted daughters;
- (vi) Father; and including adoptive parents in the case of individual whose personal law
- (vii) Mother permits adoption;
- (viii) Brothers below the age of 18 years including step brothers;
- (ix) Unmarried sisters and widowed sisters including step sisters;
- (x) Married daughters; and
- (xi) Children of pre-deceased son.

So, question of the defendant nominating the first plaintiff to receive the death-cum-retirement benefits does not arise.

16. The contention of the learned Counsel for the plaintiffs that inasmuch as the Revised Pension Rules, 1980 do not forbid a Government servant executing a Will in respect of his property and inasmuch as the death-cum-retirement benefits of the deceased are his property, he has a right to make a bequest of those benefits cannot be accepted in view of the ratio in *B. Agnis Mary's* case (1 supra), where it is held that a government servant does not have testamentary disposition in relation to gratuity payable to him contrary to Service and Pension Rules.

17. The ratio in *Rameshwari Devi's* case (3 supra) relied on by the learned Counsel for the plaintiffs is that the children born to a Hindu employee through a woman whom he married during the subsistence of his first marriage also are entitled to a share in the family pension and gratuity. That decision is not of much of help in deciding these appeals because the entitlement of a woman claiming to be the second wife of the deceased employee to claim a share in those benefits was not decided in that case. So, the decision of the trial court,

which is in accordance with the ratio in B. Agnis Mary's case (1 supra) needs no interference in these appeals, and so, I also hold that in spite of the deceased executing a Will bequeathing the death-cum-retirement benefits in favour of the plaintiffs, defendants and plaintiffs 2 and 3 only would be entitled to those benefits as held by the trial court. The point is answered accordingly.

18. One of the contentions of the learned Counsel for the plaintiffs is that consequent upon the death of the deceased, as one of the members of his family is entitled to be appointed in the 4th defendant Devasthanam on compassionate grounds, plaintiffs 2 and 3 being the legitimate sons of the deceased also have to be considered for such appointment, and so, a direction may be given to defendant No. 4 to consider them also for appointment to any post in the 4th defendant Devasthanam on compassionate grounds. Compassionate appointments are governed either by the Rules framed by the Institution concerned or the Rules framed by the Government, as the case may be. So, persons eligible as per that scheme only can be considered and given appointment on compassionate grounds, which cannot be claimed as a matter of right. Depending upon the eligibility and other criteria, as per the Rules applicable, persons among the family would be considered for appointment on compassionate grounds. But, no direction to appoint a particular member of the family of the deceased person can be given by the Court. Suffice to say that plaintiffs 2 and 3 also, being the members of the family of the deceased, can be considered for appointment by the 4th defendant on compassionate grounds as per the Rules governed for such appointment.

Point No. 2:

19. In re the grant of succession certificate to defendants 1 to 3, who filed a petition for grant of a probate, but not for issuance of a succession certificate, in my considered opinion the trial court erred in registering the O.P. for grant of probate because neither the parties to the petition nor the deceased was a resident of the area comprised in the original civil jurisdiction of the High Courts of Calcutta, Madras or Bombay and the property in respect of which probate is sought, is also not within the original civil jurisdiction of those courts. As per Section 213 of the Indian Succession Act, 1925, a probate is required to establish the right of executor or legatee in respect of Wills made by him within the local limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay or in respect of Will made outside those limits, insofar as they relate to immovable property situated within those limits. Since the Will executed by the deceased is in respect of his retirement benefits as employee of the 4th defendant at Tirupathi, the provisions of Section 213 of the Indian Succession Act are not attracted thereto, and so, question of granting probate for those benefits does not arise. The trial court while granting Succession Certificate, in a petition for probate, obviously failed to keep in view the provisions of A.P. Court Fees and Suits Valuation Act, 1956 as per which the court fee payable for probate is less than the court fee payable for a succession

certificate, and so, the court while ordering grant of succession certificate should have directed the petitioners to deposit the necessary court fee required for such certificate. But, it failed to do so.

20. Issuance of succession certificate in view of the decree passed in O.S. No. 4 of 2001 would be redundant, because as per Section 383(e) of the Indian Succession Act, certificate granted thereunder would stand revoked on the decree or order in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate. Therefore, it is clear that the decree of a civil Court over-rides the succession certificate. So, issuance of succession certificate when there is a decree of a civil court, is redundant and unnecessary.

For the above reasons, I find no merit in A.S. No. 15 of 2007 and hence the appeal is dismissed and CMA No. 1130 of 2006 is allowed, and O.P. No. 219 of 2001 stands dismissed as unnecessary. Parties are directed to bear their own costs in these appeals.