

(2006) 02 AP CK 0095
In the Andhra Pradesh High Court
Case No : CRP No. 3538 of 2004

Garlapati Nageswara Rao

APPELLANT

Vs

Devarapally Venkateswara Reddy and Others

RESPONDENT

Date of Decision : 22-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4(4)

Citation : (2006) 3 ALD 749 : (2006) 6 ALT 428

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Satyanarayana Nimmagadda, for the Appellant; S. Venkata Subba Rao, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—This C.R.P. is filed against the order dated 15-6-2004 passed by the learned Senior Civil Judge, Addanki, in LA. No. 499 of 2003, in A.S.No. 17 of 1998.

2. The petitioner filed O.S. No. 216 of 1996 against the respondents and 2 others, for the relief of partition and separate possession of the suit schedule properties. Defendants 1 to 3 are his brothers, and defendants 4 and 5 are the subsequent purchasers. A preliminary decree was passed on 14-9-1998.

3. The 1st respondent herein, i.e., the 5th defendant, alone filed A.S.No. 17 of 1998 in the Court of Senior Civil Judge, Addanki. He gave up 4th defendant in the suit, since there was not subsisting interest in him. Petitioner and respondents 1 and 2 herein and another, figured as respondents 1 to 4 in that appeal. During the pendency of the appeal, the 4th respondent in the appeal, died.

4. After some delay, the 1st respondent herein filed applications, to set aside the abatement; to condone the delay in filing the application, and an application to bring the legal representatives of the deceased, 4th respondent therein, on

record. All the applications were dismissed, on 2-12-2003.

5. The petitioner herein filed the I.A., to dismiss the appeal, on the ground that it abated, on account of the death of the 4th respondent therein. The lower appellate Court dismissed the same. Hence, this revision.

6. Learned Counsel for the petitioner submits that the reasons assigned by the lower appellate Court in dismissing the application are untenable. He places reliance upon the judgment of this Court, and contends that though a preliminary decree would remain unaffected, even if any party dies, the same is not the case with the appeal, arising out of it.

7. Learned Counsel for the respondents, on the other hand, submits that the suit for partition stands on a different footing, and Order 22 Rule 4(4) C.P.C ., has a direct application to the facts of the case.

8. The 4th respondent in A.S. No. 17 of 1998, died during the pendency of the appeal. The effort made by the appellant therein, who is the 1st respondent herein, proved futile. In the ordinary course of the things, the dismissal of application to bring the legal representatives on record must result in abatement of the appeal, as a whole.

9. One special feature of the present proceedings is that, the deceased-4th respondent in the appeal remained ex parte, as 4th defendant, in O.S.No. 216 of 1986. Rule 4(4) of Order 22 C.P.C. is to the effect that a plaintiff shall not be under obligation to bring on record, the legal representatives of a deceased-defendant, if the latter remained ex parte, during his lifetime. Rule 11 of Order 22 makes the same procedure applicable, to appeals also.

10. Learned Counsel for the petitioner has invited the attention of this Court to the judgment in *In Re Raghava Reddy*. It was held that the exemption from bringing the legal representatives of a deceased-defendant on record, under Rule 4(4) of Order 22, is not automatic and it can be granted only when an application is made, and in that view of the matter, the benefit under that provision, cannot be extended to the 1st respondent, since he did not make an application. However, it must be recognized that Rule 4(4) can be preferred into service by the effected party, as and when occasion arises. Its benefit cannot be denied to the plaintiff/appellant, at the instance of another party. It shall be open to him to make such application, at any time, till the appeal is disposed of.

11. Hence, the C.R.P. is dismissed, and it is directed that it shall be open to the 1st respondent to file an application seeking exemption from bringing the legal representatives of deceased-4th defendant, on record.

12. The appeal is of the year 1998 and it cannot brook any further delay. The lower appellate Court is directed to dispose of the same within a period of three months from the date of receipt of a copy of this order. There shall be no order as to costs.