
(2013) 07 AP CK 0136

In the Andhra Pradesh High Court

Case No : Appeal Suit No: 3119 of 2000

Gudivada Sankara Rao

APPELLANT

Vs

Gudivada Venkata Ramana and Others

RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2013) 5 ALD 452

Hon'ble Judges : S.V. Bhatt, J;L. Narasimha Reddy, J

Bench : Division Bench

Advocate : Hari Sreedhar, for the Appellant; K. Chidambaram for Respondent Nos. 2, 3 and 4, Smt. N(P). Anjana Devi for Respondent Nos. 6, 7 and 8 and Sri. P.V.R. Sharma for Respondent Nos. 12 to 16, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—The 2nd defendant in O.S. No. 37 of 1995 on the file of the learned III Additional District Judge, Visakhapatnam is the appellant. He feels aggrieved by the preliminary decree passed by the trial Court on 28.07.2000. For the sake of convenience, the parties are referred to as arrayed in the suit.

2. One late Gudivada Appanna has undertaken the activity of ship breaking and has acquired quite a good number of movable and immovable properties in and around Visakhapatnam. He had three sons, viz., Venkata Ramana, first plaintiff, Appala Naidu and China Venkata Ramana. After the death of Appanna, his third son got separated from the family on being employed elsewhere. The other two brothers i.e., first plaintiff and Appala Naidu remained joint though not as family but as partnership. A deed of partnership was also executed between them. Subsequently, the sons of the plaintiff, being plaintiffs 2 to 4 and sons of Appala Naidu, defendants 1 to 6 joined partnership. Defendant No. 7 is the wife and defendants 8 and 9 are the daughters of Appala Naidu.

3. Plaintiffs filed O.S. No. 136 of 1987 in the Court of Principal Subordinate

judge, Visakhapatnam for partition. Thereafter, it was transferred to the Court of III Additional District Judge, Visakhapatnam and was re-numbered as O.S. No. 37 of 1995. According to them, though a semblance of partition has taken place in the year 1974, by executing a document, it was not acted upon and all the suit schedule properties remained joint. They prayed for partition and separate possession of the properties according to their respective shares and entitlement.

4. The 6th defendant i.e., one of the sons of Appala Naidu alone filed written statement. He took the plea that the partnership stood dissolved and the partition as prayed for cannot be claimed. It was also his case that no property remained, after dissolution of the partnership. It was further pleaded that the suit schedules are incomplete and some properties, which are otherwise available for partition were omitted. An allegation was also made to the effect that the plaint schedules are vague and not helpful for identification of the properties. Defendants 1 to 5 and 7 filed a memo on 31.03.1998 adopting the written statement filed by the 6th defendant.

5. The 2nd defendant i.e., appellant herein was set ex parte on 12.11.1992. Thereafter, the 6th defendant filed an additional written statement stating that two more items are available for partition and prayed for inclusion thereof in the suit. During the pendency of the suit, the 1st defendant died and his legal representatives i.e., defendants 10 to 14 were brought on record.

6. The trial Court passed a preliminary decree, dated 20.07.2000 directing that plaint A and B schedule properties, except item No. 2 of plaint A schedule, be divided into two equal shares and allotted to the branches of the 1st plaintiff and Appala Naidu respectively. It was also held that the plaint C schedule properties are not available for partition.

7. Sri. D. Ramalinga Swamy, learned counsel for the 2nd defendant submits that though the 2nd defendant filed an application to set aside the order dated 12.11.1992, by filing I.A. No. 196 of 1999, it was not allowed and this appeal had to be filed, to challenge the preliminary decree. He submits that the partition of the properties held by the firm was effected on 01.04.1974 and had the same been brought to the notice of the trial Court, the preliminary decree would not have been passed at all. He further submits that a specific mention was made to the said deed of partition in the plaint itself and the plea that it was not acted upon was not established at all. He contends that all the parties have acted upon the partition deed, dated 01.04.1974 and the same is evident from the various transfers made by them on the strength of it.

8. Sri. Chidambaram, learned counsel for plaintiffs 1 to 4 and defendants 3 to 14, on the other hand, submits that once the 2nd defendant was set ex parte and the efforts made by him to get the said order set aside did not fructify, he has no right to file the appeal at all. He submits that taking advantage of his beneficial position, the 2nd defendant is in enjoyment of majority of the items of the suit schedule properties and with a view to perpetuate the same, he has filed

this appeal. He contents that when the 2nd defendant did not take any stand by filing a written statement and the only written statement filed by the 6th defendant did not deny the principal contentions raised in the plaint, there is no way that the preliminary decree passed by the trial Court can be interfered with.

9. The suit for partition was filed by one of the sons of Appanna i.e., Venkata Ramana and his sons, against the children and wife of his brother Appala Naidu. This is not a case, where the partition of coparcenary or joint family properties was sought. The joint family comprised of three brothers and with the separation of the youngest, the joint family ceased to exist. However, the two other brothers i.e., first plaintiff and Appala Naidu lived together and constituted the partnership firm. In effect, the relief claimed in the suit is for dissolution of partnership firm or partition of the properties held by it. Out of 14 defendants, the 6th defendant alone filed the written statement and some of the defendants have adopted the same. At a later point of time, the 6th defendant filed additional written statement.

10. On the basis of the pleadings before it, the trial Court framed the following issues and additional issues for its consideration:

ISSUES,:

1. Whether plaint schedule is not correct?
2. What are the properties liable for partition?
3. Whether building in Kirlampudi lay-out is self-acquired property of the first plaintiff?

ADDITIONAL ISSUES DATED, 24.08.1995

1. Whether the two items of (a) property mentioned in the additional written statement are to be included in joint family property?
2. If they are to be included for not showing the same in the plaint schedule property the suit is liable to be dismissed as contended by the defendants?

ADDITIONAL ISSUES DATED, 19.03.1997

1. Whether the entire "C" schedule property is the property of 13th defendant and as such it is not liable for partition?
2. Whether the court fee paid is not liable for partition?
3. Whether the court fee paid is not correct?
4. Whether the suit is not maintainable in view of Act 45 of 1988 The Benami Transactions (Prohibition) Act?

11. On behalf of the plaintiffs, P.W. 1 was examined and he filed Exs. A 1 to A.34. On behalf of the defendants, D.Ws. 1 and 2 were examined and Exs. B.1 to B.13 were filed. Ex. C.1 was also taken on record. The preliminary decree as

mentioned in the preceding paragraphs was passed.

12. The points that arise for consideration in this appeal are :

- 1) Whether the 2nd defendant is entitled to maintain the present appeal? and
- 2) Whether the preliminary decree passed by the trial Court suffers from any infirmity or illegality?

13. It has already been mentioned in the preceding paragraphs that the 6th defendant alone filed the written statement and some of the defendants including the 2nd defendant adopted the same. The suit was instituted originally way back in the year 1987. The 2nd defendant was set ex parte on 12.11.1992, when the suit was pending before the Court of Principal Subordinate Judge, Visakhapatnam. It is not as if the 2nd defendant did not have any opportunity to pursue the matter before that Court. It was pending before it till the year 1995. It was only thereafter that it was transferred to the Court of III Additional District Judge, Visakhapatnam. Seven years after he was set ex parte, the 2nd defendant filed an application being I.A. No. 196 of 1999. The trial Court was not at all convinced with the reasons offered by him and dismissed the I.A.

14. In case, the 2nd defendant was serious enough to participate in the suit, he could have assailed the order in I.A. No. 196 of 1999. He did not take any steps in that direction. The result is that he was kept out of the trial of the suit and he did not feel any grievance about it. The suit remained on the file of the trial Court for more than one year after the I.A. was dismissed. The preliminary decree was passed only on 28.07.2000. It is at that stage that the 2nd defendant filed the appeal.

15. Assuming that the dismissal of I.A. No. 196 of 1999 can be canvassed in an appeal and that he is able to convince us, there is a serious impediment in his way to sustain the appeal. The reason is that he did not file any written statement of his own and the grounds pleaded by him in the present appeal do not find place in the written statement or for that matter, the additional written statement filed by the 6th defendant, which in turn was adopted by the 2nd defendant. It hardly needs any mention that a party to a suit can maintain the appeal, if only the pleading delivered by him to the trial Court was not considered, or if he is able to convince the appellate Court that a different view is possible. When there is no pleading at all, and he neglected to participate in the suit, he cannot maintain the appeal. The first point is answered accordingly.

16. The second point touches the merits of the preliminary decree passed by the trial Court. Strictly speaking, in view of the answer to the first point, this point need not be dealt with at all.

17. All the same, we propose to deal with this point, in view of the fact that an application u/s Rule 27 of Order 41 C.P.C. is also filed seeking permission to lead additional evidence by filing a photostat copy of the partnership deed, dated 01.07.1974. In this regard, it becomes necessary to take, note of one of the

contentions in the plaint. A specific reference to that partition deed was made in the plaint but it was mentioned that it was not acted upon. When such a specific plea was raised, it was open to the defendants in the suit to contradict the same. In the written statement filed by the 6th defendant, there is no reference to this nor the plea of the plaintiffs is contradicted. A semblance of opposition to the suit, that was offered through written statement, was to a substantial extent watered down with the filing of additional written statement. Though the 2nd defendant has adopted the original written statement filed by the 6th defendant, there is nothing on record to show that he has adopted the additional written statement.

18. The defendants, who contested the suit or those who entered the witness box, did not have any grievance about the decree. It is only the person, who deliberately kept outside the trial and other proceedings in the suit, that has approached this Court, obviously because he is the person enjoying the highest number of items of property. Once it is not disputed that there existed partnership firm and that the firm had acquired properties, it is but natural that the properties are divided. The second point is answered accordingly.

19. We do not find any merits in the appeal and it is accordingly dismissed. The miscellaneous petition filed in this appeal shall also stand disposed of. There shall be no order as to costs.