

(1959) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Civil Revision Petition 878 of 1957

Katam Virupakshiah and Others

APPELLANT

Vs

Matam Sivalingaiah and Others

RESPONDENT

Date of Decision : 01-09-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 5, Order 43 Rule 1, 107, 115

Hindu Minority and Guardianship Act, 1956 — Section 11

Citation : AIR 1960 AP 540

Hon'ble Judges : Krishna Rao, J

Bench : Single Bench

Advocate : N.M. Sastry and M.B. Ramarao, for the Appellant; N. Ramamohan Rao, for the Respondent

Final Decision : Allowed

Judgement

Krishna Rao, J.—This is an application in revision against the order of the Court of the District Munsiff of Adoni refusing to allow the petitioners to sue in forma pauperis. The order was made under Order 33, Rule 7(3) of the CPC and was based on the learned District Munsiff's finding that the petitioners were in a position to raise the requisite court fee of Rs. 225 by giving their property as security and that the allegations in their petition do not show a cause of action. The learned District Munsiff also found that the petition is not bona fide; but it is conceded that this is not one of the grounds specified in Order 33, Rule 5, on which the petition could be rejected.

In support of the revision, it is contended on behalf of the petitioners that the reasons given by the learned District Munsiff have nothing to do with the conclusions reached by him.

2. The material facts may be briefly stated. The three petitioners are the minor sons and respondents 2 and 3 are the adult sons of the 1st respondent. They are members of a joint family or which the 1st respondent is the manager. In or

about 1951, the 2nd respondent executed a promissory note in favour of the 4th respondent for money said to have been borrowed by him in connection with some contract work. The 4th respondent filed O. S. No. 255 of 1954, impleading respondents 1 to 8 as defendants 1 to 3 and the minor petitioners represented by their father as defendants 4 to 6. Written statements were filed by the respondents 1 and 3 and the petitioners. But on the date of the trial their pleader reported no instructions. On 4-3-1955, the suit was decreed ex parte against all the defendants.

The 4th respondent filed E. P. No. 339 of 1955 in execution of the decree and attachment of the Immovable properties belonging to the family of the judgment-debtors was effected on 6-1-1956. On 31-1-1956, respondents 1 and 2 paid Rs. 100 towards the decree. Time was granted till 15-5-1956 for payment of the balance and E. P. No. 339 of 1955 was dismissed. As the balance was not paid, the 4th respondent filed E. P. No. 201 of 1955 to recover Rs. 4985 and odd by sale of the attached properties. The advocate on behalf of the judgment-debtors asked for further time till April 1957, but this was refused and the execution stood adjourned to 29-9-1956 for filing sale papers,

Meanwhile on 26-9-1956 the petitioners filed O. P. No. 28 of 1956 through their sister's husband as the next friend seeking permission to sue in forma pauperis for partition of their half share in the family properties. It was alleged in the petition that the 2nd respondent's debt was not binding on the other members of the family that although the petitioners had a good defence their guardian in O. S. No. 255 of 1954 acted fraudulently and illegally without safeguarding their interests and that the petitioners were entitled to a declaration that the decree in O. S. No. 255 of 1954 was not valid and binding on their shares. On 5-10-1956, as the sale papers filed by the 4th respondent were rejected, E. P. No. 201 of 1956 was dismissed and the attachment was raised.

3. Sri N. Ramamohana Rao, the learned counsel for the 4th respondent, raised a preliminary objection that the revision petition is not maintainable, as an appeal lay from the order in question dismissing O. P. No. 28 of 1958. Under Clause (nn) added in Madras to Order 43, Rule 1, Civil Procedure Code, an appeal lies from

"an order under Rule 5 or Rule 7 of Order 33 rejecting an application for permission to sue as a pauper on the ground specified in Clause (d) or Clause (d-1) of rule 5 aforesaid".

As one of the two grounds on which the order in question is based is the ground specified in Clause (d) of Order XXXIII. Rule 5, viz., that the allegations in O. P. No. 28 of 1956 do not disclose a cause of action, the contention of Sri N. Ramamohana Rao that an appeal lay from the order is well founded. Sri N. M. Sastry, the learned counsel for the petitioners, relied on the fact that the order was based also on the second ground viz., that the petitioners are not paupers, which is a ground specified in Clause (b) of Order 33, Rule 5.

He construes the Clause (nn) of Order 43, Rule 1 as confining the right of appeal to cases coming under Clause (d) or (d-1) alone of Order 33, Rule 5, But Order 43, Rule 1 deals with the right of appeal and not the grounds on which an appeal lies. If an order comes within the four corners of any of the Clauses in the rule, an appeal lies and the appellate court could determine the case finally u/s 107, Civil Procedure Code. The mention of the grounds in Clause (nn) of Order 43, Rule 1 cannot be properly construed as limiting the right of appeal to those grounds. I agree with Sri N. Ramamohana Rao that an appeal lay to the District Judge, Kurnool from the order in question. The further point for consideration is whether, on this ground, the revision petition under S. 115, CPC cannot be entertained.

4. Sri N. Ramamohana Rao placed reliance on the Clause "and which no appeal lies thereto" occurring in Section 115 Civil Procedure Code. But this Clause has been construed in numerous decisions as referring to cases in which no appeal lies to the High Court. In *Narasimhulu Chetty. Subbarayulu* (1956) 69 MLW (And) 50 at p. 52. Chandra Reddy, J. (as he then was) said :

"It looks to me that the powers of this court u/s 115, CPC could be invoked even in cases where appeals lie to the lower appellate courts". The jurisdiction of this court is not confined to cases where no appeal lies to the court below and the mistakes or errors of the subordinate courts have to be rectified only by this court: There is ample authority for this view of mine. At 40 of Mulla's C. P. C. (12th edition),

"The fact that an appeal lies to a lower appellate court does not take away the power of revision. But the High Court is not competent to revise a decision of an appellate court if an appeal lies from that decision to the High Court".

XX XX XX It is true that normally this court will not interfere with an order of a subordinate court when an appeal lies to the lower appellate court, but when it is brought to the notice of this court that the order is clearly without jurisdiction and one which ought not to be allowed to stand and results in injustice being done to the parties this court has not only power to revise that order but its binding duty is to do so".

No doubt the grant of the remedy u/s 115 is in the discretion of the High Court and as a rule of practice the power under this section will not be exercised in favour of interference, where the petitioner has another remedy open to him which he has not availed of. This seems to have been the ratio decidendi in *Chidambaram Chetti v. Nagappa Chetti*, AIR 1916 Mad 1014: in *(Nekkanti) Seeramma Vs. (Nekkanti) Seshamma*, and *Peddiboyima Viswanatham and Others Vs. Sreemat Kilambi Srinivasa Venkata Varadacharyulu Ayyavaram Garu*, . No doubt the decision in *Thadikonda Gopalaratnam Vs. Thadikonda Lakshmikantam and Another*, at p. 570 goes further, because *Happell J.*, said:

"A civil revision petition does not lie since the petitioner can obtain his remedy by way of appeal". But I prefer to follow 69 M LW 50.

5. The question whether, in spite of an applicant's omission to pursue the remedy of appeal, the High Court ought to exercise its discretionary power of interference in revision, obviously depends on the special circumstances of each case. It has been held by courts that it would be proper to interfere in revision where the existence of the alternative remedy is doubtful, or where the alternative remedy is inconvenient or is not efficacious or is barred or where non-interference will lead to multiplicity of proceedings and unnecessary expense and delay, or results in grave injustice. In the present case, Sri N.M. Sastry says that he felt that an appeal did not lie and therefore allowed the appeal time to expire. In the circumstances, I do not consider that interference should be refused on the ground that the petitioner ought to have preferred an appeal to the District Judge, Kurnool.

6. On the question of pauperism,, the learned District Munsiff rightly held that the case put forward by the petitioners fell under Clause (a) of Explanation (i) to Order 33 Rule 1 (Madras Amendment). He proceeded on the footing that the B schedule family properties are worth Rs. 11,000 and that the petitioners' half share is worth Rs. 5,500. He quoted from *Mithai Lal Vs. Jagan and Others* the proposition :

"Where a person who applied to sue as pauper for partition was entitled to a large share in the suit property as a member of the joint Hindu family and the court considering that he would be able to pay the court fee by raising money on the security of that share, rejected the application, it was held that the court was not in the error and even if in the error, the High Court would not interfere as the error would not amount to material irregularity in the exercise of jurisdiction".

Purporting to apply this principle he straightaway said without discussing the facts.

"I am convinced that the petitioners in this case are in a position to raise the necessary fees by giving their property as security. After all the amount due towards court fee is only Rs. 225/-".

7. With regard to the valuation of the B schedule properties, it was not the case of the petitioners or of the 4th respondent that they were worth Rs. 11,000. Excluding the house valued at Rs. 500, the valuation in the petition of the properties was Rs. 4,500. The 4th respondent valued them in his execution petition at Rs. 4,800 and the amir's valuation was given by him as Rs. 5,950.

The learned District Munsiff's valuation is apparently based on the admissions of the petitioners next friend as P. W. 1 although he made a sweeping observation at an earlier stage in the judgment.; I do not believe the evidence of P. W. 1". P. W. 1 said in the witness-box that the house was worth Rs. 700 or Rs. 800 and the remaining properties were worth Rs. 200 per acre. It may be doubted whether sale forced by an emergency will fetch the full worth of the properties. Nevertheless, the question of the value of properties is one of fact and as the

learned-District Munsiff's estimate is supported by P. W. 1's admission, it is not sought to be assailed in revision.

8. However, the learned District Munsiff, assumed that a person who is entitled to a share in joint family property of considerable value would always be able to raise comparatively smaller amounts on its security. But as observed by Walsh, J., in *Sundarathammal and Another Vs. Paramaswami Asari and Others*, when the property does not consist of cash, the test is not whether a person has a power in the abstract of raising money, but whether, in the concrete circumstances of the case, he could succeed in raising anything substantial by exercising that power. In *Thanu Pillai and Another Vs. Nellathayammal and Others*, Ramesam, J., agreed with the above observation and said that evidence would be necessary to enable one to judge whether money could be raised on the properties, Sri N.M. Sastry laid considerable stress on the fact that all the properties except the house were attached by the 4th respondent. As against this Sri N. Ramamohana Rao urged that the 4th respondent had actually offered to release some of the attached properties to enable the petitioners to raise the amount of court fee.

On a perusal of the original record of the lower court, I find that neither of these submissions is correct. The attachment was raised on 5-10-1956, about 9 days after the petitioners filed the pauper application and thereafter the attachment could not have been any impediment to the petitioners. The 4th respondent filed his counter on 23-11-1956 and suggested therein merely that the petitioners might obtain leave of the court to sell one of the family lands for paying the court fee. As the attachment had been already raised about 1 1/2 months earlier, there was no question of his offering to place any of the properties at the disposal of the petitioners for paying the court fee.

9. The more substantial point raised by Sri N.M. Sastry is that the petitioners' next friend was merely a de facto guardian and that u/s 11 of the Hindu Minority and Guardianship Act 32 of 1956, a de facto guardian has no power to dispose of or deal with the property of a Hindu minor. This point was overruled altogether by the learned District Munsiff. *Mithai Lal Vs. Jagan and Others* was apparently a case where the applicant was a major and there was no difficulty in his giving his share in the joint family property as security. But the petitioners here are minors and their next friend is not competent in law to offer their undivided share of the joint family property as security. Thus the finding of the learned District Munsiff that the petitioners are not paupers has no relation to the facts of the case.

10. Sri N. Ramamohana Rao sought to support the lower court's finding by invoking the proviso to Section 12 of the Hindu Minority and Guardianship Act, 1956. He pointed out that although the effect of Section 12 is to retain the prohibition against the appointment of any guardian for the petitioner's undivided interest in their joint family property, the proviso saves the inherent jurisdiction of the High Court to appoint such a guardian. He urged that P. W. 1 ought to have applied to the High Court and got himself appointed as the

guardian of the properties of the minors, Sri N.M. Sastry pointed out that in all the reported cases where such guardians were appointed, the guardian himself was also the manager of the family and there was no risk of introducing into the family the disturbing element of a stranger. (Vide page 28 of B.B. Mitra's Guardians and Wards Act, 8th Edition 1940).

At best, P. W. 1 could have got himself appointed as guardian by the High Court for the limited purpose of raising funds for this litigation. The 4th respondent would have naturally opposed those proceedings and P. W. 1 would have had to incur costs to the tune of about Rs. 100 or Rs. 200 for obtaining the advantage of raising the court fee amount of Rs. 255. Further, it was only after the executing court passed the order on 11-9-1956 refusing further time for payment that there was a real danger to the minor petitioners' share of the properties. There would have been no time for P. W. 1 to avert the execution sale, if he had embarked on the expensive guardian proceedings in the High Court.

There was not even a suggestion in P. W. 1's cross-examination that he could have got himself appointed as guardian of the petitioners and raised money to pay the court fee on the security of their undivided share. Merely because it would have been possible for P. W. 1 to take such a course by suitable proceedings in the High Court, it cannot be said that it was a practicable or a reasonable course to take. In any event, the possibility and expediency of P. W. 1 getting himself appointed as guardian by the High Court was not present in the mind of the learned District Munsiff at all. As already mentioned, he completely ignored the difference in the position as between a minor and an adult in raising money on the security of his undivided share of joint family property.

11. In this connection, Ram Prasad Singh and Others Vs. Jagatamba Prasad Singh and Others, That was a case where the defendants through their vakil had actually offered to purchase a part of the plaintiffs share in case a guardian was appointed. It bears no analogy to the present case, 33 the proceedings for appointment of a guardian, before launching the suit would have failed to avert the execution sale at the instance of the 4th respondent.

12. Turning to the question, whether the allegations show a cause of action, the learned District Munsiff himself has stated that the ground of fraud and negligence of their guardian in O. S. No. 255 of 1954 was averred in the petition. It has been held in numerous decisions binding on this court that a decree passed against a minor could be avoided on the ground of gross negligence of a guardian ad litem. See Subbaratnam Chettiar Vs. Gunavanthalal Vidyasankar by agent Narendralal-Gunavanthalal, and N.P.L. Egappa Chettiar Vs. Em.S.V.L. Ramanathan Chettiar and Others, The petitioners are not likely to have known all the circumstances of the fraud. The facts relating to the negligence have been set out in paragraphs 5 and 6 of the plaint and the petitioners cannot reasonably be expected to give better particulars to show that it amounted to fraud.

The learned District Munsiff's reasons for holding that the allegations did not show a cause of action were (i) that there was no reference or mention of the fraud and negligence in paragraph 9 of the petition which gave the dates of the cause of action (ii) that there was also no mention in paragraph 9 of any demand for partition by the petitioners and a refusal thereof by respondents 1 to 3 (iii) that the allegations in the earlier paragraphs are not proved as the learned District Munsiff did not believe the evidence of P. W. 1. These reasons have no bearing at all on the question which the learned District Munsiff had to consider. It is not necessary that all the allegations showing the cause of action should be summed up in the paragraph giving the dates thereof. Respondents 1 to 3 were manifestly not in a position to give the relief sought by the petitioners for a declaration that the decree in O. S. No. 255 of 1954 was not binding on their half share. A demand and refusal from them would have served no purpose.

The fact that the District Munsiff disbelieved the evidence of P. W. 1 is also immaterial because proof of the allegations was not necessary at that stage. The fraud and negligence which the learned District Munsiff himself recognised as "having been mentioned in the earlier paragraphs are allegations showing a cause of action. It is impossible to understand his reasons for a contrary finding.

13. It is thus clear that the facts and reasons set out by the learned District Munsiff have no logical connection with his findings. The discussion by him may be termed as a mere parody of reasoning. No doubt it cannot be said in this case that the learned District Munsiff acted in excess of his jurisdiction or assumed jurisdiction which he did not possess. The question is whether the case falls under Clause (c) of Section 115, Civil Procedure Code. Sri N. Ramamohana Rao cited the case of Keshardeo Chamria Vs. Radha Kissen Chamria and Others, where the Supreme Court construing the words "illegally" and "material irregularity" occurring in Section 115 Clause (c) said:

"They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with".

It appears to me that basing findings or conclusions upon facts which have no bearing or connection with them, is a material defect of procedure. There is only a show of reaching conclusion upon the facts of the case.

14. The lower court's order is therefore set aside and the petition is remanded for fresh disposal in the light of the above observations. Costs in the revision will abide and follow the result of the petition.

(This petition having been set down on Thursday, the 27th day of August 1959 and this day for being spoken to on the letter dated 25-8-1959 of Mr. N. Ramamohana Rao, Advocate for the 4th respondent the court made the following)

ORDER

15. Sri N. Ramamohana Rao states that he did not press the question whether the petitioners' allegations in the plaint showed a cause of action, because I expressed myself at the hearing of the revision petition against the learned District Munsiffs conclusions on the question of pauperism. He seeks to distinguish Subbaratnam Chettiar Vs. Gunavanthlal Vidyasankar by agent Narendralal-Gunavanthlal, and N.P.L. Egappa Chettiar Vs. Em.S.V.L. Ramanathan Chettiar and Others, and relied on C.K.S. Krishnamurthi and Another Vs. Chidambaram Chettiar and Others, Abbakka Shedthi v. Vittal Hegda. AIR 1948 Mad 129. The three decisions last cited establish that where the decree in the former suit is against the manager of a joint family, negligence on the part of the manager not amounting to fraud would not entitle the other members of the family to get the decree set aside.

But neither the pleadings nor the decree in O. S. No. 255 of 1954 have been made available by the parties in order to determine whether the petitioners' father represented their joint family thereto. Nor did the learned District Munsiffs reasoning proceed or refer to such a ground. The counter filed by the 4th respondent in the lower court also did not mention that aspect of the matter. None of the observations in my order dated 17-8-1959 on the revision petition are intended to preclude the 4th respondent from contending that the suit is not maintainable on any new grounds that may be available to them.