(1999) 04 AP CK 0035

In the Andhra Pradesh High Court

Case No : SA No. 121 of 1988

Kolluri Suseelamma and others — APPELLANT

Vs

Yerramilli Nageswara Rao — RESPONDENT

Date of Decision : 26-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18, 2(12)

Citation : (1999) 3 ALD 604 : (1999) 3 ALT 41

Hon'ble Judges : B. Subhashan Reddy, J

Bench : Single Bench

Advocate : Mr. C. Poorniah, for the Appellant; Mr. M.S.K. Sastry, for the Respondent

Judgement

1. The substantial question of law in this Second Appeal is whether Rule 12 or Rule 18 of Order XX of the CPC is applicable for ascertainment of profits, both past and future, in a suit for partition and separate possession of properties devolved by gift jointly made to the donees?

2. OS No.38 of 1970 was filed by the plaintiff, namely, Yerramilli Nageswara Rao against 25 defendants for partition and separate possession of his share in plaint A and B schedule properties and also for rendition of accounts by the 1st defendant for his management of the said properties. Defendants 2 to 18 are the other sharers entitled to all the properties. The suit schedule properties were gifted jointly to the parties.

3. The preliminary decree was passed on 30-7-1971. Defendant No.1 died on 18-1-1979. Defendant No.7 pre-deceascd him. As per the preliminary decree, plaint A schedule properties were to be divided into 6 equal shares and one such share was to be allotted to the plaintiff. Plaint B schedule properties were to be divided into 5 equal shares and one such share was to be allotted to the plaintiff and defendants 2 to 6 together. Concisely speaking, the plaintiff was entitled for 1/6th share in the plaint A schedule properties and 1/30th share in the plaint B schedule properties and for profits arising therefrom against defendant No.1,

who was in management of the properties and who was made account for profits from 3-11-1961 onwards.

4. IA No.574 of 1979 was filed for final decree proceedings and a Commissioner was appointed for division as well as for ascertainment of mesne profits. Consequent to the death of the 1st defendant, respondents 9 to 25 herein were added as legal representatives of the 1st defendant on 7-3-1981. They have contested the claim in the final decree proceedings. Among the contentions raised, the main contention was the time bar on the ground that profits beyond 3 years from the date of filing of petition for ascertainment of profits, both past and future, cannot be ordered on the ground that it is Order 20 Rule 12 CPC which is applicable and not Order 20 Rule 18 CPC. It is pertinent to mention that the profits claimed by the plaintiff were to be ascertained for the period from 3-11-1961 to 30-6-1981 and the preliminary decree directed that profits arising after 30-6-1981 and till the date of delivery of possession can be ascertained subsequent to the delivery of possession. The Commissioner''s report was accepted and Item-6 of plaint -A schedule was allotted to the plaintiff. So far as plaint-B schedule properties are concerned, item-2 was allotted jointly to the plaintiff and defendants 2 to 6. The Commissioner has also ascertained the profits and filed his report. The mesne profits were determined at Rs.21,438/- as entitled by the plaintiff, by the findings of the trial Court, but the trial Court while allotting the properties to the plaintiff as mentioned above and other specified properties to other defendants as per the preliminary decree while estimating the above amount of Rs.21,438/- towards the profits which the plaintiff is entitled, did not grant the same on the ground that the claim was time barred, accepting the contention of respondents 9 to 25 herein that as the properties are not coparcenary or joint family properties, but are the properties jointly held by the parties on account of the gift made by the donor; thus Order XX Rule 12 of CPC is applicable and not Order XX Rule 18 of CPC. Concisely speaking, the trial Court made a distinction in the case of ascertainment of mesne profits into two, i.e., out of the coparcenary property and the property devolved upon the donees by a joint gift made by the donor. It was the view of the trial Court that Order XX Rule 18 CPC can only be made applicable to a suit for partition and separate possession and ascertainment of profits of a coparcenary property, but with regard to other nature of properties even though they are jointly held as co-owners, the ascertainment of both past and future profits can be only under Order XX Rule 12 CPC. Holding so, the trial Court did not award the profits on the ground of bar of limitation. The same was appealed against in AS No. 14 of 1984 on the file of the Court of the II Additional District Judge, East Godavary at Rajahmundry and by Judgment and Decree dated 4-11-1987, the said lower appellate Court had reversed the finding of the trial Court and held that it was only Order XX Rule 18 CPC which was applicable and as such, the claim for profits was well within time. Hence, this Second Appeal.

5. Mr. C. Poornaiah, the learned senior Counsel appearing for the appellants, has strenuously contended that the suit for partition being not of the coparcenary

property, the view taken by the trial Court is correct, while Mr. M.S.K. Sastry, the learned senior Counsel appearing for the respondent, has submitted that there cannot be any distinction between nature of profits in a suit for partition, as one sharer will have pre-existing right for a share and that the view taken by the lower appellate Court is correct.

6, Earliest case on the point is that of Babburu Basavayya and Others Vs. Babburu Guravayya and Another, , decided by a Full Bench of the Madras High Court. The legal proposition laid down was that in a suit for partition, the right to account of profits is implicit in the right to a share in the common properties and need not be separately asked for and both the rights have to be worked-out and provided for in the final decree for partition. It was further held that a direction for enquiry into profits of the common property received or realised by one of the parties during the pendency of the suit may be made even after the passing of the preliminary decree and there is nothing in Order 20 Rule 18 CPC interdicting such procedure. It was also held that the right to account of such profits is implicit in the right to a share in the common properties and need not be separately asked for and even after the passing of the preliminary decree, it is open to the Court to give appropriate directions either suo motu or on the application of the parties. The ratio in the above case was accepted by the Andhra High Court in K. Venkata Subbaiya Vs. K. Veeraiyya and Another, . The said view was further upheld by the A.P. High Court in D. Satyanarayana Murthi v. D. Bhavanna, AIR 1957 A.P. 766, in Kasibhatla Satyanarayana Sastrulu and Others Vs. Kasibhatla Mallikarjuna Sastrulu, , in O.K. Obulu Raju v. D. Vobulu Raju, 1980 (1) An.W.R, 127, as also in M. Nageswara Sastry v. Narasimha Rao, 1983(2) An.W.R. 110. The same is the view taken by a Division Bench of the Madras High Court in Subba Reddiar Vs. Hazra Bibi, , and D. Nataraja Achari Vs. Balambal Animal, . The Kerala High Court in Mariyvma v. Kunhambu Nair, ILR 1968 (1) Kerala 43, has also taken the same view. Above all, the Supreme Court in Gopalakrishna Pillai and Others Vs. Meenakshi Ayal and Others, , had approved the view taken by the Madras High Court in Basavayya v. Guravayya (supra).

7. In view of the above discussion, what emerges is that there is no distinction between a coparcener and a co-sharer insofar as the application of Order XX Rule 18 CPC is concerned, as the criteria is that person laving pre-existing right as a sharer in the common properties is liable to be proceeded against for claim of both past and future profits and the legal provision applicable is only Order XX Rule 18 CPC regardless of the fact as to whether the said common properties are the co-parcenary properties or joint family properties or the properties devolved by will or gift. Jointness of the properties is the criterion for application of Order XX Rule 18 CPC in which one person is in possession and enjoyment not only on his behalf, but on behalf of others, but did not distribute the profits to other sharers and is made liable to distribute after ascertainment of the said profits by applying Order XX Rule 18 CPC. The said profits are not the mesne profits within the meaning of Section 2(12) of CPC but in contradistinction, the profits, which

are to be ascertained under Order XX Rule 12 CPC are the mesne profits coming within the definition of Section 2(12) of CPC., as the said profits are derived by a person in wrongful possession of a property belonging to another. Thus, the distinction is clearly made-out that while a person who is in wrongful possession is accountable for profits under Order XX Rule 12 CPC as compared to a person, who is in possession lawfully as a co-sharer, but did not account for the profits and is made accountable under Order XX Rule 18 CPC.

8. In view of what is stated supra, I hold that the first appellate Court has correctly applied Order XX Rule 18 CPC to the instant case and held that the claim for profits is not time barred. In the circumstances, I do not see any merit in this Second Appeal and the same is accordingly dismissed, but without costs.

