

(2004) 08 AP CK 0047

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 2665 of 2004

P. Dhanavathi Rao

APPELLANT

Vs

P. Radha Bai Rao and Others

RESPONDENT

Date of Decision : 16-08-2004

Acts Referred:

Civil Practice Rules — Rule 28

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

Citation : (2004) 5 ALD 473 : (2004) 6 ALT 591

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : R. Chandrashekar Reddy, for the Appellant; S. Ganesh Rao, for the Respondent

Judgement

L. Narasimha Reddy, J.—The petitioner filed O.S. No. 204 of 1990 in the Court of the III Senior Civil Judge, Secunderabad, for the relief of partition and separate possession, against her mother and brother, respondents 1 and 2, respectively. A preliminary decree was passed in the suit on 24-09-1998. Aggrieved thereby, respondents 1 and 2 filed A.S. No. 81 of 1998, in the Court of XX Additional Chief Judge, City Civil Court, Secunderabad. During the pendency of the appeal, the 1st respondent herein died on 05.03.2002. Petitioner filed a memo to the effect that since no application was filed to bring the legal representatives of the deceased on record, the appeal stood abated insofar as 1st respondent is concerned.

2. The 2nd respondent, who is the 2nd defendant in the suit and 2nd appellant in A.S. No. 81 of 1998 together with 3rd respondent herein, filed I.A. No. 1744 of 2002, under Order 22 Rule 4 C.P.C., read with Rule 28 of Civil Rules of Practice, to bring them as legal representatives of the deceased 1st respondent. So far as 2nd respondent is concerned, there is no dispute as regards his relation with the deceased 1st respondent. The 3rd respondent was sought to be brought on record, on the ground that the deceased executed a will on 17.10.1996,

bequeathing her share of the property in his favour. The petitioner resisted the application. Before the appellate Court, the 3rd respondent was examined as PW.1 and another was examined as PW.2. The Will was marked as Ex. A.1 After discussing the matter on the basis of the material placed before it, the appellate Court allowed the I.A., through its order, dated 13.04.2004. The same is challenged in this revision.

3. Sri R. Chandrasekhar Reddy, learned counsel for the petitioner submits that on account of failure to take any steps for a period of ninety (90) days from the date of death of the 1st respondent, the appeal stood abated and it was not for respondents 1 and 2, to file I.A. No. 1744 of 2002. He also submits that the appellate Court recorded a finding as to the validity of the Will, though the same has to be considered at the trial and hearing of the suit.

4. Sri S. Ganesh Rao, learned counsel for the respondents, on the other hand, submits that the petitioner as well as the 2nd respondent are the daughter and son, respectively, of the deceased 1st respondent, and in that view of the matter, the appeal did not abate. As regards the findings, in relation to Ex. A.1, learned counsel submits that they were restricted only for the purpose of recognizing the 3rd respondent to be treated as legal representative and not beyond that.

5. The suit filed by the petitioner for partition against her mother and brother, respondents 1 and 2, was decreed. Respondents filed A.S. No. 81 of 1998 against the same, which is pending. The 1st respondent died on 05.03.2002. Respondents 2 and 3 herein were recognized as legal representatives of the deceased 1st respondent.

6. Petitioner raises an objection on the ground of limitation. According to her, the appeal abated in view of the fact that no steps were taken up to 11.06.2002, no to speak of subsequent period, to bring the legal representatives on record. Even if this allegation is true, it needs to be seen that a suit or appeal would abate in the event of death of one of the plaintiffs or appellants, as the case may be, if only the cause of action was divisible and that there were no surviving plaintiffs or appellants to pursue the surviving right. It is not in dispute that the 2nd respondent is the son of the 1st respondent and the dispute related to the partition of the suit schedule properties. When the interest of the respondents 1 and 2 were indivisible till the proceedings reach finality and the son and daughter of the deceased 1st respondent are very much parties to the appeal, the question of abatement of the appeal does not arise. Rule 4 of Order 22 C.P.C., is very clear on this aspect.

7. The second submission of the learned counsel for the petitioner is that the discussion in relation to validity or otherwise of the Will in the context of an application filed under Order 22 C.P.C., to bring the legatee under the Will as the legal representative is very limited and no final expression of view is contemplated. He contends that the appellate Court made an observation as though the Will is proved beyond doubt. The preposition put forward by the

learned counsel for the petitioner is correct in law. However, the appellate Court can be found fault with, if it has left nothing to be adjudicated as to the proof of the Will, at a later stage. The petitioner appears to have been aggrieved by the observation made in para 21 of the order, wherein it was observed that the 1st respondent can be said to have executed the will-Ex. A.1. If this was the final and ultimate finding of the appellate Court, it certainly would have called for interference. However, in para 23 of the order itself, the appellate Court made it abundantly clear that the proof of execution of the Will has to be considered only at a subsequent stage, and the finding at this stage, is only for the limited purpose of deciding the entitlement of the 3rd respondent to come on record. That being the case, it cannot be said that the order under revision suffers from any illegality or infirmity. It shall be open to the petitioner to put forward all the contentions touching on the validity or otherwise of the Will at the trial and hearing of the suit.

8. With the above observations, the C.R.P., is dismissed.