
(2012) 01 AP CK 0040
In the Andhra Pradesh High Court
Case No : First Appeal No. 972 of 2004

Patchala Sriramulu Rao

APPELLANT

Vs

Patchala Pola Rao

RESPONDENT

Date of Decision : 03-01-2012

Acts Referred:

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

Citation : (2012) 3 ALD 656 : (2012) 5 ALT 794

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : M.S. Ramachandra Rao, for the Appellant; M. Sivanand Kumar, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy

1. This appeal is filed against the dismissal of O.S.No. 16 of 2002 filed by the appellant herein in the Court of Senior Civil Judge, Pithapuram. The sole defendant is his brother. The suit was filed for partition of the suit schedule properties viz., a rice mill and vacant plots. He pleaded that some of the suit schedule properties were acquired by their father, and others, by their grandfather, and that they have devolved upon himself and the respondent, in equal shares. He made a reference to O.S.No. 94 of 1993 filed by him in the Court of Junior Civil Judge, Pithapuram for dissolution of partnership firm and stated that a specific finding was recorded therein to the effect that the rice mill is not part of any partnership business at all. He has also stated that the respondent filed O.S.No. 85 of 1992 against him for the relief of perpetual injunction in respect of item No. 1 of the suit schedule property and that the suit was dismissed as not pressed. He prayed for the relief of partition of the suit schedule properties into two parts and allotment of one part to him. The respondent filed written statement opposing the suit. He denied the various allegations made by the appellant. He admitted that he filed O.S.No. 85 of 1992

for the relief of injunction, but stated that it was dismissed as not pressed. He too made a reference to O.S.No. 94 of 1993 and the result that ensued therein. Another plea raised by him was that the family properties were divided about 15 years prior to the filing of the present suit between himself and the respondent and that it is not maintainable. According to him, there is nothing joint between himself and the appellant.

2. Through judgment, dated 13.10.2003, the trial Court dismissed the suit.

3. Sri M.S. Ramachandra Rao, learned counsel for the appellant submits that the trial Court rendered conflicting and contradictory judgments as regards the status of item 1 of the suit schedule viz., rice mill. He submits that being under the impression that the rice mill is an asset of the firm comprising of himself, the respondent and certain others, the appellant filed O.S.No. 94 of 1993 for dissolution and the respondent has taken the stand and convinced the trial Court that the rice mill was not the property of the partnership firm at all and got the suit dismissed. Learned counsel submits that A.S.No. 21 of 2003 filed against the decree in O.S.No. 94 of 1993 was heard by the learned Senior Civil Judge, Pithapuram and it was dismissed by upholding the findings as regards the rice mill. He submits that on the one hand O.S.No. 16 of 2002 was dismissed by the Court of Senior civil Judge, Pithapuram holding that the rice mill is not the joint family property of the appellant and the respondent and on other hand, about one year thereafter, the same Presiding Officer took exactly the opposite view in A.S.No. 21 of 2003 that arose out of O.S.No. 94 of 1993. Learned counsel further submits that once the relationship is not disputed, and the respondent did not enter the witness box, much less did he plead and prove that the suit schedule properties exclusively belong to him there was no alternative for the trial Court except to pass a preliminary decree as prayed for. He submits that the respondent has been enjoying the suit schedule property to the exclusion of the appellant, for over a decade, after the death of their father.

4. Sri M. Sivanand Kumar, learned counsel for the respondent on the other hand submits that it was for the appellant to prove that the suit schedule properties were held by the joint family and on finding that the evidence on record does not support his plea, the trial Court dismissed the suit. He contends that the appellant filed O.S.No. 94 of 1993 almost for the same relief though in a different form and O.S.No. 16 of 2002 was barred under Order 2 C.P.C. Certain other contentions are also urged.

5. The suit was filed for the relief of partition and separate possession of the suit schedule properties. The relationship between the parties is not disputed. The trial Court framed the following issues for its consideration:

1. Whether there is any family arrangement as alleged?
2. Whether the principle of res judicata applies to the present case?
3. Whether the plaintiff is entitled to any share and whether the schedule

properties are joint family properties?

6. The appellant deposed as P.W.1 and his uncle by name P.R.K.S. Bhagawanlu deposed as P.W.2. Exs.A.1 to A. 14 were filed. The respondent did not enter the witness box. Exs.B.1 to 9 were taken on record and the suit was dismissed by the trial Court.

7. The points that arise for consideration in this second appeal are;

(a) Whether the suit schedule properties are available for partition? and

(b) If so, whether the appellant is entitled to half share in them?

8. The suit schedule comprises of three items of property. The first is a rice mill. Items 2 and 3 are vacant sites. Out of them, item 2 is said to be consisting of three separate bits.

9. The appellant and the respondent are the sons of late Patchala Subba Rao. He died in the year 1981. Normally, the elder son would assume the management of the family on the death of father. In the instant case, the respondent who is younger to the appellant, has assumed possession and management of the properties. The person, who is in management, is expected to take stand, truly reflecting the facts pertaining to the family. In case, the properties are held in joint, he must agree for and effect partition and if according to him, all or some of the items are owned by him exclusively, the same can be made known to the person demanding partition.

10. In the instant case, the appellant was not sure as to how and in what manner, the respondent is in management of the properties. He was under the impression that there exists a partnership firm in which himself, the respondent, their uncle-P.W.2 and some others are partners. Obviously because he was not getting any returns from the properties and the respondent was enjoying them exclusively, the appellant filed O.S.No. 94 of 1993 in the Court of Junior Civil Judge, Pithapuram for dissolution of the partnership firm and rendition of accounts. The respondent contested the suit and pointed out several alleged discrepancies as regards description of the firm, the method of their registration etc. Ultimately, he was able to convince the trial Court, to dismiss the suit, on the ground that there did not exist any partnership firm at all and the rice mill, which is item 1 in the present suit schedule, was never held by the firm. The appellant filed A.S.No. 21 of 2003 in the Court of Senior Civil Judge, Pithapuram. At the same time, reconciled to the fact that the mill is not the property of any - partnership firm, the appellant filed the present suit for partition in the same Court i.e., Senior Civil Judge, Pithapuram. The parties ought to have taken steps to get the suit clubbed with A.S.No. 21 of 2003.

11. Except denying the plea of the appellant, the respondent did not assert that any of the suit schedule properties belongs to him exclusively. In the course of his evidence, the appellant filed Ex.A.1 dated 02.09.1957, through which his father " purchased item 1, Ex.A.2, dated 21.08.1961, under which his father

purchased first bit of item 3, Ex.A.3, dated 08.02.1964 through which their grand father purchased item 2 and Exs.A.4 and A.5, sale deeds dated 19.06.1966 and 21.06.1966 respectively, through which their father and uncle (P.W.2) purchased bits 2 and 3 of item 3. As observed earlier, the respondent did not choose to enter the witness box at all.

12. Once the properties were acquired by the father and grand father of the parties to the suit, both of them are entitled to equal shares therein. If there existed any arrangement that has the effect of excluding the appellant from succession, the respondent was under obligation to plead and prove it. As observed earlier, he did not choose to enter the witness box at all. No other document that has the effect of stopping the succession was placed before the Court. Some doubt exists as to the property that is acquired through Ex.A.5 by P.W.2. However, that witness categorically stated that the item was acquired at a time when himself and his brother i.e., father of plaintiff and defendant were joint and that he does not have any share in it. The inescapable conclusion is that items 1 to 3 are available for partition. Hence, point No. 1. is answered in favour of the appellant.

13. The discussion on point No. 1 would in fact cover substantial part of point No. 2 also. It has already been found that the suit schedule properties were acquired by the ancestors of the appellant and the respondent and that there is nothing on record to suggest that the succession was in any way scuttled. Therefore, the appellant on the one hand and the respondent on the other hand are entitled for equal shares in the suit schedule properties.

14. A plea is raised on behalf of the appellant for the first time before this Court to the effect that the suit was barred under Rule 2 of Order II C.P.C. The said provision prohibits splitting of the reliefs that are available to a plaintiff in a suit, on the basis of the same cause of action. If a plaintiff intends to relinquish part of a claim that is based on the same cause of action, he can do so only with the permission of the Court. In such a case, subsequent suit for the left over claim is permissible. In the absence of such permission, he becomes handicapped.

15. An objection as to bar of a subsequent suit that can be raised under Rule 2 of Order 2 C.P.C. , would heavily depend upon the facts that are pleaded. The defendant who raises such an objection must plead necessary facts and adduce evidence. It is only then that the Court would be in a position to examine it and record its finding. In the instant case, the respondent did not raise the plea at all, much less did he supplement the details. No evidence was adduced on this aspect.

16. Assuming that the plea is otherwise permissible, a subsequent suit can be barred, only when the relief claimed in it was available on the basis of the cause of action, which constituted the basis in an earlier suit. O.S.No. 94 of 1993 was filed for the relief of dissolution of partnership firm. The relief of partition of joint family properties between two brothers can, by no stretch of imagination, be said

to be available on the basis of facts that constitute the basis for a cause of action to file a suit for dissolution of partnership. There are no merits in the contention of the respondent. For the foregoing reasons, the appeal is allowed with costs through out. There shall be a preliminary decree as prayed for.