

(2005) 07 AP CK 0045
In the Andhra Pradesh High Court
Case No : CMA No. 364 of 2005

R. Jayaprada Bai and Others

APPELLANT

Vs

Bondili Jayasri Bai and Others

RESPONDENT

Date of Decision : 27-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18, Order 7 Rule 1, Order 7 Rule 2, Order 7 Rule 7

Citation : (2005) 6 ALD 249 : (2005) 6 ALT 775

Hon'ble Judges : G. Rohini, J; D.S.R. Varma, J

Bench : Division Bench

Advocate : M.V.S. Suresh Kumar and M.R.S. Srinivas, for the Appellant; V. Subrahmanyam, for the Respondent

Judgement

D.S.R. Varma, J

1. Heard both sides.
2. Defendants 3, 11 and 12 in Original Suit No. 327 of 1994 on the file of II Additional Senior Civil Judge, Vijayawada, are the appellants herein.
3. The suit O.S.No. 327 of 1994 was filed for partition.
4. For the sake of convenience, the appellants and the respondents will be referred to as "the defendants 2, 11 and 12" and "the plaintiff's", respectively.
5. For better appreciation, it is useful to notice the prayer in the plaint, which reads thus:

"(a) partition of the plaint schedule property into forty eight equal shares and for allotment of twenty one such shares therein to the plaintiff by metes and bounds and put her in her separate possession thereof;

(b) for costs of the suit; and

(c) granting of such other relief/s as the Hon'ble Court thinks fit and proper in

the circumstances of the case."

6. At the outset, it is to be noticed that there was no relief sought for by the plaintiff with regard to past mesne profits at all in the suit.

7. The suit was decreed on 30-10-2002, by passing a preliminary decree, against which an appeal A.S. No. 2182 of 2002 was filed and the final decree proceedings pending before the trial Court were stayed. Later on, an application LA. No. 1529 of 2002 was filed by the plaintiff for ascertainment of mesne profits and the same was allowed by the trial Court by order, dated 22-10-2003. The same was challenged by the defendants (appellants herein) in C.R.P.No. 6286 of 2003. It appears that during the course of hearing of that civil revision petition, the learned Counsel for the plaintiff sought leave of this Court to permit the plaintiff to approach the Court below seeking amendment of the decree in accordance with law inasmuch as there was no prayer in the plaint seeking mesne profits. In view of the same, the said revision petition was disposed of by this Court by order, dated 22-7-2004, granting liberty to the plaintiff to make an application before the trial Court seeking amendment of the decree in accordance with law, and with a further direction to the Court below to dispose of such an application as and when made.

8. Consequently, the plaintiff filed an application LA. No. 1155 of 2004 u/s 152 of the Code of Civil Procedure, before the Court below, seeking amendment of the decree as under:

"1. In the operative portion of the decree, the following is to be added as 1(a)

The plaintiff is granted mesne profits on her share of the property from the date of suit till separate possession is delivered and the mesne profits be ascertained by way of separate proceedings under Order 20, Rule 18 Cr.P.C.

2. To delete the following in Page 2 of the decree after the word "value of the suit claim" for purpose of Court fee and jurisdiction - Rs. 2,38,475/- and to substitute the figure - Rs. 12,97,373-44 ps.

3. In the particulars of suit claim, to delete the figures Rs. 2,38,475-00 and to substitute the figure Rs. 12,97,373-44 ps.

4. To attach the decree, the correct plaint schedule containing items 1 to 3 of the plaint schedule and to remove the plaint schedule containing only item 1 of plaint schedule."

9. The Court below dismissed the said application by order, dated 17-1-2005. Later, the plaintiff filed an application LA. No. 185 of 2005 seeking review of the order passed in LA. No. 1155 of 2004. Eventually, the said review application LA. No. 185 of 2005 was allowed by the Court below resulting in filing of the present civil miscellaneous appeal.

10. The contention urged by Sri M.R.S. Srinivas, the learned Counsel appearing for the defendants is two fold. Firstly the application LA. No. 1155 of 2004 u/s

152 of the CPC Code itself was not maintainable, and secondly the Court below had no jurisdiction to entertain the review application (LA. No. 185 of 2005) after dismissal of the application in LA. No. 1155 of 2004.

11. Insofar as the first contention is concerned, the learned Counsel appearing for the defendants places reliance on a three-Judge Bench decision of the apex Court in Gopalakrishna Pillai and Others Vs. Meenakshi Ayal and Others, .

12. The apex Court in Gopalakrishna Pillai "a case (supra) itself, which is relied upon by the learned Counsel appearing for the defendants, while dealing with the scope of Order-20 Rule-12 vis-a-vis Order 7 Rules 1, 2 and 7 of the CPC held that insofar as "past mesne profits" are concerned since the cause of action already arises for the plaintiff as on the date of institution of the suit, to claim the same in the plaint, a definite prayer has to be sought for by the plaintiff in the plaint by paying necessary Court-fee, in which event only the Court can go into that question and ascertain the past mesne profits. However, with regard to "future mesne profits" are concerned, since the plaintiff will not have cause of action for claiming the same as on the date of filing of the suit, such "future mesne profits" can be ascertained obviously at the discretion of the Court, at a later point of time, basing on the facts and circumstances of the case.

13. Same view is reiterated and reinforced by the apex Court in K. Hatiza Begum and Ors. v. K.M. Usman Pasha and Ors., 2002 (6) ALD 58 (SC) = 2002 (4) CCC 41 (SC).

14. It may be noted that the apex Court in Jayalakshmi Coelho Vs. Oswald Joseph Coelho, , dealing with the scope of Section 152 of the Code of Civil Procedure, observed thus :

"As a matter of fact such inherent powers would generally be available to all Courts and authorities irrespective of the fact whether the provisions contained u/s 152 CPC may or may not strictly apply to any particular proceeding. In a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise, that is to say, while passing the decree the Court must have in its mind that the order or the decree should be passed in a particular manner by that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the Court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. There should not be

reconsideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought the Court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of the Court's inherent powers as contained u/s 152 CPC. It is to be confined to something initially intended but left out or added against such intention."

15. A Division Bench of this Court in *Atohamma v. Rami Reddi*, AIR 1958 AP 517, after citing the passage from the judgment of the apex Court, extracted above, observed :

"Before the Supreme Court the matter arose not after the decree had become final as in the present case but at the hearing on the point--whether the decree was correctly passed or not. These observations therefore apply a fortiori to the present case. It might very well be that in the light of this judgment the question of the power of a Court to give directions under Order 20, Rule 12, when there was no prayer in the plaint for such a relief might have to be reconsidered. But in the present case it is unnecessary to pursue this point because the decree in the suit did not award to the plaintiff a relief for future profits. This is sought to be added, so to speak by reopening the decree and getting a modified or supplemental decree being passed."

16. Therefore, in the light of the above legal position, it is imperative to hold that the application LA. No. 1155 of 2004 seeking amendment of decree, in the present facts and circumstances, is maintainable for the reason that this Court in the order passed in the civil revision petition had already given liberty to the plaintiff to move the Court below by filing an application u/s 152 of the CPC and directed the Court below to dispose of such an application in accordance with law.

17. As regards the second contention urged by the learned Counsel appearing for the defendants to the effect that the Court below had no jurisdiction to entertain the review application LA. No. 185 of 2005, in the light of the legal position laid down by the apex Court in *Gopalakrishna Pillai's case* (supra), we hold that though the Court below had jurisdiction to entertain the review application, the Court below fell in error in ordering amendment of the decree insofar as it relates to "past mesne profits" is concerned inasmuch as there was no specific prayer made by the plaintiff in the plaint to that effect. However, the Court below is right in ordering amendment to the decree insofar as it relates to ordering ascertainment of "future mesne profits" is concerned.

18. Sri V. Subrahmanyam, the learned Counsel appearing for the plaintiff in support of his contentions, while repelling the submissions made by the learned Counsel appearing for the defendants, places reliance on a Full Bench decision of Madras High Court in *Basavayya v. Guravayya*, AIR (38) 1951 Madras 938.

19. In the aforesaid *Basavayya v. Guravayya* case (supra), Their Lordships of Madras High Court, while dealing with the scope of Order 20 Rules 18 and 12 of

the Code of Civil Procedure, held thus :

"In a suit for partition the Court has not only to decide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Even after passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order 20 Rule 18 does not prohibit the Court from issuing such directions after the stage of a preliminary decree. The mere fact that the preliminary decree does not direct an enquiry into profits subsequent to the date of the suit does not preclude the parties from applying for, or the Court from awarding, such profits by its final decree. This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree and in either case the result of the enquiry has to be incorporated in the final decree.

..."

20. From a careful reading of the principles laid down by a Full Bench of the Madras High Court, it appears that those principles are laid down while dealing with the interference of Courts even after the preliminary decree is passed, either under Order 20 Rule 12 or Order 20 Rule 18 of the Code of Civil Procedure.

21. It is to be noticed that the question - whether the Court, while exercising the jurisdiction u/s 152 of the Code of Civil Procedure, can award past or future mesne profits, as the case may be, without there being any specific prayer to that effect in the plaint, -- did not fall for consideration before the Full Bench of the Madras High Court. On the other hand, the said question had directly fallen for consideration before the apex Court in the cases referred to above *Gopalakrishna Pillai v. Meenakshi Ayal and K. Hatiza Begum and Ors. v. K.M. Usman Pasha and Ors.* (supra).

22. The learned Counsel for the plaintiff also relies on the judgment of a Full Bench of the Patna High Court in *Indradeo Prasad Singh and Another Vs. Sheonath Prasad Singh and Others*, wherein it was held thus :

"The petition is under Order 20 Rules 18 and 12 in a suit for partition and the scope of preparation of final decree and the application at that stage by the plaintiff for enquiry into mesne profits realized during pendency of suit is maintainable and also held that the plaintiff can pray for an inquiry into the profits realized by the defendants at the stage of preparation of the final decree though such prayer had not been made in the prayer of the plaint and no such direction being given in the preliminary decree."

23. Obviously, the said view is inconsonance with the view taken by the Apex

Court in the decisions referred to above *Gopalakrishna Pillai v. Meenakshi Ayal and K. Hatiza Begum and Ors. v. K.M. Usman Pasha and Ors.* (supra).

24. At this stage, the learned Counsel appearing for the plaintiff points out that an application LA. No. 460 of 2001 had been filed seeking amendment of the plaint to the effect that item Nos.2 and 3 of the petition schedule properties shall also be included in the schedule of original plaint.

25. But, it could be seen from the judgment passed by the Court below that a decision had been rendered only with regard to item No. 1 of the suit schedule property ignoring item Nos.2 and 3 of the suit schedule properties. We are of the view that the Court below passed such a judgment totally oblivious of the fact that the abovementioned application I.A.No. 460 of 2001 filed seeking amendment of the plaint to include item Nos.2 and 3 as item Nos.2 and 3 of the suit schedule properties was ordered by the Court below. When the said amendment was ordered, decree also should have been passed relating to the other two items i.e., item Nos.2 and 3 of the suit schedule properties. Since those two items were totally ignored, it is undoubtedly open for the plaintiff to approach the Court below seeking amendment of the decree covering item Nos.2 and 3 of the suit schedule properties for the purpose of partition.

26. In fact, the application I.A.No. 1155 of 2004 was filed mainly for two reliefs; firstly for including item Nos.2 and 3 of the petition schedule properties as item Nos.2 and 3 of the suit schedule properties in the judgment and decree and secondly for "mesne profits".

27. As already discussed and held by us that insofar as the second relief i.e., "mesne profits" are concerned, being a discretionary jurisdiction that can be exercised by the Court below after the trial of the suit or even after and before a preliminary and final decree respectively are passed.

28. Therefore, the order, dated 17-1-2005, passed by the Court below in I.A.No. 185 of 2005 (review petition) in I.A.No. 1155 of 2004 (amendment petition) shall be held to be invalid insofar as it relates to granting "past mesne profits" is concerned. However, the same is valid to the extent of "future mesne profits" and also in adding item Nos.2 and 3 of the petition schedule properties in the plaint schedule for the purpose of passing appropriate preliminary decree for partition.

29. In the result, the civil miscellaneous appeal is allowed in part to the extent indicated above. The preliminary decree and the impugned judgment passed by the Court below in O.S. No. 327 of 1994 shall stand corrected accordingly. However, there shall be no order as to costs.