
(2006) 04 AP CK 0094
In the Andhra Pradesh High Court
Case No : CRP No. 4819 of 2002

Rakamapalem Bhupathamma (died) and Others	APPELLANT
Vs	
Ambakam Varathamma	RESPONDENT

Date of Decision : 18-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 20 Rule 18(1), Order 20 Rule 18(2), Order 9 Rule 13, 144

Citation : (2006) 4 ALD 514 : (2006) 4 ALT 440

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : V. Sudhakar Reddy, for the Appellant; P. Venugopal, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—This civil revision petition demonstrates as to how, one wrong step would give rise to several inconsistencies, complicating the entire proceedings.

2. One Rajamma had four daughters, viz., Bhupathamma-deceased, first petitioner herein, Nagamma, Varthamma-respondent herein, and Maramma. She held an extent of Ac.2.24 cents of land in Survey No. 76/3 of Karuru Village, Tada Mandal, Nellore District. She had no male issues. After the death of Rajamma, her two daughters, by name Bhupathamma and Nagamma, filed O.S. No. 129 of 1989 in the Court of Junior Civil Judge, Sullurpet, against their sisters, for the relief of partition of the land in Survey No. 76/3. An ex parte decree was passed on 19-9-1989. On the strength of the same, they filed E.P. No. 86 of 1990. In the execution proceedings, after several steps, the shares of the plaintiffs in O.S. No. 129 of 1989, being 56 cents each, were delivered on 10-6-1991.

3. The defendants in the suit filed I.A. No. 328 of 1991 under Order IX Rule 13 C.P.C. against the deceased-first petitioner herein (Bhupathamma), to set aside

the ex parte decree. The LA. was allowed on 22-6-1995. Aggrieved thereby, the first petitioner filed C.R.P. No. 3012 of 1992. The C.R.P. was allowed and the I.A. was remanded to the trial Court for fresh disposal. However, a further observation was made to the effect that in the absence of a final decree, the execution was untenable, and in that view of the matter, the defendants in the suit were entitled to restitution of the property.

4. After remand, the trial Court dismissed I.A. No. 328 of 1991 on 8-4-1996. The trial Court observed that the suit itself was dismissed for default on 6-10-1993 and in that view of the matter, the necessity to deal with the application under Order IX Rule 13 C.P.C. does not arise.

5. The respondent-defendant filed LA. No. 388 of 1999 u/s 144 C.P.C. for restitution. By that time, the first petitioner (first plaintiff) died. Therefore, her son, by name Munuswamy, second petitioner herein, was impleaded. The other plaintiff in the suit was not added as a party. Through order, dated 2-9-2002, the trial Court allowed the LA, and directed re-delivery of Ac.0.56 cents of land from the second petitioner, together with mesne profits, at the rate of 2 putties of grain per acre per year. The same is challenged in this civil revision petition.

6. Sri V. Sudhakar Reddy, the learned Counsel for the petitioner submits that the application filed by the respondent was totally untenable in law. He contends that once the suit schedule property to O.S. No. 129 of 1999 was delivered to the respective parties, through the process of execution, and as long as the decree that constituted the basis was not set aside, the question of restitution does not arise. He contends that the directions issued by this Court in C.R.P. No. 3012 of 1992 in relation to restitution are totally outside the scope of that revision and at any rate, they are ancillary to the application filed under Order IX Rule 13 C.P.C. He contends that once the application under Order IX Rule 13 C.P.C. was dismissed, the occasion to seek restitution, much less to order the same, did not arise. The learned Counsel further points out that when there existed several parties in the decree and the execution was comprehensive, restitution at the instance of some of the judgment-debtors against some of the decree-holders is impermissible in law.

7. Sri P. Venugopal, the learned Counsel for the respondent, on the other hand, submits that the order passed by this Court in C.R.P. No. 3012 of 1992 constitutes the basis for the application filed by the respondent and it is not at all open to the petitioner to raise any objections for it. He contends that in a suit for partition, the necessity to file an E.P. arises, only after a final decree is passed, and in the instant case, the execution has taken place, on the basis of preliminary decree itself.

8. The proceedings started with the filing of the suit for partition by two daughters of Rajamma against their sisters. The suit was decreed ex parte on 19-9-1989. The parties have not placed before the Court, the copy of the judgment or decree in the suit. It is not clear as to whether the one passed on

19-9-1989 is a preliminary, or a comprehensive decree. The decree holders filed E.P. No. 86 of 1990. The bailiff was issued warrant to deliver 56 cents each, to the plaintiffs and defendants out of the suit schedule land. When the respondent herein and the other judgment-debtor caused obstruction, police aid was extended, and ultimately, the decree was execution on 10-6-1991.

9. It is thereafter, that the respondent herein and her other sister, by name Maramma, who are the defendants, filed LA. No. 328 of 1991 under Order IX Rule 13 C.P.C for setting aside the ex parte decree and the same was allowed on 22-6-1995. As observed earlier, this application was filed against Bhupathamma alone. While disposing of LA. No. 328 of 1991, the trial Court made an observation to the effect that the execution of the decree itself was incompetent, since there was no final decree. It proceeded to observe that the mistake committed by it can be corrected by setting aside the ex parte decree.

10. While dealing with C.R.P. No. 3012 of 1992, this Court was impressed by the fact that the trial Court did not address itself to the question as to whether the respondent herein and her sister, who were defendants in the suit, were served with summons, and if so, whether they offered proper explanation for their lapse in prosecuting the suit, before it has chosen to set aside the ex parte decree. The relevant portion of the order reads as under:

Though the Court below also noted the contention of the defendants that they were not aware of the proceedings in O.S. No. 129 of 1989, and no summons were served on them, but did not consider it. Thus, the Court below did not advert to the important aspect of the case whether the defendants were duly served with summons or not or whether they were prevented by sufficient cause or not as required by Order 9 Rule 13 of C.P.C. It was necessary for it to do so. Therefore, the impugned order is not considering the same is illegal and without jurisdiction and the same is liable to be set aside.

Accordingly, the order in LA. No. 328 of 1991 was set aside and the matter was remanded to the trial Court. Had the matter ended there, the further complications would not have arisen.

11. Having decided to remand the matter, this Court proceeded to approve the observation made by the trial Court, to the effect that in a suit for partition, there cannot be any execution, in the absence of a final decree. Reference was made to Section 54 of C.P.C., which provides for the steps to be taken by a Collector, where there exists a preliminary decree in respect of agricultural lands, forming part of an estate. On that premise, it was directed that the proceedings must start from the stage, where the preliminary decree was passed, and that the parties must be put in the same position, which they occupied by the date of ex parte decree. The relevant portion of the order reads as under:

Hence, the proceedings have got to be started from the stage, a preliminary ex parte decree was passed against the defendants on 19-9-1989, by putting the parties in the position they occupied as on that date. It goes without saying that

the person who was in possession of whatever the property as on that date, that is, as on 19-9-1989 had got to be put in possession of the same. For that purpose, I order restitution of the property to the person from whom the property was taken in pursuance of the illegal execution proceedings. Accordingly, I pass the following order:

The civil revision petition is allowed and the impugned order is set aside subject to the above observation and the proceedings shall be started from the stage "as on 19-9-1989" and the petition filed under Order 9 Rule 13 C.P.C. shall be decided afresh on the material available on record. The parties shall be put in possession of their respective properties they occupied as on 19-9-1989 by effecting necessary restitution.

12. This Court finds a very delicate and peculiar situation, in analyzing the scope and ambit of the order passed in C.R.P. No. 3012 of 1992. It is not in dispute that the revision was filed against an order passed in the application filed under Order IX Rule 13 C.P.C. There could have been some scope or possibility for considering the feasibility of directing restitution, if the order of the trial Court, setting aside the ex parte decree, was affirmed. However, when the order passed by the trial Court was reversed and consequently the ex parte decree was revived, the occasion to direct restitution did not arise. In a way, such course of action became impossible.

13. It has come on record that the possession of the property was delivered in pursuance of the orders passed in E.P. No. 86 of 1990. The judgment-debtors in the E.P. did not file any revision or other proceedings challenging the orders passed therein. Therefore, there was no occasion, or possibility either for the trial Court or for this Court to examine the validity and legality of the delivery of possession of the property in favour of the decree-holders.

14. Assuming that, being a Court vested with supervisory jurisdiction, this Court was entitled to deal with such aspects, even in the absence of a formal application, it needs to be seen as to how far the direction issued by this Court for restitution accords with law. The only basis, on which the said direction was issued, was that in a suit for partition, the execution can take place, only after a final decree is passed, and that such a final decree did not exist in the instant case.

15. C.P.C. provides for passing of different kinds of decrees, depending on the nature of subject-matter of the suit. The definition of "decree" takes in its fold not only a formal adjudication which disposes of the suit, but also the preliminary and final decrees. For most part of it, a decree passed in a suit would bring about the final adjudication and resolution of the dispute before it. However, there are instances, where adjudication of certain aspects is rendered in a form of a preliminary decree and further steps on the basis of such adjudication are to be carried in a separate set of proceedings, which give rise to final decree. It is mostly a matter of convenience than of requirement of law.

16. By and large, in the suits for partition, dissolution of partnership, foreclosure or redemption of mortgages, or for the relief of administration, preliminary decree and final decree are passed. However, it is not mandatory that the two kinds of decrees must be passed invariably. Much would depend upon the nature of controversy and the type of exercise, if any, to be undertaken by the Court. In a suit for partition, the preliminary decree is devoted to determination of rights of the parties and the final decree, wherever it is contemplated, is limited to supplementing the preliminary decree with necessary details. The language of Rule 18 of Order XX C.P.C. provides for ample guidance in this regard, which reads as under:

18. Decree in suit for partition of property or separate possession of a share therein.- Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

(1) If and insofar as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;

(2) If and insofar as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

17. From this, it is clear that the Sub-rule (1) relates to the properties, which are part of an estate. As regards other immovable properties, Sub-rule (2) becomes relevant. A perusal of the same discloses that the necessity to pass a final decree would arise if only "the partition or separation cannot be conveniently made without further enquiry". In other words, if the partition or separation can be made, without further enquiry, the necessity to pass a preliminary decree and to undertake further steps to pass a final decree does not arise. In addition to determining the shares of the parties and ascertaining the properties available for partition, if the Court is able to divide the properties and allocate the shares, the suit can be disposed of in one stroke. In the cases, where the property is such that it is already divided into definite parts or shares and they can conveniently be allotted to the parties, the whole dispute can be resolved through a single decree. In fact much time can be saved through this process. There is sufficient support for this, in the form of precedents.

18. In Venkatasubhamma v. Venkatappaiah Sastri 1971 (2) ALT 212, a Division Bench of this Court held that it is not necessary that a final decree must invariably be passed in a partition suit. The relevant portion reads as under:

The mere fact that preliminary decree usually precedes the final decree in a suit

for partition is no reason to hold that the decree in the instant case is not a final decree as it is equally well established that it is open to a Court to straightaway make a final decree without the need to pass a preliminary decree in cases in which it is possible and convenient to do so, and when the contents of the decree in the present case point to the irresistible conclusion that the decree is and was intended to be final decree. *Sultan Singh v. Bahadur Singh* 17 Indian Cases 300 , is an authority for the proposition that there is no reason why in a partition suit, where the claim is for a certain share in joint property, a final decree should not be passed in the first instance, especially where the subject-matter of the suit is a house and the shares can be ascertained without difficulty in execution. It was further held in this decision that a decree in a partition suit directing the plaintiff to receive possession, by a partition of a definite share in a house is not merely declaratory and is capable of execution. It was likewise held in *Chalapathy v. Subramanya* AIR 1933 Mad. 516, that in a consent decree no preliminary decree is obligatory in a partition suit....

19. Reverting to the facts of the case, it was not even alleged by the respondent that what was passed on 19-9-1989 is a preliminary decree. On the other hand, in I.A. No. 328 of 1991, they prayed for setting aside "ex parte decree". Further, when E.P. No. 86 of 1990 was filed, the executing Court did not find any difficulty in enforcing the same. These facts suggest that it was a comprehensive decree.

20. It hardly needs any emphasis that the occasion to file an application u/s 144 of C.P.C. would arise, only when the decree or order, on the basis of which the parties have changed their positions, has been set aside, in appeal, revision or review. In other words, it becomes impermissible to file an application u/s 144 of C.P.C, as long as the order, that brought about change in the positions of the parties, remains in tact. In the instant case, the first petitioner got possession of Ac.0.56 cents of land, in pursuance of the decree passed in the suit. That decree remains in tact, even now. It was set aside only once, by the trial Court through its order in I.A. No. 328 of 1991 and the said order was reversed by this Court in C.R.P. No. 3012 of 1992. The matter was remanded for fresh consideration. After such remand, the I.A. was dismissed on 8-4-1996. The result is that the ex parte decree became final. Therefore, the entire proceedings were contrary to law. The observation of this Court directing restitution, runs contrary to the law laid down by a Division Bench of this Court, and the purport of Rule 18 of Order XX CPC. To that extend it needs to be treated as per incuriam.

21. There are several inherent contradictions and errors that crept into the whole episode. A perusal of the order under revision discloses that the suit was dismissed for default on 6-10-1993. On this premise, the trial Court felt that the necessity to deal with application under Order IX Rule 13 C.P.C. does not arise, after remand. The relevant portion reads as under:

After receipt of orders in C.R.P. No. 3012 of 1992 dated 14-7-1995, this Court conducted enquiry in the petition under Order 9 Rule 13 C.P.C. and passed orders on 8-4-1996 stating that the disposal of this petition afresh does not arise now,

as the suit itself was dismissed for default long back on 6-10-1993.

22. Firstly, when the suit was decreed ex parte on 19-9-1989, the question of the same having been dismissed for default on 6-10-1993 did not arise. It is plausible to plead that a suit for partition shall remain pending, till a final decree is passed. In the instant case, no final decree proceedings were contemplated or initiated and the only decree passed in the suit was executed way back on 10-6-1991. Therefore, the question of the suit being dismissed for default, that too after the decree therein was executed, is not only strange but also something which is out of question. The matter becomes further curious from the fact that the trial Court passed an order, dated 22-6-1995, in LA. No. 328 of 1991 setting aside the ex parte decree, dated 19-9-1989. If, in fact, the suit was dismissed for default on 6-10-1993, it is not known as to how and why the trial Court has chosen to set aside the decree in 1995. The very basis for this Court to pass the order in C.R.P. No. 3012 of 1992 was, the existence of an ex parte decree.

23. In a suit for partition, all the parties are equally interested and important, irrespective of the fact whether one figures as plaintiff or defendant. Any steps, in such a suit, can be taken with the participation of all the parties. The reason is that the effect of any step is felt by all the parties and there cannot be any proceedings by or against any selected parties in such a suit. That being the case, the application to set aside the ex parte decree was filed against the first plaintiff alone. No explanation is offered as to why the second plaintiff was omitted in I.A.No. 328 of 1991. Whatever may have been the basis for filing LA. No. 328 of 1991 in such a form, there was no justification in filing the application for restitution u/s 144 of C.P.C., only against one of the legal representatives of the first plaintiff. Even this application did not precede any steps to bring the legal representatives of the deceased-first plaintiff. No explanation was offered for omitting the second plaintiff and the second defendant from the array of the parties. The trial Court did not examine any of these aspects and proceeded to allow the application.

24. The direction as to restitution issued by this Court in C.R.P. No. 3012 of 1992 was incidental to the remand of LA. No. 328 of 1991. Once that application was dismissed after remand, there did not exist any basis for institution, or consideration of application u/s 144 CPC. Even if the restitution was otherwise permissible, an enquiry ought to have been restricted to the examination of rights of the parties, as they stood, before the decree came to be executed. This Court did not issue any directions about mesne profits. However, the respondent claimed mesne profits also. Here again, it must be noted that mesne profits is a matter, which can constitute the subject-matter of independent enquiry. But, the trial Court has chosen to order the application for restitution as well as mesne profits with effect from the date of execution of the decree.

25. For the foregoing reasons, the civil revision petition is allowed and the order under revision is set aside. It is, however, made clear that it shall be open to the parties to work out their remedies, strictly in accordance with law, in case they

intend to prosecute them. There shall be no order as to costs.