
(1996) 04 AP CK 0055

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 57 of 1996 and A.S. No. 1766 of 1993

Smt. Sripathi Susheela

APPELLANT

Vs

Smt. K. Venkata Ramana Rajeswari Devi

RESPONDENT

Date of Decision : 23-04-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 96

Citation : (1996) 3 ALT 753

Hon'ble Judges : S. Parvatha Rao, J;A.S. Bhate, J

Bench : Division Bench

Advocate : G. Krishna Murthy, in LPA and C.P. Sarathy, in A.S, for the Appellant;
I. Sreeram Murthy, for the Respondent

Judgement

A.S. Bhate, J.—This is a peculiar appeal preferred by defendant No. 3 against defendant No. 5. None of the plaintiffs or the other defendants have been made party to this appeal. In the circumstances, the maintainability of such appeal is the primary question which has been argued before us by the learned Counsel on both the sides.

2. O.S. No. 347 of 1980, in the Court of the learned Principal Subordinate Judge, Guntur, was initiated by Smt. K. Susheela and her two daughters named Jayasree and Vasundhara. The suit was instituted for obtaining a declaration that the said plaintiffs were entitled to the suit schedule properties according to their shares. The total share claimed by the plaintiffs was 6/8th. Consequently relief of partition and possession of the said property, according to their share, along with future mesne profits was also claimed. One K. Jaya Ramayya was the owner of certain ancestral properties out of the suit schedule properties. The said Ramayya died some time before 1987. He left behind his widow K. Laxmi Narsamma alias Maggamma and his son named K. Ganeswara Rao. Dr. K. Ganeswara Rao died on 4-1-1964. Thus he predeceased his mother Narsamma alias Maggamma. The said Maggamma died on 30-7-1973. Plaintiff No. 1 K. Susheela filed the suit in 1980. Her daughters were the other co-plaintiffs.

Plaintiff No. 1 Susheela claimed that she was married to Dr. K. Ganeswara Rao and the said marriage was celebrated on 16-5-1943 at Madras. Defendant No. 1 in the suit K. Subbamma was the first wife of said Dr. K. Ganeswara Rao. However, she had no issue and that is why Sri Ganeswara Rao entered into second marriage with first plaintiff. Defendants 2 and 3 were the sisters of deceased Ganeswara Rao. Defendants 4 and 6 are two Sanghams. Defendant No. 5 is the daughter of sister of defendant No. 1 K. Subbaramamma. It may be pointed out that defendant No. 5 was brought on record, on 20-7-1987 during the pendency of the suit as defendant No. 1 expired. Defendant No. 5 has been brought on record as legal representative on the strength of a "Will" which was allegedly executed by defendant No. 1 before her death.

3. As pointed out already K. Ganeswara Rao pre-deceased his mother Narsamma alias Maggamma and all property of the family whether ancestral or acquired by K. Ganeswara Rao was in possession of Narsamma till her death. The plaintiffs contended in the suit that as plaintiff No. 1 was widow of K. Ganeswara Rao, she along with defendant No. 1 was entitled to joint 1/4th share. Thus each of them were entitled to 1/8th share. Plaintiffs 2 and 3 being daughters of K. Ganeswara Rao were entitled to 1/4th share each and defendants 2 and 3 being daughters of deceased Narsamma alias Maggamma, were also entitled to 1/8th share each, as Maggamma was entitled to 1/4th share in the said property. Defendants 2 and 3 could get the share of Maggamma only. Defendants 2 and 3 had apparently created some Trust making Endowment in the name of the fourth defendant and some of the items of the schedule property were transferred to the said Trust.

4. The Defendants 2 and 3 filed a counter which was adopted by defendant No. 1. The main stand taken in the counter was that plaintiff No. 1 was not a legally wedded wife of Dr. Ganeswara Rao and therefore, plaintiffs 2 and 3 were not the legitimate children of Dr. Ganeswara Rao. The deceased Narasamma and defendant No. 1 were the only heirs to the property left behind by Dr. Ganeswara Rao. After death of Narasamma alias Maggamma her share went to defendants 2 and 3 and they had created a Trust which was valid. Plea of limitation and adverse possession was also taken as alternate plea. It was contended that even if plaintiff No. 1 was a legally wedded wife she was not entitled to the share claimed because all the property was an ancestral property and the devolution of shares would be different.

5. As pointed out earlier defendant No. 5 was brought on record after the death of defendant No. 1. She was allowed to file her separate written statement. She contended that a Will was executed by the deceased-defendant No. 1. It was executed on 29-9-1985 and registered on 30-9-1985 at Vijayawada. Under the said Will which was a valid one Defendant No. 5 became the sole owner of the property left behind by the deceased. The defence of defendants 4 and 6 is not material for decision of the said suit.

6. The learned Trial Judge raised several issues. The main issue was as follows:-

"Is not the first plaintiff is the wife and plaintiffs 2 and 3 the daughters of late Ganeswara Rao?"

An additional issue was framed on 16-1-1991 which is as follows:-

"Whether the Will dated 29-9-1985 executed by defendant No. 1 is true, valid and binding on the plaintiffs and defendants?"

7. The learned Trial Judge after a detailed examination of evidence adduced before him came to the conclusion that the first plaintiff was not the legally wedded wife of deceased-Ganeswara Rao. In para 20 of the judgment the learned Trial Judge held thus:

".....the 1st plaintiff was married to M. Rama Rao prior to living with Dr. Ganeswara Rao as wife and as the marriage between the 1st plaintiff and M. Rama Rao was not dissolved, therefore, the 1st plaintiff and Dr. Ganeswara Rao living together as wife and husband till the death of Dr. Ganeswara Rao i.e., till 1964 can only be treated that the 1st plaintiff was only a kept mistress of Dr. Ganeswara Rao but not the legally wedded wife of Dr. Ganeswara Rao as their marriage was not solemnized as per Hindu Marriage Act."

The learned Trial Judge further went on to discuss the validity and genuineness of the Will which was propounded by defendant No. 5 and held as follows:-

"I therefore hold that the Will dated 29-9-1985 executed by defendant No. 1 is true, valid and binding on the plaintiffs and defendants and accordingly this issue is answered."

8. Holding as above, the learned Trial Judge dismissed the suit of the plaintiffs and a decree was accordingly passed. No appeal was preferred by any of the plaintiffs against whom the decree was passed.

9. This appeal has been preferred by defendant No. 3 against defendant No. 5. We have already pointed out that nobody else has been joined as a party to this appeal. By the said appeal defendant No. 3 challenges the finding of the learned Trial Judge contending that the Will propounded by defendant No. 5 and which has been marked as Ex.B-24 is not a genuine and valid Will at all. It does not bind defendant No. 3 and the appeal has been filed for setting aside the said finding.

10. During the pendency of this appeal C.M.P. No. 4132 of 1995 was filed by the appellant (defendant No. 3) for claiming injunction under Order 39 Rules 1 and 2 CPC to restrain the respondent (defendant No. 5) or her agents, or relatives from alienating or entering into any transactions with third parties changing and altering the schedule properties. The said petition (C.M.P. No. 4132 of 1995) was dismissed by the learned single Judge. Against the said dismissal of the C.M.P. No. 4132. of 1995, LPA No. 57 of 1996 was presented and while arguing the said L.P.A. the learned Counsel for both parties requested that instead of L.P.A., the appeal itself may be disposed of by us as maintainability of the appeal was itself

highly questionable. That is how A.S. No. 1766 of 1993 has come up for hearing before us.

11. The facts stated already will show mat the plaintiffs lost the suit and the decree was totally in favour of defendants. The dismissal of the suit was on the basic ground that plaintiff No. 1 was not the legally wedded wife of deceased Ganeswara Rao. As she had no status as a widow of Ganeswara Rao, she had naturally no right or interest in the properties left behind by Ganeswara Rao, whether self-acquired or ancestral. Thus the decree was totally in favour of the defendants. The objection that has been raised by the learned advocate for the respondent in the circumstances is, that no appeal can lie by one defendant against the other merely against some finding given by the Court below. This is particularly so, in view of the fact mat the finding was not at all necessary for decision of the suit as laid by the palintiffs. On the other hand, the learned advocate for the appellant has contended that even though the appeal is only against a finding, the said finding is likely to operate as resjudicata as against the appellant in future litigation as between the same parties and therefore, unless the said finding is got set aside in the appeal, the appellant would suffer irreparable consequences.

12. On a careful consideration of the argument advanced by either counsel, we think that there is no room for any doubt whatsoever that appeal by the defendant against the other defendant is not maintainable merely to challenge a finding rendered by the Trial Court, when the decree is wholly in favour of the defendants. This is particularly so when the decree is not based on the finding which is challenged before us in the present appeal. It may be kept in mind mat defendant No. 5 has set up a Will, Ex.B-24 after she was brought on record as a legal representative of defendant No. 1. In other words, in the original suit as laid by plaintiffs, the issue regarding the genuineness or the validity of the Will had no place whatsoever. The case of plaintiffs did not in any way even remotely depend;on the Will in question. The case of plaintiffs could be demolished if plaintiff No. 1 was not the legally wedded wife of deceased-Ganeswara Rao. The finding on the Will one way or the other was totally irrelevant for deciding the claim of the plaintiff No. 1 in so far as she was seeking a declaration to her right in the property. We fail to understand as to how defendant No. 3 in such circumstances can have any grievance against the decree which was totally in her favour.

13. The right of appeal is not a natural right and it can be exercised only if any particular statute confers or provides for such a right in favour of a particular person. The right of appeal under C.P.C. is conferred by Section 96. Of course there are appeals provided against certain orders also u/s 104 C.P.C. read with Order 43 C.P.C. we are not concerned with those appeals Because this is not an appeal against any order. A very faint attempt was made to contend that though this is not an appeal against a decree, it may be treated as an appeal against an order of rendering a finding. The said argument is totally devoid of substance

because it had to be conceded by the learned advocate for the appellant that mere finding does not amount to any order and further that the provisions of Section 104 or Order 43 have no application. All orders are not appealable. Only those referred to in Order 43 are appealable.

14. Section 96 of the CPC so far as is relevant for our purposes is as follows:-

"Section 96: Appeal from Original decree.

(1) Save where otherwise expressly provided in the body of this Code or by any other Law for the time being in force a decree shall lie from every decree passed by any Court exercising the original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

A reading of this Section will immediately show that appeal lies from a decree passed by the Court. Therefore, unless there is a challenge to the decree no appeal can lie. This is the plain reading of Section 96 C.P.C.

15. There is considerable authority in support of this reading of ours of the provisions of Section 96 C.P.C. In S.R. Jaya Rao Vs. Venkatanarayana Chetty and Another, a Division Bench of the Madras High Court has pointed out:

"A party in whose favour a decree was passed could not appeal against the decree on the ground that the finding on one of the issues was against the party".

In that case a suit was brought by plaintiff contending that he was adopted son of one R. First defendant was the widow of R and the second defendant was daughter of the widow's brother. The first defendant set up a gift in favour of the second defendant. The District Munsif found against the alleged adoption but held that the gift set up was not a valid gift. The second defendant preferred an appeal against this finding and the learned Subordinate Judge upheld the validity of the gift. A Second Appeal was then preferred by the plaintiff and it was alleged that the second defendant was not competent at all to prefer an appeal against the decree of the Trial Court which was totally in his favour as the suit was dismissed for want of proof of adoption. The objection was upheld in the Second Appeal on the ground extracted above. There also it was urged that the finding that the gift was not valid might operate as res judicata in future litigation between the plaintiff and the second defendant. The Court observed:

"The opinion of the Judges of this Court is against the view that it is res judicata."

On such finding the appeal was allowed. The principle therefore was enunciated that there was no right of appeal to a party simply because the finding on a particular issue in controversy has been against him though the decree was given in his favour.

16. In Gogineni Bapayya Vs. Gogineni Ramakrishnayya and Others, which is again a Division Bench case² in a suit for partition of movables where the plaintiff had asked for partition, the suit was dismissed accepting the defendant's contention that the suit was bad and not maintainable. The defendant being

dissatisfied with some statements made in the judgment with regard to the moveables filed an appeal against the said judgment. It was observed:

"The defendants having secured dismissal of the suit as not maintainable in the manner prayed must accept the same and as there was nothing in the decree which would affect the defendants adversely and as no finding in the judgment operates as *res judicata*, no appeal by them is maintainable."

In the appeal before us also there is nothing in the decree which would adversely affect defendant No. 3 in any way.

17. In *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, the Trial Court decided all the issues which had arisen on pleadings between the parties. The final decision was based by Court on more than one point. Each of the findings by itself was sufficient for ultimate decision of the suit. It was held that each such finding which was recorded by the Court would operate as *res judicata* between the parties. The learned Advocate for the appellant has relied on this decision to contend that as each of the findings recorded by the Trial Court was held to operate as *res judicata*, defendant No. 3 is entitled to challenge the finding in instant case by preferring an appeal. He however forgets that the findings referred to in the case were all findings, which individually also were sufficient by themselves to dispose of the suit. Therefore, such a finding which has a nexus with the decision and decree in the case and on which a decree is based or can be based would operate as *res judicata* as per the decision in *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, . At the cost of the repetition it may be stressed that in the appeal before us it is an undisputed fact that the validity or otherwise of the Will has no bearing whatsoever on the claim made by the plaintiff and the decree is not in any way based on the validity or otherwise of the Will Ex.B-24. Thus *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, instead of being of any help to the appellant, goes against him.

18. In *Arjun Singh and Others Vs. Tara Das Ghosh and Others*, a Full Bench of the Patna High Court which was presided over by the Hon'ble Chief Justice N.L. Untwalia (as he then was) after considering the relevant case law including the decision in *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, held, "it is well settled that a party against whom a finding is recorded has got a right of appeal even though the ultimate decision may be in his favour if the findings can operate as *res judicata* in a subsequent suit or proceeding; if however it cannot operate as *res judicata* then such a party has no right of appeal". Therefore, the maintainability of appeal according to Patna High Court depended on the fact as to whether the finding which was sought to be challenged would operate as *res judicata* in the subsequent proceedings. If it operated as *res judicata* then even if the decree was otherwise in favour of the party appealing, the party would have right to prefer an appeal. Even if the said test is applied in the appeal before us, it would immediately be clear that the finding that Will Ex.B-24 was a valid one in favour of defendant No. 5, can hardly

operate as res judicata in the subsequent proceedings between the parties. A finding will operate as res judicata in the subsequent proceedings only if such a finding is necessary for decision in the suit. This is apart from the other requirements of Section 11 C.P.C. As pointed out already, the validity of the Will was not at all a finding necessary for deciding the plaintiffs' claim in the present suit. In other words the finding has no remote connection with the suit of the plaintiffs for declaration in their favour of right to the property. In the circumstances, such a finding which was uncalled for, for deciding the plaintiffs' case and for passing the decree, cannot give any right to the party in whose favour decree has been passed to prefer an appeal.

19. The most important authority for our consideration is in Smt. Ganga Bai Vs. Vijay Kumar and Others, . Their Lordships laid down Law on the subject as follows:-

"The provisions of Sections 96, 100, 104(1), 105 read with Order 43 Rule 1 of the Code show that an appeal lies only against a decree or an order passed under rules from which an appeal is expressly allowed by Order 43 Rule 1 C.P.C. No appeal can lie against a mere finding for the simple reason that the Code does not provide of any such appeal. (underlined to emphasise)."

20. In the appeal before the Supreme Court the same was filed only to challenge the findings recorded by the Trial Court. The finding was regarding partition of property which was directly and substantively in issue in the main suit. It was pointed out that the finding was unnecessary and had no impact on the decision of the suit and therefore it could not operate as res judicata. The facts of the said case were that defendant No. 1 executed on behalf of himself and his minor son-defendant No. 2, a mortgage deed in favour of the plaintiff. Defendant No. 3 was another son of defendant No. 1 but he was born after the execution of the mortgage deed. About three years after the mortgage deed was executed, a registered deed of partition was executed amongst the defendants and under the said partition the mortgaged property was allotted to the shares of sons (defendants 2 and 3). About nine months after the said partition the mortgagee filed a suit to enforce the mortgage. The Trial Court passed a preliminary decree for sale of interest of defendant No. 1 in the mortgaged property. The Court found that the consideration for the mortgage was not supported by legal necessity. The debt was held not binding on the 1/2 share in the mortgaged property. The trial Court further held on the issue relating to genuineness of partition between the father defendant No. 1 and his sons, that the same was sham and colourable with an object to delay or defeat the creditors. Two separate appeals were filed, one by defendant No. 1 i.e., by the father and the other by defendants 2 and 3. Defendants 2 and 3 filed the appeal only for challenging the finding that the deed of partition was sham and colourable. In the appeal the High Court set aside the finding of the Trial Court and held that "the partition was real and genuine". The High Court further held. that "defendants 2 and 3 had become the owners of equity of redemption and they

could not be deprived of the right to redeem the mortgage. In the Supreme Court it was urged that the appeal filed by defendants 2 and 3 against the judgment of the Trial Court was really not maintainable as it was only against a finding recorded by the Trial Court. The Supreme Court observed that the position was well established and then laid down the Law as stated earlier.

21. The learned Advocate for the appellant has however, submitted that in the aforesaid Supreme Court decision it was observed that the view of the Calcutta High Court in Hara Chandra Das v. Bhola Nath Das ILR (1935) Cal 701 that "On grounds of justice" there could be an appeal against a mere finding, provided that it would operate as resjudicata so as to preclude a party aggrieved by the finding from agitating the question covered by the finding in any other proceeding, was left open. The Supreme Court had observed "it is not necessary here to determine whether the view of the Calcutta High Court is correct". The learned advocate for the appellant submits that the Calcutta High Court's view which has not been overruled by the Supreme Court supports his contention that the appeal against a mere finding is maintainable. The learned Counsel is mistaken. A careful reading of the Hara Chandra Das's case ILR (1935) Cal 701 shows the following observations:-

"It may be taken to be the view of Courts in India generally, that a party to the suit adversely affected by a finding contained in a judgment, on which a decree is based, may appeal, and the test applied in some of the cases for the purpose of determining whether the party has been aggrieved or not was whether the finding would be res judicata in the other proceedings, (underlined to give emphasis)."

Therefore even in the Hara Chandra Das's case ILR (1935) Cal 701 a clear enunciation is made that only findings contained in the judgment on which a decree is based can be challenged. The decree of trial Court in present case is not based on impugned finding, challenged by the appellant. In fact in Ground No. 15 of the Memorandum of Appeal, the appellant has himself stated as follows:-

"The lower Court ought to have seen that it is not necessary to dispose of the suit to give a finding on the validity of the Will."

Thus the appellant himself concedes that the validity of the Will had nothing to do for deciding the plaintiffs' claim. In view of this it is quite clear that the decree passed by the Trial Court was not based at all on the finding sought to be challenged in the appeal.

22. Yet another important decision which we must refer to is in Konda Lakshman Bapuji Vs. The State of Andhra Pradesh and Others, . This again is a Division Bench decision and is of our High Court. This judgment has in clear terms analysed the whole legal position after considering the case law right from 1925. The facts in the said case were that the plaintiff sued four defendants originally for obtaining declaration of his title to certain land and also for possession of the

land. The other defendants were impleaded later on. The plaintiff alleged that he was the Inamdar of the suit land and was wrongfully dispossessed by the Government. State of Andhra Pradesh was the first defendant and the second defendant claimed to be the rival Inamdar in respect of the suit lands. Defendants 3 and 4 were grantees of part of land from defendant No. 2. Defendants 5 to 8 were also different grantees. Defendants 9 to 77, claimed share in the suit land along with defendant No. 2. Remaining defendants were subsequent purchasers. The learned Trial Court raised several issues and dismissed the suit as plaintiff failed to prove his claim to the suit property. However, the Trial Court went further and also recorded a finding that except defendant No. 1 the other defendants failed to prove their title. The suit was accordingly dismissed. The fourth, eighth and second defendants filed separate appeals to challenge the said finding. A preliminary objection was raised about the maintainability of the said appeals preferred by these defendants. This Court held in para (6) of the judgment thus:

"It is well settled that a party, who has been adversely affected by the decree can alone/appeal against it. In a case where a finding has been recorded against the defendant but the suit has been dismissed, he may challenge that finding if it is *resjudicata* and is binding upon him in future."

The Court held at later point thus:

"However, if the plaintiff's suit can be dismissed without recording any finding against the defendant and yet if a finding has been recorded against the defendant then such a finding is of no consequence because the success or failure of the plaintiff's suit is not interlinked with it and in a large number of cases depends upon the proof or otherwise of his own title."

The Court went on to hold that the defendants, who had filed the appeals were not adversely affected by the finding because the decree which was passed by the learned Trial Judge was entirely in their favour. Thus the appeals were held to be not maintainable. With respect we are bound by the decision in *Hara Chandra Das's case* (6 *supra*) and in *K.L. Bapuji's case* (7 *supra*) and we also are in fact of the same view.

23. Lastly in *Corporation of Madras Vs. P.R. Ramachandriah and Others*, . it was held by the Bench of which Justice Ratnavel Pandian (as he then was) was a member "it is well settled that the party not aggrieved by the decree is not competent to appeal against the decree on the ground that the issue is found against him."

24. Apart from the authorities referred above in *Corporation of Madras Vs. P.R. Ramachandriah and Others*, a Full Bench of the Court observed:

".....the appeal filed by the appellant is not maintainable because the decree of the lower appellate Court, as it stands has undoubtedly been in favour of the appellant and the appellant cannot have any right of appeal against a finding

when that finding does not affect the decree which is wholly in his favour."

25. From consideration of the authorities we find no difficulty whatsoever in holding as follows:-

It was not at all necessary for the learned Trial Judge to adjudicate upon the validity or otherwise of Will Ex.B-24 for deciding the plaintiff's claim for declaration of right to share in the suit property. We further hold that a party in whose favour a decree has been passed cannot appeal against the decree merely on the ground that a finding on one of the issues is against him. The finding which is recorded against a party must have some nexus with the grounds on which the decree is passed. If it has no such nexus then such a finding being unnecessary, and uncalled for decision in the suit, cannot give any right to the party against whom such finding is given, to file an appeal. This is because the CPC provides for an appeal only against a decree by an aggrieved person. No appeal is provided against a mere finding. The party not aggrieved by a decree is not competent to appeal against the decree merely because an issue has incidentally been decided in the case against it. In other words while dismissing the suit in the instant case, it was not at all necessary for the learned Trial Court to decide the controversy arising out of the Will which concerned the rights of defendant No. 5. The finding recorded by the said controversy is inconsequential for the decision of the suit. In the circumstances, no appeal would lie against that finding at the instance of any of the defendants even though they may feel aggrieved by it.

26. In view of the conclusions reached by us we find that the appeal in the instant case is not maintainable and has to be dismissed. No order as to costs.

27. As we are dismissing the Appeal Suit No. 1766 of 1993, L.P.A. No. 57 of 1996 becomes infructuous and is disposed of accordingly.