

(2007) 09 AP CK 0005

In the Andhra Pradesh High Court

Case No : Second Appeal No. 637 of 1998

Sri Durasula Dakshina Murthy

APPELLANT

Vs

Smt. Vajjala Vijaya Kumari

RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9

Citation : (2008) 1 ALD 347

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : C. Subba Rao, for the Appellant; P. Rajasekhar, for the Respondent

Judgement

P.S. Narayana, J.—Heard the Counsel on record.

2. This court, on 17.08.1998, made an order in the Second Appeal "Admit on substantial question of law raised in ground No. 10", and in C.M.P. No. 15943 of 1998, this Court granted interim stay until further orders. Subsequently, C.M.P. No. 1453 of 1999 was filed to vacate the said interim order, and on 15.12.1999, this Court made the following order:

Having regard to the facts and circumstances and having regard to the fact that the interim order was passed on 17.08.1998, the stay order made absolute.

Expedite the hearing of the second appeal.

3. Thus, the second appeal is coming up for final hearing.

4. The substantial questions of law which arise for consideration in this Second Appeal are as hereunder:

1) The plaintiff's suit should have been dismissed on the admission made by the plaintiff that they came to know that the property belonged to the mother of the defendant and the suit is not filed against the mother of the defendant and as such it is not maintainable?

2) The lower Court failed to exercise the jurisdiction vested in it and the duty cast upon it to dismiss the suit as owner of the property has not been added and as such cannot go into the merits of the case?

5. The appellant herein-the unsuccessful defendant being aggrieved of the Decree and Judgment made in A.S. No. 80 of 1995 on the file of III Additional District Judge, Visakhapatnam, confirming the decree and Judgment made in O.S. No. 810 of 1989 on the file of the Additional District Munsif, Visakhapatnam, had preferred the present Second Appeal. Respondent as plaintiff instituted the said suit for declaration that the appellant-defendant has no right to construct the northern side wall and for a mandatory injunction and direction to the defendant to remove the wall facing on the northern side of the plaintiff's building and to permit the plaintiff to remove the said wall in case the defendant fails to remove the said wall and for other reliefs.

6. In the light of the respective pleadings of the parties, having settled the issues, the Court of first instance recorded the evidence of P.W. 1 and D.W. 1, marked Ex. A.1 to Ex. A.23 and ultimately decreed the suit with costs. Aggrieved by the same, the defendant carried the matter by way of appeal A.S. No. 80 of 1995 on the file of III Additional District Judge, Visakhapatnam and the appeal also was dismissed with costs. Aggrieved by the same, the present Second Appeal is preferred.

7. The substantial questions of law raised in the Second Appeal already had been specified supra.

8. Before the appellate Court Ex. B.1 - certified copy of Judgment in O.S. No. 224 of 1989 on the file of I Additional Sub-Judge, Visakhapatnam and Ex. B.2 - the approved plan for the Building bearing Door No. 29-2-38, at Jail Road, Visakhapatnam were marked.

9. It was pleaded in the plaint as hereunder:

The plaintiff is the owner of a house and the defendant is having a vacant site to the north of the plaintiff's property and that the defendant started construction of the building in a vacant site without leaving any space on his southern side i.e., in the north of the plaintiff's property and without obtaining an approval from the Municipal Corporation and by violating the building Rules and Zoning Regulations and that the plaintiff and her husband obstructed the defendant, at the time of digging the foundation itself and the plaintiff and her husband made complaints to the Municipal Corporation and the Municipal Corporation did not take any action and that the defendant promised not to open any windows to his southern side wall of the first floor wall and that the defendant is proclaiming to fix up wooden windows to his southern side wall of the first floor. As the defendant has not left any space on his southern side, he is not entitled for opening the windows and he has not made any arrangement to allow the rain water of his building to drain out and as such the suit is filed for the above reliefs.

10. The defendant filed written statement denying the allegations made in the plaint which is as hereunder:

the plaintiff and her husband causing trouble to the defendant right from the beginning of the construction and that the defendant completed his southern side house wall long back and that the defendant is not the owner of the property and that the defendant is helping the owner of the property and that the plaintiff has nothing to do with building of the defendant and as such requests the Court to dismiss the suit.

11. On the strength of these pleadings, the following issues were settled:

- 1) Whether the plaintiff is entitled for a declaration as prayed for?
- 2) Whether the plaintiff is entitled for mandatory injunction as prayed for?
- 3) Whether the suit is bad for non-joinder of necessary parties?
- 4) To what relief?

12. It is pertinent to note here itself that issue No. 3 is whether the suit is bad for non-joinder of necessary parties. During the course of trial, plaintiff examined herself as P.W. 1 and Ex. A.1 to Ex. A.23 were marked.

13. The court of first instance, on appreciation of the oral and documentary evidence available on record, came to the conclusion that the plaintiff is entitled to a decree and accordingly decreed the suit. It may be appropriate to have a look at the findings recorded by the Court of first instance while answering issue No. 3 at paragraph No. 10 of its judgment:

The contention of the defendant in the written statement is that the suit is bad for non-joinder of necessary parties. The contention of the defendant is that the property belongs to his mother and he deposed that he supervised the construction. There is no evidence before the court that the property is that of his mother. It is evident that the defendant is responsible for the construction. In the absence of any such positive evidence with respect to the title of the property situated to the north of the plaintiff's property, I hold that the suit is not bad for non-joinder of necessary party.

14. The unsuccessful defendant being aggrieved of the said decree and judgment, carried the matter by way of appeal A.S. No. 80 of 1995 on the file of III Additional District Judge, Visakhapatnam, and the appellate court at paragraph 8 of its judgment framed the following points for consideration:

- 1) Whether admission made by PW 1 to the effect that defendant constructed his house within his site without encroaching into the site of PW 1 is sufficient enough to dismiss the suit? and
- 2) Whether the decree and judgment of the lower court is liable to be set aside on any other ground?

15. The appellate court answered points 1 and 2 commencing from paragraphs 10 to 13 and ultimately dismissed the appeal with costs. Before the appellate court Ex. B1, dated 30.04.1992 - certified copy of judgment in O.S. No. 224 of 1989 on the file of I Additional Sub-Judge, Visakhapatnam, and Ex. B2, dated 16.01.1989 - approved plan for the building bearing Door No. 29-2-38 at Jail Road, Visakhapatnam, had been marked. The appellate court at paragraph 9 of its judgment observed thus:

On a perusal of Ex. B1 which is a certified Xerox copy of judgment in O.S. No. 224 of 1989 on the file of I Additional Subordinate Judge, Visakhapatnam, it is found the said suit was filed by the defendant herein and his mother against Municipal Corporation of Visakhapatnam. The allegation made therein is to the effect, the plaintiffs (defendant herein and his mother) are owners of the plaint schedule property bearing Door No. 29-2 situate in T.S. No. 1670. The defendant herein and his mother are only L. Rs of the father of the defendant who purchased that house in the year 1954. Ex. B1 shows that O.S. No. 224 of 1989 was filed for declaration that the notice dated 29.03.1989 issued by Municipal Corporation is illegal and arbitrary. It is found in Ex. B1 judgment, the plaintiffs alleged in course of their plaint to the effect, the Municipal Corporation approved the plan on 16.01.1989 in B.A. No. 2229/888. Ex. B2 is the said approved plan dated 16.01.1989. According to the defendant herein, construction was made by him in pursuance of Ex. B2. On a perusal of Ex. B2 Door Number is mentioned as 29.02.1938 at Jail Road. The house of the respondent-plaintiff herein is bearing Dr. No. 29-2-37 at Jail Road. The plaintiffs in O.S. No. 224 of 1989 filed the said suit for a declaration against Municipal Corporation in respect of very same building which the respondent-plaintiff herein is challenging. In view of the plaint allegation made in O.S. No. 224 of 1989 that the suit property was purchased by the father of the first plaintiff and husband of the 2nd plaintiff in O.S. No. 224 of 1989, the contention of the appellant-defendant herein who is the first plaintiff in O.S. No. 224 of 1989 that he is not the owner of the property is untenable.

16. The counsel on record Sri C. Subba Rao, representing the appellant and Sri P. Rajasekhar, representing the respondent made elaborate submissions on the aspect of non-joinder of necessary party and also relied upon certain decisions to substantiate their respective stands. It is also brought to the notice of the Court that at present the mother of the appellant is also no more. Much comment had been made on the plea taken by the appellant as defendant on the aspect of non-joinder of necessary party. It is needless to say that the specific issue framed in this regard had already been referred to supra.

17. Strong reliance was placed on the decision in Laxmishankar Harishankar Bhatt Vs. Yashram Vasta (dead) by L.Rs., , wherein the apex Court, while dealing with Order I Rule 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC" for short for convenience) on the aspect of dismissal of suit for non-joinder of necessary parties, observed that the suit for recovery of possession-Plaintiff purchaser claiming to have acquired entire ownership of suit property

and the plea by defendant-tenant that suit is liable to be dismissed for non-joinder of co-owners - No averments, however, in written statement as to who are other co-owners and what rights they claim the suit cannot be dismissed for non-joinder on such vague plea.

18. The apex Court had referred to A. Viswanatha Pillai and others Vs. Special Tahsildar for Land Acquisition No. IV and others, , Pal Singh Vs. Sunder Singh (Dead) by Lrs. and Others, , Kanta Goel Vs. B.P. Pathak and Others, , Sri Ram Pasricha Vs. Jagannath and Others, , Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and Others, .

19. In Meghavaranam v. Md. Mohideen Sahib AIR 1936 Mad. 782 Wadsworth, J, the learned judge of the Madras High Court, held that if the defendants wish to object to a suit on the ground of non-joinder of parties, it is incumbent upon them to state who are the parties that should have been joined and what is the nature of their interest in the suit. It is not incumbent on the plaintiffs to make researches to discover the identity of supplemental defendants who in their opinion were not necessary, at any rate until the defendants raising the objection had given such information as would enable the plaintiffs to implead them. Nor is it necessary for the plaintiffs to take the trouble themselves by serving interrogatories upon the defendants to ascertain the names of possible supplemental defendants.

20. It may be appropriate to have a look at order I Rule 9 of CPC, which deal with the misjoinder and non-joinder and the said provision reads as hereunder:

9. Misjoinder and non-joinder - No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

(Provided that nothing in this rule shall apply to nonjoinder of a necessary party.)

21. In Ragho Prasad Gupta Vs. Shri Krishna Poddar, , the apex Court, while dealing with the proceedings between Benamidar and third party, and Binamidar died and his heirs were brought on record, an application by real owner for being brought on record was dismissed, and decree against heirs of benamidar, on facts held that benamidar and his heirs represented real owner and decree was binding on the real owner.

22. In Narayanan Nair v. Chekunni AIR 1937 Mad. 520 Horwill, J, the learned Judge of Madras High Court, on the aspect of non-joinder held that there is no rule of thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not. Order 1, Rule 9, Civil P.C., is still the rule to be applied at any stage of a proceeding; and the plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendants, his suit should not be dismissed

because of some technicality.

23. In *Surja Narain Bera and Others Vs. Chandra Bera and Others*, the Division Bench of Calcutta High Court observed that all persons interested in the right of easement are not necessary parties to the suit where the cause of action on the pleadings is against those persons only who are alleged to have interfered with the plaintiff's right. The persons who have the right of easement cannot be held to be necessary parties so long as their right is not interfered with. In order to determine whether a suit is maintainable and whether certain parties are necessary parties or not, it is necessary to ascertain the nature of the plaintiff's case as set out in the plaint.

24. The learned Division Bench had followed 19 C.W.N. 1211 and distinguished 25 C.W.N. 249.

25. In *Subbaraya v. Seetha Ramaswami* AIR 1933 Madras 664, Walsh, J, the learned Judge of the Madras High Court, observed that if a person has a right to defend, it is the same thing as saying that he is a necessary defendant, for it is not within the discretion of the Court to say whether it will add him or not. Plaintiff brought a suit to eject the defendant from a site and to remove a pial erected by him thereon. The plea of the defendant was that the land belonged to the Municipal Council, that he put up a pial with its permission and that the Municipal Council was a necessary party to the suit. The trial Court held that, as plaintiff claimed the suit property as his, it was unnecessary to implead the Municipality on the contention of the defendant, and it was held that the Municipality was a necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed.

26. In *Sornammal v. Thangavelu Mudaliar* AIR 1940 Mad. 412 Abdur Rahman, J, the learned Judge of the Madras High Court, observed that the provisions contained in Order 1, Rule 9 are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that the Court may in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject matter of the suit have not been impleaded, but this rule can have no application where the plaintiff alone brings an action in spite of the right to sue having devolved on him jointly with the other and on account of the death of the other person during the pendency of the suit, the plaintiff is the only person, when the case is taken up for trial, who is entitled to recover the entire amount under the claim.

27. In *Mt. Zabaishi Begam Vs. Naziruddin Khan and Others*, the Division Bench of Allahabad High Court observed that the non-joinder of a necessary party cannot, by itself, be a ground for dismissing the suit, and the Court is bound to adjudicate on the rights of the parties actually before it. A Court will refrain from passing a decree which would be ineffective and infructuous and the reason for this rule is obvious. It would be idle for a Court to pass a decree which would be

of no practical utility to the plaintiff, and be a waste paper in the sense that the relief that it purports to grant to the plaintiff can not be vouchsafed to him because of the objection of some person who is not bound by that decree. But this rule has no application to cases in which, notwithstanding the fact that some of the persons interested in the subject-matter of the suit are not parties to the suit, the Court is in a position to pass a decree that is capable of execution and cannot be rendered nugatory at the instance of persons not made parties to the suit.

28. The learned Division Bench also further observed that when the interest of the person not made a party to the suit is distinct from the interests of the persons who are parties to the suit, there is no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the Court are concerned. Hence where a Mahomedan heir who is out of possession brings a suit for possession against his coheirs and omits to implead one of the co-heirs, there is no reason why he should not be granted a decree for so much of his share as is in possession of the heirs who are made parties to the suit, as the interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and, as such the absence of one of the co-heirs from a suit brought by another co-heir for possession of his share cannot be a ground for dismissing the suit.

29. Reliance was also placed on the decisions reported in *K.A.M. Sheriff Vs. Ramu Reddiar*, *Vyankatesh Dhonddey Deshpande Vs. Sou, Kusm Dattatraya Kulkarni and Others*, and *Hardeva Vs. Ismail and Others*, .

30. In *Ramachandran and Others Vs. Valliammal and Others*, Srinivasan, J, the learned Judge of Madras High Court, observed that where the defendant has not raised a specific plea as to existence of co-owners at the time of filing suit and raising the said question at later point of time should not be allowed.

31. As can be seen from the findings recorded by the Court of first instance and also the appellate Court, the fact that the mother of the present appellant-defendant in the suit was the owner of the property had been brought to the notice of the respondent-plaintiff as well. It may be that specific clear pleading furnishing all the details may not be there, but, however, an issue had also been framed in this regard. It is no doubt true that at present it is stated that the mother of the appellant-defendant is also no more. It is not clear from the record whether the decree made in the facts and circumstances can be said to be an effective decree to be put into execution, even in the absence of the other sharers, if any, in the property in question. It may be that the appellant as defendant also is one of the co-owners, when a decree of this nature is put into execution it would affect the property and the persons interested in the property, as such to be on record, and in the absence of all such parties, the decree of this nature cannot be put into execution effectively. If this test to be applied, especially in the light of the specific issue, which had been framed in relation to the non-joinder of necessary parties, this Court is of the considered opinion that

both the Courts below erred in deciding the matter in the absence of other necessary parties being brought on record. It is no doubt true that normally the plaintiff is the dominus litis, and the plaintiff cannot be forced to fight the litigation as against the parties against whom the plaintiff is not willing to fight the litigation. However, there are several exceptions to this normal rule.

32. In the peculiar facts and circumstances, especially in the light of the fact that Exs. B1 and B2 were marked at the appellate stage and also in the light of the elaborate submissions made relating to the availability or otherwise of the right of easement, this Court is of the considered opinion that the decree and judgment made by the appellate Court are to be set aside and the matter be remanded to the appellate Court for the purpose of enabling the appellant-defendant to suitably amend his pleading by filing even additional written statement, if he deems fit and proper narrating the particulars of other co-sharers or other co-owners, who may be interested, having respective shares in the property in question, and it is needless to say that the respondent-plaintiff or the appellant-defendant are also at liberty to bring on record all the parties who may be interested in fighting the present litigation, and also further permit the parties to the litigation to put in additional pleadings, if such parties proposed to do so, and also further permit the parties to let in further evidence especially in the light of Exs. B1 and B2 marked at the appellate stage and decide the matter afresh in accordance with law. It is needless to say that this being an old matter, the appellate Court give top priority for disposal of this matter in accordance with law. Inasmuch as an order of remand is being made, the parties to the litigation to bear their own costs.