
(2001) 04 AP CK 0131
In the Andhra Pradesh High Court
Case No : LPA No. 151 of 1997

Srinivas Kumar Mowle

APPELLANT

Vs

Chandrasekhar Mowle and others

RESPONDENT

Date of Decision : 18-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9, Order 22 Rule 4

Citation : (2001) 3 ALD 670 : (2001) 4 ALT 169

Hon'ble Judges : V. Eswaraiah, J; Bilal Nazki, J

Bench : Division Bench

Advocate : Mr. T. Veerabhadraiah, for the Appellant; Mr. C. Subba Rao and Mr. V.L.N.G.K. Murthy, for the Respondent

Judgement

Bilal Nazki, J.—This letters patent appeal arises out of the judgment by learned single Judge in appeal CCCA No.3 of 1989. This letters patent appeal has been filed by Appellant Defendant No.2 in the suit. The same appellant had filed the appeal which was decided by the learned single Judge.

2. The plaintiff had filed a suit for partition of "A" and "B" schedule properties and for allotment of 1/8th share. The plaintiff contended that late Prabhakara Rao Moule was the original owner of the suit properties. He left behind him the first defendant his widow, defendants 2 to 4 being his sons and defendants 5 to 7 being his daughters, Prabhakar Rao Monk had died on 8-2-1975 and plaintiff claims that defendants 1 to 7 and the plaintiff himself were entitled to 1/8th share of the suit properties both movable and immovable. The plaintiff and defendants were in possession of the suit properties and inspite of repeated requests defendants 1 to 7 did not agree to effect the partition therefore the suit was filed. The first defendant in her written statement contended that she was second wife of late Prabhakar Rao Moule and she was entitled to 1/3rd share in the properties of her deceased husband. She also claimed at least Rs.300/- per month for maintenance. According to her defendants 2 to 4 were responsible for paying the maintenance. She denied that plaintiff was entitled to 1/8th share but

stated that plaintiff was entitled to 1/12th share in the properties. The second defendant also filed a written statement admitting the relationship between the plaintiff and Prabhakar Rao Moule. However, he contended that the first defendant was not widow of Prabhakar Rao Moule and she was only a cook. He further contended that 4th defendant had converted into Islam therefore he was not entitled to claim any share in the joint family property. Defendants 5 to 7 were daughters of late Prabhakar Rao. The plaintiff deleted the name of 5th defendant from the array of defendants. It was contended that deletion of name of the 5th defendant from the array of defendants would affect the suit and the plaint was bad for non-joinder of necessary party. It was also contended that 6th defendant was not daughter of Prabhakar Rao Moule. Defendants 1, 2, 4 and 6 were not entitled to any property left by Mr. Prabhakar Rao Moule. Third defendant was also not entitled to inherit any property. He stated that there was no gold jewellery. He also stated that the gun had been deposited with the International Arms and Armoury, M.G. Road, Secunderabad in accordance with law. He accepted that as karta of family he was in possession of "A" schedule property and he was managing the property during the life time of late Prabhakar Rao. He had received "A" schedule property from the execution proceedings in EP No.16 of 1977 on the file of I Additional Judge, City Civil Court, Hyderabad between Dinshawji Italia v. Prabhakar Rao Moule. He paid a sum of Rs.40,000/- towards full and final settlement of decree and then he had also spent Rs.20,000/- for filing an appeal in the Supreme Court against D. Italia. He had borrowed an amount of Rs.60,000/- from financiers and Banks towards the satisfaction of the decrees and he was paying the same with heavy interest.

3. On the basis of pleadings of the parties the following issues were framed by the trial Court:

1. Whether the D1 is the widow of late Prabhakar Rao Moule, and if so, whether she is entitled for her share in partition of the suit properties?
2. Whether the D4 is entitled to claim his share in the joint family property, even after his changing the religion?
3. Whether D6 is entitled to claim for share in the partition suit?
4. Whether D2 is entitled to receive Rs.40,000/- (about the payment of decretal amount in EP 16/77) Rs.20,000/- towards the expenses of appeal filed in the Supreme Court?
5. Whether D2 is entitled to receive the expenses of the suit filed against the tenant of the suit house?
6. What is the effect of the decrees EP 23/74 and EP 22/74 on the plaint A schedule property ?
7. Whether the suit is properly valued?
8. Whether the plaintiff got the cause of action on 11-4-1977 as alleged in para 8

of the plaint?

9. Whether the schedules A and B attached with the plaint are vague and incomplete?

10. What is the effect of the agreement dated 28-12-1976 executed by the plaintiff in favour of the D2?

11. To what relief?

The trial Court decided issue No.1 in favour of D1. Issue No.2 was decided in favour of D4. Issue No.3 was decided in favour of D6. Issue Nos.4, 5 and 6 were also decided against D2. All other issues may not be relevant for the purpose of present Appeal. A preliminary decree for partition was passed as prayed for and it was ordered that the "A" schedule property should be divided between plaintiff and D1 to D7 into equal shares by metes and bounds according to good and bad qualities. Further, decree was passed that "B" schedule properties shall also be divided between plaintiff and D1 to D7 into equal shares. Against the preliminary decree an appeal was taken which was rejected by the learned single Judge. Hence this letters patent appeal.

4. Four contentions were raised by the learned Counsel appearing for the appellant in this letters patent appeal, they are :--

1. Whether non-joinder of a daughter who is admittedly a co-share is fatal to the suit?

2. Whether the defendant No. 1 is legally wedded wife of Prabhakar Rao Moule?

3. Whether defendant No.2 is not entitled for reimbursement of the amounts spent by him during his management?

4. Whether defendant No.2 has established that the jewellery was handed over to the plaintiff?

These four points shall be taken one by one. The first point relating to non-joinder of parties was raised before the learned single Judge also. The learned Judge did not agree with the contentions of the learned Counsel for the appellant. It appears that defendant No.5 was made a party to the suit but was given up. She is admittedly the daughter of Prabhakar Rao Moule. The case of the appellant is that, once she was given up the suit had to be dismissed in terms of Order 1, Rule 9 CPC. He submits that Order 1, Rule 9 CPC was amended by Amending Act of 1976 which became effective from 1-2-1977, the suit had been filed after 1-2-1977 therefore the suit is hit by proviso to Rule 9. Order 1, Rule 9 lays down:

"Misjoinder and non-joinder

9. 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 non-joinder of a necessary party".

It is true that, before the amendment of Rule 9 of Order 1 CPC a suit could not be defeated by reason of misjoinder or nonjoinder of parties, but the proviso made it inapplicable to the cases of non-joinder of necessary parties. The contention of the learned senior Counsel appearing for the appellant is that, since defendant No.5 who was admittedly a necessary party had been given up therefore the suit got defeated and had to be dismissed. He places reliance on a judgment of the Supreme Court reported in *Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another*, . It was a clear case of nonjoinder of a necessary party. After recording the finding that it was a case of non-joinder of parties the Constitution Bench of Supreme Court considered the import of Order 1, Rule 9 and Order 1, Rule 10 sub-rule (2) of CPC and laid down the law in paras 14 and 15 of the judgment. Both the paragraphs are reproduced in order to have correct appreciation of law as laid down by the Supreme Court.

"14. We do not think there is any justification for allowing the appellant to amend her plaint by adding her brothers at this late stage. We have already noticed that the plea of non-joinder had been expressly taken by respondents 1 and 2 in the trial Court and a clear and specific issue had been framed in respect of this contention. While the suit was being tried, the appellant might have applied to the trial Court to add her brothers, but no such application was made. Even after the suit was dismissed by the trial Court on this ground it does not appear that the appellant moved the High Court and prayed that she should be allowed to join her brothers even at the appellate stage, and so, the High Court had no occasion to consider the said point. The fact that the High Court came to the contrary conclusion on the question of title does not matter, because if the appellant wanted to cure the infirmity in her plaint, she should have presented an application in that behalf at the hearing of the appeal itself. In fact, no such application was made even to this Court until the appeal was allowed to stand over after it was heard. Under the circumstances, we do not think it would be possible for us to entertain the said application. In the result, the application for amendment is rejected.

15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession u/s 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the CPC no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joinder are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage

of trial and that too without prejudice to the said parties" plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake".

While going through these two paragraphs and the judgment it becomes abundantly clear that Supreme Court was of the view that if there is a defect of non-joinder of necessary party in a suit it can be corrected even in the appellate stage. In the case which was before the Supreme Court the Supreme Court did not allow the request of the appellant because it had been made even in the Supreme Court after the case had been heard. In the present case as it could be seen, although an objection was raised by the appellant as to the maintainability of the suit in the trial Court the trial Court did not decide the controversy, on the other hand while the appeal was pending before the learned single Judge the legal representatives of defendant No.5 moved an application for being arrayed as party to the suit. Defendant No.5 had during the pendency of the proceedings died. This application was allowed by the learned single Judge and as a matter of fact in the first Appeal itself and in this letters patent appeal the legal representatives of defendant No.5 are before the Court. Therefore, in our view the objection raised by the learned Counsel cannot be accepted and the plaintiff cannot be non-suited on the ground that the defendant No.5 had been given up. On such a mere technicality even the Supreme Court was not happy to dismiss the plaintiffs suit and it found that the plaintiff had a case. From reading para 15 of the judgment one finds that even the Judges of the Supreme Court were not happy in dismissing the suit but as it was pointed out that no efforts were made by the plaintiff to move an application for arraying her brothers as defendants in the suit at any stage not even before the Supreme Court. Therefore, such a technical defect should not deprive the parties of their legal rights if such a technical defect has been cured at the appellate stage. The teamed Counsel for the appellants was not able to show us any law by which one could find a fault with learned single Judge in allowing the application of the legal representatives of defendant No.5 to bring them on record. In this connection one may make a reference to sub-rule (2) of Rule 10 of Order 1 CPC. If Rule 9 and Rule 10(2) are read together then one can assume that the learned single Judge was justified in allowing the application for bringing on record the legal representatives of the defendant No.5 and it was not necessary that such an application should have been made by the plaintiffs. It may be further pointed out that the judgment of the Constitutional Bench of Supreme Court to which a reference has been made hereinabove is being interpreted by us in the way in which it is being interpreted while drawing strength from another judgment of Supreme Court i.e., Bhagwan

Swaroop and Others Vs. Mool Chand and Others, . In this case a preliminary decree was passed after partition in a suit filed by appellants against respondents 1 and 2. During appeal respondent No.1 died. His legal representatives were not brought on record for more than three years. After, three years an application was filed under Order 22, Rule 4. Another application was filed by the legal representatives of respondent No.1 under Order 1, Rule 10 CPC. Both the applications were rejected by the High Court. The matter went to the Supreme Court. It was contended before the Supreme Court and the High Court that when a specific provision is made as provided in Order 22, Rule 4 a resort to the general provision like Order 1, Rule 10 may not be appropriate. In this context it is contended by the learned Counsel for the appellant that when the suit was dismissed as against defendant No.5 no steps were taken to get that order reversed by the plaintiff and the learned single Judge could have not taken recourse to Order 1, Rule 10(2) in allowing the application of legal representatives of the defendant No.5. But, in this judgment (supra) para 5 and para 12 are relevant and are reproduced.

"5. In a suit for partition the position of plaintiffs and defendants can be interchangeable. It is that each adopts the same position with the other parties. Other features which must be noticed are that the appeal was filed somewhere in 1972. It had not come up for hearing and the matter came on Board only upon the application of the second respondent intimating to the Court that the 1st respondent had died way back and as his heirs and legal representatives having not been substituted, the appeal has abated. Wheels started moving thereafter. Appellants moved an application for substitution. The matter did not end there. Heirs of deceased respondent No. 1 then moved an application for being brought on record. If the application had been granted, the appeal could have been disposed of in the presence of all the parties. The difficulty High Court experienced in granting the application disclosed with great respect, a hyper technical approach which if carried to end may result in miscarriage of justice. Who could have made the most serious grievance about the failure of the appellants to substitute the heirs and legal representatives of deceased respondent No.1. Obviously the heirs of deceased respondent No.1 were the persons vitally interested in the outcome of the appeal. They could have contended that the appeal against them has abated and their share has become unassailable. That is not their case. They on the contrary, want to be impleaded and substituted as heirs and legal representatives of deceased respondent No.1. They had absolutely no grievance about the delay in bringing them on record. It is the second respondent who is fighting both the appellants and the 1st respondent who wants to derive a technical advantage by this procedural lapse. If the trend is to encourage fair play in action in administrative law, it must all the more inhere in judicial approach. Such applications have to be approached with this view whether substantial justice is done between the parties or technical rules of procedure are given precedence over doing substantial justice in Court. Undoubtedly, justice according to law; law to be administered to

advance justice".

"12. It is no doubt true that a Code of Procedure is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up". Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties. In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in the state of confusion and quandary. Difficulties arise when parties are at default in complying with the laws of procedure. As procedure is aptly described to be the hand-maid of justice, the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court. Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arises for the Court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and the Court in fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interests of justice best".

The Court was further of the view that excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many cases lead to miscarriage of justice. Keeping in view the mandate of the judgment of the Supreme Court, if the procedural law is strictly construed and the contentions raised at the Bar by the learned Counsel for the appellant are accepted, then the suit would be dismissed and the rights of parties would be defeated. It could be a case of injustice. Therefore, this argument is rejected.

5, The second contention raised at the Bar was that the defendant No. 1 was not legally wedded wife of Prabhakar Rao Moule. The learned trial Court rejected this contention. It was also rejected by the learned single Judge. According to the plaint and according to the evidence, the original owner Prabhakar Rao Moule had three sons defendant Nos.2 to 4 and three daughters defendants 5 to 7, so in all he had six children. Out of six children it is only one of the children i.e., the present appellant-defendant No.2 who disputes that defendant No.1 was wife of Prabhakar Rao Moule. This has conclusively been shown in evidence that

defendant No.1 was the legally wedded wife of Prabhakar Rao Moule. The only evidence given against her was by the appellant i.e., DW6. In his examination in chief he stated that DW1 was not his mother, she was not wife of Prabhakar Rao Moule but in his cross-examination he stated that his father had three wives including Kamala Devi who is defendant No.1. He also stated in his cross-examination; "it is true that from 1955 onwards till today D1 is residing in the same house as a cook". So, the appellant himself admitted that defendant No.1 was living with his father from 1935 though as a cook. He also stated that she was wife of his father. Coupled with these admissions there are statements of D1 and also the statement of other brothers of the appellant stating that she was the legally wedded wife of Prabhakar Rao Moule. Defendant No.1 in her own statement stated that she was married to Prabhakar Rao Moule on 11th April, 1955 at Pune. In view of this evidence the trial Court and the learned single Judge did not agree with the contentions raised by the learned Counsel for the appellant. Merely because the defendant No.11 was not able to show a photograph of marriage or remember the name of the purohit who performed the marriage the marriage could not be doubted. The lady was examined in November, 1983 that is almost 28 years after her marriage and it is not expected that she would be remembering the name of purohit. In addition to this the appellant in some other contention which will be discussed later relied on EP 16/77. Even in this decree the Judgment Debtor was referred to "as "P.H. Moule (died) per LRs Mrs. Prabhakar Rao Moule and another". The Judgment debtor in this case was Prabhakar Rao Moule who had died and his legal representatives were shown as Mrs. Prabhakar Rao Motile w/o P.H. Moule and Srinivas Kumar Moule who is present appellant. So, in a way the appellant had accepted the defendant No.1 as wife of his father as early as in the year 1977. Therefore, this contention is also rejected.

6. The third contention that was raised was, whether the defendant No.2 is entitled to reimbursement of the amount spent by him during his management. The contention of the appellant was that the property in question was subject-matter of a suit and there was a decree and had that decree been executed the whole property would have gone to the decree holder in that suit and to save that property he had spent about Rs.60,000/- from his pocket. The appellant made a statement in the Court that he spent Rs.60,000/-. Plaint "A" schedule property according to him was got released by him by satisfying the decree. He had stated in his statement that there was an execution proceeding in EP No. 16/77 on the file of I Additional Judge, City Civil Court, Hyderabad. The property had been attached in pursuance of a mortgage and was to be sold by the Court and he paid Rs.40,000/-towards the settlement of the property. His father was alive at the time the decree was passed. His father had preferred an appeal in the Supreme Court. He bore the whole expenses in the Supreme Court amounting to Rs.20,000/-. He had borrowed the amount from the Bank and private financiers. This contention has not been accepted by the trial Court or by the learned single Judge. The learned Trial Court found that except the oral

testimony of the appellant there was no documentary evidence or other evidence to show that the amounts spent for execution of the decree were spent by him from his own pocket. This Court has also not been shown any evidence to show that this amount was actually spent by the appellant from his own pocket. He relies on Ex.B3 i.e., execution petition moved by J.D. Italia and others against P.H. Moule and the appellant. Ex.B4 only shows that judgment debtor No.3 paid Rs.35,358/- and the pledged jewellery was handed over to the appellant. It does not prove that the money was paid by the appellant from his pocket. It could have been paid from the joint property itself. Therefore, this contention was rightly rejected by the learned single Judge as well as the trial Court.

7. Point No.4 that was raised before this Court is with regard to the appellant's assertion that he had handed over jewellery after he got back it from the Court to the plaintiff. The trial Court found that there was no evidence to support this contention. There was evidence that the delivery of gold was taken by the appellant on 8-9-1977 to which a reference has been made hereinabove, but there was no evidence that he entrusted the gold to the plaintiff and therefore plaintiff has to account for it. In this regard also there is no evidence except the statement of the appellant and his wife to the receipt of Ex.B10. There are no witnesses. Chandra Sekhar Moule who is supposed to have given this receipt has denied the signature. No steps were taken to prove his signature. No date is given in the receipt. Therefore it does not inspire any confidence. Besides, the appellant was working as kartha of the family after the death of his father and according to him during the life time of his father as well, therefore it is unimaginable that he would hand over valuable gold jewellery to Chandra Sekhar Moule who was youngest of the brothers and was only 20 years of age at the relevant time as is mentioned by the learned single Judge. Therefore, this contention has also been rightly rejected by the trial Court and the learned single Judge. No other argument was raised at the Bar.

8. For these reasons, the appeal is dismissed. No costs.