
(2005) 06 AP CK 0083

In the Andhra Pradesh High Court

Case No : AS No"s. 1150 and 3491 of 1990

S.V. Anand

APPELLANT

Vs

S.R.K. Murthy

RESPONDENT

Date of Decision : 23-06-2005

Acts Referred:

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

Citation : (2005) 5 ALD 108 : (2005) 5 ALT 586 : (2005) 2 APLJ 460

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : M.V. Suresh, in A.S. No. 1150 of 1990 and N. Ram Mohan Rao, in A.S. No. 3491 of 1990, for the Appellant; M.V. Suresh in A.S. No. 3491 of 1990 and N. Ram Mohan Rao in A.S. No. 1150 of 1990, for the Respondent

Judgement

A. Gopal Reddy, J.—The issue involved in both the appeals is one and the same. Hence, they are heard together and disposed of by this common judgment.

2. A.S. Nos. 1150 and 3491 of 1990 are preferred by the defendant and plaintiff respectively against the judgment and decree dated 27-9-1989 passed by the Additional District Judge, Hindupur in O.S. No. 37 of 1985 (O.S. No. 138 of 1983 on the file of Subordinate Judge, Penukonda), decreeing the suit for partition and separate possession and dismissing the claim for recovery of Rs. 16,200/- towards rent of the building and for costs of the suit. Against the preliminary decree declaring that the plaintiff is entitled to for partition and separate possession of his 11/20th share defendant preferred A.S. No. 1150 of 1990; whereas against that part of the decree where the claim for recovery of rents of Rs. 16,200/- as damages for use and occupation in respect of suit premises was dismissed plaintiff preferred A.S. No. 3491 of 1990.

3. The pleadings as stated by the parties and relevant for disposal of the appeals are as under:

4. According to the plaintiff, plaintiff and defendant who are divided brothers

along with another brother did partnership business in Hindupur under the name and style S.V. Raman Company. Even after the other brother went out of the partnership, plaintiff and defendant continued the business, which was started in October, 1970, till 15-10-1980 on which date the partnership was dissolved and defendant retired from the business, whereas the plaintiff was allowed to continue the business of the erstwhile firm as sole proprietor concern. Since then plaintiff continued the business whereas the defendant started new business under the name and style "Sunkamu Coffee" in the schedule premises bearing D. No. 17-3-586 with the permission of the plaintiff. The said premises was purchased by the partnership firm for its benefit under a sale deed dated 7-3-1975 for a sum of Rs. 45,000/- in which the plaintiff and defendant are entitled 55 paise and 45 paise shares. On dissolution of the firm all the assets were distributed among the parties in the suit schedule building. When the defendant filed O.S. No. 561 of 1981 before the District Munsif, Hindupur claiming that the machinery and electrical installation etc. were allotted to his share, plaintiff filed the above suit.

5. Defendant filed a written statement denying the allegations in the plaint stating that the plaintiff and defendant's father-S. V. Raman started business in coffee in the year 1931 and improved it to a considerable extent. S.V. Raman has got 5 sons, they are: plaintiff, defendant and 3 more others and the sons joined their father and improved the business. The said joint business continued several years. S.V. Raman died on 8-1-1961 leaving behind five sons and four daughters, who succeeded to his properties. Plaintiff being the eldest son took over the management of the joint family business of which the defendant and other sons joined by extending their co-operation. The said business flourished and two more shops were also opened. Plaintiff, who was managing the properties as manager, styled the business as partnership business by bringing existence of certain documents just to avoid the complications from the Income Tax and other authorities, for which he cannot claim any benefit. When the plaintiff sought disconnection of electricity connection to the shop of the defendant, he filed O.S. No. 561 of 1981 contending that all the heirs are entitled to the suit property. When the defendant is in occupation of the joint family property, he is not liable to pay any damages for use and occupation without filing a suit for dissolution of the partnership firm and without division of its assets and liabilities and the suit as such is not maintainable.

6. On the basis of the above pleadings, the lower Court framed as many as three issues for trial and answered Issue No. 1 in favour of the plaintiff that he is entitled to claim 11/20th share in the property. On Issue No. 2, whether the plaintiff is entitled to any damages as claimed, the lower Court answered the same against the plaintiff and in favour of the defendant. As there is no agreement by the defendant to pay the rents at the rate of Rs. 500/- per month to the plaintiff and in the absence of any document worth is available and produced, the plaintiff is not entitled to any damages and on Issue No. 3 it was held in view of certified copy of the order in T.A. No. 29 of 1953 dated 25-3-1953-

Ex.A.12 wherein the father of the plaintiff and defendant preferred an appeal before the Tribunal against the order passed by the Assistant Commercial Tax Officer by clubbing the plaintiffs father's turnover with that of plaintiff partnership business and levying tax was allowed. In view of the ground taken by the plaintiffs father that the plaintiff divided in the year 1948 by relinquishing his rights over the joint family properties and a finding is recorded to that effect in T.A. No. 29/53 wherein it was held that there is clear and acceptable evidence that S.R.K. Murthy (plaintiff) S/o S. V. Raman was doing an independent business of his own and long back in the year 1948 itself the business under the name and style S.V. Raman and Company got divided and plaintiff separated himself from the family and executed a relinquishment deed. Exs.A13, A14, A15 and A16 are the orders of the Commercial Tax and Income Tax authorities showing that he is doing independent business and Exs.A4 and All confirms the fact of retirement of S.V. Shabnkararaj and the respective shares of the plaintiff and the defendant at 55 ps. and 45ps. each and after reconstitution of firm the suit property was purchased under Ex.A5, which was also admitted by the defendant that himself and P.W.1 (plaintiff) purchased the property; and in the absence of any other evidence that it is a joint family property as claimed by the defendant, the other heirs of S. V. Raman are not necessary parties to the suit and accordingly decreed the suit.

7. After hearing the appeals at length Mr. M.V. Suresh, learned Counsel for the respondent in both the appeals brought to the notice of the Court that the appeal filed by the defendant i.e. A.S. No. 1150 of 1990 is abated on the death of the plaintiff and no steps were being taken by him in spite of intimation given about the death of the plaintiff through letter dated 28-4-2000 and the said letter was also filed into the Registry. Whereas the legal representatives of plaintiff filed L.R. petition in CMP No. 10049 of 1985 in A.S. No. 3491 of 1990 on 13-2-1995 after serving same on 21-2-1995, since the very same advocate representing the defendant would not take any steps to bring the legal representatives of the plaintiff in A.S. No. 1150 of 1990. In view of the same, it is not necessary to deal with the submissions made by the learned Counsel for the appellant in A.S. No. 1150 of 1990 and the same is dismissed as abated and the finding that the plaintiff is entitled for a decree of declaration for partition and separate possession of 11/20th share need not be disturbed. Then remains the only appeals A.S. No. 3491 of 1990, which is filed by the plaintiff against the dismissal of claim for damages.

8. Heard the learned Counsel on either side.

9. The lower Court answered that the plaintiff and defendant are tenants in common and jointly purchased the property in which the plaintiff is having 55 ps. share whereas the defendant is having 45 ps. share. It is also admitted that the defendant is in exclusive possession of the suit property where he is running the business. Once the plaintiff instituted the suit for declaration of his right in the suit schedule property and for partition and separate possession of 11/20th share

he indicated his intention for severance of the status of the joint, and individual share in the suit schedule property, he may not be entitled to past mesne profits from the date of suit but he is entitled to rents to the extent of his share.

10. In *Babburu Basavayya and Others Vs. Babburu Guravayya and Another*, , the Full Bench of the Madras High Court considered the scope of preliminary decree in partition suit where no direction regarding future profits is made, whether enquiry can be made to ascertain the mesne profits and held that even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order XX Rule 18 CPC does not prohibit the Court from issuing such direction after the stage of a preliminary decree. The mere fact that the preliminary decree does not direct and enquiry into profits subsequent to the date of the suit does not preclude the parties from applying for, or the Court from awarding, such profits by its final decree. This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, and in either case the result of the enquiry has to be incorporated in the final decree. After scanning various decisions on the said subject the Full Bench held as under:

"It is necessary at the outset to distinguish It between three different types of cases in which a question of profits or mesne profits might arise: (1) Suits for ejectment or recovery of possession of immovable property from a person in possession without tide, together with a claim for past or past and future mesne profits. (2) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits. (3) Suits for partition by a member of a Joint Hindu family with a claim for an account from the manager. In the first case, the possession of the defendants not being lawful, the plaintiff is entitled to recover "mesne profits" as defined in Section 2, Clause (12) CPC such profits being really in the nature of damages. In the second case, the possession and receipt of profits by the defendant not being wrongful the plaintiffs remedy is to have an account of such profits making all just allowances in favour of the collecting tenant in common. In the third case, the plaintiff must take the joint family property as it exists at the date of the demand for partition and is not entitled to open up past accounts or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation. The plaintiff would, however, be in the position of a tenant in common from the date of severance in status and his rights would have to be worked out on that basis.

Order 20 Rule 12 CPC deals with the first class of suit above referred to, while Order 20 Rule 18 deals with the second and the third categories. In view, however, of the considerable reliance placed on Order 20 Rule 12 CPC in *Ghulusum Bivi v. Ahmadsa Rowther*, 1942 Mad. 296 in dealing with the right of a plaintiff to profits accruing during the pendency of a partition suit, it is desirable to consider the scope of this provision."

further held as under:

"...A tenant-in-common who files a suit for partition seeks a partition not only of his share of the properties forming the subject-matter of the suit, but also of his share of the profits accruing from these properties during the pendency of the suit or till he is put in possession of share. He cannot anticipate how long the suit would be pending or estimate even approximately what amount of profits would be realized during that period. He need not therefore specifically ask for any relief in respect of future profits, the prayer for general relief being sufficient to enable the Court to award him such profits. If during the pendency of the suit one or some of the co-sharers receive or realize the entire profits or more than their share of the profits of the common properties, they have to account to the other shares for the excess. If the collecting co-sharer or tenant-in-common is not in a position to bring into the hotchpot his realizations subject to all just allowances in his favour, the Court will, when passing a final decree, deprive him of a sufficient portion of the properties allottable to his share and allot the portion so taken away to the other sharers so as to give them the equivalent of their share of the profits in the shape of property. Or the Court may impose a charge on the share of the defaulting tenant-in-common for the amount for which he is accountable to the other sharers and thus equalize the shares. The theoretical allotments and the general declaration of rights in the preliminary decree have to be worked out with due regard to the realizations of profits and drawings by the parties subsequent to the institution of the suit till the passing of the final decree. The profits accruing from the common properties pending a suit for partition, like the properties themselves, are liable to be partitioned under the final decree even without a specific prayer in the plaint for an account of such profits and a division thereof. The right to an account of such profits is implicit in the right to a share in the common properties and both rights have to be worked out and provided for in the final decree for partition.

11. The above judgment will have a binding force on this Court in view of the law declared by this Court in Subbarayudu v. State of Andhra, ILR 1955 AP 1.

12. Once it is held that the plaintiff is co-sharer along with defendant, and filed suit for partition and separate possession he made his intention clear to divide the property from the date of filing of suit and entitled to rents/damages for use and occupation of the suit premises by the defendant, the same has to be ascertained in a separate proceedings by adducing necessary evidence by the parties. In view of the same, the judgment to the extent dismissing the claim of the plaintiff for mesne profits/damages for use and occupation of the premises by the defendant is set aside and it is declared that the plaintiff is entitled to damages for use and occupation of the premises by the defendant which can be ascertained by a separate proceedings. Accordingly appeal is partly allowed.

13. In the result, A.S. No. 1 150 of 1990 is dismissed as abated and A.S. No. 3491 of 1990 is partly allowed. No order as to costs.