
(2000) 10 AP CK 0009

In the Andhra Pradesh High Court

Case No : C.M.P. No. 12020 of 1999 in A.S. (SR) No. 40537 of 1999

Uppugandla Anantha Reddy

APPELLANT

Vs

Uppugandla Bhagyamma and Others

RESPONDENT

Date of Decision : 09-10-2000

Acts Referred:

Arbitration Act, 1940 — Section 14(2)

Citation : (2001) 1 ALT 344

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : C. Ramesh Sagar, for the Appellant; P.V. Narayana Rao, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—This is a petition filed by the petitioner-appellant to condone the delay of 233 days in filing the appeal.

2. The petitioner (appellant) is the 2nd defendant in O.S. No. 63 of 1980 on the file of the Court of the Subordinate Judge, Karimnagar. Respondents 1 to 3 are the plaintiffs in that suit. Respondents 2 and 3 are the children of the first respondent. First respondent is the widow of Narayana Reddy, deceased brother of the petitioner-appellant. Petitioner-Appellant and Narayana Reddy (husband of the 1st respondent) are the sons of Pedda Bala Raju, who is the first defendant in the suit. The suit is filed by the respondents 1 to 3 initially against three defendants, i.e., Pedda Balaraju, (1st defendant), the appellant (2nd defendant) and Banda Lachamma (3rd defendant) for partition of their 1/3rd share in the properties specified in the schedule appended to the plaint, and for cancellation of the sale deed dated 28-4-1980 executed by the appellant in favour of Banda Lachamma, the 3rd defendant. Subsequently defendants 4 to 7 were added as parties to the suit. During the pendency of the suit, Pedda Balaraju (1st defendant) died. After trial, the trial Court passed a preliminary decree for partition of the plaint schedule properties into three equal shares and for

allotment of one such share to the respondents 1 to 3, and ordered cancellation of the sale deed dated 28-4-1980 after declaring it null and void and not binding on the respondents 1 to 3. That preliminary decree has not been appealed against by any of the parties to the suit, and so it became final. Thereafter, respondents 1 to 3 (plaintiffs) filed I.A. No. 1/1995 seeking appointment of a Commissioner to propose a division of the plaint schedule properties into two equal shares, and also filed I.A. No. 224/97 for passing a final decree for division of their half share in the plaint schedule properties. A Commissioner appointed in I.A. No. 1/1995 filed his report. Since no objections were filed to the report of the Commissioner, it was accepted and by its order dated 3-4-1997 in I.A. No. 224/1997 the Court below passed a final decree as per the division proposed by the Commissioner. Questioning the said final decree, this appeal is preferred by the 2nd defendant with CMP No. 12020 of 1999 alleging that there is a delay of 233 days in preferring the appeal, and the same may be condoned for the reasons mentioned in his affidavit filed in support of the said petition.

3. The reason for the delay mentioned in the affidavit is that notice in I.A. No. 1/1995 was not served on him, but is said to have been served on one Sudhakar Reddy, who is in no way connected with him, and that on the basis of the said incorrect endorsement of the Process Server, the trial Court proceeded to appoint a Commissioner without proper notice to him, and that after the Advocate-Commissioner filed his report, respondents 1 to 3 filed I.A. No. 224/1997 for passing a final decree, in which petition also no notice was issued to him. It is stated that since there was an amendment of the names of defendants 3 to 5 on 3-8-1998, limitation started from 3-8-1998 from which date there is delay of 233 days in presenting the appeal, and sought condonation of that delay. Respondents 1 to 3 opposed the application contending that the appellant had notice of I.A. 1/1995, and was present at the time of inspection of the lands by the Commissioner and that the delay in presentation of the appeal is not of mere 233 days but is more than 2 years, which is not properly explained and so petition is liable to be dismissed.

4. The point for consideration is whether petitioner (2nd defendant) has shown sufficient grounds for condoning the delay that occurred in preferring the appeal.

5. Apart from the question relating to the reasons for the delay in preferring appeal, learned Counsel for the parties addressed arguments on the merits of the appeal also. So, I will consider those submissions also, though it is not necessary so to do for a decision in this petition. I am not able to agree with the contention of the learned Counsel for the petitioner (2nd defendant) that the delay in preferring the appeal is only 233 days as the names of defendants 3 to 5 were amended subsequent to the passing of the final decree on 3-8-1998. Limitation for preferring appeal on the final decree commenced from 3-8-1998. When once limitation starts running it does not stop. The fact that names of some of the parties were amended, would not give a fresh starting point for commencement of limitation from the date of amendment of names of parties, because limitation

for" preferring an appeal starts from the date of the decree. In this case, the right to prefer appeal accrued to the petitioner (2nd defendant) on 3-4-1997. The fact that names of defendants 3 to 5, against whom no decree was passed and who have no share or interest in the property in the suit, does not create a fresh right to prefer appeal against the decree allotting half share to respondents 1 to 3 (plaintiffs) from the date of amendment of the names of those defendants. Since the right to prefer an appeal accrued to the petitioner on 3-4-1997 itself, he has to explain the delay in preferring the appeal from 3-4-1997, and mere explanation of delay only from 3-8-98 would not suffice. So it has to be taken that petitioner (2nd defendant) has no reasons to explain delay from 3-4-1997 to 3-8-1998.

6. Since the contention of the petitioner is that no notice was issued to him in I.A. No 1/1995 or in I.A. 224/1997 the point to be decided is whether petitioner (2nd defendant) had or had not notice of LA. No. 1/1995.

7. A perusal of the record of the trial Court shows that on 16-1-95 the trial Court ordered notice to the petitioner (2nd defendant) and posted the case of 16-2-95. On 16-2-95 process to the petitioner (appellant) was deposited with petition, and the matter was adjourned to 28-3-95. On 28-3-95 Sri B. Rama Swamy, Advocate who appeared for the petitioner (2nd defendant) in the suit filed a memo continuing to appear for the petitioner (2nd defendant) in I.A. No. 1 of 1995. Since notices to other defendants in that petition were returned, the case was posted to 24-4-1995. From 24-4-95, it was adjourned to 16-6-1995. On 16-6-95 fresh notice was ordered to the other respondents (defendants) and the case was adjourned to 28-7-95 and from 28-7-95 to 23-8-95. On 23-8-95 since Advocates were abstaining from Courts, the case was adjourned to 21-9-95. On 21-9-95, on a petition, the trial Court dispensed with service of notice to respondents 2 to 5 in that petition i.e., defendants 2 to 5 and as the learned Counsel for the petitioner (2nd defendant) reported no objections for appointment of a Commissioner to divide the properties, it appointed Sri P. Ashok, Advocate, as Commissioner for that purpose. Thus from the proceedings of the Court below it is seen that the petitioner (2nd defendant) was represented by Sri B. Rama Swamy, Advocate, who also appeared for him during trial of the suit. He filed a memo that he continues to appear for the petitioner (2nd defendant) in I.A. No. 1 of 1995. So the contention of the petitioner (2nd defendant) that he had no notice in I.A. No. 1 of 1995 in the trial cannot be accepted.

8. From the proceeding in I.A. No. 224 of 1997 of the trial Court it is seen that it was filed into Court on 30-12-1994; and was posted to 16-2-95, but was registered i.e., numbered, only on 16-1-97. There is nothing on file in I.A. No. 224 of 1997 to show that notice of that petition was served either on the petitioner (2nd defendant) or on his Counsel. But the file shows that the said I.A. No. 224 of 1997 was being called along with I.A. No. 1 of 1995 as an unnumbered I.A., and on 3-4-1997 the Court below passed the order under appeal in the said I.A. No. 224 of 1997.

9. The contention of the learned Counsel for the petitioner (2nd defendant) is that as per the preliminary decree respondents 1 to 3 (plaintiffs) are entitled only to 1/3rd share in the suit properties, but the petition for passing final decree is filed for division of the suit property into two equal shares, which is not in accordance with the preliminary decree, and yet final decree is passed granting half share to the respondents 1 to 3, and so the final decree passed by the Court below is not sustainable. He placed reliance on Muthangi Ayyanna Vs. Muthangi Jaggarao and Others, .in support of his contention that final decree cannot go behind the preliminary decree on a matter determined by the preliminary decree. He reling on Phoolchand and Another Vs. Gopal Lal, contended that events that transpired after preliminary decree can, be gone into by the Court, and if there is a dispute in that behalf and the Court after deciding the dispute passes an order such order would be appealable; and contended that since in this case death of the father of the petitioner (2nd defendant) occurred before the preliminary decree was passed and yet preliminary decree was passed only for 1/3rd share of respondents 1 to 3 (plaintiffs) and since final decree is passed for 1/2 share the final decree is unsustainable.

10. Relying on Rajkishore Das Vs. Nilamani Das, he contended that since no notice in the final decree petition was issued, and since notice of final decree proceedings is mandatory to all the parties, the order under appeal is not sustainable. He contended that apart from the petitioner (2nd defendant) and the husband of the first respondent (1st plaintiff) deceased (1st defendant) has daughters, on the death of the 1st defendant, daughters of the 1st defendant also would be entitled to a share in his share, and in view thereof the share of respondents 1 to 3 would, in any event, be not 1/2 share in suit property, and since the sisters of the petitioner (2nd defendant) are not made parties to the final decree proceedings, petition for passing final decree is bad for non-joinder of necessary parties. He relying on Shanmugham and others Vs. Saraswathi and others, contended that objection regarding non-joinder of parties in a suit for partition can be raised at any time, since it goes to the root of the case and hence petition ought to have been dismissed by the Court below for nonjoinder of necessary parties. He contended the Court has power to pass any number of final decrees as held in Padmini Co-operative Housing Society Vs. Sirajunnisa Begum and Others, and contended that in this case no enquiry whatsoever was held and so, he contended that, final decree passed without enquiry and without considering the objections raised by petitioner (2nd defendant) is not sustainable.

11. The contention of the learned Counsel for respondents 1 to 3 (plaintiffs) is that in the trial Court I.A. No. 1 of 1995 and I.A. No. 224 of 1997 were being called and heard together and that the fact that the petitioner (2nd defendant) appeared through his Counsel Sri B. Rama Swamy in I.A. No. 224 of 1997 is recorded in the order under appeal and so the contention of the petitioner (2nd defendant) that he had no notice in I.A. No. 224 of 1997 cannot be believed or accepted. He contended that if the petitioner (2nd defendant) felt that the noting in the order under appeal that petitioner (2nd defendant) appeared through Sri

B. Rama Swamy, Advocate is not correct, his remedy was to approach the Court below for amendment of the order, but petitioner (2nd defendant) cannot raise a contention in this Court that there was an error in the order under appeal regarding appearance of parties through Counsel. He relied on State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, in support of the said contention, where the Supreme Court held that Judge's record is conclusive and neither lawyer nor litigant may claim to contradict it, except before the Judge himself but nowhere else. He also relied on Bank of Bihar Ltd. Vs. Mahabir Lal and Others, for the same proposition. He contended that significantly petitioner (2nd defendant) did not even choose to file the affidavit of Sri B. Rama Swamy, Advocate, that he did not appear for the petitioner (2nd defendant) in I.A. No. 227 of 1997. He contended that in the absence of the affidavit of the Advocate, the noting in the order under appeal that the petitioner appeared through Sri B. Rama Swamy, Advocate, has to be taken to be true as held by a Division Bench of this Court in Veeraswamy Chetty v. Varadaiah Chetty 1956 An.W.R. 394 : AIR 1957 A.P. 493 (D.B.). He contended that notice can be oral notice also, and not necessarily in writing, and contended that from the fact that both the petitions were being posted, and were heard together, and in view of the fact the appearance of Sri B. Rama Swamy, Advocate on behalf of the petitioner (2nd defendant) is noted in the order under appeal, it can be inferred that oral notice of the petitioner was given to him. He sought to draw support for the said contention from Section 14(2) of the Arbitration Act, 1940 and the ratio in Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, and Ors. where it is held that notice can be oral and need not necessarily be in writing.

12. As stated above, the recording of the Court below in the proceedings in I.A. 1/ 1995 shows that the Commissioner was appointed since the Counsel for the petitioner (2nd defendant) reported that he has no objection. The report of the Commissioner shows that the petitioner's (2nd defendant's) wife and son were present at the time of inspection of the plaint schedule properties by him. So the contention of the petitioner (2nd defendant) that he had no notice of I.A. 1/1995 cannot be accepted or believed.

13. As mentioned above there is nothing on record to show that notice in I.A. No. 221/1997 was served on the petitioner (2nd defendant). But the order in I.A. No. 224/1997 shows that the petitioner (2nd defendant) appeared through Sri B. Rama Swamy, Advocate at the time of hearing. Significantly in I.A. No. 1/1995, petitioner (2nd defendant) did not file any objections to the report of the Commissioner's report. It has to be mentioned here that it is not the case of the petitioner (2nd defendant) that he did not instruct Sri. B. Rama Swamy, Advocate, to appear on his behalf in I.A. No. 1 of 1995. Admittedly the said advocate appeared for him in the suit. So his power to appear for the petitioner (2nd defendant) continued even after passing of the preliminary decree and so notice in other proceedings in the suit would be deemed to be notice to the petitioner (2nd defendant). It is not even the case of the petitioner (2nd

defendant) that Sri B. Rama Swamy played fraud on him or misguided him. So it has to be taken that petitioner appeared through Sri B. Rama Swamy, Advocate in the trial Court.

14. The prayer in I.A. No. 1/1995 was to appoint a Commissioner to propose a division of the plaint schedule properties into two equal shares. Sri B. Rama Swamy, Counsel for petitioner (2nd defendant) reported that there was no objection for the said prayer being granted. When the Commissioner filed a report, after inspection for the plaint schedule properties in the presence of the wife and son of the petitioner (2nd defendant) proposing a division of the properties into two equal shares, petitioner (2nd defendant) did not file objections and in fact his Counsel reported "No Objection" on his behalf, which means that petitioner (2nd defendant) had no objection for the plaint schedule properties being divided into two equal shares. So he cannot now raise an objection for division of the plaint schedule property into two shares.

15. The contention of the learned Counsel for the petitioner (2nd defendant) that there are daughters to the deceased 1st defendant, i.e., sisters to the petitioner (2nd defendant) and that they are also necessary parties to the final decree proceedings cannot be countenanced at this stage, because there is nothing on record to show that the petitioner (2nd defendant) has sisters. In the preliminary decree itself it is recorded that 1st defendant i.e., father of the petitioner (2nd defendant) and the father-in-law of the 1st respondent (1st plaintiff) died. Yet the preliminary decree was passed for division of 1/3rd share of respondents 1 to 3 (plaintiffs). Thereafter, respondents 1 to 3 (plaintiffs) filed I.A. No. 1 of 1995 seeking appointment of a Commissioner to divide the plaint schedule properties in two equal shares, obviously taking the death of the 1st defendant into consideration. Even as per the decision of the Supreme Court in Pool Chand v. Gopal Lal (2nd supra) subsequent events can be taken into consideration by the Court for passing a final decree. If the petitioner (2nd defendant) felt that respondents 1 to 3 (plaintiffs) are not entitled to half share in the plaint schedule properties, consequent on the death of his father (1st defendant) and that their share would be more than 1/3rd but less than 1/2 share, he ought to have filed a counter opposing the prayer for appointment of a Commissioner to divide the plaint schedule properties into two shares. When he reported no objection for proposal to divide the plaint schedule properties into two equal shares it means that the petitioner (2nd defendant) had no objection for the plaint schedule properties being divided in two equal shares. The order in I.A. No. 224 of 1997 shows that final decree is passed in accordance with the partition proposed by the Commissioner in his report.

16. Since the petitioner did not file objections to the Commissioner's Report, the order accepting the Commissioner's Report and the consequential order passing final decree in terms of the report of the Commissioner tantamounts to a consent order. That an appeal does not lie against a consent order is rudimentary.

17. Since I.A. No. 224 of 1997 was being heard along with I.A. No. 1 of 1995,

and since Sri B. Rama Swamy, the learned Counsel for the petitioner reported no objection for appointment of, or for the report of the Commissioner, and since on the very same day the order under appeal was passed in I.A. No. 224 of 1997 in which it is recorded that Sri B. Rama Swamy, Advocate, was heard on behalf of the petitioner (2nd defendant) before passing the order, the contention of the petitioner (2nd defendant) that he had no notice of I.A. No. 224 of 1997 (final decree petition) cannot be accepted, in view of *State of Maharashtra v. Ramdas Srinivas Nayak* (6 supra) relied on by the learned Counsel for respondents 1 to 3 (plaintiffs), if the petitioner (2nd defendant) felt that the said recording is wrong he ought to have approached the Court below and got the said alleged mistake rectified. But he did not do so. In the circumstances of the case the decisions relied on by the learned Counsel for petitioner (2nd defendant) have no application to the facts of this case.

18. If the petitioner has sisters, and if they have a share in the plaint schedule properties, their right to claim a share in the property left behind by their father, is not lost by virtue of the final decree obtained by respondents 1 to 3 (plaintiffs), as the said final decree will not be binding on them, since they are not made parties to it. It is open to them to seek their remedies in appropriate forum. In this appeal, sought to be preferred against the order in I.A. No. 224 of 1997, question whether petitioner (2nd defendant) has sisters, and if they have a share in the property left behind by their father (1st defendant) cannot be gone into or decided because there was no such plea in the Court below.

19. Since the petitioner (2nd defendant) had knowledge of the proceedings, and since the order in I.A. No. 224 of 1997, against which the petitioner (2nd defendant) is seeking to prefer an appeal, was passed in the presence of the Counsel for petitioner (2nd defendant) the contention of the petitioner (2nd defendant) that he had no knowledge about the pendency of I.A. No. 224 of 1997 or I.A. No. 1 of 1995, cannot be believed or accepted. No valid or sufficient ground is made out for condonation of the delay in preparing (sic. preferring) the appeal.

20. On the merits also, for the reasons mentioned above, I find no grounds for interfering with the order of the Court below passing a final decree as per the Commissioner's Report.

21. For the above reasons, the petition is dismissed. But, in the circumstances without costs.