Appeal Suit No. 573 of 2016

Guduru Veera Nishitha v. G.V. Sambashiva Rao

2016 SCC OnLine Hyd 361 : (2017) 1 ALD 321 (DB) : 2017 AIR CC 769 : (2016) 6 ALT 553 (DB) : (2016) 4 CCC 408

In the High Court of Andhra Pradesh
(BEFORE V. RAMASUBRAMANIAN AND ANIS, JJ.)

Guduru Veera Nishitha, Rep. by Power of Attorney Holder ..... Appellant/Plaintiff No. 1

v.

G.V. Sambashiva Rao ..... Respondent/Plaintiff No. 2

G.V. Deepak Rao @ Laxmikantha Rao and 3 others ..... Respondents/Defendant Nos. 2, 3, 4 and 9

Vemuganti G.V. Sruthi ..... Respondent/Defendant No. 10

Counsel for the Appellant: Dr. Venkat Reddy Donthireddy

Counsel for Respondent No. 1: Sri C. Ramesh Sagar

Counsel for Respondents 2 to 5: Sri Alladi Ravinder

Counsel for Respondent No. 6: None appeared.

Appeal Suit No. 573 of 2016

Decided on October 26, 2016

The Judgment of the Court was delivered by

V. RAMASUBRAMANIAN, J.:— This appeal is filed purportedly under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, questioning the dismissal of an application filed under Order XX, Rule 18 read with Order XV, Rules 1 and 2 and Section 151 CPC seeking a preliminary decree for partition in respect of a few items of the plaint schedule properties.

2. We have heard Dr. Venkat Reddy Donthireddy, learned counsel for the appellant, Mr. C. Ramesh Sagar, learned counsel for the 1st respondent and Sri Alladi Ravinder, learned counsel appearing for the respondents 2 to 5.

3. The appellant herein filed a suit in O.S. No. 43 of 2009 on the file of I Additional District Court, Karimnagar, seeking partition and separate possession of her share in suit Schedules A to H properties. In the suit as it was originally instituted, the appellant impleaded (1) her own father G.V. Sambasiva Rao as the 1st defendant; (2) her sister as the 10th defendant; (3) her paternal uncles as defendants 2 to 4; (4) her paternal grandmother as the 5th defendant and her paternal aunts as defendants 6 to 8.

4. The claim of the appellant/plaintiff in the suit was that the suit properties described in Schedules A to J belonged to her paternal grandfather G.V. Sadasiva Rao (father of defendants 1 to 4) and that he died intestate on 01-11-2007 leaving behind him surviving, the defendants 1 to 8 as his legal heirs to inherit the properties described in Schedules A to J. According to the appellant/plaintiff, the properties described in Schedules A to C were ancestral properties of G.V. Sadasiva Rao and that he got them in a partition among his brothers.

5. In so far as suit D schedule is concerned, the appellant/plaintiff claimed that the same belonged to one Chakunta Kishan Rao and that after him, the said properties were divided among his three daughters, one of whom married the 1st defendant.

Similar averments were made by the appellant/plaintiff in respect of the other items of suit properties. Since we are not concerned now with the manner in which the devolution of property was pleaded by the plaintiff, we are not elaborating on the same for the present.

6. During the pendency of the suit, the appellants father, who was the 1st defendant in the suit, got transposed as the 2nd plaintiff by an order dated 21-07-2011 in I.A. No. 53 of 2011. Thereafter, the appellant herein as well as her father who is the 1st respondent herein jointly took out an application in I.A. No. 449 of 2014 purportedly under Section 151 read with Order XX Rule 18 and Order XV Rules 1 and 2 of the Code seeking a preliminary decree in respect of the properties described in suit Schedules E, F and G alone. This application was taken out by the appellant and her father on the ground, interalia, that the suit was first posted on 02-02-2010 for the appearance of the defendants; that one advocate filed vakalat for defendants 2 to 4 and 9 on the said date; that as per the amended provisions of Order VIII Rule 1 of the Code, the defendants 2 to 4 and 9 had a time limit of 90 days to file a written statement; that the said period expired on 02-05-2010; that since the defendants did not file a written statement within 90 days as stipulated in Order VIII Rule 1, they forfeited their right to file a written statement; that therefore, the appellant/1st plaintiff filed an application in I.A. No. 53 of 2010 for a declaration that the defendants 2 to 4 and 9 forfeited their right to file a written statement; that the said application was allowed by an order dated 25-11-2011; that despite the same, the 4th defendant filed a written statement, which cannot be taken into account in view of the order passed in I.A. No. 53 of 2010; that in para-16 of the written statement, the 4th defendant pleaded very vaguely that the suit properties are not joint family properties; that defendants 2 and 3 filed a memo adopting the written statement of defendant No. 22, who was only a purchaser of one item of suit B schedule property; that even the written statement of defendant No. 22 could not be taken into account in view of the fact that it was filed belatedly in November 2011; that in view of the invalidity of the written statements filed by defendants 4 and 22, they are deemed to have admitted the plaint averments; that in any case the denial in the written statement filed by them was not specific, in so far as the properties covered by Schedules E, F and G of the plaint are concerned; that therefore the defendants 2 to 4 and 9 are not at issue with regard to the liability of these properties to be partitioned; that as per Order XV Rules 1 and 2, the Court is empowered to grant a preliminary decree, if the parties are not at issue; and that therefore, a preliminary decree should be passed in respect of properties described in Schedules E, F and G to the plaint.

7. The respondents 3 and 4 in I.A. No. 449 of 2014, who are defendants 3 and 4 in the suit, filed separate counter affidavits contending that their right to file the written statement was not forfeited and that their denial in the written statement was not vague but prcise. They also contended in their counter that the appellant/1st plaintiffs father, who became the 2nd plaintiff, earlier filed a suit for partition in O.S. No. 18 of 1983, which was transferred to another Court in O.S. No. 27 of 1987. The suit was dismissed for default in 1989 and the 2nd plaintiff did not take any steps thereafter. The appellant herein was not even born on the date of filing of O.S. No. 18 of 1983, but her father set up the appellant to file the present suit. As a matter of fact, the 2nd plaintiff has also filed a fresh suit for partition in O.S. No. 204 of 2005. Therefore, the defendants 3 and 4 contended in their counter affidavit that the present suit in O.S. No. 43 of 2009 was not even maintainable in view of Section 11 and Order II Rule 2 CPC.

8. After the defendants 3 and 4 filed a counter to I.A. No. 449 of 2014, the Court below allowed the parties to file certain documents. The appellant/1st plaintiff filed 27 documents as Exs.P.1 to P.27. The respondents filed 12 documents as Exs.R.1 to R.12.

9. After considering the averments contained in the affidavit and counter affidavit

and also after taking note of the documents filed, the trial Court came to the conclusion that in the facts and circumstances of the case, no preliminary decree for partition can be granted without trial. As a consequence, the Court below dismissed the application for the grant of a preliminary decree. As against the said order, the 1st plaintiff has come up with the present appeal.

Maintainability:-

10. At the outset an objection is taken by the learned counsel for the respondents that the appeal is not maintainable, as there is no decree in the eye of law. In response to the said contention, it was argued by the learned counsel for the 1st respondent that the appeal was actually filed originally as a Civil Miscellaneous Appeal in CMA (SR) No. 19714 of 2016 and that it is only due to the objections raised by the Registry that the appeal was converted into a regular appeal under Section 96 CPC.

11. But, unfortunately for the appellant, neither a regular appeal under Section 96 nor a miscellaneous appeal under Order XLIII Rule 1 is maintainable in the case on hand. As we have seen from the narration of facts, the order under appeal was passed on an interlocutory application taken out by the 1st plaintiff for passing a preliminary decree under Order XV Rule 1. The application was dismissed by the trial Court. The dismissal of the said application was solely on the ground that the entitlement of the appellant to a decree can be adjudicated only after full trial. In other words the Court did not conclusively determine the rights of the parties by the order under appeal, with regard to all or any of the matters in controversy in the suit. Hence, the order under appeal will not fall within the meaning of the expression decree under Section 2 (2) of the Code. If the order under appeal does not amount to a decree, no appeal under Section 96(1) shall lie as against the same.

12. The order under appeal is also not one of the orders enumerated in clauses (a) to (w) of Rule 1 of Order XLIII. Therefore, no appeal shall lie as against the said order even under Section 104(1) of the Code. Hence, the contention of the learned counsel for the respondents 2 to 5 that the present appeal is not maintainable either under Section 96 read with Order XLI or under Section 104 read with Order XLIII is correct and has to be upheld.

13. But wherever an order passed by a Court below is not appealable under any of the above provisions, the same is revisable by this Court under Section 115 of the Code. Therefore, this Court can always treat the present appeal as a revision, subject however, to one important aspect namely that the revisional jurisdiction is limited by its very nature. Keeping this in mind, we shall proceed to see whether the impugned order of the Court below calls for any interference at least under the revisional jurisdiction of this Court.

On Merits:-

14. As we have indicated in the narration of facts, the appellant herein and her father, who is the 1st respondent herein, virtually wanted a shortcut to success. They sought a preliminary decree for partition in respect of the properties described in Schedules E, F & G to the plaint, on the ground inter alia that the defendants 2 to 4 and 9 had already forfeited their right to file a written statement; that the written statements filed by the defendants 4 and 22 were of no value, since the 4th defendant had already forfeited his right of defence; that in para 16 of the written statement the 4th defendant did not make a specific denial of the plaint averments that the suit properties are not joint family properties; that similarly the written statement filed by the 22nd defendant is of no value, as he was only a purchaser of Item No. 2 of plaint-B schedule property and he had no knowledge about anything; that the defendants 2, 3 and 9 adopted the written statement of the 22nd defendant and consequently their written statements are also of no avail and that the denial in the written statement of the 22nd defendant was also not specific.

15. Thus the Affidavit filed by the appellant herein in support of her application I.A. No. 449 of 2014 seeking a preliminary decree even without a trial, was full of contradictions and was nothing but an attempt at hoodwinking the Court. If the defendants 2 to 4, 9 and 22 have forfeited their right to file written statements, the only thing to which the plaintiffs would be entitled, is to have those defendants set ex parte, so that the Court could proceed further. As a matter of fact, the plaintiffs had impleaded about 198 defendants in the suit. If some or many of the defendants had lost their right to file a written statement, the only course of action open to the Court is to set them ex parte and proceed further. Even if all the defendants are set ex parte, the plaintiffs are not automatically entitled to a decree as prayed for. The Court is obliged to satisfy itself, before granting a decree even ex parte in favour of the plaintiffs that the plaintiffs have a right to succeed and the evidence adduced by them was sufficient to enable them to get a decree.

16. In other words, if the plaintiffs take a plea that the real contesting defendants had lost their right to file a written statement, they can only urge the Court to set them ex parte. After getting them set ex parte, the plaintiffs should go to the witness box, lead evidence and earn a decree. Instead of doing that, the plaintiffs attempted to bowl a yorker which the Court below correctly declared as a no ball.

17. It is very interesting to see that after contending on the one hand that the defendants 2 to 4, 9 and 22 had lost their right to file a written statement, the plaintiffs contend on the other hand that the written statements filed by them contained a vague and evasive denial, tantamounting to admission of the plaint averments. If a party had lost his right to file a written statement, the written statement cannot form part of the record. If it cannot form part of the record of the Court, any pleading contained therein will be of no avail to any of the parties. A plaintiff, who obtained the orders of the Court to the effect that the defendants had forfeited their right to file a written statement, cannot rely upon a written statement filed by the defendant thereafter. Such a written statement is not worth anything both for the defendant as well as for the plaintiff. Therefore, the contention of the plaintiff that the written statements of these defendants contained a vague and evasive denial thereby tantamounting to admission of the plaint averments, is nothing but an abuse of the process of Court.

18. A Trial Court can pass a decree on admission in terms of Order XII, Rule 6 of the Code. An admission contemplated under Order XII, Rule 6 of the Code, cannot be equated to the fiction of a deemed admission under Order VIII, Rule 5 of the Code. Order VIII, Rule 5 creates a fiction to the effect that what is not specifically denied, is deemed to have been accepted. No plaintiff will be entitled to a decree in terms of Order VIII, Rule 5, before trial. What the plaintiffs sought before the Court below was actually a decree on deemed admission in terms of Order VIII, Rule 5. Fortunately the Court below did not fall a prey to such design on the part of the plaintiffs.

19. We do not know how the plaintiff could have filed an application under Order XV, Rule 1 of the Code at all. Order XV, Rule of the Code empowers a Court to pass a decree at the first hearing of the suit, in respect of a question of law or fact on which the parties are not at issue. The question as to whether the parties are at issue on a question of law or fact, can be decided only after the stage prescribed in Order XIV of the Code is crossed. The question of framing issues under Order XIV, Rule 1 would arise either after the defendants file a written statement or after the defendants are set ex parte. A Court can come to the conclusion in terms of Order XV, Rule 1 that the parties are not at issues on a question of law or fact, only if the pleadings are complete. Even in cases where the defendants are set ex parte, the Court cannot invoke Order XV, Rule 1, but has to ask the plaintiff to prove his case to enable him to get a decree as prayed for.

20. Therefore, we are of the considered view that the attempt on the part of the plaintiffs to get a decree in terms of Order XV, was nothing but an abuse of the process of law. The reason as to why the plaintiffs have chosen to take this shortcut is not far too difficult to seek. It appears that the plaintiffs have been in enjoyment of an interim order of injunction for the past six years or so. This has to be seen in the context of the fact that the 1st respondent herein (transposed as 2nd plaintiff later) earlier filed a suit in O.S. No. 18 of 1983 seeking partition, at a time when the 1st plaintiff (appellant herein) was not even born. That suit was dismissed for default in 1989. He later filed another suit in O.S. No. 204 of 2005. Therefore, if the defendants had been set ex parte, the plaintiffs would have been called upon by the trial Court before granting an ex parte decree, to explain as to how they would be entitled to maintain the suit. Therefore, the plaintiffs appear to have resorted to this short cut route. Hence, we are of the considered view that the present appeal deserves to be dismissed with costs.

21. Accordingly, the appeal is dismissed with costs which we quantify at Rs. 10,000/- (Rupees ten thousand only), to be paid by the appellant herein to the respondents 2 to 5. Since there are nearly 200 defendants in the suit, it is unlikely that the suit would see the light of the day very soon. Therefore, we direct the Court below, either to endeavour to dispose of the suit within a period of 3 (three) months and if it is not possible, to endeavour to dispose of at least the application for injunction.

22. As a sequel thereto, the miscellaneous petitions, if any, pending in this appeal shall stand closed.