ANDHRA PRADESH HIGH COURT

Ramanujamma

Vs.

Nagamma

Second Appeal No. 754 of 1962. in Suit No. 68 of 1957

(Anantanarayana Ayyar, J.)

13.12.1966

JUDGMENT

Anantanarayana Ayyar, J.

1. Ramanujamma as sole plaintiff filed O. S. No. 68 of 1957 in the Court of the learned subordinate Judge, Anantapur claiming arrears of maintenance and also future maintenance at the rate of Rs. 600 per year on the ground that she was the exclusively kept concubine of the deceased, Anjanna Reddv, who was the son of Thimmappa and Nagamma and that she begot a son and a daughter to Anjana Reddv. There were two defendants in the case. Nagamma mentioned above was the first defendant and the second defendant, Ramayya, was her sister's son in whose favour she (Nagamma) had executed a gift deed conveying the entire property which had come to her. The suit was dismissed. The plaintiff then filed an appeal in the Court of the District Judge, Anantapur and it was also dismissed. Thereupon the plaintiff filed this second appeal.

2. The relevant facts are as follows : Anjana Reddy was the only son of his father, Thimmappa and mother Nagamma. He was a married man and had a son. But all the same, he took over as his concubine the plaintiff who was herself a married woman. The plaintiff begot a son and a daughter to Anjanna Reddy. The latter executed a relinquishment deed, Ex. B-4 dated 4-5-1943 by which he relinquished his share in the joint family property entirely in favour of his father, Thimmappa. Subsequently Anjana Reddy issued a notice, Ex. A-2 dated 26-9-43 alleging that the relinquishment deed had been executed under coercion and was not valid. But all the same he did not choose to cancel that deed of relinquishment. Ultimately, he died on 30-1-1948. He left behind a minor legitimate son Venkatarama Reddi by his wife in addition to his (Anjana Reddy's) own parents. Thimmappa himself died in about 1951 or 1952. Later, Venkatarama Reddi died. Ultimately, the plaintiff filed the suit on 26-6-1957 in forma pauperis and was originally numbered as OP. No. 50 of 1957.

3. The contentions in the plaint were to the following effect. The plaintiff was the permanently kept concubine of Anjana Reddy. She and her children were maintained by Anjana Reddy till the latter died and after the death of Anjana Reddy, Thimmappa maintained the plaintiff and her

children and subsequently he stopped payment. Thereupon, a panchayat was held by many persons including P.Ws. 2, 4 and 5. The panchayatdars decided that the plaintiff should be given wet land bearing survey No. 412/4 and a dry land bearing survey No. 363/2 and a portion of the house mentioned in the plaint schedule for her residence. After that Thimmappa died. The plaintiff in her plaint mentioned as follows :

> "..... .Thimmappa agreed to do so. This family settlement and the decision of the panchayatdars are binding on Thimmappa and his heirs and survivors. Subsequent to the death of Thimmappa, his wife Nagamma consented to abide by this decision of the panchayatdars till about two months prior to the filing of this suit. As she ultimately refused to do so the plaintiff has filed this suit for maintenance ....."

4. The 1st defendant filed her written statement raising various contentions as follows :

> "It is true that Anjana Reddi kept the plaintiff as his concubine for some time but the plaintiff was simultaneously having illicit intimacy with Mahaboob Saheb and others. So, the plaintiff was not the exclusively kept concubine of Anjana Reddy. The plaintiff's husband is still alive. The alleged panchayat is not true. On the death of Thimmappa, the property devolved on Anjana Reddy's son, Venkatarama Reddy by survivorship. The latter died subsequently and thereupon, the 1st defendant became entitled to the property as heir of her grandson. The 1st defendant became a full owner under the Hindu Succession Act, 1956. She executed a gift deed of the properties in favor of the 2nd defendant who is looking after her."

5. The 2nd defendant filed a memo adopting the written statement of the 1st defendant.

6. The learned Subordinate Judge framed 6 issues in the first instance and another 5 issues subsequently. Original issues 1 and 2 and additional issue No. 3 run as follows :

> 1. Whether the plaintiff is the permanently kept concubine of late Anjana Reddi and if so, is she entitled to maintenance and at what rate?
> 2. Whether the said Anjana Reddi died in a state jointness with the father and son ?
> Additional issue NO. 3. Whether there was settlement of plaintiff's maintenance as pleaded in para 5 of the plaint ?

We are not concerned with the other issues in the present case. On issues 1 and 2 and additional issue No. 3, the learned subordinate Judge found against the plaintiff. On issue No. 1 he held that the plaintiff was not the permanently kept concubine or Avaruddha stri of Anjana Reddi. In view of that finding he did not decide the last portion of issue No. 1 viz., as to what was the rate of maintenance.

7. In appeal the learned District Judge called for a finding from the learned subordinate Judge as to the quantum of maintenance which would be reasonable and proper if the plaintiff were held to be entitled to maintenance. Accordingly, the learned subordinate Judge submitted a finding

fixing past maintenance at Rs. 15 per month and future maintenance at Rs. 30 per month.

8. Three points for decision were formulated by the learned District Judge as follows :-

> 1. Whether the plaintiff was the permanently kept concubine of Anjana Reddy and therefore entitled to maintenance from his properties;
> 2. If so, what is the rate of maintenance to which she is entitled, and
> 3. Whether the relinquishment deed executed by Anjana Reddy was a sham and nominal transaction.

9. On point No. 3, the District Judge agreed with the lower Court that the relinquishment deed was not a sham and nominal transaction. On point No. 2, he held that, if the plaintiff were entitled to maintenance, the amount awarded should be at the rate as reported by the learned subordinate judge. On point No. 1 he disagreed with the finding of the lower Court to the extent of holding that the plaintiff was an avaruddha stri of Anjana Reddy and would be entitled to maintenance after his death from his estate. But in view of his finding on point No. 3 that the relinquishment deed was not sham and nominal transaction and was, therefore, effective, he held that Anjana Reddv did not have any share in the joint family property which ultimately came into the hands of the 1st defendant and that, therefore, no maintenance could be awarded against the 1st defendant or her done, the 2nd defendant.

10. As regards the finding on point No. 3, there is a concurrent finding of both the lower Courts and the learned District Judge has given his finding after carefully discussing the relevant evidence and he has given his reasons in paragraph 8 of his judgment. In considering the question whether the plaintiff was entitled to maintenance and whether Ex. B-4 was a genuine transaction, he referred to various decisions which had been relied upon on behalf of the plaintiff and held that those decisions did not apply because they refer to the rights of a wife and not of a concubine. The District Judge is certainly right in holding that the plaintiff could not get any right of maintenance against the properties of Thimmappa which afterwards came into the hands of the 1st defendant, as Anjana Reddy had completely ceased to have any interest in the properties as a result of his relinquishment under document Ex. B-4, I find no reason to disagree with the findings of the learned District Judge on all the three points which he had framed.

11. Mr. Pattabhiramarao, the learned counsel for the appellant, however contends that the learned District Judge committed an error in not going into the ground which had been raised in the appeal memo in A. S. No. 7 of 1959 regarding the alleged settlement by panchayatdars and that, in doing so the learned District Judge had committed an error of law as contemplated in Section 100(1)(c) of the Civil Procedure Code. That provision runs as follows :

> " 100 (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds namely :
> X X X X X X
> (c) a substantial error or defect in the procedure provided by this code or by any other law

for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."

Order 41, Rule 31 (a) C. P.C runs as follows :

"The judgment of the appellate Court shall be in writing and shall state -
(a) the points for determination
(b) the decision thereon
X X X X X"

On additional issue No. 3 the learned subordinate Judge, after careful discussion of evidence, in paragraph 12 of his judgment gave a finding against the plaintiff. In the appeal memo in A. Section 7 of 1959 before the learned Dist. Judge, grounds Nos. 12 and 13 run as follows :

'12. the lower Court ought to have held that the plaintiff was being maintained by Thimmappa, the donee of Anjana Reddy;

13. the lower Court ought to have held that there was a panchayat to which Thimmappa agreed to it.

.....'

12. If these grounds had been urged and argued by the advocate for the appellant-plaintiff before the learned District Judge in A. Section 7 of 1959, ordinarily this would have been mentioned by him as one of the points which arose for determination and he would have given a finding regarding the settlement which is concerned in these two grounds. But really no such point was framed or mentioned and no decision was given regarding the alleged settlement. Mr. Pattabhiramarao, contends that this is an error of law. When the present second appeal came up for hearing on 8-9-66 and when he raised these grounds I had given him time to contact the advocate who had argued the appeal in the lower appellate Court in A. Section 7 of 1959 and find out whether any affidavit could be filed by him to the effect that he urged these grounds but still the learned District Judge failed to mention or consider them in his judgment. I gave him time till today, that is, 13-12-1966. Mr. Pattabhiramarao, has expressed his inability to file any affidavit or to show that the grounds were actually urged and argued. All the same he contends that, because the above two grounds were contained in the appeal memo, the learned District Judge ought to have framed a point regarding the alleged settlement concerned in these grounds and given a finding on that point.

13. In this connection it has to be noted that in the memo of grounds in this second appeal, there is no ground taken that the learned District Judge ought to have framed a point for decision regarding the settlement and that his failure to frame such a point or give decision on such a point amounted to an error of law as contemplated in Section 100(1)(c), C.P.C., and therefore, it has vitiated the procedure. But all the same his contention in this Court in effect is. that when a ground was mentioned in the memo of first appeal, the 1st appellate Court was bound to frame a point regarding that ground and give a decision on such point irrespective of the question whether it was actually urged by the advocate for the appellant during the arguments or not. This contention is a point of law. So I allowed him to argue it before me though it was not mentioned by him as a ground in his memo of appeal.

14. In *Abdul Kareem v. The Shop Thankar Ram and Jaggu Ram*[1], a contention was raised

[1] AIR 1923 Lahore 124 at p. 125

before a division bench of Lahore High Court that the appellant in the second appeal was entitled to have the case remanded in order that the evidence of one remaining witness may be recorded. The learned judges observed as follows :

> "In clause 9 of the memorandum of appeal presented to the district judge the appellant did state that the lower Court had not taken all his evidence. The judgment of the learned district judge is silent on the point and counsel urges that the point must have been pressed before the district judge, who must have overlooked it or have failed for some other reason to record a finding. He concedes that it was the duty of the District Judge to record such a finding and he has not supported his ground of appeal by an affidavit from the counsel in the District Court to the effect that he did not give up the point and did press it. In Section 114 of the Evidence Act it is laid down that the Court may presume that Judicial and official acts have been regularly performed, a presumption which like all other presumptions may be rebutted but unless rebutted is conclusive. At page 747 of Woodroffe and Ameer Ali's Law of Evidence 7th Edition a mass of authorities is quoted to the effect that if it be the duty of a Court to do a particular thing it must be assumed that the judges of that Court did their duty. These authorities are precisely in point and in the absence of any affidavit to the effect that the ground was not given up, and inasmuch as the presumption is that the Court did its duty, we must assume that the ground was definitely given up. The mere recital of the ground in the memorandum of appeal is no reason for making a contrary presumption and holding as counsel wishes us to do, in contravention of Section 114, that the Court failed to do its duty....."

15. In Harji Mal v, Devi Ditta Mal, AIR 1924 Lahore 107 it was observed as follows :-

> "There were four issues in the trial Court regarding two of which the judgment of the District Judge is silent.....Now the presumption is that a district judge deals with the arguments put before him and if the form of the judgment shows clearly as it does in this case that the only points presented were those two with which he has dealt, the only inference which we can draw, more especially in the absence of an affidavit to the contrary by the counsel who appeared before him is that the remaining points were not urged and were definitely abandoned."

16. In *Krishna Promada Dasi v. Dhirendra Nath Ghosh*[2], a Question of estoppel was raised before their Lordships. This question of estoppel does not appear to have been pressed in the High Court as it is not referred to in the judgment. In effect, their Lordships held that, as that question was not referred to in a judgment of the High Court, it had to be presumed that such point was not pressed in the High Court.

17. In *Nanu Nair v. Ashta Moorthi*[3], the Madras High Court observed as follows : (at page 28)

"Section 105, Clause (2) C.P.C., prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is

[2] AIR 1929 PC 50

[3] AIR 1916 Mad 127

not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order."

18. In *Sitarama Sastrulu v. Suryanarayanasastrulu*[3], Madras High Court observed that the judgment of an appellate Court should show on the face of it that the points in dispute were clearly before the mind of the judge and that he exercised his own discrimination in deciding them.

19. In *Ram Lal v. Dhirendra Nath*[4], the Privy Council observed that since findings of fact by the first appellate Court are to be treated as final they should at least be clear and specific - not ambiguous or inferential and that a general approval to the views of the trial Court would not necessarily incorporate all its findings in detail - especially if accompanied by language which cast doubt on a particular point.

20. In *Gutta Venkayya v. Venkata Rattama*[5], the Madras High Court observed that it was not incumbent upon the appellate Court to repeat in extenso the arguments of the trial judge which it accepted but the party was entitled to a considered opinion of the appellate tribunal and that it was not the first Court's view but that of the second Court that was final if the Question was one of fact.

21. In *Yeshwant v. Walchand*[6], the Supreme Court observed that if the facts proved and found as established were sufficient to make out a case of fraud within the meaning of Section 18 Limitation Act, the objection that the plea under Section 18 was not taken in the lower Courts or in the ground of appeal was not serious as the question of the applicability of the section would be only a question of law and such a question could be raised at any stage of the case and also in the final Court of appeal.

22. In *Ramachandra v. Ramalingam*[7], the Supreme Court observed as follows - (at page 306)

". . . . The error or defect in the procedure to which the clause (S. 100 (1) (c)) refers is as the clause clearly and unambiguously indicates an error or defect connected with, or relating to, the procedure; it is not an error or defect in the appreciation of evidence adduced by the parties on the merits .....If in dealing with a question of fact, the lower appellate Court has placed the onus on a wrong party and its finding of fact is the result substantially of this wrong approach that may be regarded as a defect in procedure; if in dealing with questions of fact the lower appellate Court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure. If the lower appellate Court fails to consider an issue which had been tried and found upon by the trial Court and proceeds, to reverse the trial Court's decision without the consideration of such an

issue, that may be regarded as an error or defect in procedure; if the lower appellate court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party

[3] ILR 22 Mad 12 [5] AIR 1938 Mad 253 [7] AIR 1963 SC 302
[4] AIR 1943 PC 24 [6] AIR 1951 SC 16

that may, in some cases, be said to amount to a defect or error in procedure. But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court however, erroneous the said conclusions may appear to be to the High Court, because as the Privy Council has observed however gross or inexcusable the error may seem to be, there is no jurisdiction under Section 100 to correct that error...."

23. From the above decision the position appears to be as follows. There is a presumption under Section 114 of the Evidence Act that every court does its duty by properly following the correct procedure. This presumption extends to saying that the appellate court in its judgment dealt with all the points which had been urged before it by mentioning them as points for decision and also by giving decision on each point. This presumption is rebuttable. One way of rebuttal is by an affidavit by an advocate appearing for the appellant in the lower appellate court to the effect that he actually urged a contention which would necessitate the framing up of a point on that contention though the judgment makes no reference to such contention. In the absence of any such rebuttal the above presumption stands. On the other hand, there is no presumption that the advocate for the appellant pressed and urged every one of the grounds mentioned in the memo of appeal. It is open to an advocate at the time of argument to press or not to press any of the grounds which are mentioned in the memo of appeal. The advocate is presumed to know the strength or weakness, regarding each ground mentioned in the memo of appeal, its having or not having an adequate support in the evidence or in law and the necessity or desirability of pressing such ground or of abandoning it. In the present case, there is an initial presumption that the alleged grounds Nos. 12 and 13, which were mentioned in the appeal Memo in A. S. No. 7 of 1959 and which relate to the alleged settlement were not pressed before the learned District Judge during the arguments by the learned advocate when he argued the case and that the District Judge did not in any way fail in his duty to observe correct procedure by his failing to frame a point or give a finding regarding the alleged settlement. This presumption has not been rebutted. Such being the case, the contention of the learned Advocate that the lower appellate Court has failed in its duty in not deciding the question concerned in Additional Issue No. 3 which was mainly a question of fact, is untenable and it fails.
24. No other grounds are urged before me.

25. In the circumstances, I dismiss the second appeal with costs. No leave.

26. The Court-fee due to the Government on the memorandum of second appeal will be paid by the appellant.
Appeal dismissed.