

HON'BLE SRI JUSTICE R. KANTHA RAO

+ CIVIL REVISION PETITION Nos. 74 & 646 of 2016

%12.02.2016

Immidiseti Lakshmi Kumari & another (CRP No.74 of 2016)
Immidiseti Venkata Pattabhi Ramaiah (CRP No.646 of 2016)

...Petitioners

VERSUS

\$ Batchu Kondayya Gupta & another (both CRPs)

...Respondents

< GIST:

> HEAD NOTE:

!Counsel for Petitioners: Sri A.S.C. Bose

^Counsel for Respondents: Sri T.S.Anand

? Cases referred

1. AIR 2008 SC 901(1)
2. APLJ 1988(2) (DNC) = AIR 1988 ALL.225

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

CRP Nos.74 & 646 of 2016

Between:

I Lakshmi Kumari & another (Petitioners in CRP No.74/2016)
Immidiseti Venkata Pattabhi Ramaiah (Petitioner in CRP No.646/2016)

.. Petitioners

And

Batchu Kondayya & another (in both CRPs)

JUDGMENT PRONOUNCED ON : 12.02.2016

HON'BLE SRI JUSTICE

: R. KANTHA RAO

1. Whether Reporters of local newspapers :
may be allowed to see the Judgments?
2. Whether the copies of judgment may be :
marked to Law Reporters/Journals?
3. Whether their Ladyship/Lordship wish to :
see the fair copy of the Judgment?

HON'BLE SRI JUSTICE R. KANTHA RAO

Civil Revision Petition Nos.74 & 646 of 2016

COMMON ORDER:

Heard Sri A.S.C. Bose, learned counsel appearing for the revision petitioners and Sri T.S.Anand and Sri Y.Srinivasa Murthy, learned counsel appearing for the respondents, in both the revision petitions.

2. CRP No.74 of 2016 arises out of the order dated 03.09.2015 passed by the I Additional Junior Civil Judge, Kakinada, in EA SR No.3279 of 2015 in EP No.303 of 2007 in OS No.884 of 2000, whereas, CRP No.646 of 2016 arises out of the judgment dated 25.01.2016 passed by the VI Additional District Judge, Kakinada, in CMA No.1 of 2016, confirming the order dated 25.01.2016 passed by the II Additional Senior Civil Judge, Kakinada in IA No.752 of 2015 in OS No.49 of 2011.

3. Brief facts, leading to filing of these civil revision petitions, may be stated as follows:

The respondents-decree holders in CRP No.74 of 2016 filed suit OS No.884 of 2000 on 31.07.2000 against the revision petitioner/Judgment-Debtor, for mandatory injunction basing on the easementary right of light and air in respect of their property and also free flow of drain water in to the lane. It is submitted by the respondents before the trial court that the petitioners raised wall obstructing free flow of drain water and also have been obstructing passage of light and air to their property. The suit was

contested and it was decreed on 19.12.2006 on merits in favour of the respondents and against the revision petitioners. Feeling aggrieved the revision petitioners, preferred first appeal i.e., AS No.20 of 2009 and the same was also dismissed on 25.08.2010. Then, they preferred second appeal in SA No.1051 of 2010. In the second appeal, they filed interlocutory application seeking stay of execution of the decree, which was dismissed by this court. Against which, they approached the Supreme Court and the Supreme Court remanded the matter to the High court to decide the substantial questions of law afresh. After remand, the second appeal was dismissed on 19.03.2015. Again, the revision petitioners preferred SLP before the Supreme Court, which was also dismissed. Thereafter, they filed review petition in SAMP No.1135 of 2015 before this court and the same was dismissed on 10.07.2015.

4. The respondents filed execution petition in E P No.303 of 2007 in OS No.884 of 2000 before the court of I Additional Junior Civil Judge, Kakinada. In the said EP, the revision petitioners filed EA SR No.3279 of 2015 under Section 47 CPC to declare that the respondents are not entitled to execute the decree passed in the suit, as the suit itself is not maintainable for not seeking the declaratory relief of easementary right. The said petition was dismissed on merits at the SR stage. Feeling aggrieved, they filed CRP No.74 of 2016.

5. The revision petitioner in CRP No.646 of 2016 filed OS No.49 of 2011 for declaration of his right, title and interest in the disputed land and the same is pending. In the said suit, the plaintiff's evidence was over and the matter was posted for defendants' evidence. In OS No.49 of 2011, the petitioner filed IA No.752 of 2015 seeking temporary injunction restraining the respondents from executing the decree in OS No.884 of 2000. By order dated 04.12.2015, the learned II Additional Senior Civil Judge, Kakinada, dismissed the said application. Feeling aggrieved, he preferred CMA No.1 of 2016 before the court of VI Additional District Judge, Kakinada, which was also dismissed on merits on 25.01.2016. Against the judgment passed in CMA No.1 of 2016, the revision petitioner filed the present CRP No.646 of 2016.

6. Since the revision petitioners and the respondents are common and common questions of law and facts arise for consideration in both the revision petitions, they are being disposed of by this common order.

7. The only ground on which the execution of the decree was sought to be stayed by the revision petitioners is that, as the respondents did not

seek a declaratory relief in respect of the disputed suit property, the suit filed by them for mandatory injunction itself is not maintainable and therefore, the execution court cannot execute the decree. Obviously, the respondents did not seek any declaratory relief, but the suit for mandatory injunction filed by them was decreed and it has been confirmed throughout. Before adverting to the question as to whether the petition filed by the revision petitioners before the executing court under Section 47 CPC is maintainable, it is appropriate to extract Section 47 CPC, which reads as under:

“Section 47: All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit,

Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation-I:- For the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation-II:- (a) For the purposes of this section, a purchaser or property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.”

8. The executability of the decree and the maintainability of the suit, are different aspects. As per Section 47 CPC, the executing court can examine the question relating to the executability of the decree and also the question as to whether the decree is a nullity, since those questions relate to the execution, discharge or satisfaction of the decree. But the maintainability of a suit, is altogether a different question. However if the court, which passed the decree, has inherent lack of jurisdiction, the executing court can examine the question in an application filed under Section 47 CPC. But, when once the decree reached finality, it is not open to the Judgment-Debtor to plead that the suit filed by the Decree-Holder is not maintainable for not seeking the declaratory relief. In fact, in the instant case, in the first appeal, second appeal as well as in the review petition filed in the second appeal, the revision petitioners raised the question of maintainability of the suit, but repelling their contention, the second appeal was decided against them and the review petition filed by them was also dismissed.

9. In this case, it is not the version of the revision petitioners that the trial court which passed the decree has no jurisdiction to pass the decree.

Their only contention is that, as the respondents did not seek declaratory relief in respect of the easementary right, the suit filed by them itself is not maintainable. Therefore, the revision petitioners are precluded from raising the question of maintainability of the suit in an application under Section 47 CPC and the judgments relied on by them in '**Gurunath Manohar Pavaskar vs. Nagesh Siddappa Navalgund**'^[1] and '**Union of India vs. S.B.Singh**'^[2], are not applicable to the facts of the present case. The learned executing court has recorded a specific finding that the petitioners filed number of applications with the sole intention of stalling the execution proceedings in spite of the fact that their contention was rejected even by the Supreme Court by dismissing the SLP filed by them and subsequently the review petition filed by them was also dismissed by this court.

10. Another important fact, which requires to be taken into consideration is, that in the review petition, the petitioners sought one month time for removal of the structures, in respect of which, the learned single Judge of this court held as follows:

“For these reasons, I am of the considered view that the review application is not maintainable and the same is accordingly dismissed.

Learned counsel for review petitioners requested that one more month time may be granted as it is a decree of mandatory injunction for removal of structures, for which other side advocate strongly opposed and contended that the very purpose of this application is only to gain time.

Considering the submissions of both sides and also considering the nature of decree granted, I feel that one more month time can be granted as requested by the learned counsel for review petitioners.”

11. The learned single Judge, on the request of the learned counsel for the review petitioners, granted one month time for removal of the structures while dismissing the review petition. Therefore, for the reasons mentioned above, I am of the considered view that the order passed by the trial court, does not require any interference in this revision.

12. As regards to CRP No.646 of 2016, the revision petitioner filed OS No.46 of 2011 before the Court of II Additional Senior Civil Judge, Kakinada, seeking declaration of his right, title and interest in the plaint schedule property. The relief prayed for is in regard to the very same subject matter in OS No.884 of 2000. Since the suit is pending before the trial court, I am not inclined to express any opinion on the maintainability of the said suit in the present revision. The revision petitioner, however filed CRP against the order passed by the learned II Additional Senior Civil Judge, Kakinada, in IA

No.752 of 2015 seeking stay of execution of the decree, which was confirmed by the learned VI Additional District Judge, Kakinada by judgment dated 25.01.2016. Both the courts below have rightly pointed out that under Section 41 of the Specific Relief Act, 1963, no injunction can be granted restraining the competent court from executing the decree on the application filed by them. Therefore, the judgment passed by the learned VI Additional District Judge, in CMA No.1 of 2016, confirming the order passed by the learned II Additional Senior Civil Judge, in IA No.752 of 2015 in OS No.49 of 2011, also does not require any interference by this court.

13. I absolutely see no merit in these civil revision petitions and consequently, both the civil revision petitions are dismissed. No order as to costs. Miscellaneous petitions, pending if any in these revision petitions, shall stand closed.

R. KANTHA RAO, J

Date: 12.02.2016
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HON’BLE SRI JUSTICE R. KANTHA RAO

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Civil Revision Petition Nos.74 & 646 of 2016

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Date: 12.02.2016

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