

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3000 of 2016

ORDER:

This Civil Revision Petition, under Section 115 of Code of Civil Procedure (for short 'CPC') is filed by the Petitioners/Judgment Debtors, challenging the Order dated 14.06.2016 of the learned III Senior Civil Judge, City Civil Court, Secunderabad, passed in E.A.No.414 of 2015 in E.P.No.55 of 2015 in O.S.No.130 of 2013 filed under Order XXI Rule 26 (1) of CPC for stay of execution of decree, alleging that the petitioners have already filed a Petition under Order IX Rule 13 of CPC to set aside the decree on the same day, but the Executing Court dismissed the said Petition on the ground that there is no material to show that the petitioners filed a petition under Order IX Rule 13 of CPC and observed in paragraph 7 of the order under challenge that the affidavit disclosed that the petitioners are going to take steps for filing a petition under Order IX Rule 13 of CPC to set aside the *ex-parte* decree and without filing a petition, the execution cannot be stayed.

2. The main contention of the learned counsel for the revision petitioner is that the revision petitioners filed petitions, including a petition under Order IX Rule 13 of CPC before the same Court and they were listed on the same day along with the Execution Petition, but the observation of the Executing Court is erroneous on the face of record. In support of his contention, learned counsel drawn the attention of this Court to a judgment of this Court in **V. Divakara Rao and others Vs. Srinivasa Rao**^[1].

3. Per contra, Sri C. Kumar, learned counsel for respondent herein contended that mere filing of the petition in the main suit without filing any petition before the Executing Court is not sufficient unless a

Petition under Order IX Rule 13 of CPC to set aside the *ex parte* decree before the trial Court is filed and that since the Executing Court neither failed to exercise the jurisdiction conferred on it nor exercised jurisdiction which is not conferred on it; or exercised its jurisdiction irregularly, therefore prayed for dismissal of the petition. In support of his contentions, he relied on a judgment of this Court in **Malladi Ravishankar Vs. Anadaraju Chits Private Limited and others**^[2].

4. As seen from the Order under challenge, the reason for dismissal of the petition is that there is no material to show that the petitioners filed a petition under Order IX Rule 13 of CPC in view of the averment made at the end of paragraph 2 of the affidavit filed along with the petition. But, the Court below has not noted whether the counsel for petitioners would provide the information about filing of the petition under Order IX Rule 13 of CPC along with Execution Application No.414 of 2015. Since no such petition was filed, the petition was dismissed. Even today, except arguing the matter before this Court, no material is placed on record to accept their contention that they filed a petition under Order IX Rule 13 of CPC to set aside the *ex parte* decree. Therefore, in the absence of any material, it is difficult to believe the contention of the revision petitioners that they filed a petition under Order IX rule 13 of CPC, in view of the averment made at the end of paragraph 2 of their affidavit in the Execution Application.

5. Order XXI Rule 26 (1) of CPC deals with Stay of Execution of a decree. According to it, the Court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was

passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

6. This provision does not say that mere filing of a petition under Order IX Rule 13 of CPC would operate as stay, but the Court may stay the execution of the decree, only to enable the judgment Debtor to apply to the Court by which the decree was passed or to any Court having Appellate jurisdiction in respect of the decree or execution thereof to obtain the stay of execution. Assuming that the revision petitioners filed a petition under Order IX Rule 13 of CPC before the trial Court which passed the Decree, the question of the Executing Court granting stay of execution to enable the revision petitioners to file a petition under Order IX Rule 13 of CPC to set aside the decree or to prefer an appeal against such a decree does not arise.

7. Learned counsel for petitioners has drawn the attention of this Court to a judgment reported in **V. Divakara Rao's** case (1 supra), wherein this Court held that when a petition is filed under Order XXI Rule 26 (1) of CPC while expressing his intention to file a Petition under Order IX Rule 13 of CPC or a petition under Order IX Rule 13 of CPC along with the application under Section 5 of Limitation Act, 1963, the Court shall grant stay of execution.

8. No doubt, Order XXI Rule 26(1) of CPC confers power on the Executing Court to grant stay when the petitioners intend to file an application under Order IX Rule 13 of CPC or any application under Order IX Rule 13 of CPC along with a petition under Section 5 of

Limitation Act, 1963. But in the instant case, the revision petitioners have already filed the petition in the main suit, according to their contention urged before this Court. Therefore, the principle laid down in the above judgment has no application, since grant of stay enabling the petitioners to file an application does not arise.

9. On the other hand, the learned counsel for respondent relied on ***Malladi Ravishankar's*** case (2 supra) to contend that stay of execution of a decree can be ordered only the Court which passed the decree or the appellate Court; and the Judgment Debtor has to take steps on the original side for stay of execution. The applicability of the principle laid down in the above referred judgment is doubtful, since the Order XXI Rule 26(1) of CPC confers power on the executing Court to grant stay of execution, only to enable the judgment debtor to apply to the Court which passed the decree for a reasonable time or to enable the judgment debtor to prefer an appeal.

10. In any view of the matter, the material on record would go to show that no application was filed under Order IX Rule 13 of CPC till the date of passing an Order by the Executing Court. However, the learned counsel for revision petitioners contended that they have already filed the application under Order IX Rule 13 of CPC. In these two circumstances, the Court need not pass any order of stay of execution since the revision petitioners contended that they have already filed an application under Order IX Rule 13 of CPC and if such an application is pending before the competent Court, they can move an application for stay of execution of the decree.

11. Hence, I find no ground to grant stay of execution of the decree at this stage and I find no reason to interfere with the findings recorded by the trial Court within the limits of Section 115 of CPC, since the Court exercising revisional jurisdiction can interfere with

the Order only in three circumstances viz., (i) where the Court below failed to exercise the jurisdiction that vested in it; (ii) where the Court below exercises jurisdiction which is not vested on it; and (iii) where the Court below exercises its jurisdiction irregularly. In the instant case, I do not find any such exercise by the Court below calling for interference by this Court. Hence, the revision Petition is liable to be dismissed, being *de void* of merit.

12. Accordingly, this Civil Revision Petition is dismissed, but in the circumstances, without costs.

As a sequel, miscellaneous petitions, if any, pending in this revision, shall stand closed.

M. SATYANARAYANA MURTHY, J

12th August, 2016
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[\[1\]](#) 2004 (5) ALD 626

[\[2\]](#) 2007 (3) ALT 595