

HONOURABLE SRI JUSTICE P.NAVEEN RAO
CIVIL REVISION PETITION NOS.937 & 5580 OF 2011

Date: 20.11.2017

C.R.P.No.937 of 2011:

Between:

Adireddy Kanka Durga Rao, s/o. Veerswamy,
Aged about 59 years, Occu: Engineer, the Singareni
Collieries Company Ltd., Bellampalli area,
Quarter No.C14, Golet Village, Bellampalli Taluq,
Adilabad district and another.

.....Petitioners/petitioners/
appellants

and

Bonu Vishnu Murthy S/o Simha Chalam,
Aged 47 years, Private Employee,
R/o. D.No.30-10-10, Desthveedhi,
Rajahmundry.

.....Respondent/respondent/
Respondent



The Court made the following:

HONOURABLE SRI JUSTICE P.NAVEEN RAO

CIVIL REVISION PETITION NOs.937 & 5580 OF 2011

COMMON ORDER:

Petitioners are appellants/defendants. Plaintiff filed O.S.No.357 of 2008 on the file of Principal Senior Civil Judge, Rajahmundry, praying to grant decree against the defendants for an amount of 3,79,200/- with subsequent interest @ 24% per annum on 2,25,000/- from the date of the suit till the date of realization.

2. On 08.07.2010 suit was decreed for sum of 3,79,200/- with subsequent interest @ 6% per annum on 2,25,000/- from the date of filing of the suit till realization and also awarded costs of 16,127/-. Aggrieved thereby, defendants filed A.S.No.119 of 2010 pending on the file of I Additional District Judge, Rajahmundry. In the said Appeal Suit, appellants filed I.A.No.71 of 2011 praying to receive the documents mentioned in the list enclosed as additional evidence and to mark the same as exhibits on behalf of the appellants. No orders are passed on this application. On 09.03.2011, endorsement was made on the docket to hear the respondent in the I.A., and to call along with the appeal. The appeal was heard on the same day and was directed to be listed on 16.03.2011 for judgment. At that stage, petitioners filed C.R.P.No.937 of 2011 before this Court. On 16.03.2011, petitioners filed petition to reopen the appeal suit. The I.A., was directed to be listed on 22.03.2011. On 22.03.2011, it was further adjourned to 29.03.2011. In the meanwhile, by order dated 25.03.2011, this Court granted interim stay as prayed for. In view

of the stay granted by this Court, proceedings before the first appellate Court came to stand still.

3. Plaintiff in the suit filed E.P.No.91 of 2011. On 03.11.2011, the trial Court passed prohibitory and restraint order on transferring or creating charge on the property specified in the schedule annexed to the order. On 24.10.2011, panchanama was drawn on taking possession of the schedule property mentioned in the Execution Petition. Aggrieved thereby, defendant No.2 preferred C.R.P.No.5580 of 2011 before this Court. By order dated 21.12.2011, this Court granted interim stay as prayed for in the said C.R.P.

4. Heard learned counsel for petitioners and learned counsel for respondents.

5. Learned counsel for petitioners submits that first appellate Court erred in not passing orders on the application filed by them to receive additional documents and to mark those documents as exhibits. First appellate Court erred in posting the I.A. along with appeal suit, hearing the appeal suit on the same day and reserving the appeal suit for judgment even before passing orders in the I.A. Such action of first appellate Court is erroneous. According to learned counsel for petitioners, first appellate Court ought to have considered the application filed in the first instance before hearing the appeal suit. In support of the said contention, learned counsel placed reliance on the decisions of Supreme Court in **Jitinder Singh & another (Minor through mother) v. Mehar Singh and**

others¹ and Malyalam Plantations Ltd v. State of Kerala and another².

6. With reference to the orders passed in execution petition, learned counsel submitted that when C.R.P., is pending consideration and interim stay is granted by this Court, the trial Court erred in entertaining the E.P., and directing attachment of the properties. He, therefore, submitted that order of attachment is liable to be set aside on this ground alone.

7. Learned counsel for respondent submitted that first appellate Court has not committed any error in directing listing of I.A., along with first appeal. Provision in Order 41 Rule 27 of Code of Civil Procedure is enabling provision. It is permissible for the first appellate Court to consider the application along with appeal suit and at the time of deciding the case, if necessary, the appellate Court can pass appropriate orders and, therefore, it is not necessary for the appellate Court to consider the application filed under Order 41 Rule 27 of CPC before considering the appeal. He, therefore, submitted that no error is committed by the first appellate Court in not passing orders in the application. He further submitted that it is not the case where petitioners were not afforded opportunity of hearing. After hearing arguments on behalf of petitioners in the application as well as in the appeal suit, case was reserved for judgment.

8. He further submitted that as there is no injunction order passed by the first appellate Court, no error is committed in

¹ AIR 2009 SC 354

² AIR 2011 SC 559

attaching the properties. He would further submit that plaintiff apprehended that defendants were taking steps to dispose of the properties to frustrate the decree granted in his favour and in order to protect his interest and to enforce the decree, plaintiff filed the E.P., and no error is committed by attaching the properties as decree is operating against the petitioners and the orders passed by the trial Court is to enforce the decree passed in his favour.

9. In substance, the contention of the petitioner is even without passing orders in I.A. No.71 of 2011, I.A. was directed to be heard along with first appeal and after hearing first appeal, even without passing orders in I.A., first appeal was posted for judgment, whereas simultaneously execution proceedings were taken up by trial Court.

10. The docket entries in the I.A., as well as suit are not legible and, therefore, Court called for original record of the suit and I.A., as well as Diary Register. The original record in the suit as well as I.A., and the photocopy of the Diary Register for the relevant dates is now transmitted to this Court. Even the docket entries in the original record are not readable. From the reading of the entries made in the Diary Register, it is clear that after hearing the arguments of the respondents, first appeal was directed to be listed for judgment on 16.03.2011. On 16.03.2011 judgment was not pronounced. Whereas on the same date i.e., 16.03.2011, petitioner moved the application praying the first Appellate Court to adjourn the matter stating that Civil Revision Petition was filed and likely to be taken up for consideration by the High Court. That petition was heard and adjourned to 22.03.2011 and thereafter to 29.03.2011.

On 29.03.2011, Memo was filed informing the first Appellate Court about the stay granted by this Court. In view of stay granted by this Court, the appeal was not heard and disposed and is adjourned from time to time

11. It is not in dispute that petitioners herein filed I.A., to bring additional evidence in support of the appeal filed. The record discloses that I.A., was not considered and was directed to be listed along with appeal and on the same day, appeal was heard and directed to be listed for judgment on 16.03.2011.

12. Under Order 41 Rule 27 of CPC, an application can be filed for adducing additional evidence or filing documents. In three circumstances, such a prayer could be accepted, namely, 1) if the trial Court has illegally refused the evidence sought to be presented; 2) if the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence and 3) if the appellate Court is of the opinion that additional evidence was necessary for the purpose of proper adjudication of the dispute. However, it is settled principle of law that no additional evidence can be permitted to be adduced to fill in the lacuna or to patch up the weak points of the case.

13. In **Malyalam Planataions Ltd.**, identical issue was considered by the Supreme Court. At the appellate stage, application was filed before the High Court under Order 41 Rule 27 of CPC to place the documents in support of the claim as additional evidence. It appears, High Court adverted the said application, but did not consider the same and no order was passed. Supreme Court observed that when an application for

reception of additional evidence was filed by the parties under Order 41 Rule 27 of CPC, it was the duty of the High Court to deal with the same on merits. Supreme Court further observed that it is incumbent on the part of the appellate Court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced for any relevance/bearing in the issues involved (paragraph-11). Supreme Court further observed that “adducing additional evidence is in the interest of justice”. Having regard to the above observations, Supreme Court held as under:

“13. In the light of the separate application filed under Order 41, Rule 27 of CPC for reception of additional evidence by both sides, it is for the High Court to consider and take a decision one way or other as to the applicability of the same and decide the appeal with reference to the said conclusion.”

14. In **Jitender Singh**, in the second appeal before the High Court application was filed by the appellant under Order 41 Rule 41 of CPC for acceptance of additional evidence. While deciding the second appeal, High Court failed to take notice of the application and has not decided whether additional evidence could be permitted to be admitted into evidence. Supreme Court observed that when an application for acceptance of additional evidence under Order 41 Rule 27 of CPC was filed, it was the duty of the High Court to deal with the same on merits. Having said so, remitted the matter for consideration.

15. As noted above, though the judgment was to be pronounced on 16.03.2011, on account of subsequent developments judgment was not pronounced. In view of the peculiar facts of this case and

since stay granted in both the revision petitions is operating for the last more than six years, I deem it proper to dispose of the Civil Revision Petitions with the following directions:

i) The first Appellate Court is requested to consider the prayer in the I.A.No.71 of 2011 after hearing both parties to find out whether the documents sought to be produced have any relevance/bearing on the issues involved and on due consideration, having regard to parameters for consideration of such application and shall pass appropriate orders as warranted by law and thereafter proceed to decide the A.S.No.119 of 2010;

ii) Since appeal is at the stage of hearing, the trial Court is restrained from proceeding in the Execution Petition No.91 of 2011, till the first appeal is decided;

iii) The petitioners/defendants herein shall not create third party interest in the subject property which is mentioned in the schedule appended to the Order in E.P.No.91 of 2011, till the first appeal is decided.

Miscellaneous petitions if any pending in these revision petitions shall stand closed. There shall be no order as to costs.

JUSTICE P.NAVEEN RAO

Date: 20.11.2017
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