

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**

**+ Civil Revision Petition Nos.6483 and
6484 of 2016 and 106 of 2017**

% 04-08-2017

Chalasani Kalyani Leela, W/o Indira Ramana Rao,
Aged 56 years, House wife, Temporarily residing in USA,
Rep. by her GPA Holder, Chalasani Indira Ramana Rao,
S/o Late Venkata Satyanarayana Rao, Aged 60 years,
R/o D.No.14/127, Near Railway Station, Gudivada

... Petitioner in CRPs 6483 & 6484/2016

Chalasani Souri Raja Perumallu, S/o Late Venkata
Satyanarayana Rao, Aged 58 years, Business,
R/o D.No.14/126, Near Railway Station, Gudivada

... Petitioner in CRP No.106/2017

Vs.

\$ Chalasani Souri Raja Perumallu, S/o Late Venkata
Satyanarayana Rao, Aged 58 years, Business,
R/o D.No.14/126, Near Railway Station, Gudivada

... Respondent in CRPs 6483 & 6484/2016

Chalasani Indira Ramana Rao, S/o Late C.V. Rao,
Aged 60 years, Occ: Business, R/o D.No.14/127,
Railway Station Road, Gudivada, Krishna District

... Respondent in CRP No.106/2017

! Counsel for Petitioner in CRPs 6483&6484/2016
& for Respondent in CRP No.106/2017:

Mr. K.G. Krishna Murthy,
Senior Counsel, representing
Mr. Challa Gunaranjan

Counsel for Respondent in CRPs 6483&6484/2016
& for Petitioner in CRP No.106/2017:

Mr. Kanakamedala Ravindra Kumar,
Senior Counsel, representing
Mr. Nagaraja Kapoor

< Gist:

> Head Note:

? Cases referred:
AIR 1990 SC 867

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**Civil Revision Petition Nos.6483 & 6484 of 2016 and 106 of 2007****Common Order:**

Though these three revision petitions arise out of interlocutory orders passed in two different suits, the disputes in both these suits are actually between two brothers. Therefore, the revisions were taken up together for disposal, at the request of the learned Senior Counsel appearing on both sides.

2. Heard Mr. K.G. Krishna Murthy, learned Senior Counsel appearing for one brother and his wife and Mr. Kanakamedala Ravindra Kumar, learned Senior Counsel appearing for the other brother.

C.R.P.No.106 of 2017:

3. Chalasani Indira Ramana Rao (the respondent in C.R.P.No.106 of 2017) and Chalasani Soura Raja Perumallu (the respondent in C.R.P.Nos.6483 and 6484 of 2016 and the petitioner in C.R.P.No.106 of 2017) are blood brothers. Chalasani Indira Ramana Rao filed a suit in O.S.No.13 of 2016 against his younger brother Chalasani Soura Raja Perumallu praying for a decree of declaration and permanent injunction in respect of a vacant house site of an extent of 630 square yards bearing Door No.14/89A, Gudivada Municipality, Krishna District. There was also a prayer in the suit for a mandatory injunction for the removal of the barbed wire fencing erected with poles each of a length of about 6 feet in the middle of the plaint schedule property. The claim of Chalasani Indira

Ramana Rao in O.S.No.13 of 2016 was that the plaint schedule property and some other properties belonged to the mother of both the parties and that before her death on 15-07-1984, she executed a Will dated 06-07-1984 bequeathing the properties to the plaintiff as well as to the father; that the properties described in Schedule A to the Will fell to the share of the father, while the properties described in Schedule B to the Will fell to the share of the plaintiff in the suit; that after the death of the testatrix, the plaintiff let out 6 portions of the plaint schedule property to tenants and started collecting rents without any objection from anyone; that in December, 2013, the plaintiff sold away the structure of the house including the wooden doors etc., to one Venkateswara Rao, who removed the same and handed over the vacant site to the plaintiff; that the plaintiff not only got mutation effected in the Revenue records but also started paying tax and even mortgaged the plaint schedule property to Gudivada Cooperative Urban Bank Limited; that when the plaintiff suffered a kidney problem and got admitted in a hospital, the defendant installed poles in the middle of the suit schedule property and erected barbed wire fencing and that, therefore, the plaintiff was obliged to file the suit.

4. The younger brother Chalasani Soura Raja Perumallu filed a written statement contending that the suit based upon the xerox copy of the alleged Will of the mother was not maintainable; that the plaintiff was not in possession of the original Will; that the barbed wire fencing was in existence from May, 2009, showing that the plaintiff was not in possession of the property; that the property

described in Schedule B to the Will executed by the mother was only 576 square yards and not 630 square yards; that the total extent of site which belonged to the mother was only 1206 square yards; that out of the same, she bequeathed 630 square yards of site and the house to the father, describing it as Item No.4 of "A" schedule property; that the plaintiff sold the vacant site of the extent of 200 square yards to the south of his terraced building in the extreme southern side of his site of 576 square yards for a valuable consideration of Rs.2.00 lakhs to the defendant under an oral sale dated 10-5-2009; that the site sold to the defendant by the plaintiff is situate towards the south of building bearing Door No.14/89A; that the said site is to the north of the tiled house belonging to the defendant, who purchased the same on account of vastu and that, therefore, the suit was liable to be dismissed.

5. Along with the suit O.S.No.13 of 2016, Chalasani Indira Ramana Rao filed an application for interim injunction in I.A.No.129 of 2016. The application for injunction was allowed by the trial Court by an order dated 25-7-2016.

6. Thereafter, the plaintiff Indira Ramana Rao filed a petition to the Gudivada Municipality to measure the suit schedule property and to fix boundary stones. But the application was returned on 22-10-2016 with an endorsement that due to the pendency of the Court case, the property cannot be measured. Therefore, the plaintiff Indira Ramana Rao took out another application in I.A.No.1649 of 2016 praying for the appointment of an Advocate Commissioner to measure the plaint schedule property with the assistance of

Municipal Surveyor in order to fix boundary stones. The said application was allowed by the Court below by an order dated 16-12-2016. Therefore, the defendant in the suit has come up with the above revision challenging the appointment of Advocate Commissioner on the short ground that in a suit for permanent injunction, there was no question of appointing an Advocate Commissioner to measure the suit property and to fix boundaries.

7. It is trite to point out that in a suit for injunction, it is not permissible generally to appoint an Advocate Commissioner, as the same may tantamount to collection of evidence. But this rule is not one of universal application and it has its own exceptions.

8. From the pleadings, it is seen that the plaintiff set up his title to a vacant house site of an extent of 630 square yards on the basis of a Will executed by his mother on 06-07-1984. Interestingly, the defendant in the suit (younger brother) did not say that there was no Will at all. On the contrary, the defendant took stand that the plaintiff was not in possession of the original Will and that on the basis of the xerox copy of the Will he cannot claim declaration of title. But, at the same time, the defendant also took another stand which was directly about the contents of the Will. In paragraph-8 of the written statement, the defendant stated as follows:

"8. The defendant submits that "B" schedule property under the Will executed by the mother of the plaintiff is only 576 sq. yards but not 630 sq. yards. The total extent of site of plaintiff's mother is only 1206 sq. yards. Out of which she bequeathed 630 sq. yards of site and house to her husband shown as Item No.4 of "A" schedule property under the Will dated 06-7-1984. The said property to south of present disputed property intervening by passage. The extent shown in plaint and its schedule is incorrect."

9. Again in paragraph-9 of the written statement, the defendant stated as follows:

“9. The defendant respectfully submits that the plaintiff sold the vacant site of 200 yards of site in the south of his terraced building in the extreme southern side of his site of 576 square yards for a valuable consideration of Rs.2,00,000/- (Rupees two lakhs only) to the defendant under an oral sale deed 10-5-2009 and this defendant paid entire sale consideration to the plaintiff on the even date in presence of common relatives and the delivered possession of the said site to the defendant on the even date and since then this defendant has been in possession and enjoyment of the said site with absolute rights.”

10. Therefore, it is clear that the defendant is tacitly admitting to the ownership of the plaintiff to a portion of the plaint schedule property measuring an extent of 576 sq. yards, from out of which the defendant claimed to have purchased 200 sq. yards of site, under an oral sale.

11. If the case on hand was merely one of a boundary dispute, it would be possible for the Court to appoint an Advocate Commissioner to measure the property and fix the boundaries of the portions owned by both the parties. But, in the case on hand, the respondent/plaintiff wanted the appointment of a Commissioner not merely to look into the Will executed by the mother and to measure the property with the assistance of the Municipal Surveyor and to fix boundaries, as per the description contained in the Will. The prayer of the respondent/plaintiff was to appoint a Commissioner to measure the suit schedule property with the assistance of the Municipal Surveyor and to fix boundaries on the four corners. Once such a petition is allowed, the Municipal Surveyor will fix boundaries on the property to the extent of 630 square yards. Thereafter, two

disputes raised by the defendant, namely, (i) that what was bequeathed under the Will was only 576 square yards and (ii) that out of the same the land of an extent of 200 square yards was sold to him, cannot be adjudicated. Therefore, I am of the considered view that the Court below could not have appointed an Advocate Commissioner, especially in the light of the nature of the controversy raised in this case.

12. In other words, the case on hand is not one which will fall under the exception to the general rule. The respondent/plaintiff having already obtained an interim order of injunction in his favour, cannot now seek to identify the property, armed with an order of injunction. Hence, C.R.P.No.106 of 2017 is allowed and the impugned order of the trial Court is set aside.

C.R.P.Nos.6483 and 6484 of 2016:

13. Chalasani Kalyani Leela (the wife of the elder brother Indira Ramana Rao) filed a suit in O.S.No.30 of 2016 against Chalasani Soura Raja Perumallu seeking a declaration that she has a right of easement by prescription and necessity to a passage demarcated in the sketch attached to the plaint, to reach the Railway Station road on the western side and the Municipal road on the northern side and for a mandatory injunction to direct the defendant to remove the barbed wire fencing erected in the passage. She also prayed for a permanent injunction restraining the younger brother from making any unauthorized or illegal construction obstructing the joint passage.

14. The case of the plaintiff was that she purchased a house site of an extent of 1434 square yards in the 14th Ward of Gudivada Municipality from a third party under a registered sale deed dated 27-06-1981; that the said property was described in two parts as Item Nos.1 and 2 in the sale deed, that Item No.2 measuring an extent of 1346 square yards; that at the time of purchase, it was a trench of a depth of 18 feet; that the plaintiff filled the trench and made it fit for construction of a residential house; that Item No.1 of the schedule to the sale deed was of the extent of 88 square yards whose width was 2 yards; that after filling up the land, the plaintiff constructed a building with a ground floor and later the building was developed with 11 residential tenements which were let out to tenants; that to the west of Item No.2 of the schedule to the sale deed, there is a passage of width of 2 yards running from south to north; that in continuation of the said passage of the width of 2 yards, there is another passage of width of 4 yards formed by the plaintiff and her mother-in-law so as to have direct access to the Railway Station road on the western side and the Municipal bazaar on the northern side; that the site and tiled house adjoining Item No.2 of the schedule to the sale deed located on the western side belonged to the mother-in-law of the plaintiff and it consists of 6 portions; that since the passage is only passage to reach the Railway Station on the western side and Municipal road on the northern side, it is an easement of necessity; that the said easementary right was being exercised for more than the statutory period of 20 years even during the lifetime of the plaintiff's parents-

in-law; that when the plaintiff's husband (elder brother) was admitted in hospital in January, 2016, the defendant trespassed into the passage and put a barbed wire fencing and that therefore the plaintiff was obliged to file the suit.

15. The defendant filed a written statement in O.S.No.30 of 2016, claiming ignorance of the purchase of two items of properties by the plaintiff under the registered sale deed dated 27-6-1981. The defendant denied the existence of a passage of width of 2 yards running from south to north and also the passage of a width of 4 yards beyond the passage of the width of 2 yards. The defendant claimed that the site shown with a width of 4 yards belonged to him absolutely. The defendant also claimed that the plaintiff had alternative access to reach the Municipal road and that therefore the claim cannot be one of easement by necessity.

16. Along with the suit O.S.No.30 of 2016, the plaintiff (the wife of the elder brother) filed 3 applications, one in I.A.No.69 of 2016, another in I.A.No.70 of 2016 and the third in I.A.No.71 of 2016, respectively for (i) a temporary mandatory injunction for the removal of the barbed wire fencing fixed along with the portion marked as JKG and AD in the plaint plan, (ii) a temporary injunction restraining the respondent/defendant from interfering with the easementary right of the plaintiff over the passage shown as LDMAKJNOPQR and (iii) appointment of the Advocate Commissioner to visit the suit property as well as the passages and to note down whether there was any passage to reach the property shown in ABCD without entering into the disputed passage.

17. The trial Court first took up the third application, namely, I.A.No.71 of 2016 and allowed the same somewhere in March, 2016. The said order was not challenged by the defendant. Therefore, the Advocate Commissioner issued notice to both parties, visited the property on 16-03-2016 and filed a report on 13-04-2016 along with a rough sketch and photographs.

18. Thereafter, the trial Court heard the applications for injunction and dismissed both I.A.Nos.69 and 70 of 2016 by an order dated 06-06-2016. Aggrieved by the said order, the plaintiff filed two appeals in C.M.A.Nos.8 and 9 of 2016, but both of them were dismissed by the lower Appellate Court, forcing the plaintiff to come up with the above revisions.

19. At the outset, it should be pointed out that when applications for interim injunction and interim mandatory injunction are dismissed by the trial Court and the said order is also confirmed by the Appellate Court, the revisional Court would not normally interfere with such orders. The jurisdiction of this Court under Article 227 of the Constitution, is only limited to the question of material irregularity or impropriety. The present revision petitions are filed under Article 227 of the Constitution. Therefore, I cannot really sit in judgment over the orders of both the Courts below, as if I am a Court of appeal. The power under Article 227 of the Constitution is primarily to correct errors of jurisdiction and not to upset findings of fact. The power under Article 227 of the Constitution is not exactly similar to the power under Section 115 of the Code. Therefore, on the one hand, while dealing with a revision under Article 227 of the

Constitution, I may not have the same fetters as a Civil Court would have under Section 115 CPC. But at the same time, self-imposed restrictions in the jurisdiction under Article 227 of the Constitution of India are far more than the restrictions imposed under Section 115 CPC. Keeping these principles in mind, let me now have a look at the orders of the trial Court and the first appellate Court.

20. The trial Court rejected the applications for injunction on the grounds, *inter alia*, (i) that the grant of an interim mandatory injunction would tantamount to allowing the suit itself, (ii) that when there was an alternative passage, there was no easement of necessity, (iii) that though no vehicles can go through the alternative way, that is not a ground for the grant of interim mandatory injunction, (iv) that to prove the easement of necessity, the same should be one of absolute necessity and (v) that the easement by prescription will not become absolute unless the right has been contested in a suit. The application for interim injunction was also dismissed almost on similar lines by the trial Court.

21. The first Appellate Court simply followed the reasonings given by the trial Court and upheld the order of the trial Court.

22. Though the learned Senior Counsel on both sides advanced elaborate arguments and took me through the pleadings and documents, I am of the considered view that the resolution of the dispute on hand revolves primarily around the findings recorded by the Advocate Commissioner in his report dated 13-04-2016. Fortunately, no serious disputes were raised by both parties as against the findings recorded by the Advocate Commissioner in his

report. Therefore, it may be essential to take note of the findings recorded by the Advocate Commissioner, for deciding the question whether the findings recorded by both the Courts below were perverse, calling for any interference.

23. The report of the Advocate Commissioner is actually divided into two parts, the first comprising of the observations of the Commissioner to the work memo submitted by the petitioner and the second consisting of the observations of the Commissioner to the work memo submitted by the learned counsel for the respondents. It would be fruitful to extract the report of the Commissioner in entirety, since it is not a very lengthy report and the same requires some consideration. Hence, the report of the Commissioner is extracted as follows:

“Answers to work memo of the petitioner counsel:

1. In my observation there is a passage width of 4 yards as shown in the plaint plan at PQRJNO and it runs from East to West and joins in railway station road.
2. In my observation there is barbed wire fencing from the point H and it joins I, J, K, A and it ends at W and at W point there is an iron gate. There is no barbed wire fencing at KG point.
3. In my observation there is kadapa slab stones from the fencing towards west i.e. points N,M and to the stair case is nearly two yards and it seems to be old me.
4. In my observation there is a gate it seems very old in the compound wall in between points A and D as shown in the plaint plan, and presently I cannot say that there is access into the western passage from ABCD site and building therein shown in the plaint plan.
5. In my opinion the iron fencing was installed to the stones planted each of height about 4 feet in front of the gate fixed in the compound wall in between points A and D.
6. In my observation there is a way to the inmates of the houses in the north side to the houses in plaint plan at ABCD, but it was closed by barbed wire fencing, so except through iron gate in between A and D for entering into the western passage shown in the plaint plan.

7. In my observation by installing the iron fencing the petitioner has no access into the disputed passage.
8. In my observation the stair case was constructed to the building extending into the kadapa slabs stones.
9. In my observation there is another way at end of 2nd house compound wall in the north side but it was height of 2 feet and vehicles cannot go into that way and there will be no free access in that way.
10. In my observation there is stagnation of drainage water into the bazaar shown in the plaint plan to the north of AB and also part of passage i.e. NUGM shown in the plaint plan.

Answers to work memo of the respondent counsel:

1. In my observation there is no fencing at K,G point.
2. In my observation there is no way at B point to reach Municipal bazaar, but there is a way at end of 2nd house compound wall in the north side but it was height of 2 feet from ground and vehicles cannot go into that way and there will be no free access in that way.
3. In my observation there is no way at B point to reach municipal bazaar, but there is a way at end of 2nd house compound wall in the north side but it was height of 2 feet from ground and vehicles cannot go into that way and there will be no free access in that way. There is path way in between the two building.
4. In my observation as per plaint plan the stair case in between A and D is into the ABCD site."

24. A careful look at the findings recorded by the Advocate Commissioner would show (1) that there is a passage of a width of 4 yards running from east to west, which joins the Railway Station road; (2) that there is no access to the western passage from ABCD site and building shown in the plaint plan; (3) that an iron fencing was installed to the stones planted to a height of about 4 feet in front of the gate fixed in the compound wall in between points A and D; (4) that there is a way to the inmates of the house in the north side to the house in the plaint plan at ABCD, but it was closed by barbed wire fencing and hence, except through the iron gate in between A and D, there is no other way for entering into the western passage; (5) that by installing the iron fencing the petitioner has been denied

access to the disputed passage; (6) that there is another way at the end of the second house compound wall on the northern side, but it has height of 2 feet and hence, vehicles cannot go through that way and there will be no free access; that there is no way at point B to reach Municipal bazaar; (7) that though there is a way at the end of the second house compound wall on the northern side, it is at a height of 2 feet from the ground level, and hence, vehicles cannot go through that way and there will be no access; (8) that there is no way at point B to reach Municipal bazaar, though there is another way at the end of the second house compound wall at a height of 2 feet preventing the vehicles from going through that way.

25. From the observations of the Advocate Commissioner, which we have extracted above, it is clear that though there is an alternative way, it is of a width of 2 feet and at a height of 2 feet above the ground level. Therefore, no vehicles from the petitioner's house can pass through that passage either to the Municipal bazaar or through the railway station. If this is clear, then the only conclusion that is possible is to hold that the alternative passage said to be available, is not of any use and that therefore, the passage of a width of 4 yards now obstructed by the defendant, is an easement of necessity.

26. Unfortunately, both the Courts below did not go into the question in the right perspective. Without carefully analyzing the Advocate Commissioner's report in total, both the Courts below pulled out stray sentences in the Commissioner's report and came to the conclusion that there was an alternative passage and that

therefore, an easement of necessity cannot be pleaded. This approach of the Courts below is completely perverse and the finding reached by the Courts below could not have been reached on a prudent analysis of the Commissioner's report. Hence, I am of the considered view that the Courts below ought to have granted the interim reliefs.

27. In so far as the triple tests of *prima facie* case, balance of convenience and irreparable hardship are concerned, for the purpose of considering an application for interim injunction, I am of the view that they are available in favour of the petitioners/plaintiffs. The petitioner is none other than the wife of the elder brother of the respondents. There are other litigations between the petitioner's husband and the respondent. Some of the disputes are interconnected with each other. The ownership of the house and land are not in dispute. The suit out of which the present revisions arise, relate only to the easementary right of passage. Once it is established on ground that there are two passages, one of which is a width of 2 yards located at a height of 2 feet without any vehicles capable of being going through the same, the petitioner-plaintiff should be taken to have established a *prima facie* case. The balance of convenience will also be in favour of the petitioner, since there are 11 tenants in the building owned by the petitioner, who cannot be allowed to suffer on account of the dispute between the owner of the house and his brother. Therefore, the petitioner/plaintiff is entitled to an interim injunction as prayed for.

28. Coming to the prayer for interim mandatory injunction, it is needless to point out that the law is well settled by the judgment of the Supreme Court in **Dorab Cawasji Warden v. Coomi Sorab Warden**¹. As the Supreme Court pointed out the relief of interim mandatory injunction is granted generally to preserve or restore the status quo of the last non-contested status, which preceded the pending controversy. But since the grant of interim mandatory injunction is of a serious nature, the Supreme Court pointed out certain guidelines to be followed. These guidelines are (1) the existence of a strong case for trial, the standard of which shall be higher than that of a mere *prima facie* case required for a prohibitory injunction; (2) the necessity to prevent irreparable or serious injury, which cannot normally be compensated in terms of money; and (3) the existence of balance of convenience.

29. In the case on hand, the petitioner has a strong case, which is on a higher pedestal than a mere *prima facie* case. The ownership of the plaintiff to the house property is not in dispute. The sale deed by which the house property was purchased is of the year 1981. At that time, the mother of the family was alive. The Commissioner's report shows that though there two passages, one is located at a height, making it impossible for vehicles to pass through. Therefore, the plaintiff has a strong case for trial to show that the passage through which he claims access, is an easement of necessity.

¹ AIR 1990 SC 867

30. As I have pointed out earlier, the refusal to grant an interim mandatory injunction would result in all the 11 tenants vacating the property and the property itself became uninhabitable until the suit is disposed of. Therefore, the balance of convenience is also in favour of the petitioner.

31. Therefore, C.R.P.Nos.6483 and 6484 of 2016 are allowed and the applications for interim injunction and the mandatory injunction are allowed. The respondent shall remove the barbed wire fencing, which obstructs the right of passage, within two weeks. Since the fight is between two brothers, the trial Court shall endeavour to dispose of the suit, if possible, within a period of three months from the date of receipt of a copy of the order. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed. No costs.

V.RAMASUBRAMANIAN, J

Date: 04-08-2017

Ak/Ksn