

(2007) 10 AP CK 0017
In the Andhra Pradesh High Court
Case No : C.R.P. No. 4686 of 2007

Maddela Lazar

APPELLANT

Vs

Kopreddy Venkata Subba Reddy and Others

RESPONDENT

Date of Decision : 26-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 41 Rule 19, Order 41 Rule 23, Order 43 Rule 1

Citation : (2008) 3 ALD 6 : (2008) 2 ALT 28

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : S.R. Sanku, for the Appellant; None, for the Respondent

Judgement

P.S. Narayana, J.—This Civil Revision Petition is filed u/s 115 of the CPC as against an order made in I.A. No. 563 of 2007 in A.S. No. 21 of 2007 on the file of II Additional District Judge, Kadapa at Proddutur. It is needless to say that as against an order of this nature CRP u/s 115 of the CPC is not maintainable. As can be seen from the facts, the interim injunction granted earlier was made absolute by the learned II Additional District Judge, Kadapa at Proddutur in I.A. No. 563 of 2007 by order dated 28-2-2007. It is also pertinent to note that an order of interim injunction had been granted in a pending appeal by the learned II Additional District Judge, Kadapa at Proddutur. As against such order, the Civil Revision Petition as such cannot be maintained. In K. Gangulappa Naidu and Others Vs. K. Gangi Naidu, it was held by the learned Judge of this Court as follows:

In the instant case pending the appeal preferred against the disposal of the suit, an application under Order 39, Rules 1 and 2 is filed and that application is disposed of for the first time by the appellate Court. This is not a case where against the orders under Order 39, Rules 1 and 2 made by the trial Court an appeal is preferred to the District Court and as against the orders of the District Court the matter is carried to this Court. So this does not come under the

mischievous of Section 104(2), CPC, but squarely falls under Order 43, Rule 1(r). Accordingly, an appeal shall lie under Order 43, Rule 1(r) r/w Section 104(1) CPC. The authorities cited, as already noted, are distinguishable since the interlocutory proceedings there started from trial Court, then to the appellate Court and thereafter to the High Court attracting Section 104(2), CPC. Those High Courts are right in holding that no such appeal in those circumstances could be maintained. The case on hand is altogether different in nature and does not attract Section 104(2). Therefore, an appeal does lie and is maintainable in the instant case. In a subsequent case in *Ramaswamy v. Chinna Sithammal* AIR 1976 Mad. 63, Ramaswamy, J. had to consider a similar point. The facts of the case were: Two appeals were filed in the High Court against orders in two applications, which were filed to restore two appeals, which were dismissed for default. A preliminary objection was raised by the respondents that the appeals were not maintainable and in support of their case they relied upon the decision of Natarajan, J, in *C. Kalahasti Vs. P.C. Munuswami Chetti*, . The learned Judge, Ramaswamy, J, dealing with that point held the view that (at. P64):

Section 104(2) says that no appeal shall lie from any order passed in appeal under the said section. In order to attract Sub-section (2) the appeal should be one falling u/s 104. If the appeal is one u/s 96, and not u/s 104, Sub-section (2) of the latter section is not applicable. If Section 104(2) is construed otherwise, that is, as applying to appeals coming u/s 96, also the position would be anomalous. He further observed that Sub-clause (t) and (u) of Rule 1 of Order XLIII provide for appeals against orders passed under one provision or other of Order XLI, which governs appeals coming u/s 96. The said two sub-clauses cannot possibly refer to any order by a trial Court. While Clause (t) relates to an order refusing to readmit (or to rehear) relates to an order of remand made by an appellate Court under Rule 23 of Order XLI meaningless if Sub-section (2) of Section 104 is made to apply to appeals u/s 96. No one can suggest that no appeal lies against an order of remand made under Order XLI, Rule 23.

In the present case, the order of the court below is one under Order XLI, Rule 19 of the Code, made in appeals u/s 96. That order is certainly an appealable one as per Order XLIII, Rule 1(t) of the Code. I am quite clear that Sub-section (2) of Section 104 has no application to an order made in an appeal coming u/s 96.

The learned Judge distinguished the decision in *C. Kalahasti Vs. P.C. Munuswami Chetti*, , on the facts of the case, by observing:

If I may say so with respect, the decision of Nagarajan, J, is unexceptionable. As seen above the order which was appealed against, though made under Order XXXIX, Rule 1 had been passed in an appeal which itself was one against an appealable order. The appeal before the court which passed the order questioned before Nagarajan, J was really one coming u/s 104 that is, an appeal against an appealable order. But, the observations of the learned Judge are sought to be construed as laying down the law that no appeal lies against an order passed in any appeal even though the order is an appealable one, under one or other of

the clauses of Order XLIII, Rule 1 CPC. The learned Judge could not have possibly meant it so. If the learned Judge has really stated that an order passed even in a regular appeal coming u/s 96 of the Code is not appealable, it would be purely obiter, for, in the matter before the learned Judge, the order had been passed, not in an appeal coming u/s 96, but in an appeal coming u/s 104.

Thus, it is quite evident that in a regular appeal pending before the appellate Court if an order is passed under Order XXXIX, Rule 1 and 2, or as a matter of fact under any of the Orders, then the appeal is maintainable under Order XLIII, Rule 1 CPC as all such orders are appealable under Order XLIII.

2. In the light of the view expressed by the learned Judge of this Court in the decision referred to supra, since Civil Revision Petition is not maintainable, the learned Counsel is permitted to convert the proceedings into a Civil Miscellaneous Appeal under Order 43, Rule 1 of the CPC.

Accordingly, the Civil Revision Petition is disposed of.