

(2001) 04 AP CK 0132
In the Andhra Pradesh High Court
Case No : CRP No. 5719 of 2000

Mahaboob Basha (dead) by LRs. Mumtaz and another	APPELLANT
Vs	
T. Penchalaiah and others	RESPONDENT

Date of Decision : 20-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1, Order 21 Rule 104, Order 21 Rule 105(1), Order 21 Rule 105(2), Order 21 Rule 106

Citation : (2001) 3 ALD 705 : (2001) 3 ALT 407 : (2001) 2 APLJ 28

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : Mr. R.V. Kumar, for the Appellant; Mr. T.V. Kumar, for the Respondent

Judgement

1. The petitioners assailed the order dated 2-10-2000 in EA No.606 of 2000 in EP No.81 of 2000 passed by the Court of Principal Junior Civil Judge, Cuddapah, contending that if the order is not revised, the same would result in miscarriage of justice. Notice before admission was ordered on 29-12-2000. After receiving the notice, the first respondent appeared through a Counsel. I have heard the learned Counsel for the petitioners and the learned Counsel for the first respondent at the stage of admission. Hence, the civil revision petition is being disposed of finally.

2. The facts are in a narrow compass. The respondents are decree-holders in OS No.432 of 1998. The decree is for payment of money based on a promissory note, the execution of which appears to have been denied by the defendants. Be it noted that the petitioners herein are the legal representatives - wife and children of Mahaboob Basha, the promisor of the suit promissory note. In EP No.81 of 2000 filed by the respondents herein, after receiving notice, the judgment debtors did not appear and they were set ex parte. At that stage they appeared and undertook to file counter to EP and the executing Court set aside the ex parte order on 15-9-2000 subject to condition that they shall pay costs of Rs.15/- to the decree-holders. The order was not complied with and therefore

the matter was posted for filing of the sale papers.

3. At that stage, the petitioners herein filed EA No.606 of 2000 under Order XXI, Rule, 106 of Code of Civil Procedure, 1908 ("CPC" for brevity). In the affidavit filed by the first petitioner on her behalf and on behalf of petitioners 2 and 3 it was inter alia alleged that they are opposing execution, that after receiving notice under Rule 54 of Civil Rules of Practice they engaged an advocate who informed them to attend the Court on 15-9-2000, that the letter addressed by the advocate did not reach them, that when the first petitioner attended advocate's office on 15-9-2000, she was informed that they were set ex parte for non-payment of costs of Rs.15/- and therefore, the ex parte orders be set aside. The lower Court passed the order on 2-10-2000 as under.

Perused affidavit petition. As per docket order in EP No.81 of 2000 dated 15-9-2000 as the petitioner herein did not pay costs and remained ex parte. Now in this petition no satisfactory explanation is offered by the petitioner. Plaintiff could take permission of any one of the petitioner to appear before the Court in the above EP on the date of hearing. Hence, in the circumstances there are no bona fide or reasonable grounds to allow this petition. Hence in the circumstances this petition is dismissed.

4. The learned Counsel for the petitioner Sri R. V. Prasad submits that the lower Court improperly exercised jurisdiction vested in it under Rule, 106 of Order XXI of CPC. He reiterated the grounds urged in the memorandum of revision. Sri T. V.S. Kumar, learned Counsel for the respondents besides opposing the application raised an objection that against the impugned order Civil Miscellaneous Appeal (CMA) lies under Order XLIII, Rule 1(ja) of CPC and therefore the civil revision petition u/s 115 of CPC is not maintainable.

5. The points that arise for consideration, having regard to the rival contentions are:

(i) Whether the civil revision petition is maintainable against an order passed in purported exercise of jurisdiction of the executing Court under Order XXI, Rule 106 of CPC?;

(ii) Whether the trial Court committed error in rejecting EA No.606 of 2000 filed by the petitioners herein?

In Re Points (i) and (ii):

6. The learned Counsel for the petitioners Sri R.V. Prasad while inviting the attention of the Court to various provisions of Order XXI of CPC and submits that when the executing Court rejects application to set aside ex parte order only revision lies as no appeal lies against the original order setting the petitioner ex parte. He would submit that after amendment of CPC the endeavour of the Legislature has been to reduce the number of appeals at execution stage available to the judgment debtors or third parties or persons interested in the property which is attached or proposed to be sold in the execution and therefore

a petition u/s 115 of CPC is alone maintainable. He relied on the judgments of this Court in Sri Tankala Appalaswamy Gari Samba Murthy Vs. Gopasundara Sabatho, and Eswar Reddy v. A.P, State Co-operative Marketing Federation, 1987 (1) ALT 249.

7. Sri T.V.S. Kumar, learned Counsel for the respondents submits that as the lower Court rejected EA No.606 of 2000 by the impugned order in exercise of powers under Order XXI, Rule 106 of CPC, appeal alone would lie and revision would not lie. He placed reliance on the judgment of Calcutta High Court in Gopalan Vikraman Nair Vs. Taranath Dey Sarkar and Another, .

8. In determining the question as to whether a revision lies or an appeal lies we need to notice the provisions of Rules 105 and 106 of Order XXI of CPC as amended by CPC (Amendment) Act, 1976. They are as under.

105. Hearing of application :--(1) The Court, before which an application under any of the foregoing rules of this order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.

106. Setting aside orders passed ex parte, etc. :--The applicant, against whom an order is made under sub-rule (2) of Rule 105 of the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.

9. The plain language of the above two rules would show that any application under any of the rules from Rules 1 to 104 of Order XXI of CPC shall be heard on a day fixed by the Court. If the applicant does not appear when the case is called on for hearing, the Court may dismiss the application and where the applicant appears and opposite party fails to appear the Court may hear the application ex

parte and pass such orders as deemed fit. When an ex parte order is passed under Rules 105(2) or 105(3) of Order XXI of CPC, the applicant or the opposite party, as the case may be, may apply to the Court within thirty days from the date of the order to set aside the order by showing sufficient cause for his non-appearance when the application is called for hearing. On such application being filed under Rule 106(1) of Order XXI of CPC the Court shall set aside the order on such terms as to costs or otherwise and shall fix a day for further hearing of the application. The language in the Rules 105 and 106 of Order XXI of CPC is similar to Rules 8, 9 and 13 of Order IX of CPC. Order XLIII, Rules 1(c) and (d) provide for an appeal against the order rejecting application to set aside the dismissal of the suit or rejecting an application to set aside the decree passed ex parte in absolute terms. But, Order XLIII, Rule 1(ja), which was introduced by CPC (Amendment) Act, 1976 provides an appeal against the order passed under Order XXI, Rule 106(1) of CPC only when the original application referred to in sub-rule (1) of Rule 105 of Order XXI is appealable. Order XLIII, Rule 1(ja) reads as under:

1. Appeals from orders :--An appeal shall lie from the following orders under the provisions of Section 104, namely:--

(a) to (i) omitted

(ja) An order rejecting an application made under sub-rule (1) Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that order is appealable.

10. Though Order, XLIII provides for an appeal against order passed under Order IX, Rule 9 and Order IX, Rule 13 of CPC in absolute terms the same is not the case with regard to orders passed under Order XXI, Rule 106 of CPC. An appeal against an order passed under Rule, 106 of Order XXI of CPC lies only when the order under Order, XXI Rule 105 (1) of CPC is appealable. As already seen, Rules 105 of Order XXI refers to "application under any of foregoing Rules" i.e., Rules 1 to 104 in Order XXI. The same does not refer to application contemplated under Rule 106 of Order XXI of CPC. Further, under the Order XXI, Rule 23 where the person to whom notice is issued under Rule 22 does not appear or does not show-cause to the satisfaction-of the executing Court, why the decree should not be executed, the Court shall order the decree to be executed and where such a person offers any objection to the execution the Court shall consider such objection and make such order as it thinks fit. Therefore, if an application of the decree-holder is dismissed and the consequential order on an application, if any, to set aside the order of dismissal passed ex parte, an appeal would lie. Likewise, if the judgment debtors' application to set aside an order passed under Rule 105(3) of Order XXI of CPC is rejected an appeal under Order XLIII Rule 1(ja) would lie. The same would not be the case where the judgment debtor files application under Rule 106 of Order XXI to set aside the order setting him/her ex parte for nonpayment of costs, for in such an event, the Court would not be exercising jurisdiction either under Order XXI, Rule 105(1) of CPC read with

Rules 2 and 3 and the exercise of jurisdiction would necessarily be in a situation posterior to the stage of Rule 105 of Order, XXI of CPC. The words "application under any of the forgoing rules" in Rule 105(i) are the key to understand Order XLIII, Rule 1 (ja) which cannot be ignored.

11. In Gopalan Vikraman's case (supra), the order was passed at the instance of the decree-holder under Order XXI, Rule 106 of CPC for police help, which was sought to be set aside under Order XXI, Rule 106. The trial Court rightly rejected the application under Order XXI, Rule 106 filed by the judgment debtor on the ground that such application was incompetent. For this reason, the Calcutta High Court held that an appeal would lie in such a situation and revision would not lie. The case is distinguishable on facts and in any event, the same, in my opinion, cannot be an authority to support the proposition of the learned Counsel for the respondents in this case. With respect I am not persuaded to accept the view of the Calcutta High Court. Accordingly, I hold that unless an order under Rule 105(1) of Order XXI is appealable order, the order passed under Rule 106 of Order XXI is not appealable and only revision would lie.

12. On merits of the case, a case is made out showing sufficient cause for non-appearance on 15-9-2000 and accordingly, I hold that the Court below erred in excising jurisdiction vested in it, which occasions failure of justice. The impugned order is therefore liable to be set aside.

13. Accordingly, the civil revision petition is allowed and the impugned order is set aside subject to condition that the petitioners herein would deposit costs of EP in the lower Court within a period of two weeks from today and EA No.606 of 2000 stands allowed and the lower Court shall proceed with EP No.81 of 2000 in accordance with law. If the petitioners commit any default in depositing costs as stipulated herein, their application EA No.606 of 2000 shall stand dismissed. There shall be no order as to costs.