

N. Apalanarasamma and Others Vs. N. Appa Rao and Others

N. Apalanarasamma and Others Vs. N. Appa Rao and Others

SooperKanoon Citation : sooperkanoon.com/425621

Court : Andhra Pradesh

Decided On : Nov-16-1998

Reported in : 1999(1)ALD345; 1999(1)ALT340

Judge : R. Bayapu Reddy, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47 and 152 - Order 20, Rule 12; Advocate Fee Rules, 1990 - Rule 13

Appeal No. : CRP No. 2471 of 1993

Appellant : N. Apalanarasamma and Others

Respondent : N. Appa Rao and Others

Advocate for Pet/Ap. : M/s. G. Rohini and ;G. Veru, Advs.

Judgement :

ORDER

1. This revision is filed by the decree-holders in EP No.373 of 1992 in OS No.90 of 1986 on the file of the 1st Additional Subordinate Judge, Visakhapatnam, questioning the impugned orders dated 4-2-1993 passed in EA No.1479 of 1992 in so far as they relate to the quantum of the amount for which execution was ordered.

2. The revision-petitioners, who are the plaintiffs in OS No.90 of 1986, filed the said suit for partition and separate possession of their share in the suit property against the respondents herein, and preliminary decree with costs was passed on 15-9-1992. The said preliminary decree had become final as it was not questioned by the defendants/ respondents. Subsequently, the plaintiffs, who are the decree-holders, filed EP No.373 of 1992 for recovery of the suit costs awarded to them under the preliminary decree by seeking attachment and sale of the moveable property belonging to the defendants. The warrant of attachment was returned unexecuted on account of some obstruction caused by the judgment-debtors. Thereupon the decree-holders filed EA No. 1479 of 1992 for re-issue of the warrant of attachment to the Amin. At that stage, the defendants' judgment-debtors appeared in Court and filed their counter opposing the application on various grounds including the ground that the advocate fee awarded under the decree is more than what is permitted under A.P. Advocate Fee Rules, 1990 and that the attachment cannot be ordered for realisation of such excessive amount shown in the decree.

3. The learned Subordinate Judge rejected the contentions of the respondents on other grounds but upheld their contention regarding the quantum of advocate-fee awarded in the decree and directed re-issue of warrant of attachment only for an amount of Rs.13,711/- which according to him is the proper advocate-fee, and not for the amount of Rs.36,266/- which was shown in the decree towards advocate fee.

4. During the pendency of the revision petition, the first respondent died and respondents 4 to 11 were recorded and recognised as his LRs. Notices were served on all the respondents in this revision and they did not however choose to appear.

5. Counsel for the revision petitioner is therefore heard.

6. The only point that arises for consideration in this revision is whether the lower Court, which is the execution Court, has erred in reducing the decree amount awarded towards advocate fee and whether there are valid reasons for interfering with such orders of the execution Court.

7. It is now clear from the facts of this case that the preliminary decree for partition which was passed on 15-9-1992 has become final as it was not questioned. The preliminary decree for partition was passed with costs, and an amount of Rs.36694/- was awarded towards costs which related to the advocate fee of Rs.36,266/- for the plaintiffs. The decree-holders filed EP No.373 of 1992 for realising the above said suit costs awarded to them by seeking attachment of moveable property belonging to the judgment-debtors. The objection raised by the respondents with regard to the suit costs incorporated in the decree was that under Rule 13 of the A.P. Advocates' Fee Rules, 1990, the advocate fee can be awarded in a suit for partition only to a maximum of Rs. 10,000/- and in the present case the costs which comprised of only the advocate fee awarded by the lower Court in the preliminary decree was Rs.36694/-, that the trial Court had no jurisdiction to grant more than Rs.10,000/-towards advocate fee, that in granting advocate-fee at Rs.36,266/- the Court acted without jurisdiction and as such the decree cannot be executed beyond the amount of Rs. 10,000/- permissible under Rule 13 of the A.P. Advocates Fee Rule, 1990. The executing Court accepted such contention of the respondents by relying upon the observations made in Subbanna v. Subbanna, AIR 1962 AP 500. But a perusal of the above said decision however shows that the observations made by the Full Bench of this Court in that decision cannot be made applicable to the facts of the present case. What was observed in that decision is that the trial Court can grant future mesne profits only for a period of three years from the date of decree in view of the provisions of Order XX Rule 12 CPC and that when the trial Court however grants mesne profits for a period more than three years after passing of the decree such decree can be questioned. Such a decree is without jurisdiction and is a nullity and its validity can be questioned when it is sought to be enforced or relied upon. But in the present case the dispute relates to the quantum of advocate fee that was awarded by the trial Court while passing the preliminary decree. It is no doubt true that as per Rule 13 of the A.P. Advocates Fee Rules, 1990, advocate fee cannot be fixed at more than Rs.10,000/- in a suit of partition. But it cannot be said for a moment that the trial Court is lacking inherent jurisdiction to try a suit for partition and can it be said that lacking inherent jurisdiction to award costs including advocate fee. When the Court is not lacking inherent jurisdiction and when a

decree is passed containing some incorrect particulars such as advocate fee permissible under law such error that is committed by the trial Court can be set at right by filing an appeal before the appellate Court or by filing an application for amendment of decree under Section 152 CPC on the ground that such mistake regarding granting of advocate fee was due to clerical or arithmetical mistake and when such petition is permissible under law to correct such mistakes. But it cannot be questioned before the executing Court on the ground that the lower Court granted some excess amount towards advocate fee in the preliminary decree. The lower Court which passed the impugned orders did not make any such distinction between the jurisdiction to try a suit and lack of inherent jurisdiction to entertain a suit before passing the impugned orders. It is seen from a perusal of the impugned orders of the lower Court that the decree-holders had relied upon decision of this Court in *State Bank v. Mukundas Raja and Sons*, : AIR 1964 AP236 , in support of their contention, and the lower Court however distinguished the same on facts. It is observed in the said decision of the Full Bench of this Court that a Court executing a decree has to execute the decree as it is and cannot go behind it unless it is a nullity and that it is not competent for the Court to open the case by tracing the history of the transaction which resulted in the liability under that decree. Similarly in the present case it is not open to the executing Court to refer to the provisions of the Advocate Fee Rules and see that only a particular amount can be granted towards advocate fee as per Rule 13 and that what was granted under the decree by the trial Court is more than that of permissible limit and that therefore the decree passed by the trial Court need not be questioned.

8. The decree-holders had also relied upon a decision of the Supreme Court in *V.D. Modi v. R.A. Rehman*, : [1971]1SCR66 , which was also distinguished on facts by the lower Court and was not relied upon.

In the said decision of the Supreme Court it is categorically observed in para 6 of the judgment which is as follows:

'A Court executing a decree cannot get behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is

set-aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.'

It was further observed in para 7 of the judgment that when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record; and that where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

9. In another decision of the Supreme Court in *Hiralal v. Kali Nath*, : [1962]2SCR747 , it is observed by their Lordships that:

'The validity of a decree can be challenged in execution -- proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.'

10. A Division Bench of this Court in *V. Appannammanayuralu v. B. Sreeramulu*, : AIR 1978 AP160 , has followed the above said decision of the Supreme Court in *Hiralal v. Kali Nath* (supra) and has observed that inherent lack of jurisdiction means a power of jurisdiction which does not at all exist or vest in a Court, that the Court can be said to lack inherent jurisdiction when the subject matter before it is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction and that if it has power to entertain causes of a particular category or nature, it cannot be said that such causes belonging to that category or nature are totally foreign to the jurisdiction of that Court for the reason that they could have been brought up before other Courts.

11. In another decision of the Supreme Court in *Sunder Dass v. Ram Prakash*, : [1977]3SCR60 , the Supreme Court observed that an executing Court cannot go behind the decree nor can it question its legality or correctness and that there is one exception to such general rule and that such exception is that where the decree which is sought to be executed is a nullity for lack of inherent jurisdiction in the Court passing it, its invalidity can be set up in execution proceedings.

12. The above decision has been followed by the Full Bench of Kerala High Court in *K.P. Antony v. Thandiyode Plantations (Pvt) Ltd.*, : AIR1996 Ker37 , wherein it is observed as follows:

'The settled legal position is that the executing Court can go behind a decree only if there was lack of inherent jurisdiction and not on the ground that there was erroneous exercise of jurisdiction. It will not be open to a party to challenge a judgment when it is sought to be enforced on the ground that the judgment is based on wrong conclusions or on erroneous findings or on wrong application of law. As the remedy of the aggrieved party in such cases is to challenge the same in appeal or revision as the case may be and not to challenge it when it is sought to be enforced, the respondent's challenge in this case against the judgment can be sustained. In the present case, lack of jurisdiction was pleaded by the respondents and that has been considered and found against them. So they cannot raise the very same point in the executing Court.'

13. It is clear from all these decisions that the validity of a decree passed by the ' Court can be questioned in execution proceedings only when the Court which had passed the decree is lacking inherent jurisdiction to try such a suit and to pass a decree and not when some mistake was committed either on facts or on law in passing the decree. In the present case the Court which passed the preliminary decree for partition cannot be said to be lacking inherent jurisdiction to try such a suit and to pass a decree. It cannot also be said that the trial Court was lacking inherent jurisdiction in awarding costs including advocate fee. But while preparing the decree the advocate-fee is said to have been granted more than what is permissible under A.P. Advocate Fee Rules, 1990. Granting higher amount towards costs is only a mistake committed by (he trial Court either on facts or on

law. Such a mistake found in the decree can be corrected only by filing appeal before the appellate Court or a petition under Section 152 CPC before the trial Court. But it is not open to the executing Court to go behind the decree passed. In view of these circumstances the orders of the lower Court reducing the decree amount to Rs. 13711/- and ordering execution only to such amount is clearly erroneous and cannot be sustained. The decree-holders are entitled to execute the decree as passed by the trial Court for realisation of the amount awarded to them under the decree.

14. In the result, the revision petition is allowed, but without costs, and the impugned order of the lower Court restricting the decretal amount to Rs.13711/- is set-aside and it is held that the decree-holders/revision petitioners are entitled to recover the entire amount awarded under the decree by taking further steps in the execution petition.