

(1961) 12 AP CK 0007
In the Andhra Pradesh High Court
Case No : A.A.O. No. 300 of 1958

Bhuma Venkata Seshayya

APPELLANT

Vs

Bhuma Venkata Satyanarayana and Others

RESPONDENT

Date of Decision : 12-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : AIR 1963 AP 44

Hon'ble Judges : P. Chandra Reddy, C.J.; Venkatesam, J

Bench : Division Bench

Advocate : C.V. Narasimha Rao, for the Appellant; R.V. Vidyasagar, for B.V. Ramanarusu, for the Respondent

Final Decision : Allowed

Judgement

Chandra Reddy, C.J.—This appeal brought by the judgment-creditor in O. S. 151 of 1956 against the order of the Subordinate Judge, Vijayawada granting a temporary injunction restraining the appellant from proceeding further with the execution of his decree, raises a question bearing on Order 39 Rule 1 C. P. C. The facts of the case lie in a narrow compass and are not in dispute.

2. In execution of a decree obtained by the appellant on the foot of a promissory note in O. S. No. 151 of 1956 on the file of the District Munsif's Court, Vijayawada against the father of respondents 1 to 3, who was the manager of their joint family, the joint family properties of these respondents were brought to sale on 6-7-1957 and were purchased by the 4th respondent. Before the sale could be confirmed, respondents 1 to 3 instituted O. P. No. 46 of 1957 for permission to file a suit in forma pauperis for a declaration, inter alia, that the decree resulting in the sale as also another decree were not binding on them and for partitioning the B schedule properties into four equal shares and to put them in separate possession of their shares. Pending the petition they sought a temporary injunction preventing the 4th respondent from proceeding further with the execution of the decree in E. P. No. 202 of 1957. An interim injunction was

granted and this was made absolute subsequently in spite of the opposition of the appellant, Aggrieved by this order, the execution creditor has brought this appeal.

3. It is urged in support of this appeal by Sri C. V. Narasimha Rao that a temporary injunction could not issue in this case as it does not fall within the terms of Order 39. On the other hand, the counsel for the 4th respondent maintains that this case is governed by Order 39 Rule 1 (c) as the further execution of the decree would cause injury or loss to the plaintiff within the scope of clause (c) of Rule 1 of Order 39. It now falls to be decided whether the confirmation of the sale in this case would constitute an injury within the mischief of clause (c).

4. Order 39 Rule 1, so far as it is material for this enquiry, reads:

"Where in any suit it is proved by affidavit or otherwise

X X X x (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury or loss to the plaintiff the Court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting or otherwise causing injury or loss as the Court thinks fit, until the disposal of the suit or until further orders".

5. It is well recognised that the power of the Court to grant a temporary injunction is controlled by Order 39, and unless a case falls within any of the matters mentioned in Rules (1) and (2), the Court has no power to grant a temporary injunction. The clause that is invoked in this case is the latter part of clause (c) i.e., "otherwise causing loss or injury to the plaintiff". Could it be predicated that the judgment-creditor was causing injury to the respondents within the meaning of clause (c) ? The alleged injury is the execution of the decree, which was lawfully obtained by the appellant against the father of respondents 1 to 3. That was a decree passed by a Court of competent jurisdiction and, as such, it could not be described as illegal. If the decree is legal and, therefore, the decree-holder is entitled to execute it, could it be posited that execution could not be levied against the shares of the sons, as there has since been a disruption of joint status by the filing of the suit? We are unable to accede to the contention urged on behalf of the respondents.

6. It is to be borne in mind that the division in status is supposed to have been brought about by the presentation of the original petition for filing a suit in forma pauperis after the sale. It is not disputed that, at the time when the decree was made against the father of respondents 1 to 3, the family remained joint and the father was the manager of that family. It may, therefore, be taken that the decree was obtained against the father as a representative of the joint family in respect of joint family liability. Consequently it would be binding on the respondents and as such the entire joint family property can be proceeded against in execution notwithstanding the fact that the sons were not made eo nomine parties to the suit.

That being the legal position, the execution creditor is entitled to seize the shares of the sons in execution of the decree unless the sons succeed in proving that the debt, which was the basis of the decree, was incurred by the father for an immoral or illegal purpose, even if the partition of the joint family was effected subsequent to the passing of the decree. The fact that subsequent to the decree there was a partition would not make any difference and the decree could be executed not only against the father but also against his sons, who are constructive parties, it being immaterial whether the family continues to remain joint or became divided subsequently. The severance of status brought about by the filing of the suit does not in any way affect the right of the decree-holder to reach the shares of the sons in execution. Therefore, when the appellant initiated proceedings in execution of the decree which has not been set aside against the sons who were bound by the decree, it could not be postulated that he was committing an injury within the meaning of clause (c). The argument of the Counsel for the respondents that the action of the appellant in bringing to sale the interest of the sons after partition in the joint family should be regarded as an injury because after the division of the family the power of the father to alienate the family properties for the debts comes to an end and the only remedy available to a creditor to enforce the liability against the sons is to bring a separate suit is inadmissible.

7. The right of the judgment-creditor to execute his decree is based not merely on the power of the father to sell the family properties for the discharge of his debts but also on the theory that the judgment obtained against a person sued in a representative capacity is a judgment against every member covered by the representation and the interest of every such member is bound to satisfy that liability, whether, there was a division or not subsequent to the decree. Even though the father's power to discharge his debt by selling the share of his sons in the property might no longer exist as a result of the partition, the right of the judgment-creditor to seize the erstwhile coparcenary property remains unaffected and undiminished.

8. In the words of their Lordships of the Supreme Court in *S. M. Jakati v. S. M. Borkar* AIR 1950 SC 282, the result of the partition in a joint family is nothing more than a change in the mode of enjoyment and what was held jointly is by the partition held in severalty and therefore, the attachment of the whole coparcenary estate would not be affected by the change in the mode of enjoyment because the liability of the share which the sons got on partition remains unaffected. It follows that the interests of the sons even after partition will be liable for the decree which has been obtained against the father, who is deemed to have represented the joint family. This view of ours is amply supported by several of the pronouncements of the Supreme Court, the latest of them being *S.M. Jakati and Another Vs. S.M. Borkar and Others*, and also by a Full Bench decision of the Madras High Court in *Vadlamanati Venkatanarayana Rao Vs. Gottumukkule Venkata Somaraju*, .

9. Even otherwise, this case would fall outside the pale of clause (c). It is to be remembered that, at the time of execution, the properties remained joint. The appellant attached the properties before judgment and subsequent to the making of the decree he levied execution, brought the properties to sale and they were purchased by the 4th respondent at a time when respondents to 3 and their father constituted a joint family. It is only to avert the confirmation of the sale that the original petition has been filed. That being the position, the attachment of the properties is not ended by the partition. When once the decree was put in execution and the properties brought to sale, the subsequent partition would not be a bar to the confirmation of the sale. In this position, we fail to see how the further execution of the decree could be considered to be an injury within the connotation of clause (c). The further execution cannot be regarded as a wrongful act. The appellant was pursuing his legitimate remedies in executing the decree. There is another circumstance which disentitles the respondents to invoke the statutory provision in question. They were made parties to the execution proceedings and it is in their presence that the sale was held.

10. The question as to whether the execution of a decree lawfully obtained would constitute an injury as defined in Clause (c) of Rule 1 of Order 39 was considered by a Full Bench of this Court in *Datla China Appalanarasimha Raju Vs. Nadimpalli Seethayamma Garu and Others*, and it was answered in the negative. It was ruled there that Order 39 Rule 1 would not take in legitimate acts of persons who pursued the remedies allowed to them by law. The Full Bench approved of *Venkanna v. Venkata Rao* 1957 1 AnWR 274 : 1957 ALT 90 : AIR 1957 AP 453 which interpreted Order 39 Rule 1 (c) and the correctness of which was canvassed before them.

11. In 1957 1 AnWR 274 : 1957 ALT 90 : AIR 1957 AP 453 the respondent obtained a decree against the father of the appellants on the basis of a promissory note and was seeking to execute the decree by putting to sale the properties of the father. The sons laid an action for a declaration that the suit promissory note was not binding upon them for the reason that the debt in question was tainted with immorality and illegality and for a permanent injunction restraining the defendant from executing the decree against the share of the minors. When the matter came up in appeal to this Court, it was held by a Division Bench of this Court, negating the contention that the amended rule enabled the Court to grant an interim injunction because the shares of the minors, if sold and purchased by third parties would result in injury and loss to the plaintiff, that the injury or loss contemplated by the amended rule would not comprehend an injury or loss caused by a person pursuing his legitimate remedies. The doctrine of 1957 1 Andh. WR 274 : 1957 Andh LT 90 : AIR 1959 AP 453 would govern with full vigour the instant case.

12. In the circumstances, we allow the appeal and set aside the order of the trial Court. There will be no order as to costs.