
(2005) 10 AP CK 0074
In the Andhra Pradesh High Court
Case No : CRP No. 4541 of 2005

Buddana Suryachandra Rao	Vs	APPELLANT
Pala Lakshmi Kanthamma		RESPONDENT

Date of Decision : 07-10-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 3
Constitution of India, 1950 — Article 227

Citation : (2006) 1 ALD 681

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : S. Subba Reddy and D. Sudersana Reddy, for the Appellant; Polisetti Radhakrishna, for the Respondent

Final Decision : Allowed

Judgement

A. Gopal Reddy, J.—The short question that arises for consideration in this revision is, whether appeal Order 43 Rule 1 of the CPC (for short "the Code") is maintainable against the order issuing notice in IA filed under Order 39 Rule 1 of the Code?

2. The revision petitioner who is defendant in the suit filed the present revision petition under Article 227 of the Constitution of India to review the judgment passed by the Senior Civil Judge, Tadepalligudem dated 12-7-2005 CMA No. 2/2005, whereunder learned Judge modified the order passed by the Principal Junior Civil Judge, Tadepalligudem dated 23-6-2005 in IA No. 856/2005 in OS No. 278/2005 directing that interim injunction orders dated 19-5-2005 shall continue till the disposal of said IA.

3. The respondent-appellant-plaintiff filed suit OS No. 278/2005 before the Vacation Court for permanent injunction, in which, she obtained an ex parte injunction in IA No. 856/2005 on 19-5-2005 till 7-6-2005. On reopening of the Court, the plaintiff filed an application, before the trial Court, seeking extension

of the interim order dated 19-5-2005 granted by the Vacation Court. But the same was not called by the trial Court for want of record. On 23-6-2005 while ordering urgent notice observed that interim injunction granted till 7-6-2005 has not been extended and certified copy of ex parte injunction order dated 19-5-2005 granted by the Vacation Court has not been filed along with the extension petition and posted the matter to 30-6-2005. Questioning the correctness of the same, the plaintiff filed CMA No. 2/ 2005 before the Senior Civil Judge, Tadepalligudem, who after holding that without calling the matter on 7-6-2005 on the Bench, the appellant-plaintiff cannot have an opportunity to file extension petition on 7-6-2005, and for the fault of the office it cannot be found that injunction cannot be extended subsequent to 7-6-2005 and it is a fit case to grant interim injunction till the disposal of IA No. 8456/2005/, modified the orders dated 23-6-2005 passed by the Principal Junior Civil Judge, Tadepalligudem dated 23-6-2005 in IA No. 856/2005 in OS No. 278/2005 directing that interim injunction orders dated 19-5-2005 shall continue till the disposal of IA No. 856/2005, and trial Court was directed to dispose of the said IA within 30 days from the date of filing of the counter. Questioning the legality and validity of the said judgment, the present revision petition is filed contending that since against order, issuing notice, passed by the trial Court is not an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order 39 of the Code no appeal lies, therefore impugned judgment passed by the lower appellate Court cannot be sustainable for want of jurisdiction and the same is liable to be set-aside.

4. Sri S. Subba Reddy, learned Counsel for the revision petitioner-defendant contends that when there is no order passed by the trial Court in IA No. 856/2005 appeal ought not to have been entertained, therefore, appeal as such is not maintainable against the order issuing notice and placed reliance on the following judgments:

1. Lakhai Vs. Ram Niwas and Others,

2. Khusilal and Others Vs. Gorelal and Another,

5. Sri D. Sudershana Reddy, learned Senior Counsel appearing for the respondent-plaintiff would contend that earlier ad-interim injunction order was passed by the Vacation Court and not extending the same will amount to refusing injunction or vacating the order passed earlier, therefore appeal is maintainable. He further contends that pursuant to the orders passed by the lower appellate Court, the trial Court heard the matter on 14-9-2005 and posted for orders on 26-9-2005 and in view of the suspension of the impugned orders of the lower appellate Court, the trial Court posted the matter on 17-10-2005 for orders.

6. Sub-section (14) of Section 2 of the Code defines "Order" which means, formal expression of any decision of a Civil Court which is not a decree.

7. Order 43 of the Code governs appeal against order. For the purpose of

deciding the question, it is relevant to quote Order 43 Rule 1(r) which reads as under:

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

(a) to (q). x x x x

(r) an order Rule 1, Rule 2, Rule 4 or Rule 10 of Order XXXIX.

8. Undisputedly, while ordering notice in IA, the trial Court has not expressed any decision about the rights of the parties except noting that injunction earlier granted has not been extended after 7-6-2005.

9. In the case of Lakhai (supra), the Allahabad High Court after considering Order 43 Rule 1(r) held that an appeal lies only against an order under Rule 1, Rule 2, Rule 2-A, Rule 4 and Rule 10 of Order 39 of the Code and mere order issuing notice on an application for grant of an injunction clearly comes under the provisions of Rule 3 of Order 39 of the Code and it is not appealable under Order 43 Rule 1(r). Similar view is taken by the Gwalior Bench of Madhya Pradesh High Court in the case of Khusilal (supra) that an order an injunction whether interim or final, is appealable under Order 43 Rule 1, but if the trial Court passes an order either refusing or granting temporary injunction, then in such a situation the appeal shall not lie under Order 43 Rule 1 and where Court orders urgent notice in an application under Order 39 Rule 1 is not an appealable.

10. Admittedly, in the case on hand, ad-interim injunction was granted by the Vacation Court only for a limited period, but on expiry of the same, there is no formal expression of any decision by the Court for extension of the same. Since injunction is not in operation from 7-6-2005 till the IA was taken up for consideration the trial Court felt that it is better to hear both sides and ordered urgent notice. In such view of the matter, the appeal, as such, is not maintainable and accordingly the impugned judgment passed by the lower appellate Court is without jurisdiction and the same is liable to be set-aside.

11. The civil revision petition is accordingly allowed and the impugned judgment and decree is set-aside. The trial Court shall pronounce its order in IA No. 856/2005 if the same is heard.