
(2005) 02 AP CK 0021
In the Andhra Pradesh High Court
Case No : CRP No. 5910 of 2003

Korivi Mallaiah (died) by LRs.

APPELLANT

Vs

P. Narender and Others

RESPONDENT

Date of Decision : 02-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32(5)

Citation : AIR 2005 AP 251 : (2005) 2 ALD 831 : (2005) 2 ALT 649 : (2005) 2 APLJ 92

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : C. Ramesh Sagar, for the Appellant; M. Rajamalla Reddy, for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—Deceased first revision petitioner i.e., husband of second revision petitioner and father of third revision petitioner, filed O.S. No.101 of 1993 seeking a decree of perpetual injunction restraining the respondents from interfering with his peaceful possession and enjoyment of the land in Sy. No. 1119 of Karimnagar Town, which was decreed. Alleging that Respondents 1 and 2, in violation of the said Orders of injunction, had constructed a compound wall and a shed in the property covered by the aforesaid O.S. No.101 of 1993, Revision Petitioners 2 and 3, after the death of the first revision petitioner, filed E.P. No.42 of 2000 for removal of those constructions alleging as follows:

"The Judgment Debtors 1 and 2 have illegally and in violation of the decree in O.S. No.101 of .1993 have constructed compound wall and one shed in the schedule property forming part of Plot No. 13 during the year 1996. Likewise, the Judgment Debtors Nos.4 to 6 have constructed shed in a portion of land forming part of Plot No. 12 during the year 1997. As a matter of fact, the Judgment Debtors have no right in the schedule property and they are grabbers of the land. The Judgment Debtors have intentionally and wilfully disobeyed the decree.

The illegal and unauthorized construction shall not be allowed to remain. This Hon''ble Court has got wide and ample powers to grant the relief for demolition of structures made by the Defendants after the decree for perpetual injunction has been granted. Therefore, the Hon''ble Court may be pleased to Order for demolish of structures made in Schedule -Property by the Judgment Debtors under Order 21 Rule 32(5) CPC by directing the bailiff to demolish the structures found in schedule property and expenses of demolition may be realized from the Judgment Debtors."

Respondents filed a counter contending that the structures raised by them are not in Sy. No. 1119 of Karimnagar Town but in fact are in Sy. No. 1131 belonging to one Peddapally Nirmala and Peddapally Chandrakala-wife of the 1st respondent and that the said Nirmala and Chandrakala have filed suits in O.S. Nos.1130 of 1993 and 1132 of 1993 against the first revision petitioner in respect of the plots purchased by them and obtained decrees and so the execution petition is not maintainable.

2. In support of the case of the revision petitioners, only third revision petitioner was examined as P.W.I but no documentary evidence was adduced. On behalf of respondents, only first respondent was examined as R.W.1 and Exs.B.I to B.11 were marked. The Executing Court holding that Revision Petitioners 2 and 3 by claiming the buildings etc., constructed by Chandrakala and Nirmala in their plots in Sy. No.1131 covered by O.S. Nos.1130 and 1132 of 1993 as the structures raised in the land covered by O.S. No.101 of 1993 and that they had failed to establish that respondents violated the injunction passed in the suit, dismissed E.P. No.42 of 2000 by the Order under revision. Hence, this revision by Revision Petitioners 2 and 3.

3. The main contention of the learned Counsel for the revision petitioners is that the Court below was in error in dismissing the execution petition without first considering E.A. No.119 of 2001 filed by the revision petitioners for appointment of a Commissioner to demarcate the land in Sy. Nos.1119 and 1131 of Karimnagar, and was in error in observing that revision petitioners did not adduce evidence in support of their case and contends that in view of the ratio in Kilari Pedda Appalaswamy v. Bhagivilli Venkataswamy 1976 ALT 61 (NRC), even in case of a prohibitory injunction the Court has ample power to Order demolition of the structures raised in violation of a prohibitory injunction and so the Order under revision is liable to be set aside and the matter has to be remitted to the Executing Court for deciding the matter afresh after appointing a Commissioner to find out whether the structures are in the land covered by O.S. No.101 of 1993 or in the plots allegedly purchased by Nirmala and Chandrakala, and contends that since the shed and the compound wall which are but temporary structures, if they are found to be in existence in the land covered by O.S. No.101 of 1993, have to be Ordered to be removed from the said land irrespective of the fact that the decree is for prohibitory injunction but not mandatory injunction in view of the ratio in Kilari Pedda Appalaswamy case

(supra). It is also his contention that the Court below was in error in relying on the report of the Commissioner said to have been produced in other cases, without even considering whether it has relevance to the facts of this case or not.

4. The contention of the learned Counsel for respondents is that since the decree is for a prohibitory but not a mandatory injunction, even assuming that the structures raised are in the property covered by the decree sought to be executed, the remedy, if any, of the revision petitioners is to file a separate suit for removal of the structures, but not an E.P. in O.S. No.101 of 1993, since Rule 32(5) of Order 21 C.P.C. does not apply to perpetual injunction as held by a Division Bench of this Court in *Evuru Venkata Subbayya Vs. Srishti Veerayya and Others*, . He also relied on *B. Bhagawantha Rao v. Nathiri Yellaiah* 2002 (1) AWR 262 (AP) and *Y. Lakshmaiah Vs. Esso Eastern Inc. and Others*, .

5. O.S. No.101 of 1993 filed by the deceased first revision petitioner is for a perpetual injunction restraining the respondents from interfering with his possession over the suit property and is not a suit for mandatory injunction. The E.P. is filed under Rule 32(5) of Order 21 C.P.C. In *E. Ventityta Subbayya* case (supra), it is held that Rule 32(1) of Order 21 C.P.C. applies both to mandatory as well as prohibitory injunctions, but Rule 32(5) of Order 21 C.P.C. applies only to mandatory injunctions. I have extracted the prayer in the Execution Petition in extenso in Para-1 supra which clearly shows that the prayer is made under Rule 32(5) of Order 21 C.P.C. Since the *Kilari Pedda Appalaswamy* case (supra) relied on by the learned Counsel for the revision petitioners is a short noted judgment, I sent for the judgment in the said C.M.S.A.No.68 of 1975 dated 22-4-1976 from the Section and have gone through the said judgment. The facts of that case show that the plaintiff (in that case) filed the suit for a declaration that he is entitled to an easementary right over the passage marked "W X Y Z", and shown in red colour, in the plaint plan, and for a permanent injunction restraining the defendants from ploughing the said strip of land or causing any obstruction to the user of the said passage by him. The suit was decreed by the Trial Court and on appeal in A.S. No.105 of 1974 the learned I Additional District Judge, Visakhapatnam, confirmed the decree of the Trial Court subject to the modification that as and when public roads are formed, giving access to the plaintiffs plot, the easementary right of the plaintiff over the defendant's plot would stand extinguished. After the said judgment became final, defendant put up a "Baddi" at the line "W X" and erected a fencing at the line "Y Z", causing obstruction to the user of the passage by the plaintiff. Thereupon plaintiff/decreed-holder filed E.P. under Rule 32(5) of Order 21 C.P.C. for removal of the said obstructions. The plea taken by the defendant was that plaintiff cannot invoke Rule 32(5) of Order 21 C.P.C. and has to file a separate suit. When the case came before this Court, the learned Judge, while referring to *E. Venkata Subbayya* case (supra) and *Ramabrahma Sastri v. Lakshminarasimham* AIR 1957 AP 44, observed as follows:

"In both the cases referred to above, the constructions were of a permanent

nature; whereas in the instant case, what was constructed was of a temporary nature causing obstruction to the user of the passage by the plaintiff in violation of the injunction granted in favour of the respondent. I do not think the learned Judges intended to lay down in the aforesaid cases that every small construction or obstruction of a temporary nature can be got removed only by a separate suit treating the said construction or obstruction as a fresh cause of action. That will only give a handle to the judgment-debtor to violate the Orders of prohibitory injunction with impunity and drive the decree-holder to separate suits, I am inclined to hold that where obstruction is caused by raising a temporary construction in violation of a decree granting a prohibitory injunction, the same can be got removed in execution of the decree. The facts of the two cases relied upon by the learned Counsel for the appellant are distinguishable and inapplicable to the facts of the present case."

6. In this case, even according to the case of the revision petitioners, Respondents 4 to 6 constructed a shed in a portion of the land, forming part of Plot No. 12, during 1997 and Respondents 1 and 2 constructed a compound wall and one shed, in the land forming part of Plot No. 13, during the year 1996. The Execution Petition was filed on 30-4-2000. The sheds and compound wall admittedly constructed by the respondents about 3 or 4 years prior to the E.P., cannot be said to be structures of temporary nature like a "Baddi" (kiosk) and fence which can be removed or moved to any other place at any time. So, in my considered opinion, the ratio in Kilari Pedda Appalaswamy case (*supra*) does not apply to the facts of this case because, the construction in this case cannot be said to be of temporary nature, which can be removed without any difficulty. Therefore, Rule 32(5) of Order 21 C.P.C. cannot be invoked by the revision petitioners for removal of the compound wall and sheds constructed by the respondents, allegedly constructed in the land covered by O.S. No.101 of 1993.

7. Rule 32(1) of Order 21 C.P.C. reads:

"Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced, in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both."

Revision petitioners did not seek any relief as contemplated by the above said sub-rule 1, but the E.P. is filed under Rule 32(5) of Order 21 C.P.C. which does not apply to prohibitory injunctions as laid down in E. Venkata Subbayya case (*supra*). So, I find no grounds to interfere with the Order of dismissal of the E.P. by the Trial Court.

8. In view thereof, I need not go into the question whether the Court below was right in considering the report of the Commissioner in another suit and if the

Court below was in error in not appointing a Commissioner as sought by Revision Petitioners in E.A. No. 119 of 2001 for finding out if the constructions made by the respondents are in the land covered by O.S. No. 101 of 1993 or are in the land covered by the other suits.

9. Therefore, the civil revision-petition is dismissed. No costs.