

(2009) 12 AP CK 0058

In the Andhra Pradesh High Court

Case No : A.S.M.P. No's. 1476 of 2008 and 799 and 2040 of 2009 in A.S. No. 284 of 2006

Singuluri Krishna Murthy and Another

APPELLANT

Vs

Singaluri Damodararao and Others

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2010) 3 ALT 777 : (2010) 4 CivCC 781

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : Naram Nageswara Rao, in A.S.M.P. No. 1486 of 2008, K. Chidambaram, in A.S.M.P. No. 2040 of 2009 and I. Maamu Vani, in A.S.M.P. No. 799 of 2009, for the Appellant; Naram Nageswara Rao and I. Maamu Vani for Respondent Nos. 1 and 2 in A.S.M.P. No. 2040 of 2009 and K. Chidambaram in A.S.M.P. Nos. 1476 of 2008 and 799 of 2009, for the Respondent

Final Decision : Dismissed

Judgement

B. Seshasayana Reddy, J.—A.S.M.P. Nos. 1476 of 2008 and 799 of 2009 are filed by R-1 and R-2 and whereas A.S.M.P. No. 2040 of 2009 is filed by the appellants in A.S. No. 284 of 2006. Reliefs sought for in the petitions are:

A.S.M.P. No. 1476 of 2008: "It is therefore prayed that the Honourable Court may be pleased to permit the petitioners to convert the aged Mango garden in item Nos. 1 and 2 of plaint schedule properties as cultivable land by removing the aged mango trees in part of the lands R.S. Nos. 140/1,141 situated at Darbhagudem village of Jeelugumilli Mandal and to pass such other order in the interest of justice".

A.S.M.P. No. 2040 of 2009: "For all the reasons stated in the accompanying affidavit, it is prayed that this Honourable Court may be pleased to direct the respondents not to cut and remove the existing mango trees and not to change the physical features of the suit schedule property in O.S. No. 23 of 2001 on the

file of the Court of the Principal District Judge, West Godavari District. Eluru pending disposal of the above appeal and pass such other order or orders as this Honourable Court may deem fit and proper in the circumstances of the case".

A.S.M.P. No. 799 of 2009: "For the reasons stated in the accompanying affidavit, it is therefore prayed that this Honourable Court may be pleased to grant an interim injunction restraining the respondents, their men and agents from interfering with the peaceful possession and enjoyment of the suit schedule property, including the right to harvest and sell the produce and timber yielded from the suit schedule property more particularly described in the schedule and pass such other order or orders as this Honourable Court may deem fit in the circumstances of the case."

2. Back ground facts, in a nutshell, leading to filing of these applications by the parties in A.S. No. 284 of 2006 are:

Singaluri Damadararao, Singaluri Venkata Madhusudhanarao and Singaluri Lakshmi Prasad filed O.S. No. 23 of 2001 on the file of Principal District Judge, Eluru against Singaluri Krishna Murthy, Singaluri Surya Chandra Rao and Singaluri Pradha Saradhi for partition and separate possession of their 1/3rd share each in the suit schedule properties. Plaintiff Nos. 1 to 3 and D-3 are brothers and they are sons of Satyanarayana. D-1, D-2 and Satyanarayana are brothers and they are sons of Late Venkataramayya and Ramanamma. The three sons of S. Venkataramayya partitioned the joint family properties under a registered partition deed dated 28-11-1957. According to the plaintiffs, the suit schedule property fell to the share of Late Venkataramayya. The said Venkataramayya died intestate leaving behind his wife and three sons. The father of the plaintiffs Satyanarayana died leaving behind plaintiffs 1 to 3 and Ramanamma who is wife of late Venkataramayya in the year 1991. The plaintiffs 1 to 3 and D-3 have 1/3rd share and D-1 and D-2 have 2/3rd share in the plaint schedule properties. D-1, according to the plaintiffs, is managing the suit schedule properties on behalf of sharers and distributing the income to all the share holders. Since D-1 did not pay any amount to the plaintiffs and D-3 for the last two years and postponed the payment on some pretext or the other, the plaintiffs demanded for partition of the suit schedule property. Since the demand is not acceded to by D-1, they resorted to file a suit for partition.

3. It is the case of D-1 that the father of the plaintiffs separated himself from the joint family in the year 1961. D-1 used to assist his father in cultivation. The properties fell to the share of late Venkataramayya are situated in agency tract and whereas the properties belonging to D-1 are situated at Taduvai. Late Venkataramayya became indebted to various persons. Since the properties fell to his share of Late Venkataramayya are situated in agency tract and are inalienable, D-1 sold the properties fell to the share and discharged the debts of late Venkataramayya. Late Venkataramayya during his life time executed a WILL dated 29-12-1985 bequeathing item Nos. 1, 2 and 4 in plaint schedule to D-1 and item No. 5 to his fifth daughter. By virtue of the will, D-1 is in possession of

item Nos. 1, 2 and 4 of the plaint schedule properties as an absolute owner. The trial Court settled the following issues:

- (1) Whether the plaintiffs are entitled to partition as prayed for?
- (2) Whether the suit is bad for nonjoinder of parties?
- (3) To what relief?

On behalf of the plaintiffs, three witnesses were examined as P.Ws.1 to 3 and 16 documents were marked as Exs.A-1 to A-16. On behalf of D-1 and D-2, seven witnesses were examined as D.Ws.1 to 7 and 6 documents were marked as Exs.B-1 to B-6. On considering the material brought on record and on hearing the Counsel for the parties, the learned District Judge held that the plaintiffs are not entitled to the reliefs sought for and accordingly dismissed the suit by a judgment dated 30-1-2006. Assailing the judgment and decree dated 30th January, 2006 passed in O.S. No. 23 of 2001, the plaintiffs filed A.S. No. 284 of 2006 and also filed A.S.M.P. No. 989 of 2006 under Order 39 Rule 1 CPC seeking temporary injunction restraining the defendants from alienating the suit schedule property. An interim order came to be passed on 19-6-2006 restraining the defendants from alienating the suit schedule properties during the pendency of the appeal. Thereafter, three interlocutory applications as stated supra have been filed by the parties.

4. Heard learned Counsel appearing for the parties.

5. The parties are hereinafter referred to as appellants/plaintiffs and respondents/defendants.

6. Learned Counsel appearing for the appellants/plaintiffs submits that R1 and R2/D1 and D2 are trying to change the physical features of the suit schedule property and therefore they have to be restrained from removing the existing mango trees in the suit schedule properties or altering the physical features of the suit schedule properties pending the appeal.

7. Per contra, learned Counsel appearing for R1 and R2/D1 and D2 submits that the appellants taking advantage of the pendency of the appeal are trying to interfere with the possession of R1/D1 in respect of item Nos. 1, 2 and 4 of the suit schedule properties. It is further submitted that R1 got item Nos. 1, 2 and 4 of the plaint schedule properties by virtue of will dated 29-12-1985 and when the trial Court has accepted the genuineness of the will, the appellants cannot be permitted to put an obstacle with regard to the manner of enjoyment of property in occupation of R-1. Learned Counsel contends that though R-1 and R-2 are defendants in the suit, an application filed by them against the appellants/plaintiffs under Order 39 Rules 1 and 2 CPC is maintainable. In support of her submissions, reliance has been placed on the decision of Supreme Court in *Manohar Lal v. Seth Hiralal* AIR 1972 SC 527, *M. Gurudas and Others Vs. Rasaranjan and Others*, and *Tanusree Basu and Others Vs. Ishani Prasad Basu and Others*, .

8. In response, learned Counsel appearing for the appellants submits that the appellants are not interfering with the possession of R-1 in respect of the lands in his occupation, but at the same time R-1 cannot be permitted to cut the mango trees and change the nature of the subject lands.

9. At the cost of repetition, I may state that the appellants are the plaintiffs and respondents are defendants in the suit. D-1 and D-2 contested the suit and whereas D-3 remained *exparte*. On a full-fledged trial, the trial Court accepted the Will propounded by R-1 and accordingly dismissed the suit of the plaintiffs.

10. I shall now refer the provisions of Order 39 Rule 1 CPC. They read as follows:

Where in any suit it is proved by affidavit or otherwise, (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens, or intends, to move or dispose of his property with a view to defrauding his creditors; (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit. 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, damaging alienation, sale, removal or dispossession of the property or dispossession of the plaintiff" or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit, as the Court thinks fit, until the disposal of the suit or until further orders.

From a reading of the above provision it is clear that Sub-clause (a) of Rule 1 of Order 39 C.P.C. does not refer either to the plaintiff or to the defendant but uses the words "any party to the suit". While Sub-clauses (b) and (c) refer to actions of the defendant taken or to be taken against the plaintiff. In other words an application for injunction under Clause (a) above mentioned could be either by the plaintiff or by the defendant. So far as cases relating to waste, damage, or alienation by the plaintiff or wrongful sales in execution of a decree, mentioned in Clause (a) of Rule 1 of Order 39. C.P.C., the defendant can file an application under Order 39, Rule 1(a) C.P.C., A question came up for consideration as to whether the defendant can seek an injunction against the plaintiff on the ground other than those mentioned in Clause (a) of Rule 1 and Order 39 C.P.C. in *J. Sambamurthy v. Ch. Srinivasa Rao* 1987 (2) ALT 630, wherein it has been held that the defendant cannot invoke the inherent powers of the court u/s 151 CPC for getting a temporary injunction against the plaintiff in circumstances other than covered by Clause (a) Rule 1 of Order 39 CPC. It is trite to note paras 15 and 16 of the said judgment, which read as under:

15. The object behind Sub-clause (a) of Rule 1 of Order 39 appears to me to be to preserve the property intact and not allow it to be damaged, or wasted or alienated or sold by any party, be he the plaintiff or the defendant, pending suit. For that purpose, an injunction could even be granted in favour of defendant and against the plaintiff. In fact, if such a relief is granted under Clause (a) it would

equally subserve the ultimate relief that may be granted in the suit in favour even of the plaintiff or even in case the suit is dismissed so that the defendant is, left where he is so far as the property is concerned.

(16) But to grant a positive relief in the manner mentioned in Clauses (b) and (c) of Rule 1 of Order 39, C.P.C. in favour of defendant is permissible only if a relief of a similar nature could be granted in favour of the defendant in the main suit or original petition. If the defendant is not entitled to any such relief in the main suit against the plaintiff-he not having filed any counter claim or asked for any set-off, the defendant could not ask for any interim relief of a similar nature. That in my opinion; is the reason why the defendant cannot invoke the inherent powers of the court u/s 151, C.P.C. for getting a temporary injunction against the plaintiff in circumstances other than those covered by Clause (a) of Rule 1 Order 39, C.P.C. The inherent power of the court which could be invoked for subserving the ultimate relief to be granted in the main suit or proceeding, cannot be invoked by a defendant who could not be granted any positive relief in the main suit or proceeding except in cases where a counter claim or setoff is claimed. The contention of the learned Counsel for the respondents that Section 151, C.P.C. could still be invoked by the defendants in cases not covered by Clause (a) of Rule 1 of Order 39, C.P.C. is therefore not correct.

11. The possession of R-1 in respect of item Nos. 1, 2 and 4 of the suit schedule properties is not disputed by the appellants. Therefore, the appellants under the guise of pendency of the appeal cannot be permitted to interfere with the possession of R-1 in respect of item Nos. 1, 2 and 4 of suit schedule properties.

12. Regarding the relief sought for by R-1 and R-2/D-1 and D-2 in A.S.M.P. No. 1476 of 2008 permitting them to remove the age old mango trees in item Nos. 1 and 2 of the plaint schedule property, the same cannot be considered since it alters the nature of the property pending the appeal.

13. For the above reasons, A.S.M.P. No. 799 of 2009 is allowed in part restraining the appellants/plaintiffs from interfering with the possession of the respondents 1 and 2/D-1 and D-2 in respect of item Nos. 1, 2 and 4 of the suit schedule properties; and A.S.M.P. No. 2040 of 2009 is allowed granting temporary injunction restraining the respondents/defendants from changing the physical features of the suit schedule properties or removing the existing mango trees in the suit schedule properties. A.S.M.P. No. 1476 of 2008 is dismissed. No order as to costs.