(2007) 10 MP CK 0029

In the Madhya Pradesh High Court

Smt. Shashi Agrawal APPELLANT

Vs

Ram chandra Agrawal RESPONDENT

Date of Decision : 30-10-2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, Order 41 Rule 5(3)(c)

Citation : (2008) ILR (MP) 271

Hon'ble Judges : U.C Maheshwari, J

Bench : Single Bench

Judgement

U.C. Maheshwari, J.—This order shall decide IA No. 3599/07, appellant''s application under Order XLI Rule 5 of the CPC for grant of stay against the execution of the impugned decree and IA No. 10254/07, respondent''s application under Order XLI Rule 5(3)(c) of the CPC for imposing some conditions on granting the stay against the execution of the impugned decree.

2. The facts which are necessary to adjudicate the aforesaid I.As in brief are that in respect of House No. 739 and 739/1 (New No. 880) situated in Maratal, Ram Manohar Lohiya Ward, Jabalpur, the respondent herein filed a suit against the appellant seeking declaration to declare him to be the owner of 2/3rd share in it with a prayer of its partition, separate possession and mesne profits. As per the case of the respondent, initially the aforesaid house was purchased jointly by the respondent, his brother Krishna Kumar and father Rameshwar Prasad vide registered sale deed dated 1.5.1972, since then the respondent was the co-owner of the property along with the father and brother. Subsequently, his father Rameshwar Prasad bequeathed his share to the appellant by way of Will dated 7.12.1985 and, on his demise, the appellant became the owner of the 1/3rd share of the said house, while the brother Krishna Kumar transferred his right in favour of the respondent by a registered document dated 25.9.1995. Accordingly, he became the owner of 2/3rd share of the aforesaid house. In such premises, the respondent filed the aforesaid suit for obtaining separate possession of his 2/3rd share. Such suit was contested by the appellant on

various grounds including that it was the sole property of Rameshwar Prasad and the name of the respondent and Krishna Kumar was mentioned in the document only on account of love and affection. Hence, in view of the exclusive property of Rameshwar Prasad, his other legal representatives are also having the share in it, and without impleading them as a party to the suit, neither the suit can be entertained nor the same can be decreed.

3. After holding the trial, on appreciation of the evidence, the suit of the respondent has been decreed by the trial court by holding his 2/3rd share in such house. The decree has also been passed for giving separate possession to the respondent but the suit was dismissed on the question of mesne profits. Such preliminary decree is under challenge at the instance of the appellant/defendant.

4. In pendency of the appeal, the appellant filed an application IA No. 3599/07 for grant of stay against the execution of the impugned decree contending the above mentioned facts, on which she contested the matter in the trial court. It is also pleaded that she is in possession of 1/3rd share in it on the strength of the aforesaid Will, while the 2/3rd share of it, being the property of deceased Rameshwar Prasad Agrawal, the interest of other legal representatives is also involved in it and the impugned decree has been passed without impleading such legal representatives. In this premises, prayer for grant of stay against the impugned decree is made.

5. While, on the other hand, in IA No. 10245/07 on behalf of the respondent, it is contended that in the disputed premises, the hotel business is being run in the name and style of Standard Hotel. As per findings of the trial court the appellant being in possession of the entire premises is getting profit by running the hotel business, whereas she is not entitled to enjoy the entire property except the 1/3rd share of it. In view of the decree of the trial court in favour of the respondent, by staying the same, the respondent should not be deprived to get the fruits of the decree and on staying the same, keeping in view the locality of the house and the hotel business of the appellant in it, in order to protect the interest of the respondent, the appellant be directed to deposit Rs. 15,000/- per month and also the adequate security to abide the probable decree which would be passed against her in this appeal.

6. It appears from the record that both the parties have not replied the applications of each other but the same are supported by the affidavits of the respective parties.

7. While arguing the case, Shri R.K. Verma, learned appearing Counsel for the appellant said that various legal questions are involved in this appeal and till their adjudication, the possession of the appellant over the property should be protected by grant of stay against the execution of the impugned decree otherwise the appellant will have to suffer irreparable injury. He further said that the claim of the respondent regarding mesne profit has already been dismissed by the trial court. Thus, no direction for depositing any sum in respect of the

mesne profit or otherwise could be passed against the appellant. He also said that the alleged hotel business is not being run by the appellant in the said premises and prayed for allowing his application for grant of stay by dismissing the application of the respondent.

8. On the other hand, Shri A.K. Jain, leanred Counsel appearing on behalf of the respondent, while responding the aforesaid arguments said that after passing the decree by the trial court in his favour, he cannot be deprived to get its fruits by granting the stay against its execution without imposing any terms and conditions against the appellant. In any case, in view of the clear findings of the trial court, in order to protect the interest of the respondent regarding 2/3rd share of the property, while granting the stay as prayed by the appellant, she should be directed to deposit Rs. 15000/- per month as damages or the mesne profits as she is earning Rs. 25000/- per month by running the hotel business in said premises. He placed his reliance on a reported case of the Apex Court in the matter of Pabbathi Venkataramaiah Chetty v. Pabbathi N. Rathnamaiah Chetty and Ors. (2207) 3 SCC 151 and prayed for dismissal of the appellant''s application. In the alternative he prayed for imposing the aforesaid conditions while granting the stay as prayed by the appellant.

9. Having heard the Counsel, on perusing the record and the impugned judgment, it appears that the alleged house was purchased by the respondent, his brother Krishna Kumar and father Rameshwar Prasad and they being joint owners had equal share in it. Subsequent to it, the appellant acquired the title of 1/3 rd share in it by virtue of a Will executed by Rameshwar Prasad and the share of Krishna Kumar was acquired by the respondent vide some registered document, and in such premises, the trial court has decreed the suit of the respondent by holding his 2/3rd share in it with a direction for its separate possession.

10. I am of the view that during pendency of the lis, in the present circumstances, the possession of the appellant should be protected till disposal of the appeal but on the other hand, the court is duty bound to protect the interest of the respondent/decree holder who will not be in a position to get the fruits of the impugned decree after staying the same by this Court.

11. It appears from the record that in the aforesaid premises, some hotel business is being run by or on behalf of the appellant. The house is also situated in the prime and commercial locality of the Jabalpur, hence the execution of the impugned decree could be stayed only subject to some terms and conditions and not otherwise. The aforesaid question is answered by the Apex court in the matter of Pabbathi Venkataramaiah Chetty (supra), in which it is held as under:

4. This appeal arises from an interim order of the High Court. The appellant herein has filed an appeal against the final decree in a suit for partition. In the said appeal, he sought stay of execution of the final decree, which required division of a commercial building which is in the occupation of the appellant who

is running a lodge therein. The High Court, considered the application for stay filed by the appellant and made an order dated 1-9-2006 directing that the appeal itself should be listed for final hearing after Dussehra vacation and till then, the building shall not be demolished.

5. The said order is under challenge. The learned Counsel for the appellant submits that he is in possession of the suit premises and his prayer was for interim stay of dispossession as he is running a lodge and an order of stay of demolition will not, therefore, protect his rights, pending'' appeal. On the other hand, the learned Counsel for the first respondent submitted that the appellant has been enjoying the suit premises and though the first respondent is entitled to two-third share therein, he has been kept out of possession and he is also not receiving any income therefrom. It is not in dispute that the appellant is running a lodge in the suit premises. The appeal against final decree filed before the High Court may become infructuous if stay of dispossession is not granted. But at the same time, the interests of the first respondent require to be protected. The learned Counsel for the first respondent estimates the minimum loss to his client as Rs 25,000 per month.

6. Having regard to the facts and circumstances, interests of justice would be served if the appellant is directed to pay to the first respondent Rs. 25,000 (Rupees twenty-five thousand) per month unconditionally during the pendency of the appeal.

12. In view of the aforesaid circumstances and the dictum of the Apex court, I dispose of aforesaid both the applications on the following terms:

(a) Subject to depositing Rs. 10,000/- (Rs. Ten Thousand) per month with the trial court/executing court by the appellant from the month commencing 01.02.2007, the execution of the impugned decree shall remain stayed till disposal of this appeal. The past arrears amount shall be deposited within six months while the recurring monthly amount shall be deposited within 15 days from the commencement of the succeeding month as per english calender. On committing any default in such deposit by the appellant, the stay shall be vacated automatically without further reference to the Bench and the respondent shall be at liberty to execute the decree.

(b) The respondent shall be at liberty to withdraw such amount on submitting the solvent surety for the amount withdrawn and also an undertaking to redeposit the same along with the interest at the banking rate on arising the occasion and subject to the decision of this appeal.

Now, this matter be listed for final hearing in due course.

