
(2001) 11 AP CK 0046
In the Andhra Pradesh High Court
Case No : C.R.P. No. 4219 of 2001

Sri Ravipati Satya Harichandra Prasad	APPELLANT
Vs	
Sri Atkuri Venkatanarayana	RESPONDENT

Date of Decision : 09-11-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32(1), Order 41 Rule 5, Order 41 Rule 5(1), Order 41 Rule 5(2)

Citation : (2001) 11 AP CK 0046

Hon'ble Judges : G. Bikshapathy, J

Bench : Single Bench

Advocate : Venkateswara Rao Gudapati, for the Appellant; M.V. Durga Prasad, for the Respondent

Final Decision : Dismissed

Judgement

G. Bikshapathy, J.—This revision is filed against the order dated 20-7-2001 passed by the Court of Senior Civil Judge, Kovvur in I.A. No. 865 of 2001 in A.S. No. 31 of 2001. The plaintiff in O.S. No. 218 of 1995 on the file of the Court of Principal Junior Civil Judge, Kovvur, is the petitioner herein. The above suit was filed for declaration of easementary right and for consequential perpetual injunction. The trial Court after considering the respective contentions of the parties decreed the suit by Judgment and Decree dated 14-6-2001; against which appeal - A.S. No. 31 of 2001 - has been filed by the defendant, respondent herein. He had also filed an application in I.A. No. 865 of 2001 for stay and suspension of the execution of the decree dated 14-6-2001 in O.S. No. 218 of 1995. The appellate Court, after considering the matter, allowed the said application by order dated 20-7-2001; against which, the present revision has been filed.

2. At the outset, the learned counsel for the petitioner submits that the very grant of stay of the injunction decree is illegal and contrary to the provisions laid down under Order XLI Rule 5 of the CPC and in support of his contention, he has

relied upon the Judgments of this Court in POTHURU VENKATA RAMA RAJU v. YANDRA VENKATA NARASAYYA¹ and POKALA POLAIAH v. POKALA AVULAIAH². He further submits that the decree for perpetual injunction is not an executable decree and, therefore, the question of either staying or suspending the said decree would not arise and that, therefore, the impugned order is illegal and without jurisdiction.

3. Mr. M.V. Durga Prasad, the learned counsel for the respondent, submits that the impugned order passed by the lower appellate Court is quite legal and justified and that the decree passed by the trial Court is an executable decree. In support of his contentions, he relied upon the decision of a learned single Judge of this Court K. Ramaswamy, J. (as he then was) rendered in M.RAMACHANDRA REDDY v. JANAKI³ and the decision of the Supreme court in MOOL CHAND YADAV v. RAZA BULAND SUGAR CO.LTD., RAMPUR⁴.

4. The issue that falls for consideration is as to whether the impugned order granting stay of execution of the injunction decree in O.S. No. 218 of 1995 on the file of the Principal Junior Civil Judge, Kovvur is tenable in law ?

5. For deciding the above issue, it is necessary to refer to Order XLI Rule 5 of Civil Procedure Code, which reads thus:

R.5 Stay by Appellate Court:- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appeal able decree before the expiration of the time allowed for appealing there from, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provision of sub-rule (3), the Court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the

decree.

6. It is also necessary to note certain facts. That during the pendency of the suit, there was no injunction and according to the plaintiff, he has been using the alternative way for ingress and egress to his fields, which is being disputed by the defendant. Be that as it may, His Lordship Justice K. Ramaswamy (as he then was) in RAMACHANDRA REDDY's case held that the decree for perpetual injunction is an executable decree when Order 41 Rule 5(1) is read with Order 21 Rule 32(1) of Civil Procedure Code. In the said decision, His Lordship K. Ramaswamy, J. observed as follows:

Therefore, the question is whether a decree of perpetual injunction is an executable decree or not? The lower court assailed that it is not executable and therefore Order 41, Rule 5(1) does not apply. I am unable to agree with the lower court. Order 21, Rule 32 adumbrates that where a party against whom a decree for.....for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced.....for an injunction by his detention in the civil prison, or by the attachment of his property, or by both. Therefore, a decree for perpetual injunction is clearly an executable decree under Order 21, Rule 32(1) of the Civil Procedure Code. The decree is clearly an executable decree and, therefore, comes within the sweep of "execution of such decree" couched under Order 41, Rule 5(1) of the Code. Thus, I hold that the appellate court, in an appropriate case, if the facts and circumstances so warrant, may order stay of the execution of such decree for perpetual injunction.

7. In POTHURU VENKATA RAMA RAJU's case (1 supra), a learned single Judge of this Court held that the decree for perpetual injunction is not an executable one, and therefore, it cannot be stayed under Order 41 Rule 5 of the Civil Procedure Code. But, however, he records that it can be suspended keeping in view the facts and circumstances of the case. Paragraphs 9 and 10 of the said decision, which are relevant, are extracted below:

9. It has to be borne in mind that there is any amount of difference between a decree for recovery of money or a decree for possession on one hand and a decree for perpetual injunction on the other. In the former cases, the decrees are executable and whenever an appeal is filed, interim stay is granted with a view to maintain the status quo between the parties. Order 41 Rule 5 C.P.C. empowers an appellate Court to pass such an order in respect of such decrees. Whereas in the latter cases, the decree comes into force the moment it is pronounced by the trial judge and there is no question of stay of such a decree. It is noteworthy that in cases of decree for perpetual injunction it is the contravention if any that becomes executable and it is the act of disobedience of the decrees that gives rise to cause of action for invoking Order XXI Rule 32 C.P.C. Otherwise there is no question of executing such a decree unlike in the former cases. To dilate further in all decrees for possession or demolition of structures or payment of money, when once the decree is executed it will be

difficult to restore the parties to the previous position and there is every likelihood of third parties interests being set in and many more complications are likely to arise. To avoid such contingencies, Order 41 Rule 5 C.P.C. requires stay of execution in such executable decrees. I, therefore, find force in the contention of Sri Chandrasekhar that the decree for perpetual injunction in a case of this type is not executable and question of stay of such decrees does not arise. 10. It is another thing that judgments and decrees for perpetual injunction are suspended in appropriate cases. For that purpose, it is necessary that the evidence on record is drawn into and it has to be seen whether the appellant-petitioner has any chance of success. In the case on hand, the Revision Petitioner has raised several contentions in the counter, but none of them are looked into. It is noteworthy that the evidence adduced by the Revision Petitioner in support of his case has been set out in so many words and evidently the trial Court appears to have passed the decree for perpetual injunction on the basis of that evidence. I do not think that the learned Sub-Judge would have easily brushed aside such evidence if he had perused the same, though superficially, as the matter under consideration was only an interlocutory application. Nevertheless, it was incumbent upon the lower Court to have considered whether the decree which was sought to be suspended or stayed, as the case may be, was such that it was not supported by any evidence whatsoever. In these circumstances, I have to observe that there is no proper application of mind on the part of the learned Subordinate Judge to any of the matters in controversy and that impugned order is, therefore, liable to be set aside.

8. In POKALA POLAIAH's case (2 supra), a learned single Judge of this Court observed as follows:

When a decree of permanent injunction is issued after recording a finding in favour of a party in possession of the property, instead of impairing of such a right by the adversary, after reviewing the same in the appellate Court with the materials available in the case records, a fresh order of temporary injunction will have to be issued under Order XXXIX Rule 2 of C.P.C. and not by passing an order of stay under Order XLI, Rule 5 (2) Civil Procedure Code. It is said that such an order may not always be exhaustive and in a given case even the power of the Court u/s 151 CPC can be exercised. All these exercises require reasoning, materials, finding and the rule of discharge of the judicial mind. The impugned order is arbitrary at least on the face of it without following any of these exercises and cannot stand the test of judicial scrutiny.

9. The facts of the said case are not applicable in to the case on hand. The Supreme Court in somewhat similar circumstances In MOOL CHAND YADAV's case (4 supra) observed as follows"

We heard Mr. S.N. Kacker, learned counsel for the appellants, and the respondents appeared by Caveat through Mr. Manoj Swarup, Advocate. We are not inclined to examine any contention on merits at present, but we would like to take notice of the emerging situation if the operation of the order under appeal is

not suspended during the pendency of the appeal. If the F.A.F.O. is allowed obviously Mool Chand Yadav would be entitled to continue in possession. Now, if the order is not suspended in order to avoid any action in contempt pending the appeal, Mool Chand Yadav would have to vacate the room and handover the possession to the respondents in obedience to the Court's order. We are in full agreement with Mr. Manoj Swarup, learned Advocate for respondents, that the Court's order cannot be flouted and even a covert disrespect to Court's order cannot be tolerated. But, if orders are challenged and the appeals are pending, one cannot permit a swinging pendulum continuously taking place during the pendency of the appeal. Mr. Manoj Swarup may be wholly right in submitting that there is intentional flouting of the Court's order. We are not interdicting that finding. But, judicial approach requires that during the pendency of the appeal, the operation of an order having serious civil consequences must be suspended. More so when appeal is admitted. Previous history of litigation cannot be overlooked. And it is not seriously disputed that the whole of the building, Hari Bhawan, except one room in dispute is in possession of the Corporation. We accordingly suspend the operation of the order dated August 6, 1982 directing the appellants to hand over the possession of the room to the respondents till the disposal of the first appeal against the order pending in the High Court of Allahabad. Mr. Manoj Swarup requests that both the earlier and later appeals should be heard together as early as possible. We order accordingly and request the High Court, if it considers proper in its own discretion to hear both the appeals expeditiously as possible in order to avoid the continuance of the boiling situation. The appeal stands disposed of. There shall be no order as to costs.

10. The question whether a decree for perpetual injunction is an executable decree or not fell for consideration before this Court as early as in 1984 in RAMACHANDRA REDDY's case (3 supra) in which it was categorically held that the decree for perpetual injunction is an executable decree and the appellate Court has power to grant stay depending upon the facts of the case. But, however, in the later case in POTHURU VENKATA RAMA RAJU (1 supra) dealt with by V. Bhaskara Rao, J. (as he then was), the decision in RAMACHANDRA REDDY's case (3 supra) was not brought to the notice of the learned Judge and he accepted the contention of the learned counsel for the petitioner that the decree of perpetual injunction is not executable and therefore, the question of stay of the said decree does not arise. However, he held that the said decree can be suspended in appropriate cases. The Supreme Court has considered the aspect of grant of stay of decree of perpetual injunction by the appellate Court in MOOL CHAND YADAV's case (4 supra) and held that if any order having serious civil consequences is passed, it is always open to the appellate Court to stay the Judgment pending disposal of the appeal. Therefore, the decision rendered in POTHURU VENKATA RAMA RAJU's case (1 supra) directly conflicts with the decision of the Supreme Court in MOOL CHAND YADVA's case (4 supra) and also the earlier decision of this Court in RAMACHANDRA REDDY's case (3 supra) was not brought to his notice. It is to be noted that when a decision is rendered

without considering the law laid down by the Supreme Court on that point, the same has to be treated as per incurium. Admittedly, in the instant case, decree was granted declaring the easementary right in favour of the plaintiff and by virtue of the same, injunction was granted. If the plaintiff is allowed to utilize the land of the defendant pending the appeal, it would cause loss to the defendant and the appellate Court has also observed this aspect in its order, which reads:

But, in the instant case, admittedly, the defendant is in possession of the disputed passage during pendency of the suit and that the plaintiff has got alternative passage on the western side which is a public puntha and that the plaintiff has been using the same for ingress and egress all these years. I, therefore, find much force in the contention of the petitioner/defendant that if the plaintiff is allowed by virtue of the decree to pass through the suit passage, the plaintiff may cause loss to the bode and loss to the land of the defendant and the defendant may suffer irreparable loss.

11. Keeping in view the dicta laid down by this Court and also the Supreme Court in the above decisions, I am of the view that the impugned order cannot be interfered with. Moreover, the appellate Court only exercised the discretion keeping in view the facts and circumstances of the case and such a discretionary order, unless it is illegal and impermissible, cannot be interfered with. Under these circumstances, I do not find any merit in this revision. Accordingly, the Civil Revision Petition is dismissed. The lower appellate Court is directed to proceed with the appeal expeditiously and dispose of the same within a period of four months from the date of receipt of a copy of this order. No order as to costs.