

(1974) 03 AP CK 0008

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No's. 346 and 347 of 1974

Yaparti Sambaiah

APPELLANT

Vs

Jasti Basavapurna

RESPONDENT

Date of Decision : 29-03-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 7

Citation : AIR 1975 AP 15

Hon'ble Judges : Venkatrama Sastry, J

Bench : Single Bench

Advocate : N. Chandramowli, for M. Chandrasekhara Rao, for the Appellant;
P.L.N. Sarma, for the Respondent

Judgement

1. These two revisions arise out of two applications one for the appointment of a Commissioner to seize the lorry A. D. B. 162 and produce the same into Court and the other one filed u/s 151. Civil P. C. to order delivery of the lorry to the petitioner herein. The facts giving rise to these revisions are the following:--

2. The respondent herein filed the suit O. S. 3 of 1974 on the file of the Sub-Court, Tenali for specific performance of an agreement dated 12-11-1973 and for possession of the lorry A. D. B. 162. According to her case, she purchased the lorry from the petitioner herein by an agreement dated 12-11-1973 after paying an advance sum of Rs. 10,000/- for a sum of Rs. 36,700/-. The possession of the lorry was delivered to her and she became the owner thereof. According to the conditions of the agreement the petitioner herein had to clear a debt due on the lorry to a creditor at Bhimavaram and after obtaining T. P. permit in his name he should inform the plaintiff when she should pay Rs. 20,000/- to the defendant by arranging a pledge of the lorry with any finance corporation. The balance of the amount had to be paid on or before 12-2-1974. The plaintiff arranged for the finance of Rs. 20,000/- but the defendant, contrary to the terms of the agreement forcibly took away the said lorry from the possession of the plaintiff on 29-12-1973. when it was placed opposite to her house. She gave a report to

the police, who did not take any action. As the defendant came unauthorisedly into possession of the said lorry and was plying the same the present suit was brought for specific performance of the agreement and for possession of the said lorry. Plaintiff stated that she was ready and willing to perform the terms of the agreement dated 12-11-1973. She also claimed in the alternative, damages to the tune of Rs. 20,000/- which consisted of return of the advance sum of Rupees 10,000/- paid by her to the defendant and Rs. 10,000/- towards loss suffered by her on account of the default committed by the defendant in performing the agreement.

3. Along with the suit, the plaintiff filed an application I. A. 80/74 for the appointment of a Commissioner to seize the lorry and produce it into Court. In the affidavit filed in support of that application she stated that if the defendant, who has unauthorisedly taken away the lorry from her possession and is running it without authority, is allowed to continue in possession of the same he would spoil the lorry and cause damage to it by removing valuable parts of the same. On the said application, which was filed on 21-1-1974 along with the suit, the learned Subordinate Judge passed an ex parte order appointing Sri Y. S. K. Prasad, Advocate Tenali as a Commissioner for seizing the said lorry wherever it was and for producing the same into Court. In accordance with the warrant issued by the Court the said Commissioner seized the lorry and produced the same into Court along with his report dated 31-1-1974.

4. Thereafter the petitioner herein filed an application I. A. 140 of 1974 u/s 151, Civil P. C. for handing over the lorry back to him. According to the allegations in the affidavit filed in support of that application he stated that although the contract was true, it was later on cancelled by mutual consent and the amount of Rs.10,000/- received by him as advance was adjusted towards profits made by the plaintiff in running the lorry for about 11/2 months. He also stated that after taking possession of the lorry in the presence of mediators he has repaired it by spending Rs. 11,000/-. Having come to know about the said repairs the plaintiff has come forward with this mala fide suit and got an ex parte Commissioner appointed by misrepresenting the facts and got the lorry seized. It may be noted that in this petition no objection was taken to the competency of the Court in appointing a commissioner ex parte. The plaintiff respondent herein filed a counter opposing the said application.

5. Both parties led in documentary evidence before the lower Court in I. A. 140 of 1974 and argued the matter. The learned Subordinate Judge after considering the entire documents and the arguments dismissed the application filed by the petitioner herein by his order dated 21-1-1974. In the other application, after the receiver filed his report on 31-1-1974, it was closed by an order dated 1-2-1974, as no objections were filed to the Commissioner's report. These two revisions have been preferred against the orders in the above two applications.

6. Mr. N. Chandramouli, learned counsel appearing for the petitioner in both the C. R. Ps. has raised the following contentions (1) Order 26. Rule 9. Civil P. C. is

inapplicable to a case of this type for the appointment of a commissioner to seize movable property. (2) Order 39, Rule 7, Civil P. C. which is the only other provision applicable is also violated here, as under Order 39, Rule 8, Civil P. C. no commissioner can be appointed without notice to the opposite party. (3) On the facts there is no justification for the appointment of a commissioner in this case.

7. Mr. P. L. N. Sarma, appearing for the respondent-plaintiff argued that there was power in the Court to appoint an ex parte commissioner and the provision of law invoked is not material and the substance of the application has to be taken by the Court. As regards the provisions of Order 39, Rule 8, Civil P. C. he contended that it is not obligatory on the part of the Court to issue a notice before a commissioner is appointed to seize movable property. On the facts the learned counsel argued that this is a fit case in which the lorry should have been seized from the possession of the defendant, who has unauthorisedly removed it from the possession of the plaintiff.

8. As regard the objection that Order 26, Rule 9, Civil P. C. which was invoked for the petition to seize the lorry, does not in terms authorise the Court to appoint a commissioner for seizure of the movable property or the detention of the same into Court, it is clear that under that provision a commission can be issued for local investigation for the purpose of elucidating any matter in dispute, or of ascertainment of market value of any property or the amount of mesne profits or damages or annual net profits. This rule does not in terms authorise the Court to appoint a commissioner to seize any movable property, which is the subject-matter of the suit. But the Court has to look into the substance of the petition and not the provision of law indicated therein. It is stated clearly in the affidavit that the suit is for specific performance of an agreement and for possession of the lorry A. D. B. 162 that the plaintiff was given possession of the lorry on 12-11-1973, that she was plying the same till 29-12-1973 when she was unauthorisedly dispossessed by the defendant and that the defendant, if permitted to run the lorry, is likely to spoil and cause damage to the lorry by removing valuable parts thereof. It is therefore a case in which the suit related to the lorry itself and the lorry was therefore the subject-matter of the suit. There was also an apprehension in the mind of the plaintiff that if the lorry were to be in the possession of the defendant he would meddle with it and spoil the same to cause loss to the plaintiff. The plaintiff therefore asked for immediate orders to seize the lorry and detain in Court till her rights are determined. On this material the Court opined that it is a fit case for the appointment of an ex parte commissioner to seize the lorry and produce it into Court. The commissioner accordingly seized it and produced it into Court along with his report. The defendant, who was aware of the said seizure which was made under a mediators report, did not take any exception to the provision of law invoked in the petition or the power of the Court to issue an ex parte commission. As a matter of fact he has not filed any objections to the commissioner's report. Hence the said petition was closed. The present objection, therefore, that there was no power in the Court to appoint a commissioner to seize the lorry under

Order 26, Rule 9. Civil P. C. is an afterthought and cannot be entertained.

9. There can be no doubt that a commissioner can be appointed ex parte in appropriate cases. (Vide Chalapati Veeranna and Others Vs. Chalapati Venkatachalam, . The argument of the learned counsel for the petitioner based upon the decision in Padam Sen and Another Vs. The State of Uttar Pradesh, is also, not substantiated since what was held by the Supreme Court in that case was that there was no power in the Court to seize any movable property which was not the subject-matter of the suit. I do not therefore see any substance in the first contention of the learned counsel.

10. As regards the contention of the learned counsel that an order appointing a commissioner to seize movable property, which is the subject-matter of the suit, for the purpose of detention or preservation in Court, can only be made after notice to the defendant under Rule 8 of Order 39 and inasmuch as there is no notice given in this case before such a commissioner was appointed the order is bad the learned counsel placed reliance upon the decision of the Madras High Court in Sengotha v. Ramasami. (1884) ILR 7 Mad 241".

Order 39, Rule 7 (1) (a) is in the following terms:

"The Court may on the application of any party to a suit, and on such terms as it thinks fit:--

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein:

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Order 39. Rule 8. Civil P. C is in the following terms;

"(1) An application by the plaintiff for an order under Rule 6 or 7 may be made after institution of the suit,

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance."

11. On a fair reading of these two provisions it does not appear that it is obligatory on the part of the Court to issue notice to the opposite party before an order is made under Order 39, R, 7. The expression used in Rule 8 is "may".

12. Their Lordships of the Supreme Court have held in Province of Bombay Vs. Kusaldas S. Advani and Others, as follows:--

"The authorities show that in construing a power the Court will read the word may as "must" when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation." (Underlining is mine.)

13. As the word used in the provision is only an enabling word, it cannot signify any obligation on the part of the Court to issue a notice. Wherever the legislature wanted to use a mandatory provision like "shall" it has used it. But in other cases where the legislature intended to confer a discretion upon the Court the word "may" in such circumstances cannot be interpreted as "must" in all cases. The Court while appointing a commissioner has to take into consideration the importance or urgency of the situation, the respective rights of the parties and the necessity for passing an interim order even without a notice to the opposite party, to protect the rights of the parties or in the ends of justice. In all those cases there would exist always a discretion in the Court to appoint a commissioner ex parte for any of the purposes mentioned in Order 39, Rule 7, Civil P. C.

14. The above view is also supported by the decision of Beaumont. C. J., and Wassoodew. J., of Bombay High Court in Totaram v. Dattu, AIR 1943 Bom 143 who held as follows:--

"In cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court, before proceeding under p. 39, Rule 7 can always appoint a receiver or grant an injunction ex parte."

Similar is the view held by Ramaprasada Rao, J. of Madras High Court in Subbae Gounder Vs. Palanathal, .

15. In Kruthiventi Kutumba Rao Vs. Muthi Venkata Subba Rao and Others, . Jaganmohan Reddy, C. J. and Venkatesam, J. were considering a case of obstruction to a commissioner appointed under Order 39, Rule 7. Civil P. C. to seize account books, which were required as piece of evidence by the plaintiff to obtain an order of permanent injunction. From the facts of that case it is also clear that the commissioner was appointed ex parte without notice to the defendant. Their Lordships approved the appointment holding that the Court had Jurisdiction to issue the order.

18. In view of this unanimity of judicial opinion it cannot be contended that the appointment of a commissioner in this case ex parte to seize the lorry is in any way opposed to law.

17. The learned counsel for the petitioner lays reliance upon the Bench decision of Madras High Court in (1884) ILR 7 Mad 241. That was a case in which after filing of the suit summons was issued to the defendant and thereafter a petition was filed for the appointment of a competent person to take charge of the property in the suit pending disposal of the suit. The said application was not supported by any affidavit. The provision of law under which the application was made, was Sections 499 and 500, Civil P. C. at that time, which are similar in terms to Order 39. Rules. 7 and 8. Civil P. C It was held by their Lordships Turner, C J. and Hutchins. J. that such an application could be made only after the summons had been served. Their Lordships observed that the term "may"

must be read with the words "at any time" and does not import that it is competent to a plaintiff to apply before service of summons, or to evade the condition of notice. The said case is therefore distinguishable from the facts of this case. In this case the suit was filed on 21-1-1974 and the summons was not issued to the defendant when the interim order appointing an ex parte commissioner was made. The above decision is not an authority for the proposition that the Court is powerless even in a case where summons had not been issued to the defendant to appoint a commissioner for any of the purposes mentioned in Order 39, Rule 7, Civil P. C.

18. In the above view I do not find any illegality or irregularity in the order passed by the lower Court under Order 39. Rule 7, Civil P. C.

19. Coming to the last and final point, it is clear that the defendant admits the agreement dated 12-11-1973. According to him it was cancelled subsequently by mutual agreement. No evidence was placed before the lower Court in I. A. 140 of 1974 to satisfy it that there was such a cancellation. In the absence of such evidence and in the face of the admission about the execution of the agreement and the delivery of the lorry to the plaintiff, the subsequent possession of that lorry by the defendant must be deemed to be unauthorised. The plaintiff was therefore within her rights in asking the lorry to be brought to the Court and detain it in Court till her rights are finally determined. She was also justified in apprehending that the defendant might meddle with the lorry and remove important parts thereof and make it unfit for use or deteriorate in value for her in" case of her ultimate success. It is no doubt true that if the lorry is placed in the Court premises without being used by anybody it would be a loss to the successful party. If the plaintiff were to ultimately succeed she cannot blame anybody for such a loss, but if the defendant were to succeed ultimately he can always claim damages for such loss or compensation. The lower Court can also consider, on an application of either party for directions as to the running of the lorry by any of the parties to the suit or by some third person, pending determination of the respective rights of the parties in the suit, so that the profits so realised by such running may be kept in deposit in the Court to the credit of the suit.

20. In the circumstances of this case I am therefore satisfied that the order of the lower Court appointing the commissioner to seize the lorry and to detain into Court was Justified. It is open to the parties as indicated above to take steps as they desire to avoid any further loss by virtue of non-user of the lorry pending the suit.

21. In these circumstances I do not find any ground to interfere with the order of the lower Court in both the I. As. The C. R. Pa. therefore fail and are dismissed with costs in C. R- P. 346/74.