

**THE HON'BLE SRI JUSTICE G.CHANDRAIAH**

**C.R.P.NOS.1802 AND 2098 OF 2015**

**COMMON ORDER**

Heard the learned Senior Counsel appearing for both the parties.

2. As the subject matter in both the revisions is connected and arising out of the same appeal, they are heard together and are being disposed of by this common order.

3. The plaint schedule property is a big hall in the ground floor of a newly built building bearing door No.40-1-52/5, situated in Mahatma Gandhi Road, Vijayawada with the boundaries and extent mentioned in the plaint schedule.

4. For the sake of convenience, the parties will be referred to as per their array in the original suit.

5. The respondent in both the revisions is M/s Sun Trading Corporation and is being represented by its GPA holder and it is the tenant. It filed the suit in O.S.No.309/2011 on the file of Principal Senior Civil Judge, Vijayawada not to evict without following the due process of law. By judgment and decree dated 11.2.2015, the trial court dismissed the suit. Aggrieved by the judgment and decree dated 11.2.2015 passed by the trial court, the plaintiff filed first appeal before the lower appellate court – court of XII District Judge, Krishna at Vijayawada in A.S.No.45 of 2014. Pending the appeal, the plaintiff filed I.A.No.223/2015 in A.S.No.45/2014, seeking temporary injunction restraining the defendant and his men from interfering with its peaceful possession and enjoyment of the schedule property till the disposal of the appeal. In the said appeal, the original defendant, who is the landlord, also filed two interlocutory applications in I.A.Nos.265/2015 and 288/2015 in A.S.No.45/2014 to reject the appeal and to appoint an Advocate Commissioner to note down the physical features of the plaint schedule premises by taking photographs and video. By common order and decree dated 22.04.2015, the lower appellate court dismissed I.A.Nos.265 and 288 of 2015 in A.S.No.45/2014 filed by the landlord and allowed the I.A.No.223/2015 filed by the tenant and granted temporary injunction restraining the defendant and his men from interfering with peaceful possession and enjoyment of the plaint schedule property till the disposal of the suit.

6. Aggrieved by the grant of temporary injunction in I.A.No.223/2015 in A.S.No.45/2014, the original defendant, who is the landlord, filed revision in C.R.P.No.1802/2015 and similarly

aggrieved by the dismissal of I.A.No.288/2015 in A.S.No.45/2014 filed for seeking appointment of an Advocate Commissioner, revision in C.R.No.2098/2015 has been filed.

7. The learned Senior Counsel Sri K.G.Krishna Murthy appearing for the revision petitioner in both the revisions submitted that the plaintiff is the tenant over the schedule property and the lease period expired on 31.12.2010 and the plaintiff is continuing in the premises after expiry of the lease period and there is also no payment of rents. He submitted that the trial court has categorically recorded finding of fact that the plaintiff was not in possession as on the date of the filing of the suit and that it entered into possession by virtue of *ex parte* interim injunction order and that there are no equities on the part of the plaintiff and accordingly rejected to grant the relief of injunction sought for by the plaintiff. The learned Senior Counsel submitted that during the pendency of I.A.No.223/2015 when the lower appellate court did not pass any orders, aggrieved by the same, the plaintiff filed revision before this court and this court granted interim injunction pending further orders and aggrieved by the same, the defendant carried the matter to Apex Court and by order dated 31.3.2015 in S.L.P.Nos.9730 and 9731 of 2015, the apex court while granting status quo existing as on that day, as an interim measure, directing the trial court to dispose of I.A.No.223/2015 in A.S.No.45/2014 within certain time, categorically observed that *the appellate court shall hear the matter of injunction within the parameters for grant of injunction in accordance with law without being influenced by any order passed by any court*. The learned counsel contended that the lower appellate court has not considered the parameters for grant of interim injunction as required under Order 39 Rules 1 and 2 of C.P.C. and without recording any finding on prima facie case, balance of convenience and irreparable loss that would be caused to the plaintiff, granted interim injunction on presumption. He submitted that after dismissal of the suit, the plaintiff voluntarily vacated the suit schedule property and the defendant has leased the property to third parties. He submitted that the trial court has not referred to the documents relied on by the defendant and granted interim injunction pending the appeal. Relying on the judgments of learned single Judges of this court reported in DASARI SANYASAYYA SETTY AND ANOTHER v. PULLAGUJJALA SRINIVASA RAO and P.VEERABHADRAPPA SETTY AND ANOTHER v. POLLIKI CHANDRAHAS, the learned Senior Counsel contended that the trial court has categorically found that the plaintiff was not in possession of the suit schedule property as on the date of the filing of the suit and that it entered by virtue of an *ex parte* interim injunction and that it is not paying the rents and that there are no equities on the part of the plaintiff and, therefore, in the absence of any prima facie case, balance of convenience or proving any irreparable loss that would be caused to it by denying temporary injunction, and

without recording any finding on these aspects, and without evening referring the documents sought to be relied on by the defendant, the lower appellate court is not justified in granting temporary injunction. He further submitted that the defendant is not seeking to appoint an Advocate Commissioner to gather evidence and noting the physical features of the plaint schedule premises would facilitate the lower appellate court to come to a just conclusion. With these submissions, the learned Senior Counsel sought to set aside the impugned common order and to remand the matter to the lower appellate court to pass orders afresh by giving opportunity to the defendant.

8. On the other hand, the learned Senior Counsel Sri S.Satyanarayana Prasad supporting the impugned order submitted that it is well settled that no person shall be evicted except in accordance with law. He submitted that in the present case, the plaintiff is in possession of the property and findings of the trial court are in appeal before the lower appellate court. He submitted that the case of the defendant is that the plaintiff vacated the suit premises voluntarily after dismissal of the suit. He stated that this is factually incorrect and the same needs to be adjudicated in the appeal. As found by the lower appellate court even as per the case of the defendant, the plaintiff is in possession of the property by the time of dismissal of the suit and when the defendant is pleading that the plaintiff vacated the suit premises voluntarily after dismissal of the suit, there shall be tangible evidence to support his plea. The defendant has not produced any prima facie evidence to prove his case, therefore, the trial court by rightly drawing the presumption as required under Section 114(d) of the Indian Evidence Act, 1872 with regard to continuation of possession, granted temporary injunction pending the appeal and that even pending the suit there was interim injunction in favour of the plaintiff. He stated that after the dismissal of the suit, the defendant has trespassed into the suit schedule property with antisocial elements and plaintiff filed a police complaint and based on which an FIR was registered and, therefore, the plea of the defendant that plaintiff voluntarily vacated the premises cannot be believed. He stated that the defendant has not approached this court with clean hands and is taking the law into his hands which this court and Apex Court have been deprecating. The learned Senior Counsel also sought to relying on certain correspondent between the defendant and the franchisee of the plaintiff to prove that the claim of the defendant is false with regard to possession, and also the pleading of the defendant in a writ petition filed before this court. As the same may not be relevant for disposal of these revisions, they are not being referred to. The learned Senior Counsel relying on the judgments reported in KARTHIYAYANI AMMA v. GOVINDAN, SRI BALAJI TRADING COMPANY v . VEERASWAMY SRINIVASAN, M.ANNAPURNAIAH v.

M.NARASIMHA RAO and KRISHNA RAM MAHALE v. SHOBHA VENKAT RAO submitted that in the present case, the plaintiff is a tenant at sufferance and it has asked for protection of such possession by way of injunction as the landlord is dispossessing forcibly. He stated that as the appeal is pending and the plaintiff is in possession of the suit property and as there is injunction subsisting during the pendency of the suit and as the lower appellate court has rightly drawing the presumption in favour of the plaintiff granted temporary injunction pending the appeal and as the parties are at logger heads and as the stage of the appeal is arguments and in the interest of justice, there are no grounds to interfere with the impugned order. He submitted that it is settled principle that in a suit for injunction, the parties have to prove their case based on evidence and they cannot seek to appoint an advocate commissioner to gather evidence with regard to possession. He submitted that though the defendant is seeking appointment of an advocate commissioner to note down the physical features of suit schedule property, but the contents of the affidavit filed in this regard, clearly shows that the purpose of the petition is to gather evidence on the aspect of possession, which cannot be permitted and the lower appellate court considering these aspects rejected the application filed for appointment of an advocate commissioner. With these contentions, the learned senior counsel sought to dismiss the revisions.

9. In view of the above rival contentions, the issue that arises for my consideration is whether there are grounds to interfere with the impugned common order passed in the present I.As.?

10. The suit is filed for injunction and the both the parties are claiming possession, which requires to be adjudicated in the appeal. Though the trial court has dismissed the suit, the issue is pending in appeal and as per the case of the defendant, the plaintiff voluntarily vacated the suit premises after the dismissal of the suit and the same is being vehemently denied by the plaintiff and the issue is to be adjudicated in the appeal. When the defendant pleads that the plaintiff has vacated the suit premises, leaving other merits of the case at the present stage, he is admitting the possession of the plaintiff by the date of dismissal of the suit. The plaintiff is denying that it vacated the suit premises after the dismissal of the suit. Therefore, there is any amount of dispute in this regard and the matter is pending adjudication by the lower appellate court and it is also not in dispute that pending the suit, there was interim injunction in favour of the plaintiff. As submitted by both the learned Senior Counsel, the matter is at the stage of arguments. In these circumstances, it is desirable to leave it open to both the parties to raise all the issues before the lower appellate court,

which will decide the same on merits based on evidence in accordance with law. Further, as rightly held by the lower appellate court, in a suit for injunction when both the parties are claiming possession, the defendant cannot seek to appoint an advocate commissioner to gather evidence with regard to possession. In my considered view, the lower appellate court by drawing the presumption under Section 114(d) of the Evidence Act, and without recording any finding on the disputes facts, which are to be considered in the appeal, rightly granted temporary injunction and I do not find any justifiable reason to interfere with the impugned common order and the revisions are liable to be dismissed.

11. Accordingly the revisions are dismissed. No costs.

12. It is made clear that the court below shall dispose of the appeal on merits in accordance with law, uninfluenced by any observation, if any, made in this order.

13. Miscellaneous petitions pending if any, shall stand closed.

AVS -----

23—09—2015