

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**

+ Civil Revision Petition Nos.1881 and 1950 of 2018

% 9 -11-2018

C.R.P.No.1881 of 2018

Between:

Sri Vasu Cut Pieces, represented by Matta
Srinivasulu, S/o Radhakrishna Murthy, aged
About 60 years, Shop Nos.1, 2 and 3,
Brindavan Complex, Besant Road, Governorpet,
Vijayawada

... Petitioner

Vs.

Vemuluri Venkata Lakshmi Narayana Rao,
S/o Venkataratnam, aged about 65 years,
R/o Aravind Street, Vidyadharapuram,
Vijayawada.

... Respondent

C.R.P.No.1950 of 2018

Between:

Sri Vasu Cut Pieces, represented by Matta
Srinivasulu, S/o Radhakrishna Murthy, aged
About 60 years, Shop Nos.1, 2 and 3,
Brindavan Complex, Besant Road, Governorpet,
Vijayawada

... Petitioner

Vs.

Vemuluri Venkata Lakshmi Narayana Rao,
S/o Venkataratnam, aged about 65 years,
R/o Aravind Street, Vidyadharapuram,
Vijayawada.

... Respondent

! Counsel for the Petitioner : Mr. V.S.R. Anjaneyulu

^ Counsel for Respondent : Mr. S.S. Prasad, Sr. Counsel

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? Cases referred:

1) AIR 1992 Madras 279



HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN**Civil Revision Petition Nos.1881 and 1950 of 2018****COMMON ORDER:** *(per V. Ramasubramanian, J)*

The petitioners in both these revisions, was a tenant in respect of three shops bearing Nos.1, 2, and 3 in the ground floor of a commercial complex known as Brundavan Complex, Besant Road, Governorpeta, Vijayawada. The respondent herein is the landlord of the premises.

2. The respondent filed a suit in O.S.No.1109 of 2010 on the file of the VII Additional Senior Civil Judge's Court, Vijayawada, for the eviction of the petitioner herein from the suit shops and for damages at Rs.25,000/- per month from 01-08-2010, till the date of delivery. By a judgment dated 08-01-2018, the trial Court decreed the suit, directing the petitioner herein to vacate and handover vacant possession of the three shop portions within two months from the date of the judgment. The respondent-plaintiff was permitted to file a separate application under Order XX Rule 12 of the Code of Civil Procedure, 1908 for ascertainment of the quantum of damages.

3. As against the judgment and decree in O.S.No.1109 of 2010, the petitioner filed a regular first appeal in A.S.No.55 of 2018. The respondent herein had filed caveat in the First Appellate Court. It is the case of the petitioner that his counsel attempted to serve the copy of the memorandum of grounds of appeal and the copy of the stay petition, on the counsel, who had filed caveat, but he refused to receive the same. Therefore, when the stay petition in I.A.No.230 of

2018 was moved, the First Appellate Court directed notice to be issued to the caveator returnable by 23-03-2018. When the notice was attempted to be served on the respondent's counsel, he made an endorsement to the following effect:

"Instructed to file caveat only. Hence, the party will be informed about the date of adjournment as 23-03-2018. Received the copy of the affidavit and petition in I.A.No.230 of 2018 and copy of the grounds of appeal."

4. But in the meantime, the respondent filed an application for execution in E.P.No.10 of 2018. Since the Execution Petition was filed within two years, the Court thought it unnecessary to direct notice to be issued, but passed an order on 15-03-2018 directing delivery. Delivery was recorded on the very next day, thereby frustrating the remedy of appeal. Shocked at the lightening speed with which things had happened, the petitioner has come up with the above revisions. In C.R.P.No.1881 of 2018, the petitioner is challenging the order dated 15-03-2018 passed in E.P.No.10 of 2018 directing delivery. In C.R.P.No.1950 of 2018, the petitioner is challenging the order dated 08-03-2018 passed by the First Appellate Court in I.A.No.230 of 2018 in A.S.No.55 of 2018, merely ordering notice to the caveator without granting stay.

5. On 23-03-2018, when the revisions came up for hearing as to admission, I passed the following order:

"Notice before admission.

Post after three weeks.

Personal notice is permitted.

The manner in which delivery was ordered by the Executing Court and the execution was attempted to proceed with, is quite shocking. The suit for eviction was decreed by a judgment dated 08.01.2018. It is seen from the certified copy of the decree that the application for certified copy was made on 10.01.2018 and the copy was delivered on 19.02.2018. The decree itself grants two months time for the petitioner to vacate and handover the possession. In any case, within the time limit prescribed for filing a regular appeal, the petitioner has filed a regular first appeal in A.S.No.55 of 2018.

In the first appeal, the landlord was on caveat and the copy of the stay petition was attempted to be served on the counsel for the caveator. It is seen from the docket order passed by the First Appellate Court on 08.03.2018 that notice was offered and the respondent refused. Therefore, fresh notice was issued returnable by 23.03.2018.

But in the mean time, E.P. was filed and the Executing, in all haste, recorded that no stay was pending and passed an order on 14.03.2018 directing delivery. The photographs show that on 15.03.2018 the premises was locked and sealed.

In view of the shocking circumstances revealed above, there will be an interim stay of all further proceedings pursuant to the execution proceedings. The Presiding Officer of the Executing Court is directed to submit a report as to how delivery was ordered and it was sought to be affected in a lightening speed without any semblance of due process. The physical possession of the premises shall not be handed over until further orders, to the landlord. The Presiding Officer/Executing Court shall submit a detailed report by the next date of hearing, viz., 06.04.2018.

It is made clear that the property, until further orders, is in custodia legis, viz., the custody of the Court. While submitting a report the Executing Court shall examine the conduct of the Amin in this case and call for his explanation.

Post on 06.04.2018.”

6. Pursuant to the said order, the Court below submitted a report. The report reveals the following facts:

- i) that the Execution Petition was filed along with an out of turn application on 14-03-2018 and the Presiding Officer of the Court directed the office to check and put up the Execution Petition;

- ii) Thereafter, the Presiding Officer went on Earned Leave from 15-03-2018 to 26-03-2018, on account of his father's bypass surgery;
- iii) On 15-03-2018 the Execution Petition was placed before the In-charge Officer and he ordered delivery; and
- iv) The regular Presiding Officer of the Court, after returning from leave, issued a show cause notice to the Amin. The Amin is said to have submitted a reply that when he went to the spot on 17-03-2018 along with the warrant, the Judgment Debtor was present and that after seeing the warrant, he went away and that therefore, he effected delivery.

7. It is seen from the copy of Execution Petition filed by the respondent that in Column No.5 of the Execution Petition, he mentioned that an appeal in A.S.No.56 of 2018 was pending on the file of the XIII Additional District Judge, Vijayawada. In the affidavit filed by the decree holder, along with the Execution Petition, he stated in paragraph 4 that though the judgment debtor preferred an appeal, interim orders were not granted by the Appellate Court. He stated further that no notice is required to be issued to the judgment debtor, as the Execution Petition was filed after the expiry of the time granted by the trial Court for vacating and handing over possession.

8. Technically, what was stated by the decree holder in Column No.5 of the Execution Petition and what was stated by him in paragraph 4 of the accompanying affidavit, were not false.

However, they were not the whole truth. The whole truth, as it unfolds from the sequence of events, is as follows:

- i) the date of the judgment and decree of delivery of possession is 08-01-2018;
- ii) the application for certified copy of the judgment and decree was made on 10-01-2018 and the copies were made ready on 19-02-2018;
- iii) The last date for filing a regular first appeal, was to expire on 21-03-2018. Even if the two days that intervened between the date of judgment namely 08-01-2018 and the date of filing the copy application namely 10-01-2018 is counted, the last date for filing a regular appeal was 19-03-2018
- iv) Since the judgment was delivered on 08-01-2018 granting two months time for the defendant to vacate and handover possession, the decree holder counted 07-03-2018 as the last date for vacating the premises;
- v) The memorandum of regular appeal was actually filed on 07-03-2018;
- vi) According to the petitioner, his counsel attempted to serve the copies of the memorandum of grounds of appeal and the stay petition on the counsel for the decree holder/caveator on 08-03-2018, but the same was refused. The affidavit of one Mr. P. Ravikumar, the junior counsel for the petitioner is also said to have been filed on 08-03-2018 before the court below.

- vii) On 08-03-2018 the application for stay in I.A.No.230 of 2018 in A.S.No.55 of 2018 was taken up by the first appellate court and the following order was passed:

“Appeal filed and notice was offered, respondent was refused and notice issue to caveator by 23-03-2018”.

- viii) On 12-03-2018, the counsel for the judgment debtor again attempted to serve the notice in the stay petition, on the counsel for the respondent in the appeal/decreed holder. But, the counsel for the decreed holder/caveator made the following endorsement in the notice:

“Instructed to file caveat only. Hence, party will be informed about the date of adjournment as 23-03-2018. Received copy of the petition in I.A.No.230 of 2018 and copy of grounds of appeal”.

- ix) On the very same day namely 12-03-2018 the decreed holder filed the Execution Petition stating on oath that interim orders were not granted in the appeal.
- x) On 15-03-2018, the Execution Petition is moved before the In charge Presiding Officer and he passes an order, which reads as follows:

“D.Hr. prays that to order issue for delivery of vacant possession of E.P./Decree schedule premises to the D.Hr. by removing the JDr and their men and this belongs articles and put the D.Hr in vacant possession of the same U/O.21, R-35 CPC in the interest of justice and equity.

No stay is pending.

E.P. is filed within 2 years

Register E.P. Issue notice to JDr and delivery warrant on payment of process. Call on 17-4-18.”

9. From the above sequence of events, it is clear that by a clever manipulation of events and circumstances, the decree holder got an order of delivery and frustrated the valuable right of appeal available to the judgment debtor. The affidavit of the decree holder accompanying the Execution Petition, was filed on 12-03-2018. On 12-03-2018, the counsel for the decree holder had made an endorsement in the notice served on him in the Stay Petition pending appeal that he was instructed only to file caveat. But the affidavit contained a very clever statement that no interim orders were passed.

10. Mr. S. Satyanarayana Prasad, learned senior counsel sought to contend as though the learned counsel for the caveator did not refuse to receive the notice and that such a statement made by the revision petitioner was intended to prejudice the Court. I could have accepted this argument, but for the fact that the endorsement made by the counsel for the decree holder in the notice served on him on 12-03-2018 very clearly exposed his intentions.

11. For a moment, let me assume that the counsel for the caveator acted within the strict parameters of the letter of the law. Let me also assume that he is entitled in his own right to adopt all kinds of methods to get to his client what he wants. Even then, I cannot overlook what the Executing Court, especially the Presiding Officer, who was only holding Court as In-charge officer had done or had not done. In Column No.5 of the Execution Petition, it is clearly mentioned that an appeal was pending. Unfortunately, there is no

column in the format of the Execution Petition, where details regarding stay petitions are to be filled up. This is why the Execution Petition has to be accompanied by an affidavit. In the affidavit accompanying the Execution Petition, a statement was made by the decree holder that “interim orders were not granted by the Appellate Court”.

12. In the light of these two facts, let us see what was the order passed by the Executing Court. The order passed by the Executing Court is already extracted in one of the preceding paragraphs. It proceeds on the basis of that “no stay is pending”. Such a statement on the part of the Executing Court is patently wrong. A stay petition was pending and the court had ordered notice on 08-03-2018 recording the fact that the counsel for the decree holder is stated to have refused to receive notice. On 12-03-2018, the counsel for the decree holder made an endorsement as though he was instructed only to file caveat.

13. Therefore, even if I keep aside for a moment, the conduct of the counsel for the decree holder, (vis-à-vis his duty to the court), the Executing Court has grossly failed to perform its duty properly. If only a small attempt had been made by the Executing Court to find out as to what happened to the stay petition, then the trial Court would have gained knowledge of the fact that there was an endorsement by the Appellate Court on 08-03-2018 about the refusal of the counsel for the decree holder to receive notice and that a curious endorsement was made by the counsel for the decree

holder on 12-03-2018 in the notice on the stay petition. If these facts had come to the notice of the Executing Court, the Executing Court may not have ordered delivery exparte on 15-03-2018.

14. In a very brave attempt to sustain the conduct of the counsel for the caveator before the lower Appellate Court and to sustain the action by the Executing Court, it was contended by Mr. S.Satyanarayana Prasad, learned senior counsel for the respondent,-

- (i) that C.R.P.No.1950 of 2018 is not maintainable, in as much as it is directed only as against an order passed by the Appellate Court directing the issue of notice in the stay petition;
- (ii) that there were no merits in C.R.P.No.1881 of 2018, as the Executing Court had power under the proviso to Rule 22 of Order XXI of the Code of Civil Procedure, to order delivery in cases where the Execution Petition is filed within two years; and
- (iii) that the mere filing of an appeal, would not operate under Order XLI as an automatic stay and hence, what transpired before the lower Appellate Court cannot invalidate the order passed by the Executing Court.

15. I have carefully considered the above submissions.

16. At the outset, it should be pointed out that a counsel cannot act merely as the mouth piece of his client. Just as he has a duty to his client, he also has a duty to the court. The very endorsement made by the counsel for the decree holder before the lower Appellate Court, on 12-03-2018 in the notice on the stay

application pending first appeal, exposes that the counsel placed his duty to the client far above his duty to the court. The efficacy of the system of administration of justice is directly proportionate to the value system that the members of the Bar and the Bench come to hold. Therefore, the manner in which an endorsement was made on 12-03-2018 by the counsel for the caveator and the manner in which an affidavit was filed on the very same day on 12-03-2018 before the executing court without disclosing the endorsement made in the stay petition, leave no manner of doubt that the decree holder outwitted the judgment debtor to defeat his valuable right of appeal.

17. The first contention of Mr. S. Satynarayana Prasad, learned senior counsel for the respondent that C.R.P.No.1950 of 2018 is not maintainable in as much as it arises merely out of an order directing issue of notice in a stay petition, cannot be accepted. This is for the reason that the power of revision conferred upon this Court under sub-section (1) of Section 115 of CPC extends not merely to the exercise by the Subordinate Court of a jurisdiction not vested in it by law, but also to the failure of the Subordinate Court to exercise a jurisdiction vested in law. After recording the statement of the counsel for the judgment debtor on 08-03-2018 to the effect that the counsel for the caveator refused to receive the notice, the lower Appellate Court ought to have granted stay especially in a matter of eviction. It would have been a different matter, if the first Appellate Court felt that it was such a hopeless case that there was no question of staying the decree of eviction.

18. Irrespective of the correctness of the order, it must be pointed out that the refusal of the Court to grant stay under Order XLI Rule 5 CPC, but to order notice to the respondent even after the counsel for the respondent-caveator refused to receive the notice, can certainly be brought within the purview of the failure to exercise a jurisdiction vested on the first appellate court by law, covered by clause (b) of sub-section (1) of Section 115 CPC. Therefore, the contention of the learned senior counsel for the respondent that C.R.P.No.1950 of 2018 is not maintainable, cannot be accepted and is liable to be rejected.

19. The second contention of Mr. S. Satyanarayana Prasad, learned counsel for the respondent revolves around the proviso to sub-rule (1) of Rule 22 of Order XXI of CPC.

20. It is true that the issue of notice is not mandatory, if the parameters indicated in the proviso to sub-rule (1) of Rule 22 of Order XXI are satisfied. It is also true that even in cases where the High Court had issued Administrative Circulars to the Executing Courts to order the issue of notice, the proviso to sub-rule (1) of Rule 22 of Order XXI would not stand annulled as held by the Madras High Court in ***Nachayee Ammal and others v. Pichaimuthu***¹.

21. But the question in this case is as to whether the Executing Court was made aware of (i) the order passed by the lower Appellate Court in the stay application on 08-03-2018 regarding the allegation of refusal of the counsel for the caveator to

¹ AIR 1992 Madras 279

receive notice; and (ii) the endorsement made by the counsel for the caveator on 12-03-2018 in the notice on the stay application. The real question in this case is as to whether the Executing Court would have ordered stay, if these two facts had been brought to its notice.

22. The next contention of Mr. S. Satyanarayana Prasad, learned senior counsel for the respondent is that the Amin's conduct cannot be the subject matter of a revision. But this contention is misconceived. I am not for a moment trying to find out whether what the Amin did, was right or wrong. I am just shocked at the manner in which the lower Appellate Court dealt with the stay application on 08-03-2018 despite a representation that the counsel for the caveator was refusing to receive notice. I am equally shocked at the manner in which the Executing Court failed to make a little enquiry about the stay petition, which if done, would have made the court aware of two important things that I have indicated earlier.

23. The contention of the learned senior counsel for the respondent that the mere filing of an appeal would not operate as stay under Order XLI CPC and that what transpired before the lower Appellate Court cannot invalidate the execution proceedings, are irrelevant in this case. The real questions to be answered in this case, revolve around (i) what the Appellate Court did especially after the alleged refusal of the counsel for the caveator to receive the notice, was brought to its notice on 08-03-2018; and (ii) what the Executing Court did, because of not being made aware of what transpired before the First Appellate Court.

24. It is clear from what had actually transpired, both before the lower appellate court and before the executing court that by a clever manipulation, by presenting half truths, the decree holder has successfully thrown the tenant out of the property, defeating the valuable right of first appeal available to the judgment debtor against the decree of possession. Therefore, the Civil Revision Petitions deserve to be allowed. But the question as to what kind of relief that I should grant at this stage, is now to be deliberated.

25. In the normal circumstances, the petitioner is entitled to be put back into possession of the suit schedule property, as he has been dispossessed by adopting ingenious methods. But, I do not wish to do so for one simple reason. It is seen from the copy of the decree passed in O.S.No.1109 of 2010 that the fight between the landlord and tenant began almost about 24 years ago. It appears that a suit for eviction was filed way back in 1994 in O.S.No.220 of 1994. The suit ended in a compromise when the petitioner/tenant agreed to pay enhancement of rent @ 20% after every three years. The present suit O.S.No.1109 of 2010 was filed on the ground that the tenant did not pay the enhancement as agreed to in the first round of litigation. Therefore, putting the petitioner/tenant back into possession appears to be a hard option.

26. However, I cannot also allow the respondent/landlord to reap the benefit of a clever manipulation that he resorted to. Therefore, keeping the property in *custodia legis*, as per the interim order passed on 23-03-2018 and directing the First Appellate Court

to dispose of the appeal within a time frame, appears to be an option where equities between the parties could be balanced.

27. Therefore, the Civil Revision Petitions are disposed of with the following directions:

- 1) The suit schedule property shall be treated as property in the custody of the Court (*custodia legis*) till the disposal of the appeal in A.S.No.55 of 2018. The respondent/landlord shall not part with the physical possession of the suit schedule property to any third party;
- 2) The lower Appellate Court may dispose of the appeal in A.S.No.55 of 2018 within a period of three (3) months. If the petitioner/tenant succeeds in the first appeal, the Executing Court shall put the petitioner/tenant back into possession, subject to the right of the landlord to file a second appeal. If the petitioner/tenant fails in the first appeal, then the property will stand released from the *custodia legis*.
- 3) If the Amin has taken possession of any stock lying in the shop at the time of taking delivery, the same shall be handed over to the petitioner.

There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

Date: 9-11-2018

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