

K. Pullaiah Vs. K. Gowraiah

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Court : Andhra Pradesh

Decided On : Jul-26-2006

Reported in : 2007(1)ALD82

Judge : G. Rohini, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 10 and 151; [Constitution of India](#) - Article 227

Appeal No. : CRP No. 5794 of 2005

Appellant : K. Pullaiah

Respondent : K. Gowraiah

Advocate for Def. : K. Soma Konda Reddy, Adv.

Advocate for Pet/Ap. : K. Noushad Ali, Adv.

Disposition : Petition allowed

Judgement :

ORDER

G. Rohini, J.

1. This civil revision petition is directed against the order dated 3-8-2005 in I.A. No. 1077 of 2005 in LA. No. 1545 of 2004 in O.S. No. 458 of 2004 on the file of the

Court of II Additional Junior Civil Judge, Kurnool.

2. The revision petitioner is the defendant in O.S. No. 458 of 2004 which is filed by the respondent herein seeking eviction of the revision petitioner from the up stair portion of the suit schedule house and also claiming damages for use and occupation at the rate of Rs. 3,000/- per month.

3. For the sake of convenience, the petitioner and the respondent are hereinafter referred to as 'the defendant' and 'the plaintiff respectively as they were arrayed in the suit.

4. It is not in dispute that the plaintiff and the defendant are brothers. The plaintiff filed O.S. No. 458 of 2004 claiming that he had succeeded to the suit schedule house under a Registered Will dated 24-11-1997 executed by their father. The defendant in his written statement contended inter alia that the Will dated 24-11-1997 was not genuine and the same was brought into existence under suspicious circumstances. He claimed possession of the upstairs portion of the suit schedule house as rightful owner.

5. It is also not in dispute that earlier the defendant filed O.S. No. 22 of 1998 on the file of the Court of Additional Senior Civil Judge, Kurnool for partition of the joint family properties including the house covered by the Will dated 24-11-1997 which is the subject-matter of O.S. No. 458 of 2004. The plaintiff in O.S. No. 458 of 2004 (suit for eviction) who was the 2nd defendant in the said suit for partition filed a written statement pleading that there was a prior partition. After full-fledged trial, the suit for partition was decreed partly. In respect of Item Nos. 1 to 5 of the suit schedule properties including the house property covered by the Will dated 24-11-1997, the suit was dismissed. Aggrieved by the same, the plaintiff in O.S. No. 22 of 1998 (defendant in O.S. No. 458 of 2004) filed A.S. No. 1398 of 2004 before this Court. While the said appeal is pending, the present suit i.e., O.S. No. 458 of 2004 had been filed for eviction.

6. In view of the pendency of A.S. No. 1398 of 2004, the defendant filed LA. No. 1545 of 2004 under Section 10 of the Code of Civil Procedure for stay of the proceedings in O.S. No. 458 of 2004. Initially, the Court below granted stay as

prayed for. Subsequently, the plaintiff filed an application being I.A. No. 1077 of 2005 under Section 151 of C.P.C. to vacate the stay granted in LA. No. 1545 of 2004 and to proceed with the trial of the suit or in the alternative to direct the defendant to deposit Rs. 3,000/- per month towards damages for the use and occupation of the suit house till the disposal of the suit. The said application was opposed by the defendant. However, the Court below by order dated 3-8-2005 allowed LA. No. 1077 of 2005 directing the defendant to pay a sum of Rs. 3,000/- per month towards damages as prayed for. The said order is under challenge in this civil revision petition, filed by the defendant under Article 227 of the [Constitution of India](#).

7. I have heard the learned Counsel for both the parties and perused the material on record.

8. Under Section 10 of C.P.C, no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For ready reference, Section 10 of C.P.C. may be extracted hereunder:

10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation :- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

9. In the case on hand, the plaintiff in O.S. No. 458 of 2004 claims title to the suit schedule property under a Will said to have been executed by his father dated 24-11-1997. The defendant disputed the genuineness of the said Will. The said issue was considered in the earlier suit for partition i.e., O.S. No. 22 of 1998 between the same parties and a finding was recorded against the defendant herein. Admittedly,

the appeal preferred by him against the said judgment and decree is still pending. It is also not in dispute that the suit schedule house is one of the items, in respect of which the suit for partition was dismissed in O.S. No. 22 of 1998 which is under challenge in the appeal pending on the file of this Court.

10. As a matter of fact, the suit for eviction is based on the decree granted in O.S. No. 22 of 1998, in which the suit schedule house was allotted to the share of the plaintiff. If that be so, undoubtedly, the matter in issue i.e., the question relating to genuineness of the Will dated 24-11-997 is also directly and substantially in issue in A.S. No. 1398 of 2004 between the same parties. The law is well settled that the appeal is continuation of the suit and an appeal must be deemed to be included in the word suit used in Section 10 of C.P.C.

11. In the circumstances, the bar under Section 10 of C.P.C. is directly attracted and the proceedings under the suit for eviction which is a latter suit cannot be proceeded. In case the petitioner is aggrieved by the order of stay granted under Section 10 of C.P.C., it is always open to him to challenge the same by working out the appropriate remedy, but it is not open to him to seek vacation of the said order under Section 151 of CPC. The bar under Section 10 of C.P.C. with regard to the proceedings in a latter suit is absolute and would operate till the conclusion of the previously instituted suit. The stay under Section 10 of C.P.C. is not a mere interlocutory order such as an order of temporary injunction or attachment before judgment and therefore no application can be maintained under Section 151 of C.P.C. to vacate the order of stay granted under Section 10 of C.P.C. Hence, the Court below committed an error in entertaining IA. No. 1077 of 2005 and allowing the same with a direction to the respondent to pay a sum of Rs. 3,000/- per month as damages. Such a course is impermissible under law.

12. For the aforesaid reasons, the order under revision which suffers from an error apparent on the face of the record is hereby set aside and the civil revision petition is allowed. No costs.