

**(1990) 01 GAU CK 0010**

**Gauhati High Court**

**Case No:** Civil Revision No. 10 of 1990

Sree Hargobind Agarwal

APPELLANT

Vs

Ramawtar Dipak Kr. Property  
(Huf) represented by its Karta  
Shri Ramawtar Modi and Others

RESPONDENT

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**Date of Decision:** Jan. 12, 1990

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 32, Order 41 Rule 5, Order 41 Rule 5(1), Order 43 Rule 2, 115

**Citation:** (1990) 1 GLR 414

**Hon'ble Judges:** Manisana, J

**Bench:** Single Bench

**Advocate:** S.P. Roy, R. Borah, S.N. Dev Nath, M. Ali and R.R. Roy, for the Appellant; J.N. Sarma and K.C. Sancheti, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Manisana, J.

This revision petition arises from an order dated 23.12.89 passed by the District Judge Kamrup at Gauhati in Misc. Appeal No. 7 of 1989.

2. In Title Suit No. 64 of 1989, on an application filed by the Plaintiff, the Munsiff (2) Gauhati granted an ex parte interim injunction restraining the Defendant--1, his agent, employees from closing the main collapsible gate of the ground floor as well as closing the door for going to the roof, and also from obstructing the Plaintiff, his servants and employees from taking water from the Gauhati Municipal Corporation tap. The order was appealed to the District Judge Kamrup. The District Judge passed interim orders pending the appeal staying the order relating to closing of the door for going to the roof, and directing the Defendant to allow the Plaintiff to take water from the Gauhati Municipal Corporation tap from morning till 10.00 pm and to keep

the collapsible gate open till 10,00 pm for the ingress and egress of the Plaintiff. Hence this petition.

3. The learned Counsel for the Appellant has contended that the lower appellate Court has no jurisdiction to stay an order granting ex parte interim injunction passed by the trial Court. He has referred (sic) to a decision of the Madhya Pradesh High Court in [Vasant Diwakar Patrikar and Others Vs. Union of India \(UOI\) and Others,](#)

4. In [Vasant Diwakar Patrikar and Others Vs. Union of India \(UOI\) and Others,](#) , it has been held;

...examination of the language used in Sub-clause (1) of Rule 5 clearly provides for stay of proceedings, under a decree or an order, or the stay of executions of a decree. It is, therefore, clear that so far as an order of temporary injunction, as was granted in this case is concerned, there are no proceedings under the order which could be stayed, nor is there any question of execution which could be stayed. In ray opinion, therefore, no order could be passed by the learned appellate Court in exercise of jurisdiction under Sub-rule (1) of Rule 5 of Order 41, Code of Civil Procedure.

In the case before the Madhya Pradesh High Court, the trial Court granted an exparte temporary injunction restraining the Defendants from passing transfer orders. In the context, the Madhya Pradesh High Court has held that there was no proceeding under the order which could be stayed, nor was there any question of execution which could be stayed and, therefore, no order could be passed staying the order of injunction.

5. Order 41, Rule 5(1), CPC runs as follows:

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 or execution of such decree.

Explanation....

6. Under Order 41, Rule 5(1), the appellate Court may for sufficient cause order stay of execution of a decree, Order 43, Rule 2 provides that rules of Order 41 shall apply, as far as may be, to appeals from orders. Section 36, CPC provides that the provision of the Code relating to execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. Therefore, an appellate Court may for sufficient cause order stay of execution of an order.

I am not expressing my opinion on the decision of the Madhya Pradesh High Court as the case before the Madhya Pradesh. High Court relates to an injunction

restraining from passing transfer orders. The fact of the present case is different from that before the Madhya Pradesh High Court. Therefore, the decision of the Madhya Pradesh High Court does not help the Petitioner. As regards the question whether an order of injunction restraining from passing transfer orders can be executed or stayed. I will prefer to leave the question to be dealt with later, if ever it is alleged.

7. As regards the mode of execution of a decree or order for injunction, where the party against whom a decree or order for injunction has been passed, the decree or order may be enforced by his detention in civil prison or by attachment of his property or by both (see Order 21 Rule 32) It is stated at the bar that police assistance has been prayed for from the Court for the implementation of the order. In my opinion, the order of injunction can be executed and therefore, the appellate Court has jurisdiction to stay an order of injunction under Sub-rule (1) of Rule 5 of Order 41, Code of Civil Procedure.

8. The next question which arises for consideration is whether the jurisdiction of this Court u/s 115, CPC would be invoked on the facts and circumstances of the case. The order of the lower Court may be right or wrong, or may be in accordance with law or may not be in accordance with law, but an order even if it is erroneous, that order will not be corrected u/s 115 unless the lower appellate Court has exercised its jurisdiction either illegally or with material irregularity. On perusal of records, it appears that there is no jurisdictional error. However, in view of the statement made by Mr. J.N. Sarma, the learned Counsel for the Defendant-opposite parties, that the collapsible gate of the ground floor will be opened for the ingress and egress of the Plaintiff Petitioner in case of emergency. I hope the Defendant will honour the undertaking given by his learned Counsel.

9. For the foregoing reasons, thy petition is dismissed.