(2002) 11 AP CK 0013

Andhra Pradesh High Court

Case No: C.R.P. No. 1319 of 2002

Gaddam Narsimha		APPELLANT
	Vs	
Puli Swamy and Another		RESPONDENT

Date of Decision: Nov. 29, 2002

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 3A, Order 41 Rule 27

Citation: (2003) 6 ALD 66 : (2003) 3 ALT 487

Hon'ble Judges: C.Y. Somayajulu, J

Bench: Single Bench

Advocate: Bankatlal Mandhani, for the Appellant; R. Subhash Reddy, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

C.Y. Somayajulu, J.
This revision is preferred against the order dated 29.01.2002 in C.M.A. No. 11 of 2001 on the file of the Court of Senior Civil Judge, Jangaon, allowing the appeal and dismissing I.A. No. 501 of 2001 in O.S. No. 34 of 2001 on the file of the Court of Junior Civil Judge, Jangaon, filed under order 39 Rule 1 C.P.C.

2. Revision petitioner filed O.S. No. 34 of 2001 on the file of the Court of Junior Civil Judge, Jangaon seeking a decree of perpetual injunction restraining the respondents and their family members from entering into or interfering with his possession and enjoyment of Ac.2-30 Cents in S. No. 81/1 (old) corresponding to 82/72 (new) within the boundaries mentioned in the plaint schedule (hereinafter called "the suit property"), alleging that as an ex-serviceman he was assigned an extent of Ac.5.00 in S. Nos. 82 and 68, i.e., Ac.4.00 in S. No. 82 and Ac.1.00 in S. No. 68 of Yeshwanthapur village of Jangaon Revenue Mandal, which includes the suit land, in 1980, and since then he has been in peaceful possession and enjoyment of the said land, and that the respondents, with a dishonest intention, are trying to encroach into the suit

land; and filed I.A. No. 501 of 2001 in the said suit seeking a temporary injunction during the pendency of the suit against the respondents. By his order dated 21.11.2001, the learned Junior Civil Judge passed an order of ex parte injunction against the respondents. Subsequently, respondents put in their appearance and filed the counter-affidavit of second respondent (second defendant in the suit) on their behalf in I.A. No. 501 of 2001, denying the allegations in the plaint, and contending that the petitioner is not the owner of the suit land or the remaining land in the said survey number as alleged by him, and that her father Puli Narasimhulu, who was an ex-serviceman, was assigned an extent of Ac.2.20 Gts., in S. No. 82 of Jangaon Town under a patta, and consequently his name also was mutated in the revenue records and the said land was given Survey No. 82/B1 for some period and for some period it was shown as S. No. 82/1, but in Setwar of 1988 the land assigned to her father was shown as S. No. 82/72, but the same was not implemented in the pahanies, and after the death of her father in 1993, when she sought for mutation of that land in her name, her name was mutated in the revenue records, and was given a patta passbook under the provisions of Record of Rights Act, and since she has been in peaceful possession and enjoyment of Ac.2.20 Gts., in S. No. 82 as an absolute owner, and her cousin - first respondent, is looking after the said land on her behalf, and since revision petitioner is not in possession of any part of the said land, revision petitioner is not entitled an injunction, but he, by making false representation, obtained an ex parte injunction against her and second respondent.

3. Revision petitioner filed a petition to send for certain documents from the Mandal Revenue Office, and the case was being adjourned from time to time for receipt of documents from the Mandal Revenue Office, and so the learned Junior Civil Judge did not take up the hearing of I.A. No. 501 of 2001. Therefore, on the basis of A. Venkatasubbiah Naidu Vs. S. Challappan and Others, respondents filed CMA No. 11 of 2001 against the order granting an ex parte injunction against them. The learned Senior Civil Judge, after allowing the parties to adduce documentary evidence, allowed the C.M.A. and dismissed I.A. No. 501 of 2001 and vacated the ex parte injunction granted against the respondents. Hence this revision by the plaintiff.

4. The main contention of the learned counsel for the revision petitioner is that the learned Senior Civil Judge was in error in not taking into consideration the fact that the father of the second respondent, even during his lifetime, sold away the land of Ac.2.20 Gts., assigned to him TO Vemula Sukanya, W/o. Madhusudan Reddy under a registered sale deed dated 25.01.1985 (Ex.A.1), and so the question of the second respondent inheriting any land in S. No. 82 from her father does not arise. He also contended that the pattadar passbooks (Exs.B.1 and B.2), relied on by the second respondent, are tampered with and S. No. 82/B1 was changed as 82/72 and so the contention of respondents that second respondent inherited land in S. No. 82/72 ought not to have been accepted by the learned appellate Judge. He further contended that since the revision petitioner, who is disputing the entries in Ex.B.4,

with a view to establish that the entries in the pahanies are tampered with or brought into existence by the second respondent with the help of the Village Administrative Officer, revision petitioner sought for production of the original record from the Mandal Revenue Officer''s Office, and instead of awaiting receipt of those documents, the learned Senior Civil Judge, in a hasty fashion, on the assumption that revision petitioner is deliberately trying to take advantage of the ex parte injunction, proceeded with the hearing of the appeal on merits without keeping in view the fact that revision petitioner is not responsible for the delay, and so the order under revision is not sustainable. It is also his contention that since the pahanies produced by revision petitioner clearly establish his possession over the suit land, the learned Senior Civil Judge ought not to have vacated the injunction granted in favour of the petitioner. The contention of the learned counsel for the respondents is that the voluminous documentary evidence adduced by the respondents clearly establishes their possession over the land in S. No. 82/72, and so the learned Senior Civil Judge vacating the injunction by allowing the appeal cannot be found fault with. It is his contention that Ex.A.1 has no relevance for the disposal of this case because it relates to land in S. No. 82/2, which is not the suit land. He contended that the entries in Ex.B.4 clearly show that the survey number in the pahanies was wrongly shown as S. No. 82/B1 instead of S. No. 82/72, and so the contention of the revision petitioner that the suit land is different from the land allotted to the father of the second respondent is not and cannot be true. It is also his contention that since the revision petitioner did not produce pahanies subsequent to Ex.A.4, which is of the year 1989-90, in view of Exs.B.5 to B.10, the learned Senior Civil Judge vacating the order of ex parte injunction granted and dismissing I.A. No. 501 of 2001 cannot be said to be erroneous.

5. At the outset, I must state that the procedure followed by the learned Senior Civil Judge in disposing of I.A. 501 of 2001 finally on merits after marking the documents for the first time is not the correct procedure to be adopted in this type of cases. It is no doubt true that the Supreme Court in A. VENKATASUBBIAH NAIDU case (1 supra) held that failure to decide the application, or vacate the ex parte temporary injunction, shall, for the purpose of appeal, be deemed to be final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in Rule 3A of Order 39 C.P.C. It should be remembered that that observation was made while dealing with a situation where the Court that granted the injunction does not finally dispose the application for injunction on merits within thirty days of granting the ex parte order, as contemplated by Rule 3A of Order 39 C.P.C. The Supreme Court held that in such a situation the aggrieved party is entitled to file an appeal not withstanding that the pendency of the application for grant or vacation of a temporary injunction against the order remaining in force. It is in that connection the Supreme Court observed that for the purpose of filing an appeal the order granting an (ex parte) injunction would be deemed to be a final order passed on the application for temporary injunction. In such appeal the appellate Court can

go into the question as to whether the trial Court was justified in granting an ex parte injunction or not, and depending on the facts and circumstances of the case can vacate or modify the order of ex parte injunction. It is the trial Court that has to dispose of the application for injunction on merits after hearing both sides, by giving opportunity to them to adduce such evidence as they wish to. The appellate Court cannot permit the parties to adduce evidence in the appeal for the first time, because the parties should satisfy the appellate Court that the ingredients of Rule 27 of Order 41 C.P.C. are satisfied. When the application for injunction is still pending, the appellate Court should be very slow in permitting the parties to adduce additional evidence in appeal. The appellate Court should have directed the parties to approach the trial Court and argue the case on merits before it, either by vacating or modifying or without interfering with the order of ex parte injunction granted by the trial Court, depending on the facts and circumstances of the case. If it were not so and if the appellate Court were to take on itself the task of deciding the application on merits for the first time, after permitting the parties to adduce evidence before it either by following or ignoring the provisions of Rule 27 of Order 41 C.P.C., the aggrieved party would be losing a very valuable right of appeal. That would not have been the intention of the Supreme Court when it held that an appeal can be preferred against the order of ex parte injunction if the trial Court does not dispose of the application within 30 days of granting the ex parte injunction. Therefore, the learned Senior Civil Judge was in error in taking up the task of deciding I.A. No. 501 of 2001 on merits by permitting the parties to adduce evidence before him, even without giving a finding whether parties can be permitted to adduce additional evidence as per the provisions of Rule 27 of Order 41 C.P.C. If the Senior Civil Judge felt that there was no reason for the trial Court granting an ex parte injunction, he should have vacated the ex parte injunction and directed the trial Court to dispose of I.A. 501 of 2001 on merits. Since the Senior Civil Judge himself decided the appeal after permitting the parties to adduce evidence, thereby depriving the revision petitioner of the valuable right of appeal, though this is a revision, I would consider the evidence on record in detail as if this were an appeal against the order of Senior Civil Judge dismissing I.A. No. 501 of 2001.

6. Ex.A.1 is a copy of the sale deed dated 25.01.1985, under which the father of the second respondent sold Ac.2.17 Gts., in S. No. 82/2 to one Vemula Sukanya. As rightly contented by the learned counsel for respondents, Ex.A.1 is not relevant to this case because suit land is not in S. No. 82/2. Ex.A.2 is a certified copy of the pahani for the year 1980-81 relating to S. No. 82/1, which shows that Ac.2.30 Gts., therein is Sarkari, and was in possession of revision petitioner, who raised Jawar in Ac.2.00 Gts., and Ac.2.20 Gts., therein was patta land in possession of the father of second respondent. Exs.A.3 and A.4 are certified copies of pahanies for the years 1988-89 and 1989-90 relating to S. No. 82/1A, which show that an extent of Ac.2.30 Gts., Sarkari land was in possession of revision petitioner. Exs.A.5, A.7 and A.8 are copies of B-Memos for the years 1980-81, 1982-83 and 1983-84 in respect of Acs.1.00

Gts., in S. No. 68/1, Ac.2.30 Gts., in S. No. 82/1, Ac.0.21 Gts., in S. No. 82/60, Ac.0.21 Gts., in S. No. 82/61 and Ac.0.12 Gts., in S. No. 82/68 in possession of the revision petitioner. Ex.A.6 is a copy of the B-Memo for the year 1981-82 relating to Ac.1.00 Gts., in S. No. 68/1, Ac.0.21 Gts., in S. No. 82/60, Ac.0.21 Gts., in S. No. 82/61 and Ac.0.12 Gts., in S. No. 82/68 issued to revision petitioner. Ex.A.9 is a copy of B-Memo for the year 1988-89 relating to S. Nos. 82/1 (Ac.2.30 Gts.) issued to the revision petitioner. Ex.A.10 is the patta certificate issued to revision petitioner in respect of Ac.4.00 in S. No. 82 and Ac.1.00 in S. No. 68. Ex.A.11 is the proceedings dated 10.05.1979 proposing to assign Ac.5.00 i.e., Ac.4.00 in S. No. 82/1 and Ac.1.00 in S. No. 63 to the revision petitioner.

7. Exs.B.1 and B.2 are pattadar passbooks issued to the second respondent in respect of Ac.2.20 Gts., in S. No. 82/1/B, which was later corrected as S. No. 82/72 in pursuance of the proceedings in File No. 11 (Shetwar) K7/3526/88. Ex.B.3 is a copy of Shetwar for the year 1988 in respect of Ac.2.20 Gts., in S. No. 82/72 in the name of the father of second respondent. Ex.B.4 is a copy of proceedings under the provisions of Record of Rights Act, which shows that the extent of land of Ac.3.09 Gts., in S. No. 82/1 as per file No. K7/3526/88 dated 08.08.2001, was mutated in the name of the father of second respondent (Ac.2.20 Gts., in S. No. 82/72 and 0.29 Gts., in S. No. 82/1). Column Nos. 5 (d) and 6 show that in respect of Ac.2.20 Gts., in S. No. 82/72 patta was given to Puli Narasimhulu S/o. Sailu (father of second respondent), and after his death his daughter Vijaya Lakshmi (second respondent) was given ryotwari passbook and duplicate Setwar in KT/3526/88 was issued though patta was issued in her name and passbook also was given to her earlier, survey number was wrongly recorded as 82/B/1 instead of 82/72. In respect of entries in Column Nos. 2 and 3 of Ex.B.4, which relate to survey number and extent, there is a remark that survey number and extent are found altered (in the original). Ex.B.5 to B.10 are copies of pahanies for the years 1994-95 to 1999-2000 relating to S. No. 82/B/1, which show that Puli Vijaya Lakshmi, who was given patta, is the pattadar and person in possession and enjoyment of Ac.2.20 Gts. Exs.B.5 and B.6 show that cotton crop was raised in the land during those years, i.e., 1994-95 and 1995-96. Exs.B.7 to B.10 show that the land was kept fallow during those years, i.e., from 1996-97 to 1999-2000.

8. The fact that the revision petitioner was granted patta in respect of Ac.2.30 Gts., in S. No. 82/1 is not denied or disputed by the respondents. Ex.A.2 shows Ac.2.30 Gts., in S. No. 82/1 and Ex.A.3 shows Ac.2.30 Gts., in S. No. 82/1A. Ex.A.5, A.7, A.8 and A.9 show that Ac.2.30 Gts., in S. No. 82/1 was in possession of revision petitioner during those years. Ex.A.6 is not relevant because it does not relate to S. No. 82/1. Ex.A.10 read with Ex.A.11 shows that Ac.4.00 in S. No. 82/1 was granted patta to revision petitioner in 1979. When S. No. 82/1 became S. No. 82/72 is not explained by revision petitioner. Exs.B.1 and B.2 were originally issued in respect of Ac.2.20 Gts., in S. No. 82/1/B. Ex.B.5 to B.10 also relate to Ac.2.20 Gts., in S. No. 82/B/1. Ex.B.3 relates to S. No. 82/72. Ex.B.4 shows that Ac.2.20 Gts., in S. No. 82/72 and Ac.0.29

Gts., in S. No. 82/1 was assigned to the father of second respondent and after his death, as per the proceedings in KT/3526/88, second respondent was granted succession. Ex.B.4 was counter-signed by Mandal Revenue Officer on 29.09.2001. Exs.B.1 and B.2 show that they were issued on 15.05.1994 and the survey number is shown as 82/1/B initially, and subsequently it was corrected as S.No.82/72. The entries in Exs.B.1 and B.2 do not tally with the entries in Ex.B.4. When in Ex.B.7 the survey number is mentioned as 82/72 and the extent of land is shown as Ac.2.20 Gts., how the passbook was applied for only one survey number and how the passbook was issued in respect of S. No. 82/1/B in the first instance in 1994 can be explained only during the course of trial by the respondents. In Ex.B.4 the total extent of land in S.No.82/1 is shown as Ac.3.09 Gts., and as stated earlier, there is a remark in Ex.B.4 that survey number and extent of land are said to have been corrected. So, how the extent of S. No. 82/1 became Ac.3.09 Gts., when all through the extent is shown as Ac.2.20 Gts., can be decided only during the course of trial after examining the concerned revenue officials. As stated earlier, when S. No. 82/1 was changed as S. No. 82/72 is also not fully explained by the parties. It is not known whether any public notice was given where S. No. 82/1/B is changed as 82/72 as shown in Ex.B.4. Neither the revision petitioner nor respondents clearly establish that they are in possession of S. No. 82/72. There seems to be a scramble for possession or confusion about survey number of the land. Therefore, in my considered opinion, this is a fit case where the Court should take custody of the property and auction the leasehold right of Ac.2.30 Gts., in S. No. 82/72 between the parties to the suit for the benefit of the party that ultimately succeeds in the suit.

9. Therefore, the trial Court is directed to take possession of the suit land and put it to auction between the parties. The trial Court should dispose of the suit as expeditiously as possible, at any rate before the end of July 2003. The revision petition is disposed of accordingly.