

## Pamulapati Varadayya Vs Kommareddi Chinnappareddi and another

**Court:** Andhra Pradesh High Court

**Date of Decision:** Aug. 22, 1955

**Citation:** AIR 1956 AP 64

**Hon'ble Judges:** Subba Rao, C.J.; Bhimasankaram, J

**Bench:** Division Bench

**Advocate:** G. Chandra Sekhara Sastry, for the Appellant; O. Chinnappa Reddy, for the Respondent

### Judgement

Subba Rao, C.J.

This is an appeal against the order of our learned brother Satyanarayana Raju J. dismissing the application filed by the appellant on the ground that it was not maintainable.

2. Respondent 1 filed O. S. No. 13 of 1953 on the file of the Subordinate Judge's Court, Guntur, to recover the amount due to him under

promissory note alleged to have, been executed by the appellant and another. It was contended before the learned Judge that the promissory note

was executed in connection with an illegal partnership and, therefore, it was not enforceable. It was also argued that it was not supported by

consideration. The learned Subordinate Judge negatived both these contentions and defendant 2 preferred an appeal to this Court.

In the memorandum of appellate grounds filed by him. he contested the correction of the aforesaid findings given by the Subordinate Judge and

paid court fee in regard to the entire suit claim. To that appeal, the plaintiff and defendant 1 were made respondents. Pending that appeal, the

appellant, who is respondent 2 in the appeal, filed an application under O. 41 R. 5, C. P. C. asking for stay of execution of the decree pending the

disposal of the appeal. Satyanarayana Raju J. dismissed the application on the ground that it was not maintainable. Hence, the appeal.

3. Mr. Chandrasekhara Sastry, Learned Counsel for the appellant, contended that by the combined operation of the provisions of O. 41 Rr. 4 and

5, C. P. C. his application for stay of execution of the decree is maintainable. The relevant provisions read:

Order 41. Rule (4):

Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the

plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate

Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be.

Rule 5.

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 of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in

pursuance of the preliminary decree or the execution of any such final decree if already made.

4. It is seen from the aforesaid provisions that the mere filing of an appeal does not automatically operate as a stay of the execution of the decree

but the appellate Court may, for sufficient causes, order stay of execution of the said decree. But it is contended that the provisions of those rules

can only be invoked by a party who prefers an appeal and as the appellant before us is only a respondent in the appeal, he has no "locus standi" to

apply for stay. This argument ignores the provisions of R. 4.

Under R. 4, if the decree appealed from proceeds on any ground common to all the defendants, any one of them may appeal from the whole

decree and the court may reverse the decree even in favour of all the defendants. The appeal, therefore, in the circumstances mentioned in the

provisions, must be deemed to have been filed by one of the defendants on behalf of all the defendants. If so, it could reasonably be held, without

stretching the language, that respondent 2, on whose behalf the appeal also must be deemed to have been filed, could apply under R. 5.

Further R. 5 does not in express terms say that the application shall be filed only by the appellant. It is a power conferred upon a Court to make an

order if it is moved in accordance with law. We think that the power can be exercised in favour of respondent 2, for by reason of the provisions of

R. 4, a decree might be given even in his favour.

5. If so, the next question is whether this is a fit case for staying execution of the decree. It is an established rule of practice that ordinarily stay of

money decrees will not be given unless there are special circumstances. In this case, the appellant is only a surety and the primary liability rests

upon defendant 1.

In the circumstances, we think the ends of justice would be met if the appellant is directed to deposit half the decree amount and costs within two

months from this date. Respondent 1 may draw out the amount so deposited and the attachment already effected would continue. The appellant

may, if he chooses, apply to the lower court under O. 21 R. 83 for appropriate directions. There will be no order as to costs.