



21/05/09

54

HIGH COURT OF CHHATTISGARH, BILASPUR

WRIT PETITION (227) No. 2652 of 2009

PETITIONER:

Ramadhar Sahu S/o Manglu, aged about 87 years, R/o Implipara, Bilaspur, Tahsil & District Bilaspur (C.G)

Vs.

RESPONDENTS:

1. Smt. Dulari Bai, aged about 45 years, wife of J.S. Sharma, Occupation, house wife
2. Sanjay Kumar Sharma, aged about 28 years, s/o J.S. Sharma,
Both R/o Implipara, Bilaspur, Tahsil & District Bilaspur (C.G)
3. State of Chhattisgarh, through Collector, Bilaspur (C.G)

**WRIT PETITION UNDER ARTICLE 227 OF THE
CONSTITUTION OF INDIA**

Appearance:

Shri Rishi Rahul Soni, counsel for the Petitioner.

Shri Sushil Dubey, Government Advocate for the State/
respondent no.3, on advance copy

ORDER
(20.05.2009)

SUNIL KUMAR SINHA, J.

Heard.

(2) Being aggrieved with the order dated 12.05.2009 passed in Civil Appeal No.35-A/2008 by the II Addl. District Judge, Bilaspur, the petitioner/appellant/defendant (judgment debtor) has filed this petition.

(3) Facts briefly stated are as under:

Respondents 1 & 2/plaintiffs filed Civil Suit No.29-A/2007 against the petitioner which was decreed from the Court of 9th Civil Judge, Class-II, Bilaspur, vide Judgment and decree dated 27.6.2008 and it was directed that the petitioner/defendant shall hand over the vacant possession of the suit land bearing Khasra No.479/3 Area 0.02 acres to respondents 1 & 2/plaintiffs immediately. A decree of permanent injunction was also granted in favour of the respondents/plaintiffs.

The petitioner/defendant challenged the aforesaid judgment and decree in Civil Appeal No.35-A/2008 and prayed for stay under Order 41 Rule 5(1) of the Code of Civil Procedure. The stay application was allowed exparte by the appellate Court on 18.8.2008 and it was directed that on furnishing security of Rs.10,000/- to the satisfaction of the trial Court, the execution of judgment and decree shall remain stayed till the decision of the civil appeal. Thereafter, the respondents/ plaintiffs filed an application for vacating the order of stay granted in favour of the petitioner. The said application was allowed and the stay order granted in favour of the petitioner on 18.08.2008 was set aside by the impugned order dated 12.05.2009.

(4) Shri Rishi Rahul Soni, learned counsel appearing on behalf of the petitioner, would submit that the appellate court grossly erred in law in setting aside the order of stay granted in favour of the petitioner. He would further submit that admittedly the petitioner was in possession of the suit land, therefore, a 'sufficient cause' was existing in his favour and the first appellate court ought not have set aside the order of stay granted in favour of the petitioner.

(5) I have heard learned counsel for the petitioner and have also perused the records of the writ petition.

(6) Admittedly, the appellate Court has discretion to grant an order of stay or to refuse the same in an appeal filed by an

aggrieved party. The only guiding factor, indicated in Order 41 Rule 5 CPC is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. The principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is: why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted. Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be "substantial loss" to the party applying for stay of execution within the meaning of Order 41 Rule 5(3)(a) CPC (Please see (2005) 1 SCC 705 – Atmaram Properties (P) Ltd. V. Federal Motors (P) Ltd.).

(7) In the present case, the decree was a decree for possession that means undisputedly the petitioner/defendant was in possession of the suit land and if he is dispossessed during the pendency of the appeal, it would certainly be a "substantial loss" to the petitioner on which passing of an order of stay under Order 41 Rule 5 of the Code of Civil Procedure was fully justified. The appellate Court, in the first instance, has rightly exercised the jurisdiction under Order 41 Rule 5 CPC and has granted stay in favour of the petitioner but it definitely erred in law by vacating such an order by the impugned order on the ground of mental and financial losses likely to occur to the respondents.

(8) In the considered opinion of this court, the said approach of the appellate Court was fully unjustified and strange to the provisions of Order 41 Rule 5 of the Code of Civil Procedure.

(9) In the result, the petition is allowed and the impugned order dated 12.05.2009 is quashed. The ex-parte stay granted in favour of the petitioner on 18.8.2008 is made absolute till final decision of the first appeal.

(10) It is made clear that this order is being passed ex-parte without notice to the respondents, therefore, if the respondents/plaintiffs feel aggrieved with this order, they shall have a right to approach this Court in appropriate forum making their all grievances.

(11) In view of the above order, I.A.No.1 for grant of ad interim relief, I.A.No.2 for urgent hearing and I.A.No.3 for hearing the case during summer vacation all stand disposed of.

(12) No costs.

Sd/-
Sunil Kumar Sinha
Judge