

**HIGH COURT OF MADHYA PRADESH PRINCIPAL**

**SEAT AT JABALPUR**

<b>WRIT PETITION NO.</b>	<b>27014/2021</b>
<b>Parties Name</b>	Trivikram Prasad VS. Yashodanandan Dwivedi and another
<b>Bench Constituted</b>	Single Bench
<b>Judgment delivered By</b>	HON'BLE SHRI JUSTICE VISHAL DHAGAT, J.
<b>Whether approved for reporting</b>	Yes
<b>Name of counsel for parties</b>	<b>For petitioner:</b> Shri Vibhudhendra Mishra, Advocate.  <b>For respondent:</b> Shri Sharad Gupta, Advocate.
<b>Law laid down</b>	Decree of injunction cannot be stayed exercising power under Order 41 Rule 5 of C.P.C. However, in appropriate cases appellate Court can suspend decree of injunction exercising its inherent power.
<b>Significant paragraph number</b>	8

**(O R D E R)**

**21/04/2022**

Petitioner has filed this writ petition under Article 226 of the Constitution of India challenging order dated 10.11.2021 contained in Annexure-P/1.

2. By impugned order dated 10.11.2021 contained in Annexure-P/1, appellate Court has stayed order of injunction.

3. Counsel appearing for petitioner submitted that order of appellate Court suffers from illegality and is without jurisdiction. It is submitted that appellate Court cannot pass order of stay over grant of injunction. Counsel appearing for petitioner relied on judgment reported in (1997) 5 ALT 776, in case of *Pothuru Venkata Rama Raju Vs. Yandra Venkata Narsayya and others*. He relied on para 9 of the said judgment which is quoted as under:-

“9. It has to be borne in mind that there is any amount of difference between a decree for recovery of money or a decree for possession on one hand and a decree for perpetual injunction on the other. In the former cases, the decrees are executable and whenever an appeal is filed, interim stay is granted with a view to maintain the status quo between the parties. Order 41 Rule 5 C.P.C. empowers an appellate Court to pass such an order in respect of such decrees. Whereas in the latter cases, the decree comes into force the moment it is pronounced by the trial judge and there is no question of stay of such a decree. It is noteworthy that in cases of decree for perpetual injunction it is the contravention if any that becomes executable and it is the act of disobedience of the decree that gives rise to cause of action for invoking Order XXI Rule 32 C.P.C. Otherwise there is no question of executing such a decree unlike in the former cases. To dilate further in all decrees for possession or demolition of structures or payment of money, when once the decree is executed it will be difficult to restore the parties to the previous position and there is every likelihood of third parties' interests

being set in and many more complications are likely to arise. To avoid such contingencies, Order 41 Rule 5 C.P.C. requires stay of execution in such executable decrees. I, therefore, find force in the contention of Sri Chandrasekar that the decree for perpetual injunction in a case of this type is not executable and question of stay of such decrees does not arise.”

In view of aforesaid, counsel appearing for petitioner made a prayer for setting aside of impugned order.

4. Counsel appearing for respondent supported the order passed by the appellate Court and submitted that appellate Court has jurisdiction under Order 41, Rule 5 of C.P.C. to grant stay. No error has been committed by appellate Court in passing the impugned order and made a prayer for dismissal of petition.

5. Heard the counsel for appellant as well as respondent.

6. Since petitioner has challenged order passed by appellate Court granting stay over decree of permanent injunction. In view of same, petitioner ought to have filed a petition under Article 227 of Constitution of India and not a petition under Article 226 of the Constitution of India. Considering the same, writ petition filed by petitioner is treated as a petition under Article 227 of the Constitution of India. Illegality pointed out in the order calls for interference of this

Court exercising its jurisdiction under Article 227 of the Constitution of India.

7. Order 41, Rule 5 of C.P.C. is reproduced as under:-

**“5. Stay by Appellate Court.-**(1)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.

[Explanation-An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.]”

8. From perusal of Order 41, Rule 5 of C.P.C., it is clear that appellate Court is provided with jurisdiction and power to stay execution of a decree. Decree/order of injunction cannot be executed. It is only when breach of injunction order is committed by a party, who had opportunity of obeying the decree and has failed to obey it, an

application can be filed under Order 21, Rule 32 of C.P.C. for his detention in civil prison or by attachment of his property or both. Power under Order 41 Rule 5 of C.P.C. is stay on execution of decree. Since decree of injunction cannot be executed and same comes into force immediately after passing of decree and in case of breach of injunction party aggrieved may file an application under Order 21, Rule 32 of C.P.C. In view of aforesaid, appellate Court had committed an error of law in passing an order of stay over decree of injunction. In appropriate cases inherent power can be exercised by appellate Court for suspending decree of injunction, but there is no power to stay injunction order.

9. In view of aforesaid, miscellaneous petition is **allowed** impugned order dated 10.11.2021 is set aside.

10. Certified copy as per rules.

**(VISHAL DHAGAT)**  
**JUDGE**

sp/-