

Rev. A. Prabhuchand and ors. Vs. Yeshurathna and ors.

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Court : Karnataka

Decided On : Dec-06-1995

Reported in : ILR1997KAR29; 1996(1)KarLJ524

Judge : Harinath Tilhari, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115(1) and 148A, Order 39, Rule 3

Appeal No. : C.R.P. No. 3699/95

Appellant : Rev. A. Prabhuchand and ors.

Respondent : Yeshurathna and ors.

Advocate for Def. : K.R. Subbakrishna and ;G.B. Manjunath, Adv.

Advocate for Pet/Ap. : M. Papanna, Adv.

Disposition : Revision petition allowed

Judgement :

ORDER

Harinath Tilhari, J.

1. This revision application under Section 115 CPC having been listed along with the application for vacation of the stay order, appearance has been put on behalf

of respondents.

2. Learned Counsel for respondents 1 to 10 states that respondent-11 Rev. Harry John has not been the plaintiff in the suit or applicant to the application for interim relief before the Trial Court. It has been pointed out that Rev. Harry John was impleaded in the suit as a formal party as 14th defendant. It has also been brought to my notice that before the Trial Court Rev. Harry John was served with notice and he had put in appearance, and in the lower appellate Court he refused service of notice. If he has been one of the defendants in the suit and defendants 1 to 13 have filed the revision petition and Rev. Harry John's power vakalatnama could not be obtained by the revision petitioners in the present revision petition. So he has been impeded only as formal party.

3. At this stage Mr. M. Papanna, Learned Counsel for the revision applicants, submitted that instead of considering the application for vacation of the stay order, let the whole matter be decided and service of notice on respondent-11 be dispensed with.

4. It appears, the contest is primarily between the revision applicants and the plaintiffs/respondents. The decision of the revision may not adversely affect respondent-11 Rev. Harry John and service of notice on him may be dispensed with so as to avoid further delay in the matter, Accordingly, service of notice on respondent No. 11 is being dispensed with.

5. I have heard Sri M. Papanna, Learned Counsel for the revision applicants and Sri K.R. Subbakrishna.

Learned Counsel for respondents 1 to 10.

6. The brief facts of the case are that plaintiffs 1 to 10 filed the suit for a decree declaring that they have legal status to continue in office as executive committee members of Wesley Cathedral Pastorate Committee for the period prescribed, from the date of approval of their election to C.S.I K.S.D.C. i.e 22.11.94 and a decree for permanent injunction restraining the defendants, their men, agents etc., from interfering with the alleged legal rights of the plaintiffs in the due discharged

of their powers and responsibility as members of the executive committee and for grant of other reliefs. Plaintiff-1 claims himself to be the Honourary Secretary and plaintiff-9 claims that he is Honourary Treasurer in the executive committee of Wesley Chathedral Pastorate Committee. The case of the plaintiffs is that they were not allowed to discharge their duties, so the need and cause for the suit did arise.

7. The plaintiffs, along with the plaint, have filed an application under Order 39 Rules 1 and 2 C.P.C. seeking grant of temporary injunction. Defendants filed an application for rejection of the plaint and the Trial Court allowed the said application and rejected the plaint holding that no cause of action has been made out. Having felt aggrieved from the judgment and order dated 21.10.1995 of the Trial Court rejecting the plaint, the plaintiffs preferred R.A. No. 237/ 95 on 28.10.1995. The defendants had filed caveat under Section 148A C.P.C. in the Court of the Civil Judge.

8. On 30.10.1995 the appeal was placed along with the application for temporary injunction under Order 39 Rules 1 and 2 CPC with a specific report note that 'Caveat No. 393/95 is enclosed.' It has also been specifically mentioned by the office of the Court that 'copies not served on the Caveator'. In spite of that, the first appellate Court, without applying its mind to Section 148A as well as to the provisions of Order 39 Rule 3 C.P.C. granted interim temporary injunction order on 30.11.1995. The defendants, having felt aggrieved by the said order, have preferred this revision petition under Section 115 CPC.

9. On behalf of the revision applicants, it has been contended that the order of temporary injunction appears to have been granted in all haste by the first appellate Court without applying its mind to the basic principles of natural justice and fair play as well as without applying its mind to the mandatory provisions of Section 148A C.P.C. and also to the proviso to Rule 3 of Order 39 C.P.C. Mr. M. Papanna, Learned Counsel for the petitioners submitted that no notice of the appeal or application for interim injunction moved in the Court below was served on the defendants, nor was any direction issued by the first appellate Court in the light of Sub-section (3) of Section 148A CPC. He invited my attention to Section

148-A(3) as well as Order 39 Rule 3 CPC and submitted that apart from failure to serve notice inspite of filing of caveat petition, for a moment Order 39 Rule 3 is read, the requisite condition is that if Court has power subject to certain conditions specified to pass exparte orders without serving notice in cases, in which caveat is not filed. The Court concerned is required to record that it is satisfied and is of the opinion that service of notice may delay the matter and on account of delay the purpose of granting injunction may be frustrated and it should also record its reasons for the opinion. Learned Counsel submitted that no reasons have been recorded in this case that the purpose of application will be frustrated if copy of application is served on the caveator. His attack to the order is twofold. Firstly, the purpose of Section 148A is that when the caveator has put in appearance, he must be given copies of the appeal and application before any order is passed and there is no question of any delay and Section 148A CPC does not provide for any exception akin to Order 39 Rule 3 CPC. He further submitted that when the law prescribes certain mode of doing certain things, then the power has to be exercised with due compliance of the same and not otherwise. As such, he submitted that the order in question suffers from jurisdictional error apart from its being the result of illegal exercise of jurisdiction. He submitted that the institution is likely to suffer if defendants are allowed to interfere with the affairs and the applicants would have placed their case against the granting of temporary injunction. He submitted that if injunction order is not obeyed, the parties may be subjected to contempt proceedings also and as such it has been necessary to approach this Court under Section 115 CPC and that the order per se is void and requires to be set aside in exercise of the revisional jurisdiction of this Court. He also submitted that the application for injunction may be pending for consideration on merits and that will be considered by the Court but this exparte interim order needs be set aside.

10. The contentions urged on behalf of revision applicants have been hotly contested by the Learned Counsel for plaintiff opposite parties 1 to 10. He submitted that an affidavit has been field here by the caveators to the effect that an attempt was made to serve a copy of the appeal and revision petition on the counsel who has been appearing in the Trail Court. He further submitted that once intimation is given to the counsel, he should have taken care and been present in

the Court. He further submitted that he had approached the respondents after having filed the appeal on 29.9.1995 and intimated them about the filing of the appeal and therefore it was their part to have run to the Court and to find-out as to what was going-on. But the respondents/present revision petitioners did not respond and in such circumstance it is not a fit case for interference. To the question put by the Court, the counsel fairly submitted that no such affidavit has been filed before the lower appellate Court stating that copy of the appeal was offered to the counsel who was appearing in the Trial Court. He also fairly conceded that no affidavit has been filed that he had intimated the date on which the appeal or the interim application was going to be taken nor any affidavit had been filed in the Court below explaining why the copies of the appeal or interim application for interim order was not served on the defendants/revision petitioners. Therefore, there was nothing before the first appellate Court to indicate that appellants served or made any attempt to serve copies of the appeal and application on the plaintiffs/respondents. No counsel had put in appearance on behalf of respondents as no notice had been issued or served. Learned Counsel for the respondents further submitted that the jurisdiction of this Court is limited and this Court should not interfere in exercise of its jurisdiction even if there is any jurisdictional error. He further brought to my notice that an application for vacation of injunction order could have been made in the first appellate Court and as alternative remedy was available, the revision is not maintainable.

11. I have applied my mind to the contentions urged on behalf of parties their counsel. The jurisdiction of this Court under Section 115 CPC, no doubt, is not that of the appellate Court though it is part and parcel of the general supervision of the higher appellate Court. But, this jurisdiction is circumscribed by the conditions prescribed under Section 115 CPC. The order impugned, no doubt, amounts to be a case decided. The power to grant *ex parte* injunction is vested under Order 39 Rule 3 CPC only in the circumstances which are specially indicated as an exceptional cases by the expression 'except where it appears that the object of granting the injunction would be defeated by the delay'. The proviso further provides that 'where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay'. If we

read the scheme of Order 39 Rules 1 and 3 CPC, the general principle emerges is that no injunction is to be granted unless notice is served on the opposite party. But the power to grant *ex parte* injunction order is covered by Rule 3 of Order 39 vide the expression which I have quoted above and which contains exception should be read along with the exception provided under Rule 3. When an *ex parte* injunction order is passed exercising the powers, the matter may be said to be covered by Rule 3 as well and the order passed under the proviso to Rule 3 is not directly made appealable under Order 43 Rule 1 CPC though the order passed after service of notice and hearing the parties may be said to be appealable under Order 43. Such a view appears to have been taken by a division bench of this Court in *T. KRISHNAPPA v. H.LINGAPPA*, : AIR1982 Kant58

Thus considered, in my opinion, the *ex parte* temporary injunction order cannot be said to be appealable under Order 43 C.P.C. Thus, the first two conditions stand satisfied for the applicant to approach this Court and those hurdles stand crossed.

12. The third question to be considered is whether the order impugned suffers from jurisdictional error because jurisdiction of this Court is confined to jurisdictional error as mentioned and described in Section 115(1)(a), (b) and (c) CPC. It is trite principle of law that as laid down in many cases, beginning from the famous case of *NAZIR AHMED v. EMPEROR*, AIR 1939 PC 253 wherein it is held that where power is given to do certain things in a certain way, the thing must be done in that way, or not at all. Otherwise, the methods of performance are necessarily forbidden. This principle has been followed with approval later on by the Supreme Court in *STATE OF UTTAR PRADESH v. SINGALA SINGH*, : [1964]4SCR485 wherein their Lordships have laid down as under: -

'If a statute has conferred a power to do an act and has laid down the method in which the power has to be exercised, it necessarily prohibits the doing of the act in any other manner than it has been prescribed. The principle behind the rule is that if they were not so, statutory provision might as well not have been enacted.'

This principle of law has also been followed in later decisions.

13. The provisions of Order 39 provides for injunction being granted under Order 39 Rule 1 read with Rule 3 CPC. The general principle is that when an application for temporary injunction is made, notice shall be issued to the defendant before passing any order. Exception is provided under the proviso to Rule 3 mentioning specific conditions wherein *ex parte* injunction can be granted i.e. how when and subject to what conditions, the power to grant *ex parte* injunction may be exercised. That is indicated in proviso to Rule 3 by the phrase used in Rule 3 itself. The material portion of Rule 3 of Order 39 is to the effect as under:-

'The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay. before granting an injunction, direct notice of the application for the same to be given to the opposite party'.

The expression underlined 'except where it appears that the object of granting the injunction would be refused by the delay' is indicative of the condition and circumstances in which the *ex parte* injunction order can be passed without notice to the other side. Otherwise, the Rule is that once application is moved for injunction, notice is a must before passing/granting temporary injunction order. So if a case comes under exceptional clause the Court has been given power to grant *ex parte* injunction. When it is proposed to grant such as *ex parte* order of injunction without notice of the application to the opposite party, the law further requires that the Court should record its reason for its opinion that the object of granting injunction would be defeated by delay and then requires the applicant to do other things required to be done, such as service of copy of the application later-on etc.,. So, the power to grant *ex parte* injunction is subject to two conditions. Firstly, the Court should be of the opinion that if the general principle in Rule 3 is to be followed, the object of granting injunction would be defeated. The second is that it must also record the reasons for its arriving at such conclusion.

14. When we read Section 148A CPC, which provides that where a party has lodged caveat as per Sub-section (1), then the Court shall serve notice of the application to the caveator. Subsection (4) requires that the applicant shall serve copy of the application and other documents, if any, in support thereof. Section 148A does not provide for any such exception as well, as is provided in Rule 3 of

Order 39 because there is no question of delay when caveator is to be served with copy of application. The requirement of Rule 148-A is that before passing any order in cases where caveat has been lodged, notice of the application shall be served on the caveator.

15. When I examined the matter in the light of the aforementioned two mandatory provisions of law, I find that in the present case irrespective of the fact that the office of the Trial Court has made a note that caveat has been lodged, which bears the number 393/95 and the copies have not been served on the caveator, I feel sorry to find that the Court below did not issue notice of the application to the caveator nor did require the opposite party to serve the notice of application on the caveator before passing the impugned order in spite of the report and the mandatory requirement of law contained in Section 148A. The impugned order has been passed behind the back of the caveator and in breach of Section 148-A(3) C.P.C. Apart from that, it is also in breach of basic principle of law under Order 39 Rule 3. The general principle directs that when application under Order 39 Rules 1 and 2 is made, the Court shall direct issue of notice to the opposite party. No doubt, as mentioned earlier, there is an exception to this general rule and the exception provides special power to the Court to grant *ex parte* temporary injunction without issuing notice to the opposite party. But that power being subject to the two conditions mentioned therein and the power being circumscribed by those two conditions, namely there should be failure of object of granting injunction by delay and the Court must record its reasons for forming such an opinion. In the present case there is nothing to indicate that the Court has formed its opinion that the purpose of granting injunction would fail by delay etc., nor there is recording of any reason for such opinion. Where injunction is granted by simply observing that there is every threat to appellants discharging their duty as duly elected members, is not something which may be said to be covered by exceptional clause. In the case of *SHIV KUMAR CHADHA v. MUNICIPAL CORPORATION OF DELHI*, ILR 1994 Kar 2299 (SC) particularly at page 2317, Their Lordships have been pleased to observe:-

'.....The proviso was introduced to provide a condition, where Court proposes to grant an injunction without giving notice of the application to the opposite party,

being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the Court 'shall record the reasons' why an *ex parte* order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of *ex parte* injunction 'cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a Statute or under the Common Law, must inform why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party who invokes the jurisdiction of the Court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the Court about the gravity of the situation and Court has to consider briefly these factors in the *ex parte* order. We are quite conscious of the fact that there are other Statutes which contain similar provisions requiring the Court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance thereof will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such *ex parte* orders have far reaching effect, as such a condition has been imposed that Court must record reasons for its opinion before passing such order. If it is held that the compliance 'of the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purpose. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. This principle was approved and accepted in well-known cases of *TAYLOR v. TAYLOR* (1875) Ch.D 426, *NAZIR AHMED v. EMPEROR* (A.I.R 1939 PC 253).

35. As such, whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to the other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including

as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed'.

16. A reading of the above case of the Supreme Court clearly reveals that Court has no jurisdiction to grant ex parte injunction order unless the conditions prescribed therein had been shown to have been complied with because of the settled principle that a power is given to do certain thing in a particular manner, then it has to be done in that manner or not Thus considered, in my opinion, in view of the provisions of Order 39 Rule 3 as well as Section 148A C.P.C. which also makes a mandatory duty of the Court to issue notice of the application before passing the ex parte interim order, the Court had no jurisdiction to grant injunction without there has been compliance of the requirement of proviso.

17. Learned Counsel for the applicant submitted before me a substantial injury or injustice that is being caused by the order impugned. I think it proper not to express any opinion on this but I think it is a fit case in which it can be said that the case will come within Clause (b) of exceptions to proviso to Section 115 C.P.C. If the functioning institution is being allowed to be interfered with under the guise of ex parte order, irreparable injury would be caused.

18. In the result, I allow this revision petition and set aside the order of ex parte injunction granted by the Court below. I keep it open to the Court below to consider the matter afresh after the appellants are provided with copies of injunction application along with all documents on which the applicants are relying to rely upon and the revision applicants being given an opportunity of filing counter affidavit etc.,. After hearing the parties, it is always open to the Court below to grant or reject the application for temporary injunction.,

19. Revision Petition is allowed with costs to be realised from respondents 1 to 10.