

Roomi Prasad Vs. liird Additional District Judge, Etah and Others

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Court : Allahabad

Decided On : Apr-27-1998

Reported in : 1998(4)AWC445

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 39, Rules 1, 2 , 3 and 4 - Order XLIII, Rule 1; [Constitution of India](#) - Article 227

Appeal No. : C.M.W.P. No. 2989 of 1990

Appellant : Roomi Prasad

Respondent : liird Additional District Judge, Etah and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : H.N. Sharma, Adv.

Judgement :

D.K. Seth, J.

1. In a suit for injunction on the basis of an application for temporary Injunction by an order dated 12.4.1990 passed in Original Suit No, 192 of 1990 by the learned Munsif, Kasganj district Etah, ad interim injunction was granted against the defendant while directing issue of notice. An appeal was preferred against the said

order being Misc. Appeal No. 41 of 1990. Thereafter by order dated 23.5.1990 passed by the learned Munsif the order dated 12.4.1990 was extended. By an order dated 22.10.1990 passed by Illrd Additional District Judge, Etah, the appeal was allowed and the order passed by the learned Munsif granting ad interim order was set aside while directing the record to be sent back for disposing of the case in accordance with law.

2. Sri Sharad Sharma, learned counsel, holding brief of Sri H. N. Sharma, learned counsel for the petitioner contends that since the appellate court had decided the application for injunction, at the ad interim stage, it was no more open to agitate the application any more before the learned trial court. At the same time the appellate court while allowing the appeal had relied on the affidavit filed on behalf of defendant appellant without giving opportunity to the plaintiff-petitioner to rebut the said affidavit, and, therefore, the finding is perverse. He further contends that since before the appeal was decided, the defendant had entered into appearance and had been contesting the application for injunction. Therefore, the mischief of Order XXXIX, Rule 3 of the Code of Civil Procedure can no more be attracted and the remedy of the defendant was that of Order XXXIX. Rule 4 of the Code. The appellate court had acted in excess of its jurisdiction in entertaining the appeal in such circumstances, when it was incumbent on the defendant to resort to application under Order XXXIX. Rule 4 of the Code since he has been contesting the injunction matter after putting his appearance. For all these reasons,, this order should be set aside.

3. Before opening his case. Sri Sharma prayed for leave to convert this petition into one under Article 227 of the Constitution in view of the decision in the case of Ganga Saran v. Civil Judge, Hapur. AIR 1991 All 114, by reason whereof the writ petition is not maintainable. As prayed, leave is granted. Sri Sharma can amend the cause title in course of today.

4. I have heard Sri Sharad Sharma, learned counsel at length. A perusal of the order dated 12.4.1990 shows that notices were directed to be issued to the defendant fixing 26.4.1990 for objection and disposal of the application for injunction, while restraining the defendants from interfering with the possession of

the plaintiff in respect of the disputed property till the date fixed. At the same time, he had also allowed commission to be issued and this order was extended by order dated 23.5.19.90, where it was recorded that the 'case was called. Parties counsels are present. The Court is vacant. Fixed 9.7.1990 for disposal of 6-C/2. The order dated 12.4.1990 is extended, meanwhile'. In the order dated 22.10.1990 passed in appeal, it does not appear that the appeal was filed out of time. This question does not appear to have been raised by the plaintiff nor dealt with by the learned District Judge. This pre-supposes that the appeal must have been filed within time. Therefore, it might have been filed before the order dated 23.5.1990. But that question was neither raised nor pointed out even in the writ petition. Therefore, in absence of any effective material to contradict the fact that the appeal was filed after the order dated 23.5.1990 was passed, it is not possible for this Court to arrive at such conclusion. Since such point has not been pleaded in the writ petition itself, therefore, it is presumed that the appeal was filed before the order dated 23.5.1990 was passed.

5. Admittedly, order dated 12.4.1990 was passed before issuance of notice and without recording any reasons as to why ad interim injunction was granted before issuing notices. Rule 3, Order XXXIX of the Code prescribes that before granting injunction, the Court should direct issue of notice to the opposite party. But however, in case where the delay would defeat the object of granting injunction after recording reasons of forming such an opinion, the Court may grant injunction without giving notice to the opposite party.

6. Proviso to Rule 3. Order XXXIX of the Code was inserted through 1976 Amendment of the Code of Civil Procedure by reason of legislative anxiety to confirm the principle of natural justice as was observed by Vivian Bose. J., in the case of Sangram Singh v. Election Tribunal AIR 1955 SC 425. that 'there must be ever present in the mind of Court that our law of procedure are grounded on principles of natural justice, which requires that a man should not be condemned unheard, that decision should not be reached behind their back. The proceeding that affect their life and properly should not continue in their absence and they should not be precluded from participating in them'. The proviso so added thus require recording of reasons for its opinion while granting ex parte injunction that

the object of granting injunction would be defeated by delay. The scheme of the said proviso indicates that recording of such reasons while granting ex parte ad Interim injunction is mandatory, no form relating to such recording of reason, has been mentioned. But there must be some reasons to indicate application of mind by the Court. Non-mentioning of reasons in the order makes it Invalid. Such a view is supported by the decision in the case of Om Prakash v. Vijai Krishna, AIR 1981 Col 351. The same view has been taken in the case of State Authority v. State of Orissa. AIR 1982 Ori 245 and Dalip Kumar v. Pamendru, AIR 1987 Col 172. In the case of Tata Sals Agencies v. Om Prakash Jaluta, 1986 (2) CLJ 219, though such need for recording reasons have been held to be mandatory, but there was no such mandatory form or any such expression for expression opinion is prescribed. Ordinarily, injunction should be upon notice and finding about the existence of prima facie case having regard to balance of convenience that might be arrived at after hearing the contesting parties. But where delay might defeat the object, in such case injunction can be granted under the Proviso only after fulfilling its requirement namely by recording reasons as was held in the case of Shiv Kumar Chatha v. Municipal Corporation. Delhi, 1993 (3) SCC 161.

7. According to the ratio in the case of Roadline Carrier v. G.E.C. of India, AIR 1990 All 134, the failure of the Court in recording reasons for grant of ex parte injunction renders the order invalid and the order cannot be sustained. The Apex Court in the case of Margan Stanley v. Tarpik Das. 1994 (2) CLJ 706 (SC), has held that whenever the Court considers it necessary in the facts and circumstances of a particular case, may pass order of injunction without notice to other side, it must record reasons for doing so and should take into consideration while passing the order of injunction all the relevant factors including as to how an object of granting injunction itself shall be defeated if ex parte injunction order is not passed.

8. In the present case, no such reasons having been recorded, it was rightly found by the appellate court that there has been infraction of Rule 3. Order XXXIX of the Code while passing the order dated 12.4.1990.

9. But that was not the sole ground on which the order dated 12.4.1990 was set aside by the appellate court. The appellate court had also found that from the affidavit in the appeal, he found prima facie case to the extent that the plaintiff had claimed right through the Will, by virtue whereof the plaintiff had got his name mutated in respect of the property. Now it was found that there are two Wills and copy whereof have been furnished alongwith the affidavit. On scrutiny of the said two Wills, the lower appellate court had come to a finding that marginal witness of the said two Wills were different. It has also come to a finding, on the basis of affidavit that the first application for mutation on the basis of first Will was refused. Thereafter mutation was applied by the plaintiff on the basis of second Will, which was allowed. But on the application of defendant that order of mutation was kept in abeyance. Against the said order appeal was preferred which was not decided till then, but the learned Munsif passed an order on the basis of khatauni wherein the name of the plaintiff was mutated. The appellate court found that such mutation was kept in abeyance and the appeal thereout was pending and even on the basis of such khatauni, the interim order could not have been passed.

10. Now Sri Sharma, learned counsel, contends that this finding was arrived at without giving any opportunity to the plaintiff to counter the affidavit. Learned lower appellate court has recorded a finding that the plaintiff did not deny that the defendant were the heirs of the deceased from whom the plaintiffs claim to have derived title through the alleged Will. In such a circumstances, the appellate court had come to a finding that prima facie case was not made out for grant of such injunction, without notice. In the writ petition itself it has not been alleged by the petitioner that the appellate order was passed ex parte or that the petitioner was not given any notice of appeal or that it did not have any opportunity to appear and contest the appeal. However, the plaintiff had chosen not to file any affidavit. It cannot be said that the learned appellate court had proceeded without giving any opportunity to rebut the said affidavit filed by the appellant. Though in para 7 it has been contended that the Court had violated all norms of equity and fair play by falling to provide opportunity to the plaintiff to rebut the facts as stated in the affidavit and treating the contents of the said affidavit as a gospel truth. But nowhere in the writ petition, it has been asserted that as to when he did receive the notice and when he appeared in the appeal and when hearing had taken place

and how opportunity was denied to him. In absence of such material, it is not possible to come to a definite finding that such opportunity was denied to the plaintiff respondent. But then the appellate authority has set aside the interim order and directed the records to go back to the trial court for disposal of the case in accordance with law. Therefore, it was still open to the plaintiff to rebut the said facts through appropriate affidavit before the trial court as the occasion may for could have arisen. Admittedly, no Interim order was granted in this writ petition. Therefore, it was always open to plaintiff-petitioner to rebut the alleged facts in the trial court and ask for injunction on the basis of application for injunction. If he has not done so it is he who alone could be blamed.

11. Sri Sharma further contends that sending back of the record with a direction to decide the case in accordance with law, means decision in the suit itself. I am unable to agree with the said contention of Sri Sharma. Normally expression case is not used to connote the suit particularly when the Court in exercise of appellate jurisdiction was confined only to grant ad interim injunction without notice. Therefore, it would refer to the case to which jurisdiction of the appellate court was confined and not beyond. The suit was not before the appellate court. In the Code of Civil Procedure, no where suit has been referred to as a case. In the scheme of the Code of Civil Procedure suit has been always referred to as the suit. On the other hand interlocutory matter has been referred to as the case as we find in Section 115 where expression has been used as the 'case.....decided.....in the course of a suit or other proceeding.' Thus, the expression 'case' relates to part of the proceeding of the suit and not the suit itself. Therefore, the expression case could not refer to the suit. It referred to the proceeding in the suit, viz., the application for injunction itself. Therefore, I am unable to agree with the contention of Sri Sharma with regard thereto.

12. It has further been contended by Sri Sharma that in view of order dated 23.5.1990 application under Order XXXIX. Rule 4 of the Code is attracted and therefore, scope of Rule 3 was eclipsed. So far as the contravention of Rule 3 is concerned, the same cannot be eclipsed by reason of appearance of the defendant. It is always open to the defendant to contend after appearing in the suit that Rule 3 has been infringed. After the person against whom ex parte Injunction

is granted it is open to him to apply for vacating the interim order under Rule 4 even on the ground that Rule 3 was infringed.

13. It is also open to such defendant to prefer an appeal against such an interim order where Rule 3 has been infringed and in such appeal infraction of Rule 3 will remain open to be contended. The existence of Rule 4 does not mutually exclude operation of Order XLIII under which appeal is permitted against the order passed under Order XXXIX, Rules 1 and 2 of the Code. Neither in Order XLIII nor under Rule 4 there is any provision which mutually exclude operation of each other when one is resorted to. Against the order of injunction when procedure provides two remedies, one under Rule 4. Order XXXIX and the other under Order XLIII and in that event, it is the discretion of the person against whom injunction is granted to opt for the either. It is also not provided in the provision that once one of the provision is opted, the other is excluded or that both options cannot be opted together. It is always open to such persons to proceed simultaneously when one or the other opts for the both and success and defeat in one or the other may have the impact on the result of other, which is decided later. Such a matter is to be taken into account by the Court dealing with such cases and weigh the impact of the situation in a given case depending on the facts and circumstances of the case and the question raised therein.

In the present case, admittedly the defendant did not resort to Rule 4 though it appeared in the suit. As observed earlier, it appears that the appeal was preferred even before the order dated 23.5.1990. Therefore, it is not necessary to go into the question of impact of order dated 23.5.1990. But then the extension of the interim order on the other hand supports the utility of continuation of appeal since the interim order had not come to an end, as originally granted on the date fixed.

14. When the ex parte order of injunction is granted without notice both the remedies under Rule 4 and Order XLI1I are open to such aggrieved party, who may even concurrently proceeded with both the remedies. Such a view was taken by Calcutta High Court in *Re Santosh Kumar Ghosh v. State*. AIR 1983 Col 250, and ad interim injunction passed prior to issue of notice to the defendant is appealable is a view taken in the case of *Sarju Prasad v. Ganga Prasad*, AIR 1951

Cal 446, as well as in the case of Bebts and Company v. Ram Pyari, AIR 1951 All 8 and L. D. Meston School Society v. Kashi Nath Mitra. AIR 1951 All 558. In the case of Zila Parishad v. B. R. Sharma. AIR 1970 All 376, this Court had held that a party aggrieved by the order of ex parte interim injunction, has two remedies. He may seek vacation or variation of the order under Rule 4 or he may file appeal under Order XLIII.

Therefore, I am unable to agree with the contention of Sri Sharma that appeal in the present case was not maintainable and the remedy of the defendant lay under Rule 4 alone. In the present case the defendant did not resort to both the remedies but adopted one namely the appeal, as observed earlier. Therefore, Sri Sharma cannot espouse the said point.

15. For all these reasons. I am not inclined to interfere with the order impugned in the present case.

Before parting with the case Sri Sharma has submitted that it is not known to him whether the suit has been disposed of in the meantime or not. He, therefore, prayed that the suit may be directed to be decided expeditiously. If the suit has not been decided in the meantime. The suit is directed to be decided as early as possible preferably within a period of one year. However, I may record that all the findings recorded by the Court of appeal as well as this order shall be tentative for the purposes of grant of ad interim injunction only and shall not have any impact on the decision of suit on merit.

The writ petition, therefore, fails and is dismissed. There will be no order as to costs.

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