

Ram Ashis and Another Vs. District Judge, Deoria and Others

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Court : Allahabad

Decided On : Aug-17-1999

Reported in : 1999(4)AWC3024

Judge : D.K. Seth, J.

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

Appeal No. : C.M.W.P. No. 34472 of 1999

Appellant : Ram Ashis and Another

Respondent : District Judge, Deoria and Others

Advocate for Def. : S.C. and ;Indra Sen Singh, Adv.

Advocate for Pet/Ap. : R.S. Kushwaha, Adv.

Judgement :

D.K. Seth, J.

1. Leave is granted to convert the petition into one under Article 227 of the [Constitution of India](#).

2. The order dated 24th July, 1999 passed by the learned District Judge. Deoria in Civil Appeal No. MI of 1999 affirming the order dated 21st July. 1999 passed by

the learned Civil Judge. (Senior Division), Deoria in Original Suit No. 33 of 1997 has since been challenged in this writ petition under Article 227 of the [Constitution of India](#). Initially on 6th February, 1997 notices were Issued in connection with the application for temporary injunction filed by the plaintiff. On 17th February, 1997 in presence of the defendants No. 2, 3, and 4, ad interim injunction was granted. Subsequently defendant Nos. 1, 2 and 5 had filed an application under Order XXXIX, Rule 4 of the Code of Civil Procedure. The same was allowed by order dated 21st July, 1999 by the Civil Judge (Senior Division). Deoria. The interim order dated 17th February, 1997 was vacated as against the defendant Nos. 1, 2 and 5 and thereafter on the basis of the finding, in the interest of justice, the parties were directed to maintain status quo. This order was affirmed by the learned District Judge. Deoria.

3. While challenging the same. Mr. R. S. Kushwaha, learned counsel for the petitioners contends that since the defendant No. 2 was present when the order of ad interim injunction was passed, therefore, the same could not be varied or vacated under Order XXXIX. Rule 4 in view of Second Proviso to the said Rule. He contends that since defendant No. 2 was present unless he is able to show that there has been a change in circumstance, there is no scope for vacating the interim order. He further contends that unless the Court records a finding of its satisfaction that the order passed was causing undue hardship to the party, there was no scope for vacating the interim order against the defendant No. 2. On these grounds, he contends that the order impugned should be set aside.

4. Learned counsel for the opposite parties Mr. Indra Sen Singh on the other hand contends that though the defendant No. 2 was present but in fact, he was not given an opportunity of being heard. Mere presence would not suffice the test of opportunity of being heard. Then again he contends that on the basis of the merits of the case, the Court had passed the order, which is justified in the facts and circumstances of the case. No prejudice is suffered by the plaintiff because the Court had passed the order of status quo as between the parties. Therefore, there is no merit in this writ petition, which is liable to be dismissed.

5. I have heard both the learned counsel at length.

6. Order XXXIX, Rule 4 of the Code provides for an opportunity to the defendant to apply for discharge or variance or setting aside of an order, if he is dissatisfied with such order. Sub-rule (4) contains two Provisos. The First Proviso provides that if any false statement is made by the applicant for obtaining an interim order, in that event the Interim order shall be vacated, unless for reasons to be recorded, the Court considers that it is not necessary so to do in the interest of Justice. The Second Proviso provides that where an order of Injunction has been passed after giving an opportunity of being heard, such order of injunction shall not be varied or set aside or discharged unless there has been change in circumstance or unless the Court is satisfied that the order has caused undue hardship to that party.

7. In the present case, the application was moved on 6th February, 1997, when notices were directed to be issued fixing 17th February, 1997. On 17th February, 1997, defendant Nos. 2, 3, and 4 were present. It is recorded that on the said date, no objection was filed on behalf of the said defendants. Therefore, the order of injunction was issued. In fact, the order that was issued, was an ad interim Injunction against the defendant Nos. 1 to 5. It cannot be said that the defendants were given an opportunity of being heard.

8. At the same time, there cannot be any opportunity of hearing being given, even if defendant Nos. 2, 3 and 4 were present on 17th February, 1997. That also would not amount to an opportunity of being heard given to the said defendants. Non-filing of objection, does not ipso facto mean that they would not be filing any objection. In any event even if they were present but there is nothing on record to show that the defendant No. 2 or the defendant Nos. 3 and 4 were represented by their counsel and that they were heard. Non-filing of objection and opportunity of being heard cannot go equated. Even if any objection is not filed, still then a person has a right to be heard. Unless any person appears, he is not supposed to be heard in absence of engagement of a counsel. There is nothing to show that defendant Nos. 2 and 4 had appeared in person, nor there is anything to show that they were represented by their counsel. Nothing has been shown on the record that the defendant Nos. 2, 3 and 4 were heard. Mere presence would not satisfy the test of opportunity of being heard. Then again, ad interim Injunction that was passed, was interim in nature. It was not a temporary injunction passed after

hearing the parties. Therefore, the Second Proviso to Rule 4 of the Code cannot be attracted in the present case.

9. Then again in the present case after the above order, the Court had varied, in the interest of justice to the extent of maintaining a status quo by all the parties. Thus, the Court was satisfied to vary the order in the interest of Justice in the facts and circumstances of the case. After going through the respective claims, it appears that on merit there was justification in maintaining the order of status quo. Inasmuch as it was found that the parties were coparceners and/or were co-sharers and the question of partition was to be determined between them. Therefore, there was sufficient justification for the Court to order for status quo between the parties.

10. In the circumstances, I do not find any infirmity in the impugned order in question.

11. The petition accordingly fails and is dismissed accordingly. No. cost.