

Vincent and ors. Vs. Aisumma

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Court : Kerala

Decided On : Feb-10-1988

Reported in : AIR1989Ker81

Judge : K.T. Thomas, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 39, Rules 1 and 2 - Order 43, Rule 1

Appeal No. : C.R.P. No. 1842 of 1987-B

Appellant : Vincent and ors.

Respondent : Aisumma

Advocate for Def. : P.K. Balasubramonian, Adv.

Advocate for Pet/Ap. : K.N. Narayana Pillai, Adv.

Judgement :

ORDER

K.T. Thomas, J.

1. This revision is by the defendants whose application for an order of mandatory injunction was dismissed by the trial Court. Learned counsel for the respondent -- plaintiff raised a preliminary objection that the application for revision cannot be

entertained in view of the hurdle contained in Section 115(2) of the Civil P.C. for short 'the Code'), since an appeal lies against the impugned order.

2. Facts are the following : In a suit filed by the plaintiff for perpetual injunction restraining the defendants from entering upon the plains schedule property, an application for a temporary injunction was also filed. The temporary injunction was to restrain the defendants from trespassing upon the plaint schedule property or from cutting open a pathway through the said property. The trial Court granted an ex parte interim injunction order. When the defendants entered appearance and tiled objections, the Court vacated the ex parte order and dismissed the application for temporary injunction. Neither the appellate Court nor the revisional Court disturbed the order dismissing the application for injunction. Defendants' case that they were using a portion of the plaint schedule property as a pathway appeared to the Court to be prima facie true. But defendants complained that the plaintiff taking advantage of the ex parte interim order had put up a fence in such a way as to block the pathway claimed by them. An application for directing the plaintiff to remove the fence so put up was filed in the trial Court. The application was dismissed by the lower Court. Hence this Civil Revision Petition at the instance of the defendants.

3. Learned counsel who raised the preliminary objection contended that the impugned order falls within the scope of Order 39, Rule 1 of the Code, although the defendants had quoted only Section 151 in their application. It is not disputed that if the order has been passed under Order 39, Rule 1 of the Code, the remedy of the defendants is to file an appeal since an appeal is provided in Order 43, Rule 1(r) of the Code against such an order. I shall now proceed to examine the question whether the order under attack had been passed under Order 39, Rule 1 of the Code.

4. An order dismissing the application for temporary injunction filed by a plaintiff could only be passed under Order 39, Rule 1 or Rule 2 of the Code. There is no dispute on that aspect. That orders of mandatory injunction are envisaged in Order 39 is no more in doubt now since the weight of authorities is in favour of the view that such injunctions are also contemplated in Order 39 of the Code. Earlier, there

was some doubt on that point. Beaman, J. expressed that doubt first as early as in *Rasul v. Pirbhai*, AIR 1914 Bom 42. It was doubtful for his Lordship whether the Court has power at all to issue mandatory injunction on an interlocutory application. Shah, J. who was also on the Bench, however, did not share the doubt expressed by Beaman, J. and the learned Judge left the question to be decided in other appropriate cases. During the same period another Division Bench of the Bombay High Court in *Champsey Bhimji & Co. v. Jamna Flour Mills*, AIR 1914 Bom 195, had adopted the opposite view and held that mandatory injunctions can be granted on interlocutory applications filed under Order 39 of the Code. The said view has been consistently followed in later decisions by other High Courts. (Vide *Kandaswami v. Subramania*, AIR 1918 Mad 588, *R. K. Biswas v. Union of India*, AIR 1966 Pat 263, *Maria v. Alvaro*, AIR 1978 Goa 46 and *Patram v. Rameshwardayal*, AIR 1979 NOC (Madh Pra) 182. But in none of those cases had the question been considered whether a mandatory injunction could be granted on an application filed by a defendant under Order 39 of the Code. Learned counsel for the petitioners referred me to the decision in *Varghese v. Joseph Thomas*, AIR 1957 Trav Co 286. The Travancore-Cochin High Court had in that decision, confirmed the reasoning adopted by the trial Court that 'if inherent powers of the Court can be exercised in exceptional circumstances on behalf of the plaintiff there is no reason not to extend the same jurisdiction in similar circumstances on behalf of the defendant'. It is contended on -the strength of the said decision that any order of injunction passed on the defendant's application could only be granted under the inherent powers of the Court and not in exercise of powers under Order 39 of the Code. The contention calls for examination of the relevant provisions more closely.

Order 39, Rule 1 is quoted below :

'Cases in which temporary injunction may be granted.-

Where in any suit it is proved by affidavit or otherwise -

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defrauding his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property (or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further order)

((c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit)').

R. 2 envisages only application filed by the plaintiffs against the defendants. But Rule 1 contains indications that an order of injunction can be passed either against the defendant or against the plaintiff. Out of the three Clauses in the Rule, the last two refer to orders of injunction passed against defendants, whereas the first Clause (a) does not confine to applications filed by the plaintiffs alone. The words 'by any party to the suit' in the said Clause are sufficient enough to indicate that the legislature intended such orders to be passed even on applications filed by defendants. Support for the above reasoning can be drawn from some of the expressions employed in Rules 2A, 3, 3A and 4 of Order 39 of the Code. Rule 2A deals with consequences of disobedience of the injunction. 'The person guilty of such disobedience' is liable to such consequences. It is not necessary that such person should be a defendant. It could as well be a plaintiff. Rule 3 says that before granting an injunction, the Court shall direct notice of the application to be given to 'the opposite party'. Same expression ('the opposite party') is used in Rule 3A also. If an order of injunction has to be discharged or varied or set aside by the Court, Rule 4 enjoins filing of an application for that purpose 'by any party dissatisfied with such order'. If the injunction order envisaged in Order 39 could be passed only against defendants, there is no need to use expressions such as those referred to above in the aforesaid Rules. Such expressions have been used to contain the eventuality in which even a defendant may have to seek for injunctions against plaintiffs. That apart, there is no prohibition in the Rules under Order 39 against a defendant making an application for injunction. Rules in Order 39 and Order 40 are intended to protect the subject matter of the suit and to

safeguard the rights of parties during the pendency of the litigation. The principle behind enacting the Rules in Order 39 is to stop the mischief complained of and to keep the things in status quo during pendency of the litigation, if that course is necessary in the interest of justice in each case. It cannot be forgotten that the result of the suit is binding on the plaintiff and defendant equally. Defendant cannot be exposed to the mischief committed by plaintiffs merely because the party who approached the Court first is the plaintiff in a suit. These are probably the reasons for not incorporating any prohibition in the Rules under Order 39 against a defendant making an application for injunction against the plaintiffs. Hence there is nothing wrong in assuming that Order 39, Rule 1 affords scope for passing orders of injunction, prohibitory or mandatory, on applications filed by defendants also.

Therefore, I uphold the preliminary objection accepting the view that the impugned order falls within the ambit of Order 39, Rule 1 of the Code. Any such order is appealable as per Order 43, Rule 1(r) and hence no application for revision is entertainable. It is open to the petitioners to file an appeal and move for condonation of delay on the ground of pendency of this revision petition.

The Civil Revision Petition is disposed of in the above terms.

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