

Laxmi Devi Vs. Dula Ram

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Court : Rajasthan

Decided On : Dec-16-1991

Reported in : AIR1992Raj165; 1991(2)WLC656

Judge : N.K. Jain, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 39, Rule 4

Appeal No. : Civil Revn. No. 422 of 1991

Appellant : Laxmi Devi

Respondent : Dula Ram

Advocate for Def. : B.L. Purohit, Adv.

Advocate for Pet/Ap. : A.L. Chapra, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

N.K. Jain, J.

1. This is a defendant's revision against the order of learned Civil Judge, Parbatsar dt. 9-5-91 whereby he has affirmed the order dt. 20-10-87 passed by the learned Munsif and Judl. Magistrate, Makrana in the matter of Order 39, Rule 4 read with

Section 151, CPC.

2. In brief the facts are that the plaintiff-non-petitioner filed a suit for declaration and permanent injunction on 9-2-87 in the court of Munsif and Judicial Magistrate, Makrana with the allegation that quarry No. 142/3 belongs to his father late Arjun Rao, who took it from Government on lease. The petitioner was minor at the time of death of his father and his elder brother was managing the quarry who got the quarry mutated in his name, now deceased. On 1-2-74 he transferred the quarry in the name of his wife. The petitioner requested for partition of his half share, but criminal proceedings under Section 107, Cr.P.C. were initiated. An application for temporary injunction was also, filed and in alternative it was prayed that in case no injunction is issued receiver may be appointed for at least half share notice was issued on 19-2-87, one Dilip Singh, advocate appeared on behalf of the petitioner and he sought time to file written statement and the reply. But on 9-7-87, the advocate of the defendant-petitioner pleaded no instructions on behalf of the defendant. On 15-7-87, the learned trial Court ordered that till the disposal of the suit the defendants are restrained from interfering in the excavation work of the plaintiff. On 23-7-87, the defendant-petitioner moved an application under Order 39, Rule 4 read with Section 151, C.P.C. along with some documents alleging that Laxmi Devi was seriously ill on 9-7-87 and an opportunity may be given to them as they could not attend the court and the order be set aside. It was submitted that the lease was renewed in the name of one Birdha Ram upto the year 1969 but on 13-7-79 this quarry was declared as Khalsa and from the year 1972-73, it remained unoccupied. It was also alleged that quarry No. 142/3 belongs to defendant. On 1-2-74 a lease was granted in her favour by the mining department. It was also alleged that the plaintiff is not at all in possession of the quarry and he is not entitled to excavate half of it. It was prayed that in case work of excavation to the third party is allowed to carry out the defendant will suffer great loss. The learned Judicial Magistrate after hearing both the parties rejected the application on 20-10-87. An appeal was preferred but the same was also dismissed on 9-5-91. Hence this revision.

3. I have heard learned counsel for the parties, and perused the case law as well as the impugned orders.

4. Mr. A. L. Chopra, learned counsel for the petitioner has submitted that the learned lower courts have erred in saying that the scope of Order 2, Rule 39, Rule 4 is limited. It has been submitted that the learned courts below have erred in not considering the merits of the case in the light (of) the documents. Mr. Chopra has also submitted that the order of injunction is not maintainable because great hardship would be caused to the defendant. He has placed reliance on *Purna Chandra Das v. Smt. Bishnu Priya Mohapatra*, AIR 1985 NOC 59, *Bajrang Rai V. Ismail Mian*, AIR 1978 Patna 339 (FB), *Chhaganlal v. Nanhe Shah*, 1982 Raj LW 519 : (AIR 1983 Raj 6) and *Abdul Shakoor Sahib v. Umachander*, AIR 1976 Mad 350.

5. Mr. B. L. Purohit, learned counsellor the plaintiff non-petitioner has submitted that there was no change of circumstances and the order was passed after giving several opportunities to the petitioner and the points which were neither raised nor argued before the learned trial court cannot be raised before this court and the impugned order calls for no interference. He has placed reliance on *Naba Kishore Das v. Umakanta Mohapatra*, AIR 1985 Orissa 222.

6. In *Purna Chandra Das v. Smt. Bishnu Priya Mahapatra*, AIR 1985 NOC 59(Orissa) ad interim order of injunction was made absolute on the failure of the defendant to appear on date fixed for showing cause, application for recalling was filed. It has been held that application was maintainable,

7. In *Bajrang Rai v. Ismail Mian* AIR 1978 Patna 339 (FB) the question for consideration was as to whether an application under Section 151, CPC an order for restoration of an application under Order 9, Rule 9 or Order 9, Rule 13 or appeal under Order 41, Rule 19, CPC can be passed and held that exercise of inherent jurisdiction cannot therefore be limited to cases where there is abuse of the process of the court.

8. In *Abdul Shakoor Sahib v. Umachander*, AIR 1976 Mad 350 the question was where an ex parte interim injunction is granted by court, then appeal is the only remedy or an application under Order 39, Rule 4 will lie. It was held in this case that 'no appeal will lie against an ex parte ad interim injunction, but the specific remedy available in Order 39, Rule 4, CPC has to be availed of by the party who is

affected by the injunction, so that a final reasoned order could be obtained in the trial Court itself against which the Code has provided an obvious appeal under Order 43, Rule 1(r), C.P.C.

9. In *Chhaganlal v. Nanhe Shah* 1982 Raj LW 519 (AIR 1983 Raj 6) while considering the scope of Section 115, CPC it has been held that 'it can no doubt be said that under all the three Clauses (a), (b), and (c) of Section 115, C.P.C. there must be jurisdictional error committed by the courts below and then only a case for interference in revision can be made out. But at the same time, if in recording finding on prima facie case, the courts below have not taken into consideration each and every material brought before it, namely, affidavits and documents, having material hearing on such a finding, then as held by this Court in *Smt. Vimla Devi v. Jang Bahadur*, 1977 Raj LW 326 : (AIR 1977 Raj 196) the courts below can be said to have committed jurisdictional error and can be said to have exercised.

10. A bare perusal of Order 39, Rule 4 shows that if injunction order is passed without giving notice to the opposite party, the same can be discharged, varied, modified or set aside on the application if the court is satisfied that there is change in the circumstances and the order has caused undue hardship.

11. It is to be seen whether in this case the order can be termed as an ex parte or there is an abuse of the process of the court. In the present case notice was issued to the defendant and after service, the defendant's counsel appeared and sought adjournments on 27-2-87, 3-4-87 24-4-87, 15-5-87 and 28-5-87 for filing written statement and reply but no reply was filed till 2-7-87, ultimately on 9-7-87 the defendant's counsel pleaded no instructions. In view of this court had no option but to pass appropriate order on 15-7-87 on the basis of material on record. As such the impugned order cannot be termed as an ex parte order and the submission of the learned counsel for the petitioner that the fact of illness pleaded by the appellant in her application for recalling the order was not denied has no substance. The case of *Purna Chandra Dash v. Smt. Bishnu Privy a Mahapatra* (AIR 1985 NOC 59) (Orissa) (supra) is not applicable as in that case facts are not given in detail as to whether notice of the application was given or not the other

side is not clear and the court has considered the sufficient cause for absence. In such circumstances, it was held that application under Section 151, CPC for recalling the order is maintainable.

12. The contention as regards non-consideration of affidavits and documents which were filed with the application is concerned, admittedly it was not before the learned trial court at the time of hearing and passing of alleged order dt. 15-7-91. Thus, it cannot be said that the court has not considered the material on record and was misled by the opposite parties. A bare perusal of the application will show that there is no claim that there is any change in the circumstances and the question of hardship does not arise, as nothing has been pleaded in the application as in what manner undue hardship arose. As stated above there is no change in the circumstances. In *Maha Kishore Das v. Umakanta Mohapatra*, AIR 1985 Orissa 222 also same view has been taken. In view of this, the case law cited by the learned counsel for the petitioner is not applicable to the facts of present case as in this case injunction order was not passed without notice to the other party. As discussed above, neither the impugned order can be termed as an ex parte order nor there is an abuse of the process of the court, hence the application filed by the petitioner does not come within the purview of Order 39, Rule 4. Under these circumstances, I do not find that the courts below in the exercise of their jurisdiction have acted illegally or with material irregularity.

13. In the result, this revision petition has no force, so it is hereby dismissed.