In Re: Sankar Kumar Ghosh

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Court : Kolkata

Decided On : Feb-24-1983

Reported in : AIR1983Cal250,87CWN400

Judge : Amitabha Dutta, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 39, Rules 1, 2, 2A, 4, 10 and 14 - Order 43, Rule 1

Appellant : In Re: Sankar Kumar Ghosh

Advocate for Def. : Ajit Roy Mukherji, ;Shyamal Sen and ;S.N. Dutta, Advs.

Advocate for Pet/Ap. : Kashi Kanta Maitra, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

Amitabha Dutta, J.

1. This revisional application tinder Section 115 of the Code of Civil Procedure is directed against an order dated 4-1-83 passed by the learned District Judge, Hooghly in Misc. Appeal No. 4 of 1983 staying the operation of an ex parte order of ad interim injunction dated 22-12-82 made by the learned Munsif-in-charge 1st Court, Hooghly in Title Suit No. 256 & of 1982.

2. It appears that on 23-12-82 thepetitioner along with opposite party NO.2 filed Title Suit No. 256 of 1982 in theFirst Court of Munsif, Hooghly againstthe defendant-opposite party No. 1, Dun-lop India Limited challenging the orderof suspension and the charge-sheet issued against the petitioner by the defendants' letters Nos. CS/2/82 and CS/1/82dated 26-11-82 respectively. The plaintiffalso filed a petition under Order 39, Rule 1and 2 read with Section 151 of the Code for anorder of temporary injunction againstthe defendant restraining it from givingeffect to the said charge-sheet and alsofrom taking any further penal actionagainst the plaintiff till the disposal ofthe suit and an order of ad interim injunction to that effect on the groundsstated in the petition. On the same datethe learned Munsif passed order issuingnotice on the defendant to show causewithin 10 days from the service thereofwhy the plaintiff's petition for temporaryinjunction should not be allowed andgranting an ad interim injunction interms of the plaintiff's prayer against thedefendant till the disposal of the injunction matter. The defendant company appeared in the suit and on 3-1-83 movedan application under Order 39, Rule 4 ofthe Code with notice to the plaintiffs forvacaing their interim injunction. Thelearned Munsif fixed the matter on 6-1-83 for hearing. In the meantime on 4-1-83 the defendant preferred Mise. AppealNo. 4 of 1983 before the learned DistrictJudge, Hooghly against the order of adinterim injunction and applied for stayof operation of the said order till thedisposal of the appeal; The learned District Judge ordered issue of notice uponthe plaintiffs-respondents to show causewithin seven days of service of the noticewhy the stay order as prayed for shouldnot be granted and passed the impugnedorder of interim stay of operation of theorder of ad interim injunction underappeal.

3. It is, submitted by the learned advocate for the petitioner that the learned District Judge has acted illegally or with material irregularity in exercise of his jurisdiction in passing the impugned stay order as no appeal flies) under Order 43, Rule 1 (r) of the Code against an order of ad interim injunction when an application under Order 39, Rule 4 of the Code for varying or vacating the said order is pending before the Court of first instance. In support of his submissions hehas relied on the Bench decision in Ab-dul Shukeer v. Uma Chander, AIR 1976 Mad 350 and in Zilla parishad v. B. R. Sharma : AIR1970 All376 (FB). On the other hand it is submitted by the learned Advocate for the defendant-opposite party No. 1 that the remedies

available to the defendant against an ex parte order of ad interim injunction are by way of an application for vacating or varying the order under Order 39, Rule 4 and an appeal under Order 43, Rule 1 (r) of the Code and that the two remedies being concurrent, there is no substance in the present revisional application. In support of this contention reliance has been placed on the Bench decision in United Club v. Nowgong Football Association, AIR 1964 Assam 81 in which the point at issue in the present case directly arose and was decided.

4. In my opinion, the submissions made on behalf of the opposite party are well founded and must prevail. In Abdul Shukoor v. Umachander a Division Bench of the Madras High Court has found that the grant of temporary or ad Interim injunction comes under two broad decisions viz. ad interim injunction granted by the court until disposal of the suit and ad interim injunction granted until further order and that the former presupposes a final order with reasons after hearing both parties and a conclusive determination of the right of the plaintiff to the grant of such order and so it is appealable under Order 43, Rule 1 (r) but the latter is less severe and issued without formal expression of the court's decision, as a step in aid to a reasoned final order to he passed after notice and hearing both parties and so no appeal lies against such order, the only remedy against it being provided under Order 39, Rule 4 so that a final reasoned order can be obtained for appeal under Order 43, Rule 1 (r) of the Code. With due respect to the learned Judges of the Madras High Court, I find it difficult to agree with their views as, in my opinion, the provisions for appeal in Order 43, Rule 1 (r) that an appeal shall lie from 'an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order XXXIX' do not permit classification of an order of ad interim injunction under Order 39, Rule 1 or Rule 2 or both into two divisions and taking one of the divisions out of the purview of appeal. The courts should adopt an interpretation which maintains ratherthan curtails a remedial right, even ifit leads to a multiplicity of proceedings.The right of appeal being a creation ofthe statute, its scope must be determined by a reference to the provisions ofthe statute conferring it and cannot bewhittled down by in orpretation. It isalso a substantive right and not a merematter of procedure. I also respectfullyagree with the views of the Pull Benchof Allahabad High. Court in Zilla Pari-shad v. B. R. Sharma, : AIR1970 All376 has expressed in the following observations occurring in paragraph 12 of

thejudgment:

'Rule 1 (r) of Order 43 does not say that an appeal shall He from a final order under Rule 1 or Rule 2 of Order XXXIX nO adequate reason is shown for interpolating the word 'final' before 'order' in Rule 1 (r). Courts do not ordinarily make additions in enactments. That is a legislative function'.

In the aforesaid Allahabad case the point for decision was whether an appeal lies against an ex parte ad interim order or not or whether such order falls within the purview of Rule 1 (r) of Order 43. In deciding that point the Full Bench expressed its views in paragraph 16 of the judgment in the following words:--

'The language and the object of Rule 1 (r) of Order 43 and the scheme of Rules 1 and 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it he has two remedies: (1) He can either get the ex parte injunction order, discharged or varied or set aside under Rule 4 of Order 39 and if unsuccessful avail the right of appeal as provided under Order 43. Rule 1 (r) or (2) straightway file an appeal under Order 43, Rule 1 (r) against the injunction order, passed under Rules, 1 and 2 of Order 39, C.P.C., It is riot unusual, to provide for alternative remedies. For instance when an ex parte decree is passed against a person he has two remedies either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court' .

The learned advocate for the petitioner in the instant case has sought to argue from the above observation, that the two remedies are alternative and not concurrent. But in my view such argumentis not (enable as the question whetherthe remedies are alternative or concurrent did not arise for decision by the FullBench of Allahabad High Court in thereported case. The analogy of remediesagainst the ex parte decree given in thesaid observation shows that the concurrent nature of the remedies has not beenruled out. So far as the decisions of theCalcutta High Court are concerned theremedies against an ex parte decree areconcurrent. (See (1908) 12 Cal WN 885;(1909) 13 Cal WN 846; Mulla's C. P.Code, 13th Edn. p. 813). The questionwhether the two remedies against an exparte order of ad interim injunction areconcurrent or not arose directly in United

Club v. Nowhong Football Association,AIR 1964 Assam 81 and Mehrotra C. J.delivering the judgment of the DivisionBench overruled the objection raised onbehalf of the petitioner that the oppositeparty had no right to come up in appealagainst an interim injunction when hehad already filed objection thereto andthe objection had not been finally decided by the learned Munsif and held asfollows in paragraph 9 of the judgment"The opposite party having known ofthe interim order of injunction filed objection and what was adjourned was thedisposal of objections filed by the opposite party No. 2. But that does notdeprive the opposite party of the rightof appeal if he had otherwise any griev- ance against the order granting an exparte interim injunction. After the objection has been disposed of the opposite party may have a fresh right of appeal against the order passed underOrder 39, Rule 4. The fact of filing objectionsby the opposite party does not debarthe opposite party from going up in ap-peal against, the order if the appeal isotherwise permissible.'

I respectfully agree 'with the view ex-pressed by the Division Bench of the Assam High Court which fits in with the provisions of the Code.

5. It may be mentioned that filing of an appeal against the order of ad interim injunction does not take away the jurisdiction of the original court to deal with the decision in controversy in any way and if the interim stay order is vacated by the appellate Court after giving both parties opportunity of being heard the original court will be free to decide the application under Order 39.Rule 4 of the Code in spite of the pendency of the appeal. The position willhowever, be, different after adjudication of the appeal when the original order has been superseded by the order of the appellate Court. So, there is no question of conflict of jurisdiction. The same position occurs in the case where both applications to set aside an ex parte decree and an appeal from the ex parte decree are filed by the defendant. In this connection reference may be made to the following observations of Sri Ashutosh Mookerjee, J. in Kumud Nath Ray v. Rai Jatindra Nath Chowdhury; (1911-13 Cal LJ 221) (225):

'It is broadly contended however by the learned Vakil for the respondent upon the authority of expressions to be found in the judgments in Dhonai Sar-dar v. Tarak

Nath. Chowdhury, (1910) 12 Cal LJ 53; Ramanadhan v. Narayan, (1904) ILR 27 Mad 602 and Shankara Bhatta v. Subraya Bhatta, (1907) ILR 30 Mad 535 that the immediate effect of the presentation of an appeal to a superior court against the decree of a subordinate court is to destroy the jurisdiction of the latter court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well founded on principle and it is as a matter of fact, opposed to the decision of the House of Lords in Mellish v. Richardson (1832) 1 C. 1. and F 244:36 RR 111:6 ER 900 in which it was ruled that when the court would otherwise have the authority to amend the judgment it may be done after an appeal has been taken. This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the original court to deal, in any way with the judgment under appeal. The position is obviously different after the adjudication of the appeal when the original judgment has been superseded by the judgment of the court of appeal. Brij Narayan v. Tejbal (1910) 11 Cal LJ 560. The view we take has been adopted also in a long series of decisions in the American Courts amongst which reference may be made to Exp. Henderson (1887) 4. Southern 284 and Texes Railway Company v. Waker (1905) 87 SW 194. We must therefore adhere to the principle which underlines the decision of this Court in Damodor Manna v. Sarat Chandra. Dhal (1909) 13 Cal WN 846 and overrule the contention of the respondent that the original court could not entertain the application to set aside the ex parte de-cree presented by the appellant merely because the contesting defendant had preferred an appeal to this Court'.

6. In the instant case it is open to the appellate Court either to maintain the stay order till the disposal of the appeal and decide the appeal itself or to vacate the interim stay order to permit the learned Munsif to decide the application under Order 39 Rule 4 of the Code keeping the appeal pending. In any event, it cannot be said that the appeal does not lie merely because an application under Order 39 Rule 4 of the Code was filed by the defendant-opposite party No. 1 before preferring the appeal.

7. I, therefore, hold that in the present case the appeal preferred by thedefendant-opposite party No. l is maintainable and the appellate court has notcommitted any

error of jurisdiction ingranting interim stay of operation of theorder of ad-interim injunction to appealtill the hearing of the application forstay after notice to the plaintiff-respondents, I may mention that the questionof mainability of the suit filed by theplaintiffs has not been decided by me inthis proceeding. The revisional application, therefore, fails and is dismissed.No order is made as to costs.