

**Astral Traders Vs. Haji Mohammad Shaban Dar and ors.**

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**Court :** Jammu and Kashmir

**Decided On :** Jun-02-1982

**Judge :** Mufti Baha-Ud-Din Farooqi, Ag. C.J.,; I.K. Kotwal and; G.M. Mir, JJ.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Section 2(14) - Order 43, Rule 1 - Order 39, Rules 1, 2 and 4

**Appeal No. :** Civil Revn. No. 56 of 1977

**Appellant :** Astral Traders

**Respondent :** Haji Mohammad Shaban Dar and ors.

**Advocate for Def. :** K.N. Raina, Adv.

**Advocate for Pet/Ap. :** S.Y. Kaul and; J.L. Choudhry, Advs.

**Disposition :** Petition dismissed

**Judgement :**

**Kotwal, J.**

1. This revision petition which should have been normally heard by a single Judge is before the Full Bench on a reference made to it by one of us, namely, Hon'ble the Acting Chief Justice. Necessity to make the reference arose because of the cleavage in judicial opinion on the point as to whether an ex parte ad interim

injunction order issued under Rule 1 or Rule 2 of Order 39 of the Code of Civil Procedure is appealable under Order 43, Rule 1 (r) of the Code.

2. The petitioner brought a suit for declaration to the effect that it alone was entitled to use for vehicular traffic the road leading to Compartments Nos. 28 (b) and 29 (c) Boniar, with a consequential relief of permanent injunction restraining the respondents from using that road for vehicular traffic. Alongside, an application was made under Rules 1 and 2 of Order 39 for an ad interim injunction restraining the respondents from plying their vehicles on this road. Sub-Judge, Baramulla, in whose court the suit was filed, passed an ex parte ad interim injunction order in these terms :

'I have heard the learned counsel for the plaintiff applicant, perused the documents such as payments made by him to different landowners to use the land for path and also perused the Clause 25 of the agreement deed. The application is also supported by an affidavit. Issue notice to other party meanwhile issue temporary injunction as prayed for. The order shall be subject to objections of the other side. Put up the case on due date.'

3. The respondents, instead of filing objections, challenged the aforesaid order in an appeal before District Judge, Baramulla, who on hearing both the parties, accepted the same by passing a meticulously lengthy and detailed order, the operative part whereof reads as under:

'..... I have discussed above in paras 13 and 20 that there was no material available with the trial court on the basis of which the impugned order could be justified. The order as such is liable to be set aside and I set it aside and remand the case back to the trial court with this direction that it will allow the parties to produce such documents, in a legal manner, on which they rely, obtain the written statement of the defendant, hear the parties afresh and then see whether on the guidelines indicated in para 21 above a case for grant of temporary injunction in terms of the prayer is made out or not.....'

4. This order has been assailed by the petitioner on the grounds : firstly, that the District Judge had no jurisdiction to pass it, as no appeal lay against an ex parte

ad interim injunction order passed by a court in exercise of its powers under Rule 1 or Rule 2 of Order 39; and secondly that he erred in disposing of the appeal by writing a much too detailed and lengthy judgment, containing observations that tend to determine the rights of the parties before the suit is actually tried. When this revision petition came up for hearing before Hon'ble the Acting Chief Justice, reliance on behalf of the petitioner was placed upon a Bench decision of the Madras High Court in Abdul Shukoor Sahib v. Umachander, AIR 1976 Mad 350, wherein it has been held that no appeal lies under Order 43, Rule 1 (r) against an ex parte ad interim injunction order issued under Rule 1 or Rule 2 of Order 39. Since the view taken in this authority ran counter to the view taken by a number of other High Courts, he deemed it necessary to refer the whole case to a Full Bench for an authoritative pronouncement. This is how the case is before us.

5. In what circumstances temporary injunction may be issued, varied, set aside, or discharged and its disobedience punished, is to be found out in Rules 1 to 4 of Order 39: though apart from these provisions, temporary injunction may also be issued by the court in exercise of its inherent powers Under Section 151, C. P. C. where the case is not covered by Rules 1 and 2. (Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527). Whereas under Clause (r) of Rule 1 injunction may be issued where the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, whether plaintiff or defendant, Clause (b) empowers the court to restrain the defendant from removing or disposing of the property, whether subject matter of the dispute or not, where he intends or even threatens to remove or dispose of it with a view to defrauding his creditors. Rule 2 enables the court to grant temporary injunction against a defendant with a view to restraining him from committing a breach of contract or other injury of any kind Under both these Rules injunction may be issued either till further orders or till the final disposal of the suit. Rule 3 enjoins upon the court to give a notice of the application to the opposite party before issuing a temporary injunction, but at the same time it gives it a discretion to dispense with the same, where it is satisfied that the resultant delay in serving the notice would defeat the very object of the injunction. Rule 4 empowers it to discharge, vary or set aside the injunction order issued by it, if an application is made to that effect by the party dissatisfied with it.

6. From a combined reading of these Rules it clearly emerges that a temporary injunction may be issued by a court either ex parte, or after giving a notice to the opposite party. It may also be set aside, varied, or discharged by it at any time on an application made to that effect by the party dissatisfied with it. Such an application may be made, depending of course upon the facts and circumstances of each case, either where the order has been made ex parte, or where it has been made after hearing both the parties. But, the fact remains that the court is not powerless to make an ex parte order of ad interim injunction.

7. Every order of ad interim injunction, whether ex parte or otherwise, and whether made under Rule 1, 2 or 4 of Order 39, is on the plain terms of Clause (r) of Rule 1 of Order 43, appealable. There is no room for the argument that the appeal shall lie against only such orders passed under these Rules, as have been passed after hearing both the parties, and nor is there any scope for the argument that Rules 1, 2 and 4 of Order 39 postulate only those orders that are made after hearing both the sides. To say so, would tantamount to reading something between the lines. This is the view taken by most of the High Courts in the country, with which I am in respectful agreement. (*Zila Parishad, Budaun v. B. R. Sharma*, AIR 1970 All 376 (FB), *Mangai Achi v. Asokan*, AIR 1973 Mad 258, *Raj Kumari Suri v. Prem Lal Dhiman*, AIR 1972 Him Pra 67, *Andhra University v. P. V. Raju* (1974) 2 Andh WR 17, *Devasahayam v. Arumukhan*, AIR 1953 Trav Co 240, *Ramulu v., Ganga Ram*, AIR 1953 Hyd 138, *United Club v. Nowgong Football Association of Nowgong*, AIR 1964 Assam 81, *Shyam Behari Singh v. Biseswar Dayal*, AIR 1924 Pat 713, and *Sk. Jusa v. Ganpat Dagdu Gire*, AIR 1976 Bom 222).

8. A contrary view has, however, been taken by the Madras High Court in AIR 1976 Mad 350 (supra). In this case the ex parte ad interim injunction order read as follows :

'An interim injunction and notice by 20-12-1975.'

9. The Division Bench overruling its earlier single Bench decision taking a contrary view in AIR 1973 Mad 258 (supra) held that no appeal lay against the said order under Order 43, Rule 1 (r). For this, the learned Judges gave three reasons : one, that an order under Rule 1 or Rule 2 of Order 39 against which an appeal may lie

under Order 43 (1) (r) has to answer the definition of the expression 'order' contained in Section 2(14) C. P. C. and therefore, must be a formal expression of the decision of the court supported by reasons that has been passed after hearing both the sides; two, that such an interpretation would help in avoiding conflict in judicial decisions, that is likely to arise in case the two remedies i.e. one of appeal under Order 43, Rule 1 (r), and the other of application under Order 39, Rule 4 are held to exist concurrently; and three, that it would tend to serve the principle of stare decisis, et non movere quietas as this was the view that had been consistency taken by the High Court of Madras for more or less five decades.

10. With utmost respect to the learned Judges, I am unable to subscribe to the view that a decision of a court before it can be said to be an order as denned by Section 2(14), must be supported by reasons and made after hearing both the sides. There is nothing in the language of this provision to warrant such an inference. Section 2(14) defines order as 'the formal expression of any decision of any civil court which is not a decree'. The expression 'formal expression' occurs in Clause (2) of Section 2 also. It must, therefore, be presumed to convey the same meaning in both the Clauses. Just as a decree is not to contain any reasons and need not be necessarily passed after hearing both the sides, an order need not also contain any reasons for the decision which it is meant to convey, and nor need it necessarily be made after hearing both the sides. An ex parte order is as good an order to attract the provisions of Order 43, Rule 1 (r), as an order passed after hearing both the sides. Failure to state reasons for it can be no doubt a good ground for oversetting an order in appeal, but surely such failure cannot render the order non-appealable. If the intention of the Legislature were to make only such orders appealable as were passed after hearing both the sides, then nothing could have prevented it from saying so in clear and unequivocal terms. The language of Order 43, Rule 1 (r) is too wide and distinct not to admit of any interpretation that its provisions would be attracted to only that order which has been passed by the court after hearing both the parties and contains reasons for the decision sought to be conveyed through it.

11. Reliance was also placed on a single Bench decision of the Karnataka High Court in *Midche Linge Gowda v. Channamma*, AIR 1974 Kant 63. This is however,

a case, clearly distinguishable on facts. The trial court in this case, even after hearing both sides, had not proceeded to pass an order granting or refusing ad interim, injunction, but had merely deferred its decision to grant or not to grant the same to a future date at the same time directing the parties to maintain status quo in the meantime. It was held that such an order did not fall within the purview of Rule 1 of Order 39 and was consequently not appealable under Order 43, Rule 1 (r).

12. Nor do I feel inclined to give such a restricted meaning to the expression 'order' because as opined by the learned Judges, a wider meaning would lead to conflict in judicial decisions. The decision of the trial court under Order 39, Rule 4 being also open to question in appeal under Order 43, Rule 1 (r), there would indeed be no such conflict. The conflict, if any, would be short-lived. The third reason has no relevance in the present case, for it has not been brought to our notice that this court too has consistently taken the view that an ex parte ad interim injunction order is not appealable under Order 43, Rule 1 (r). For all that has been stated heretofore, my answer to the question would be that an ex parte ad interim injunction order is appealable under Order 43, Rule 1 (r). Viewed thus, the appeal taken by the respondent from the ex parte ad interim injunction order passed by the trial court was clearly maintainable.

13. The plaintiff or defendant seeking temporary injunction has to establish a prima facie case in his favour which merely means that he has to show that a serious question is to be tried at the hearing and there is material which probalises the success of this case. Since ad interim injunction is by and large sought at the initial stage of the suit when the main issues in it are yet to be tried on taking evidence, the court has to be cautious in examining these issues and offering its comments on the merits of the case. At that stage they are not supposed to examine the merits of the case too closely or too minutely. Such a course always inheres the danger of prejudging or misjudging the case and making observations that may prejudice the parties in the long run. It is supposed to merely take a general view of the case judging its apparent strength and weakness. The learned District Judge, there can be no manner of doubt, has taken a too minute view of the case which was not called for at all. He has disposed of the appeal in a manner as if he

was sitting in appeal against the decree of the trial court passed at the conclusion of the trial of the suit itself. Be that as it may, since he has not given his own opinion as to whether or not the respondent is entitled to the injunction prayed for, but has merely remanded the case to the trial court leaving it alone to take a decision whether or not to grant ad interim injunction on reappraisal of the material that may be placed before, it, including the written statements to be filed by the defendants, I see no good ground to upset his order. Suffice it to say that the trial court shall decide the issue of ad interim injunction, keeping in view the principles stated above. With these observations, the revision petition is dismissed, but in the circumstances of the case, without any order as to costs.

Mufti Baha-Ud-Din Fakooqi, Acting C.J.

14. I am inclined to agree with the view expressed by my learned brother that an ex parte ad interim injunction is as much appealable as an order of temporary injunction passed after hearing both the parties. But in my opinion it would be in the fitness of things if, as a matter of practice the appellate court refuses to entertain an appeal directed against an ad interim injunction so long as the aggrieved party has not approached the trial court for its vacation. I say so on the twin grounds; firstly, that an order passed after hearing the parties would naturally be passed upon, the material and data placed on the file by either party and, secondly, because such order would provide the appellate court the benefit of the views expressed by the trial court in the matter, howsoever brief and cryptic such views might be. On the other hand if an appeal against an ex parte order of injunction is entertained, the aggrieved party would necessarily demand that it should be allowed to place on record the material that it seeks to rely upon and this would naturally turn the appellate court into the trial court and, moreover, the appellate court would not be able to guess as to what the opinion of the trial court would be if such material were placed before it. That much about the first ground of objection raised by the learned counsel for the petitioner.

15. Coming to the second point, I do agree with my learned brother that the appellate court or for that matter, the trial court is not expected to write a detailed and lengthy judgment while passing an order of temporary injunction, but it does

not follow and, I think, my learned brother does not mean to suggest, that the order should be non-speaking howsoever, brief and short it might be. It should demonstrate that the court has applied its mind and found that principles governing the grant of temporary injunction are satisfied by the facts and circumstances of the case.

16. With these observations I agree with the order proposed by my learned brother directing that the revision petition be dismissed, without any order as to costs.

**Mir, J.**

17. I agree with Hon'ble A. C. J.

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