
(2015) 05 UK CK 0055

In the Uttarakhand High Court

Case No : Misc. Writ Petition No. 1112 of 2015

Anuradha Gupta

APPELLANT

Vs

D.A.V. College Managing Committee and Others

RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 3
Constitution of India, 1950 — Article 227

Citation : (2015) 05 UK CK 0055

Hon'ble Judges : Umesh Chandra Dhyani, J.

Bench : Single Bench

Advocate : Siddhartha Singh, Advocate, for the Appellant; B.M. Pingal, Amar Shukla, Advocate and I.P. Kohli, Brief Holder, for the Respondent

Final Decision : Disposed Off

Judgement

Umesh Chandra Dhyani, J.—By means of present writ petition, the writ petitioner seeks to issue a writ, order or direction in the nature of certiorari quashing the order dated 06.04.2015 regarding non-grant of stay order passed by the Educational Tribunal/District Judge, Haridwar, in Misc. Civil Appeal No. 24 of 2015 captioned as Smt. Anuradha Gupta v. D.A.V. College and others. At the very outset, the order under challenge is being reproduced herein below for convenience:

"Heard.

Perused the record.

Admit.

Register a civil Misc. Appeal.

Issue notice to respondents.

Fix 15.04.2015 for hearing.

Steps by both ways."

Heard on Stay Application. Without hearing the opposite parties, it is not proper and just to grant stay order (ex parte) in favour of appellant. Hence issue notice to respondents/opposite parties accordingly.

2. Learned counsel for the respondents argued that neither the writ petition under Article 227 of the Constitution of India nor the Civil Revision is maintainable against the impugned order.

3. It is an admitted fact that neither ad-interim ex parte injunction has been granted in favour of the writ petitioner nor the same has been refused. Learned District Judge, Haridwar (Education Tribunal) has simply directed that notices be issued to the respondents and opined that it will not be proper on her part to have granted ex parte ad-interim injunction order without issuing notices to the defendants-respondents.

4. The very first question which arises for consideration of this Court is whether a Civil Revision or Writ Petition is maintainable against the impugned order or not?

5. It will be apt to quote the following observations made by learned Single Judge of this Court decided on 12.06.2009, in WPMS No. 829 of 2009, Sri Sunil Madan Vs. Sri Bela Ram Batra, . Relevant paragraphs of said judgment are being reproduced here-in-below:

"The learned counsel for the petitioner has contended that there is no provision of appeal under Order XLIII of C.P.C. Only the appeal is maintainable if the injunction is granted or refused as per provision of Order XLIII Rule 1(r) C.P.C. The order passed by the trial court is under Order XXXIX Rule 3 of C.P.C. It is also contended on behalf of the petitioner that appeal is maintainable only if the order is passed under Order XXXIX Rule 1 and 2 C.P.C. No order was passed under Order XXXIX Rule 1 and 2 C.P.C. The order was passed under Order XXXIX Rule 3 C.P.C. by the trial court. In support of his contention, the learned counsel or the petitioner has placed reliance in a case Banarsi and Others Vs. Incharge District Judge and Others, , Allahabad High Court (Lucknow Bench). In the said judgment in Para-16 it has been observed that after referring the matter to a third Judge, Agarwala, J. for his opinion, Hon"ble Agarwala, J. answered the first question in negative. Said portion of the judgment is quoted as under:

"I, therefore, think that when the Court refuses to grant an ex parte injunction and issue notice to the other side of the application for injunction, it has passed no order under Rule 1 or 2 and, therefore, no appeal can lie from such an order. But when the Court grants the application for injunction ex parte, an appeal lie because the application made under Rule 1 or Rule 2 is disposed of."

I am fortified in my view by the opinion given by the Hon"ble Agarwal J, in the aforesaid case. Order XLII Rule 1(r) C.P.C. reveals that only appeal is maintainable against the order passed under Order XXXIX Rule 1 and 2 C.P.C. The learned Incharge District Judge has erred in law in admitting the appeal

against the order which was passed under Order XXXIX Rule 3 C.P.C. by issuing notice to the defendant to file objection against the temporary injunction application."''

6. It will also be useful to quote the observations made by the coordinate Bench of this Court in A. O. No. 56 of 2010, *Rajneesh Singh Bahrtari Vs. Surya Pal Bhandari and Others*, . Relevant paragraphs of said judgment are being quoted here-in-below:

"The defendant/respondent Nos. 2 and 3 filed a counter affidavit mentioning therein that the appeal against the order dated 08.02.2010 is not maintainable. It is asserted in the counter affidavit that vide impugned order, the learned District Judge merely refused to give ex parte injunction order in favour of the plaintiff but he did not reject the interim injunction application filed by the plaintiff under Order 39 Rule 1 and 2 of the Code of Civil Procedure and fixed the case for objection and disposal of interim injunction application. The interim relief application of the plaintiff is still pending disposal before the Court below.

...Learned counsel for the appellant also submitted that no person should be left remediless and therefore, appeal against an order of refusal to grant ex parte injunction is maintainable. In support of this submission he relied upon the judgments reported in (2007) 7SCC 695, AIR 1094 Gauhati 87 (F.B.), 1998 (supp) RD 635, 2004 (56) ALR-771, AIR 2003 Bombay 392, 1996 AIHC 1593, AIR (38) 1951 Calcutta 446, AIR 1982 Sikkim 26 and AIR 2002 Gauhati 146.

On the other hand Mr. Pankaj Purohit, the learned counsel for respondents submitted that vide impugned order, the learned District Judge has merely refused to give ex parte injunction order in favour of the plaintiff but he did not reject the interim injunction application filed by the plaintiff under Order 39 Rule 1 & 2 of the Code of Civil Procedure and fixed the case for objection and disposal of interim injunction application. He further submitted that under Order 43 Rule 1(r) C.P.C., only the orders passed under Rule 1 , Rule 2 , Rule 2A , Rule 4 or Rule 10 of Order 39 of C.P.C. are made appellable and since the order dated 08.02.2010 is not an order by which the interim relief application moved by the appellant/plaintiff is allowed or rejected, the appeal filed by the plaintiff/appellant is not maintainable. He also submitted that it is not the proper stage for the appellant to file an appeal. In support of his arguments Mr. Pankaj Purohit, Advocate relied on the judgment reported in 1999 (35) ALR 38, 2003 All. L.J. 1324, 2009 (2) UD221 and *Gajraj Singh and Others Vs. Ram Kumar and Others*, .

...Rule 3 is an integral part of Rule 1 and 2 of Order XXXIX which lays down the procedure which is essential to be followed by the Courts where an application for injunction is filed under Rule 1 or Rule 2 of Order XXXIX. But where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting injunction would be defeated by delay. This is an exception given in

Rule 3 of Order XXXIX.

Order XLIII Rule 1(r) provides that an appeal lies from an order of the Trial Court if the order is passed in any of the rules specified in clause (r) or Order XLIII Rule 1. Thus, it is clear that no appeal lay against an order directing issue of notice under Rule 3 of Order XXXIX.

In view of the above discussion, I am not in agreement with the case law of other High Courts cited by the learned counsel for the appellant, rather I am in agreement with the case law cited by the learned counsel for the respondent. Due care has already been taken in Rule 3 and Rule 3A of Order XXXIX of C.P.C. The learned counsel for the appellant also placed reliance upon the judgment of Hon'ble Supreme Court, reported in (2007) 7 SCC 695 and argued that appeal filed by the appellant is maintainable. Paragraph 21 of the same is quoted below.

21. It is the acknowledge position of law that no party can be forced to suffer for the inaction of the Court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party which does not get justice due to the inaction of the Court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant of vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in complying with the provisions of Rule 3A. In appropriate cases the appellate Court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purpose of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule. The Hon'ble Supreme Court in the aforesaid judgment has observed that where the mandate of Order XXXIX Rule 3A of C.P.C. is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant of temporary injunction. But in the present case there is no violation of Rule 3A of Order XXXIX."

7. Learned counsel for the plaintiff-writ petitioner relied upon the judgment passed by a co-ordinate Bench of this Court in WPMS No. 148 of 2013, Surendra Singh v. Mohd. Yusuf decided on 13.03.2013. Relevant paragraph of said judgment is being excerpted here-in-below:

"...Learned counsel for the petitioner submits that the petitioner has no alternative remedy as no appeal lies against the impugned order passed under Order 39 Rule 3 of the C.P.C. He has drawn my attention to paragraph 9 of the judgment rendered by the Division Bench of Allahabad High Court in case of Ram Dhani and Others Vs. Raja Ram and Others, . The aforesaid Division Bench has said that no appeal is provided for from a decision to issue notice under Order 39 Rule 3 of the C.P.C...."

"...In my view, the learned trial Judge by the impugned order has not only issued notice to the defendant/respondent, at the same time, he decided not to pass any ad-interim order as prayed for. The aforesaid Division Bench nowhere said that if any ad-interim order of injunction was not granted, and the Court issues the notice, such as order would not be appealable.

Therefore, I am of the view that if cannot be said to be an order passed under Rule 3 of Order 39 of C.P.C. so as to render non-appealable as observed by the Division Bench of Allahabad High Court taking note of the provision of Section 104 read with Order 43 of the C.P.C. I am of the view, if the Trial Judge issues notice simplicitor without recording refusal to pass interim order, this order would not be appealable...."

8. It will also be worthwhile to quote para 20 of the decision of Division Bench of Hon"ble Allahabad High Court in Ram Dhani and Others Vs. Raja Ram and Others, herein below:

"From the discussion above, for an order to be revisable under Section 115 C.P.C. as is applicable in the State of U.P., firstly it must be an order which must decide a part of the case or the proceedings. The expression "order" as it is defined in the C.P.C., requires determination which must bring finality by determining the rights of the parties in respect of the controversy in the application. Order 39 Rule 3 is a duty conferred on the Court before granting an injunction to issue notice to the party. It is a procedural provision, a step in the case. The Court, in the event, arrives at a conclusion that the grant of ex parte injunction would be defeated by delay, can in the case of urgency proceed to grant an injunction under Order 39 Rule 1 or Order 39 Rule 2 . If the injunction is granted or rejected, as observed earlier, it would be appealable under Order 43 . The procedure followed under Order 39 Rule 3 is determination by the Court of the urgency of the matter vis-?-vis the relief claimed by the plaintiff. On a failure to grant the injunction, no part of the case or the proceeding is disposed of, but the proceedings merely stand adjourned to the next date. In other words a step in the case or proceedings. In these circumstances, in our opinion, it cannot be said that, by merely issuing notice on arriving at a finding that there is no urgency, the same amounts to an "order" within the meaning of Section 2(14) C.P.C. In that context, the question of applying Rule 3 (ii) of Section 115 would not come into play. That can only be applicable if the other precondition of "an order deciding the case" are satisfied. Therefore, merely issuing a notice on arriving at a conclusion that there is no urgency would not be an order which is revisible. It

is not, as if a party is without a remedy if such a view is taken. The extraordinary jurisdiction of this Court under Article 227 of the Constitution of India would always be available in such a case."

9. Even if it is conceded for the sake of arguments that the writ petition under Article 227 of the Constitution of India is maintainable against the impugned order passed by learned Education Tribunal, this Court does not consider it fit to interfere in the impugned order, inasmuch as, no final order has been passed on the stay application. It does not amount to "case decided". The writ petitioner has still remedy to press her claim once the respondents enter appearance before the said tribunal and place her case. The doors have not been closed as yet to the writ petitioner. This Court, therefore, does not think it proper to interfere in the impugned order at this stage.

10. Learned counsel for the writ petitioner has submitted that the learned Tribunal has fixed a date in July, 2015. It will be open to the writ petitioner to make a request to the Tribunal for preponement of the date of hearing. The writ petition thus stands disposed of at the admission stage itself.