
(2004) 11 AHC CK 0220
In the Allahabad High Court
Case No : Writ Petition No. 5045 (M/S) of 2004

Banarsi and Others

APPELLANT

Vs

Incharge District Judge and Others

RESPONDENT

Date of Decision : 09-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 21 Rule 105(1), Order 21 Rule 106(1), Order 21 Rule 34, Order 21 Rule 72
Constitution of India, 1950 — Article 226, 227

Citation : (2005) 2 AWC 1628

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Karunakar Srivastava and Ashok Nigam, for the Appellant; S.M.K. Chaudhary, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Cynosure of attention is the order dated 14.10.2004 passed by the Incharge District Judge, Gonda in Misc. Civil Appeal No. 73 of 2004, Balrampur Chini Mills Limited v. Naseem and Ors., the correctness of which has been challenged in the instant writ petition.

2. The suit for permanent injunction was instituted by the opposite party No. 3 along with an application under Order XXXIX, Rules 1 and 2, C.P.C. for grant of ex parte injunction. The trial court having not been satisfied on the material did not pass an ex parte temporary injunction, but directed to issue notice to the defendants-petitioners.

3. The plaintiffs-opposite parties aggrieved by an order to issue notice, preferred an appeal under Order XLIII, Rule 1 (r), C.P.C. The appellate court, after hearing the parties decided the application under Order XXXIX, Rules 1 and 2, C.P.C. granting temporary injunction vide impugned order dated 14.10.2004. Being aggrieved by the aforesaid order dated 14.10.2004, respondents-petitioners preferred the present writ petition attacking the order on two counts, viz. :

Firstly, an appeal before the lower appellate court was not maintainable as the order under appeal was not an order of refusal or grant of temporary injunction, but was one under Order XXXIX, Rule 3, C.P.C, which was not appealable; and

Secondly, even if the lower appellate court was of the opinion that the appeal was maintainable, it could not have finally granted the temporary injunction till the decision of the suit, as it would amount to hold up the proceedings pursuant to the reply to show cause notice, therefore, the appellate court ought to have remitted the case to trial court for passing order on the application under Order XXXIX, Rules 1 and 2, C.P.C.

4. Sri Ashok Nigam, learned senior advocate appearing for the petitioners, in support of his contentions relied upon the case of Gajraj Singh and Others Vs. Ram Kumar and Others, wherein their Lordships of the Hon'ble High Court Madhya Pradesh held that an appeal lies from an order of the trial court if the order passed under any of the rules specified in Clause (r) of Order XLIII, Rule 1, C.P.C, but no appeal lies against an order, directing issuance of notice under Rule 3 of Order XXXIX, C.P.C.

5. Sri S.M.K. Chaudhary appearing for the respondent No. 3 filed counter-affidavit be taken on record. He has submitted that appeal will lie against the order passed by the trial court under Order XXXIX, Rule 3, C.P.C. He has further submitted that the provisions of Section 3, Order XXXIX, C.P.C. provides that the Court had to see whether the object of granting the injunction would be defeated by the delay and by not passing an ex parte order the Court in effect had dismissed the application which was likely to become infructuous. He further submits that under Order XXXIX, Rule 3, C.P.C. an order has been passed in a proceeding, which is separate and independent of the suit or appeal, as the case may be, it would be a "case decided". The words "separate and independent" indicate that the proceeding is not part of the main process which leads to the termination of the suit or appeal, but is something detached from the same in the sense that the suit or appeal can be disposed of even without there having been such a proceeding. He further submits that an application for injunction pending a suit or an application for stay of the order of the trial court pending an appeal would certainly be a separate and independent proceeding in the sense that it is not a part of proceeding leading to the termination of the suit. In support of his submission he placed reliance on Rajendra Singh v. Sri Brij Mohan Agarwal 2003 (2) LCD 604.

6. Lastly, he submits that since it is an interlocutory order passed by the District Judge as such no writ petition is maintainable. In support of his contention he has placed reliance in the judgment passed in Civil Misc. Case No. 126 of 1992 Shyam Kishore Goswami Vs. District Magistrate, Hamirpur and another,

7. As regards the submission of Shri S.M.K. Chaudhary is that the writ petition is not maintainable as the same is against an interlocutory order. Since the order is without Jurisdiction and in exercise of powers under Article 227 of the

Constitution, which empowers this Court to have superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. Since the order of granting a temporary injunction by the District Judge in an appeal is an order without jurisdiction and as such in exercise of supervisory powers, the present writ petition is maintainable under Article 226/227 of the Constitution.

8. To appreciate the first contention, a reference to Section 104, C.P.C. is necessary, which is extracted in extenso :

"104. Orders from which appeal lies.

(1) an (ff) an order u/s 35A :

(ffa) an order u/s 91 or Section 92 refusing leave to institute a suit of the nature referred to in Sections 91 and 92, as the case may be :

(g) an order u/s 95 ;

(h) an order under any of the provisions of this code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;

(i) any order made under rules from which an appeal is expressly allowed by rules :

Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section."

9. The relevant provisions of the CPC are produced as under :

Order 39 (3) : Before granting injunction, Court to direct notice to opposite party :

"The court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party :

Provided that, 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 the injunction would be defeated by delay, and require the applicant :

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with :

(i) a copy of affidavit filed in support of the application ;

(ii) a copy of the plaint ; and

(iii) copies of document on which the applicant relies, and day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent."

Order XLIII (1) :

Appeal from order.--An appeal shall lie from the following orders under the provisions of Section 104, namely ;

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper court (except where the procedure specified in Rule 10A of Order VII has been followed) ;

(b) (* * *) ;

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte ;.

(e) (***) ;

(f) an order under Rule 21 of Order XI ;

(g) C * * *) ;

(h) (***) ;

(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;

(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale ;

(ja) an order rejecting an application made under Sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in Sub-rule (1) of Rule 105 of that order is appealable ;

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;

(l) an order under Rule 10 of Order XXII giving or refusing to give leave ;

(m) (***) ;

(n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under Rule 5 or Rule 7 of Order XXXII rejecting an application for permission to sue as an indigent person ;)

- (o) (***);
- (p) in interpleader-suit under Rule 3, Rule 4 or Rule 6 of Order XXXV.
- (q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVII ;
- (r) an order under Rule 1, Rule 2, (Rule 2A), Rule 4 or Rule 10 of Order XXXIX;
- (s) an order under Rule 1 or Rule 4 of Order XL;
- (t) an order of refusal under Rule 19 of Order XLI to re-admit, or under Rule 21 of Order XLI to rehear, an appeal ;
- (u) an order under Rule 23 (or Rule 23A) of Order XLI remanding a case, where an appeal would lie from the decree of the appellate court ;
- (v) (***);
- (w) an order under Rule 4 of Order XLVII granting an application for review.

10. A bare look to the aforesaid provision it will be revealed that an appeal lies only from those orders which have been enumerated in this section and from no other orders. For the purposes of this petition Clause (i) of Section 104(1) is relevant which speaks that an appeal shall lie from rules from which an appeal is expressly allowed by rules. Section 105, C.P.C. puts a further bar on the filing of an appeal against an order made by a court in exercise of its original or appellate jurisdiction, unless an appeal is expressly provided against such order. On further perusal of Order XLIII, Rule (1) (r) it is clear that the orders passed under Order XXXIX, Rules 1, 2 and 4 of the C.P.C. are appealable.

11. As the order was passed under Order XXXIX, Rule 3, C.P.C, a look to Rules 1, 2 and 3 of the said order is also necessary. Rule 1 of Order 39 speaks of grant of temporary injunction in any suit. Rule 2 speaks of injunction to restrain repetition or continuance of breach in any suit. Rule 3 of Order XXXIX empowers the Court to direct notice to opposite party before grant of injunction. This rule also makes it incumbent on the Court to record its reasons for its opinion.

12. In H. Bevis and Co. Vs. Ram Behari and Others, the opinion on the question whether an order refusing ad interim ex parte injunction and issuing notice to the defendant under Rule 3, Order XXXIX is appealable under Order XLIII, Rule 1 (r) was parted company between. the Judges constituting the Bench, Mushtaq Ahmad, J.. held the view that such an order was appealable and in any case, a revision lay against such an order u/s 115 of the code. The quintessence of the view held by the learned Judge is extracted below :

"Now Order XXXIX, Rule 1 of the Code allows the Court in which the suit is filed to "grant a temporary injunction.....until the disposal of the suit or until further order", and in Rule 3 of that order it is provided that the Court shall direct notice of the application to be given to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay. That is to say, It, may not issue notice to the opposite party, whether there is a danger of

this object being lost, and issues an injunction, of course ad interim straightway. Such an order, in my opinion, would be covered by the words "until further order" which Rule 1 of Order XXXIX, concludes. It was argued that an order of this character could not be conceived to be one on the application for temporary injunction. Where an application purporting to be for such injunction is filed, there are three alternative orders that may possibly be made by the Court on that application, firstly. it may be rejected forthwith secondly, its final disposal may be postponed, until after the opposite party has been heard, no ad interim injunction, "being granted and lastly, an order granting an ad interim injunction, and then after the Court had heard the opposite party, disposing of the application finally. In all these cases, it would be an order essentially on application for temporary injunction, there being no other application at the time for that purpose. If the order is to say, to use the words of Rule 1, Order XXXIX, not "until the disposal of the suit." It may take effect only "until further orders" if it is one only for ad interim injunction having the effect of a stay order. In all these cases, it would be an order under Rule 1, Order XXXIX and not outside that rule. This being so, again in all these cases it would be appealable under Order XLIII, Rule 1 (r) of the code."

13. The learned Judge held that the order refusing to grant ad interim injunction ex parte is as much appealable as the final order granting or refusing injunction and went on to observe :

"Even if the said order was not appealable, I would have been inclined to set it aside in revision in view of the particular facts of the case, to which I shall refer in the paragraph following."

14. Desai, J. (as he then was) took a contrary view and held as under :

"Refusing to grant ex parte injunction does not amount to refusing to grant it altogether. If the trial court had granted ex parte injunction, the opposite party would have been entitled to appeal from it, because as I stated earlier, an ex parte injunction is still an injunction order under Rules 1 and 2 and does not require to be followed up by another is refused, the applicant has no remedy by way of an appeal."

15. Desai, J. placed reliance on Luis v. Luis 12 Mad 186, in which Wilkinson and Shephard, JJ. ruled that there is no provision for an appeal against an order issuing notice to the defendant before granting temporary Injunction against him. They observed :

"The order made by the subordinate Judge was not formal expression of his decision on the question whether an injunction should be granted or not. A discretion is vested in the Court by Section 494 of refusing to grant a temporary injunction if satisfied that the object of granting an injunction will not be defeated and no appeal is provided in case of his refusal."

16. The matter was referred to a third Judge Agarwala, J. for his opinion on the

following questions :

(1) Is an order refusing to issue an ad interim injunction as allowed by Rule 8 of Order XXXIX, Civil Procedure Code, appealable?

(2) If the order is appealable, did the appellant make out a case for the trial court's granting such an injunction?

(3) If the order is not appealable can it be questioned by this Court in the exercise of its revisional jurisdiction?

17. Agarwala, J. answered the first question in negative in the following words :

"I, therefore, think that when the Court refuses to grant an ex parte injunction and issues 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 lies because the application made under Rule 1 or Rule 2 is disposed of."

18. It would thus appear from the rationalization of the aforestated decision that an order declining to grant injunction and issuing notices to defendants under Order XXXIX, Rule 3 is not appealable under Order XLIII, Rule 1 (r) of the Code.

19. As a result of foregoing discussion, I am of the view that the order dated 5.10.2004 passed by the trial court in the instant case was not an appellate order under Order XLIII, Rule 1 (r) of the C.P.C. The order dated 14.10.2004 is without jurisdiction and is hereby quashed.

20. The writ petition is allowed. Costs are made easy. The matter is remanded back to the Civil Judge, Senior Division, Gonda, fixing 18.11.2004, on which date, both the parties shall appear before the Civil Judge, Gonda. It is provided that if the parties do not cooperate with the proceedings and seek adjournment or try to linger on the case, it will be open for the Civil Judge concerned to decide the application for temporary injunction in absence of the parties.