

(2012) 09 AHC CK 0083

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 40340 of 2012

Central Bank Karmchari Grih Nirman Sahakari Samiti Ltd. and APPELLANT
Another

Vs

Shanti Prasad (Since Deceased) and Others RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 39 Rule 3, Order 39 Rule 4, 151
Constitution of India, 1950 — Article 226

Citation : (2012) 10 ADJ 356

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Dilip Gupta, J.—This petition seeks the quashing of the order dated 18th May, 2009 passed by the Civil Judge, Meerut by which temporary injunction was granted in Original Suit No. 831 of 2007 filed by respondent Nos. 1 and 2-Shanti Prasad (since deceased) and Shashi Jain. The petitioners have also sought the quashing of the order dated 28th October, 2011 by which the application filed by the petitioners Order 39 Rule 4 of the CPC (hereinafter referred to as the "CPC") was rejected. The petitioners have also sought the quashing of the order dated 26th July, 2012 by which the appeal filed by the petitioners for setting aside the order dated 28th October, 2011 has been dismissed by the Additional District Judge, Court No. 12, Meerut. Petitioner No. 1-Central Bank Karmchari Awas Samiti Limited (hereinafter referred to as the "Society") is a Society registered under the provisions of the U.P. Co-operative Societies, Act, 1965. Petitioner No. 2-Naresh Kumar claims to be the Secretary of the Society. In furtherance of the objects for which the Society was constituted, several plots in Village Nagala Tasi Kasampur, Tehsil and District Meerut were purchased by the Society through registered sale-deed dated 23rd December, 1988 and after the purchase of the aforesaid land, the Society started development on the basis of the lay out plan

submitted before the Meerut Development Authority.

2. Original Suit No. 831 of 2007 was, however, instituted by Shanti Prasad (since deceased) and Shashi Jain against the Society through the Ex-Secretary of the Society Rajesh Mishra (defendant No. 1). Notice was issued to the defendant and a written statement was filed by the defendant through Rajesh Mishra on 12th February, 2008. In paragraph 27 of the written statement it was specifically averred by the defendant that the Society had wrongly been impleaded through the Ex-Secretary.

3. The application filed by the plaintiffs for grant of temporary injunction came up before the Court on 18th May, 2009. The Court noticed that the plaintiffs had put in appearance in the suit but neither any application seeking adjournment had been filed and nor the counsel for the defendant had appeared. The Court, in such circumstances, allowed the application filed by the plaintiffs for grant of temporary injunction and restrained the defendant from interfering with the possession of the plaintiffs over 1/6th portion indicated at the end of the plaint and from transferring the property in favour of any other person and fixed 20th July, 2009 for framing of issues. The plaintiffs served a copy of the order dated 18th May, 2009 on 31st May, 2009 and it is asserted that the Society then came to know of the filing of the Original Suit by the plaintiffs.

4. An application was, accordingly, filed on 1st July, 2009 by Yuvraj Kumar, Secretary of the Society, under Order 1 Rule 10 read with Section 151 of CPC (39-C) with a prayer that the plaintiffs may be directed to delete the name of the Ex-Secretary Rajesh Mishra and substitute the name of Yuvraj Kumar. This application was allowed though the plaintiff resisted it. Yuvraj Kumar also filed an application (42-C) on behalf of the Society under Order 39 Rule 4 CPC for recalling the order dated 18th May, 2009 and for hearing the temporary injunction application on merits. This application was supported by an affidavit (43-C).

The order dated 18th May, 2009 was also assailed by the petitioners by filing an appeal which was registered as Misc. Appeal No. 55 of 2009. This appeal was dismissed on 29th July, 2009 for the reason that the appellants had filed an application under Order 39 Rule 4 CPC which was pending and a direction was issued to the Trial Court to decide this application within a period of one month.

Rajesh Mishra, the Ex-Secretary of the Society also filed an application dated 24th August, 2009 (48-C) mentioning therein that he was not the Secretary of the Society and asserted that he had also mentioned this fact in paragraph 27 of his written statement.

5. The Trial Court by the order dated 28th November, 2011 rejected the application filed by the defendant under Order 39 Rule 4 CPC for the following reasons :

1. A perusal of the records shows that neither the plaintiffs nor the Ex-Secretary

in the written statement made a false or misleading statement in relation to a material particular and, therefore, the provisions of Order 39 Rule 4 CPC are not attracted.

2. The facts stated in the application filed by Yuvraj Kumar relate to the merits of the case and the Court cannot sit in an appeal over the order dated 18th May, 2009 earlier passed by the Court.

3. The order dated 18th May, 2009 was not an ex parte order and was the order passed on merit and, therefore, in the absence of any change in circumstances, the application will not fall within the scope of Order 39 Rule 4 CPC.

6. Feeling aggrieved, the Society filed a Miscellaneous Civil Appeal for setting aside the aforesaid order dated 28th November, 2011. This appeal was dismissed by the order dated 26th July, 2012 for the following reasons :

1. The appellant has not pointed out anything in the affidavit which may show that the plaintiffs had knowingly made a false or misleading statement in relation to a material particular in the application filed for grant of temporary injunction.

2. Notice was served on the Society which filed a written statement through Rajesh Mishra who claimed himself to be the Secretary of the Society.

3. Even in the Appeal filed by the defendant against the grant of temporary injunction, plea was not taken that the Society did not have notice of the suit or that Rajesh Mishra was not authorised to file a written statement on behalf of the Society.

4. There is no infirmity in the order passed by the Trial Court that the provision of Order 39 Rule 4 CPC was not attracted.

7. Sri Shashi Nandan, learned Senior Counsel appearing for the petitioners assisted by Sri Shiv Sagar Singh, submitted that both the Trial Court and the Appellate Court committed an illegality in holding that Order 39 Rule 4 CPC was not attracted. In this connection, learned Senior Counsel has pointed out that the petitioners had deliberately impleaded the Society through its Ex-Secretary Rajesh Mishra who in his written statement had clearly stated that he was the erstwhile Secretary and, thereafter, he or his counsel did not appear in the case and it is only when the Society got to know of the order dated 18th May, 2009 on 31st May, 2009 that it filed an application through the Secretary Yuvraj Kumar for a direction upon the plaintiffs to substitute the name of Yuvraj Kumar in place of Rajesh Mishra and also filed an application under Order 39 Rule 4 CPC for recalling the order dated 18th May, 2009. It is his submission that it is clearly a case where notice was not served on the Society at all since the notice on the Society can be said to have been served only if the Society was impleaded through the Secretary and not the Ex-Secretary.

8. Learned Senior Counsel for the petitioners also submitted that the Trial Court passed the temporary injunction order on 18th May, 2009 merely for the reason

that the counsel for the defendant had not appeared and adjournment was not sought without even adverting to the three established ingredients for grant of temporary injunction namely prima facie, balance of convenience and irreparable injury likely to be caused to the plaintiffs. Learned Senior Counsel submitted that in such circumstances, the Trial Court committed an illegality in holding that since the written statement had been filed by the defendant, the application under Order 39 Rule 4 CPC was not maintainable.

9. Sri B.D. Mandhyan, learned Senior Counsel for the respondents, however, submitted that there is no illegality in the impugned orders which may call for any interference by this Court under Article 226 of the Constitution. Learned Senior Counsel submitted that the application under Order 39 Rule 4 CPC was not maintainable and in support of his contention he has placed reliance upon the decision of this Court in *Mayur Packaging Industries v. U.P. State Financial Corporation*, 2007 (6) ADJ 447.

10. I have considered the submissions advanced by the learned counsel for the parties.

It is not in dispute that the plaint of Original Suit No. 831 of 2007 was presented on 10th August, 2007 by the plaintiffs in which the Society was impleaded as a defendant through its Secretary Rajesh Mishra. The case of the petitioners is that Rajesh Mishra had been removed as the Secretary of the Society by the order dated 2nd December, 2004 passed by the Deputy Housing Commissioner, Lucknow and the Administrative Committee also resolved on 10th March, 2005 to remove Rajesh Mishra which resolution was duly served upon Rajesh Mishra on 12th March, 2005. The plaintiffs do not dispute this fact but what is asserted is that notice was issued to the defendant and the written statement was also filed by the defendant through Rajesh Mishra.

It needs to be noticed that Rajesh Mishra, in the written statement filed on behalf of the defendant, specifically asserted in paragraph 27 that he was the erstwhile Secretary of the Society and in the verification clause he also stated that he was erstwhile Secretary of the Society. This written statement was filed by the Society through its erstwhile Secretary Rajesh Mishra on 12th February, 2008. Rajesh Mishra had also filed the affidavit before the Trial Court clearly asserting that he was the Ex-Secretary of the Society and he had also mentioned this fact in the written statement.

11. When the application for grant of temporary injunction came up for orders before the Trial Court on 18th May, 2009, temporary injunction was granted by the Trial Court merely for the reason that the defendant or the counsel of the defendant had not appeared and nor application seeking adjournment was moved on their behalf. There is no discussion of the facts, much less any finding on prima facie case, balance of convenience or irreparable injury likely to be caused to the plaintiffs.

Order 39 Rule 4 CPC is as follows :

4. Order for injunction may be discharged, varied or set aside.-Any order for an injunction may be discharged, or varied, or set aside by the Court, for reasons to be recorded, either on its own motion or on application made thereto by any party dissatisfied with such order.

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice.

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

Provided also that if at any stage of the suit it appears to the Court that the party in whose favour the order of injunction exists is dilating the proceedings or is otherwise abusing the process of Courts, it shall set aside the order for injunction.

It has, therefore, to be seen whether the plaintiffs had knowingly made a false or misleading statement in relation to material fact in the application filed for grant of temporary injunction and the injunction was granted without giving the notice to the opposite party. It has also to be seen whether the order of injunction was issued without giving opportunity to the defendant of being heard.

12. It is not in dispute that the defendant-Society was impleaded through the Ex-Secretary Rajesh Mishra as this fact has not been denied by the plaintiffs. It is also not denied that the written statement was filed through the Ex-Secretary. In the said written statement filed by Rajesh Mishra, it was specifically stated that he was the Ex-Secretary of the Society. The Society should have been impleaded through the present Secretary Yuvraj Kumar and not the Ex-Secretary who may not have any interest in the matter. In such circumstances, it cannot be said that any notice was issued to the Society or that the written statement had been filed by it. It is clearly a case where notice had not been issued to the Society and, therefore, the defendant was justified in filing the application under Order 39 Rule 4 CPC for setting aside the order.

13. A party subsequently impleaded as a defendant can file an application under Order 39 Rule 4 CPC as has been held by the Kerala High Court in *Celin and Another Vs. Thomas Johnson and Others*, . The relevant observations are as follows:

5. I find that interpretation of the expression "any party dissatisfied with such

order" canvassed by counsel for the petitioners to be totally unacceptable. The expression "any party" used in Order 39 Rule 4 must, according to me, reasonably and considering the purport, purpose and object include any party who had subsequently come on record as a party. The insistence that such a subsequently impleaded necessary and vital party cannot seek the invocation of the powers under Order 39 Rule 4 would, according to me, be counter productive and defeat the interests of justice. A plaintiff acting without bona fide will in such event be entitled to file a suit without the essential and necessary party on the array and secure interim orders and successfully resist the attempt of such an essential and necessary party to get the order set aside, vacated or modified when he later comes on record as permitted by the Court. That cannot obviously be the law. Such an interpretation would negate the interests of justice. There is nothing in Order 39 Rule 4 which would permit this Court to adopt such restricted and limited interpretation of the expression "any party". No principle or precedent is pressed into service in support of that contention. I take note of the fact that the impleadment of respondents 3 and 4 is not challenged at all.

(emphasis supplied)

14. In this connection, the decision of the Pat High Court in Mohammad Khalilur Rahman v, Parasnath and others, AIR 1964 Patna 165, also needs to be noticed:

3. Mr. Asghar Hussain, appearing for the petitioner, has contended that the Court had no jurisdiction under Order XXXIX, Rule 4, of the Code to recall the order of injunction already passed as it was intended to apply to only two cases, namely, (1) where in certain urgent cases the Court could pass an ex parte order of injunction under Rule 3 of Order XXXIX, and (2) where the order of injunction may have the effect of becoming unduly harsh or unnecessary or unworkable if there had already been a previous order or injunction. In support of this contention, he has cited before me a Bench decision of the Madras High Court, in (Sri) Govinda Ramanuja Das Goswami Vs. (Appala) Vijiaramaraju and Another, . In that case their Lordships did make an observation that Order XXXIX Rule 4, is intended to cover two classes of cases, (1) when an urgent order ex parte has been passed under Rule 3, Rule 4 will allow the party against whom it has been passed to apply to have it discharged or varied or set aside, and (2) when an Injunction order already in force has, owing to fresh circumstances, become unquiet harsh or unnecessary or unworkable, it would be open to either party to apply under Rule 4 to the Court to discharge vary or set it aside. It was further observed that Rule 4 is not intended to set at nought the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be reopened except on the representation of some new matter not available when the original order was passed. In my opinion, this case, instead of being of any assistance to the petitioner, supports the case of the defendant. The ratio of that case appears to be that, if an order of injunction has been passed after giving opportunity to both the parties to be heard, it cannot ordinarily be

set aside or varied under Rule 4; but where there has been no opportunity given to a party against whom the order of injunction has been passed to be heard, that principle of law will not apply and Rule 4 of Order XXXIX of the Code will come to the aid of that party to require the Court to recall the order. In the instant case, on the finding that the notice of the ad interim order of injunction was not served on the defendant, it was a clear case where the Court could exercise its power under Rule 4 of Order XXXIX. Moreover, the effect of the decision of the Madras High Court is not that the principles of Rule 4 could be invoked only in two classes of cases enumerated by their Lordships in their judgment. Their Lordships have made a reference to two classes of cases only by way of illustration. They did not, however, say that there cannot be a third class of cases in which, on the principle enunciated above, Rule 4 could not be invoked.

(emphasis supplied)

Learned Senior Counsel for the respondents has placed reliance on the decision of the High Court in Mayur Packaging Industries (*supra*). The Court observed :

13. In my opinion, the injunction order granted by the trial Court, cannot be recalled under Order 39 Rule 4 of the C.P.C. and the Court below committed a manifest error in posting the application afresh for reconsideration of the injunction application. The injunction order can only be discharged, varied or set aside either under the first proviso or the second proviso or under the proviso added by the U.P. Amendment Act. The Court cannot recall the injunction order nor could it pass an order directing the injunction application to be heard afresh. Such an order is wholly illegal and without jurisdiction. Since the defendant was served with the notice and he failed to appear, therefore, he cannot allege that no opportunity of hearing was provided to him or that the injunction order was passed without giving a notice to him. If there is a change in the circumstances or the order causes undue hardship, the Court in that event, can vary, discharge or vacate the injunction order but could not, on those grounds recall its order and post the matter afresh for reconsideration.

This decision does not help the respondents. The defendant cannot be said to be served as notice was not sent through the Secretary of the Society but through the erstwhile Secretary.

The orders dated 28th October, 2011 and 26th July, 2012 passed by the Court below are, accordingly, set aside. The Court below shall now decide the application filed by the petitioners under Order 39 Rule 4 CPC expeditiously, preferably within a period of three months from the date a certified copy of this order is filed by either of the parties.

The writ petition is allowed to the extent indicated above.