

(1971) 09 PAT CK 0013
In the Patna High Court
Case No : Civil Revision No. 878 of 1971

Chandrama Singh

APPELLANT

Vs

Yasodanandan Singh and Another

RESPONDENT

Date of Decision : 14-09-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3, Order 39 Rule 4, 115, 80
Evidence Act, 1872 — Section 101

Citation : AIR 1972 Patna 128

Hon'ble Judges : B.D. Singh, J

Bench : Single Bench

Advocate : Basudeo Prasad, Radha Mohan Prasad, Narendra Prasad, Shambhu Nath Jha No. 2, Mahesh Prasad and Sudha Rani Jaiswal, for the Appellant; Kailash Roy, B.N. Agrawal, S.S. Hassan, Siddheshwar Prasad Sinha and Madhu Sudan Singh, for the Respondent

Final Decision : Allowed

Judgement

B.D. Singh, J.—This application, u/s 115 of the Code of Civil Procedure, (hereinafter referred to as "the Code") is directed against an order of the District Judge dated the 7th July, 3,971, passed in Misc. Appeal No. 17 of 1971, refusing to stay the operation of the ad interim order of injunction dated, the 17th May, 1971, passed by the Subordinate Judge, in title Suit No. 20 of 1971, whereby he had directed the petitioner (defendant No. 2) and Begun Sumbrai, (opposite party No. 2 -- defendant No. 1), the then Minister of Excise. Government of Bihar, to maintain the status quo, and further restrained the petitioner from joining the post of the Superintendent of Excise, Chaibassa, until further orders.

2." In order to appreciate the point involved in this application for consideration by this Court it will be necessary to state briefly the facts. Yasodanandan Singh opposite party No. 1, who, was functioning as the Excise Superintendent at Chaibassa, instituted the said title suit on the 17h May, 1971, impleading the petitioner and the then Excise Minister, Begun Sumbrai, as defendants. In

Paragraph 5 of the plaint he alleged that the Excise Minister was very much prejudiced and hostile to him, as he did not fulfil illegal directions issued by the Minister, who lost temper, and on the 4th May, 1971, threatened the plaintiff to transfer him to some distant place, as he had not obliged him. On the 10th May, 1971, the plaintiff had been to Patna to attend Excise Officers' Conference, when the Minister summoned him at his residence, and asked the plaintiff to mend his ways and to tender apology for not carrying out his orders. The plaintiff thereupon submitted that he was all along following the rules and it would not be possible for him to carry out the illegal order passed by him upon which the Minister became furious, and threatened to transfer him within a week. In Paragraph 6 of the plaint it is stated that the action of the Minister in making transfer of the plaintiff from Chaibassa and posting the petitioner in his place was motivated and it was only to penalise the plaintiff. In paragraph 7 he stated that the cause of action for the suit arose on the 4th May, 1971, when the defendant No. 1 threatened the plaintiff at Chaibassa, on the 10th May, 1971, at Patna and lastly on the 14th May, 1971, when the plaintiff learnt at Chaibassa that defendant No. 1 was going to transfer him. In the suit he sought amongst others the following two reliefs:

(a) It be declared that the Plaintiff cannot be transferred from Chaibassa by defendant No. 1 within three years of his service there and unless the proposal is made by the departmental heads.

(b) The defendant No. 1 be restrained from taking any steps to transfer the plaintiff from the district of Singhbhum to any other place unless the proposal for transfer is made in due course after completion of three years of service at Chaibassa or in the alternative if the transfer order has already been, passed the operation of the order be stayed till the Plff. completes three years of service at Chaibasa and defendant No. 2 be restrained from implementing any order of transfer and from, joining and taking over charge from the plaintiff as Superintendent of Excise, Singhbhum at Chaibassa.

3. It will be relevant to mention here that when the suit was filed on the 17th May, 1971, it was morning court. On that very date a notification in Hindi was issued by the State Government making certain transfers including that of the plaintiff and the petitioner, the relevant portion of which is quoted below in Roman:

"Sankhya A/TR -- 207/70/0 2765 Shri Chandrma Singh, Adhikshak Utpad, Muzaffarpur, ko Singhbhum Jila men Adhikshak Utpad ke rup men padasthapit kiya jata hai. Inka Mukhyalaya Chaibassa men rahega.

Bihar Rajyapal ke adesh se, Sd. Mehendra Singh. Sarkar ke Up Sachib.

XX XX XX Sankhya A/TR-207/70/0 2768 Sri Yasodanandan Sinha Prabhari Adhikshak Utpad Singhbhum ko Saharsa Jila men Prabhari Adhikshak Utpad ke rup men padasthapan kiya iata hai. Inka Mukhyalay Saharsa men rahega.

Bihar Rajyapal ke adesh se. Sd. Mahendra Singh Sarkar ke Up Sachib."

After institution of the suit, the Plaintiff on the same date had filed an application before the court for ad interim injunction. The court accordingly passed ex parte order dated the 17 May, 1971, and issued notices on the defendants to show cause fixing 5th June, 1971, for the same. On that date the petitioner as well as opposite party No. 2 jointly showed cause and prayed that the order of injunction be vacated. In the show cause it was stated inter alia, that the suit could not be entertained on the ground of non-service of mandatory notice u/s 80 of the Code; the suit was bad for non-joinder of the State of Bihar as a necessary party to the suit, it was misconceived and not maintainable for any of the reliefs claimed. It was, also alleged that there was no question of irreparable loss to the opposite party No. 1 in the event of injunction being refused and the balance of convenience did lay in not granting the injunction, as prayed. It was also alleged that in the plaint no prima facie case was made out. The Minister, i. e., opposite party No. 2, had also denied any motive or grudge against opposite party No. 1 in the said show cause, and the order of the transfer did not amount to punishment to opposite party No. 1.

In the show cause they prayed that the order of ad interim injunction passed should be vacated. The Subordinate Judge, however, on a petition filed by the opposite party No. 1, adjourned hearing of the injunction matter to the 15th June, 1971. On that day also the injunction matter was not heard, as the Subordinate Judge on the application of the opposite party No. 1 adjourned matter to be heard on the 9th July, 1971.

Meanwhile the petitioner on the 17th June, 1971 filed an appeal before the District Judge against the order of the Subordinate Judge granting ex parte injunction. On the 23rd June, 1971, the petitioner filed a petition before the District Judge in the said appeal praying for stay of the operation of the order dated the 17th May, 1971, passed by the Subordinate Judge. The District Judge, however, by the impugned order dated the 7th July, 1971, rejected the prayer of the petitioner to stay the operation of the order. On the 9th July, 1971, which was the date fixed by the Subordinate Judge for hearing, the injunction matter was not hearing and again it was adjourned to 14th July, 1971, as the learned Subordinate Judge was on leave on that date. Opposite party No. 1 on that date filed a petition for adjournment and it was adjourned to the 21st July, 1971, when the Government Pleader appeared on behalf of the defendants and contended that the suit was not maintainable and in view of the reliefs claimed by the plaintiff in the plaint no prima facie case was made out, justifying the order of ad interim injunction. On that date also the matter could not be heard in full and it was adjourned to 22nd July, 1971, on which date the opposite party No. 1 filed a petition for amendment of the plaint in order to meet the argument advanced by the Government Pleader.

A petition was filed on behalf of the defendants on that date that the injunction matter should be disposed of first by the learned Subordinate Judge and the

petition for amendment of the plaint filed by the plaintiff should be disposed of subsequently. However, the learned Subordinate Judge did not accede to the request made on behalf of the petitioner and did not dispose of the matter regarding ad interim injunction. Thereafter defendant No. 2, Chandrma Singh, filed this civil revision before this Court on the 5th August, 1971, which was admitted on the 17th August, 1971; in the revision application the petitioner has prayed also for the operation of the order but on that date counsel for the opposite party prayed for time. On the 27th August, 1971, this Court after hearing the parties ordered that the best course would be to dispose of civil revision itself.

4. On the facts and circumstances of the case enumerated above and on the submission made by the learned counsel for the parties two points emerge for consideration in this Civil revision, namely, (i) whether the civil revision is maintainable against the impugned order and (ii) whether on the facts and circumstances of the case the learned Subordinate Judge was justified in granting ad interim injunction by order dated the 17th May, 1971. The consideration of these points, however, is interdependent but since Mr. Kailash Roy, learned Counsel appearing on behalf of opposite party No. 1 has raised preliminary objection regarding maintainability of the civil revision in this Court it will be convenient to deal With point No. (i) first.

5. Learned counsel for opposite party No. 1 submitted that the revision application u/s 115 of the Code is maintainable neither against the order of the District Judge refusing to stay operation of the order of ad interim injunction; nor against the order of the Subordinate Judge granting ad interim Injunction, which was obviously passed under Rule 3 of Order 39 of the Code. According to him the remedy of the petitioner is provided under Rule 4 of the said order and to show cause against the order of ad interim injunction passed by the Subordinate Judge. He submitted that in fact in the instant case the petitioner along with the Excise Minister has showed cause. They ought to have waited till the show cause application was disposed of by the trial court, but instead they rushed against the order before the District Judge in appeal. The appellate court found that title plaintiff had established a prima facie case for ad interim injunction and, therefore, he rightly refused the prayer of the petitioner to stay operation of the order of ad interim injunction. According to him, the order, which was passed by the Subordinate Judge under Rule 3 of Order 39 of the Code is also not appealable under Order 43, Rule 1 of the Code.

6. In order to substantiate his contention that in the instant case Rules 3 and 4 of Order 39 are applicable, he referred to (Sri) Govinda Ramanuja Das Goswami Vs. (Appala) Vijaramaraju and Another, where their Lordships observed that Order 39, 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 show 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 unduly 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. In the instant case, on the facts and circumstances of the case the object of granting injunction would have been defeated as the transfer order passed by the Excise Minister would have taken its effect and opposite party No. 1 would have been forced to hand over charge to the petitioner at Chaibassa.

Learned Counsel then drew my attention to *Ramnikal Pitambardas Mehta Vs. Indradaman Amratlal Sheth*, where their Lordships were considering Sections 13 and 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, and the provisions contained u/s 115 of the Code, Their Lordships in paragraph 7 of their Judgment at pages 1677-1678 observed that the question raised was whether a decree in ejectment should be passed on the ground of personal requirement u/s 13(1)(g) of the Act where it was proved that the landlord wanted to pull down the premises and build another and then occupy it. It was said that in such a case he had to proceed under Clause (hh) of Section 13(1). It was clear that the question so raised was one of interpretation of these two clauses. Section 28 of the Act gives jurisdiction to the Court specified in it, to try a suit or proceeding between a landlord and tenant relating to possession of the premises. That section expressly provides that no other Court, subject to the provisions of Sub-section (2) which do not apply to this case, has jurisdiction to entertain such suits. It was clear from this section that the trial Court had full jurisdiction to entertain the suit for ejectment. That being so, it had jurisdiction to interpret whether Clause (g) of Section 13(i) would apply to the present case. The appellate Court had jurisdiction to hear the appeal. The High Court could not, therefore, interfere in revision with the decision of the appellate Court, even if it had gone wrong, on facts or law, in the exercise of its jurisdiction. It follows that the revision application had to be dismissed by the High Court and that this appeal too must fail. Learned counsel submitted that the revisional power of the High Court is derived from Section 115 of the Code which reads:--

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of Its jurisdiction illegally or with material irregularity.

the High Court may make such order in the case as it thinks fit."

He urged that every order of a court in course of a suit does not amount to a case decided. According to him, in the instant case the order which the learned Subordinate Judge has passed was under Order 39, Rule 3 of the Code and it did not amount to a case decided under the terms of Section 115 of the Code. In

order to find support to his contention he relied on Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, where their Lordships were considering the provision contained u/s 115 of the Code. Their Lordships at page 410 observed that every order of the Court in course of a suit does not amount to a case decided. A case may be said to be decided if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy, every order in the suit cannot be regarded as a case decided within the meaning of Section 115.

In my opinion, their Lordships have not laid down a general proposition of law. In that case their Lordships were considering whether the trial Court by overruling an objection to a question put to a witness and allowing the question to be put decided a case. Their Lordships held that that would not be a case decided. It may further be seen at that very stage in paragraph 10, their Lordships had observed that the expression "case" is not limited in its import to the entirety of the matter in dispute in an action. The expression "case" is a word of comprehensive import; it includes a civil proceeding and is not restricted by anything contained in Section 115 of the Code to the entirety of the proceeding in a Civil Court. To interpret the expression "case" as an entire proceeding only, and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the as-grieved litigant where it is most needed and may result In the perpetration of gross injustice.

7. He then referred to D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, where their Lordships while dealing with the provisions contained in Section 115 of the Code observed in paragraph 4 that a mass of reported cases only serve to show that the High Court do not always appreciate the limits of their jurisdiction under this section. He also drew my attention to M.K. Palaniappa Chettiar and Another Vs. A. Pennuswami Pillai, where their Lordships at page 293 observed that the Courts had the jurisdiction either to grant the application or to reject it, depending on whether the landlord succeeded in proving that the tenant had used the building for a purpose other than the one for which it was let out, or failed to do so. Even if the finding by the lower Courts was incorrect, it would be an error committed by those courts in the decision itself in proper exercise of their jurisdiction. It could not be held that, in giving such a decision, the courts exercised jurisdiction not vested in them. At the highest, the only criticism that could be levelled was that their decision suffered from an error of law; but, however gross an error of law committed by those courts, the High Court could not interfere u/s 115 of the Code of Civil Procedure, specially when there was no procedural error committed by those courts. In my view the above observations of their Lordships do not restrict the revisional power of the High Court in appropriate cases. If the Subordinate Judge while granting ad interim injunction had overlooked the well established principle of law, this Court has certainly jurisdiction to interfere it.

Reference may be made to Major S.S. Khanna Vs. Brig. F.J. Dillon, , where their Lordships at page 502 observed in paragraph 17 that for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court and it would be putting an unwarranted restriction upon the jurisdiction of the High Court to restrict it to those cases only where no appeal would reach the High Court from the final order passed in the proceeding. In the instant case it will be more appropriate to examine those cases which relate to Order 39 dealing with temporary injunction.

In Shyam Behari Singh Vs. B. Biseswar Dayal Singh and Others, Jwala Prasad and Kulwant Sahay, JJ. observed that an appeal lies from an order granting an injunction as well as from an order refusing an injunction. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under Order 39, Rule 1 and is appealable under Order 43, Rule 1 (r). It may be seen that in the instant case the valuation of the suit was such that an appeal would lay before the District Judge. The petitioner could not have come directly to the High Court. In that view also the revision would lie to this court.

In the same volume Mullick and Bucknil, JJ. at page 526 in the case of Keneth Arthur Hill v. Ranjan Bardhan observed that an ad interim injunction is justified only when a prima facie case is made out by the plaintiff. On which side lies the balance of convenience should be seen by the Court. Where damage could be recovered from the defendant who had spent a large sum of money which would be wasted if the injunction were granted, the Injunction was refused.

In Sankara Pillai Madhavan Pillai Vs. Inez Rosario, his Lordship after surveying various cases on the point including several cases of this Court in Brajendra Nath Ghosh and Others Vs. Sm. Kashi Bai and Others, and Hemraj Kapoor Vs. Seventeen Textile Traders (India) and Others, , at page 31 observed that in some cases, points of law may arise which are related to questions of jurisdiction. The provision of law is that in granting injunction the Court is bound to follow certain well laid down principles. Of these principles the subordinate Courts failed to consider two of the important conditions. One is irreparable loss which can be compensated in damages if an injunction, is refused, and the other is the balance of convenience. When the subordinate Court failed to consider this important question of law, it can be said that they failed to exercise jurisdiction which is vested in it. If there is such a failure to exercise jurisdiction on a question of law, evidently Section 115, of the Code comes into play.

8. I am also reminded of a passage at page 101 of "the law relating to Injunctions" (12th Edition, by Woodroffe) which reads:

"The power which the Court possesses of granting injunctions whether interlocutory or perpetual (however salutary) should be very cautiously exercised, and only upon clear and satisfactory grounds; otherwise it may work the greatest injustice. An application for an injunction is an appeal to the

extraordinary power of the Court, and the plaintiff is bound to make out a case showing a clear necessity for its exercise; it being the duty of the Court rather to protect acknowledged rights than to establish new and doubtful ones. Moreover, a temporary injunction is a restrictive or prohibitory process designed to compel the party against whom it is granted to maintain his status merely until the matters in dispute shall by due process of the Courts be determined. As such, an injunction is in its operation, somewhat like judgment and execution before trial; it is only to be resorted to from a pressing necessity, to avoid injurious consequences which cannot be repaired under any standard of compensation."

In the light of the above observation I proceed to examine the impugned order dated the 17th May, 1971, the relevant portion of which is contained in paragraph 2 thereof, which reads thus:

"In the circumstances of the facts stated and the allegations made in the plaint and in the petition, I think it fair, reasonable and proper to pass orders against defendants Nos. 1 and 2 to maintain the status quo with a clear direction that defendant No. 2 be restrained from joining the post of superintendent of Excise, Chaibassa, until further orders. Let a show cause notice be issued to the defendants as to why this order be not made absolute, fixing 5-6-71, for return."

This is all we find in the impugned order. He failed to consider three important conditions for the grant of ad interim injunction, namely, (i) prima facie case to be established by the plaintiff; (ii) irreparable loss which can be compensated in damages if an injunction is refused and (iii) the balance of convenience. In my opinion, therefore, the learned Subordinate Judge has failed to exercise jurisdiction on the question of well established principle of law. Thus, this Court has jurisdiction to interfere with the said order u/s 115 of the Code.

9. Mr. Kailash Roy then referred to certain paragraphs of the counter-affidavit of the opposite party No. 1 dated the 23rd August, 1971; which was filed on that very date in this Court. In paragraph 12 therein it is stated that the present Government headed by Shri Bhola Paswan Shastri was formed in the first week of June, 1971 and the Council of Ministers took a decision that the order of transfer and posting passed by the Council of Ministry or the Minister-in-charge from the 15th of May 1971 to the 31st May 1971, stood stayed and even if such orders had been acted upon they would be examined afresh by the present Council of Ministers or the Minister-in-charge. It is further stated therein that the impugned order of transfer comes under the category noted above and subsequently by notification dated the 21st July, 1971, the transfer of the Excise Superintendent, Saharsa, has been cancelled and thus by implication the transfer of opposite party No. 1 to Saharsa stands cancelled. The opposite party No. 1 has also annexed a copy of the notification No. 4016 dated the 21st July, 1971, as Annexure "C" to the counter-affidavit. On the basis of the above statement learned counsel submits that it would be futile now to stay the operation of the impugned order by this Court as the present Government has already stayed the transfer which had given rise to the present suit. In my opinion, that is an

additional ground why I wish to interfere with the impugned order. The suit itself becomes futile and that further affects also adversely the principle of the "balance of convenience" which the plaintiff has endeavoured to establish, for the grant of ad interim injunction.

10. After careful consideration of the facts and circumstances of the case I hold that the revision application against the impugned order is maintainable.

11. Now I turn to consider point No. (ii). While dealing with point (i) I have already observed and quoted the relevant portion of the impugned order, In my opinion, the plaintiff, as the plaint stood at the date, when the impugned order was passed, had failed to establish prima facie case, as it may be seen that no notice u/s 80 of the Code was given to the Excise Minister before the institution of the suit It has been repeatedly held by this Court, that the provision u/s 80 is mandatory and admits of no exception. Reference may be made to the The State of Bihar and Another Vs. Jiwan Das Arya, wherein Untwalia and Mukherji, JJ. observed that Section 80 is mandatory even if relief claimed is in the nature of injunction. Their Lordships further held:

"The inhibition contained in the section as to the institution of suit against the Government is unqualified. No suit can be instituted against the Government or as a matter of that, against the State or the Union until the expiration of two months next after notice in writing has been given to the proper authority. It matters little whether the suit relates to the past action of the Government or is in relation to the threatend action or injury and the suit is in the nature of a bill quia timet. But if the suit is to be filed against a public officer notice is mandatory only when it is in respect of any act purporting to be done by such officer in his official capacity."

Mr. Roy, however, contended that in the instant case the Excise Minister's order for the transfer was vitiated and could not be said to be in the official capacity, as it was motivated. In my opinion, mere allegation in the plaint is not enough to establish mala fide against the Minister. Heavy onus lies on the plaintiff to establish that. Merely by making allegation it cannot be said that he was not acting in the capacity as Excise Minister. Mr. Roy then referred to the observations made by their Lordships in The State of Bihar and Another Vs. Jiwan Das Arya, wherein Untwalia. J. observed in paragraph 7 at page 390 (of Pat LJR) = (at p. 144 of AIR)

".....But, I am afraid, the section, when so interpreted in relation to the suit to be instituted against the Government, invites the risk of being constitutionally invalid on the ground of infraction of the fundamental right of a citizen under Article 19(1)(f) of the Constitution....."

On the basis of the said observation Mr. Roy contended that in the instant case also his client would challenge the constitutionality of Section 80 of the Code. But, in my opinion, so long it is not challenged and decided one way or the other, the provision contained in Section 80 is mandatory. The learned Subordinate

Judge should not have ignored the provision contained in Section 80 of the Code while passing ad interim injunction.

12. It may further be seen that there is no mention in the plaint of any transfer order said to have been made by the Minister on the date when the suit was instituted. It was a mere apprehension. In fact, after the institution of the suit on the same date there was notification by the Governor at the instance of the State Government published in the official Gazette which I have earlier mentioned. The State of Bihar is also not made party in the suit. The notification is also not challenged therein. Even then the petitioner is restrained from joining the post and from carrying out the order of transfer, mentioned in the said notification. The petitioner has alleged in his petition that before he received notice from the Court regarding ad interim injunction he had already handed over charge at Muzaffarpur to new incumbent and had proceeded to join the post indicated in the notification. Faced with the said situation because of the ad interim injunction of the Court, he cannot obey now the order of the State Government contained in the said notification. He is sitting idle and not performing any duty. In that circumstance, as the plaint stood then, no prima facie case was established by the plaintiff. Learned Counsel for the opposite party No. 1 has fairly conceded that I have to test the impugned order in the light of the plaint as it stood then. Subsequent amendment petitions, which the plaintiff has filed, should be ignored for the time being for consideration of the impugned order. Besides, in this case there would not have been irreparable damage caused to opposite party No. 1. His loss, if any, due to transfer can easily be measured in terms of money and he can be adequately compensated if he succeeds in the suit that his transfer was bad in law. Mr. Roy, however, contended that by the notification dated the 17th May, 1971, he had been reduced in rank and made incharge (Prabhari) Superintendent of Excise instead of promoted officiating (Pronatti dwara Sthanapanna) Superintendent of Excise. In my opinion, that notification was not even mentioned in the plaint, as I have mentioned earlier. Therefore, that was not at all under consideration when the Subordinate Judge had passed the impugned order. At present I do not wish to express my opinion whether it would amount to his reduction in rank or not as that may prejudice the Subordinate Judge while disposing of the suit. In the circumstances of the case the balance of convenience also did not necessitate the grant of ad interim injunction.

13. In this case I wish to point out that the learned Subordinate Judge was not justified in granting so many adjournments and did not dispose of the show cause application filed by the petitioner and the then Excise Minister (opposite party No. 2). He ought to have disposed of the application without delay. That should not have waited for the subsequent applications which the plaintiff filed for amendment of his plaint, as mentioned earlier. In *L.D. Meston School Society Vs. Kashi Nath Misra, Agarwala and P.L. Bhargava,, JJ.* observed, while dealing with Order 39, Rule 4, that when an ex parte injunction is issued against a party, and the party applies under Rule 4 for discharge, variation or setting aside of the order, it is the duty of the court to decide objections raised by the opposite party

to the passing of the order of injunction- Learned counsel thereafter contended that if the operation of the order is stayed, it virtually amounts to setting aside the impugned order, but for this the petitioner has not prayed before this Court. Besides, the petitioner has already filed an appeal before the District Judge against the impugned order and it is pending before the appellate Court. If the impugned order is set aside by this Court, that would affect the appeal also. In order to find support to his contention he relied on *Khushro S. Gandhi and Others Vs. N.A. Guzder and Others*, where their Lordships at page 1471 observed in para 9:

"The learned counsel for the appellants contends before us that the High Court had no jurisdiction to decide issue No. 5 in a revision. He says that the subject-matter of the revision was the order of the Civil Judge dated November 28, 1956, and the High Court could not decide any other point and convert itself into an original court. The learned counsel for the respondents tried to justify the decision regarding jurisdiction of the High Court u/s 24 Civil Procedure Code. This section, inter alia, provides that the High Court may withdraw any suit, appeal or other proceeding pending in any court subordinate to it and try and dispose of the same- We are unable to appreciate, how, the order of the learned Judge can be justified u/s 24. He has not purported to withdraw any suit and try the same. What he has done is to try an issue arising in a suit in a revision arising out of an interlocutory order. It seems to us that the High Court, even if the parties conceded, had no power to decide the issue. But if we set aside the order of the High Court and remit the case to the Civil Judge to try it according to Law, the Civil Judge would feel handicapped in deciding the case properly because he will feel bound to follow the opinion given by the learned Judge on issue No. 5.

14. In my opinion, this submission of learned Counsel for the opposite party No. 1 is correct. At present I do not wish to set aside the impugned order as an appeal is pending against the said order but at the same time it would be highly improper not to stay the operation of the said order, which cannot be supported on any principle of law, as indicated above. In my view, the appellate court ought to have stayed the operation of the impugned order. I may also point out that while dealing with the matter regarding stay of the operation of the order, the appellate Court has virtually decided the appeal itself by making various observations on the merit of the appeal. That he should not have done. After careful consideration, therefore, I set aside the order of the appellate court refusing to stay the operation of the impugned order dated the 17th May, 1971, and direct the stay of the operation of the said order till the disposal of the appeal.

15. In the result, the application is allowed and the operation of the impugned order dated the 17th May, 1971, is stayed till the disposal of the appeal pending before the lower appellate court. In the circumstances, however, there will be no order as to costs of this Court.

16. Before I part with this case I would like to make it clear that whatever

observations made by the appellate Court and by me while disposing of this application should not, affect in any way the disposal of the suit itself on merit. Whatever observations I have made are only for the purpose of examining whether it was a fit case for staying of the operation of the impugned order or not.