
(1981) 02 MP CK 0022

In the Madhya Pradesh High Court

Case No : Civil Revision No. 272 of 1979

Dhunda Singh

APPELLANT

Vs

Leeladhar and Another

RESPONDENT

Date of Decision : 25-02-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 1, Order 6 Rule 17

Citation : AIR 1982 MP 14 : (1982) 27 MPLJ 432

Hon'ble Judges : H.G. Mishra, J

Bench : Single Bench

Advocate : Party in person, for the Appellant; N.R. Newaskar, for the Respondent

Final Decision : Allowed

Judgement

H.G. Mishra, J.

This revision has been filed by the plaintiff against the order dated 31-3-1979, passed by the learned District Judge, Dewas, whereby he remanded the case to the trial Court for deciding the application for issuance of a temporary injunction, which was allowed by the trial Court by order dated 11-7-1978 and against which the appeal was preferred by the defendant-non-applicants under Order 43, Rule 1 (r), C. P. C.

Facts essential for decision of this revision are as under : In a suit brought by the plaintiff-applicant for declaration of title and issuance of a permanent injunction against the defendant-non-applicant he (the plaintiff) submitted an application for issuance of a temporary injunction, whereby issuance of temporary injunction restraining the defendant-non-applicants from interfering with the possession of the plaintiff over the plot in dispute, was claimed. This application was opposed by the defendant-non-applicants-herein on the ground that the land belongs to the Gram Panchayat, Panigaon, on allotment, and that the plaintiff-applicant-herein has unauthorisedly constructed a Tapra thereon.

The trial Court granted a temporary injunction by order dated 11-7-1978.

Aggrieved by this order the defendant-non-applicants herein preferred an appeal under Order 43, Rule 1 (r), C. P. C. During the pendency of this appeal the plaintiff submitted an application for amendment of the plaint seeking impleadment of the State of Madhya Pradesh as a party to the suit. After hearing arguments on the appeal as well as on the application for amendment of the plaint, the learned District Judge has allowed the aforesaid application submitted by the plaintiff and has set aside the order for grant of injunction merely on that ground and has directed the trial Court to examine the case of grant of injunction after impleadment of the State Government as a party to the suit, in the manner indicated in the impugned order. Hence this revision.

In this revision the applicant was heard in person. The applicant contended that the impugned order has been passed in an illegal manner; that it was obligatory on the learned District Judge to have decided the appeal preferred by the non-applicants against the order of grant of interim injunction passed by the trial Court in his favour; that the application for amendment of the plaint could not be decided by him on merits as he was not in seisin of the suit and the application could have been and ought to have been forwarded to the trial Court for decision according to law. Shri N. R. Nevaskar, learned counsel for the defendant-non-applicants argued in support of the impugned order. Having heard the applicant and Shri Nevaskar I have come to the conclusion that this revision deserves to be allowed and the case deserves to be sent back to the learned District Judge for the purpose indicated hereinafter.

The appeal before the learned District Judge was one under Order 43, Rule 1 (r), C. P. C. and not a regular appeal. Jurisdiction of the appellate Court while deciding appeal of such a character extends only to examine the validity of an order enumerated in Clause (r) of Order 43, Rule 1, C. P. C., which runs as under :

"An appeal shall lie from the following orders under the provisions of Section 104, namely :--

(r) an order under Rule 1, Rule 2, (Rule 2-A), Rule 4 or Rule 10 of Order XXXIX."

Accordingly, the scope of such appeal is limited. It extends to adjudication of challenge to an order of grant or refusal of interim injunction as envisaged by Order 43, Rule 1 (r), C. P. C. As such, the learned District Judge has no seisin over the suit as such. He was seized of proceedings for issuance of a temporary injunction in the suit and not of the suit itself. This aspect of the law appears to have been overlooked by the learned District Judge.

As a logical corollary flowing from the aforesaid position of law, it has to be concluded that the learned District Judge had no jurisdiction to entertain the application for amendment of the plaint submitted before him by the plaintiff-applicant herein. If the applicant herein (plaintiff) chose to submit the application in the appeal preferred by the defendants before the learned District Judge, only courses which would have been adopted by the learned District Judge were (a) to

direct the plaintiff to submit the amendment application before the trial Court; and (b) to forward it to the trial Court for decision in accordance with law after deciding the appeal on merits. However, he had no jurisdiction to decide the application for amendment of the plaint on its merits.

In order to resist the aforesaid conclusion Shri Nevaskar, learned counsel for the defendant-non-applicant, placing reliance on the provisions of Section 108 read with Section 107(2); Order 43, Rule 2 read with Rule 1 thereof and Order 6, R, 17, C. P. C., contended that power to allow amendment of the plaint was exercisable and has rightly been exercised by the District Judge, inasmuch as the appeal before the learned District Judge arose out of the "proceedings". It was also contended that the appeal is a proceeding. Accordingly, the impugned order could be and has rightly been, passed by the learned District Judge. Reliance was placed on the ratio of *Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another*, . This argument, though attractive on the face of it, is devoid of substance.

Undoubtedly, by virtue of Section 108 the provisions relating to appeals from original decrees shall, so far as may be, apply to appeals, inter alia from orders made under the Civil P. C. Accordingly, in an appeal against an appealable order under the C. P. C., the powers of the appellate Court, as far as may be will be the same as are conferred by the Code on the trial Court. So also by virtue of Rule 2 of Order 43, the rules of Order 41, shall apply, so far as may be, to appeals from orders. In spite of this, the scope of the appeal under Order 43, Rule 1 (r) is restricted as discussed above to examine the propriety and/or legality of order passed under the various rules of Order 39 referred therein. A distinction has to be made between the scope of regular appeal and a miscellaneous appeal under the aforesaid provision. While deciding the appeal of former character the appellate Court has, on the theory that appeal is continuation of suit, power to allow amendment in the pleadings, but in an appeal of the latter type the appellate Court has jurisdiction only to adjudicate upon the correctness or otherwise of order refusing or granting an interim injunction. The position of trial Court in such a situation appears to be different, as the trial Court is in seisin of the suit as well as of application for issuance of a temporary injunction made in the suit. The powers exercisable by an appellate Court while hearing appeals preferred under Order 43, Rule 1 (r) cannot be regarded to extend to allowing amendment of the plaint, as he is not in seisin of the suit as such. The ratio of *Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another*, , relied on by Shri Nevaskar, is as under (at p. 397):

"An appeal is a proceeding for the purpose of Section 146 and further the expression "claiming under" is wide enough to include cases of devolution and assignment mentioned in Order 22, Rule 10. Whoever is entitled to be but has not been brought on record under Order 22, Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no

prohibition against it in the Code."

The context in which the appeal was treated as a proceeding in the aforesaid case was different. In the present situation, the word "proceeding" connotes merely an application for issuance of a temporary injunction and/or its reply. Accordingly, where the plaintiff-applicant moves an application for amendment of the application for issuance of temporary injunction, the appellate Court may be regarded to have jurisdiction to decide it.

In view of the aforesaid discussion, it has to be concluded that the learned District Judge acted in an illegal manner and he appears to have erroneously assumed jurisdiction to allow the application for amendment of the plaint submitted by the plaintiff-applicant. It is law well settled that a party cannot confer jurisdiction on a Court, which it does not possess. Accordingly, nothing turns on the fact that it was the plaintiff-applicant, who solicited amendment before" the learned District Judge. It appears further that the learned District Judge acted in an illegal manner in setting aside the order passed by the trial Court granting injunction in favour of the plaintiff-applicant-herein merely after allowing amendment in the plaint.

As a result of the discussion aforesaid, this revision succeeds and is hereby allowed. The impugned order is set aside. Now the case will go back to the learned District Judge for decision of the appeal in accordance with law and observations made herein above. In the circumstances of the case, I leave the parties to bear their own costs as incurred.