
(2007) 04 AHC CK 0141
In the Allahabad High Court

Mayur Packaging Industries

APPELLANT

Vs

U.P. State Financial Corporation

RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

State Financial Corporations Act, 1951 — Section 29

State Financial Corporations Act, 1951 — Section 29

State Financial Corporations Act, 1951 — Section 29

Citation : (2007) 4 AWC 3425

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Heard Sri P.K. Singh, the learned Counsel for the petitioner and Sri A.A. Khan, the learned Counsel for the respondent. Since no factual controversy is involved, this writ petition is being disposed of finally at the admission stage itself without calling for a counter affidavit.

2. The petitioner is the plaintiff and had purchased an industrial unit through an auction from the U.P. Financial Corporation, and thereafter, was sanctioned a loan from the said Corporation. It is alleged that the petitioner paid various instalments, but on account of a default in the payment of the instalment, the possession of the factory was taken over by the financial corporation u/s 29 of the State Financial Corporation Act, 1951. It was also alleged that the factory, machinery, etc., was auctioned by the corporation and that the corporation exhausted its remedy of recovering the loan under the agreement. It was also alleged that the entire amount had been recovered but the plaintiff apprehended that the corporation would make further recovery from the personal assets of the proprietor of the factory and adopt coercive measures. Accordingly, the plaintiff filed a suit claiming the following reliefs:

(A) that a decree of declaration be passed in favour of the plaintiff and against the defendant declaring there is that the defendant is liable to pay a sum of Rs. 1

lac to the plaintiff firm.

(B) That a decree of declaration be passed in favour of the plaintiff and against the defendant declaring therein that defendant is not legally entitled to recovery any amount from the plaintiff-firm in life of its loan granted to plaintiff-firm as the remedies has already been exhausted by the defendant.

(C) That a decree of permanent injunction be passed in favour of the plaintiff and against the defendant restraining therein that the defendant should not recovery any amount from the plaintiff in any way specially by way of arrest against the loans of which the description has been given in the body of the plaint.

(D) That costs of the suit and such other relief which this Hon''ble Court deems fit, be also awarded to the plaintiff, against the defendant.

3. The petitioner also filed an application for a grant of a temporary injunction restraining the defendant from recovering any amount from the plaintiff against the loan taken from the Corporation. The trial court did not grant any ex parte injunction but found it fit to issue a notice to the defendant on the application for the grant of a temporary injunction. It is alleged that notice to the defendant was served, inspite of which, the defendant neither appeared nor contested the application for the grant of a temporary injunction. Consequently, the trial court considered the application for the grant of a temporary injunction and after considering the material that was available on record allowed the application for the grant of a temporary injunction by an order dated 23.8.2003 and restrained the defendant from recovering any amount from the plaintiff.

4. It transpires that after two months of the passing of the order, the defendant appeared and filed their objections to the temporary application and also filed their written statement. The defendant also moved an application No. 93-C dated 23.10.2003 praying that the ex pane injunction be recalled and the application for the grant of a temporary injunction be heard afresh on merits. The plaintiff filed his objection stating that the injunction order cannot be recalled nor the application of the defendant could be treated as an application under Order 39 Rule 4 of the C.P.C.

5. The trial court, after considering the matter, allowed the application and recalled the injunction order dated 23.8.2003 and directed that the application for grant of temporary injunction would be reconsidered on merits. The plaintiff, being aggrieved by the aforesaid order, filed a misc. appeal which was also dismissed. Consequently, the plaintiff has filed the present writ petition for the quashing of the two orders.

6. A perusal of the application dated 23.10.2003 filed by the defendant reveals that the ground for recalling the order was that it was an ex parte order and that a huge amount was to be recovered from the plaintiff. On this basis, the Court recalled its order on payment of cost of Rs. 200/-. The appellate court, while dismissing the appeal, held that no prejudice would be caused to the plaintiff if

the matter was reheard on merits after giving an opportunity to the defendant and that, if no opportunity was given to the defendant, it would cause irreparable loss to them, inasmuch as the amount sought to be recovered was huge. The appellate court further found that the application filed by the defendant was maintainable and could be treated as an application under Order 39 Rule 4 of the C.P.C. and, even though, the defendant was served with the summons and did not appear at the time when the temporary injunction was granted, nonetheless, the plaintiff had been compensated by the payment of cost which was daily received by the plaintiff, and therefore, no prejudice would be caused in rehearing the matter.

7. The learned Counsel for the petitioner submitted that the application of the defendant for recalling the order was misconceived and was not maintainable and could not be treated to be an application under Order 39 Rule 4 of the C.P.C. The learned Counsel for the petitioner further submitted that the ingredients contemplated under Order 39 Rule 4 of the C.P.C. were missing and in any case, the injunction order could not be recalled because it was not an ex parte order. The learned Counsel further submitted that merely because cost of Rs. 200/- was received by the counsel for the petitioner did not debar the plaintiff from contesting the order on merit and that mere acceptance of cost did not waive his right to challenge the impugned order since the order did not amount to an estoppel.

8. On the other hand, the learned Counsel for the respondent submitted that material facts had been concealed by the plaintiff which led the trial court to pass a temporary injunction and that under changed circumstances and undue hardship that was caused to the defendant, the trial court had the jurisdiction to vacate the injunction order under Order 39 Rule 4 of the C.P.C.

9. The moot question that falls for consideration in this petition is whether the application of the defendant was maintainable under Order 39 Rule 4 of the C.P.C.? Whether the court could recall the injunction order and direct the application for the grant of a temporary injunction to be heard? Admittedly, in the present case, no ex parte injunction was issued at the time when the application for the grant of a temporary injunction application was filed. The trial court did not find it fit to grant an ex parte injunction and issued notice to the defendant to seek their version before considering the application for the grant of a temporary injunction. The notices were issued to the defendant which was duly served and, in spite of the service of the summons under Order 39 Rule 3 of C.P.C., the defendant did not appear nor contested the application for the grant of a temporary injunction. Consequently, the trial court after considering whatever material that was available on the record, granted a temporary injunction in favour of the plaintiff.

10. Against such an ex parte order, two remedies are available to the defendant. The first remedy available is to file an application under Order 39 Rule 4 of the C.P.C. for the discharge, variation or vacation of the injunction order. The other

remedy available is to file a misc. appeal under Order 43 Rule 1(r) of the C.P.C. For facility, the provision of Order 39 Rule 4 of the C.P.C., as applicable in the State of U.P., is quoted here under:

Order 39 Rule 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 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.

11. From the aforesaid provision, it is clear that the first proviso provides for the vacation of an ex parte injunction on the ground that a false and misleading statement had been made by the plaintiff. In this regard, the law is clear and explicit, namely, that a person who approaches the court must come with clean hands and must not suppress the material facts and should not make any misleading statement. If an injunction has been obtained by a misstatement of relevant facts or suppression of material facts, the injunction could be vacated under the first proviso. Further, under the second proviso, an injunction granted after giving a party an opportunity of being heard cannot be discharged, varied or set aside except in special cases, namely, change in circumstances or where it causes undue hardship to a party.

12. Under the proviso added by the U.P. Amendment Act No. 57 of 1976, an order of injunction can be set aside, if the Court finds that a party is dilating the proceedings or is otherwise abusing the process of the court.

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.

14. In view of the aforesaid, this Court is of the opinion that the application filed by the defendant could not be treated as an application under Order 39 Rule 4 of the C.P.C. nor the court had the jurisdiction to recall the order on the ground that it was an ex parte order. The judgment cited by the learned Counsel for the defendant in Khalid Nizami alias Sullu v. State of U.P. and Ors. 2005 ADJ 72 reveals that the provision of Order 39 Rule 4 cannot be used to review or reagitate the same issue.

15. The learned Counsel for the respondent submitted that pursuant to the order of the trial court, a cost of Rs. 200/- was paid which was duly received by the plaintiff and therefore he was estopped from agitating the matter or from challenging the impugned orders and that the principle of estoppel was wholly applicable upon the plaintiff.

16. In my view, the submission of the learned Counsel for the respondent is bereft of merit. The trial court allowed the application on payment of cost of Rs. 200/-. It was not a conditional order. In a simile matter, the Supreme Court in Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others, held that where the order was in the nature of a conditional order and that the payment of cost was a condition precedent to the petition being allowed, in such a case acceptance of the amount could stop the other party from challenging the impugned order, but where the application was allowed without any conditions attached: the order was not a conditional order, the principle of estoppel would not be applicable.

17. The Supreme Court further held-

That apart the principle of estoppel which precludes a party from assailing an order allowing a petition, subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case, it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs

because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order. The decision of the Andhra Pradesh High Court in *The Metal Press Works Ltd. Vs. Guntur Merchants Cotton Press Co. Ltd.*, on which reliance has been placed by the High Court, proceeds on the basis that awarding of costs was, in fact and substance, a part of the entire order allowing amendment in written statement and the said order was a conditional one. The decision of the Madras High Court in *Sree Mahant Prayag Dossjee Varu Vs. Raja Venkata Perumal*, and the decisions of the Patna High Court in *Ramcharan Mahto and Others Vs. Custodian of Evacuee Property and Another*, and *M. Kapura Kaur v. Narain Singh* AIR 1949 Patna 49, on which reliance has been placed in the said judgment of the Andhra Pradesh High Court also emphasise that the orders under challenge were conditional orders and payment of costs was a condition precedent to allowing the petition. In *Devaiah v. Nagappa* AIR 1965 Mys 102, the order allowing amendment of the election petition contained a direction regarding payment of costs. It was held that the application was allowed without any condition and that the order was not a conditional order and principle of estoppel was held inapplicable.

18. In the present case, the order of the trial court is, that the application of the defendant was allowed on payment of cost of Rs. 200/-. In my opinion, it was not a conditional order, and therefore, even if the amount of cost was received by the plaintiff, it did not restrict the plaintiff from challenging the impugned order before an appropriate forum.

19. In view of the aforesaid, this Court finds that the application of the defendant could not be treated as an application under Order 39 Rule 4 of the C.P.C. and that the trial court had no power to recall its order, and/or post the application of the plaintiff, for the grant of a temporary injunction, afresh for consideration. Consequently, the impugned orders cannot be sustained and are quashed. The writ petition is allowed.

20. It is, however, open to the defendant to move an appropriate application under Order 39 Rule 4 of the C.P.C. for the discharge, variation or for the vacation of the temporary injunction granted by the trial court, if they so desire.

21. In the circumstances of the case, parties shall bear their own cost.