
(1995) 07 AHC CK 0080

In the Allahabad High Court

Case No : Civil Miscellaneous W. P. No. 11219 of 1995

Mohd. Rafi Khan

APPELLANT

Vs

D.J., Aligarh & Ors.

RESPONDENT

Date of Decision : 06-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 4, Order 41 Rule 27, Order 43 Rule 1(r)

Citation : (1995) 07 AHC CK 0080

Hon'ble Judges : A.K.Banerji, J

Final Decision : Dismissed

Judgement

A.K.Banerji, J.—By means of the present writ petition the petitioner has prayed for quashing of the impugned order dated 1841995 (Annexure12) passed by the respondent No, 1 and the impugned order dated 2041995 (Annexure13) passed by the respondent No. 2. He has also prayed for a writ of mandamus commanding the respondents not to interfere with working of the petitioner as the Principal of the institution in question.

2. Brief facts, as set out in the petition, are that the petitioner was appointed on the post of Principal of the institution known as Aligarh Public School, Aligarh, which is imparting education from Nursery to class X. The society which runs the institution as known as Sir Syed Education Development Society, Aligarh, which is registered under the Societies Registration Act. According to the petitioner, the defendantrespondents suddenly, due to mala fide reasons, wanted to terminate the cervices of the petitioner and started interfering with his functioning as the Principal. Consequently, the petitioner had no alternative but to file Suit No, 122 of 1995 in the Court of Munsif, Koil, Aligarh, for permanent injunction against the defendantrespondents restraining them from terminating the services of the petitioner or from interfering with his functioning as the Principal. The Suit was filed on 141995 and along with the plaint the petitioner also filed an application under Order XXXIX Rules 1 and 2 read with Section 151, C. P. C. praying for temporary injunction during the pendency of the suit. The trial court issued

notice to the defendants and also passed an ad interim injunction order restraining the defendants from interfering with the functioning of the plaintiff/petitioner as the Principal of the institution till 10/4/1995. On 15/4/1995 the operation of the interim injunction order was extended till 17/4/1995 which was the date fixed for hearing the objections of the defendants. On 17/4/1993 the interim injunction order was again extended till 18/4/1995. In the meantime on 4/4/1995 the defendant/respondents 4 and 5 preferred a Misc. Appeal before the District Judge, Aligarh against the ex parte interim injunction dated 14/1/1995 granted by the trial court (respondent No. 3). Along with the memo of appeal an application for staying the operation of the interim injunction order dated 14/1/1995 was also filed. The appearance was put in on behalf of the petitioner in the aforesaid appeal on 10/4/1995 and a preliminary objection was raised regarding the maintainability of the appeal. The preliminary objection was heard by the District Judge (respondent No. 1) on 17/4/1995 and by order dated 18/4/1995, which is also impugned in the present petition, it was held that the appeal was maintainable. Consequently, the appeal was admitted and transferred to the court of respondent No. 2 for hearing and disposal. The parties were directed to appear before the said court on 19/4/1995 and in the meanwhile the operation of the ex parte interim injunction order dated 14/1/1995 was stayed. The matter was heard by the respondent No. 2 who vide the impugned order dated 20/4/1995 allowed the appeal filed by the defendant/respondents No. 4 and 5 and set aside the ex parte ad interim injunction order dated 14/1/1995 passed by the respondent No. 3. Feeling aggrieved, the present writ petition has been filed.

3. The defendant/respondents had filed a caveat through Shri S. U. Khan, Advocate. Counter and rejoinder affidavits have been exchanged between the parties and with the consent of learned counsel for the parties the writ petition is being finally disposed of at the admission stage.

4. Dr. R. G. Padia, learned counsel for the petitioner has challenged the impugned orders dated 18/4/1995 and 20/4/1995 passed by the respondents No. 1 and 2 respectively on three grounds. Firstly, it has been strenuously contended that the appeal filed by the respondents No. 4 and 5 was not legally maintainable and order dated 18/4/1995 passed by the District Judge holding the appeal to be maintainable and admitting the same was manifestly illegal and unsustainable. It has been contended that against the order of the trial court granting ex parte ad interim injunction the defendants could either apply for getting the said order vacated and if unsuccessful file a miscellaneous appeal against the said order or in the alternative file a miscellaneous appeal straightway before the appellate court under Order XLIII, Rule 1(r), C.P.C. but they could not invoke both these remedies simultaneously. In support of this submission learned counsel has placed strong reliance upon the Full Bench decision of this Court in the case of Zila Parishad v. B. R. Sharma, reported in AIR 1970 All 376. He has also relied upon the decision of a learned Single Judge of this Court in the case of Mumtaz Khan v. 1st Additional District Judge, Bahraich, reported in 1993 (2) ARC 99.

5. I have considered the contention of the learned counsel for the petitioner and have also carefully perused the aforesaid decisions cited by him. In the case of Zila Parishad (supra), (FB) the question which was referred for the decision was to the effect whether an ex parte order issuing injunction against the defendant was appealable in the facts of the referred cases. The main controversy, therefore, before the Full Bench was whether a miscellaneous appeal under Order XLIII, Rule 1(r) lay against an ex parte ad interim injunction order or only against the final order passed by the trial court after hearing the defendants, it was held that even against an ex parte order issuing temporary injunction it was open to the defendants to file an appeal straightway under Order XLIII, Rule 1(r), C. P. C. While considering the argument in the said case the following observations were made in paragraph 16 of the judgment:

"16. The language and the object of Rule 1(r) of Order XLIII, and the scheme of Rules 1 to 4 of Order XXXIX, show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it has two remedies ; (1) he can either get the ex parte injunction order discharged or varied or set aside under Rule 4 of Order XXXIX, and if unsuccessful avail the right of appeal as provided for under Order XLIII, Rule 1(r) ; or (2) straightway file an appeal under Order XLIII, Rule 1(r) against the injunction order passed under Rules 1 and 2 of Order XXXIX, C. P. C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two remedies; either he may go up in appeal against the ex pane decree or he may seek to get the ex parte decree set aside by the same court."

Learned counsel for the petitioner has placed strong reliance upon the aforesaid observation made by the Full Bench which has also been followed by a learned Single Judge in the case of Mumtaz Khan (supra) He has further contended that in the present case the defendantrespondents and 5 had filed appeal against the ex parte

6. Having heard learned counsel for the patties, I am unable to agree with the submissions made by learned counsel for the petitioner. From the facts of the case presented before me it would be evident that the ex parte ad interim injunction order was passed by the trial court on 141995. The defendantrespondents 4 and 5 preferred miscellaneous appeal before the District Judge on 441995 as is evident from the copy of the memo of appeal filed alongwith the counteraffidavit. It appears that an amendment application was filed subsequently which was ordered to be put up on 1041995 and after hearing learned counsel for the parties on 1741995 the impugned order dated 1841995 was passed by the respondent No. 1 holding that the appeal was maintainable. The objections praying for not extending the ex parte ad interim injunction order annexing various documents as annexures were filed before the trial court in the Suit on 1041995, a few days after filing of the miscellaneous appeal. It is evident, therefore, that the miscellaneous appeal and the objections for not

extending the exports injunction order were not filed simultaneously, At the time when the appeal was filed the objections were not in existence. Therefore, the defendantrespondents had adopted the second course as laid down in the Full Bench decision and had straightway filed appeal under Order XLIII, Rule 1(r) against the ex parte injunction order. The appeal consequently was maintainable on the date when it was filed. The record of the case reveals that on 1041995 the defendants had only filed objections stating that in view of the facts of the case ex parts ad interim injunction order dated 141995 could not be extended any further. The said objections had not been heard or decided till the disposal of the appeal and there is nothing to show that the defendants were pursuing their remedies simultaneously before the trial court as well as before the appellate court. That apart, I do not agree with the submission made by the learned counsel that the Full Bench decision in the case of Zila Parishad (supra), excludes an appeal in case an application for vacating the ad interim injunction order had been filed. Before the Full Bench this point was neither involved nor did the Full Bench express any such view in para 16 of the judgment quoted above. It is noteworthy that a similar argument like in the present case was advanced before this Court in the case of Indradeo Singh v. District Judge, Gorakhpur, reported in 1993 (2) ARC 357, and the same was repelled. It was held that there is no such condition under Order XLIII, Rule 1(r), C. P. C. that if an application has been moved under Rule 4 of Order XXXIX, C. P. C. for vacating an ex parte injunction order and the said application has not been disposed of, the appeal would not be maintainable. Further, in the absence of any specific provision in the Rules, it will not be proper to restrict the right of appeal conferred by the statute by holding that the appeal would not be maintainable if the application to vacate the ex parte order is still pending. I respectfully agree with the aforesaid view.

7. So far as the case of Mumtaz Ahmad (supra), is concerned, in my opinion, the same is distinguishable on facts and the point involved in the present case or in the case of Indradeo Singh were not directly involved therein. In the case of Mumtaz Ahmad, the appeal against the ex parte injunction was dismissed by the District Judge on the ground that the defendant's application against the ex parte interim injunction had not been decided by the trial court on merits and as a date had already been fixed therein, the order did not call for any interference at that stage. On the said facts learned Single Judge while dismissing the writ petition challenging the said order had observed that a person aggrieved has to choose either of the alternate remedies and if he has filed objections as well as filed appeal and then the appellate court does not entertain the appeal and dismisses it on the ground that the objections are yet pending which are to be decided by the trial court, the appellate court commits no jurisdictional error or error of law on the of record nor does the order of the court suffer from any irregularity. The observations made were based on the facts of the said case while, on the other hand, the facts of the case of Indradeo Singh (supra), are more akin to the facts of the present case and the point involved therein was also similar. The decision in the case of Mumtaz Ahmad (supra), in my opinion,

does not help the submission of the learned counsel in the facts of the present case.

8. It was next contended that the impugned order passed by the respondent No. 2 allowing the appeal filed by the defendantrespondents was illegal as the said court has considered certain documents which were filed before it by the defendantrespondents without there being any application under Order XLI, Rule 27, C. P. C. Reliance has again been placed on the Full Bench decision in the case of Zila Parishad (supra), wherein it has been held that in an appeal from an ex pane order passed under Order XXXIX, Rules 1 and 2, C. P. C. the appellant, as a matter of right, cannot rely on fresh evidence which was not before the trial court until it is admitted by the appellate court under Order XLI, Rule 27, C. P. C. In the counteraffidavit filed by the contesting respondents in the present writ petition it has been stated that the documents on which reliance has been placed by the appellate court were on record of the trial court and no new documents had been filed before the appellate court hence there was no need to seek permission for filing additional evidence under Order XLI, Rule 27, C. P. C. In the rejoinder affidavit it has not been categorically denied that the said documents were not before the trial court. It also appears from the copy of the objections fixed as annexure to the writ petition that the defendants had filed the documents, on which the appellate court has placed reliance, along with their objections before the trial court on 1041995. It can be presumed that while deciding the appeal the appellate court had the record of the trial court before it. Therefore, if some of the said documents have been referred to by the appellate court in the impugned order it could not be taken to be additional evidence. I, therefore, do not find any merits in the second submission either.

9. Thirdly, it has been contended that the impugned order dated 2041995 passed by the respondent No. 2 suffers from misreading inasmuch as it has been stated in the said order that the petitioner had admitted that his services were terminated with effect from 2831995. Learned counsel contends that there is no such document on record from which it can be inferred that the petitioner admitted that there was an order of termination passed on 2831995 against the petitioner. From the record of the case it is evident that the contesting defendants had filed alongwith their objections the photostat copies of the minutes of the meeting dated 1231995, agenda dated 2731995 and the minutes of the meeting dated 2831995 as well as photostat copies of the letter of communication dated 2931995 and Despatch Book/Peon Book which contained refusal to receive the copy of the agenda dated 1731995 and the letter of communication dated 2931995 by which it was being conveyed to the petitioner that his services has been terminated by the managing committee on 2831995. As the said documents were on record, assuming the submission made by the learned counsel for the petitioner to be correct, I do not find that the same would have any affect on the merits of the impugned order. There is, therefore, no substance in this submission either.

10. Lastly, it has been contended that the respondent No. 1 had admitted the appeal on 18/4/1994 and directed the parties to appear before the court where the appeal was transferred on the very next day and consequently the petitioner did not get adequate opportunity for contesting the case effectively. I am unable to accept this submission for the reason that the petitioner participated in the proceedings inasmuch as he argued the matter before the respondent No. 2 on the date fixed without praying for any adjournment or seeking further time for preparation of the case. In view of the same after the decision has gone against the petitioner, he cannot raise the grievance that he did not get adequate opportunity to contest the appeal.

11. In view of the reasons given above, I do not find any merits in this writ petition and the same is, therefore, dismissed. However, in the facts and circumstances of the case the parties shall bear their own costs of this petition.