

(1989) 09 OHC CK 0045

In the Orissa High Court

Case No : Civil Revision No. 637 of 1989

Naliniprava Patnaik and Another

APPELLANT

Vs

Smt. Jyotirmayee Das and Others

RESPONDENT

Date of Decision : 28-09-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 43 Rule 1(r)

Citation : (1990) 69 CLT 664

Hon'ble Judges : P.C. Misra, J

Bench : Single Bench

Advocate : A.S. Naidu and B. Routray, for the Appellant; S.D. Das, R.C. Rath, D. Nayak and D.P. Dhal, for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—The short point which arises for consideration in this revision is as to whether an appeal lies against an order refusing to grant an ex parte injunction.

2. The present opp. parties 1 to 4 filed the suit out of which this revision arises for declaration of title and permanent injunction in respect of the properties described in the plaint. They filed an application under Order 39, Rules 1 and 2 of the CPC praying for an interim injunction. One of the Defendants, namely, Defendant No. 2 (Petitioner No. 1 in this revision) entered appearance suo motu and prayed for an opportunity of being heard in the matter of grant of interim injunction. The learned Subordinate Judge. Puri in his order passed on 1-7-1989 did not find any urgency to pass an ex parte order of injunction and rejected the application filed under the provisions of Order 39, Rule 3 CPC in that behalf. Consequently the prayer for passing an ex parte order of injunction was rejected and the matter was posted to 7-7-1989 for filing of counter by the opp. parties. Being aggrieved by the aforesaid order, the Plaintiffs filed Misc. Appeal No. 81 of 1989 in the Court of District Judge, Puri. Before the appeal was admitted, the

present Petitioner No. 1 appeared in the Court and contended that the appeal is not maintainable for which reason the same should not be admitted. The learned District Judge after hearing both parties held that the order passed by the learned trial Court is appealable and thus admitted the appeal and directed issue notice to the other Defendant-Respondents. The Defendants 2 and 3, who were Respondents in the said appeal have filed this revision challenging the legality of the order of the lower appellate Court admitting the said appeal.

3. It is contended on behalf of the Petitioners in this revision that the order passed by the learned trial Court refusing to pass an ex parte order of injunction being an order under Order 39, Rule 3, CPC is not appealable under Order 43, Rule 1, CPC and, therefore, the learned District Judge has exercised jurisdiction not vested in it by law by admitting the appeal. On the other hand, it has been argued by the learned Counsel appearing for the Plaintiff opp. parties that refusal to exercise jurisdiction under Rule 3 of Order 39, CPC and thereby refusing to grant an ad interim injunction squarely falls under Order 39, Rules 1 and 2 of the CPC and is, therefore, appealable.

4. Order 39, Rules 1 and 2 lay down the, circumstances under which a temporary injunction can be granted. The general rule in Order 39, Rule 3 is that the Court shall in all cases except where, it appears that the objection of granting injunction would be defeated by delay, before granting injunction, direct notice of the application to be given to the opp. parties. A proviso has been added to the said rule by the CPC Amendment Act, 1976 (Act 104 of 1976) to the effect that where it is proposed to grant injunction without giving notice of the application to the opp. parties, the Court shall record reasons for its opinion that the object of granting injunction would be defeated by delay and require the applicant to deliver to the opp. party or to send to him by registered post immediately after the order of granting injunction has been made, a copy of the application for injunction together with all relevant documents on which he relies and inform the Court by an affidavit that the requirements of the proviso have been complied with. It, therefore, follows that unless the Court finds that the object of granting injunction would be defeated by delay it would direct notice of the application of the same to the opp. party before granting injunction. This is a case where the Court did not find any urgency in granting an ex parte order of injunction, and directed notice to be issued to the opp. parties in conformity with the requirements of Rule 3 of Order 39, Code of Civil Procedure. The Court did not purport to exercise jurisdiction under Rules 1 and 2 of Order 39, CPC nor did the Court consider the application praying for grant of injunction on merits.

5. The High Court of Punjab in the case of Iqbal Singh and Others Vs. Chanan Singh and Others, examined the question whether an order declining to grant an ex parte temporary injunction on an application under Order 39, Rule 1 or Rule 2, CPC and issuing a notice under Order 39, Rule 3 to the other side is appealable. His Lordship held that under Order 39, Rule 1 as well as under Rule 2 the Court has three courses open to it; it may dismiss an application, it may

grant an application, or it may merely give notice of the same to the Defendants. Rule 3, Order 39 superimposes a restriction on the powers of Court under Rule 1 or Rule 2 and makes it clear that no Court can pass an order granting an injunction either under Rule 1 or Rule 2 of Order 39 without first directing notice of the application to be given to the opp. party. The only exception to that rule provided by the Code in Rule 3 of Order 39, CPC is where it appears to the Court concerned that the object of granting the injunction would be defeated by the delay in serving the Defendants with a notice of the application. It, therefore, follows that an order of declining to pass an ex parte temporary injunction under Order 39, Rule 1 or Rule 2, CPC and issuing a notice under Order 39, Rule 3 to the other side is not appealable. Taking a converse case the scope of Rule 3 would be further clarified. As required by the proviso to Rule 3, of Order 39, CPC where the Court records its reasons for its opinion that the object of granting injunction would be defeated by the delay and thereafter proceeds to consider the application for injunction on its own merits, the order that he would proceed to consider the application under Order 39, Rules 1 and 2 on merits can by no stretch of imagination be construed as an order either under Rule 1 or Rule 2 of Order 39, CPC even though its consequence may be that the Court would have the scope of granting or refusing a temporary injunction without issuing notice. The effect of Rule 3, therefore, is to impose restriction in exercise of the powers of the Court under Rules 1 and 2. While exercising discretion under Rule 3, the Court is required merely to find out if the object of granting injunction would be defeated by delay in the process of serving notice on the opp. parties and in case the Court so finds, the bar of directing notice to the opp. parties before granting injunction is relaxed and the Court would then be competent to exercise its jurisdiction under Rules 1 and 2 of Order 39, Code of Civil Procedure, Clause (r) of Order 43, Rule 1, CPC makes an Order under Rules 1, 2, 2(a), 4 and 10 of Order 39 appealable and the order declining to consider an application for temporary injunction ex parte being an order under Rule 3 of the said order has not been made appealable under the said Rule. The right of an appeal being creation of the Statute, no appeal would lie from an order which has not been made appealable under Rule 1 of Order 43. The same view has been taken by the Gwalior Bench of Madhya Pradesh High Court in the case reported in *Khusilal and Others Vs. Gorelal and Another*, .

6. The only decision cited before me taking a contrary view is of the Sikkim High Court in a decision reported in *Ashok Tshering Lama Vs. Tshering Wangdi*, . The opinion expressed therein can be said to be an obiter as the learned Judge having held that the appeal before the District Judge against an order declining to grant ad interim injunction ex parte was prosecuted in good faith and with due diligence irrespective of its maintainability. The learned Judge further proceeded to observe that if it were necessary for the Court to decide the question as to whether the appeal filed before the District Judge was maintainable the Court might have held that the appeal was maintainable. The learned Judge further expressed that since the order of the District Judge dismissing the appeal has not

been challenged, the said question need not be gone into in the revision which was directed against the order of the Civil Judge refusing to grant ad interim injunction ex parte and issuing notice to the Respondent-Defendant. The learned Counsel appearing for the opp. parties relied on a large number of decisions of different High Courts, all of which deal with the question as to whether an ad interim injunction granted or refused to be granted in exercise of the powers under Rules 1 and 2 of Order 39 is appealable irrespective of whether the order was passed before or after the issue of notice.

7. In the result, the order impugned in this revision passed by the lower appellate Court holding that the appeal is maintainable is set aside and the revision is allowed.

8. In the circumstances, there shall be no order as to costs.

Revision allowed.