
(1981) 09 KAR CK 0024

In the Karnataka High Court

Case No : Civil Revision Petition No. 549 of 1981

Parijatha and Another

APPELLANT

Vs

Kamalaksha Nayak and Others

RESPONDENT

Date of Decision : 29-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 1R, 151
Specific Relief Act, 1963 — Section 36

Citation : AIR 1982 Kar 105 : (1981) ILR (Kar) 1433 : (1981) 2 KarLJ 570

Hon'ble Judges : M. Chandrashekhar, C.J;N. Venkatachala, J

Bench : Division Bench

Advocate : H.R. Vankataramaniam, for the Appellant; Balachandran, Basavaraj Balarang and U.L. Narayana Rao, for the Respondent

Judgement

Venkatachala, J.—This civil revision petition is before us on its reference to a Division Bench.

2. The necessary and material facts are, briefly, these: Respondent-1 was the plaintiff in O. S. No. 442 of 1980, on the file of the Munsiff, Udipi. Respondents 2, 3, 4 and 5 were defendants 2, 1, 3 and 4 respectively therein. In that suit, the plaintiff, inter alia, sought a permanent injunction to restrain defendants 3 and 4 from granting an "Exhibition Certificate" respecting the motionpicture "Gandabherunda" on the allegations that defendant-1 represented to the plaintiff that he (defendant-1) had acquired the exclusive right to exhibit that film "Gandabherunda" in Dharwar District by virtue of the agreement Df15-1-1979 executed in his favour by defendant-2 and one Vajramuni; that the plaintiff, on the strength of that representation, entered into an agreement D/5-9-1980 with defendant-2 whereunder defendant-1 had to deliver to the plaintiff by 15-12-1980 prints of the said film enabling the latter to exhibit the same in Dharwar District : and that since the plaintiff, subsequently, learnt of the advertisements in newspapers that a certain M. J. M. Productions and Parijatha Movies had asserted their exclusive distribution rights of the said film, the

present suit for enforcement of the agreement in his favour had to be instituted. The plaintiff, however, did not implead either the said "M. J. M. Productions" or "Parijatha Movies" as defendants in the suit. Instead, he impleaded the Regional Censor Officer, Madras, and the office-in-charge of Central Board of Films Censors, Bombay, as defendants 3 and 4.

3. In the suit, the plaintiff made an application under Rr. 1 and 2 of O. 39 read with S. 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) seeking an interlocutory injunction in terms following:

".....restraining opponents-1 and 2 (Defendants 3 and 4) from receiving any application from anybody and processing, screening, sanctioning and granting any Censorship Certificate to the film "Gandabherunda" in Kannada language and grant ex parte order to the same effect pending disposal of this I. A"

On that application, the learned Munsiff made an interim ex parte order of injunction.

4. Petitioners (who were not parties to the suit and the application) took up the interim order in appeal before the Civil Judge, Udupi, invoking R. 1 (r) of O. 43 of the Code. In that appeal, the plaintiff (respondent-1) raised a preliminary objection as to the maintainability of an appeal from an ex parte interim order under R. 1 or 2 of O. 39. The learned Civil Judge overruled that objection as to maintainability and dismissed the appeal on merits. Petitioners, therefore, have come up in revision.

5. At the hearing of the revision before Puttaswamy, J., a contention was taken by the plaintiff-respondent-1 that petitioners appeal before the learned Civil Judge was itself not maintainable and that accordingly the revision was also not maintainable. In support of that contention, reliance was placed on the ruling of this court in M. G. Pai v. Canara Bank ILR (1980) Kant 256 and that of a Division Bench decision of the Madras High Court in Abdul Shukoor Sahib v. Urnachander AIR 1976 Mad 350.

Petitioners, however, urged the maintainability of such an appeal relying upon rulings of this court in Keshava Chand Gopalachand Gujjar v. NigapDa Pandappa Kolalar (1969) 2 Mys LJ 525; bhimba Ningappa Khot V. Ratnabhai (Civil Revn. Petn. No. 3056 of 1978 decided on 6-2-1979) and Mahilasamaja v. Srnt. Varija Aithal (Civil Revn. Petn. No. 2705 of 1978 decided on 5-2-1980). Puttaswamy, J., advertng to the need to refer the matter to a Division Bench, said:

"5. As I apprehend, the first and the foremost question that required to be decided is whether an appeal lies against an ex parte order of temporary injunction under Order 43, R. 1 of the Code.....a clear guidance on this question has to be found for the guidance of this Court as also the guidance of the subordinate Courts before whom such questions arise for determination almost every day"

6. The learned counsel for the plaintiff respondent-1 reiterated before us, his

contentions as to the maintainability of an appeal under O. 43 R. 1 (r) against an ex parte interim order under O. 39 R. 1 or 2, placing reliance on the decision of the Madras High Court in Abdul Shukoor Sahib v. Umachander (supra). The learned counsel for the petitioners, on the other hand, in contesting that contention, relied upon the Full Bench decision of the Allahabad High Court in Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma, and also the decision of the Bombay High Court in SK. Jusa Vs. Ganpat Dagdu Gire and Others,

7. Thus, the question that arises for decision is whether O. 43 R. 1 (r) contemplates and permits an appeal from an ex parte interim order of temporary injunction made under O. 39 R. 1 or 2.

8. Section 36 of the Specific Relief Act, 1963, envisages grant of preventive relief by way of temporary injunctions by a Court at its discretion. Sub-sec. (1) of S. 37 of that Act provides that such temporary injunctions may continue until a specified time or until further orders of the Court and may be varied at any stage of the suit, as regulated by the Code.

Section 94 of the Code says that in order to prevent ends of justice from being defeated, the Court, if it is so prescribed by rules, may grant a temporary injunction. Rules 1, 2, 3, 3A and 4 of O. 39 of the Code enable the initial grant and the subsequent affirmation, setting aside, varying or modifying of the interim order of temporary injunctions. Section 151 of the Code enables the Court to grant temporary injunctions in certain residuary situations, as provisions of O. 39 are not exhaustive of the Court's injunctive jurisdiction.

Rule 1 (r) of O. 43 of the Code permits appeals from orders made under R. 1 or 2 of O. 39. The material portion of that rule reads :

"1. Appeals from orders: An appeal shall lie from the following orders under the provisions of S. 104, namely:--

(a) ** ** *

(r) an order under R. 1, R. 2..... of Order XXXIX.11

The expression in R 1 (r) is not "any order". An ex parte interim order of temporary injunction to become appealable must partake of the nature of an order contemplated in R. 1 (r). It is necessary, therefore, to see whether, in the context of the scheme of the provisions in Rr. 1, 2, 3, 3A and 4 of O. 39, R. 1 (r) of O. 43 is intended to and does provide for an appeal against an ex parte interim order of temporary injunction also,

9. We shall now examine the scheme of Rr. 1, 2, 3, 3A and 4 in O. 39 of the Code.

Rules 1 and 2 enable the trial court at its discretion to grant a temporary injunction until a specified time or until further orders on an application made in that behalf or until the disposal of the suit. Rule 3 enjoins that the Court should first direct notice to the opposite party on such an application before granting a

temporary injunction. The only exception to this general rule being where it appears to the Court that the very purpose of the injunction would itself be defeated by delay involved in the notice, that Court may, for reasons to be recorded by it, grant an ex parte order. The proviso thereto refers to the measures to be taken by the Court for safeguarding the interest of the opposite party in the event of grant of such an ex parte injunction. Rule 3A enjoins that whenever an ex parte temporary injunction is granted by a Court, it shall endeavour to dispose of the main application within one month of the ex parte order. This rule corresponds to the English rule that an ex parte temporary injunction should be until a certain day usually the next motion day a salutary rule, exceptions being known only in cases such as restraint of marriage with a ward of Court, where the injunction is granted until a further order (See Ex. P. Abrams (1884) 50 LT 184) R. 4 provides for the setting aside, varying or modifying an ex parte temporary injunction by the very court which granted it, upon a motion by the party affected even before the application for grant of injunction is finally disposed of the proviso to that rule enables the Court to vacate the ex parte temporary injunction where it finds that a party obtaining the ex parte injunction has knowingly made a false or misleading statement in relation to a material particular.

An ex parte order of injunction made on an application under Rr. 1 and 2 before its final disposal, is distinct from an order made on such application at the stage of its final disposal. This distinction is implicit in the scheme of the Rules. Strong and convincing grounds must be shown for grant of an ex parte interim injunction. An ex parte interim injunction is also qualitatively different from an order of temporary injunction made at the final disposal of the application in that behalf after both parties have an opportunity of being heard. An ex parte interim order if secured on insufficient or untenable grounds, is obviously short-lived and potentially evanescent, being liable to set aside, varied or modified by the very Court which granted it. At all events, from the policy of the law and the scheme of the rules, it should normally not have a life-span of more than a month. This ex parte order is, in that sense merely provisional and a step in the disposal of an application for interlocutory-injunction.

Rr. 1, 2, 3, 3A and 4 of O. 39, thus effectively regulate the powers and functions of the Court in the administration of this form of interlocutory remedy and constitute a self-contained legislative scheme. If Rule 1 (r) of O. 43 is intended to and does take in its ambit an appeal against an ex parte order of temporary injunction, the significance of R. 4 is whittled down and may indeed become redundant. The scope of Rule I (r) of O. 43 suggested by the petitioners cannot be effectuated without rendering R. 4 of O. 39 somewhat redundant, a result which should be avoided by a Court of construction. Besides the suggested scope of O. 43 R. 1 (r) is beset with procedural difficulties in the practical working. For instance, if an ex parte order of injunction affects more than one defendant, a dichotomy and separateness in the remedies pursued by each of them - one of them taking up the matter in appeal under R. 1 (r) of O. 43 and the other(s)

moving the Court that passed the ex parte order under R. 4 of O. 39 - would lead to a possible conflict of jurisdictions.

Keeping in view, the need to construe the rules of O. 39 and R. 1 (r) of O. 43 harmoniously so as to avoid redundancy and possible conflict of jurisdictions, the construction that commends itself, is to so understand the provision for appeal and the powers of the Appellate Court under O. 43 R. 1 (r), as not to be concurrent with the jurisdiction of the trial Court under R. 4 of O. 39.

10. We may, here, notice and dispose of the argument that the petitioners, being strangers to the suit and to the application under Rr. 1 and 2 of O. 39 made therein, could not have applied under R. 4 of O. 39 for vacating an ex parte interim order made on such application and that, therefore, the expression "order" found in O. 43 (1) (r) requires to be so construed as to enable an appeal by such strangers. There appears to be no substance in this argument, for R. 4 enables "any party" affected by the ex parte order of temporary injunction to seek a discharge of the order under that Rule. Indeed, the statement of law contained in *Kerr on Injunctions* (6th Edn. P. 662) is:

"Where a stranger to the action is affected by an injunction he -may apply to have the injunction set aside.,,

To the same effect is the statement in *Halbury's Laws of England* (4th Edn, Vol. 24-para 1111):

"A stranger to the suit who is affected by an injunction may apply to dissolve it."

Hence, this argument fails.

11. We may now refer to the decisions relied on by either side.

The decision in *Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma*, relied upon by the petitioners, typifies the view in support of the availability of an appeal even from an ex parte interim order. In reaching the conclusion, the Full Bench took into consideration the circumstances, that the Rules (as they then stood) in themselves do not require issue of notice on the application on which an ex parte interim order of injunction is made, the court issued such notice as a matter of caution; that an application under Rule 4 can be made by an adversary party for discharging, varying or setting aside of both ex parte as well as other orders of injunction; and that Rules, as such, do not recognise a classification of orders of injunction as between ex parte orders and final orders. It was observed that the object of Rule 1 (r) of Order 43, being to provide a remedy against an improper exercise of injunctive power affecting the rights of a person, its scope ought not to be restricted to final orders. Such a restriction, it was thought, would detract from the object of the Rule. It was also said that the express language in Order 43 Rule 1 (r) would allow an appeal from an ex parte interim order. This was the first aspect of the reasoning of the Full Bench.

Secondly, referring to the anomaly of a right of appeal restricted only to final

orders, it was observed by the Full Bench (at p. 378):

..... The object of R. 1 (r) of O. 43 is to provide a remedy for improper or invalid interference with his rights. If we restrict this rule to only final orders of injunction, the object of the rule will not be fully achieved. For instance, where a grievance of the party affected by the ex parte interim injunction is that the Court granting it has also acted from bias against him, it is meaningless to force him to go to that very Court in the first instance. It shall only prolong the suspension of his valuable rights. In many cases he may get no relief in the end. Similarly, where the order of injunction is founded on an Act challenged as unconstitutional, appeal may yield quicker relief.

In *SK. Jusa Vs. Ganpat Dagdu Gire and Others*, a single Judge of the Bombay High Court, adopted the reasoning in the Allahabad Full Bench case. It was also observed that the pronouncement of the Supreme Court in *Firm Ishar Das Devichand and Another Vs. R. B. Prakash Chand and Another*, would support this view.

12. Now, with very great respect to the learned Judges of the Full Bench of the Allahabad High Court, we are un

able to agree with their reasoning. Whatever might have been the validity of the first part of the reasoning, in context of the relevant Rules of O. 39 as they stood then, it is obvious that many of the circumstances which supported that reasoning are unavailable under the amended Rules. Now under R. 3 of O. 39 the issue of notice to the opposite party is expressly made obligatory. Besides the provisos to Rr. 3 and 3A of O. 39 recognise a classification between ex parte orders and final orders.

So far as the second aspect of the reasoning contained in the excerpted portions of the judgment, two extreme instances are intended to illustrate the proposition. Bias, no doubt, as pointed out, vitiates exercise of any power. But, remedies to the aggrieved party against such bias are, in their very nature, different and the particular Judge acting with bias will be prevented from hearing the cause. Then coming to constitutional issues and challenge to vires of legislation, it ought not to make any difference to the principle, so long as the Court concerned has jurisdiction. That jurisdiction will not be any the less effective only because serious questions of constitutionality of "Acts" arise in a case.

In the decision of the Supreme Court referred to and relied on in *Sk. Jusa v. Ganpat Dagdu Gire* (supra), the Supreme Court was concerned with an order rejecting outright an application under Rr. 1 and 2 of O. 39 of the Code. In dealing with that situation the Supreme Court held that the appellate Court and the High Court were in error in holding that no appeal lies against the order of the trial Court. It is difficult to say that that view necessarily supports the proposition that an appeal would lie against an ex parte interim order of temporary injunction.

13. In *Abdul Shukoor Sahib v. Umachander* AIR 1976 Mad 350 (supra), a Division Bench of the Madras High Court held that no appeal lies under O. 43 R. I (r) against an ex parte interim injunction made by a trial Court in an application under Rr. 1 or 2 of O. 39. That decision relates to, and proceeds on, the interpretation of the relevant provisions of the Code, as they stood prior to their amendment by Act 104 of 1976. A distinction is drawn between an unreasoned order made ex parte issuing interim injunction and a reasoned order made after notice to opposite party, finally disposing of an application under Rr. 1 and 2 of Order 39. An appeal under R. I (r) of Order 43,¹ it is held, is confined- to a reasoned order. In our view, the right of appeal against, an order must depend upon the amplitude of the provisions creating that right. The permissibility and, right of appeal against an order ought not to depend upon whether an order gives reasons or not. A distinction resting merely on whether the order is a reasoned or unreasoned one, cannot be decisive on the question of appealability. Indeed, an unreasoned order of rejection of an application for injunction becomes appealable (See: *Firm Ishar Das Devichand and Another Vs. R. B. Prakash Chand and Another*, However, we are in respectful agreement with the conclusion in *Abdul Shukoor Sahib's* case tho" on somewhat

different reasoning.

14. Since the views of the learned single Judges of this Court in the other decisions referred to in the order of reference are either rendered on an assumed long practice of the Court or taken following the decisions of other Courts to which we have adverted and not on a detailed independent examination of the relevant provisions of the Code bearing on the question, we do not find it necessary to advert to them in detail separately

15. For the foregoing reasons, we hold that O. 43 R. I (r) of the Code does not allow the filing, of an appeal from

an ex parte interim order of temporary injunction granted under R. I or 2 of O. 39, but the remedy of the aggrieved person is to move the trial Court under R. 4 of O. 39 of the Code in the first instance. We further hold that even a

stranger to the suit or proceeding can maintain such an application. We here by overrule the decisions of single

Judges taking a view in favour of the permissibility of an appeal against an interim ex parte order of temporary in

junction, to wit, *Keshavachand Gopalachand Gujjar v. Ningappa Pandappa Kolakar* 1969 (2) Mys IJ 525, *Bhima*

Ningappa Khot v. Ratnabhai (Civil Revn. Petn. No. 3056 of 1978) and *Mahila Samaja v. Smt. Varija Aithal* (Civil Revn. Petn. No. 2705 of 1978).

16. In the result, the view taken by the appellate Court that the appeal before it was competent, cannot be allowed to stand. Accordingly, we allow this revision

petition and reverse the order of the learned Civil Judge on the sole ground that the appeal before him was not maintainable. It is however open to the petitioners to move the trial Court under R. 4 of O. 39 of the Code, We leave open the contentions of parties on the merits of the case. Parties are directed to bear their own costs in this petition.

17. Revision allowed.