

(2000) 01 CAL CK 0029

In the Calcutta High Court

Case No : Civil Revisional Jurisdiction C.A.N. No. 6713 of 1999

Ravi Maharia

APPELLANT

Vs

Reliance Petroleum Limited and Others

RESPONDENT

Date of Decision : 19-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 2A, Order 39 Rule 4

Citation : (2000) 1 CALLT 321 : (2000) 1 CHN 439

Hon'ble Judges : Bhaskar Bhattacharya, J

Bench : Single Bench

Advocate : Mr. Joy Saha and Mr. D. Sen, for the Appellant;

Judgement

B. Bhattacharya, J.—This is an application for recalling my order dated June 24, 1999 passed In A.S.T. No. 2244 of 1999 by which I rejected the said revisional application u/s 115 of the CPC preferred against Order No. 9 dated June 3, 1999 passed by the learned Judge, 3rd Bench, City Civil Court, Calcutta in Title Suit No. 2056 of 1998 as not maintainable.

2. The present petitioner instituted the aforesaid Title Suit No. 2056 of 1998 for declaration and injunction and in the said suit filed an application under Order 39 Rules 1 and 2 of the CPC thereby praying for the following reliefs :--

"(a) Mandatory Injunction be Issued directing the opposite party Nos. 1 & 2 to Issue a debentures certificate in the name of the petitioner after transferring the same from the earlier holders of the Debentures.

(b) Temporary Injunction be Issued restraining the Opposite Party Nos. 1 & 2 from Issuing any debenture and/or paying the financial and other benefits to any person other than the petitioner in respect of the said debentures and to stop transfer of the fresh debenture certificate Issued by the opposite Party No.2 to the transferors.

(c) Ad-interim Order in terms of prayer (a) & (b).

(d) Cost of the application.

(e) Such other order or orders as the learned court may deem fit and proper."

3. On such application, the learned trial Judge on November 5, 1998 Issued notices upon the opposite parties to show cause why the prayer of the petitioner should not be granted and further passed an ad interim order "directing the parties to the suit to maintain status quo in respect of issuance of debentures against the debentures in the suit until further order."

4. Subsequently, the petitioner filed another application described as one u/s 151 of the CPC thereby praying for modification or variation of the Injunction order dated November 5, 1998 and in the said application prayed for fresh order "restraining the defendant No. 2-Company from Issuing any new debentures to any third party except the petitioner and from transferring the debentures in any name other than the plaintiff in respect of the fresh debenture certificates Issued by defendant No.2 to the transferors In lieu of the debentures in the suit."

5. On such application the learned trial Judge by Order No.9 dated June 3, 1999 refused to pass any order which was the subject matter of the revisional application being A.S.T. No. 2244 of 1999.

6. On June 24. 1999. I refused to entertain the said revisional application on the ground that although the order Impugned was passed on an application described as one u/s 151 of the Code, the revisional application was not maintainable Inasmuch as the said order was appealable under Order 43 Rule 1 of the Code.

7. While passing such order; I gave liberty to the learned advocate for the petitioner to take back certified copy of the order impugned on furnishing a xerox copy thereof.

8. After the aforesaid order was passed, the learned advocate for the petitioner took back the certified copy and preferred an appal before this court being F.M.A.T. No. 2143 of 1999 and a Division Bench of this court by Order dated July 13, 1999 dismissed the said appeal as not maintainable as the petitioner "on his own showing" filed an application u/s 151 of the Code for modification of the order of ad Interim injunction. The Division Bench observed that "such an order per se was not an appealable one". Moreover, the Division Bench continued, "from the prayer portion of the application it is evident that such an application does not also come within the purview of Order 39 Rule 4 of the CPC and on that ground too, the order is not an appealable one."

9. After the passing of the aforesaid order of the Division Bench dismissing the appeal, the present application for recalling my earlier order has been filed.

10. Mr. Saha, the learned advocate appearing on behalf of the petitioner has made two fold submissions before this court.

11. The first submission of Mr. Saha is that in view of the subsequent Division

Bench decision holding that the appeal is not maintainable, I should recall my order dated June 24, 1999.

12. The other submission advanced by Mr. Saha is that if an application is described as one u/s 151 of the Code, in such a case, even if the prayer comes within the purview of Order 39 Rules 1 and 2 of the Code, no appeal can be maintainable and such order will be a revisable one.

13. At the outset, I propose to deal with the second submission of Mr. Saha.

14. According to Order 43 Rule 1(r) of the Code of Civil Procedure, any order passed under Order 39 Rules 1 and 2 or 2A, 4 or 10 of the Code is an appealable one. It is now a settled law that even grant of Interim order Injunction or refusal of ad Interim order of Injunction under Order 39 Rules 1 and 2 also comes within the purview of Order 43 Rule 1(r) of the Code and it is not necessary that in order to maintain an appeal under Order 43 Rule 1(r) of the Code, such appeal must be preferred against final order.

15. The law is equally settled that in order to consider the scope of an application, such application should be read as a whole and mere caption or heading of the application does not decide the nature of such application. In other words, even if an application is filed under a wrong section of a statute, the court nevertheless can grant relief or decide such application on merit If the court has Jurisdiction over the subject matter of the proceeding.

16. In the Instant case after filing the suit for declaration and Injunction, Initially the petitioner filed an application under Order 39 Rules 1 and 2 of the Code thereby praying for the reliefs as quoted above and got an ad Interim order on November 5, 1998.

17. Subsequently, the petitioner prayed for modification of the said order dated November 5, 1998 by relying upon two letters dated April 26, 1999 and May 13, 1999 written by defendant No. 2 in the suit contending that in the changed circumstances unless the previous order dated November 5, 1998 is modified, no fruitful purpose will be served and accordingly prayed for Injunction "restraining the defendant No. 2-Company from Issuing any new debentures to any third party except the petitioner and from transferring the debentures in any name other than the plaintiff in respect of the fresh debenture certificates issued by defendant No. 2 to the transferors in lieu of the debentures in the suit."

18. As mentioned earlier, although the second application was one u/s 151 of the Code, the prayer made therein clearly came within the purview of Order 39 Rules 1 and 2 of the Code. Thus, a fresh prayer of the petitioner for injunction was turned down by the order Impugned.

19. Therefore, rejection of such application squarely comes under the purview of Order 43 Rule 1 (r) of the Code and was appealable.

20. If I accept the contention of Mr. Saha, In that event, if a litigant Instead of

correctly describing an application as one under Order 39 Rules 1 and 2 of the Code, captions the same as one u/s 151 of the Code, any order passed on such application on merit will be appealable simply because either the parties wrongly decided to make it u/s 151 or court passed such order without clarifying the position.

21. Litigants cannot be allowed to by-pass the provisions of the Code by wrongly describing an application as one u/s 151 of the Code though it really comes within the purview of Order 39 Rules 1 and 2 resulting in deprivation of the right of appeal of a litigant.

22. Therefore, I do not find any error, not to speak of error apparent on the face of record, in my order dated June 24, 1999 Justifying recall of the same.

23. This court is quite alive to the position of law that there may be cases where the temporary injunction sought is of such a peculiar nature that the same may not come within the scope of Order 39 Rules 1 and 2 of the Code and in such cases the court can for ends of Justice grant relief to a litigant by invoking inherent power. If such an injunction is granted or refused, the dissatisfied party cannot avail of the right of appeal under Order 43 Rule 1(r) of the Code. In the instant case, as Indicated earlier, the petitioner did not pay for such a type of temporary Injunction.

24. As regards the first contention of Mr. Saha that I should recall my order because a Division Bench has taken a different view from the one taken by me, in my opinion, such fact is no ground of recall of an order. The said Division Bench passed such order in an appellate jurisdiction while I passed order dated June 24, 1999 sitting in revisional jurisdiction. Therefore, simply because a court sitting in a co-ordinate Jurisdiction has taken a different view, the same cannot be any ground of review or recall of earlier order passed by another Judge sitting In a co-ordinate Jurisdiction. According to explanation added to Order 47 Rule 1 of the Code, the fact that the decision on a question of law on which the Judgment of a court is based has been reversed or modified by the subsequent decision of even a superior court in other case cannot be a ground of review of any Judgment. Therefore, merely because in a subsequent decision, another bench of the same court has taken a different view such fact cannot furnish a ground of review to the petitioner.

Both the points taken by Mr. Saha are thus devoid of any substance and the application is thus dismissed.

In the facts and circumstances there will be however no order as to costs.

25. Application dismissed