
(1994) 08 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : C.M.P. (M) No. 279 of 1994

Smt. Lajwanti and Others	Vs	APPELLANT
Sh. Kedar Nath and Others		RESPONDENT

Date of Decision : 10-08-1994

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 3

Citation : (1995) 1 ShimLC 347

Hon'ble Judges : A.L. Vaidya, J

Bench : Single Bench

Advocate : Om Parkash and P.P. Grewal, for the Appellant; R.K. Bawa, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Vaidya, J.—A short question of law is involved in this petition and in order to appreciate it some facts are required to be dealt with.

2. Sh. Kedar Nath, the present Respondent, filed a suit for grant of permanent prohibitory injunction restraining-Defendants 3 and 4 (present Petitioners) from raising unauthorised construction on Khasra No. 396/2 and 397 without leaving proper set back towards the property of the Plaintiff and also from raising any construction in pursuance to the sanction order No 213 AP, dated 16-10-1993 vide which the building plan of Defendants 3 and 4 has been approved by Defendant No. 1 and the Order No. HIM/TP case No. 3773/93-218-19 dated 28-9-1993 passed by Defendant No. 2 approving the building plan of Defendants 3 and 4. The aforesaid orders are null and void being contrary to the factual position at the spot and also being in violation of the H.P. Municipal Corporation Act and the Town and Country Planning Act. The Plaintiff also further prayed in the suit that Defendants 3 and 4 be restrained from raising any construction without leaving one metre open space/set back towards the building of the Plaintiff and further a mandatory injunction has been sought directing the

Defendant Nos. 1 and 2 to demolish the unauthorised construction raised by Defendant Nos. 3 and 4. Alongwith this suit, an application under Order 39, Rules 1 and 2 read with Section 151 of the CPC for grant of temporary injunction was also preferred.

3. Injunction under Order 39, Rules 1 and 2 read with Section 151 of the CPC was prayed for to be granted against Defendant Nos. 3 and 4 from carrying out the construction of their building on Khasra Nos. 396/2 and 397 as detailed in the plaint The Plaintiff also prayed for grant of interim ex parte injunction.

On this petition, the relevant order passed by the trial Court was as under:

1-7-1994 Present: Sh. Kulbir Chauhan Advocate, for Plaintiff. Sh. C.P. Sood, Advocate, for Defendant No. 4.

Office report seen. Suit be Registered.

Copies of plaint, application supplied to the Defendant No. 4 Now Defendant Nos. 1 to 3 be summoned for 7-7-1994 through Dasti summons.

Sd/- Sub-Judge (I), Shimla.

4. The Plaintiff assailed the aforesaid order passed by the trial Court before the Additional District Judge (I), Shimla by preferring an appeal under Order 43, Rule 1 of the CPC on various grounds. Alongwith the appeal, an application under Order 39, Rules 1 and 2 of the CPC was preferred by Sh. Kedar Nath Appellant, praying for passing an ex parte ad intarim injunction restraining Respondent Nos. 3 and 4 (present Petitioners) from raising construction on khasra Nos. 396/2 and 397, Bazar Ward, Bara Shimla, Tehsil and Distt. Shimla, it was also prayed in this application that these Respondents be restrained from raising any construction without leaving one metre open space/set back towards the land and building of the applicant-Plaintiff situated on Khasra No. 391/1, House No. 102, Parimahal, Cart Road, Bazar Ward, Bara Shimla, Tehsil and District Shimla.

5. The lower appellate Court, admitted the appeal and ordered notice to the Respondents. However, in the application preferred under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, lower appellate Court granted an exparte injunction and the relevant portion of the order runs as under:

I have heard the learned Counsel for the Appellant and gone through the record. In view of the allegations which are supported by an affidavit, there exists a prima facie case at this stage for the grant of stay in favour of the applicant/Appellant, as, according to the photographs, the documents, i.e. the report of the expert and the affidavit, it appears that light and air to the building of the Plaintiff is likely to be adversely affected. The balance of convenience also lies in favour of the Appellant for the grant of such ex parte interim stay because if the construction is allowed to be completed or continued the Appellant is likely to suffer irreparable loss and injury. I, therefore direct that the Respondent Nos. 3 and 4 will not carry out any construction till further orders in Khasra Nos. 396/2

and 397. To show-cause on or before 18-7-1994. Order 39, Rule 3, CPC be complied before issuance of this stay order.

6. The aforesaid order of the lower appellate Court has been assailed in the present petition on various grounds, the main being, the order passed by the lower appellate Court was without jurisdiction inasmuch as the order dated 1-7-1994 passed by the trial Court issuing notice of the application preferred under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, was not at all an appealable order and the same, as such, suffered from inherent lack of jurisdiction in the lower appellate Court.

7. I have heard the learned Counsel for the parties and have also appreciated the arguments advanced by them.

8. A temporary injunction under the CPC can be granted by the court under Order 39, Rules 1 and 2 of the CPC and also under inherent power u/s 151 of the Code of Civil Procedure. Order 39, Rule 3 of the CPC envisages the procedure in dealing with the petition of that nature preferred under Order 39, Rules 1 and 2 of the Code of Civil Procedure. It is mandatory under Order 39, Rule 3 to issue notice of the application to the opposite party but there is an exception to this rule and on the basis of the same before the issue of notice of application in certain cases where it appears that the object of granting the injunction would be defeated by the delay and notice to the opposite party can be waived and an ex parte order in that event could be passed. However, this Rule 3 further provides certain compliance to be made in case it has been proposed to grant an injunction without giving notice to the opposite party and in that event, the court shall record the reasons for its opinion that object of granting the injunction would be defeated of delay, and require the applicant-

(a) to deliver to the opposite party or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of plaint; and

(iii) copies of documents on which the applicant relies; and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

9. Under Order 43, Rule 1(r) an appeal shall lie from the following orders under the provision of Section 104 namely... under Order 39, Rules 1 and 2, 2A, 4 and 10.

10. The sole point of controversy between the parties has been whether the order passed by the trial Court on 1-7-1994, issuing notice of temporary injunction application to the opposite party comes within the ambit of the

aforesaid provision or not.

11. Admittedly, no order accepting or rejecting the prayer of the applicant-Plaintiff for the grant of ex parte temporary injunction or otherwise has been passed by the trial Court.

12. It has been forcefully contended on behalf of the Plaintiff-Respondent that Plaintiff's prayer for grant of ex parte injunction impliedly has been dis-allowed by the trial Court by passing that order issuing of notice to the opposite party, which order as such would be an appealable order under the aforesaid provision of law. It is not so a simple matter as has been submitted on behalf of the Plaintiff-Respondent.

13. Learned Counsel for the parties do not dispute the proposition that the order refusing or granting ex parte order is an appealable order. However, the sole variance between them pertains to the proposition that according to the learned Counsel for the Petitioner, the order passed by the trial Court on 1-7-1994, referred to above, cannot be considered to be an order rejecting the prayer of the Plaintiff for the grant of ex parte injunction, but on the other hand learned Counsel for the Respondent has tried to interpret this order otherwise as mentioned earlier.

14. The order passed by the Sub-Judge, clearly reflected the non-application of the mind of the Presiding Officer in appreciating the prayer of the applicant-Plaintiff for the grant of ex parte injunction. The court could pass a reasonable order, after appreciating the pleadings, the affidavit and the documents filed alongwith the plaint, and either-reject the prayer for the grant of ex parte ad interim injunction or allow the same. This has not been so done by the trial Court but instead it selected to issue notice to the opposite party, meaning thereby the trial Court in a way deferred the decision of passing appropriate order after hearing the parties. Order issuing of notice to the opposite party of the application, as such, will not, in any manner, be an order rejecting the prayer of the applicant-Plaintiff for the grant of ex parte-ad interim injunction on merit. This order, as such, issuing notice of the application to the Defendant-Respondent will not in any way come within the ambit of Order 43, Rule 1(r) of the Code of Civil Procedure.

15. The aforesaid view finds support from the various decided case law.

16. In Bidulata Das Vs. Braja Bihari Palit and Others, the point was dealt with as under:

Where court is not satisfied that it should consider an application for temporary injunction under Order 39, Rules 1 and 2 before notice to the opposite party, it does not pass an order under Order 39, Rules 1 or 2. It postpones the consideration of such application to a later date after notice to the opposite party as envisaged under Order 39, Rule 3 proviso. Such order not being an order under Order 39, Rules 1 or 2, right of appeal under Order 43, Rule 1(r) cannot be

exercised in respect of such an order.

An order under Order 39, Rules 1 or 2, Code of Civil Procedure, may be either by grant of temporary injunction or refusal to grant such injunction. Where that order is passed ad interim for further consideration it has the same effect as an order of temporary injunction till it remains in force. Thus, right of the party restraining is affected. In that view of the matter, an appeal lies against such an order. Where, however, the Court adjourns such an application to the future date after notice to opposite party, no right of any party is affected. Application of the party making the application remains pending for future consideration. Such an order cannot be treated as an order refusing to grant injunction.

17. In *Khusilal and Others Vs. Gorelal and Another*, it was held that where application for temporary injunction was filed along with the suit and the trial Court could not decide on available material whether parties were-in joint possession of the suit land or not and the court had not felt any urgency, ordered notice to Defendant. Therefore, such order being one under Order 39, Rule 3 was not appealable under Order 43, Rule 1(r) of the Code of Civil procedure. In this reported case, the trial Court on the application for temporary injunction, passed the following order:

It has been found from the revenue record that suit land was joint of the parties and at first instance the Plaintiff had not produced any proof whereby it could be ascertained that partition has taken place between the parties and as a result of partition the applicant was in occupation of the same independently. Therefore, under such circumstances, without hearing the opposite party grant of ex parte interim injunction was not justified and therefore notice be issued to the opposite party.

18. In the aforesaid reported case, in a way some record was appreciated in order to issue notice to the opposite party and with that background, it was held that said order was not appealable.

19. *Lakhai Vs. Ram Niwas and Others*, also supports the aforesaid proposition. The relevant observations made in this case are reproduced hereunder:

Section 104 makes it clear that an appeal shall lie from only those orders which have been enumerated in this section and from no other order. The effect is that only those orders under the rules which have been enumerated in Order 43, Rule 1, CPC are appealable and none others. Section 105, CPC further places a bar on the filing of an appeal against an order made by a court in the exercise of its original or appellate jurisdiction unless an appeal is expressly provided against such order. From Sub-clause (r) of Order 43, Rule 1, it is apparent that an appeal lies only against an order under Rule 1, Rule 2, Rule 2-A, Rule 4 and Rule 10 of Order 39, Code of Civil Procedure. The mere order issuing notice on an application for grant of an injunction clearly comes under the provisions of Rule 3 of Order 39. An order under Rule 3 of Order 39 is not appealable under Order 43, Rule 1(r). It is, therefore, clear that whenever a court passes an order for issue

of notice on an injunction application, this order is not appealable under Order 43, Rule 1 (r), Code of Civil Procedure.

20. Learned Counsel for the Plaintiff-Respondent has tried to find support from *Shyam Behari Singh Vs. B. Biseswar Dayal Singh and Others*, wherein it has been held that an appeal lies from an order granting an injunction as well as from an order refusing an injunction. It was held that an order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under Order 39, Rule 1 and is appealable under Order 43, Rule 1(r).

As referred earlier, in so far as facts of the present case are concerned, application for grant of temporary injunction, without notice to the opposite party had not been disposed of and no interim or final order in that behalf has been passed. Therefore, without their being such an order, it will not come within the ambit of Order 43, Rule 1(r) of the Code of Civil Procedure.

21. Thus, on the basis of the aforesaid law laid down by the various High Courts, it becomes apparent that order dated 1-7-1994, passed by the trial Court, issuing notice of the application to the Respondent was not an appealable order, not coming within the ambit of Order 43, Rule 1(r) of the Code of Civil Procedure. Appeal before the District Judge, was not legally competent and as the Additional District Judge, Shimla had no jurisdiction to pass the impugned order, the same under the circumstances is required to be interfered with. The injunction order dated 2-7-1994 under reference passed by the learned Additional District Judge (I), Shimla in favour of the Plaintiff is therefore quashed. It is directed that the trial Court after hearing the parties, shall pass proper order, on the application of the Plaintiff, filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure. The parties are directed to appear before the trial Court on 18-8-1994. Proceedings before the lower appellate Court stands quashed. The trial Court is further directed to dispose of the application preferred under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, after hearing the parties, without any undue delay. There shall be no order as to costs.

C.M.P. No. 40 of 1994

22. In view of the disposal of the main petition this C.M.P. has become infructuous and, as such, is dismissed.