

(1929) 04 MAD CK 0047
In the Madras High Court

(Sri) Govinda Ramanuja Das Goswami	APPELLANT
Vs	
(Appala) Vijiaramaraju and Another	RESPONDENT

Date of Decision : 05-04-1929

Acts Referred:

Citation : AIR 1929 Mad 803

Judgement

1. The appellant appeals against the order of the Subordinate Judge of Berhampore in the matter of a temporary injunction in the following circumstances.

2. The minor plaintiff in O.S. No. 14 of 1923 on the file on the lower Court is suing to set aside a Court sale in O.S. No. 39 of 1921 so far as it

relates to his share of the property sold. The appellant was the decree-holder purchaser at the Court sale. Unable to get possession under his sale,

he filed O.S. No. 56 of 1925 to eject the present plaintiff and his father. The trial of that suit was stayed for a long time but a decree was passed in

it ex parte in favour of the present appellant on 10th March 1928. In the meantime on 30th January 1928, the minor respondent filed his suit, O.S.

No. 14 of 1928, and with it an application for a temporary injunction restraining the appellant from executing his decree in O.S. No. 56 of 1925.

That application came on after notice to the appellant for hearing on 10th September 1928. The appellant put in no appearance and filed no

counter and an order was passed staying delivery under the decree in O.S. No. 56 of 1925 till the disposal of O.S. No. 14 of 1928. On 11th

September 1928, the appellant put in a petition under Order 39, Rule 4 praying that the order of the previous day be dissolved. On 24th October

1928, the Subordinate Judge passed orders on this directing that ""in order to do

substantial justice to both sides,"" the injunction be varied allowing a receiver to collect half the current fasli rents and staying all further execution. Against this order, the appellant has come up in appeal.

3. The respondent advances a technical plea that as the appellant has not appealed against the original order of 10th September 1928 staying delivery, that has become final and binding upon him and that therefore the present appeal is futile. The appellant endeavours to meet this point by contending that Order 39, Rule 4 allows a Court on application to vary an injunction whenever and in whatever manner it likes and that the original order has in that way been superseded by the present order under appeal which is itself an appealable order. The respondent rejoins that such a wide interpretation of Order 39, Rule 4 is untenable and that the lower Court has not in fact varied its original order since it merely imposed on it an order appointing a receiver, which in any case it had no jurisdiction under Order 39, R, 4 to do, since neither party had asked for a receiver and since the appointment of a Receiver has nothing to do with the passing of an injunction and certainly nothing to do with Order 39, Rule 4. The real point at issue therefore is, what is the scope of the jurisdiction of the Court under O.39, Rule 4?

4. We think the point taken by the respondent that the Subordinate Judge has not really varied his original injunction staying delivery, though he purports to do so by appointing a Receiver for the current rents, is a good point. The original order staying delivery remains in full force and is reiterated in the revised order. Whatever be the scope of O."39, Rule 4, it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order.

5. We think it is clear that Order 39, Rule 4 is intended to cover two classes of cases. (1) When an urgent order ex parte has been passed under Rule 3, Rule 4 will allow the party against whom it has been passed to apply to have it discharged or varied or set aside, and (2). When an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable, it would be open to either party to apply under Rule 4 to the Court to discharge, vary or set it aside. We are clear that Rule 4 cannot give a Court jurisdiction to interfere with an injunction already passed when each side has had an opportunity of

being heard, and no grounds other than those available at the original hearing appear or, are urged. When therefore a party has by his own fault neglected to put his case forward at the original hearing, he cannot come forward under Rule 4 later and plead that he has a legal right under that rule to have the case re-opened and re-heard. Rule 4 cannot be read so as to allow a party e.g., to let the appeal time slip by or to wait until his appeal has been dismissed and then to re-open his original case. We are satisfied that R.4 is not intended to set at nought the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed.

6. Although the point has been argued before us here, there is no question of the Subordinate Judge having re-opened the matter because he thought the appellant had sufficient ground for not putting in his counter in time. The Subordinate Judge's order under the "appeal does not say anything of the kind, and we understand from the appellant that he did put in an application for review of the original order on this very ground and that that was dismissed. The order under appeal therefore was not passed because the Subordinate Judge thought that the appellant had good grounds for not putting in his counter in time but as he himself says because he thought substantial justice required that his original order should be modified. It may be that the appellant had excellent grounds to urge why the injunction should not be granted, but the best weapon is of no use unless it is used at the proper time. As we have held, the Subordinate Judge had no jurisdiction to vary an order already passed on the ground of substantial justice or any other ground unless on the ground of new matter not available at the time of the original order. Hence if necessary, we should hold that the order under appeal is without jurisdiction. That of course would not benefit the appellant against whom the order of 10th September 1928 still stands. The appellant might probably prefer that the appeal be dismissed and the order under appeal should stand, but we understand that in any case the order appointing a receiver proved futile because the rents had already been taken by the respondent.

7. The only proper order therefore is technically to allow the appeal as the order

appealed against is without jurisdiction and dismiss C.M.P. No.

526 of 1928 as appellant had no right in law to have his petition entertained at all. The original order of 10th September 1928 therefore stands.

We direct each party to pay his own costs in this appeal, and respondent will get his costs in the C.M.P. No. 526 of 1928.