

(2006) 04 AHC CK 0042
In the Allahabad High Court
Case No : C.M.W.P. No. 22446 of 2006

Syed Zafar Ali and Another	Vs	APPELLANT
Saeed Ahmad alias Dhungi and Others		RESPONDENT

Date of Decision : 25-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 10, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4

Citation : AIR 2006 All 300 : (2006) 3 AWC 3114 : (2006) 2 RD 187

Hon'ble Judges : Umeshwar Pandey, J

Bench : Single Bench

Advocate : Wasim Alam and Anil Kumar Tiwari, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Umeshwar Pandey, J.—Heard learned Counsel for the parties.

2. The petitioner plaintiffs have challenged the order of the District Judge dated 12.4.2006, whereby their appeal preferred under Order XLIII, Rule 1(r). C.P.C. has been dismissed as not maintainable.

3. The plaintiffs filed a suit before the trial court being Original suit No. 165 of 2006 in which they also moved an application under Order XXXIX, Rules 1 and 2, C.P.C. praying for grant of temporary injunction. The trial court vide its order (Annexure-7) dated 1.4.2006 instead of passing an order granting ex parte injunction, directed issuance of notice to the respondents-defendants fixing a date inviting objections/counter-affidavit from them and also fixed a date for disposal of the said temporary injunction application. Against this order of the trial court the petitioners preferred an appeal before the District Judge concerned which has been dismissed as not maintainable by the impugned order.

4. While challenging the aforesaid order of the District Judge, the learned Counsel for the petitioner has tried to emphasize that an order declining grant of

an ex parte temporary injunction is an appealable order and the impugned order of the District Judge holding that the appeal was not maintainable, is wholly erroneous and requires interference in this petition. The learned Counsel for the petitioner has placed reliance upon the case law of Israr and another Vs. District Judge, Saharanpur and others,

5. The question which has arisen for decision here is whether an order declining grant of an ex parte injunction order in favour of the plaintiff actually amounts to an order liable for challenge in an appeal under the provisions of order XLIII, Rule 1(r). C.P.C. or not. The Hon''ble single Judge in the aforesaid case of Israr (supra) while holding that any order passed by the trial court granting or not granting an ex parte Injunction in favour of plaintiff, is an order duly covered by the provisions of Order XXXIX, Rules 1 and 2, C.P.C. and, therefore, it is held to be an appealable order. There is no dispute that an order granting ex parte injunction in favour of the party to the suit is also an order under Order XXXIX, Rules 1 and 2, C.P.C. and the view is definitely settled on this point. In order to appreciate the conclusions arrived at by the Hon''ble single Judge in the aforesaid case, that an order not granting an ex parte order on such injunction application and directing issuance of notice thereon is also appealable order, it would be relevant to extract below the provisions of Order XXXIX, Rules 1, 2, 3 and 4. C.P.C. as well as the provisions of Section 94, C.P.C. and also the provisions of Order XLIII, Rule 1 (r), C.P.C.

Order XXXIX (Rules 1, 2, 3 and 4):

1. Cases in which temporary injunction may be granted.- Where in any suit it is proved by affidavit or otherwise:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution or a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to (defrauding) his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property (or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit) as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach:

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit

or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

3. Before granting injunction. Court to direct notice to opposite party,-The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by 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 the 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.

4. Order for injunction may be discharged, varied or set aside.- Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue

hardship to that party.

Section 94. Supplemental proceedings.-In order to prevent the ends of Justice from being defeated the Court may, if it is so prescribed -

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he falls to comply with any order for security commit him to the civil prison ;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Order XLIII,.Rule 1 (r):

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

(r) an order under Rule 1, Rule 2 [Rule 2A], Rule 4 or Rule 10 of Order XXXIX;

Referring to the aforesaid provisions it has been held in the case of Israr (supra) that Rule 3 of Order XXXIX is not an independent provision but is in aid of the exercise of the power under Rules 1 and 2. It is not an enabling provision also and it does not prescribe power as contemplated in Section 94(c). Rule 3 simply prescribes the procedure for grant of injunction before Issuing notice. The Hon"ble single Judge in the aforesaid case has thus concluded that if an ex parte ad interim order is not passed and notices are directed to be Issued without granting injunction in that event it amounts to refusal to grant Injunction before the notice and when the Jurisdiction for grant or refusal of injunction flows only from Rules 1 and 2 and not from Rule 3, the order automatically becomes an order passed under those Rules 1 and 2 only thus making it liable for challenge in appeal under Order XLIII, Rule 1(r), C.P.C.

6. The following paragraphs of the Judgment of Israr"s case being worth reference in the present case are being extracted:

Rule 3, Order XXXIX of the Code only prescribes procedure as to how and in what manner jurisdiction under Rules 1 and 2 could be exercised in case of grant of ad interim injunction. Rules 1 and 2 has two stages, (t) the grant of ad interim injunction pending Injunction application and, (ii) the grant of temporary injunction order pending disposal of the suit while disposing of the application for temporary injunction. Therefore, grant or refusal of ad interim injunction is an

order under Order XXXIX, Rules 1 and 2 of the Code. Whereas Rule 3 prescribes only mode and procedure, as to how such an order is to be passed. The order under Rule 3 is, therefore, may not be appealable but as soon as it is refused, it becomes an order under Order XXXIX, Rules 1 and 2 of the Code and thus appealable under Order XLIII, Rule 1(2) of the Code.

Jurisdiction to grant injunction is derived by the Court from Section 94(c) read with Order XXXIX, Rules 1 and 2. Inasmuch as u/s 94(c) the Court can grant Injunction only if it is prescribed. The word "prescribed" in Section 94(c) would mean as defined in Section 2(16) "prescribed by rules". The rules which prescribe grant of temporary injunction are Rules 1 and 2 of Order XXXIX, of the Code.

The above view finds support in the case of Jagjit Singh Khanna Vs. Dr. Rakhal Das Mullick and Another,

Whereas Rule 3 requires that injunction should not be granted without issuing notice to the other side. Then it prescribes the procedure how the power under Rules 1 and 2 is to be exercised. Power to grant includes power to refuse. Thus, grant or refusal both is an exercise of the power under Rules 1 and 2. Rule 3 requires that injunction can be granted even without notice only in case where the Court is of opinion that delay will defeat the object and purpose. In such case it is provided that it has to record its reason for forming such opinion.

7. The order of the Hon"ble single Judge in paragraph 5 of the judgment that "the order under Rule 3 is, therefore, may not be appealable but as soon as it is refused, it becomes an order under Order XXXIX, Rules 1 and 2 of the Court and thus appealable under Order XLIII, Rule 1(r) of the Court, appears to be contrary to the view taken by a Division Bench of this Court in the case of H. Bevis and Co. Vs. Ram Behari and Others, upon which the Hon"ble single Judge has also placed his reliance and has made reference thereto. An identical question was there for decision before the Division Bench of this Court in that case where there was difference of opinion between the two Hon"ble Judges and, therefore, it was referred to the third Hon"ble Judge in which the first question which was formulated for the answer was "whether" an order refusing to issue ad-interim injunction as allowed by Rule 3 of Order XXXIX, C.P.C. is appealable or not." The Hon"ble third Judge has specifically replied this question in paras 31 to 35 of his judgment which is extracted as following:

I, therefore, think that when the Court refuses to grant an ex parte injunction and issues notice to the other side of the application for injunction, it has passed no order under Rule 1 or Rule 2 and, therefore, no appeal can lie from such an order. But where the Court grants the application for Injunction ex parte, an appeal lies because the application made under Rule 1 or Rule 2 is disposed of.

This view is supported by authorities.

That an appeal lies when an ex parte order or injunction is passed under Rule 1,

was affirmed in *Amolak Ram v. Sahib Singh* 7 All 550 : 1885 AWN 128.

That no appeal lies against a refusal to proceed ex parte and pass an ex parte order but to issue notice to the opposite party before deciding the application was held in *Luis v. Luis* 12 Mad 186 and *S.D. Annamalai Desikar Vs. M.R. Govinda Rao*,

My answer to the first question is, therefore. in the negative.

8. In order to better appreciate the point, in issue the observations made in part of paragraph 30 of the Judgment of the Hon''ble third Judge also needs to be extracted as below:

It is clear from a reading of Rules 1 to 4 that whenever an ex parte injunction is issued, the application is disposed of finally and the order is one made under Rule 1 or Rule 2 as the case may be. But when the Court does not think that "the object of granting the injunction would be defeated by the delay", and issues a notice of the application to the opposite party, it does not dispose of the application made under Rule 1 or Rule 2. That application is still pending and will be disposed of after hearing the opposite party in pursuance of the notice issued to him. The common practice followed both in the lower courts as well as in this Court of issuing notice of the application for an Injunction and at the same time of issuing an ad interim ex parte order of injunction is not Justified by the provisions of the Code. What ought to be done is that when the Court feels that the object of granting the injunction would be defeated by the delay, it should grant the application for injunction (of course, if it is satisfied that the injunction ought to be granted), and no notice of the application need be issued to the opposite party. The other side is not prejudiced at all by this procedure because in order to make the injunction operative and effective it has got to be served on the party restrained and so that opposite party will get notice of the grant of the injunction. If dissatisfied with this injunction, he can always approach the Court and have the order discharged, varied or set aside under Rule 4.

9. Without going into the controversies of the observation of the Hon''ble single Judge that Rule 3 is not an independent provision nor it is an enabling provision but is only in aid of exercise of the power under Rules 1 and 2, the very procedure which it prescribes, does enable the Court to grant an Injunction without giving notice of the application to the opposite party. It also prescribes to the Court to direct issuance of notice to the other party before grant of an injunction. The exceptional power to the Court for grant of ex parte injunction order is conferred only by Rule 3 and this Rule thus may be treated also to be in aid to Section 94(c) as well as Rules 1 and 2 of Order XXXIX, C.P.C. Therefore, to identify this Rule as purely procedural Rule and holding it to be only an enabling provision may be an erroneous proposition. The Division Bench in the aforesaid case of *H. Bevis & Co. (supra)* has also held that whenever an ex parte injunction is issued the application is disposed of finally and the order is made under Rule 1 or Rule 2 as the case may be. It is worthwhile to find out here itself as to which

provision of the Court enables the Court to pass an ex parte injunction order thus disposing of the injunction application in the absence of the defendant, ex parte. The answer to this query is only that it is Rule 3 alone which enables the Court to pass an ex parte injunction order thus disposing the injunction application at that stage but in case the injunction application is not disposed of and only notices are issued, such order in any case cannot be treated to be one passed under Order XXXIX, Rules 1 and 2, C.P.C.

10. Reverting to the present case, it is obvious that the trial court had directed issue of notice to the defendant before passing any order on the plaintiffs application for temporary injunction. This order being one which is not covered within the orders passed by the Court under Rules 1 and 2 of Order XXXIX, C.P.C., can never be treated as an appealable order and the District Judge by the Impugned order very rightly found this appeal to be wholly misconceived and not maintainable and has correctly dismissed the same.

11. No relief against such order would thus be given to the petitioner in the writ jurisdiction of this Court.

12. The petition being wholly devoid of merits is hereby dismissed.