

(2023) 09 CAL CK 0063

In the Calcutta High Court

Case No : CO No. 3262 Of 2022, CAN 1 Of 2022

Yajur Fibres Limited & Anr.

APPELLANT

Vs

Dharmendra Tiwari & Ors.

RESPONDENT

Date of Decision : 18-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 227

Code of Civil Procedure, 1908 — Section 151, Order 39 Rule 1, Order 43 Rule 1, Order 39 Rule 2

Bengal, Agra and Assam Civil Courts Act, 1887 — Section 21, 21(1)(a), 21(1)(b)

Citation : (2023) 09 CAL CK 0063

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Sudip Deb, Sounak Bhattacharya, Sumitava Chakraborty, Bijoy Bag, Aranyak Saha, Rupak Ghosh, Chayan Gupta, Souryadeep Banerjee, Dwip Raj Basu

Final Decision : Allowed

Judgement

Moushumi Bhattacharya, J

1. The applicants in CAN 1 of 2022 seek recalling of an order passed by this Court on 18th October, 2022 in a civil revisional application namely CO 3262 of 2022 filed by the opposite parties. The applicants are the defendants in a Title Suit filed by the opposite parties/plaintiffs being TS 147 of 2021 in the learned Civil Judge (Senior Division) at Uluberia.

2. By the order dated 18th October, 2022 the order passed by the Trial Court on 23rd September, 2022 was quashed and the revisional application filed by the plaintiffs/opposite parties was finally disposed of. The interim order dated 14th January, 2022 passed by a Division Bench of this Court in favour of the revisionists was restored.

3. The applicants/defendants have filed the present application for recalling the order dated 18th October, 2022. Before considering the grounds made out for

the relief prayed for, a brief narration of the facts is required.

4. In the Title Suit, the opposite parties/plaintiffs prayed for a decree of perpetual injunction restraining the defendants (applicants) from entering into or encroaching upon any part of the suit premises described in Schedule B to the plaint and the portion indicated in the plaint being Annexure I to plaint. The plaintiffs also filed an interlocutory application under Order XXXIX Rules 1 and 2 read with section 151 of The Code of Civil Procedure, 1908 (CPC) for an order of injunction restraining the respondents from interfering with the construction of a boundary wall and godown in the suit premises. The opposite parties amended the plaint and moved the application for interim protection which was however rejected by the learned Trial Court. The plaintiffs challenged the said order before this Court and obtained an ad interim order of injunction from the Division Bench on 14th January, 2022. By the interim order of injunction by which the defendants were restrained from creating any obstruction to construction of the boundary wall in the suit premises subject to the condition that the plaintiffs shall adhere to any permissions required for construction of the boundary wall.

5. This order was subsequently confirmed by an order dated 23rd February, 2022 extending the interim order dated 14th January, 2022 for 7 months or till the Trial Court decides the matter on merits, whichever is earlier.

6. The defendants/applicants thereafter filed the written statement to the plaint and affidavits were exchanged between the parties in the interlocutory application filed by the plaintiffs. The interlocutory application however could not be disposed of within the time directed by the Division Bench in the order dated 23rd February, 2022.

7. The plaintiffs filed an application under section 151 of the CPC seeking extension of the interim order passed by the Division Bench. The defendants filed their objection to the application. The learned Trial Court however refused to extend the interim order and recorded its reason for the refusal. The order of the Trial Court is dated 23rd September, 2022. The plaintiffs preferred a revisional application from the said order being CO 3262 of 2022. The impugned order dated 18th October, 2022 which is the subject matter of the present application was passed in the said civil revisional application filed by the plaintiffs. The defendants seek recalling of this order.

8. The ground taken for recalling the order is that the order was disposed of without giving an opportunity to the defendants to present their case. Learned counsel appearing for the applicants/defendants also argues that the order dated 23rd September, 2022 passed by the learned Trial Court, which was the subject matter of the revisional application filed by the plaintiffs, was passed under section 151 of the CPC and is an appealable order. Counsel submits that the said order was passed on merits and in terms of the direction of the Division Bench contained in the order dated 23rd February, 2022. Counsel submits that there is a specific provision for appeal against such order in the Bengal, Agra and Assam

Civil Courts Act, 1887. It is submitted that the plaintiffs withheld crucial facts from this Court and are hence guilty of suppression of such facts. Counsel also submits that the plaintiffs have chosen not to take any steps for hearing of the application filed under Order XXXIX Rules 1 and 2 of the CPC which is still pending before the learned Trial Court.

9. Learned counsel appearing for the opposite parties / plaintiffs who were the revisionists before the Court and obtained the order dated 18th October, 2022, submits that the order passed by the learned Uluberia Court/Trial Court on 23rd September, 2022 was on an application under section 151 of the CPC and is therefore not an appealable order. Counsel submits that there was no bar on the plaintiffs to file an application under Article 227 of the Constitution. The gist of the arguments made on behalf of the plaintiffs is that the order of the learned Trial Court dated 23rd September, 2022 is not an appealable order under Order XLIII Rule 1 of the CPC and the plaintiffs were therefore constrained to file this revisional application under Article 227 of the Constitution before this Court.

10. The issue which falls for adjudication in the present application for recalling the order passed by this Court in the revisional application filed by the plaintiffs is whether the order of the learned Trial Court dated September, 2022, which was the subject matter of the revisional application, is an appealable order. The other issue is whether the plaintiffs suppressed relevant facts from this Court at the time of moving the revisional application.

11. To answer the second question first, the plaintiffs had previously preferred an appeal from the order of the learned Trial Court refusing to give interim relief to the plaintiffs in the plaintiff's application under Order XXXIX Rules 1 and 2 of the CPC. In the second round however, the plaintiffs chose to file a revisional application under Article 227 of the Constitution instead of following the earlier route taken by the plaintiffs in filing an appeal under Order XLIII Rule 1 of the CPC. It is also correct that at the time of moving the revisional application an appeal Court available to the plaintiffs.

12. Further, although the plaintiffs say that the applicants / defendants did not file any caveat and the plaintiffs were entitled to move ex-parte, the fact that contested proceedings were pending between the parties in the learned Trial Court, the defendants had also contested the appeal in this High Court are relevant considerations.

13. It also appears that the appeal Court by its order dated 14th January, 2022 had granted interim relief to the plaintiffs which was confirmed by another Appeal Court on 23rd February, 2022, on the condition that the interim order would be in force for 7 months from the date of the second order or till the Trial Court decides the matter on merits, whichever is earlier. The Appeal Court further gave an opportunity to the learned Trial Court to pass appropriate orders if the plaintiff's application for interim relief could not be concluded within a period of 6 months from the date of completion of affidavits. It does not appear

from any material disclosed by either of the parties before this Court that the plaintiffs have taken any steps to expedite the hearing of the interlocutory application filed by the plaintiffs or for final resolution of the pending application. The plaintiffs instead filed an application under section 151 of the CPC for extension of the interim order.

14. With regard to the first question as to whether the order passed by the learned Trial Court on 23rd September, 2022 is an appealable order, it is well settled that an erroneous nomenclature or filing an application under a wrong provision would not disentitle a party to the relief sought for. Several decisions of the Calcutta High Court have conclusively settled that even an application filed under section 151 of the CPC would be an appealable order under Order XLIII Rule 1 of the CPC subject to the application being read as a whole and not only the caption or heading of the application. A Coordinate Bench in *Ravi Maharia v. Reliance Petroleum Limited*; (2000) 1 CHN 439 considered an application filed under section 151 of the CPC praying for modification/variation of an earlier injunction order and the Court held that the prayer made in the application comes within the purview of Order XXXIX Rules 1 and 2 of the CPC and the rejection of such an application hence comes within the purview of Order XLIII Rule 1 of the CPC and was an appealable order. A similar finding was returned by another Coordinate Bench in *C.E.S.C Ltd. v. Sk. Salauddin*; (2009) 2 CAL LJ 536.

15. Therefore, even though the order passed by the learned Trial Court on 23rd September, 2022 was passed in an application filed under section 151 of the CPC, it is a detailed order touching upon the merits of the case. The order raises issues affecting vital rights of the plaintiffs and the defendants/applicants. The substance of the order of refusing to extend the interim order granted in favour of the plaintiffs would hence in effect be an order under Order XXXIX Rules 1 and 2 of the CPC and an appealable order under Order XLIII Rule 1 of the CPC.

16. Moreover, section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887 relates to appeals from a Civil Judge (Senior Division) and Civil Judge (Junior Division). Section 21 classifies certain orders to be appealable orders. Section 21(1)(b) provides for appeal to the High Court in cases other than those covered under section 21(1)(a). Section 21(1)(a) provides for appeals to the District Judge whether the value of the original suit in which or in any other proceedings arising out of which the decree or order does not exceed Rs. 1,50,000/-. Since the suit filed by the plaintiffs has admittedly been filed at Rs. 1,64,000/-, the appeal from an order passed in that proceeding would lie before the High Court under section 21(1)(b) of the Act of 1887.

17. The order passed by this Court on 18th October, 2022 reflects that the plaintiffs/revisionists did not make any argument on the alleged non-appealability of the order of the learned Trial Court dated 23rd September, 2022. The only argument made before the Court was on the absence of proper service and the absence of reasons for rejecting the plaintiffs' application for extending the interim order. The revisionists naturally did not disclose of the Court that an

appellate forum available to them on the date when civil revisional application was moved before the Court.

18. The non-disclosure of relevant facts is contrary to the plaintiffs' choosing to challenge the order of the learned Trial Court's refusal to grant interim relief before a Division Bench of this Court and having the first order confirmed by a second order of 23rd February, 2022.

19. Another significant fact is that the order dated 18th October, 2022 was passed ex parte and the revisional application was disposed of on that very date itself, quashing the order passed by the learned Trial Court dated 23rd September, 2022.

20. The entirety of facts disclosed by the applicants/defendants makes it evident that the parties had contested proceedings before the learned Trial Court and thereafter before the Division Bench of this Court and the defendants were suffering the interim order granted by a Division Bench of this Court on 14th January, 2022 for 9 months before the plaintiffs moved the revisional application on 18th October, 2022.

21. The revisionists have not been able to give any credible explanation for filing a revisional application instead of choosing the more efficacious remedy of filing an appeal under Order XLIII Rule 1 of the CPC as they had earlier done in January, 2022.

22. The decisions cited on behalf of the revisionists/plaintiffs namely Director of Health Services v. Sevugaperumal; 2015 SCC OnLine Cal 10458 and Eastern Engineering Corporation v. Abhijit Sarkar; CO 3253 of 2022 were passed in civil revisional applications but in the presence of the opposite parties. Both the orders were passed on contest and the orders of the learned Trial Court were quashed and/or set aside. In the present case, the impugned order being passed in the absence of the applicants/defendants is therefore fundamentally distinguishable.

23. The factual conspectus presented by the parties in this application was not made available to the Court on the day of passing of the order that is on 18th October, 2022. Considering the relevant law on the subject and the material disclosed before this Court, this Court is of the view that the order dated 18th October, 2022 should be recalled.

24. CAN 1 of 2022 is accordingly allowed and disposed of by recalling the order dated 18th October, 2022 passed in CO 3262 of 2022. Needless to say, the parties shall be relegated to the position which they were in as on 17th October, 2022 and be at liberty of taking steps in accordance with law.

Later

25. Considering the facts which were brought to the notice of the Court after the ex parte order dated 18th October, 2022, the prayer for stay is considered and

refused.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.