

**AFR**

**Court No. - 8**

**Case :-** MATTERS UNDER ARTICLE 227 No. - 4239 of 2023

**Petitioner :-** Upendra Nath Srivastava

**Respondent :-** Additio

nal District And Sessions Judge/Special Judge, Pocso Act, Court No. 1,Lko. And 3 Others

**Counsel for Petitioner :-** Ravi Shanker Tewari,Anant Tewari

**Counsel for Respondent :-** Lalit Kishore Pandey,Pankaj Shukla

**Hon'ble Jaspreet Singh,J.**

1. Heard Shri Ravi Shanker Tewari, learned counsel for the petitioner and Shri Lalit Kishore Pandey, learned counsel for private respondent no.3.

2. Under challenge is the order dated 26.05.2023 passed by the Additional District Judge / Special Judge, POCSO Act, Court No.1, Lucknow, whereby it dismissed the appeal of the petitioner and affirmed the grant of ex parte interim injunction order dated 06.09.2022 passed by Civil Judge (Senior Division), Malihabad, Lucknow in Regular Suit No.1732 of 2022.

3. The controversy before this Court is limited to an extent inasmuch as it is the case of the petitioner that the private respondent no.3 had instituted the suit for permanent injunction before the Civil Judge (Senior Division) Malihabad, Lucknow bearing Regular Suit No.1732 of 2022. Along with the plaint in suit, the private respondent no.3/ plaintiff also moved an application under Order 39 Rule 1 and 2 C.P.C. duly supported by an affidavit.

4. It is the case of the petitioner that on 06.09.2022 the trial court while admitting the suit had also heard ex parte on the application under Order 39 Rule 1 and 2 C.P.C. and the trial court passed an ex parte interim order dated 06.09.2022 directing the parties to maintain status quo. By the said order itself the plaintiff was required to comply with the provision of Order 39 Rule 3 C.P.C. within 24 hours.

5. It is the case of the petitioner that a sham compliance of Order 39 Rule 3 C.P.C. was made by the private respondent no.3 as a result the said injunction order could not have subsisted nor could have been extended, as any person who approaches the Court must approach the Court with clean hand. In this regard, the counsel for the petitioner had drawn the attention of the Court to paragraph 12 of the petition wherein specific averments have been made to indicate that the compliance as alleged to have been done by the private respondent no.3 could not be treated as a valid compliance in terms of Order 39 Rule 3 CPC. Thus, for the aforesaid reason, the injunction order was liable to be recalled.

6. It is further submitted that even otherwise, if a court passes an ex parte interim order, then as per the legislative mandate, it is required to assign reasons, even though briefly to indicate that in case, if the said ex parte injunction order is not granted, it may entail frustration of the suit itself and on this count as well the order falls foul.

7. It is further submitted that the petitioner had filed an appeal and the lower appellate court also did not find favour with the reason that since the petitioner has adequate remedy of filing objections against the application under Order 39 Rule 1 and 2 C.P.C. which partakes the nature of an objection in terms of Order 39 Rule 4 C.P.C., hence, it would be appropriate for the petitioner to get the matter decided on merits as he had already put an appearance. Thus, it is submitted that the basic ingredients of Order 39 Rule 3 C.P.C., having been blatantly violated, yet this aspect has not been noticed either by the trial court or the lower appellate court, hence the both the orders are bad and interim order cannot subsist perpetually wrong.

8. Shri Lalit Kishore Pandey, learned counsel appearing for the private respondent no.3 has filed his counter affidavit, which is taken on record after serving a copy on the counsel for the petitioner, who submits that he does not wish to file any rejoinder affidavit as the facts in the instant case are not in dispute and only a short but a legal question is involved.

9. Shri Lalit Kishore Pandey, learned counsel appearing for the private respondent no.3 submits that the compliance of Order 39 Rule 3 C.P.C., was duly made. It is further urged that once the compliance is made, whether it is adequate or inadequate would be an issue which can be considered by the trial court while considering

the application Order 39 Rule 1 and 2 C.P.C. on its own merits and specially once the order of status quo has been passed which does not in any manner create any prejudice for either parties as the same is only for the protection of the property in question. In the aforesaid circumstances, it would appropriate for the court to pass an order even though directing the trial court to consider and decide the application Order 39 Rule 1 and 2 C.P.C. on its own merits finally rather than to procrastinate the proceedings before this Court. Shri Pandey has also relied upon a decision of this Court in the case of ***U.P. Pasi Jagriti Mandal, Lucknow and others Vs. Devi Dayal Chauhan and others 1997 (1) ARC 518*** and specific attention has been drawn to Paragraph 12 of the said report, which reads as under:-

*"12. I have considered the above submissions of the learned Counsel of the parties and gone through the decisions that have been relied upon by the learned Counsel for the parties. The submissions of the learned Counsel of the petitioner in respect of non-compliance of the Rule 3 of Order XXXIX, has lost its significance in view of that fact that the petitioner had put in appearance before the trial Court and had been heard. In such a case the provisions of Rule 4 of Order XXXIX, comes in to play. After the petitioners were heard by the trial Court and even after hearing, the ad-interim injunction has been allowed to continue then, the ground of non-compliance of Rule 3 relevance loses, I am, therefore, unable to agree with the learned Counsel of the petitioners on this part of the submissions.*

10. The Court has heard the learned counsel for the parties and also perused the material on record.

11. In order to appreciate the respective contentions, it will be worth while to take a glance at the provisions of Order 39 Rule 1,2 and 3 C.P.C. which read as under:

**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 of 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) [\* \* \*]*

*(4) [\* \* \*]*

**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.*

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12. It is no doubt true that a Court is vested with the power to grant an ex parte injunction order in a befitting case. The scheme of Order 39 is such that primarily as far as possible the application must be heard bi parte and for which notices to the defendants have to be issued in terms of Rule 3. However, in cases, where the Court is of the opinion that unless an ex parte interim order is granted the basic purpose of filing the suit would be frustrated hence, as exception, the trial court can grant an ex parte injunction and in such circumstances, the provisions of Order 39 Rule 3 C.P.C. assumes significance.

13. From the perusal of the provisions which have been reproduced

hereinabove, it would indicate that a party in whose favour an ex parte injunction is granted must comply with the provisions that is to say that by the next day, the compliance affidavit has to be filed before the Court indicating that the copy of the plaint, the application under Order 39 Rule 1 and 2 CPC and affidavit in its support and the documents upon which the plaintiff has relied have been sent to the defendants. The consequence of non-compliance would be that as the injunction granted ex parte being subject to the aforesaid condition, hence unless and until the compliance is made, the ex parte injunction order cannot subsist or be extended.

14. At this stage, it will also be relevant to notice the specific pleading made by the petitioner in Paragraph 12 of the petition which reads as under:

*12. that upon grant of the ex-parte interim injunction order dated 06.09.2022, the opposite party no.3/plaintiff made a sham compliance of the provisions of Order 39 Rule 3 Code of Civil Procedure.*

*12.1 On 07.09.2022 an affidavit was filed before the trial court by one Triloki Nath Srivastava claiming to be clerk of Shri Pankaj Shukla, Advocate stating that a copy of the plaint, application along with affidavit and documents have been sent to the defendants. The rigors of the proviso to Order 39, Rule 3 specifically. require the "applicant" to file an affidavit of compliance of the provisions of Order 39, Rule 3 and 3(a) and (3b). The opposite party No.3 never filed the affidavit of compliance. A true copy of the affidavit sworn by the clerk of Shri Pankaj Shukla, Advocate in alleged compliance of the provisions of Order 39, Rule 3 of Code of Civil Procedure is annexed as Annexure No.8 to this petition.*

*12.2. Pursuant to this sham compliance the petitioner received a small envelope containing only the bare tanki summon. The plaint, application, affidavit and documents were not there in the small envelope. As per the postal departments endorsement the weight of the envelope (84 inches) was a mere 20 grams as evidenced in the postal receipt affixed thereto. The petitioner thereafter obtained copies of the plaint, application, affidavit and documents and got them weighed from the postal department and found that the entire packet could fit only in a large envelope and weighed approximately 390 grams. A true copy of the envelope received by the petitioner in sham compliance of the provisions of Order 39, Rule 3 of Code of Civil Procedure is annexed as Annexure No.9 to this petition.*

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15. The respondent has disputed the aforesaid contents by filing the counter affidavit but has not specifically replied as shall be seen from Paragraph 8 of the counter affidavit, which reads as under:-

*8. That the contents of para 12 and 13 of the petition under reply are emphatically denied and it is further stated that the deponent through the clerk of counsel for deponent got complied the provisions of Oder 39-Rule 3. C.P.C. apart from that on the mere perusal of averments made by the petitioner in para 12.2 of this petition that he has received an envelope containing bare **tanki summon** on other hand in the petitioner himself stated in his counter affidavit dated 07.10.2022 that he has received a Blank Sheet this contradictory averments by the same person on oath*

*constitute the fact that he wants to deprive the deponent to enjoy her property by all means and wants to get delay the final disposal of the application under order-39 Rule 1 & 2 read with section 151 C.P.C. by this way or that. Moreover it is also stated that if the copies of the preferred suit will not be supplied to the petitioner then without demanding the copies of the preferred petition by the deponent the petitioner by how filed his reply on very first day of hearing, this also seems that the entire copy of the preferred petition will be supplied to the petitioner of this petition.*

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16. Noticing the aforesaid, it would indicate that the private respondent has not given specific reply rather an evasive reply has been given to indicate that compliance has been made. There is nothing on record in shape of the counter affidavit whereby the private respondent no.3 has stated that the compliance which has been made and the registered cover sent to the defendants of the suit also accompanied the pleadings as well as the documents.

17. Certain discrepancies have been pointed out in Paragraph 8 of the counter affidavit that the petitioner at one stage stated that the compliance has not been made whereas on the other hand, it is stated that he had received two blank pages, thus the learned counsel for the respondent submits that apparently the contention of the learned counsel for the petitioner is not correct.

18. Be that as it may, the fact remains that even if two pages have been received yet there can be no denial of the fact that the copy of the plaint, the affidavit and application under Order 39 Rule 1 and 2 C.P.C. and its accompanying affidavit with the necessary documents filed by the private respondent no.3 could not be encapsulated within two pages nor the registered cover could contain all such material and the charges of postal cover is of 20 grams. Thus, there is apparently, no way that the compliance in terms of Order 39 Rule 3 CPC has been done correctly.

19. In the aforesaid circumstances, it is clear that the private respondent no.3 did not comply with the direction of the Court vide order dated 06.09.2022 and two courts have also ignored the fact that their order of injunction was subject to the compliance and if the compliance is wanting in substance then there is no compliance in the eyes of law.

20. At this stage, it will also be relevant to notice that an injunction is a purely discretionary relief and therefore, if a person comes to court, he must come with clean hands. A party is not entitled to persuade the court to pass an order in his favour while on the other

hand the condition attached to the said order is violated. Moreover if the legislature has provided for an act to be done then it must be done in its letter and spirit.

21. At this stage, the decision of the Apex Court in ***Shiv Kumar Chadha Vs. Municipal Corporation of Delhi and other; (1993) 3 SCC 161*** will be worthwhile to be noticed and paras 31 to 35 reads as under:-

*31. Under the changed circumstance with so many cases pending in courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.*

*32. Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the court shall, before grant of an injunction, direct notice of the application to be given to the opposite-party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying 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..."*

*33. It has come to our notice that in spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff*

before hearing the defendant.

34. The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said “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”. The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite-party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court “shall record the reasons” why an *ex parte* order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of *ex parte* injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the *ex parte* order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such *ex parte* orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. This principle was approved and accepted in well-known cases of *Taylor v. Taylor* [(1875) 1 Ch D 426 : 45 LJ Ch 373] and *Nazir Ahmed v. Emperor* [AIR 1936 PC 253 (2) : 63 IA 372 : 37 Cri LJ 897] . This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of *Ramchandra Keshav Adke v. Govind Joti Chavare* [(1975) 1 SCC 559 : AIR 1975 SC 915] .

35. As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an *ex parte* order is not passed. But any such *ex parte* order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

“*Ex parte* injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion....

*An ex parte injunction should generally be until a certain day, usually the next motion day....”*

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22. Insofar as decision cited by the counsel for private respondent is concerned, it would reveal that the facts of the said case are quite different inasmuch as the issue of Order 39 Rule 3 was not directly in question in the said case as the defendant has put in appearance and at the said stage of inception the objections was not pressed rather it was raised alongwith the merits and once the application under Order 39 Rule 1 and 2 CPC was decided on merits, and affirmed in appeal, the said ground was raised before the High Court. However, in the instant case, the petitioner has come up before this Court by raising the issue at the inception and the application under Order 39 Rule 1 and 2 CPC has yet not been decided on merits. Hence, the said decision may not come to the aid of the private respondent and it does not consider the decision of the Apex Court in Shiv Kumar Chaddha (supra).

23. In view of the aforesaid, this Court is of the clear opinion that both the courts were not justified in brushing aside the issue before it solely on the ground that the petitioner had already put in appearance before the court and all the objections can be heard by the court concerned.

24. This matter requires to be seen from another angle inasmuch as once an order of ex parte injunction has been passed which requires the plaintiff to comply with the provisions of order 39 Rule 3 and even though, if the defendant gets the knowledge and puts in appearance and may file his objections in terms Order 39 Rule 4 CPC but the fact remains that it is the plaintiff, who is required to adhere to the legislative mandate of order 39 Rule 3 CPC and in the instant case the order of ex parte injunction dated 06.02.2022 which categorically required the plaintiff to comply with the said provision within 24 hours. Having failed to do so, it is not open for the plaintiff to take advantage of his own wrong or else it will give a very unfair message that a person who gets an order from the court subject to conditions yet he can take benefit of it even without complying with the said conditions then it will amount to rewarding such unscrupulous plaintiff for his own wrong and will also amount to perpetuating the ex parte injunction which may operate harshly against the other party.

25. The trial courts must look into the issue regarding the non-compliance of the conditions upon which an injunction order is granted by the court. Illustratively if an injunction order is granted ex

parte subject to certain terms or conditions imposed as provided under Order 39 Rule 2 Sub-Rule (2) or even relating to the compliance of Order 39 Rule 3, and later after service if it is brought to the notice of the court that the party in whose favour the interim order subsists has got the same on the basis of false, misleading or vexatious pleadings or documents or it is informed to the Court that the mandatory compliance of Order 39 Rule 3 has not been done as per law then the trial court must be prompt in vacating such interim order or refuse to extend it so that a party should not be rewarded for his sharp tactic. The Court if it is quick in granting incongruous ex parte, it must be equally quick on vacating it or refusing to extend it, if it finds a party misusing it.

26. There is no justification that once a party has put in appearance then the matter be decided on merits and the issue of non-compliance or adoption of sharp tactic to gain the order must not go unnoticed and must be addressed by the trial courts at the first given opportunity. This attitude of the trial courts does more harm than good and must be eschewed.

27. In view of the aforesaid, this Court considering the facts and circumstances finds that the order dated 06.09.2022 in so far as it grants and continues to extend the ex parte injunction order is concerned cannot be sustained and the ex parte injunction order shall stand discharged and the order of the appellate court dated 26.05.2023 shall also stand set aside. It is directed that the parties shall appear before the trial court on 15.02.2024 [which as per the parties is the date fixed] and the trial court after hearing the parties shall decide the application for injunction expeditiously on merits without granting any unnecessary adjournment to either of the parties and endeavour be made to decide the said application, preferably within a period of two weeks from the date fixed i.e. 15.02.2024. It is further clarified that the injunction order granted ex parte has been discharged solely on the ground of non-compliance of Order 39 Rule 3 CPC and not on merits, hence the trial court shall decide the application on its own merits.

28. With the aforesaid, the petition is **allowed**. Costs are made easy.

**Order Date :- 13.2.2024**

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