

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13553 of 2015

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The State Of Bihar & Ors

.... Petitioner/s

Versus

M/s Suraj Construction & Anr

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Kamlesh Kumar Sharma

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

- 3 01-12-2015 1. Heard the learned counsel, Mr. Kundan Bahadur Singh, S.C.12, on behalf of the petitioner and the learned senior counsel, Mr. S. S. Dwivedi, on behalf of the respondents on the interlocutory application No.8213 of 2015.
2. At the time of hearing of this interlocutory application, the learned counsels for both the parties submitted that the writ application itself may be heard on merit in admission matter and accordingly, I heard them on merit in admission matter.
3. This application under Article 227 of the Constitution of India has been filed by the petitioner for setting aside the order dated 21.03.2015 passed by the District Judge, Vaishali at Hajipur in Misc. Appeal No.2 of 2015 whereby the Court below has held that appeal under Order 43 Rule 1 Clause (r) CPC is not maintainable because the order challenged in Misc. Appeal is not

an order passed under Order 39 Rule 1 & 2 CPC.

4. It appears that the plaintiff respondent filed title suit No.540 of 2007 and order of injunction against the defendants restraining them from recinding the contract of the plaintiff and forfeiting the security money given through the bank guarantee and further prayed to get back the amount of securities. The plaintiff also prayed for restraining the defendant from black-listing the plaintiff and taking any coercive action. During the pendency of the suit, injunction application was filed. The Court below adjourned the case for filing show cause by the State of Bihar and in the meantime passed interim order dated 20.11.2007 to the effect that the withdrawal of the bank guarantee and demand draft by the defendants is stayed. After filing the show cause at the time of hearing the injunction, the plaintiff respondent stated that in spite of the order of the Court dated 20.11.2007, the defendants have withdrawn the bank guarantee by placing the demand draft. Therefore, the Court below directed the defendants petitioners to refund the forfeited amount of Rs.41,05,000/- of the plaintiff's bank granted with 18 per cent interest thereof since 24.12.2007 up to the date of the refund of the said amount within two months from the date of receiving of the order and directed both the parties to file petition under Section 89 CPC. This order



was challenged by the petitioners before the lower appellate Court by filing Misc. Appeal No.2 of 2015. The lower appellate Court held that the Misc. Appeal is not maintainable against the order because the order is not passed under Order 39 Rule 1 and 2. Therefore, appeal under Order 43 Rule 1 Clause (r) is not maintainable. The lower appellate Court also held that the petitioner has the remedy either to file civil revision or the writ application as the case may be.

5. Learned S.C.22 for the petitioner submitted that the order passed by the Court below is in the nature of injunction application and in fact the order was passed while hearing the injunction application. Now, if order is passed under Order 39 Rule 1 & 2 CPC or it is passed under Order 39 Rule 2A CPC then also it is appealable under Order 43 Rule 1 Clause (r) CPC but the Court below has wrongly held that the appeal is not maintainable. According to the learned S.C.22, the Misc. Appeal was maintainable. The order passed by the Court below amounts to mandatory injunction and, therefore, the order passed by the Court below should be set aside and the Court below may be directed to hear the appeal and dispose of the same according to law.

6. On the other hand, the learned senior counsel, Mr.

Dwivedi, for the plaintiff respondent submitted that Misc. Appeal was not maintainable before the District Judge because the impugned order is not passed either under Order 39 Rule 1 CPC or under Order 39 Rule 2A CPC and, therefore it is not appealable under Order 43 Rule 1 clause (r) CPC.

7. Perused the order dated 22.12.2014 which is 'Annexure '2' to this writ application. It appears that at the time of hearing the injunction application, the Court below found that the order dated 20.11.2007 has been violated by the petitioner and, therefore, the Court adjourned the hearing of the injunction application directing the petitioner to make the status quo as existing on 20.11.2007 by refunding the forfeited amount of Rs.41,05,000/-. Therefore, in view of the fact that the order dated 22.12.2014 is not passed under Order 39 Rule 1 & 2 CPC and that the injunction application is still pending before the trial Court, the lower appellate Court has rightly by the impugned order dated 21.03.2015 held that the Misc. Appeal under Order 43 Rule 1 Clause (r) CPC is not maintainable. The Court below also observed that the petitioner herein may challenge the order by filing either civil revision or C.W.J.C. In such circumstances, I do not find any reason to interfere with the impugned order in exercise of jurisdiction under Article 227 of the Constitution of

India. Thus, this writ application is dismissed. Consequently, the interlocutory application is also rejected.

(Mungeshwar Sahoo, J)

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