

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.492 of 2015

Order reserved on: 5-10-2016

Order delivered on: 21-10-2016

Sanjeet Singh, aged about 49 years, S/o Late Bishnudev Singh, (Through Power of Attorney Manish Singh, age 45 years) R/o Village Mahmand, Dhuma Silpahri Road, Bilaspur, Police Station Torwa, Tahsil & District Bilaspur (C.G.), Civil & Revenue District Bilaspur (C.G.)

(Defendant No.1)
----- Petitioner

Versus

1. Kamlesh Singh, aged about 48 years, S/o Late Ramchandra Singh, R/o Village Mahmand, Dhuma Silpahri Road, Bilaspur, Police Station Torwa, Tahsil & District Bilaspur (C.G.), Civil & Revenue District Bilaspur (C.G.)

(Plaintiff)

2. State of Chhattisgarh, Through the Collector, Bilaspur, Police Station Civil Lines, Tahsil & District Bilaspur (C.G.), Civil & Revenue District Bilaspur (C.G.)

(Defendant No.2)
----- Respondents

For Petitioner: Mr. Ratnesh Kumar Agrawal, Advocate.
For Respondent No.1: Mr. Ravindra Agrawal, Advocate.
For Respondent No.2: Mrs. Astha Shukla, Panel Lawyer.

Hon'ble Mr. Justice Sanjay K. Agrawal

C.A.V. Order

1. Respondent No.1 herein is the plaintiff before the trial Court.

He instituted a civil suit for declaration and permanent injunction claiming that he has easementary right of access /

way over the 180 ft. wide road from the house of defendant No.1 / petitioner herein, therefore he has acquired easementary right and defendant No.1 be restrained from interfering in his possession and he be restrained from closing the suit way. The plaintiff also filed an application under Order 39 Rules 1 & 2 of the CPC along with an application under Order 39 Rule 3 of the CPC. The trial Court considered the application under Order 39 Rule 3 of the CPC on 20-6-2014 without issuing and serving notice to defendant No.1 and granted ex parte temporary injunction restraining defendant No.1 till the date of his appearance that he should not make any construction on the suit way till his appearance. Defendant No.1 appeared before the trial Court on 1-7-2014 and filed reply to the application under Order 39 Rules 1 & 2 of the CPC, but the trial Court did not consider the application under Order 39 Rules 1 & 2 of the CPC on that day and on that day itself, the plaintiff filed an application for mandatory injunction in temporary form stating inter alia that the suit way has already been closed by defendant No.1 therefore, defendant No.1 be directed by mandatory injunction in temporary form to remove the construction / wall and to make available the right of access / way to the plaintiff. The trial Court by its order dated 30-1-2015, rejected the application for mandatory injunction in temporary form finding no merit in the said application.

2. Feeling aggrieved against the said order, the plaintiff preferred

a miscellaneous appeal under Order 43 Rule 1(r) of the CPC before the first appellate Court and the said Court by its impugned order dated 28-4-2015, set aside the order rejecting the application for mandatory injunction in temporary form and remanded the matter to the trial Court to get the suit way inspected through a revenue officer and thereafter to decide the application dated 1-7-2014 afresh. It is pertinent to mention that in the meanwhile, the application under Order 39 Rules 1 & 2 of the CPC was withdrawn by the plaintiff on 2-1-2015 which remained pending since the date of institution of suit.

3. Defendant No.1 has preferred this petition under Article 227 of the Constitution of India against the order dated 28-4-2015 by which the appellate Court has set aside the order passed by the trial Court dated 30-1-2015 refusing to grant mandatory injunction in temporary form stating inter alia that such an order suffers from illegality and material irregularity, as the order dated 20-6-2014 was passed in exercise of jurisdiction conferred under Order 39 Rule 3 of the CPC and defendant No.1 had appeared on 1-7-2014 and life of the said order expired on the date of appearance of defendant No.1 i.e. on 1-7-2014 and, therefore, a fresh application for mandatory injunction in temporary form was not maintainable before the trial Court, as the application for temporary injunction filed under Order 39 Rules 1 & 2 of the CPC has already been withdrawn by the plaintiff. If the order dated 20-6-2014 has

been violated by defendant No.1, remedy for the plaintiff was to file application under Order 39 Rule 2-A of the CPC. Even otherwise, on merits, this order cannot be maintained as the appellate Court could not have remanded the matter in exercise of its limited jurisdiction under Order 43 Rule 1(r) of the CPC. Therefore, the impugned order be set aside.

4. Return has been filed by the plaintiff / respondent No.1 herein opposing the writ petition.
5. Mr. Ratnesh Kumar Agrawal, learned counsel appearing for the petitioner / defendant No.1, would submit that the order impugned passed by the appellate Court is without jurisdiction and without authority of law, as the order passed under Order 39 Rule 3 of the CPC has not been confirmed by the trial Court and if the order granting Order 39 Rule 3 of the CPC has been violated, remedy of the plaintiff was to file application under Order 39 Rule 2-A of the CPC for breach of injunction and mandatory injunction in temporary form was not maintainable. He would further submit that neither the suit has been amended seeking relief of removal of construction nor any relief has been sought for mandatory injunction in the suit. Therefore, the impugned order deserves to be set aside.
6. Mr. Ravindra Agrawal, learned counsel appearing for the plaintiff / respondent No.1, would submit that since defendant No.1 has violated the order of the trial Court dated 20-6-2014

granting ex parte temporary injunction and closed the suit way, the only remedy was to file application for mandatory injunction in temporary form. He would further submit that the appellate Court has rightly set aside the order passed by the trial Court refusing to grant mandatory injunction in temporary form and the writ petition deserves to be dismissed.

7. I have heard learned counsel for the parties and considered their rival submissions cautiously and also gone through the available record extensively.
8. In order to judge the correctness of the plea raised at the Bar, few important and relevant facts leading to filing of this petition under Article 227 of the Constitution of India deserve to be noticed.
9. The plaintiff filed a suit for declaration of title and permanent injunction and claimed easementary right based upon Section 15 of the Indian Easements Act, 1882 claiming relief that he has an easementary right of access / way (180 ft. long) from the house of defendant No.1 to reach his house and as such, he has perfected his right of easement and, therefore, defendant No.1 be restrained from interfering in his right of access / way and be restrained from closing such suit way. He filed two applications namely application under Order 39 Rule 3 of the CPC and application under Order 39 Rules 1 & 2 of the CPC. The suit was filed on 18-6-2014. However, the application

under Order 39 Rule 3 of the CPC was taken-up for hearing on 20-6-2014 and the trial Court disposed of the application, without noticing defendant No.1, passing ex parte temporary injunction restraining defendant No.1 from the date of order till the date of his appearance that no construction be made on the suit way and no steps should be taken to interfere the suit way. Defendant No.1 appeared before the Court on 1-7-2014 and filed his reply to the application under Order 39 Rules 1 & 2 of the CPC, but the application under Order 39 Rules 1 & 2 of the CPC was neither decided finally by the trial Court within thirty days from the date on which ex parte temporary injunction was granted (20-6-2014) nor any reason was recorded expressing its inability for doing so as mandated under Order 39 Rule 3-A of the CPC.

10. Meanwhile, on 1-7-2014, the plaintiff filed an application for mandatory injunction in temporary form stating inter alia that defendant No.1 has made construction on 23-6-2014 and has closed the suit way and, therefore, mandatory injunction in temporary form be granted removing the suit shop till the disposal of the suit. The plaintiff filed his affidavit and the affidavits of his witnesses and defendant No.1 also filed his affidavit and that of his witnesses, and the trial Court permitted the parties to cross-examine the witnesses of each other and ultimately, the trial Court by its order dated 30-1-2015 rejected the application holding that the plaintiff has failed to establish by

documentary evidence that he is using the suit way for last 20 years. Apart from his affidavit, no documentary evidence has been brought on record by the plaintiff to establish his right of access / way for last 20 years and the said fact can be established upon leading evidence by the plaintiff and, therefore, no prima facie case of easementary right is made out and consequently, dismissed the application for mandatory injunction in temporary form. Feeling aggrieved against that order, the plaintiff preferred an appeal before the first appellate Court. The first appellate Court considered the first appeal and came to a conclusion that from the affidavit evidence duly cross-examined by the parties and from the records, it is not clear as to whether alternative route is available or not, therefore, the order of the trial Court is not sustainable and remanded the matter to the trial Court with a view that local inspection be allowed by the revenue officer with regard to alternative way and the application dated 1-7-2014 be heard on merits afresh against which this writ petition has been preferred by defendant No.1.

11. Before proceeding further to consider legality and correctness of the order passed by the first appellate Court, it would be expedient to keep in mind the principles for grant of mandatory injunction in temporary form while considering that application.
12. It is very well settled way back in the year 1990 by an authoritative pronouncement of the Supreme Court in the

matter of **Dorab Cawasji Warden v. Coomi Sorab Warde and others**¹ that the relief of interlocutory mandatory injunctions are granted to preserve or restore the status quo. Their Lordships further held that in order to grant mandatory injunction in temporary form, a strong case for trial that is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction is to be established by the plaintiff seeking mandatory injunction in temporary form and observed as under: -

“16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.”

1 (1990) 2 SCC 117

13. In the matter of **Kishore Kumar Khaitan v. Praveen Kumar**

Singh², the Supreme Court has reiterated the principles with respect to the interim mandatory injunction by holding as under:-

"6. An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction."

14. The decision rendered in **Dorab Cawasji Warden** (supra), was followed with approval recently by the Supreme Court in the matter of (i) **Metro Marins v. Bonus Watch Co. (P) Ltd.**³; (ii) **Purshottam Vishandas Raheja and another v. Shrichand Vishandas Raheja (Dead) Through LRs and others**⁴; and (iii) **Mohd. Mehtab Khan and others v. Khushnuma Ibrahim Khan and others**⁵, and it has been held that grant of mandatory injunction in temporary form requires the highest degree of satisfaction of the court, much higher than a case involving grant of prohibitory injunction and observed in paragraph 18 of **Mohd. Mehtab Khan's** case (supra) as under: -

"18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the appellate Bench of the High Court in the present case is a mandatory direction to hand over possession to the plaintiffs. Grant of mandatory interim relief requires the

2 (2006) 3 SCC 312

3 (2004) 7 SCC 478

4 (2011) 6 SCC 73

5 (2013) 9 SCC 221

highest degree of satisfaction of the court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in *Dorab Cawasji Warden v. Coomi Sorab Warden*¹ has come to be firmly embedded in our jurisprudence.”

15. After having noticed the principles for grant of temporary injunction in mandatory form and before considering the matter on its merit, it would also be appropriate to notice the scope of interference by the appellate Court while hearing an appeal under Order 43 Rule 1(r) of the CPC.
16. The Supreme Court in the matter of **Wander Ltd. v. Antox India (P) Ltd.**⁶, has held that in an appeal against granting or refusing temporary injunction that is appeal against the exercise of discretion by the trial Court, the appellate Court should not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely and observed as under: -

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The appellate court will not reassess the

material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles, Gajendragadkar, J. in *Printers (Mysore) (P) Ltd. v. Pothan Joseph*⁷ held: (AIR p. 1159, para 9)

'9. ... These principles are well established; but, as has been observed by Viscount Simon in *Osenton (Charles) & Co. v. Johnston*⁸: (AC p. 138)

“... The law as to the reversal by a Court of Appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well-settled principles in an individual case.” ‘

The appellate judgment does not seem to defer to this principle.”

17. The law laid down in **Wander Ltd.** (supra) has been followed by the Supreme Court with approval in **Purshottam Vishandas Raheja** (supra) and **Mohd. Mehtab Khan** (supra).
18. Now, I shall proceed to examine the facts of the case in light of the principles for grant of mandatory injunction in temporary form as well as the scope of jurisdiction of the appellate Court under Order 43 Rule 1(r) of the CPC delineated by Their

7 AIR 1960 SC 1156 : (1960) 3 SCR 713

8 1942 AC 130 : (1941) 2 All ER 245 (HL)

Lordships in the above-stated judgments (supra).

19. The suit was for permanent injunction based on easementary right. The trial Court in its order dated 30-1-2015 has clearly recorded a finding on the basis of affidavit evidence duly cross-examined by the parties, that the plaintiff has not filed any documentary evidence to establish that he is using the suit way for last 20-22 years uninterruptedly and as such, evidence would be required to decide the plea of the parties but no documentary evidence has been filed to establish such right of access / way. Therefore, the trial Court declined to grant mandatory injunction in temporary form. The first appellate Court also did not find any material to reverse the finding of the trial Court in that regard, but while hearing the appeal did not follow the principles of law laid down in **Dorab Cawasji Warden** (supra) for granting mandatory injunction in temporary form holding that strong prima facie case is made out in favour of the plaintiff and **Wander Ltd.** (supra), which defines scope of interference by the first appellate Court, and reached to a conclusion that from the statements of witnesses it is not clear whether the plaintiff has alternative way or not and set aside the order of the trial Court and remanded the matter to the trial Court to get the inspection report from the Tahsildar and to decide the matter afresh. Such a course is clearly not permissible as the first appellate Court should not have interfered with the findings of the trial Court which clearly

recorded that there is no prima facie case of the plaintiff to grant mandatory injunction in temporary form, as the highest degree of satisfaction is required for granting mandatory injunction in temporary form.

20. The plaintiff's suit is based on easementary right as contained in Section 15 of the Indian Easements Act, 1882 and in order to establish right of access / way, the plaintiff has to demonstrate prima facie that he has enjoyed right to access / way peaceably and openly, as an easement, and as of right, without interruption, and that too for last 20 years.

21. The first appellate Court did not reverse the finding of the trial Court recorded in this behalf and did not hold that the plaintiff has established strong prima facie case more than what is required for grant of prohibitory injunction and also did not come to the conclusion, while hearing the miscellaneous appeal of limited jurisdiction, that the discretion has been exercised by the trial Court arbitrarily, capriciously and perversely, and further proceeded to set aside the order of the trial Court remanding the matter to collect evidence by getting inspection report from the Tahsildar which is contrary to the law laid down by the Supreme Court in the afore-cited cases, as the trial Court has rightly recorded that the plaintiff has failed to establish his prima facie right of access / way over the suit land. Therefore, the appellate Court could not have interfered with the order of the trial Court, as the discretion has been exercised by the trial

Court by keeping in view the principles laid down for grant of temporary injunction in mandatory form. In the circumstances, the impugned order is set aside and the order of the trial Court refusing mandatory injunction in temporary form is hereby restored, thereby the plaintiff's application for grant of mandatory injunction in temporary form stands rejected. The suit was filed by the plaintiff on 18-6-2014, but there is no substantial progress in trial. The trial Court is directed to expedite the trial and conclude it expeditiously preferably within a period of four months from the date of receipt of certified copy of this order.

22. A word of caution is necessary for the trial courts dealing with the suit for injunction in which interlocutory applications seeking temporary injunction as well as ex parte temporary injunctions are usually and routinely filed, as the trial Court in this case has granted ex parte temporary injunction to the plaintiff under Order 39 Rule 3 of the CPC on 20-6-2014 without notice to other side and even did not record any reason for doing so and further more, did not adjudicate the application under Order 39 Rules 1 & 2 of the CPC within one month from 20-6-2014 ignoring the legislative mandate of Order 39 Rule 3-A of the CPC and that application was ultimately rejected as withdrawn on 2-1-2015. Such a course is absolutely impermissible and in violation of the legislative mandate as contained in Order 37 Rules 3 & 3-A of the CPC as well as the well settled law in this

regard by Their Lordships of the Supreme Court, which I shall notice hereinafter.

23. Order 39 Rule 3 of the CPC imposes a duty on the court before granting an injunction to issue notice to other party except in a case it appears to the trial court that the object of granting injunction would be defeated by delay and in that situation 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 injunction would be defeated by delay and would require to comply the application requisites as provided in sub-clauses (a) and (b) of Rule 3 of Order 39 of the CPC, but where an injunction has been granted without giving notice to the opposite party, the Court shall make attempt to decide the application for temporary injunction within thirty days from the date of granting injunction and in case the court is unable to decide within said period, it shall record its reason for not doing so. The legislative mandate of such a direction is contained in Order 39 Rule 3-A of CPC which states as under:-

“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 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) ”

24. Way back, in the matter of **Shiv Kumar Chadha v. Municipal Corporation of Delhi and others**⁹, the Supreme Court has cautioned the courts stating that the power to grant injunction is an extra ordinary power vested in courts have to be more cautious when the said power is being exercised without notice or hearing to the party who is affected by the order so passed and held as under:-

“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

9 (1993) 3 SCC 161

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.”

25. In the aforesaid case of **Shiv Kumar Chadha** (supra), Their Lordships further held and emphasized that recording of reasons for not issuing notice before granting ex parte temporary injunction is not a mere formality and held as under:-

“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*¹⁰ and *Nazir Ahmed v. Emperor*¹¹. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in

10 (1875) 1 Ch D 426 : 45 LJ Ch 373

11 AIR 1936 PC 253 (2) : 63 IA 372 : 37 Cri LJ 897

the case of *Ramchandra Keshav Adke v. Govind Joti Chavare*¹².

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....”

26. Their Lordships while concluding, issued the directions as to how the application for interim injunction has to be considered and to be disposed of by the trial court and which states as under:-

“36. Accordingly we direct that the application for interim injunction should be considered and disposed of in the following manner:

(i) The court should first direct the plaintiff to serve a copy of the application with a copy of the plaint along with relevant documents on the counsel for the Corporation or any competent authority of the Corporation and the order should be passed only after hearing the parties.

(ii) If the circumstances of a case so warrant and where the court is of the opinion, that the object of

12 (1975) 1 SCC 915 : AIR 1975 SC 915

granting the injunction would be defeated by delay, the court should record reasons for its opinion as required by proviso to Rule 3 of Order 39 of the Code, before passing an order for injunction. The court must direct that such order shall operate only for a period of two weeks, during which notice along with copy of the application, plaint and relevant documents should be served on the competent authority or the counsel for the Corporation. Affidavit of service of notice should be filed as provided by proviso to Rule 3 of Order 39 aforesaid. If the Corporation has entered appearance, any such ex parte order of injunction should be extended only after hearing the counsel for the Corporation.

(iii) While passing an ex parte order of injunction the court shall direct the plaintiff to give an undertaking that he will not make any further construction upon the premises till the application for injunction is finally heard and disposed of.”

27. In the matter of **A. Venkatasubbiah Naidu v. S. Chellappan**

and others¹³, Their Lordships of the Supreme Court while considering the provisions contained in Order 39 Rule 3 of the CPC and held as under:-

“15. What would be the position if a court which passed the order granting interim ex parte injunction did not record reasons thereof did not require the applicant to perform the duties enumerated in clauses (a) and (b) of Rule 3 of Order 39. In our view such an order can be deemed to contain such requirements at least by implication even if they are not stated in so many words. But if a party, in whose favour an order was passed ex parte, fails to comply with the duties which he has to perform as required by the proviso quoted above, he must take the risk. Non-compliance with such requisites on his part cannot be allowed to go without any consequence and to enable him to have only the advantage of it. The consequence of the party (who secured the order) for not complying with the duties he is required to perform is that he cannot be allowed to take advantage of such order if the order is not obeyed by the other party. A disobedient

13 (2000) 7 SCC 695

beneficiary of an order cannot be heard to complain against any disobedience alleged against another party.”

28. In the aforesaid judgment, Their lordships have also considered the consequence of non-compliance of Order 39 Rule 3-A of CPC and held as under:-

“19. The aforesaid Rule casts a three-pronged protection to the party against whom the ex parte injunction order was passed. First is the legal obligation that the court shall make an endeavour to finally dispose of the application of injunction within the period of thirty days. Second is, the legal obligation that if for any valid reasons the court could not finally dispose of the application within the aforesaid time the court has to record the reasons thereof in writing.

20. What would happen if a court does not do either of the courses? We have to bear in mind that in such a case the court would have bypassed the three protective humps which the legislature has provided for the safety of the person against whom the order was passed without affording him an opportunity to have a say in the matter. First is that the court is obliged to give him notice before passing the order. It is only by way of a very exceptional contingency that the court is empowered to bypass the said protective measure. Second is the statutory obligation cast on the court to pass final orders on the application within the period of thirty days. Here also it is only in very exceptional cases that the court can bypass such a rule in which cases the legislature mandates on the court to have adequate reasons for such bypassing and to record those reasons in writing. If that hump is also bypassed by the court it is difficult to hold that the party affected by the order should necessarily be the sole sufferer.

21. It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1,

2, 2-A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. He cannot approach the appellate or revisional court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party which does not get justice due to the inaction of the court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3-A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3-A. In appropriate cases the appellate court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule.”

29. Likewise, recently the Supreme Court in matter of

Ramrameshwari Devi and others v. Nirmala Devi and

others¹⁴ has held that the court should be cautious and

extremely careful while granting ex parte ad-interim injunction

and Their Lordships were pleased to hold as under:-

“44. Usually the court should be cautious and extremely careful while granting ex parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable bipartite orders. Experience reveals that ex parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore,

14 (2011) 8 SCC 249

as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

45. If an ex parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

46. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex parte injunction orders or stay orders may not find encouragement.”

30. I hope and trust that the trial Courts dealing with injunction suits and applications under Order 39 Rules 1, 2 & 3 of the CPC will religiously and scrupulously follow the legislative mandate incorporated in the above-stated provisions particularly, Order 39 Rules 3 and 3-A of the CPC while considering those applications without fail and ensure its strict observance in its letter and spirit. The trial Courts are further obliged to keep in mind the binding observations made and appropriate directions issued by Their Lordships of the Supreme Court in **Shiv Kumar Chadha** (supra), **A. Venkatasubbiah Naidu** (supra) and **Ramrameshwari Devi** (supra) as noticed by me and reproduced for the observance of the trial Courts.

31. The Registrar (Judicial) is directed to send a copy of this order to all the District Judges of the State with the leave of Hon'ble the Chief Justice for their onward circulation to the trial Courts dealing with injunction suit for strict adherence and observance while considering the injunction applications.

32. The writ petition is allowed to the extent indicated herein-above.

No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma