

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.647 of 2015

Shivnath, S/o Ramdas, aged about 55 years, Caste Teli, R/o Village Narayanpur, Police Station & Tahsil Ramanujnagar, District Surajpur (C.G.), Civil and Revenue District Surajpur (C.G.)

(Plaintiff)
---- Petitioner

Versus

1. Jagdish Prasad, S/o Late Hiralal, aged about 50 years, Caste Ahir
2. Minor Deepak Kumar, S/o Jagdish Prasad, aged about 14 years, Caste Ahir
3. Minor Aakash Kumar, S/o Jagdish Prasad, aged about 12 years, Caste Ahir
4. Kunj Bihari, S/o Rattu, aged about 70 years

For appellant No.2 & 3 through his father next friend Jagdish Prasad, S/o Late Hiralal, Respondent No.1.

All R/o Narayanpur, Police Station & Tahsil Ramanujnagar, District Surajpur (C.G.)

Respondent No.4 at present R/o Village Sara, Police Station & Tahsil Baikunthpur, District Korla (C.G.)

5. The State of C.G., through Collector, Surguja at Ambikapur (C.G.)
(Defendants)
---- Respondents

For Petitioner:	Mr. A.K. Prasad, Advocate.
For Respondents No.1 to 4:	Mr. A.N. Pandey, Advocate.
For State/Respondent No.5:	Mr. Avinash Singh, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

10/11/2016

1. In a suit filed by the petitioner / plaintiff for declaration of title and permanent injunction, the trial Court by its order dated 3-7-2013 allowed the application for temporary injunction and restrained the

defendants from interfering with the possession of the petitioner plaintiff. Feeling aggrieved against the order granting temporary injunction, the respondents / defendants preferred a miscellaneous appeal under Order 43 Rule 1(r) of the CPC before the first appellate Court and that Court by its impugned order, set aside the order granting temporary injunction and remanded the matter for fresh consideration under Order 39 Rules 1 and 2 of the CPC, in accordance with law. Questioning the impugned order, this writ petition under Article 227 of the Constitution of India has been preferred by the petitioner plaintiff stating inter alia that the first appellate Court has committed an error of jurisdiction in allowing the appeal and setting aside the order granting temporary injunction without considering the appeal on merits.

2. Mr. A.K. Prasad, learned counsel appearing for the petitioner plaintiff, would submit that the appellate Court while hearing the appeal under Order 43 Rule 1(r) of the CPC has exceeded in its jurisdiction in remanding the matter without considering the appeal on merits. Since the order granting temporary injunction is a jurisdiction exercised by the trial Court, the miscellaneous appeal under Order 43 Rule 1(r) of the CPC is an appeal from the order as well as appeal on principle and discretion exercised by the trial Court, the order granting temporary injunction ought not to have been interfered with unless the discretion is said to have exercised by the trial Court, capriciously, arbitrarily or perversely. He would further submit that the first appellate Court while hearing the appeal under Order 43 Rule 1(r) of the CPC is a court of limited jurisdiction, it could have only considered the legality, validity and correctness of the order appealed against

and could not have gone beyond that limit and could not have entertained the application under Order 41 Rule 27 of the CPC, and could not have set aside the order granting temporary injunction, as such, the impugned order deserves to be set aside.

3. Mr. A.N. Pandey, learned counsel appearing for the defendants respondents No.1 to 4, would support the impugned order and oppose the writ petition and would submit that such a document is absolutely necessary for just and proper disposal of appeal, therefore it has rightly be taken and the matter has rightly been remanded to the trial Court.
4. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also perused the impugned order.
5. It is not in dispute that the trial Court considered the application under Order 39 Rules 1 and 2 of the CPC on merits holding that the petitioner plaintiff has prima facie case in his favour, balance of convenience also lies in his favour and if temporary injunction is not granted, irreparable injury would caused to the plaintiff against which the appeal was preferred under Order 43 Rule 1(r) of the CPC.
6. It is well settled law that appeal under Order 43 Rule 1(r) of the CPC is an appeal based on principle and particularly against the discretionary order issued by the trial Court, and it should not be interfered with unless it is exercised by the trial Court perversely, capriciously and arbitrarily. Even if two views are possible and one has been taken by the trial Court, the appellate Court should not

interfere. (See Wander Ltd. v. Antox India (P) Ltd.¹ and Skyline Education Institute (India) Private Limited v. S.L. Vaswani and another².)

7. Clause (r) of Order 43 Rule 1 of the CPC provides as under: -

"An appeal shall lie from the following orders under the provisions of section 104, namely: -

(r) an order under rule 1, rule 2, rule 2-A, rule 4 or rule 10 of Order XXXIX;"

8. The powers of appellate Courts are the same as are conferred by this Code to the trial Court. By virtue of Order 43 Rule 2 of the CPC, the provisions of Order 41 of the CPC shall apply to appeals from orders.

9. At this stage, it would be appropriate to notice the provisions contained in Section 107 of the CPC which provides powers of Appellate Court and Section 108 of the CPC which provides procedure in appeals from appellate decrees and orders, contained in Part VII of the CPC. Sections 107 and 108 read thus,

"107. Powers of Appellate Court.--(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power--

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

1 1990 Supp SCC 727

2 (2010) 2 SCC 142

108. Procedure in appeals from appellate decrees and orders.--The provisions of this Part relating to appeals from original decree shall, so far as may be, apply to appeals--

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided."

Thus, by virtue of Section 108 of the CPC, the provisions of Part VII including Section 107 which relates to powers of appellate court to take additional evidence or to require such evidence to be taken, has been made expressly applicable to appeals from orders under the Code. But, Section 108 of the CPC limits the application of other provisions in that Part by using the expression "so far as may be".

10. The expression "so far as may be" should be taken to mean so far as it is consistent with the nature of order appealed against. The Supreme Court in the matter of **Dr. Partap Singh and another v. Director of Enforcement, Foreign Exchange Regulation Act and others**³ while considering the meaning of expression "so far as may be" employed in Section 37(2) of the Foreign Exchange Regulation Act, 1973, held that the expression "so far as may be" has always been construed to mean that those provisions may be generally followed to the extent possible.

11. Thus, the powers of the appellate courts are the same as are conferred by this Code to the trial Court. By virtue of Order 43 Rule 2 of the CPC, the provisions of Order 41 of the CPC shall apply to the appeals from orders. But scope of appeal under Order 43 Rule 1(r) of the CPC is restricted by Section 108 read with Section 42(2) of the

3 (1985) 3 SCC 72

CPC, though the entire procedure as applicable to the regular appeal has been made applicable to miscellaneous appeal under Order 43 Rule 1(r) of the CPC, but distinction must be kept in mind regarding the scope of regular appeal and miscellaneous appeal. In case of a regular appeal, the same is continuation of suit and the power to make additional evidence is always there, but in an appeal of miscellaneous nature, the jurisdiction of miscellaneous appellate court is confined to decide the correctness or otherwise of the order of temporary injunction granting or rejecting that application, as the miscellaneous appellate court has no concern with suit, but it is only an appellate authority to adjudicate the legality or validity of order deciding the application for temporary injunction. Even otherwise, on a perusal of Sections 107 and 108 read with Order 43 Rule 1 of the CPC, it is quite clear that there is implied bar on such an exercise of jurisdiction. Thus, the scope of miscellaneous appeal under Order 43 Rule 1(r) of the CPC is limited. The challenge is only regarding grant of temporary injunction, as the miscellaneous appellate court was not exercising the power or jurisdiction over the suit. Accordingly, the miscellaneous appellate court while hearing miscellaneous appeal may not entertain an application for additional evidence submitted before it and if such an application is made in miscellaneous appeal, the only course which ought to have been adopted by that court is to direct the party, plaintiff / defendant as the case may be, to file the said application before the trial court for deciding it in accordance with law after disposing of the miscellaneous appeal on merits.

12. The High Court of Madhya Pradesh in the matter of **Dhundasing v.**

Liladhar and another⁴ has clearly held that though by virtue of Section 108(b) of the CPC, the provisions of Section 107 of the CPC that powers of appellate Court shall apply to appeals from orders under the Code including Order 43 Rule 1(r) of the CPC, but distinction between regular appeal under Section 96 of the CPC and miscellaneous appeal under Order 43 Rule 1 of the CPC has to be born in mind, as regular appeal is continuation of suit, but miscellaneous appeal under Order 43 Rule 1 of the CPC is not seisin either to suit or file appeal, it is confined to decide legality and validity of an order passed during the pendency of suit and in appeal under Order 43 Rule 1(r) of the CPC, correctness or otherwise of application for temporary injunction granting or refusing temporary injunction has to be decided.

13. In the matter of **Kailash Nath Singh v. The District Judge, Mirzapur and another**⁵, the Allahabad High Court has also followed the law laid down by the M.P. High Court in **Dhundasing** (supra) and has held that the court while hearing miscellaneous appeal under Order 43 Rule 1(r) of the CPC is not competent to allow amendment of plaint.

14. Following the law laid down in the aforesaid cases, it is quite apparent that the first appellate Court could not have entertained the application under Order 41 Rule 27 of the CPC while exercising the limited jurisdiction of appeal under Order 43 Rule 1(r) of the CPC as it was not either in seisin over the suit or it is an appeal under Section 96 of the CPC.

15. In the present case, the appellate Court while considering the appeal

4 1982 M.P.L.J. 432 : AIR 1982 MP 14

5 AIR 1993 Allahabad 67

under Order 43 Rule 1(r) of the CPC, did not consider the appeal on merits as to whether the trial Court while granting temporary injunction in favour of the plaintiff/petitioner has exercised the discretion perversely, arbitrarily or capriciously, straightway considered the application under Order 41 Rule 27 of the CPC and found it expedient to send the matter to the trial Court for fresh adjudication; set-aside the order granting temporary injunction and remitted the matter to the trial Court. Such a course is clearly impermissible in law. The first appellate Court ought to have decided the appeal on merits before sending / remitting the matter to the trial Court. If such a course is allowed to stand, it will be very easy for unscrupulous appellant to file an application for additional evidence and to get the matter remitted to the trial Court by setting aside an order duly passed.

16. Consequently, the impugned order is set aside and Misc. Civil Appeal No.11/2013 is restored to the Court of 1st Additional District Judge, Surajpur for hearing and disposal in accordance with law. The said appeal was instituted on 19-7-2013 and therefore, the said Court is directed to consider and dispose of the appeal on merits within a period of three months from the date of receipt of a copy of this order, as per the parameter laid down by the Supreme Court in **Wander Ltd.** (supra) and **Skyline Education Institute** (supra).

17. The writ petition is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge