

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art. 227) No.269 of 2019

Radheshyam Soni (Wrongly typed Radhelal Soni), S/o Late Chakradhar Soni, aged about 62 years, R/o Village Bhoghapara, Shivrinarayan, Tahsil Navagarh, District Janjgir-Champa (C.G.)
 (Defendant No.1/Respondent)
 ---- Petitioner

Versus

1. Ganesh Prasad Agrawal, S/o Maluram Agrawal, aged about 47 years, R/o Vinoba Nagar, Talapara Road, Bilaspur, District Bilaspur (C.G.)
 (Plaintiff/Appellant)
2. State of Chhattisgarh, through Collector, Janjgir, District Janjgir-Champa (C.G.)
 (Defendant No.2/Respondent)
 ---- Respondents

ANDWrit Petition (Art. 227) No.270 of 2019

Radheshyam Soni (Wrongly typed Radhelal Soni), S/o Late Chakradhar Soni, aged about 62 years, R/o Village Bhoghapara, Shivrinarayan, Tahsil Navagarh, District Janjgir-Champa (C.G.)
 (Defendant No.1/Respondent)
 ---- Petitioner

Versus

1. Omprakash Sultaniya, S/o Late Ganpat Rai, aged about 69 years, R/o Mahant Para, Shivrinarayan, Tahsil Nawagarh, District Janjgir-Champa (C.G.)
 (Plaintiff/Appellant)
2. State of Chhattisgarh, through Collector, Janjgir, District Janjgir-Champa (C.G.)
 (Defendant No.2/Respondent)
 ---- Respondents

For Petitioner: Mr. Manoj Paranjpe, Advocate.

For Respondent No.2 / State: -

Mr. Apoorva Goyal, Panel Lawyer.

Amicus Curiae: Mr. Hari Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board11/04/2019

1. Since both the writ petitions involve common question of law, they are being disposed of by this common order.
2. The petitioner herein was defendant No.1 before the trial Court. The plaintiff has suffered the decree of dismissal of suit for declaration of title and permanent injunction against which he has preferred a regular appeal under Section 96 of the CPC in which he filed an application under Order 39 Rules 1 & 2 of the CPC for grant of temporary injunction, that application was allowed by the first appellate Court and temporary injunction in favour of the plaintiff and against the present defendant restraining him from constructing on the suit land has been granted in two appeals separately against which these two writ petitions under Article 227 of the Constitution of India have been preferred.
3. Mr. Manoj Paranjpe, learned counsel for the petitioner / defendant No.1, would submit that the first appellate Court is absolutely unjustified in granting temporary injunction under Order 39 Rules 1 & 2 of the CPC, therefore it is liable to be set aside. On being asked whether a writ petition is maintainable in view of the order of temporary injunction passed in regular civil appeal filed under Order 41 of the CPC would be appealable under Order 43 Rule 1(r) of the CPC, learned counsel for the petitioner / defendant No.1 would submit that since the order granting temporary injunction is passed by the first appellate Court in regular civil appeal and no miscellaneous appeal is provided under Order 43 Rule 1 of the CPC against that order, therefore, the petitioner / defendant No.1

has no option left except to file writ petition under Article 227 of the Constitution of India.

4. On the contrary, Mr. Hari Agrawal, Advocate, appearing as *amicus curiae*, would submit that since the application for temporary injunction under Order 39 Rules 1 & 2 of the CPC has been granted in a regular appeal preferred under Section 96 read with Order 41 of the CPC by the first appellate Court, miscellaneous appeal would be maintainable under Order 43 Rule 1(r) of the CPC, as such, writ petition is not maintainable and the petitioner be relegated to the remedy of appeal under Order 43 Rule 1(r) of the CPC.
5. I have heard learned counsel for the parties, considered the rival submissions made herein-above and went through the record with utmost circumspection.
6. The question for consideration would be, whether against the order passed granting an application for temporary injunction filed in a regular first appeal preferred under Section 96 read with Order 41 of the CPC, miscellaneous appeal would be maintainable under Order 43 Rule 1(r) of the CPC?
7. Section 96 of the CPC provides for appeal from original decree.
Sub-section (1) of Section 96 states as under: -

“96. Appeal from original decree.—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.”
8. Section 104 of the CPC provides, orders from which appeal lies.
Sub-section (2) of Section 104 provides, no appeal shall lie from any order passed in appeal under this section.

9. Section 107 of the CPC provides, powers of Appellate Court. Sub-section (2) of Section 107 reads as under: -

“(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 this Code on Courts of original jurisdiction in respect of suits instituted therein.”

10. Order 43 of the CPC provides, appeals from orders. Rule 1(r) of Order 43 reads as under: -

“1. **Appeals from orders.**—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 XXIX;”

11. Order 43 of the CPC provides for appeal under several orders made under various orders of the CPC. Rule 2 of Order 43 provides that the rules of Order 41 shall apply, so far as may be, to appeals from orders. As such, the procedure laid down in Order 41 shall apply to the appeals from orders.

12. Section 104(2) of the CPC states that no appeal shall lie from any order passed in appeal under this section. So, what has been prohibited by virtue of Section 104(2) of the CPC is appeal from the order passed in appeal under Section 104. Thus, Section 104(2) does not bar appeals permitted by any other law in force. (See **P.S. Sathappan v. Andhra Bank Ltd.**¹) Bar engrafted under sub-section (2) of Section 104 would not apply if appeal against an order is provided for under any other law. (See **Subal Paul v. Malina Paul**².)

13. A focused perusal of Order 43 of the CPC would show that appeals

1 (2004) 11 SCC 672

2 (2003) 10 SCC 361

are filed not only against the order made under various Sections of the CPC, but appeal is also provided against several orders enumerated in Order 43 under various orders of the CPC. Order 39 Rules 1 & 2 of the CPC is one of the orders against which an appeal shall expressly lie under Order 43 Rule 1(r), but when appeal against such order is disposed of, no further appeal would lie in view of express bar contained in Section 104(2) of the CPC. Therefore, for the first time, if an order is passed by any Court under Order 39 Rules 1 & 2 of the CPC, by the trial Court or by the appellate Court, as the case may be, appeal shall certainly lie under Section 104(1) of the CPC, but thereafter, no further appeal would lie, as the legislative bar contained in Section 104(2) of the CPC would apply in full force.

14. The question would be, if the first appellate Court, which is seisin of the regular appeal preferred under Section 96 read with Order 41 of the CPC, entertains an application of a party to the suit under Order 39 Rules 1 & 2, whether that order would be appealable under Order 43 Rule 1(r) of the CPC?
15. Order 39 Rule 1 of the CPC speaks of temporary injunctions in suit, which states 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 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.”

16. It is well settled law that an appeal is continuation of a suit or proceedings wherein the entire proceedings are again left open for consideration by the appellate authorities which have the power to review the entire evidence subject, of course, to the prescribed statutory limitations. (See Lachhman Dass v. Santokh Singh³.) Similarly, it has also been held that it is a continuation and rehearing of the suit. Appeal court is therefore entitled to take into account even facts and events which came into existence after passing of decree appealed against. (See Dilip v. Mohd. Azizul Haq⁴.)

17. In my considered opinion, in appeal under Section 96 read with Order 41 of the CPC, Section 104(2) of the CPC would not be applicable, as in order to attract Section 104(2), the appeal should be one covered under Section 104. The Madras High Court in the matter of Ramaswamy Reddiar and others v. Chinna Sithammal and others⁵ considered the issue and held that sub-section (2) of Section 104 of the CPC has no application to an order made in an appeal coming under Section 96, and assigning the reason, it was observed as under: -

3 (1995) 4 SCC 201

4 (2000) 3 SCC 607

5 AIR 1976 Madras 63

“3. Section 104 (2) says that no appeal shall lie from any order passed in appeal under the said section. In order to attract sub-section (2), the appeal should be one falling under Section 104. If the appeal is one under Section 96, and not under Section 104, sub-section (2) of the latter section is not applicable. If Section 104(2) is construed otherwise, that is, as applying to appeals coming under Section 96, also the position would be anomalous. Sub-clauses (t) and (u) of Rule 1 of Order XLIII provide for appeals against orders passed under one provision or other of Order XLI, which governs appeals coming under Section 96. The said two sub-clauses cannot possibly refer to any order by a trial court. While clause (t) relates to an order refusing to re-admit (or to re-hear) an appeal (as in the present case), clause (u) relates to an order of remand made by an appellate court under Rule 23 of Order XLI. These two provisions would become meaningless if sub-section (2) of Section 104 is made to apply to appeals under Section 96. No one can suggest that no appeal lies against an order of remand made under Order XLI, Rule 23.”

18. Similar view has been taken by the Calcutta High Court in the matter of Smt. Mayarani Dutta v. Bhupal Banerje⁶ and by the Andhra Pradesh High Court in the matter of K. Gangulappa Naidu and others v. K. Gangi Naidu⁷, and in the recent past, the Bombay High Court in the matter of Shivaji Shankar Jadhav v. Laxman Gajanan Godbole⁸ held as under: -

“21. When in an Appeal under Section 96 of the CPC against an original decree, the Appellate Court grants temporary injunction covered by Rules 1 and 2 of Order XXXIX of the CPC, it exercises a power under the said Rules and not under Section 94 or Section 107(2) of the CPC.

29. As the powers under Rules 1 and 2 of Order XXXIX or Rules 3, 4 and 6 of Order XXXVIII could be exercised in an Appeal against decree under Section 96 by virtue of Section 107(2), the provisions of the Rules under Order XXII are expressly applicable to Appeals by virtue of Rule 11 of Order XXII.”

19. In view of the aforesaid legal position, I am of the considered opinion that in the instant case, the application under Order 39

6 AIR 1981 Calcutta 264

7 AIR 1982 Andhra Pradesh 284

8 AIR 2019 Bom 1

Rules 1 & 2 of the CPC has been decided and thereby the application for temporary injunction has been granted in favour of the plaintiff, thus, remedy of the petitioner / defendant would be to file appeal under Order 43 Rule 1(r) of the CPC and writ petition as framed and filed under Article 227 of the Constitution of India would not be maintainable. The petitioner is at liberty to file miscellaneous appeal under Order 43 Rule 1(r) of the CPC. Accordingly, the writ petitions are dismissed as not maintainable reserving liberty in favour of the petitioner to file appeal. No order as to cost(s).

20. Certified copies of the orders impugned be returned to counsel for the petitioner on furnishing duly attested photocopy of the same.

21. This Court appreciates the assistance rendered by Mr. Hari Agrawal, Advocate, as *amicus curiae*.

Sd/-
(Sanjay K. Agrawal)
Judge