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Ct. No. 09

akd

F.M.A. 547 of 2021

With

CAN 1 of 2021

Sri Rabindra Nath Banik & Anr.
Vs.
Sri Jagadish Chandra Banik & Ors.

Mr. Gopal Chandra Ghosh,
Mr. Sibsankar Bandyopadhyay.
... for the appellants.
Mr. Soumen Dutta,
Ms. Pritha Bhowmik.
... for the respondent
nos. 4 and 5.

The present appeal arises from the order dated 19th January, 2021 passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat, 24-Parganas (North) in Title Suit No. 37 of 2021; whereby and whereunder an ex parte ad interim order of injunction is passed directing the parties to maintain status quo with regard to nature, character and possession over the suit property as it stands on that date till the next date.

The appellants have challenged the said order solely on the ground that the said order is bereft of any reasons required under Order XXXIX Rule 3 of the Code of Civil Procedure.

We do not want to enter into the facts involved in the instant case, as the instant appeal arises from an ex parte ad interim order of injunction and the appellants have no opportunity to put the defence.

We are conscious of the proposition of law that against an ex parte ad interim order of injunction the defendant has three remedies; firstly, he can answer the show cause issued upon him and invite the Court to determine the cause for which the application for temporary injunction is filed; secondly, he can file an

application under Order XXXIX Rule 4 of the Code for variation, vacation and/or setting aside the ex parte ad interim order of injunction making out a case envisaged under the aforesaid provisions and thirdly he can file an appeal under Order XLIII Rule 1 (r) of the Code of Civil Procedure before the higher forum.

Once the third remedy is exhausted, the Court shall not enter into the defence projected by the defendant, but must confine its scrutiny on the peripheral of the plaint treating such statement to be sacrosanct and if can be demonstrated that despite the existence of the said fact no case of emergent situation has been made out to take exception to the general rule of service of application upon the defendants, the Appellate Court may interfere with the said order.

This is a case where on the face of the impugned order there is no hesitation in our mind that the impugned order is bereft of any reasons. Order XXXIX Rule 3 of the Code postulates that the Court shall in all cases, except where it appears that the object of granting an injunction, direct notice of the application for the same to be given to the opposite party. However, the proviso appended thereto bestowed power upon the Court even to grant injunction without serving notice upon the other side subject to the recording of reasons for its opinion that the object of granting the injunction would be defeated by delay. The recording of reasons is *sine qua non* to activate the powers reserved in the proviso appended to Order XXXIX Rule 3 of the Code, which cannot be said to be a mere formality nor can be wiped away taking a circuitous route or by recording the language of the provision in the order.

The support can be lent to a judgement of the

Supreme Court rendered in case of *Shiv Kumar Chadha vs. Municipal Corporation of Delhi* reported in (1993) 3 SCC 161, where the Apex Court has held that if the Court consider it necessary in the given facts 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 or relevant factors including as to how the object of granting injunction shall be defeated even ex parte order is not passed.

It is further held that a party is not entitled to an order of injunction as a matter of right, but the injunction being an equitable relief, the discretion lies with the Court to pass or not to pass such an order and such discretion must be exercised judicially as opposed to capriciously or arbitrarily.

The power to grant injunction is an extraordinary power vested in the Court and the moment it is circumscribed by certain conditions or the exercise to be performed within the contour of the statutory provisions, any attempt to violate or frustrate such mandate shall be viewed seriously. The enlightening observations of the Apex Court in the above noted decision is quoted hereunder:

“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].

The aforesaid principles of law enunciated in the above noted report is reiterated and restated in a subsequent judgement of the Supreme Court rendered in case of *Morgan Stanley Mutual Fund vs. Kartick Das* reported in (1994) 4 SCC 225 in these words:

“38. This Court had occasion to emphasise the need to give reasons before passing *ex parte* orders of injunction. In *Shiv Kumar Chadha v. Municipal Corpn. of Delhi* [(1993) 3 SCC 161, 176],

it is stated as under: (SCC pp. 176-77, paras 34-35)

“... 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 restrain 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] .

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.”

The ratio, enunciated in the above case in unequivocal terms, laid down that while passing an ex parte ad interim order of injunction, it is imperative on the part of the Court to record the reasons on the basis of the facts and circumstances involved therein. Any infraction or departure from the same renders the said order unsustainable in law.

In the instant case by passing an ex parte ad interim order of injunction the Trial Court has not recorded any independent finding either on the existence of prima facie case nor balance of convenience and inconvenience nor irreparable loss and injury nor on the delay as envisaged in the provisions contained under Order XXXIX Rule 3 of the Code. Since the order is palpably illegal having passed in contravention to the statutory provisions, more particularly order XXXIX Rule 1 of the Code, it cannot be sustained.

The order impugned is thus set aside.

The plaintiffs/respondents are granted liberty to move the application for injunction during Vacation before the Trial Court if the exigency so demands and the Trial Court shall consider the case independently and will record the reasons while passing the said order in accordance with law.

Since we have not gone into the merit of the case, none of the observations recorded hereinabove shall

have persuasive effect on the Trial Court while considering the prayer for ad interim order of injunction.

With these observations, the appeal is disposed of. Consequently the connected application is also disposed of.

There will be no order as to costs.

(Harish Tandon, J.)

(Bibek Chaudhuri, J.)