

ORDER SHEET
APOT 18 OF 2021
WITH
CS 152 OF 2020
GA 1 OF 2021
IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
COMMERCIAL DIVISION
ORIGINAL SIDE

JAIDEEP HALWASIYA
Versus
ASTREX ENTERPRISES PVT LTD.

BEFORE:
The Hon'ble JUSTICE I. P. MUKERJI
The Hon'ble JUSTICE SUBHASIS DASGUPTA
Date : 11TH February, 2021.

Appearance:
Mr. Tilak Bose, Sr. Adv.
Mr. R. Mitra, Adv.
Mr. A. P. Gomes, Adv.
...for the appellant

Mr. Rupak Ghosh, Adv.
Mr. A. Dutta, Adv.
...For the respondent

The Court : This is an appeal from a judgement and order dated 21st January, 2021 passed by a learned single judge of this Court.

It was an ex parte ad interim order.

There are two errors which we notice in the said order. They are as follows :

- (1) In an ex parte order, there should have been a returnable date for the application. That provision is not there in the order.
- (2) Directions were made for filing of affidavits. These directions are usually made on the returnable date of the application. Either the defendant appears and receives the directions or directions are made for the plaintiff/petitioner to communicate them to the defendant.
- (3) The question of continuance of the ad interim order ought to have been considered on the returnable date.

Mr. Bose, learned senior counsel appearing for the appellant cited A. Venkatasubbiah Naidu Versus S. Chellappan And Others reported in (2000) 7 Supreme Court Cases 695. In this case, the Court was dealing with the rights and remedies available to a party aggrieved by an ex parte ad interim order.

Paragraphs 19 and 20 of the said judgement are important and set out below :-

“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.”

As noticed by the Supreme Court, an interim application has to be disposed of within thirty days. If not so disposed of, reasons have to be advanced by the learned judge. After passing an ex parte interim order, a copy of the application is to be served upon the defendant. Mr. Ghosh, learned advocate appearing for the respondent submits that a copy of the petition has been served upon the appellant. Ordinarily, the interim order should be passed upon notice to the defendant.

It appears that, Order 39 Rule 4 of the Civil Procedure Code was not under consideration by the Supreme Court.

On a reading of it, it appears that the aggrieved party has two remedies, either to approach the Court which passed the ex parte interim order for its vacation or variation or to straightway prefer an appeal from the order. The appellant in this case has availed of the second option.

Whether the facts of this case warranted an interim order freezing the defendant’s bank account has to be gone into and adjudged.

In our opinion, the initial formation of a prima facie reasoned opinion should be left with the first Court. The appellate Court should not undertake this task of fact finding at the threshold. Moreover, the impugned order was made on 21st January, 2021 and this stay application in connection with the appeal is being moved today.

In those circumstances, in our view, it would be just and proper if in exercise of our power under Order 41 Rule 23A read with Order 43 Rule 2, the application is remitted to the Court below for a fresh consideration, at the returnable date stage. We direct accordingly.

We set aside that part of the order dated 21st January, 2021 directing filing of affidavits.

We direct the application to appear as “New Motion” before the learned single judge on 15th February, 2021. All points are kept open before his lordship.

As the point involved was very short, we have heard out the appeal (APO No.18 of 2021) and the connected application (GA No.1 of 2021) dispensing with all formalities and the same are disposed of by this order.

The allegations in the stay petition are deemed not to be admitted.

On the prayer of Mr. Bose, learned senior counsel appearing for the appellant, liberty is granted to his client to mention the matter before the learned single judge for proponing the returnable date.

(I. P. MUKERJI, J.)

(SUBHASIS DASGUPTA, J.)