

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD.**

**WRIT PETITION NO. 2600 OF 2021**

Nagnath s/o Ramchandra Muttepwar

...Petitioner

**Versus**

Sadhana Nagnath Muttepwar & Ors.

...Respondents

.....

Mr. A. D. Kasliwal, Advocate for the petitioner

Mr. D. K. Kulkarni, Advocate for the respondents

.....

**CORAM : BHARATI H. DANGRE, J.**

**DATE : JANUARY 6<sup>TH</sup>, 2022**

**PER COURT : -**

1. Heard the learned Counsel for the petitioner and the Counsel for the respondents.

2. The petitioner, who is the original plaintiff, instituted Reg. Civil Suit No. 671/2014, where he sought a declaration and injunction. The suit being instituted in the year 2014, though the respondents/defendants filed their appearance on being served they failed to file their written statement, resultantly an order of 'no WS' came to be passed. This order was however set aside, on the request made by the defendants subject to the costs. However, there was no compliance and again an application was moved to file written

statement on additional costs and the written statement was taken on record on 19.08.2016. During the interregnum, the application filed by the plaintiff vide Exh. 5 was decided and on 20.04.2015, it was allowed by recording *prima facie* case, balance of convenience and irreparable loss factor in favour of the plaintiff/petitioner. Recording that in spite of affording many opportunities, the defendant nos. 1 to 3 have failed to file their say to the application, the contents of the application filed by the plaintiff remained unchallenged and since the defendants have not denied the possession of the plaintiff over the suit property, the question as to whether the suit property is exclusive property of the defendant no.1 purchased by her from her own income can be decided by adducing evidence of both the parties. While allowing the Exh.5, the defendant nos. 1 to 3 or any other person claiming through them were temporarily restrained from obstructing possession of the plaintiff over the suit property and transferring the suit property to any other person till disposal of the suit. On 03.11.2015, the plaintiff filed affidavit-in-chief in lieu of examination vide Exh.23 and on 07.11.2016, the issues were also settled. Though the evidence affidavit was filed, the respondents failed to cross-examine the plaintiff and, therefore, the 'no cross' order was passed on 14.03.2017. This order came to be assailed, on the plea of the respondents claiming *bona fides*, which compelled the

court to set aside the 'no cross' order on 15.07.2019 but despite setting aside the earlier order, the plaintiff was not cross-examined. On 23.10.2019, another application was moved for setting aside the no-cross order and the Court by order dated 23.10.2019, once again allowed the same but imposed costs. In the interregnum, the respondents moved an application vide Exh. 43 by invoking Order 39 Rule 4 of the Code of Civil Procedure and by this application, the *ex parte* order of injunction was sought to be vacated with a relief of fresh hearing being afforded.

. The learned Civil Judge Junior Division, Aurangabad by a well reasoned order dated 05.10.2018, rejected the said application by taking into consideration the scope and ambit of Order 39 Rule 4, where an order of injunction is permitted to be discharged or varied or set aside. Recording that the two circumstances which broadly permit exercise of the said power being change in circumstances and undue hardship in view of the continuation of interim injunction, the learned Judge rejected the said application and refused to vary/set aside the order passed below Exh. 5.

3. On an appeal being filed, the District Judge, Aurangabad vide it's judgment dated 18.01.2021 has set aside the said order by partly allowing Misc. Civil Appeal. The appellate Court has

remanded the matter to the trial Court to decide the Application vide Exh.5, after giving an opportunity of hearing to both the parties and on consideration of the rival pleadings and documents filed. A time bound direction was issued to decide Exh.5 within a period of two months, and during its pendency, the order passed by the trial Court vide Exh. 5 was directed to be continued.

4. Though while issuing notice this Court on 09.02.2021, did not pass any interim order, on subsequent date i.e. on 06.04.2021, recording that since the provisions of Order 39 Rule 4 are required to be interpreted and it is not possible on account of virtual hearing, till the next hearing the order passed below Exh. 5 dated 20.04.2018 was directed to be continued i.e. the position at which the proceedings stand on today, the interim injunction in favour of the applicant being continued.

5. The ambit and scope of Order 39 Rule 4 of the CPC can be discerned from the reading of the said provision and as it indicate, the order of injunction may be discharged/varied or set aside by the Court on an application made to it by any dissatisfied party, if the application disclose that the temporary injunction has been granted on the basis of a false or misleading statement in respect of the

material particulars and the injunction was granted without giving notice to the opposite party. Despite these factors being in existence, the Court shall not vacate the order of injunction unless it considers that it is not necessary to do so in the interest of justice by recording the reasons. Where an order of injunction has been passed after giving to a party an opportunity of being heard, the second proviso appended to Rule 4 adumbrate that the order shall not be discharged/varied or set aside on the application of that party, except where such discharge, variation or setting aside has been necessitated by change in circumstances, or unless the Court is satisfied that where the order has caused undue hardship to that party.

. In the present case, where the injunction order has been granted, in spite of an opportunity of being afforded to the defendants to put an appearance, the opportunity was not availed, presuming that the pleadings in the application are not traversed by the respondents, the injunction came to be granted. Pertinent to note that the wordings used in the second proviso "after giving to a party an opportunity of being heard" will have to be construed to mean that despite notice, if the party has not availed the opportunity to be heard and in such circumstances, only two circumstances would justify the variation or setting aside of an order of injunction, being,

change in circumstances or the continuation of order causing undue hardship to that party.

6. When the application moved before the ld. Judge under Order 39 Rule 4 of CPC is perused, it fail to set out / establish either of these grounds and merely stating that the threats given by the plaintiff through the superior officer to vacate the suit premises occupied by the defendants, cannot be sufficient to justify the hardship. The change in circumstance, one of the factor which would have justified the exercise of power under Rule 4 has also not been made out in the application, which prompted the trial Court to reject the same, being falling short of the parameters set out in Order 39 Rule 4 of the CPC. The appellate Court, however, has shown indulgence and the learned Judge appeared to be impressed by the fact that the defendants were not present for hearing nor their written statement was on record. The appellate Court, however, did not advert itself to the Roznama which reflected that despite of sufficient opportunity being afforded to the defendants by the trial Court, they have failed to avail the said opportunity which left the trial Court with no option than to proceed with Exh.5 ex-parte. The order passed by the appellate Court justifying the change in circumstance being the written statement being brought on record, in

my considered opinion, would not meet the intention of Rule 4 of Order 39 of CPC.

7. The learned Single Judge of this Court (Justice S. C. Gupte as he was then) in case of M/s. Manas Shelters Pvt. Ltd. vs. Madhavlal Narayanlal Pittie and others, 2018 (2) All.M.R. 226, had an occasion to consider the ambit and scope of Order 39 Rule 4 of CPC and after referring to the decision of the Madras High Court and Full Bench decision of the Madhya Pradesh High Court, the position of law is summarized in the following words.

“7. Anyway, these are not the matters which can really be urged at the hearing of an application under Order 39 Rule 4 of the Code. As held by Madras High Court in the case of Govinda Ramanuja Das Goswami Vs. Vijiaramaraju, AIR 1929 Mad 803, Order 39 Rule 4 is intended to cover two classes of cases, namely, (1) when an urgent order has been passed ex parte under Rule 3, and the party against whom it has been passed applies to have it discharged or varied or set aside and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable. In the latter case, it would be open to either party to apply under Rule 4 to discharge, vary or set it aside. In a case where each side has had an opportunity of being heard but a party omitted to put his case forward, Rule 4 does not give jurisdiction to the Court to interfere with an injunction already passed after hearing the parties. In other words, as held by Madras High Court, rule 4 is not intended to set at nought the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be reopened except on the presentation of some new matter not available when the original order was passed. Needless to add, this new matter must have such material bearing on the order passed earlier that it was possible that the Court would have decided the matter otherwise had the material been pointed out

to it earlier.

8. This principle was further affirmed by the Full Bench of Madhya Pradesh High Court in the case of Ravishankar Vs. VIIth Additional District Judge, 1994(2) MPJR 200. The following observations of the Madhya Pradesh High Court may be noted:

“Whenever a prayer is made under Order 39, Rule 4, Civil Procedure Code, the Court has to pose itself with a question – whether there is a change in the circumstances or whether the order of the Court is causing undue hardship to a party? The later part of the question, needless to say, would involve consideration of only such factors causing undue hardship as have come in existence after passing of the order of the Court or which factors would be a consequence of the order of the Court itself. So is the case with the change in the circumstances. Exercising its jurisdiction under Rule 4 abovesaid, the Court may with advantage draw upon the principles revolving around Explanation IV to Section 11 of the Civil Procedure Code and ask itself whether the pleas raised in the application under Rule 4 might and ought to have been raised prior to the passing of the order? If the answer be ‘yes’, the Court may reject the application. If the answer be in the negative, the Court may very well entertain the application and dispose of the same on merits.”

8. Recording that unless and until a case is made out under Order 39 Rule 4 CPC, the exercise of the powers ought to be refused by a particular Court concerned with such an application. The facts of the present case do not justify exercise of power of Order 39 Rule 4 and the trial Court has rightly rejected the application vide order dated 05.10.2018, which has been set aside by the appellate Court. The matter has been remanded back to the trial Court for hearing on Exh. 5, in utter ignorance of the various subsequent developments, where the defendants had not only failed to file written statement

within the time prescribed by the Code but also has failed to cross-examine the plaintiff who has filed his evidence-affidavit long back in the year 2013. The conduct of the defendants therefore do not entitle them to seek any indulgence, nonetheless to seek variance or setting aside of the order passed below Exh.5 on 20.04.2015 and is in operation since last six years. However, the interest of justice can be better served if the learned Civil Judge Junior Division, Aurangabad is requested to dispose of the proceedings bearing Reg. Civil Suit No. 671/2014 within a time bound manner and since it is informed that the matter is now scheduled tomorrow, and it is lingering at the stage of cross-examination of the plaintiff, the learned Judge is requested to permit the cross-examination and also permit the defendants to examine their witnesses, if any, and conclude the proceedings on or before 30.04.2022.

9. With the aforesaid directions, the writ petition is disposed off.

**[ BHARATI H. DANGRE ]**  
**JUDGE**