

123.

2024:PHHC:003064

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-7277-2023

Date of decision: 10.01.2024

Vijay Sharma

... Petitioner

Versus

Sanjay Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE GURBIR SINGH

Present: Mr. Sangram Singh Saron, Advocate and
Mr. Nikhil Sabharwal, Advocate,
for the petitioner.

Mr. Jai Vir Yadav, Senior Advocate with
Mr. Nitish Sharma, Advocate and
Ms. Parul, Advocate,
Mr. Rohit Kumar Rana, Advocate,
for respondent No.1/caveator.

GURBIR SINGH, J.

1. Prayer in this revision petition filed under Article 227 of the Constitution of India is for setting aside the order dated 03.11.2023 (Annexure P-19) passed in appeal by learned Additional District Judge, Amritsar, vide which, the order dated 14.12.2021 (Annexure P-14) passed by the trial Court has been set aside and the application filed by respondent No.1-plaintiff under Order 39 Rule 1 and 2 read with Section 151 CPC for restraining the petitioner-defendant from constructing a basement near the property of the plaintiff, has been remanded back to the trial Court for fresh adjudication and till the decision of that

application, the petitioner has been restrained from raising any construction whatsoever in the suit property.

2. The brief facts, as culled out from the petition, are that respondent No.1-plaintiff (hereinafter called, “plaintiff”) filed a suit for permanent injunction restraining the petitioner-defendant (hereinafter called, “defendant”) from constructing a basement in the property of the defendant situated at Queens Road, opposite Railway Station, Amritsar. The defendant is constructing a Hotel under the name and style of M/s Richie Hotels Limited. The plaintiff claims himself to be the owner of Grand Hotel and if basement is dug out near the wall of property of the plaintiff, his apprehension is that the whole structure would become weak and can even fall and will cause loss to human life. Along with the suit, an application under Order 39 Rule 1 and 2 read with Section 151 CPC was also filed for restraining the defendant from raising any construction of basement within the area of 5 feet from the property of the plaintiff.

2.1 The defendant appeared in pursuance of notice. Written statement to the suit was filed and replication thereto was also filed by plaintiff.

2.2 The stand taken by the defendant in his written statement is that construction is being undertaken by him in his own property without there being any impact or affect on the property of the plaintiff. The construction is as per sanctioned site plan and necessary certificate for

constructing a basement from the Mining Department has also been obtained. Therefore, the plaintiff is not entitled to any relief of injunction. It is submitted that the plaintiff is not the owner of adjoining property i.e. Grand Hotel as per the revenue record. Said alleged building of the plaintiff, being old one, is in dilapidated and inhabitable condition and in this respect, the Municipal Corporation, Amritsar, respondent No.2 herein, had sent various notices to undertake necessary repairs, as any mishap can happen, but no steps were taken by him.

2.3 Vide order dated 14.12.2021, the application of the plaintiff filed under Order 39 Rules 1 and 2 read with Section 151 CPC was dismissed by the trial Court by observing that the defendant has every right to construct basement in his own property for which he had obtained necessary permissions. With regard to property of the plaintiff, it has been observed that a notice was issued by Municipal Corporation, Amritsar after noticing the dilapidated condition of the adjoining building and the plaintiff was directed to demolish the same within 15 days of issuance of notice in order to avoid any injury or loss of life to the habitants of the locality.

2.4 Said order was challenged in appeal before the learned Additional District Judge, Amritsar.

2.5 Vide order dated 03.11.2023, the learned appellate Court allowed the appeal and the order dated 14.12.2021 was set aside. The

extract of order is as under:-

“14. So, in view of my aforesaid detailed discussion, I am of the considered opinion that the impugned order dated 14.12.2021 is not legally sustainable as the learned trial court has failed to appreciate the facts and documents pleaded in the replication filed by the appellant/plaintiff and as such is liable to be set aside. Accordingly, the appeal in hand is allowed and the impugned order dated 14.12.2021 is hereby set aside with the directions to the learned trial court to decide the application u/o 39 rule 1 and 2 read with section 151 CPC filed by the appellant/plaintiff afresh on completion of the amended pleadings of the parties after appreciating the entire pleadings and documents submitted by the parties. In the meantime, the respondent/defendant no.1 Vijay Sharma is restrained from raising any construction in the suit property till the decision of application u/o 39 rule 1 and 2 read with section 151 CPC filed by the appellant/plaintiff by the learned trial court. However, this order of mine shall have no effect on the merits of the main suit.”

3. Learned counsel for the petitioner-defendant contends that the appellate Court, vide order dated 03.11.2023, decided the main appeal without giving him a reasonable opportunity to defend his case. The appellate Court has not taken into consideration the findings recorded by the trial Court. The fact that the building of plaintiff is more than 70 years old and is in a dilapidated condition, for which, Municipal Authorities, Amritsar issued several notices, was not taken into

consideration. Moreover, plaintiff himself had executed an affidavit dated 09.04.2019 giving No Objection to the construction of the basement in the suit property. The documents as relied upon by the defendant before the trial Court were ignored, however, the impugned order was passed by the learned Appellate Court by stating that the stand taken by the plaintiff in his replication was not taken into account by the trial Court. It is submitted that the case could not be remanded back for fresh decision on the application since court cannot remand the matter in miscellaneous proceedings invoking the provisions of Rules 23, 23A, 25 of Order 41 of CPC. Reliance is placed on the judgments in ***Nand Lal and others Versus Purshottam and others, 1988 AIR (Rajasthan) 26*** and ***Smt. Sanju Devi Kashyap and others Versus Smt. Uma Bai and others, 2019 AIR (Chhattisgarh) 56.***

3.1 It is further submitted that during the pendency of appeal against the order dated 14.12.2021, the plaintiff also moved this Court by filing CWP No.1245 of 2022. Said writ petition was disposed of vide order dated 03.03.2022 with liberty to the plaintiff to move an application for impleading Municipal Corporation, Amritsar as a party to the civil suit. While disposing of said writ petition, this Court also observed that the plaintiff had concealed the fact that his application had already been dismissed and against that order, he has also filed an appeal. In the said order, it has nowhere been observed by this Court that by impleading the Municipal Corporation as a party to the civil suit, the

application for temporary injunction would be heard afresh by the trial Court.

3.2 Learned counsel for the petitioner further argues that the prayer in the application under Order 39 Rule 1 and 2 read with Section 151 CPC filed by the plaintiff was for stay of construction of the basement in the suit property within the area of 5 feet from the property of the plaintiff, whereas the appellate Court has granted a blanket ad interim injunction against the defendant from undertaking any construction whatsoever in the suit property, which is completely unjust and unlawful. He has also relied upon judgments in *M/s Best Sellers Retail (India) Private Limited Versus M/s Aditya Birla Nuvo Limited, 2012(6) SCC 792* and *Jagmohan Bakshi Versus M/s Sumeet Enterprises and others, 2023(1) RCR (Civil) 588*.

4. Notice of motion.

5. Mr. Jai Vir Yadav, Senior Advocate with Mr. Nitish Sharma, Advocate, Ms. Parul, Advocate and Mr. Rohit Kumar Rana, Advocate, has caused appearance on behalf of respondent No.1 as caveator.

5.1 Learned senior counsel appearing on behalf of respondent No.1-plaintiff argues that the trial Court has not applied its judicious mind while deciding the application under Order 39 Rule 1 and 2 read with Section 151 CPC. The trial Court overlooked the report submitted by Beams and Spams LLP (Structural Engineers) wherein it has been observed that the set back space of 6 meter all around the basement, as

per sanctioned plan, was not found on the site. In the replication, it has been specifically mentioned that construction is being raised in violation of the building plan and now Municipal Corporation is impleaded as defendant No.2 in pursuance of the observations made by this Court vide order dated 03.03.2022 passed in CWP No.1245 of 2022. Reliance is placed on the judgments in ***Kantilal and others Versus Vidyadhar and another, 2018(1) W.L.N. 150; Ram Nath and others Versus Raghunath Singh and others, Misc. Petition No.4329 of 2023, decided on 01.09.2023 (High Court of Madhya Pradesh at Gwalior); and Dipal Kumar Mukherjee Versus Kolkata Municipal Corporation and others, 2013(5) SCC 336.***

6. I have heard the submissions of learned counsels for the parties and have gone through the paper book.

7. The first question is whether the learned appellate Court can pass order of remand in appeal filed under Order 43 of CPC. Section 108 of CPC apply to all appeals irrespective of whether those arise from decree or not. In case ***Rupinder Singh Anand Versus Gajinder Singh Anand and others, 2011(1) MPLJ 646***, a Division Bench of the High Court of Madhya Pradesh at Gwalior has also held that Section 108 of CPC makes Chapter VII is applicable to all appeals irrespective of whether those arise from decree or not. Relevant para 15 is reproduced as under:-

“15. So far as maintainability of cross-objections is concerned, it is true that cross-objections can be filed in appeal against impugned judgment/order under Order XLI, Rule 22, Civil Procedure Code. Section 108 makes Chapter VII apply to all appeals, irrespective of whether they arise from decrees or orders. Order XLIII, Rule 2, clearly lays down that the rules of Order XLI shall apply, so far as may be, to appeals from orders. It appears from this that the intention is to allow all matters covered by Order XLI so far as they can be made applicable to appellate orders and appeals therefrom as well. It is quite clear therefore that a cross-objection in an appeal against an order appealable under Order XLIII. Rule 1, Civil Procedure Code can be made. This aspect of the case has been taken into consideration by this Court in the matter of Beniprasad Agarwal v. Hindustan Lever Ltd., Bombay, 1957 MPLJ 676 = AIR 1958 Madhya Pradesh 348, wherein this Court held that cross-objections in appeal against such order can be made and the cross-objections be placed as an appeal after it is filed.”

8. The authorities in ***Nand Lal and others’ case (supra)*** of Rajasthan High Court and ***Sanju Devi Kashyap (supra)*** of Chhattisgarh High Court are of no help to the petitioner.

9. After disposing of the application for temporary injunction by the trial Court, Municipal Corporation, Amritsar has been impleaded as party vide order dated 03.03.2022 pursuant to the order of this Court passed in CWP No.1245 of 2022. In the replication, the respondent-plaintiff has pleaded that construction is being raised in violation of the

building plan and the Municipal Corporation has already put in appearance. It is the duty of the Municipal Corporation that all the constructions in the area falling in its jurisdiction should be made in accordance with the sanctioned site plan or the building plan. At the time of decision by the learned trial Court and even by the learned appellate Court, stand of the Municipal Corporation was not there and by now written statement would have been filed by the Municipal Corporation, so, fresh decision by the trial Court on the application for temporary injunction is required and the learned appellate Court had passed the order keeping in view that there is amendment of pleadings also. The courts are required to do complete justice to the parties and duties of the parties is to act in accordance with law. No doubt, petitioner has started construction and same is held up due to this litigation but petitioner has no right to make any construction till adjudication of the application for temporary injunction or subject to the decision thereof.

10. Keeping in view the hardship being faced by the petitioner, a direction can be given to the trial Court to decide the application for temporary injunction in a time bound manner.

11. Without discussing the merits of the case, this Court is of the view that the order of remand passed by the learned appellate Court is in accordance with law and the learned trial Court is directed to dispose of the application for temporary injunction preferably within a

period of one month from the date of receipt of certified copy of this order.

12. Present revision petition stands disposed of accordingly.

13. Parties are directed to appear before the learned trial Court concerned on 22.01.2024.

(GURBIR SINGH)
JUDGE

January 10, 2024

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Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No