

(1998) 11 GAU CK 0011

Gauhati High Court

Case No: Misc Appeal (First) No. 13 (K) of 1998

N.V.International

APPELLANT

Vs

M.S.Associates

RESPONDENT

Date of Decision: Nov. 23, 1998**Acts Referred:**

- Civil Procedure Code, 1908 - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4, Order 43 Rule 1(r)
- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4, Order 43 Rule 1(r)

Citation: (1998) 3 GLJ 492**Hon'ble Judges:** H.K.Sema, J**Bench:** Single Bench**Advocate:** Taka Masa Ao, B.N.Sharma, T.Koza, Sanjay Jain, Advocates appearing for Parties

Judgement

1. This appeal is directed against the exparte injunction granted by the learned Deputy Commissioner (J), Nagaland by its order dated 1.9.98 passed in Civil Misc Case No. 7 of 1998 arising out of Civil Suit No. 1 (DC) of 1998. This appeal has been preferred by the defendant.

2. The appeal was originally filed at Principal Seat on 10.11.98 and the learned Single Judge by its order dated 10.11.98 stayed the operation of the exparte injunction granted by the learned Court below. The learned Single Judge ordered that the exparte injunction granted by the learned Court below shall remain in abeyance for 7 (seven) days from that date, and further directed that the case records be transmitted to Kohima Bench immediately.

3. By another order dated 16.11.98, the learned Single Judge at Principal Seat modified the interim order dated 10.11.98 to the extent that the order passed on 10.11.98 shall remain in force till the case records are placed before this Bench at

Kohima. The case records was ultimately received on 18.11.98 by this Bench, and at suggestion of counsel of both sides, it was listed on 20.11.98 for hearing the parties.

4. Accordingly, I have heard Mr. BN Sarma, learned counsel for the appellant/defendant, Mr. Takamasa, learned counsel for the proforma respondent No.2/defendant No. 1, and Mr. Sanjay Jain, learned counsel for the respondent No.I/plaintiff at length.

5. At the time of hearing of this appeal, it was proposed and decided by the counsel of both sides that since the present appeal is only against exparte injunction order, and since the main suit is pending for final disposal, the appeal would be disposed on merit. This is how the parties were heard at length.

6. Before I advert to the points raised by the respective parties in this appeal, it must be emphatically made clear that this Court is not called upon to embark on the merit of the civil suit as the main suit is pending disposal before the learned Court below, and if any observation is made by this Court at this stage may ultimately prejudice the merit of the respective parties before the learned Court below.

7. Following contentions have been raised by Mr. BN Sarma, learned counsel for the appellant:

(a) that the plaintiff obtained the exparte interim order dated 1.9.98 by suppressing the material facts.

(b) No cause of action arose within the jurisdiction of Deputy Commissioner (J), and therefore, the learned Deputy Commissioner (J) assumed the jurisdiction not vested in him.

(c) The learned Court below granted the exparte injunction in violation of procedure laid down under Order XXXIX Rule 3 of the CPC.

8. As against this, it is contended by Mr. Sanjay Jain that while granting the exparte injunction order the learned Court below has considered the three established principle of law and there is no infirmity in the order. It is further contended by the respondent that Order XXXIX Rules 1 and 2 are substantive and Order XXXIX Rule 3 are procedural to be followed, and therefore, nonobservation of the procedure contained under Order XXXIX Rule 3 would not vitiate the exparte injunction order. The further contention of the respondent is that, even otherwise under Order XXXIX Rule 4, the defendants, if aggrieved could file an application before the Court below passing the order for vacating, varied or set aside the order, and the defendants having not applied an application under Order XXXIX Rule 4, the present appeal is incompetent.

9. Before I proceed further on the contentions raised by the parties, it will be pertinent to mention herein that the present appeal is filed under Order XLIII, Rule 1 (r) read with section 151 of the CPC and Rule 29 of the Rules for Administration of

Justice and Police in Naga Hills and under Article 227 of the Constitution of India with a sole prayer to set aside the *ex parte* interim injunction dated 1.9.98 passed by the learned Deputy Commissioner (J) Dimapur in Civil Misc Case No.7 of 1998 arising out of Civil Suit No.1 (DC) of 1998. The contention of counsel for the appellant that the learned DC (J) has no jurisdiction to entertain the civil suit as no cause of action arose within his jurisdiction is the subject matter of the main civil suit. This can be dealt with when the main civil suit namely; CS 1 (DC) of 1998 is taken up by the learned Court below on merit. At the same time, if the plaintiff obtained the *ex parte* interim injunction that would be a good ground to apply an application under Order XXXIX Rule 4 of CPC which I shall be dealing at the appropriate time.

10. Now, the only point that survives for consideration is, whether the *ex parte* injunction order dated 1.9.98 passed by the learned Court below is vitiated for nonobservance of the procedure laid down under Order XXXIX Rule 3 of the CPC.

11. To answer the question aforesaid, it may be relevant to refer to Order XXXIX Rule 1 which provides the cases in which temporary injunction may be granted, it reads :

"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 is in danger of being wasted, damaged 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."

12. The granting or refusal of temporary injunction under Order XXXIX Rule 1 is a discretionary of the Court and it covered by three well established principles:

(1) Whether the plaintiff have made out a *prima facie* case;

(2) Whether the balance of convenience is in their favour, that is to say whether it would cause greater inconvenience to them if injunction is not granted than the inconveniences which the opposite party or persons claiming through the Opposite party would be put to if the temporary injunction is granted , and

(3) Whether the plaintiffs would suffer an irreparable injury.

13. In the backdrop of well established principles of law with regard to granting and refusal of temporary injunction, let me now examine the provisions of Order XXXIX Rule 3, more particularly proviso to Rule 3.

14. Before I examine Rule 3, it will be pertinent to mention herein that, at the time of hearing of this appeal it is also conceded by counsel of both sides that the provision under Order XXXIX. Rule 1 and 2 are substantive but the provision contained under Order XXXIX Rule 3 are procedural.

15. Order XXXIX Rule 3 reads :

"3. Before granting injunction, Court to direct notice to opposite party. 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 :

Provided 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, and require the applicant (underline is mine)

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with :

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies; and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent."

16. Rule 3 has been inserted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). Rule 3 was added by the aforesaid Amendment Act, pursuant to the Joint Committee of the Parliament recommending the amendment.

17. Rule 3 as quoted above contemplates :

(a) When the Court grants an *ex parte* injunction, the Court is obliged to record the reasons for its opinion that the object of granting the injunction would be defeated by delay.

(b) Secondly, when the Court grants an *ex parte* injunction, copies of the application supported by an affidavit, copy of the plaint, copies of the documents on which the applicant relies to file on the day on which such injunction is granted or on the day immediately following that day shall be sent or delivered to the defendants

immediately after the injunction has been granted and an affidavit shall be filed by the applicant for injunction stating that it has been so delivered or sent.

18. In the instant case, counsel of both sides has taken pain in going through the exparte injunction order passed by the learned Court below on 1.9.98. A bare perusal of the exparte injunction, it clearly appears that the learned Court below has considered three well established principle of law namely; prima facie case, balance of convenience and irreparable injury as stated above, and in this view, it cannot be said that the learned Court below has granted an exparte injunction in violation of the three established principle of law.

19. The only contention of learned counsel for the appellant is that, the learned Court below did not record its opinion that the object of granting the injunction would be defeated by delay.

20. Let us now see whether the mere omission of the learned Court below in recording its opinion and reasons that the object of granting the injunction would be defeated by delay, would vitiate the exparte injunction order.

21. Order XXXIX Rule 3 visualises the Court to issue notice to the opposite party before granting injunction, except where it appears that the object of granting injunction would be defeated by the delay. It is under this exception the Court has got discretionary power to grant exparte interim injunction. If we examine Order XXXIX Rule 1 read with Order XXXIX Rule 3, it would show that in both the rules the word "injunction" appeared. Therefore, any order passed by the Court in its discretionary power under Rule 3 must be construed to mean not merely an exparte injunction but also an order in the nature of an injunction which the Court is competent to make under Order XXXIX Rule 1.1 have already observed that while passing order under Order XXXIX Rule 3, the learned Court below has observed the three established principle of law. If that is so, the order passed under Order XXXIX Rule 3 cannot be faulted merely because the learned Court below did not record the reasons that the object of granting the injunction would be defeated by delay.

22. In my view, the provision contained under Rule 3 of order XXXIX as to the recording of reasons is merely directory and omission to record the reasons would therefore not vitiate the injunction granted exparte, provided the learned Court below observe the three well established principle of law with regard to prima facie case, balance of convenience and irreparable lose and injury. This apart, to grant or not to grant injunction is a discretionary power of the Court. An appeal preferring against an order passed in exercise of discretionary power is said to be an appeal on principle. What is discretionary cannot be made rigid unless, prima facie it is found that the discretion has been exercised arbitrary, capriciously, perversely or where the Court has ignored the settled principle of law regulating the grant or refusal an interlocutory injunction.

23. In view of the aforesaid discussions and reasons, the ex parte interim injunction order dated 1.9.98 passed by the learned Court below in Misc Case No. 7 of 1998 arising out of Civil Suit No.1 (DC) of 1998 cannot be faulted for the simple reason that the learned Court below has not recorded its reasons that the object of granting the injunction would be defeated by the delay.

24. Before parting with the record, the contention raised by counsel of the respondents deserves to be considered. It is contended by Mr. Sanjay Jain that appellant has not availed the provisions of Rule 4 Order XXXIX. Rule 4 of Order XXXIX reads :

"4. Order for injunction may be discharged, varied or set aside. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order :

Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice :

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, 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 a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party."

25. Before I consider Rule 4, it will be pertinent to mention that this Court has already expressed its opinion in MA (F) 15 (K) 97 (HM Enterprises vs. M/s MS Associates, disposed on 11.8.97 that the appellant must be resorted to Order XXXIX Rule 4 if the learned Court below while granting ex parte interim injunction under Order XXXIX Rule 3 has fixed date of hearing for consideration of the temporary injunction.

26. Rule 4 as quoted above contemplates that an order of injunction may be discharged, varied or set aside on the ground that a false or misleading statement has been made in the application. To put it alternately, an injunction may be dissolved if it was granted on a suppression or misrepresentation of material facts. It is the case of the appellant that the plaintiff/respondent has obtained the ex parte injunction by suppressing the material facts. If that is so, they could have immediately file an application under Order XXXIX Rule 4 with a prayer for discharge, varied or set aside the ex parte injunction, which has not been done.

27. It may also pertinent to point out while passing the ex parte injunction order dated 1.9.98, the learned Court below has also fixed 6.10.98 for submission of

written statement and hearing. By the aforesaid order, the learned Court below also directed plaintiff to furnish a copy of the order to all the defendants with a copy of the plaint.

. 28. It is stated at the Bar by counsel of the respondents that, as directed the plaintiff has furnished copies of the order, documents and the plaint to the defendants. The appellant has denied receipt of the notice. This appeal was preferred on 9.11.98. In the appeal memo, not even a whisper as to when the appellant/defendants received the notice. In the appeal memo a copy of the plaint and also copies of the application under Order XXXIX Rules 1 and 2 and the exparte injunction order dated 1.9.98 has been annexed.

29. In view of what has been stated above, this appeal fails and it is accordingly dismissed. The interim order dated 10.11.98 and extended by 16.11.98 stands vacated.

30. It is also stated at the Bar that the next date is fixed on 9.12.98 for written statement and consideration of the exparte injunction. If that is so the appellants/defendants are directed to take steps before that date and the learned Court below shall take up the exparte injunction peremptorily on 9.12.98. Unless the Court is compelled by circumstances beyond his control, no adjournment shall be resorted to. Needless to say that if the appellant or any parties are aggrieved by any order that may be passed on 9.12.98 or any other dates, they are at liberty to approach this Court again.