
be entitled to any adjournment except for very exceptional circumstances.

(103) Both the revision petitions are accordingly disposed of. However, in the peculiar facts and circumstances of the case, we leave the parties to bear their own costs.

R.N.R.

Before Iqbal Singh, J.

KARNAL IMPROVEMENT TRUST,—*Defendant/Petitioner*

versus

ISHWAR CHANDER,—*Plaintiff/Respondent*

C.R. No. 5185 of 1998

8th October, 1999

Code of Civil Procedure, 1908—0.39 Rl. 4—Modifying order of status quo—Trial Court ordered status quo regarding possession—During pendency of suit defendant demolished boundary wall—Plaintiff filed application u/o 39 Rl. 4 to modify status quo order and to seek permission to reconstruct wall—Application dismissed by the trial Court and subsequently allowed by the appellate Court to reconstruct boundary wall—Impugned order virtually granted relief of mandatory injunction sought in suit—Not sustainable—Order set aside.

Held, that under Order 39 Rule 4 of the Code, a party may seek discharge, variation or setting aside of an order of injunction if it is so necessitated by a change in the circumstances or if such order of injunction has caused undue hardship to it. By the order under revision, the appellate court has in a way granted the relief, at least the relief of mandatory injunction, as claimed in the suit by granting the permission to the plaintiff to reconstruct the boundary wall and this would amount to decreeing the suit, without affording to the parties opportunities to lead evidence. The lower appellate court should go slow in upsetting/ varying the finding of the trial court on an application u/o. 39 Rls. 1 and 2 of the Code and should not substitute its opinion for the opinion of the trial court.

(Para 7)

C.B. Goel, Advocate, *for the petitioner.*

K.C. Bhatia, Advocate, *for the respondent.*

JUDGMENT

Iqbal Singh, J.

(1) Plaintiff—respondent filed a suit for permanent injunction restraining the defendant Improvement Trust, not to demolish the portion shown as 'E B C F' in the site plan attached with the plaint. Alongwith the suit, he also filed two applications under Order 39 Rules 1 and 2 of the Code of Civil Procedure (for short "the Code") seeking interim injunctions. In one application, the plaintiff prayed for temporary injunction restraining the defendant not to demolish the portion shown as E B C F in the site plan during the pendency of the suit and in the another application, a prayer was made for granting *ad interim* injunction, restraining the defendant not to demolish the portion shown as EBCF in the site plan and further, not to take forcible and illegal possession of the same from him till the decision of the suit. The trial court on a consideration of the matter, directed the parties to maintain *status quo* regarding the state of affairs existing at the spot. Defendant filed written statement controverting the averments made in the plaint. During the pendency of the suit, as per the allegations of the plaintiff, the defendant demolished the boundary wall and some portion of the house in dispute. The plaintiff, therefore, moved an application for amendment of the plaint for adding a relief of mandatory injunction for directing the defendant to restore the boundary wall and the house in the same condition as it was before, in its original condition. Amendment was allowed as prayed.

(2) Meanwhile, the plaintiff also moved an application under Order 39 Rule 4 read with section 151 of the Code with the allegations that the defendant had demolished the boundary wall and some portion of the house illegally and due to demolition of the boundary wall, the house had become unsafe as it is situated in such a locality where any crime of theft etc. could take place any time. It was also stated that the wife of the plaintiff is mental and a young daughter of twenty years was also residing with the plaintiff in the said house. Therefore, in order to provide safety to the house and the family, the order of *status quo* passed earlier may be modified and the plaintiff may be permitted, *ad interim*, to re-construct the boundary walls of the house in question, in the interest of justice and equity. The application was resisted. It was stated that if the prayer made in the application was granted, it would amount to granting the final relief claimed in the suit, which cannot be done until the suit is decided on merits.

(3) On a consideration of the matter, the trial court come to the conclusion that application under Order 39 Rule 4 of the Code was not maintainable because under these provisions, no permission could be

granted to re-construct the boundary walls. The defendant demolished the boundary wall alleging it to be an encroachment on its land, which fact stood corroborated from the site plan, which was a part of the sale deed dated 15th July, 1994 in respect of the property of the plaintiff. Trial court also came to the conclusion that in the site plan as well as in the sale deed the portion was not shown to have been sold to the plaintiff and only a plot was shown to have been sold to him, which was lying adjacent to the property in dispute. As such the plaintiff was not the owner of the property in dispute. Trial court further observed that construction raised by the plaintiff in the shape of boundary wall on the land of the defendant was certainly an encroachment and giving permission to the plaintiff to reconstruct the boundary wall would mean giving permission to him to encroach upon the land of the defendant. Thus finding no merit in the application, the same was dismissed by the trial court by order dated 2nd June, 1998.

(4) Aggrieved against the above order, plaintiff filed appeal. The appellate court after hearing the counsel for the parties, observed that the application under Order 39 Rule 4 of the Code was maintainable. The appellate court was alive to the proposition of law that mandatory injunction could be granted in rarest of rare cases. It, thus, also observed that present was a case of that kind. The appellate court, therefore, allowed the appeal and permitted the plaintiff to re-construct the boundary wall of the suit property, by order dated 12th November, 1998, by observing as under :—

“As by the demolition of the wall, the house of the appellant/plaintiff who is an helpless advocate, has become open to every one. In these days of law and order problem in the city and various murders, dacoity and rape cases has happend, so safety of the family of the appellant/plaintiff is endangered. The court should not sit in a tight compartment without observing the actual day to day happening. In case the application is not allowed, some mishappening if happened which will be an irreparable loss to the appellant-plaintiff. That too even if the appellant/plaintiff has shown on the file a registered sale deed in his favour of the disputed property. The sale deed dated 25th April, 1975 is on the file and alongwith it there is a site plan attached dated 15th May, 1974. The boundaries, dimension, shown in the site plan dated 15th July, 1974 and in the recital of the sale deed tally with the site plan filed alongwith the suit. All this evidence coupled with the report of the local Commissioner Shri Bhagat Singh

Naib Tehsildar, Karnal further supports the case of the appellant/plaintiff that this suit property is in Khasra No. 5471 and not in Khasra No. 5848. By the order of *status quo* dated 13th June, 1997 and by the order dated 2nd June, 1998 the appellant/plaintiff has suffered undue hardship. Hence seeing the peculiar circumstances of this case, the order of *status quo* is liable to be changed and the order dated 2nd June, 1998 passed by the learned counsel is hereby reversed.”

(5) I have heard learned counsel for the parties. Learned counsel for the petitioner contended that allowing the application under Order 39 Rule 4 of the Code would amount to decreeing the suit and nothing would remain to be decided afterwards. Learned counsel for the respondent, on the other hand, contended that it has not as yet been proved on record whether the site in dispute is a part of the property sold to the plaintiff and whether he has a right to raise construction thereon or not. He further submitted that the safety of the house and the family of the plaintiff is of paramount importance as in the absence of the boundary wall, not only the criminals and strangers but strayed animals also would have access to the house and the property of the plaintiff, which may affect the affairs of his house.

(6) The question which requires determination is whether the order as passed by the appellate court could be passed under Order 39 Rule 4 of the Code. I, therefore, deem it appropriate to notice the provisions of Rule 4 of Order 39 of the Code, which reads thus :

“4. Order for injunction may be discharged, varied or set aside.—

Any order for an injunction may be discharged, 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.”

(7) No doubt, under the above provisions, a party may seek discharge, variation or setting aside of an order of injunction if it is so necessitated by a change in the circumstances or if such order of injunction has caused undue hardship to it. The appellate court seems to have been influenced by these two considerations while modifying the order of *status quo* granted earlier and granting the permission to the plaintiff to re-construct the boundary wall. It is equally true that there should not be any quarrel with the two questions that the plaintiff had a right to move an application seeking modification or variation of an order of injunction and further that the Court, subject to the consideration of the aforesaid two factors, could certainly discharge, vary or set aside the order of injunction. But as noticed above, the plaintiff had initially filed a suit for permanent injunction restraining the defendant from demolishing the portion shown as EBCF in the site plan claiming that he was the owner in possession of the same since 25th April, 1975. This fact was categorically denied by the defendant in the written statement who also stated that the plaintiff was in unauthorised possession thereof, and it is why the defendant, having regard to the fact that the plaintiff had encroached upon its land by constructing a boundary wall, demolished the same. The appellate court, however, modified that order and permitted the plaintiff to re-construct the boundary wall. It deserves to be mentioned here, though at the cost of repetition, that earlier the plaintiff had filed applications for the grant of injunction restraining the defendant from demolishing the boundary wall and not to take forcible and illegal possession of the same from him, after the demolition of the boundary wall, a relief of mandatory injunction was got added by way of amendment of the suit, directing the defendant to re-construct the demolished portion of the property marked EBCF i.e. a portion of the room and the boundary wall as fully detailed in para 4-A of the amended plaint. Thus, by the order under revision, the appellate court has in a way granted the relief, at least the relief of mandatory injunction, as claimed in the suit by granting the permission to the plaintiff to re-construct the boundary wall and this would amount to decreeing the suit, without affording to the parties opportunities to lead evidence. In my opinion, however grave danger may be to the safety and affairs of the house of the plaintiff as has been sought to be demonstrated by the counsel for the respondent during the course of hearing, the case

of the plaintiff does not fall in the category of rarest of rare cases. Besides, change of circumstances might have taken place but the hardship which has been sought to be faced by the plaintiff in the absence of boundary wall is not such which may justify to grant permission to the plaintiff to re-construct the boundary wall. This is a question which straight-way touches the merits and the main relief prayed for in the suit, which obviously could not be granted without appreciating the evidence which may be led by the parties in due course of time. It is also not shown to the satisfaction of this court that any irreparable loss would be caused to the plaintiff in the absence of boundary wall. Further more, the power to exercise jurisdiction under the above provisions should otherwise be used sparingly. It is also well settled principle of law that the lower appellate court should go slow in upsetting/varying the finding of the trial court on an application under Order 39 Rules 1 and 2 of the Code and should not substitute its opinion for the opinion of the trial court. The appellate court was thus not right in modifying the order of *status quo* passed earlier and permitting the plaintiff to re-construct the boundary wall.

(8) In view of the above reasons, the revision petition is accepted, the order of the lower appellate court is set aside and that of the trial court restored. The application of the plaintiff under Order 39 Rule 4 of the Code thus stands dismissed accordingly. However, having regard to the facts and circumstances of this case and in the interest of justice, I deem it appropriate that the suit be decided at an early date. The trial court is, therefore, directed to dispose of the suit within six months after affording at least two effective opportunities to each of the parties for their respective evidence. The trial court shall also report compliance of this direction to this Court.

J.S.T.

Before Jawahar Lal Gupta and K.S. Garewal, JJ.

MRS. RAJINDER KAUR,—*Petitioner*

versus

UNION TERRITORY, CHANDIGARH AND ANOTHER,—
Respondents

C.W.P. No. 19356 of 1998

13th November, 2000

Constitution of India, 1950—Art. 226—Allotment of a site for setting up a weigh bridge—Petitioner depositing 25% of the amount—