

Shivam etc. Vs. Anand

**ORDER BELOW EXH.55**(Dated: 24/07/2023)

The defendant has filed this application vide order XXXIX rule 4 of The Code of Civil Procedure, 1908 (hereinafter referred as 'the CPC', for the sake of brevity) to set aside the order passed below Exh.05 dated 20/12/2021.

02. He submitted that, Ex-parte interim injunction was passed against the defendant on 20/12/2021. However, the defendant received the summons on 08/10/2020 and on 04/02/2021 the suit was proceeded Ex-parte against the defendant. On 03/08/2022, defendant appeared and filed delay condonation application along with the w.s. and say to Exh.05. Further, he has filed application vide Order VII Rule 11 of C.P.C. to reject the plaint, which has been rejected by the court on 01/02/2023. However, the said Ex-parte interim injunction was granted by violating the principle of natural justice as '*Audi Alteram Partem*' and without giving opportunity of being heard to the defendant. It was granted without giving notice to the defendant.

03. He further submitted that, prima-facie case of the defendant was not considered on the merits and false and fabricated material was placed before the court. Plaintiff has knowingly made a false and misleading statement for grant of Ex-parte injunction and willfully concealed some material particulars. The court issued the order under presumption that defendant

cannot suffer irreparable loss and undue hardship. However, said presumption was based on false and concocted set of facts put forth before the court by the plaintiff. Hence, the defendant will suffer irreparable loss that till today the mutual partition was not effected between the family of defendant. Hence, share of defendant could not be determined, relations of defendants brother and sisters are stretched due to said order, the said injunction order also made applicable to some properties which are self-acquired of the defendant. Plaintiffs are not entitled to claim share from such self-acquired properties till the life time of the defendant and defendant and his family are suffering heavy financial losses due to said order. They are suffering from emotional, mental and physical loss which is effected on day to day life of defendant. Hence, he prayed to allow this application and to vacate and set aside the order passed below Exh.05 with heavy costs.

04. The plaintiff has filed say to this application at Exh.57. She denied all the contentions in the application. She submitted that, on 18/03/2020, she has instituted this suit for the relief of partition. Vide bailiff report dated 08/10/2020 at Exh.09, notice was duly served on defendant for the hearing of Exh.05. However till 04/02/2021, defendant failed to appear and file say, hence, the application was proceeded Ex-parte against him. Accordingly, on 20/12/2021 the court was allowed the interim injunction application which is due fair and correct. On 04/07/2022, she filed affidavit in lieu of chief examination and further filed

additional affidavit on 17/03/2023. However, on 04/07/2022, the defendant appeared in the suit and filed delay condonation application and application for setting aside Ex-parte order. When the said applications were allowed, his w.s. was taken on record and later on issues were framed. Still, the defendant filed application vide Order VII Rule 11 of C.P.C. on 30/08/2022 which has been rejected by the court on 01/02/2023. Further on 27/06/2023, the application for secondary evidence filed by the plaintiff was allowed. Only in order to prolong the case, the defendant has filed such applications. This application is not tenable on the ground of limitation. Order below Exh.05 was allowed only till the disposal of this suit and it would not be proper to vacate the said order. It was clearly mentioned by the court that in order to avoid multiplicity in the proceeding if the defendant will alienate the suit property. On the contrary if the defendant could be restrained from alienating, then he could not suffer any irreparable loss. The defendant is in attempt to alienate the suit property and hence, with that intention he filed this application to vacate the said order only with the malafied intention he filed this application which is liable to be rejected. Lastly, she prayed to reject this application with cost of Rs.30,000/-.

05. Perused the record. It appears that, vide bailiff report dated 08/10/2020 at Exh.09 notice was duly served on the defendant for hearing of interim injunction application, still till the date of order of interim injunction application he failed to

appear and counter the case of the plaintiff. Hence, on 04/02/2021 Ex-parte order was passed against him and on 20/12/2021 said order was passed. Now the defendant has raised objection to vacate the said order in view of Order XXXIX Rule 4 of C.P.C. on the ground that notice was not served on him and opportunity of being heard was not given to him. In the legal perspective of Order XXXIX Rule 4 of C.P.C., it is statistically prescribed that, the order for an injunction “ 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 interests 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.”

06. On bare perusal of this statutory law, it is specifically mentioned that if without giving notice the opposing party the temporarily injunction application is allowed, then the court shall vacate such injunction yet in the interest of justice court should not. If an order for injunction was passed after giving opportunity of being heard, such an 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 the court is satisfied that such order has caused under hardship to the defendant.

07. The defendant has not put his case in any of the above situations as the notice is already duly served on him by notice Exh.09 dated 08/10/2020 and it cannot be assumed that the said order is passed without issuing such notice. Hence, the defendant failed to put his case with this proviso. On the other hand, the defendant has also not submitted that, there is such change in the circumstances which necessitates discharge, variation or setting aside such order. There is no any statement pleaded by the defendant as regarding such change and circumstances which may entitled to seem for such relief. Further this proviso would be applicable if said order was passed after giving an opportunity of being heard to the defendant. However not so in this case. Hence, both these circumstances are not applicable to the case of the defendant. More than this, on perusal of bare roznama and record it shows that, even after value in chief examination rather than to conduct the cross-examination the defendant is filing this

application only in order to harass the plaintiff. This conduct of the defendant seems to be malafied. Not only this, the nature of the properties can be decided at the time of trial and if the defendant claims the said property as self-acquired, then he may put his case with such an probable defence and rebut the case of the plaintiff. However, instead of this, it seems that, he is prolonging the trial of this suit. Hence, it would be suitable to hold a view that this application is devoid on merits and is liable to be rejected with exemplary cost of Rs.2000/- which would suitable the delay cause to the plaintiff to proceed with the suit. In the result, following is the order.

**ORDER**

1. Application at Exh. 55 is rejected with cost of Rs.2000/- on the defendant to be paid to the plaintiff on or before next date.
2. Defendant is directed to conduct the cross-examination expeditiously on next date.

(Dictated and pronounced in open court).

Date – 24/07/2023.

(Sonal. A. Salunkhe)  
4<sup>th</sup> Jt. Civil Judge, J.D.,  
Pandharpur.