

**Court No. - 35**

**Case :-** FIRST APPEAL FROM ORDER No. - 52 of 2024

**Appellant :-** Ashok Kumar Katiyar

**Respondent :-** Charan Jeet Singh And 3 Others

**Counsel for Appellant :-** Shivam Shukla, Sushil Kumar Shukla

**Counsel for Respondent :-** Komal Mehrotra, Rahul Sahai

**Hon'ble Vipin Chandra Dixit, J.**

1. This first appeal from order has been filed on behalf of defendant-appellant against the order dated 28.08.2023, passed by Commercial Court, Kanpur Nagar, in Commercial Suit No. 46 of 2023 (Charan Jeet Singh and others vs. Ashok Kumar Katiyar and another) by which temporary injunction was granted in favour of plaintiffs on the application filed under Order 39 rule 1 & 2 read with Section 151 C.P.C. (Paper No. 6-C). The defendant-appellant was restrained to interfere in peaceful possession of plaintiffs-respondents over property no. 117/A-1, situated at Arazi Nos. 594, 595 and 596 in village Barsaitpur Tehsil & District Kanpur Nagar. The defendant was also restrained to interfere in operation of petrol pump, its bank account and to maintain status quo in respect of suit property.

2. Heard Sri Sushil Kumar Shukla, learned counsel for the appellant, Sri Rahul Sahai, learned counsel for the respondents and perused the record.

3. Brief facts of the case are that the defendant-appellant was the owner and in possession of property no. 17/A-1, situated over Arazi Nos. 594, 595 and 596 in village Barsaitpur Tehsil & District Kanpur Nagar. The defendant-appellant has sold 700 sq. yards (585.27 sq. meter) land of the aforesaid property to the plaintiff along with petrol pump through registered sale deed on 24.02.2020. The possession of petrol pump had already been handed over by defendant appellant to the plaintiff-respondent no. 1 on 19.10.2019. A memorandum of undertaking was executed between the parties on 27.06.2019. It was agreed between the parties that the plaintiff-respondent no. 1 will pay Rs. 6,25,00,000/- to the defendant-appellant as sale consideration. The plaintiff no. 1 had already paid Rs. 1,00,00,000/- at the time of execution of memorandum of undertaking and the remaining

amount was agreed to pay at the time of execution of sale deed. It was also agreed that defendant-appellant will transfer petrol pump to the plaintiff no. 1 after completing formalities with Hindustan Petroleum. The defendant-appellant had sent legal notice to the plaintiff no. 1 in the month of December, 2019 admitting therein that he received Rs. 2,23,00,000/- and Rs. 4,02,00,000/- is still outstanding. The sale deed in respect of petrol pump as well as suit property was executed by defendant-appellant in favour of plaintiff-respondent no. 1 on 24.02.2020 and possession was also handed over to the plaintiff-respondent no. 1.

4. The petrol pump is being run by plaintiff, but defendant-appellant has failed to complete the formalities for transfer of petrol pump in favour of plaintiff and demanding extra Rs. 1,00,00,000/-, whereas, entire sale consideration has already been paid by the plaintiff at the time of execution of sale deed.

5. The plaintiffs-respondents have filed suit for injunction seeking direction that the defendant-appellant may be directed to transfer the petrol pump in pursuance of sale deed dated 24.02.2020 in favour of plaintiff after completing formalities with Hindustan Petroleum. It is further prayed in the suit that the defendant-appellant and his agents may be restrained from interfering in peaceful possession of plaintiff-respondent no. 1 in respect of suit property. The plaintiffs-respondents have also moved an application for interim injunction under Order 39 rules 1 & 2 read with Section 151 C.P.C. (Paper No. 6C). The trial court after considering the fact that petrol pump along with suit property has already been purchased by plaintiff-respondent no. 1 through registered sale deed on 24.02.2020 and he is in possession over the same, has granted ex-parte injunction in favour of plaintiffs-respondents vide order dated 28.08.2023, which is impugned in the present appeal.

6. It is submitted by learned counsel for the defendant-appellant that the plaintiff had failed to pay the remaining amount in terms of memorandum of undertaking dated 27.06.2019. It is further submitted that as per memorandum of undertaking the plaintiff-respondent no. 1 was required to pay Rs. 6,25,00,000/- and only Rs. 1,00,00,000/- was paid at time time of memorandum of undertaking dated 27.06.2019 and Rs. 4,00,00,000/- was paid at the time of execution of sale deed. Rs. 1,25,00,000/- is still unpaid by the plaintiffs. It is further submitted that the present suit has been filed by the plaintiff-respondent no. 1 on altogether incorrect facts only to save the unpaid amount. The plaintiffs-respondents by concealing the material facts have filed suit for injunction and they

did not approach the trial court with clean hands. The trial court has also erred in granting ex-parte injunction in favour of plaintiffs-respondents. The plaintiffs were required to make efforts for mediation and settlement before filing of suit in view of Section 12 A of Commercial Court's Act, 2015, but without exhausting the remedy of pre-institution mediation, the present suit was filed. He has placed reliance on the judgment of Hon'ble Apex Court in the case of *M/s. Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited* reported in **2022 (10) SCC 1**.

7. On the other hand, learned counsel appearing for plaintiffs-respondents submits that the entire sale consideration has already been paid by the plaintiff-respondent no. 1 to the defendant no. 1 at the time of execution of sale deed. The plaintiff-respondent no. 1 is in possession over the suit property. It is further submitted that the trial court after considering the entire evidence and materials adduced by the plaintiff-respondent no. 1 has recorded the finding regarding prima-facie case in favour of plaintiff-respondent no. 1 as the suit property was purchased by the plaintiff after payment of agreed sale consideration. The possession of suit property was already handed over to plaintiff-respondent no. 1 and he is in possession over the same. The petrol pump is now operated by the plaintiffs and the trial court has rightly passed the order dated 28.08.2023 granting interim injunction in favour of plaintiff-respondent no. 1. The learned trial court has recorded the finding that the plaintiff is in possession over the suit property and is operating petrol pump. The trial court after its satisfaction has passed the temporary injunction in favour of plaintiffs-respondents. Lastly, it is submitted that the appeal against the ex-parte injunction is not maintainable under Order 43 Rule 1(r) C.P.C. The defendant-appellant has right to file application for vacating / recalling of ex-parte injunction order in view of Order 39 Rule 4 C.P.C. The provisions of Section 12A of Commercial Court Act are also not applicable, as the plaintiff required urgent interim relief against the defendant-appellant.

8. Considered the submissions of learned counsel for the parties and perused the record.

9. It is admitted fact that the plaintiff no. 1 has purchased the suit property through registered sale deed dated 24.02.2020 and is in possession over the same. The petrol pump in question is operated by the plaintiffs. As per memorandum of undertaking, the defendant is required to transfer the petrol pump in favour of plaintiff no. 1 after completing formalities with Hindustan

Petroleum. The defendant has not made any efforts to complete the formalities with Hindustan Petroleum to transfer the petrol pump in favour of plaintiff no. 1. The trial court after recording its satisfaction that prima-facie case is in favour of plaintiffs has passed ex-parte interim injunction in favour of plaintiffs vide order dated 28.08.2023.

10. So far as pre-litigation mediation and settlement is concerned, the defendant-appellant has not taken any such ground in the memo of appeal. Section 12A(1) of Commercial Court Act is reproduced herein below :-

*"12A. Pre-Institution Mediation and Settlement.-- (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government."*

From the bare perusal of Section 12A(1), it is apparent that it is applicable where urgent interim relief is not required. Record shows that the defendant was interfering in functioning of petrol pump and there was an urgent need of interim injunction.

The Hon'ble Apex Court in the case of ***M/s. Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited (supra)*** has held that mediation is mandatory, where the plaintiff does not contemplate urgent interim relief. Relevant paragraph no. 72 is reproduced herein below :-

*"72. We may sum-up our reasoning as follows:*

*The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word 'shall', certainly, go a long way to assist*

*the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory. Apparently, the value judgement of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties."*

Section 12A(1) provides that pre-institution mediation is mandatory, where in the suit there is no urgent interim relief is required, but in the present case, as the defendant is interfering in operation of petrol pump and there was an urgent need of interim relief, the provisions of Section 12A are not attracted in the present case.

11. Since the interim injunction was granted by the learned trial court is ex-parte, the defendant-appellant has a remedy to file application for vacating / recalling of ex-parte injunction order under Order 39 Rule 4 C.P.C. Statutory remedy is available to the defendant-appellant to approach the trial court by filing application for vacating the ex-parte order. The provisions of Order 39 Rule 4 C.P.C. are reproduced herein below :-

**"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 been*

*caused undue hardship to that party.]"*

12. From a bare perusal of Order 39 rule 4 C.P.C., it is apparent that the defendant has a remedy to move application for setting aside the ex-parte order. Since, the appellant has a statutory remedy under Order 39 Rule 4 C.P.C. to file such application for setting aside the ex-parte injunction order, the present appeal on behalf of defendant-appellant is not maintainable and is liable to be dismissed.

13. The first appeal from order is accordingly, **dismissed**.

**Order Date :- 1.8.2024**

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