

1991(2) G. L. H. 399

B. J. SHETHNA, J.

Gujarat Small Industries Corporation ...Petitioner

Versus

Rajkot Engineering Association ...Respondent

Civil Misc. Application No. 906 of 1991

D/- 26-8-1991*

*Civil Misc. Application against the decision dated 20-8-91 of the learned Assistant Judge, Rajkot, in Civil Misc. Appeal No. 132/91 filed against the decision dated 19-8-91 of the learned Civil Judge, S. D., Rajkot on Exh. 5 in Civil Suit No. 732/91, etc.

Code of Civil Procedure, 1908-O. 43, R. 1 - An order only issuing show-cause notice below application Ex. 5 for interim injunction was not appealable under O. 43, R. 1 Civil Procedure Code - Order issuing notice does not fall under O. 43(1) - Appellate Court was not at all justified in entertaining appeal and in passing the impugned orders.

When show-cause notice was only issued by the learned Civil Judge on application Exh. 5, order of issuing notice was not appealable under O. 43 R. 1 C.P.C. The appeal would lie only against the orders of issuing notice does not fall under O. 43(1)C.P.C. Therefore, the learned Judge was not at all justified in entertaining the appeal and passing the impugned order on Exh. 5 filed in the said appeal. Therefore, the impugned orders passed on 20-8-91 and 23-8-91 are liable to be set aside which are hereby set aside.

[\(Para 7\)](#)

Appearances :

Mr. P. V. Hathi, advocate for the petitioner

Mr. K. S. Nanavati, learned advocate for Mr. Y. S. Lakhani for the respondent on caveat

B. J. SHETHNA, J. :-

Rule

Mr. Nanavati, L. A. for the respondent waives service of Rule.

By consent of the parties this application is ordered to be heard today.

2. On 19-8-91 the respondent-plaintiff filed a Civil Suit No. 732/91 in the court of the learned Civil Judge (SD), Rajkot and prayed for *ex parte* injunction by filing application Exh. 5 in the said suit. The learned Judge,

after hearing the learned Advocate of the plaintiff did not grant *ex parte* interim injunction as prayed for; but ordered to issue short notice and make it returnable on 22-9-91 to the defendant corporation-present petitioner. The order of the said notice was received by the petitioner's branch office at Rajkot on 21-8-91.

3. As no *ex parte* injunction was granted by the learned Civil Judge, the respondent herein rushed before the learned Assistant Judge, Rajkot by way of an appeal under Order 43 Rule 1 of C.P.C. Admittedly, it was an order issuing notice only therefore, no Appeal from Order would lie against that order under Order 43 Rule 1 C.P.C. Still, the learned Assistant Judge on 20-8-91 issued *ex parte* injunction as prayed for by the present respondent-plaintiff, though the learned Civil Judge made the notice returnable on 22-8-91, i.e. before 2 days of the date of hearing of the notice. On 20-8-1991 the learned Assistant Judge, Rajkot stated in his impugned order as under :

"...Considering the facts and circumstances of the case of the appellant, it is desirable for the interest of justice that ad interim injunction be issued for limited period till the Corporation submits their objection at that time...."

4. I fail to understand that in what interest of justice, the learned Assistant Judge has passed that order and what were the facts and circumstances of the case which tempted him to pass such an order. [*@page399*]

The learned Assistant Judge by his impugned order issued an ad interim injunction against the present petitioner in terms of para 2 of the application Exh. 5 which is filed in Civil Misc. appeal No. 132 of 1991 before him upto 26-8-1991 with direction that the Trial Court should pass an order after giving an opportunity to other side expeditiously.

5. The learned Assistant Judge ordered to issue the show-cause notice below Exh. 5 in appeal filed by the present respondent-plaintiff that why the injunction as prayed for in Exh. 5 should not be granted and simultaneously granted ad interim injunction below application Exh. 5 in Civil Misc. Appeal No. 132/91, upto 26-8-91, by giving direction to the learned Civil Judge (SD) to pass an order after giving an opportunity to the other side.

6. It is pointed out to me that the order passed by the learned Civil Judge (SD) making the notice returnable on 22-8-91 on application Exh. 5, the summons of the suit and the order passed on 20-8-91 by the learned Assistant Judge were served on the present petitioner-Association simultaneously on 21-8-91. Therefore, immediately on the next day on 22-8-91 the present petitioner rushed from Ahmedabad to Rajkot and appeared before the learned Civil Judge and prayed for time as the lower appellate court was seized of the matter.

On the next day, i.e. 23-8-91 the petitioner approached the learned Assistant Judge in Appeal and submitted an application Exh. 8 praying to stay further implementation of his order passed on 20-8-91. The learned Assistant Judge passed an order below application Exh. 8 on 23-8-91 which is annexed at para 6 of this application. Surprisingly, in that order, he has stated as under:

"...The court has granted ad interim injunction for the limited period, i.e. upto 26-8-1991 with direction to the lower court to decide the matter on merits expeditiously. With this direction this court has disposed of C.M.A. on 20-8-91."

If we read the order dt. 20-8-91 passed by the learned Assistant Judge, no where it is stated that he had disposed of C.M.A. No. 132/91. The copy of the order dt. 20-8-91 received by the present petitioner from the learned Assistant Judge, Rajkot which is annexed herewith at page 1 of this Application shows that the petitioner was called upon to remain present on 26-8-91 before the learned Assistant Judge. Therefore, how the learned Assistant Judge can say in his order that Civil Misc. Appeal was disposed of on 20-8-91 ? The learned Assistant Judge has further observed in his impugned order dt. 23-8-91 that " This respondent (present petitioner) would not suffer any substantial loss if operation of injunction not stayed when otherwise would suffer considerably". Now, no finding is given whether the plaintiff-present respondent has any prima facie case in their favour or not. That apart, on what basis the learned Assistant Judge has come to the conclusion, we do not know about the same. Except stating that the respondent-petitioner) would not suffer any substantial loss if operation of injunction not stayed, when the other side would suffer considerably, there is nothing more stated in the impugned order by the learned Assistant Judge.

7. In view of the above discussion when show-cause notice was only issued by the learned Civil Judge on application Exh.5, order of issuing notice was not appealable under Order 43 Rule 1 C. P. C. The appeal would lie only against the orders mentioned in Order 43(1) C.P.C. The order of issuing notice does not fall under Order 43(1) C. P. C. Therefore, the learned Judge was not at all justified in entertaining the appeal and passing the impugned order on Exh.5 filed in the said appeal. Therefore, the impugned orders passed on 20-8-91 and 23-8-91 are liable to be set aside which are hereby set aside.

8. It may be noted that Mr. Nanavati, L. A. for [page400] the respondent in his usual fairness conceded that the learned Assistant Judge, Rajkot has committed an error in stating in his order that the "respondent would not

suffer substantial loss if operation of injunction is not stayed, when other side would suffer considerably." Therefore, I am not dealing with the order passed by the learned Assistant Judge.

9. For the reasons stated above, the impugned orders passed by the learned 2nd Extra Assistant Judge, Rajkot on 28-8-91 in Civil Misc. Appeal No. 132/91 and the order passed below Exh.8 in Misc. Civil Appeal No. 132/91 are hereby quashed and set aside.

The learned 2nd Jt. Civil Judge (SD), Rajkot is directed to dispose of the application Exh.5 in Civil Suit No. 732/91 on merits, in accordance with law, after giving an opportunity of being heard to both the parties on or before 6-9-1991.

This Revision Application is allowed with no order as to costs.

The office is directed to communicate the above order to the learned 2nd Jt. Civil Judge (SD), Rajkot forthwith.

(ISS) Rule made absolute.