
(1950) 09 AHC CK 0043
In the Allahabad High Court
Case No : F.A.F.O. No. 246 of 1947

H. Bevis and Co.	Vs	APPELLANT
Ram Behari and Others		RESPONDENT

Date of Decision : 28-09-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 43 Rule 1, 115

Citation : AIR 1951 All 8

Hon'ble Judges : Mushtaq Amhad, J;Desai, J;Agarwala, J

Bench : Full Bench

Advocate : C.S. Saran and B.D. Gupta, for the Appellant; The Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Mushtaq Ahmad, J.—This is a plaintiff's appeal against an order refusing an injunction.

2. The plaintiff is a firm dealing in tents and brushes, etc., for which it has to employ a large body of workmen and labourers. The defendants are the representatives of those workers in the employ of the plaintiff concern. There was a dispute between the parties with regard to the defendants' right to receive from the plaintiff certain sums, and the U. P. Governor, on 25-2-1947, referred the same under Rule 81, Defence of India Rules for adjudication to a particular officer of the Government. This officer made an award on 16-5-1947, that the plaintiff firm should pay roughly Rs. 40,000 as bonus to the workers in its employ. The plaintiff objected to this award and filed a Suit No. 73 of 1947 in the Court of the Civil Judge, Kanpur to obtain its cancellation. In this suit, the plaintiff made an application praying for a temporary injunction restraining the defendants from recovering the amount under the aforesaid award.

3. The Court below passed a very short order on this application in the following words :

"Civil Court vacation is near at hand. In this case intricate questions of law are involved and I cannot issue even ex parte injunction off hand. Both the parties are to be heard on the date to be fixed for hearing of injunction application. The applicant wants an injunction against the Government's award. Order Rejected".

4. I take this order not as finally refusing, the application for injunction but surely as refusing to issue an ad interim injunction, inasmuch as the learned Judge clearly said that both the parties were to be heard on the date to be fixed for the hearing of the injunction, application.

5. A preliminary objection was taken by the learned counsel for the respondents that the order, not being a final order on the application for temporary injunction but only a preliminary order refusing to issue an ad-interim injunction, was not appealable under Order 43, Rule 1 (r) of the Code. Now Order 39, Rule 1 of the Code allows the Court in which the-suit is filed to "grant a temporary injunction. until the disposal of the suit or until further order", and in Rule 3 of that Order it is provided that the Court shall direct notice of the application to be given to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay. That is to say, it may not issue notice to the opposite party, where there is a danger of this object being lost,, and issues an injunction, of course ad interim, straightway. Such an order, in my opinion, would be covered by the words "until further order", which Rule 1 of Order 39 concludes. It was argued that an order of this character could not be conceived to be one on the application for temporary injunction. Where an application purporting to be for such injunction is filed, there are three alternative orders that may possibly be made by the Court on that application. Firstly, it may be rejected forthwith, secondly, its final disposal may be postponed until after the opposite party has been heard, no ad interim injunction being granted, and lastly, an order granting an ad interim injunction, and then, after the Court has heard the opposite party, disposing of the application finally. In all these cases, it would be an order essentially on the application for temporary injunction, there being no other application at the time for that purpose. If the order is to take effect not for the period of the pendency of the suit, that is to say, to use the words of Rule 1, Order 39, not "until the disposal of the suit", at may take effect only "until further orders" if it is one only for an ad interim injunction, having the effect of a stay order. In all these cases, it would be an order under Rule 1, Order 39 and not outside that rule. This being so, again in all these cases, it would be appealable under Order 43, Rule 1 (r) of the Code.

6. It was contended by the learned counsel for the respondents that it was only the final order on an application for temporary injunction that was appealable and not an order allowing or refusing an ad interim injunction. This necessarily meant that, where a Court, howsoever urgent a matter may be from the point of view of the plaintiff, once took a fancy that there was no urgency; and refused to issue an ad interim injunction, that order was final, and no higher Court could pretend to touch it, although admittedly the same Court could, in appeal, reverse

the order, if it was one finally disposing of the application. I see no juristic basis for such a discrimination, nor any legal explanation for such a policy underlying the law. If the High Court had an appellate jurisdiction to consider the merits of a final order on an application made for temporary injunction before a Civil Judge, it would, by parity of reasoning, have a similar jurisdiction in respect of an order of a similar character, which as to take effect not for the period of the pendency of this suit but for a smaller duration. Any other view, I am inclined to think, would lead to a highly anomalous situation; granting jurisdiction to the appellate Court in one respect and denying it altogether in the other, although both may relate to a common subject. I, therefore, think that the order passed by the Court below is appealable to this Court.

7. Even if the said order was not appealable I would have been inclined to set it aside in revision, in view of the particular facts of the case, to which I shall refer in the paragraph following.

8. On the merits, I am of opinion that it was a fit case in which the Court below should have granted an ad interim injunction. The plaintiff's case, rightly or wrongly, was that the award made by the Labour Officer was invalid. It involved a very substantial amount. The amount was made payable to an appreciably large body of persons of the labour class. It is obvious that it would be a problem, in case of the success of the suit, to recover the amount in dribblets from such a body, and the task of recovery would itself prove highly expensive, entailing a further burden in costs on the defendants. This Court having first issued an ad interim injunction forbidding the payment of the amount to the defendants and then confirmed the same, and the money having not been so far paid to the defendants for a period of about three years and the suit itself being now well towards its end in the trial Court, it seems to me that the status quo should be maintained, and the contingency, for the prevention of which the plaintiff applied in the Court below should be avoided, at least for some time more, as it has been for a much longer period hitherto.

9. I would, therefore, allow the appeal, set aside the order of the Court below and grant an ad interim injunction to the plaintiff, restraining the defendants, from recovering the amount in question from the appellant, who would be entitled to its costs in this Court.

Desai, J.

10. It is to be regretted that there should have been difference of opinion between my brother Mushtaq Ahmad and myself in this matter which is only of academical interest now. But as I find nothing right in the appellant's case and think that there never was a worse case for. granting injunction in appeal, I am bound to state my views.

11. The appeal itself is incompetent. It is admitted that the only provision under which it could lie is that in Order 43, Rule 1 (r), Civil P. C. which allows an appeal from "an order under Rule 1, Rule 2, Rule 4 or Rule 10 of Order XXXIX." It is

conceded that the order appealed from was not passed under Rule 4 or Rule 10 of Order 39. Learned counsel for the appellant attempted to argue that it was passed under Rule 1 or Rule 2 of the Order. Actually I find that it was not passed under either of these rules even and that the fact is that the lower Court has not passed a final order on the appellant's application to it for injunction. Rules 1 to 5 of the Order deal with temporary injunctions. Rules 1 and 2 state the grounds on, or the circumstances, in which temporary injunction can be granted and Rule 3 prescribes the procedure to be adopted by the Court for granting it. I leave aside for the present the grounds on, or the circumstances in, which temporary injunction can be granted. The normal rule is that temporary injunction cannot be granted except after notice of the application for temporary injunction to the opposite party. It is only where the Court finds that the object of granting the injunction would be defeated by the delay, that it can grant it ex parte. There are no different kinds of temporary injunction; an ex parte injunction is as much a temporary injunction as an injunction granted after hearing the opposite party. An ex parte. injunction is not a provisional injunction and does not require to be followed by another injunction; nor does it require, to be confirmed. As far as the application for temporary injunction is concerned, it is fully disposed of when the Court grants injunction either ex parte or after hearing the opposite party. The only difference between an ex parte injunction and an injunction granted after hearing the opposite party is that in the former case, the opposite party is not bound by it and can move the Court to dissolve it under Rule 4 whereas in the latter case, the opposite party can have it dissolved only by the appellate Court. Now what has happened in the present case is simply that the trial Court refused to grant ex parte injunction. The application that the appellant made before it has not been produced before us, but it appears from the grounds of this appeal and from the order under appeal, that the appellant simply asked for ex parte injunction. The order under appeal has been reproduced by my brother. The trial Court has expressly stated that on account of intricate questions of law being involved, it would not grant ex parte injunction and that it would hear the opposite party on the date to be fixed for hearing the injunction application. This means that it has elected to follow the normal procedure and far from disposing of the application by refusing it, has kept it pending and ordered a notice of it to be given to the opposite party. "Such an order is not an order passed under Rule 1, or Rule 2, and no appeal can lie from it. An appeal can lie only when it has refused to pass an order tinder Rule 1, or Rule 2. Refusing to grant ex parte injunction does not amount to refusing to grant it altogether. If the trial Court had granted ex parte injunction, the opposite party would have been entitled to appeal from it, because, as I stated earlier, an ex parte injunction is still an injunction under Rules 1 and 2, and does not require to be followed up by another injunction after hearing the opposite party. But if ex parte injunction is refused, the applicant has no remedy by way of an appeal. I am not concerned with the reason why the Legislature has thought fit not to provide a remedy ; I am concerned with the fact that it has not done so. Rules 1 and 2 are subject to Rule 3 which lays down the procedure and so long as that procedure is followed

and final orders are not passed on the application, it cannot possibly be said that an order is passed under either of the rules. The words, "until farther orders" in Rule 1, have no bearing on the point under discussion; they only mean that the Court has full liberty over the duration of temporary injunction. It can grant injunction either for the whole duration of the suit or upto a certain date. I have already said that if injunction is granted, it will be an injunction granted under Rule 1 and 2 regardless of whether it is ex parte or not.

12. I am supported by Luis v. Luis 12 Mad. 186, in which Wilkinson and Shephard JJ., ruled that there is no provision for an appeal against an order issuing notice to the defendant before granting temporary injunction against him. They observed :

"The order made by the subordinate Judge was not; the formal expression of his decision on the question, whether an injunction should be granted or not. A discretion is vested in the Court by Section 494 of refusing to grant a temporary injunction if satisfied that the object of granting an injunction will not be defeated thereby and no appeal is provided in case of his refusal."

13. Another Bench of the same High Court decided in S.D. Annamalai Desikar Vs. M.R. Govinda Rao, , that no appeal lies under Order 43, Rule 1 (r) against an order merely ordering notice to be issued as required under Rule 3 of Order 39.

14. Even if the appellant's application before the trial Court was for ex parte injunction and ex parte injunction only, the refusal of the trial Court to grant ex parte injunction is not appealable. The order of the trial Court would be deemed to be an order simply refusing to adopt the particular procedure of granting injunction straightway without issuing a notice to the opposite party, and not an order refusing to grant temporary injunction in accordance with the procedure laid down in Rule 3. If a certain procedure is prescribed and an application is made to Court to pass an order without following that procedure and the Court insists upon following the procedure before passing the order, it cannot be said that it has refused to pass the order. If the appellant itself did not think of getting a notice of its application served upon the opposite party and did not enable the lower Court to follow the procedure of Rule 3, it has to blame itself.

15. The application for ex parte injunction was not bona fide and the trial Court exercised its discretion judiciously in refusing it. It is stated in Woodroffe's Law relating to injunctions, Edn. 5 at p. 135 that :

"The power to issue an ex parte injunction no doubt exists but the greatest care should be employed in its exercise. There may be instances where the injury is so great that an ex parts injunction is necessary; but the Court should if possible always require notice, however short, to be given. (2) Such an injunction on the application of one party, and without previously giving to the person to be affected by it the opportunity of contesting the propriety of its issuing, is a deviation from the ordinary course of justice, which nothing, but the existence of some imminent danger to property if it be not so granted, can justify A case,

therefore, of irremediable mischief impending must be made out."

The appellant failed to make out such a case. The award was made by an adjudicator to whom the dispute was entrusted for adjudication by the Provincial Government under the Defence of India Rules kept alive under the Emergency Provisions Ordinance. It was made on 12-4-1947, and was sent by the adjudicator to the Provincial Government. The Provincial Government enforced the award on the parties concerned through a notification dated 14-5-1947, served upon the appellant two days later. The award required the appellant to pay bonus amounting to Rs. 40,000 approximately to its workers by 28-6-1947. The appellant instituted the suit challenging the validity of the award on 27-5-1947, and applied for ex parte injunction. The lower Court refused to grant ex parte injunction on 29-5-1947. The appellant had plenty of time within which to serve the notice of its application upon the opposite party, which consists of its own workers in the factory, and to have the application decided under Rule 3 before the expiry of the date within which the award should have been obeyed. But it did nothing of the kind, and when ex parte injunction was refused, it rushed to this Court with an appeal. This just shows its mala fides in the matter. I specifically asked its learned counsel about the fate of the application for injunction and I was surprised to hear that he did not know what was being done in that application. If there had been the slightest urgency in the matter, the appellant would have got the notice of the application served upon the opposite party and got the application disposed of by the trial Court within 2-3 days, I think there was an oblique motive behind the applicant's insistence upon ex parte injunction. It fully realized that under the award, the bonus had to be paid before a certain date and that once that date elapsed, there was no other date before which the bonus was bound to be paid. The liability of the appellant to pay the bonus arose under the Government order and if it did not pay it before the date fixed in the Government order, it could only be prosecuted for disobeying the Government order. There was nothing else to be done by the Government or the opposite party. The appellant knew that if it could get temporary injunction of such a duration that the date 28-6-1947 fell within the duration, it was excused for all time to come from obeying the award. Unless the Government issued another order fixing another date for compliance with the award, the appellant could not be blamed or prosecuted for not complying with it. It has achieved its object, because it secured ex parte injunction from this Court. It has now lost all interest in seeing to the prompt disposal of its application by the trial Court. That explains why its counsel was unable to say what has happened to the application.

16. On the facts that have been placed before us, no injunction could have been granted under Rule 1 or Rule 2. Under Rule 1 injunction is granted when "any property in dispute in a suit is in danger of being wasted" or damaged or alienated or wrongfully sold in execution of a decree or the defendant threatens to dispose of his property. Admittedly if injunction could be granted in this case, it could be only on the ground that some property in dispute was in danger of being wasted. The suit was to challenge the award. I do not think it can be said

that there was any property in dispute in the suit, but even if some property could be said to be in dispute in the suit, it was the award itself. The money that was payable in compliance with the award could not by any stretch of the language be said to be the property in dispute in the suit. Further, it could not be said that it was in danger of being wasted. The workers are sought to be restrained; they can be restrained only from receiving the money. Receiving money under a Government order cannot possibly be described as wasting it. In *Parbhu Dayal Vs. Laldas Maganlal and Others*, , Ismail J. stated:

"The question is whether the lawful exercise of a right vested in a person can be legally restrained by the Court under this rule. In my opinion, this cannot be done (p. 829). The enforcement of a mortgage can never be characterised as an attempt to waste or damage any property." (p. 830).

17. Just as a mortgagee could not be restrained in that case from suing in another Court on the foot of the mortgage, so also the opposite party cannot be restrained in the instant suit from receiving the money under the award. Rule 2 permits an injunction to be granted in a "suit for restraining the defendant from committing a breach of contract or other injury of any kind." There is no question of breach of contract, but it was sought to be argued that this is a suit to restrain the defendants from committing injury. I wonder how it can be said that if the opposite party received the money awarded to them by the Government order, they committed "injury." Further the suit itself was not one to restrain the opposite party from committing injury of any kind. The suit was for the setting aside of the award. It is quite different from a suit to restrain the defendants from committing injury. A declaratory suit is different from a suit for injunction. Unless it is a suit for injunction, it cannot be said to be a suit to restrain the defendants from committing injury. Thus, the injunction prayed for could not be granted under Rule 1 or Rule 2 even.

18. Learned counsel for the appellant also brought in the inherent powers. Temporary injunction cannot be granted under the inherent powers : see *Kuppammal and Others Vs. Seetharama Aiyar*, and *Kewal Ram v. Gulabsing* AIR 1937 Sind 315 : 172 Ind. Cas. 13. In some cases it has been held that temporary injunction can be granted under the inherent powers but even then it is a matter within the exclusive jurisdiction of the trial Court. If the trial Court refuses to exercise its inherent powers, the aggrieved party cannot take up the refusal in appeal. So the appellant cannot come up in appeal against the lower Court's refusal to exercise its inherent powers.

19. It is impossible for me to acquiesce in the granting of the ex parte injunction after this period of more than three years, in which period the appellant, if it was so minded, could have got the notice of its application served upon the opposite party hundred times, one after another. No ex parte injunction can be granted by this Court unless it is in a position to say that the object of granting the injunction would be defeated if it heard the opposite party. The more I think of the matter, the more absurd it seems to me. We have heard the opposite party in

response to this appeal and it would be meaningless for us after this to say that we cannot afford to wait for hearing it in reply to the application for ex parte injunction.

20. The appellant failed to make out a case of irreparable or irremediable injury. If it paid the bonus in accordance with the award and succeeded in getting it set aside, it could recover back the money from its workers. I do not know why it should have been impossible for it to recover the amount from its own workers. It could have recovered it by short payment of the wages. Even if there would have been some inconvenience in recovering the money from a large number of workers, it did not amount to that irreparable or irremediable injury to prevent which temporary injunction is granted.

21. Learned counsel for the appellant did not address us on the merits at all. We do not know at all whether the appellant had a prima facie case. If it had no prima facie case it was not entitled to temporary injunction at all. It did not make the Provincial Government a party to the suit though it was the order of the Government that was binding on it and gave it a cause of action. The adjudicator's award by itself was not binding upon it. When its liability to pay the bonus arose under the Government order, it could not evade the liability unless that order was set aside. The order could not be set aside unless the Government were impleaded as a defendant. No order of the trial Court would bind the Government or have any effect on the order issued by them. I even do not understand how the appellant could be benefited by the injunction. It was under an obligation to pay the bonus and it had to pay it even though the opposite party might have been restrained from enforcing it. There arose, no question of the opposite party's enforcing the Government order. I think the order of Government did not require to be enforced by , anybody; it took effect as soon as it was published and served upon the appellant. The opposite party could not do anything to prevent its taking full effect and it was no use restraining it. As long as the Government order remained in force and was not kept in abeyance, the appellant's liability to pay it remained.

22. Even if this appeal were treated as an application for revision, I would not have been inclined to grant it at all. Whether a case of urgency was made out or not was merely a matter of judgment or discretion of the trial Court and a Court acting in revision would-not be justified in interfering with the exercise of discretion. Further, a Court refusing to grant ex parte injunction cannot be said to act with material irregularity in the exercise of its jurisdiction.

23. The opposite party has suffered considerable loss by being deprived of the bonus for nearly three years. If interest is calculated on the amount of the bonus at, say, 7 per cent., it would amount to approximate Rs. 8,000/- which is a substantial amount. There is no reason why the opposite party should suffer if the appellant's suit is dismissed. It is unfortunate that when ex parte injunction was granted by this Court, no conditions were imposed upon the appellant. That, however, should not prevent our making the appellant liable for this loss to the

opposite party in the event of the Government order being upheld. While dismissing this appeal, I would order that in case the appellant's suit is dismissed, it should pay interest at 6 1/4 per cent, per annum on the amount of the bonus for the period 28-6-1947 to the date of actual payment. In my judgment the appeal should be dismissed and the injunction issued by this Court should be dissolved.

24. By the Court.--In view of the difference of opinion between us, we direct that this appeal be laid before the Hon'ble the Chief Justice for obtaining the opinion of a third Judge on the following points:

(1) Is an order refusing to issue an ad interim injunction as allowed by Rule 3 of Order 39, Civil P. C., appealable ?

(2) If the order is appealable, did the appellant make out a case for the trial Court's granting such an injunction?

(3) If the order is not appealable, can it be questioned by this Court in the exercise of its revisional jurisdiction ?

Agarwala, J.

25. This case has been referred to me for opinion upon the points formulated in the referring order. The facts of the case briefly stated are as follows :

26. The appellant firm is the employer of certain workmen and labourers. There was a dispute between the appellant firm and its employees in respect of the employees' right to receive certain bonuses. The Governor of the United Provinces (now the State of Uttar Pradesh) referred the dispute under Rule 81, Defence of India Rules for adjudication to an officer of the Government. The officer gave an award finding that the appellant firm was liable to pay about rupees forty thousand as bonus to its employees. The United Provinces Government enforced this award by means of a notification dated 14-5-1947, directing the appellant firm to pay to its employees the sum mentioned in the award by 28-6-1947. This notification was served upon the appellant firm on 16-5-1947. On 27-5-1947, the appellant firm instituted the suit, which has given rise to this appeal, in the Court of the Civil Judge of Kanpur for a declaration that the award was invalid. The firm also made an application that a temporary injunction be issued to the defendant-respondents restraining them from recovering the amount under the award. This application was put up before the learned Civil Judge on 29-5-1949.

27. It appears that the plaintiff, appellant also prayed for an ex parte injunction to be issued forthwith without notice to the other side. The Court did not accede to this request and passed the following order :

"Civil Court Vacation is near at hand. In this ease intricate questions of law are involved and I cannot issue even an ex parte injunction off hand. Both the parties are to be heard on the date to be fixed for hearing of injunction

application. Applicant wants an injunction against the Government's award. -- Order rejected."

28. It may be mentioned here that the civil Court vacations were to commence from 5-6-1947, and the Courts were to re-open on 5-7-1947. The money under the award was to be paid by 28-6-1947; so that if the application was to be heard after the vacation it would become infructuous. The appellant firm then filed the present appeal in this Court on 2-6-1947 and as ad interim injunction, directing the opposite-party not to enforce the award, was also obtained. This appeal came up for hearing before my brothers Mushtaq Ahmad and Desai JJ. They differed in their opinions as to the decision to be given in the case and framed the following questions for the opinion of a third Judge :

"(1) Is an order refusing to issue an ad interim injunction as allowed by Rule 3 of Order 89, Civil P. C., appealable ?

(2) If the order is appealable, did the appellant make out a case for the trial Court's granting such an injunction ?

(3) If the order is not appealable, can it be questioned by this Court in the exercise of its revisional jurisdiction ?"

29. The answer to the first question depends upon a reading of Rules 1-4 of Order 39 and Rule (1) (r) of Order 43, Civil P. C.

30. Rule 1 of Order 39 permits the Court to grant a temporary injunction until the disposal of the suit or until further orders. Similarly under Rule 2, the Court may issue a temporary injunction on such terms as it thinks fit. Rule 3 is important. That rule runs as follows :

"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."

Under this rule the normal procedure is to issue a notice of the application for the issue of an injunction to the opposite party before the injunction is granted. But in exceptional cases "where the object of granting the injunction would be defeated by the delay", no notice, need be sent to the opposite party and the application for injunction may be granted forthwith. In that case, no doubt, the injunction, will be granted until further orders. "When the Court grants an ex parte injunction, Rule 3 does not contemplate the issue of the notice of the application to the opposite party. But under Rule 4, liberty is reserved for the opposite party against whom an ex parte injunction has been issued to make an application to the Court to discharge or vary or set aside the injunction that has been issued. It is clear from a reading of Rules 1 to 4 that whenever an ex parte injunction is issued, the application is disposed of finally and the order is one made under Rule 1 or Rule 2 as the case may be. But when the Court does not think that "the object of granting the injunction would be defeated by the delay", and issues a notice of the application to the opposite party, it does not dispose of

the application made under Rule 1 or Rule 2. That application is still pending and will be disposed of after hearing the opposite party in pursuance of the notice issued to him. The common practice followed both in the lower Courts as well as in this Court of issuing notice of the application for an injunction and at the same time of issuing an ad interim ex parte order of injunction is not justified by the provisions of the Code. What ought to be done is that when the Court feels that the object of granting the injunction would be defeated by the delay, it should grant the application for injunction (of course, if it is satisfied that the injunction ought to be granted), and no notice of the application need be issued to the opposite party. The other side is not prejudiced at all by this procedure because in order to make the injunction operative and effective it has got to be served on the party restrained and so the opposite party will get notice of the grant of the injunction. If dissatisfied with this injunction, he can always approach the Court and have the order discharged, varied or set aside under Rule 4.

31. I, therefore, think that when the Court refuses to grant an ex parte injunction and issues notice to the other side of the application for injunction, it has passed no order under Rule 1 or Rule 2 and, therefore, no appeal can lie from such an order. But where the Court grants the application for injunction ex parte, an appeal lies because the application made under Rule 1 or Rule 2 is disposed of.

32. This view is supported by authorities.

33. That an appeal lies when an ex parte order or injunction is passed under Rule 1, was affirmed in *Amolak Ram v. Sahib Singh* 7 ALL 550 : 1885 A. W. C. 128

34. That no appeal lies against a refusal to proceed ex parte and pass an ex parte order but to issue notice to the opposite party before deciding the application was held in *Luis v. Luis* 12 Mad. 186 and *Annamalai v. Govinda Rao* AIR 1924 Mad 857: 20 M. L. J. 556

35. My answer to the first question is, therefore, in the negative.

36. In view of my answer to the first question, the second question does not arise for consideration.

37. As regards the third question, I consider that the Bench referred to me not only the question whether a revision lies to this Court, but also the question whether, on the facts of the case, the order under appeal could be questioned by this Court in the exercise of its revisional jurisdiction.

38. Where the Court below does not apply its mind to the provisions of Order 39, Rule 3 when it refuses to grant an ex parte injunction, it acts illegally or with material irregularity in the exercise of its jurisdiction and a revision may lie. Under Rule 3 of Order 39, what the Court has to see when requested to grant an ex parte injunction is whether "the object of granting, the injunction would be defeated by the delay." In the present case the Court did not apply its mind to this aspect of the case at all. On the facts of the case I am satisfied that it was a

fit case in which an ex parte injunction should have been granted.

39. Was there a likelihood, in the present case, of an irreparable and irreparable injury resulting from the refusal of the injunction ? I think there was this likelihood. The award involved a large amount to the tune of rupees forty thousand to be paid to a large body of workmen and labourers. If this amount were paid out to the workmen and labourers it is quite clear that it would be very difficult, if not impossible, to recover it back in case of the plaintiff's success in the suit. It can be recovered, if at all, only in dribblets, as my brother Mushtaq Ahmad has pointed out, from such a body and the task of recovery would itself prove highly expensive, entailing a further burden in costs. There is no certainty even of this recovery in dribblets because neither the wages of labourers to the full extent, nor the salary of workmen to the extent of first, hundred rupees and one half of the remainder is liable for attachment in execution of a decree against them: (vide Section 60, Civil P. C.) The amount under the award was to be paid by 28-6-1947, during the civil Court vacation, and it is clear that by not passing an ex parte order the Court, in effect, dismissed the application itself because the application was likely to become infructuous after 28-6-1947. At any rate, it put the plaintiff on the horns of a dilemma. If he paid the amount under the award his application became infructuous. If he did not pay the money he might possibly make himself liable for punishment under the Defence of India Rules. The question involved in the case was a serious one. It was whether the plaintiff being engaged in the manufacture only of tents, tent cloth, brush and bags, etc., it could be said that these were "supplies essential to the life of the community" and whether reference to the arbitration by the Government was void and illegal being in excess of its powers conferred by Rule 81A, Defence of India Rules. The plaintiff, therefore, disclosed a prima facie case for the purposes of the grant of an ad interim injunction. The reasons given by the lower Court in refusing to proceed ex parte and in not issuing an ex parte injunction are wholly beside the point. The lower Court did not apply its mind to the only question before it, namely, whether in the words of Rule 8 "the object of granting the injunction would be defeated by the delay."

40. The question whether the Court could at all pass an injunction under the provisions of Rule 1 or Rule 2 is academic; because assuming that it could not, it could certainly pass an order under its inherent jurisdiction in the ends of justice. This view has been fully explained in a Division Bench case of this Court reported in Dhaneshwar Nath Tewari Vs. Ghanshyam Dhar Misra, . I am satisfied that this was a fit case in which the Court could exercise its inherent jurisdiction.

41. As regards the objection that government was a necessary party it is enough to state that since the plaintiff did not pray for an injunction against the Government, the fact that the Government was a party was immaterial at that stage.

42. As regards the objection that by the grant of the order of injunction prayed for, the award could not be stopped from running its course, that again was not a

matter to be considered by the Court, at that stage, because what the plaintiff wanted was that defendants might not recover the amount before the suit was decided. The order of the Court would have certainly prevented this happening, even if by disobeying the order of the Government, the plaintiff rendered himself liable to prosecution.

43. With regard to the objection that the application was not bona fide I do not think there was anything to show that it was not bona fide. The mere fact that after the issue of an ad interim injunction by this Court, the plaintiff did not prosecute his application in the lower Court with due diligence, does not reflect upon the nature of the application itself, but merely shows that the plaintiff having obtained an order in his favour, allowed the matters to take their own course. It is curious that in spite of the fact that while admitting this appeal, this Court ordered that the lower Court might proceed with the hearing of the suit as expeditiously as possible, the case has not been disposed of by the lower Court as yet.

44. Having regard to all the circumstances of the case, I think this Court should interfere in revision and grant the ad interim injunction prayed for by the plaintiff-appellant. I would, therefore, treat this appeal as revision and allow it. My answers to the questions formulated by the Bench are as follows: (1) No. (2) Does not arise in view of the answer to question No. 1. (3) Yes.

45. Let these answers be laid before the Bench concerned.

46. By the Court. -- The answers to the questions referred to the third Judge have now been received. In view of those answers the appeal has to be treated as a revision and allowed.

47. Accordingly, we set aside the order of the Court below and grant an ad interim injunction on the application made by the plaintiff in that Court. In the circumstances of the case, we direct the parties to bear their own costs in this Court.