

(1982) 01 GUJ CK 0012
In the Gujarat High Court

Case No : Civil Revision Application No. 426 of 1981

Patel Jasmat Sangaji Padalia

APPELLANT

Vs

Gujarat Electricity Board, Baroda and Others

RESPONDENT

Date of Decision : 11-01-1982

Acts Referred:

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

Citation : AIR 1982 Guj 264 : (1982) GLH 463 : (1982) 2 GLR 104

Hon'ble Judges : N.H. Bhatt, J; I.C. Bhatt, J

Bench : Division Bench

Advocate : P.V. Hathi, for the Appellant; M.D. Pandya, for the Respondent

Judgement

N.H. Bhatt, J.—This is a revision application brought to this Court by the original plaintiff of the regular Civil Suit No. 224 of 1980 pending in the Court of the Civil Judge Q. D.), Dhoraji and who was the respondent before the Appellate Authority at Gondal in the Civil Misc. Appeal No. 53 of 1980 on his Me. This applicant-plaintiff had filed the said suit in the Court of said Civil Judge (J. D.), Dhoraji for the purpose of getting an injunction against the Electricity Board, its Executive Engineer and its Deputy Engineer, restraining them from installing any pillars or electric line in his land S. No. 528 situated in the same village Moti Marad. During the pendency of the suit, he had filed an application, Ex. 20, for a temporary injunction by invoking provisions of O. 39, Rr. 1 and 2 of the Civil P. C. The learned trial Judge had passed the ex parte order below that application in the following terms:-

"Heard. Read the plaint, application and affidavit. It transpires that Electricity Board intends to install sub-station just near the plaintiff's well. It will certainly create danger to the plaintiff and his servants working there. Hence ex parte interim injunction is granted in order to maintain status quo up to 9-12-80. Issue notice on defendant returnable on 6-12-80."

2. The defendants, soon on being served, chose not to approach the learned trial

Judge for vacating the injunction, but preferred the appeal before the Appellate Authority at Gondal. The appeal came to be registered as the Civil Misc. Appeal No. 53/80 and the learned Appellate Judge at Gondal admitted the appeal and it appears he suspended the operation of the ex parte interim injunction. The original plaintiff appeared before the learned Appellate Judge and gave the application, Ext. 13, putting forth certain objections to the maintainability of the appeal under O. 43, R. 1 (r) of the Civil P. C. Two grounds were advanced in the application, Ex. 13. Firstly it was alleged that what was issued by the learned trial Judge was only an ex. parte order and that when the learned trial Judge was willing to hear the other side, rushing to the appellate Court w-.is uncalled for. It was secondly urged that the appeal under O. 43, R. 1 (r) lay only against the order passed by the trial Court biparte (bi party?) and not against an ex parte order. The learned Appellate Judge by his order dated 7-3-81 rejected that application, Ex. 13, and held that an appeal did lie under O. 43, R. 1 (r) of the Code c, en against an ex parte order of injunction granted by the trial Court.

3. Being aggrieved by the aforesaid order passed by the learned Appellate Judge, this revision application was brought to this Court. It was admitted by me sifting as a single Judge, but I thought that it was advisable to have the decision of the Division Bench of this Court in view of the conflict between the Madras High Court on one side and the Allahabad and the Bombay High Courts on the other. Incidentally, the matter has come up to-day before me sitting, with my brother I. C. Bhatt, J.

4. The only question - certainly a question of jurisdiction - that has been raised before us is whether an appeal under O. 43, R. 1 (r) of the Civil P. C. is or is not competent against an ex parte order passed by the learned trial Judge by recourse to O. 39, Rr. 1 and 2 of the Code.

5. On one side, there is the view of the Madras High Court in the case of Abdul Shukoor Sahib v. Umachander AIR 1976 Mad 350 . The Division Bench of that High Court has unequivocally held that an appeal against an ex parte order was not competent. The earlier view adopted by the learned single Judge of the Madras High Court was overruled and the view expressed by the Full Bench of the Allahabad High Court in the case of Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma, , was dissented from.

6. The appellate right is a statutory right and if the statute creating a right in its wisdom provides for an appeal against any order, such a right cannot ordinarily be an passed of the Judge taken away. Under O. 43, R. 1 (r) appeal is competent against orders under R. 1 or 2 or 4 of Order 39 Code. An order passed by a trial ordinarily is to be passed biparte. That is the mandate of R. 3 of O. 39 of the Code, but the very R. 3 of the said Order contemplates certain peremptory situations and, therefore, Rule 3 enables the trial Court to" pass an ex parte order of injunction, is an order passed under R. 1 or 2 of that Order, if the Court for reasons to be recorded is satisfied: that the object of granting the injunction would be defeated by delay. So, in our, opinion, one thing is very clear that ever,

an, ex parte order of injunction is an order passed under R. 1 or 2 of Order 39 or the Code. Reading the said Rules with Rule 3, this inference or conclusion is inevitable or is inescapable. Once it is held that such an order, even if ex parte, is an order under O. 39, R. 1 or 2 of the Code, the provisions of clause (r) of R. 1 of Order 43 are attracted. We, therefore, hold that an ex parte order passed by the trial Court is also appealable, technically speaking.

7. The Madras High Court, however, has taken a contrary view by a process of reasoning, which, with respects, we say, is a strained one. It appears that the learned Judges of the Madras High Court thought that an ex parte order is never reasoned and the appellate Court entertaining an appeal against an ex parte order would be groping in darkness, because it would have no material on the basis of which it could adjudicate whether the ex parte decision was reached by the trial Court on some evidentiary material. In our view, whenever a trial Court Judge issues an injunction, it would be presumed that he has applied his mind to the material placed before him and on being satisfied about the requirements of the provisions of O. 39, R. 1 and 2 of the Code and also for reasons to be recorded as required under R. 3, he thinks it peremptory to pass a comparatively harsh order behind the back of the other side. It goes without saying that such an ex parte order is short lived and tentative and it would be perfectly open to the other side to get it revised, varied or set aside. It is, therefore, difficult for us to agree with the reasoning of the Division Bench of the Madras High Court that if any order under O. 39, R. 1 is made in and by which a temporary injunction is granted until the disposal of the suit, that by itself presupposes that there was a hearing on the subject matter and both parties, were before the Court at or about the time when such an order was made. This assumption stands negated by the amendment of Rule 3, which has already been referred to by us above. Whatever apprehensions were expressed by the learned Judges of the Madras High Court stand fully allayed by the amendment of Rule 3, which simultaneously also lays down limitations on the Court's power to issue ex parte injunctions.

8. We are in full agreement with the reasoning adopted by the Judges of the Full Bench of the Allahabad High Court in the case of Zila Parishad, Budaun and Others Vs. Brahma Rishi Sharma, . Once the Court after perusing the application and affidavit comes to the conclusion that the case is a fit one in which temporary injunction should be issued ex parte, the Court does take a tentative decision in the matter and the expression of this decision is a final order for the duration it is passed and such an order is the one contemplated by Rr. 1 and 2 of Order 39 of the Civil P. C. read with R. 3 of that very Order.

9. It was rightly apprehended that this view, if taken, would open gates for flooding the appellate Courts with appeals and more often than not the original defendants would rush to the appellate Court and would not allow the normal procedure laid down by R. 3 of O. 39 of the Code to be complied with. On careful consideration of this argument, we find that it is untenable. It proceeds on the assumption that the appellate Courts will readily entertain and admit such

appeals and with equal readiness suspend the operation of injunctions. We, on the contrary, find that the Appellate Authorities would be loath to entertain and admit such appeals and they may, in normal cases, summarily reject such appeals for want of any material placed before them to challenge the ex parte tentative decision of the trial Judge. They would be still more unwilling to suspend the judicial order of injunction passed by the judicial authority below. In other words, in the rarest of rare cases they would admit such appeals and still more in the rarest of rare cases, they would ex parte suspend the operation of the ex parte tentative injunctions. This power of the appellate Court, therefore, is a sufficient safeguard against the possible danger ventilated in respect of the outcome of this decision of ours. This means that as per our judgment, such an appeal is technically competent, but the appellate Court will exercise it cautiously by viewing all the relevant factors at the lime of admission of such appeals.

10. We accordingly answer the question and dismiss the civil revision application by discharging the rule. However, there shall be no order as to costs of this revision application.

11. Revision dismissed.