

(1983) 03 CAL CK 0023

Calcutta High Court

Case No: C.R. No. 3730 of 1982

Wellman Incandescent
India Ltd.

APPELLANT

Vs

M/s. A.K. Agnihotry

RESPONDENT

Date of Decision: March 8, 1983**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 7, Order 39 Rule 7(1)(a)

Citation: 86 CWN 525**Hon'ble Judges:** N.G. Chowdhury, J**Bench:** Single Bench**Advocate:** A.K. Sengupta and R.K. De, for the Appellant; Sushil Ch. Banerjee and Nirmal Banerjee, for the Respondent**Final Decision:** Allowed

Judgement

N.G. Chowdhury, J.

The short point for consideration in this Civil Revision case u/s 115 of the CPC is if the jurisdiction of an Appellate Court entertaining an appeal under order 43 of the Code extends beyond the order appealed against. The question arises in the facts and circumstances given below. The defendant petitioner obtained a contract from Steel Authority of India Ltd. for Wheel normalising furnace at wheel and axle plant in the Durgapur Steel Plant. The plaintiff opposite party was a sub contractor under the petitioner. The terms and conditions of the sub-contract were reduced to writing on 28.10.80. The defendant petitioner rescinded the sub-contract on 17.10.81 and called upon the plaintiff to surrender the work site of the plaintiff to the petitioners engineers within seven days of the receipt of the letter. On 21.11.81 the plaintiff filed a suit in the Court of Munsif at Durgapur for a declaration that the contract aforesaid between the parties was subsisting and continuing; and termination thereof was illegal. On the very same date the Plaintiff filed an application under order 39 Rules 1 & 2 C. P. Code for

restraining the defendant from interfering with the plaintiff's continuance of the work under the contract during the pendency of the suit and also prayed for an ad-interim order of injunction. The learned Munsif refused to pass any order of ad-interim injunction, but he ordered issue of notice of the application. On 24.11.81 the plaintiffs filed Miscellaneous Appeal No. 212 of 1981, in the court of the District Judge, Burdwan against the order of the Learned Munsif. The said Misc. Appeal was transferred by the Learned District Judge to the Court of Additional District Judge at Durgapur for hearing and disposal. While the appeal was pending on 2.8.82 plaintiff opposite party filed an application in the said appeal purporting to be an application under order 26 and/or Section 151 C. P. Code praying for direction of the court on the defendant petitioner to make necessary arrangement with its principal (D. S. P) enabling the plaintiff appellant to take out all its articles, equipments etc. mentioned in Annexure "A" to the application from the work site of the D. S. P. The defendant respondent in the said appeal raised objection principally on the point of jurisdiction. In point of fact the defendant respondent contended that the machineries equipments, tools etc. referred to in the Annexures to the plaintiffs petition were on their own admission brought to the work site under the control and custody of the D. S. P. authority and the said articles etc. were brought to the work site after entry challans duly passed by the Security officer of the D. S. P. on verification at the time of their entry. It was the duty and responsibility of the plaintiff to get back the articles from the D. S. P. on production of necessary documents to their satisfaction, but the D. S. P. authorities were not impleaded as parties to the suit.

2. The learned Additional District Judge by his order dated 1. 10 82 passed in the said Misc. Appeal No. 212 of 1981 after hearing the parties ordered "without prejudice to the rights and contentions of the parties the prayer of the appellant is allowed. The respondent is directed to make necessary arrangement with its principal the Durgapur Steel Plant for enabling the appellant to take out various equipments, articles as mentioned in Annexure "A" in the petition". What arrangement the learned Additional District Judge desired the defendant to make by the order impugned is not clearly indicated in the order itself. But the plaintiff respondent alleged that the DSP authority by their letter dated 9.9.82 had informed them that they were prepared to return the tools and equipments if the petitioners had no objection thereto. True copy of the letter has been filed along with the opposite party's application. The copy of the letter does not fully corroborate the plaintiff opposite party. The said letter indicates that DSP authorities desired the plaintiff opposite party to make all correspondence in connection with the above subject through the defendant petitioner. The stand is perfectly justified, because we have seen that the plaintiff respondent was merely a sub-contractor whereas defendant petitioner was a contractor under the DSP. Be that as it may, aggrieved with the order the defendant has come up in revision.

3. Mr. Sengupta the learned advocate for the defendant petitioner has advanced elaborate arguments contending that the plaintiff's suit itself is not maintainable in view of the provisions of the Specific Relief Act; and the appeal in the court of the learned District

Judge Burdwan at the instance of plaintiff was incompetent inasmuch as the order of the learned Munsif was passed under Or. 39 Rule 3 and no appeal from such an order is contemplated under Order 43 Rule 1 Sub-Rule (r) CP Code. I do not propose to consider the above arguments in this revision case as the trial Court and the appellate Court will have occasion to consider the above arguments. I propose to confine my consideration to the point referred to at the outset.

4. I have pointed out that the Additional District Judge, Durgapur to whom Misc. Appeal No. 212 of 1981 was transferred for hearing and disposal passed the impugned order. I have also pointed out that the aforesaid appeal was filed by the plaintiff because the plaintiff was dissatisfied with the learned Munsif's orders refusing the prayer for ad-interim injunction. It has been held in the case of Kamalendu Chandra vs. Dilip Kumar Biswas reported in 1981 (2) Calcutta Law Journal, page 153 that notwithstanding provisions of Rule 3 the power of the Court to grant or refuse an ad-interim injunction flows from Rule 1 or 2 of Order 39 of the Code. It follows therefore, that an appeal from the order of the learned Munsif lay under Or. 43 Rule 1(r) C.P. Code and the Misc. Appeal No. 212 of 1981 was such an appeal.

5. The Code, it is well known makes a clear and express distinction between appeals from decrees and appeals from E orders. Part VII of the Code deals with appeals and Section 96 in this part deals with appeals from original decrees expressly providing in which court such an appeal from a decree shall lie. Section 104, placed in this part of the Code, lays down that appeal shall lie from orders expressly provided in the body of the Code and from no other orders and Section 106 indicates the court to which an appeal from an order shall lie. Section 105, however, has an important bearing on the point under consideration. The implication of this section is that no appeal shall lie from an order made by the Court in exercise of its original jurisdiction save those contemplated in section 104 and Order 43 C.P. Code. Still where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as the ground of objection in the memorandum of appeal. It follows, therefore, that any order passed in the suit prior to passing of the decree may be challenged in an appeal against the decree if such an order has affected the decree impugned although no appeal lay against such an order under Order 43.

6. We now notice the provisions contained in section 107 of the Code providing for the powers of the appellate Court. In elaboration of the provisions of section 105 in Order 41 of the Code relating to appeals from original decrees particularly in Rule 33, it has been expressly provided that the appellate court shall have power to pass any order which ought to have been passed or made and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree. Regarding the powers of the appellate court referred to in section 107 elaborate provisions have been incorporated in Order 41. It is worthy of note that Order 43 C. P. Code which deals with appeals from Orders does not contain elaborate provisions regarding the powers of the appellate court. The conclusion, is therefore inescapable that the power of the appellate court under Or.

43 is not as wide as it is under Or. 41. So I reach the conclusion that while entertaining an appeal under Or. 43 the appellate court has very limited power, it will only consider the propriety or correctness of the order appealed against for which appeal has been expressly provided under the order. It has no power or jurisdiction beyond the order appealed against, though in the case of an appeal from a decree the appellate court has power in respect of orders not directly coming within the ambit of a decree. The appellate court may therefore after entertaining the appeal under Or. 43 affirm the order, set aside or modify the order. But in no case does it acquire the jurisdiction over any matter not in the embrace of the order appealed against.

7. In the present case the tools, machineries, equipments etc. which the plaintiff respondent sought to remove from the work site of the Durgapur Steel Plant were not subject matter of the order appealed against that is to say the order refusing prayer for ad-interim injunction. So I conclude that the order of the learned Additional District Judge impugned herein was passed without jurisdiction. In this connection it is emphasized that the jurisdiction of the original court and of the appellate court entertaining an appeal from the decree passed by the original court is not same, still the appellate court can pass appropriate orders which the trial court could pass in the said suit in view of the provisions of section 104, 107, Order 41 and particularly Rule 33 of Order 41. The appellate court entertaining an appeal under Order 43 does not possess similar power.

8. Next I come to the contents of the order impugned and the application on which the order was passed. I have already noted that the expressions "directed to make necessary arrangement" embodied in the impugned order are vague. The tools, articles, equipments etc. are lying on the work site within D. S. P. The articles mentioned were taken to the work site on the basis of passes etc. granted by the D. S. P. authorities. There is no evidence that the D. S. P. authority refused to return to the plaintiff respondent the articles etc. even on production of gate passes etc. obtained from the D.S.P. authorities at the time of entry of those articles. The D.S.P authorities have only directed the plaintiff respondent to make correspondence regarding the return of the articles through the defendant petitioner. The implication is that the Durgapur authorities may not prevent the plaintiff from taking away the articles if the contractor, namely the defendant petitioner herein whom only the D.S.P. authorities recognised refrained from raising objection to such return. It is therefore clear that defendant petitioner is not expected to make any arrangement. It was for the plaintiff petitioner to make an application for return of the goods to the Durgapur Steel Authorities through the defendant petitioner obtaining an endorsement of no objection. The plaintiff did not proceed that way. Looked at from that point of view the plaintiff's petition whereon the impugned order was passed was premature.

9. The plaintiff's petition, I have already indicated, was filed with the heading "under Order 26 and/or Section 151 C. P. Code". There was no scope for treating the petition as one under Order 26 which deals with issue of commissions. The heading of the petition to that extent was inartistic and incorrect. Let us consider if the prayer could be made in a

petition u/s 151 C. P. C. To consider the applicability of Section 151 in relation to the prayer made by the plaintiff in his petition reference is invited to the provisions of Or. 39 Rule 7 C. P. Code. Here the plaintiff invited the court's direction in relation to certain goods equipments etc. There is no indication in the petition that the said goods and articles were subject-matter of the suit. The provisions of Order 39 Rule 7(1)(a) make it expressly clear that Court can make appropriate orders for detention, preservation etc. Of any property which is the subject matter of the suit. If the tools machineries etc. were not subject-matter of the suit itself, obviously the trial court itself could not pass any order on the petition if it was there. Necessarily the appellate court could not pass any order which the trial court itself could not pass. Considering this point I think the order impugned was absolutely without jurisdiction. Looking at the materials before me from the points of view discussed above I answer the point raised at the outset in the negative. In my view the power of an appellate court under Order 43 C.P. Code is strictly confined to the order appealed against and the said power does not extend to any matter extraneous to the order appealed against. In that view of the matter I consider this to be fit case for exercise of revisional jurisdiction u/s 115 C.P. Code. Accordingly the Revisional Application is allowed on contest and the Rule is made absolute and the order impugned dated 1.10.82 is set aside. This is, however, made clear that the plaintiff respondent is in no way precluded from setting back his articles, tools, machineries etc. from the work site upon an application made to the Durgapur Steel Plant authority with a list of articles appended to such an application on production of gate passes etc. granted by the D. S. P. authorities at the time of the entry of the goods within the work site and from obtaining suitable endorsement from the defendant petitioner.