

(2002) 06 GAU CK 0052
In the Gauhati High Court
Case No : CRP No. 142 of 2002

Airport Authority of India

APPELLANT

Vs

Paradise Hotel and Restaurant

RESPONDENT

Date of Decision : 14-06-2002

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 2002 Guw 146 : (2002) 3 GLT 1

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : K.N. Choudhury, N. Moral and A. Borah, for the Appellant; R.N. Choudhury, T.N. Srinivasan and B. Acharyya, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—When a person, either because of his own fault or because of deliberate mischievous actions of others, gets involved in protracted legal battles, it is but natural that such a person will knock the doors of every Court, which, in the opinion of such a person, can possibly give relief, which such a person may desire or deserve. The Courts, so approached, may not, however, be competent to give relief, because Courts have to deal with such cases dispassionately, for, compassionate considerations may lead the Court to grant reliefs, which it is not legally competent to grant, and cause thereby aberrations in the administration of justice. The present revision petition is one of such cases. In fact, the present revision petition appears to be a desperate attempt by a litigant, who has visibly become fed-up with continuous litigation and is apparently unable to achieve its object.

2. This revision is directed against the order, dated 28.2.2002, passed by learned District Judge, Jorhat, in Misc. Case. No. 36/2002, arising out of Title Suit No. 2/2002, whereby parties to the suit have been directed to maintain status quo.

3. This case has a long history and it was inevitable that the revision petitioners,

while approaching this Court under Article 227 of the Constitution of India read with Section 115 with the CPC (hereinafter referred to as "the Code"), lay before the Court facts of various rounds of litigations that they had with the opposite party. The facts of this case are, therefore, quite lengthy. I will attempt to reflect the cases of the parties in as concised form as possible.

4. The facts and various stages, which have led to this revision, may, in brief, be stated as follows :-

(i) The O.P, of this revision instituted, as plaintiff. Title Suit No. 2/ 2002 aforementioned in the Court of Civil Judge (Senior Division), Jorhat, which was, later on, withdrawn to the Court of learned District Judge, Jorhat, the cast; of the plaintiff being, briefly stated, thus : The plaintiff is a registered partnership firm carrying on, amongst others, business of catering and restaurant under the "name and style of "Paradise Airport Restaurant, at Lokapriya Gopinath Bordoloi International Airport, Guwahati. The plaintiff came to run the said restaurant on the strength of a licence issued by the defendant No. 1 (i.e., petitioner No. 1 of this revision) vide letter of award No, GR/R/ GT/EU, dt. 28th September, 1981. Following formation of the defendant No. 1 as a statutory body, the licence, so issued, remained in vogue and reciprocal obligations were discharged by the parties to the said agreement. The initial period of licence was for two years commencing from 1.10.1981 to 30.09 1983 and an agreement to that effect was duly entered into between the plaintiff and the defendant No. 1 and the said agreement still subsists. The licence fees for the said restaurant was initially fixed at Rs. 21,202 for a period of two years and thereafter, it has been periodically enhanced, every three years, at the behest of the defendants. Pursuant to an arbitration award, which became a Rule of the Court, on 14.6.1993, passed in Misc. (Arb.) Case No. 6 of 1992, certain extraneous terms and conditions were imposed by the defendants beyond the terms and conditions incorporated in the arbitration award and the decree passed thereon. The defendant No. 3, vide their letter, dated 23.5.1994, threatened to determine the authority of the plaintiff to run the said restaurant, whereupon the plaintiff instituted T.S.No.42/ 1994 in the Court of Civil Judge (Senior Division), Jorhat, against the defendants. This suit was decreed, on 4.4.2000, in favour of the plaintiff holding, inter alia, that the Court had the jurisdiction to try the said suit. During the course of the proceeding, of T.S. No. 42/94, the defendant No.3 filed, in the said suit, petition No. 3486/99, on 29.6.1999, intimating, inter alia, that steps would be taken by the defendants to temporarily shift the plaintiffs licence from the then space/room under current occupation of the plaintiff to the adjacent space/room available at the newly constructed portion of the terminal building of the Guwahati Airport in order to facilitate construction of the third phase of the Model Airport Terminal Building of the Guwahati Airport. According to the petition of the defendant No. 3 and also on the assurances and promises made that as soon as the new Terminal Building was completed, plaintiff would be accommodated and handed over the rest of the earmarked space/ room of the Airport Restaurant as set out in the Master Plan, the plaintiff shifted the

restaurant to the space/room temporarily allotted in a portion of the earmarked space/room for the restaurant as set out in the Master Plan of the Model Guwahati Airport. The temporary accommodation, as allotted to the plaintiff, comprises only of the kitchen portion of the, new airport restaurant premises as set out in the Master Plan of Guwahati Model Airport and the rest of the Airport restaurant space/room/premises is yet to be handed over to the plaintiff as a licensee thereof, although on completion of construction, the Terminal Building of the Airport stands Inaugurated since 3rd July, 2001. Having paid the enhanced current licence fees in toto on the strength of the subsisting agreement, dated 1.10.1981, the plaintiff is entitled to occupy the total area space/room of the earmarked airport restaurant. The plaintiff has, thus, been suffering huge losses by way of goodwill and business, which cannot be compensated in terms of money and thereby the plaintiff is being made to suffer irreparable loss and injury. At all material times, plaintiffs services to the passengers and VVIP, VIPs and officials passing through Guwahati Airport has been highly appreciated and even the defendants have been availing of this service as and when required by them with no complaints whatsoever. Thus, the alleged continued illegal denial by the defendants to handover completed earmarked space/restaurant to the plaintiff has led to the institution of the suit, wherein the plaintiff sought for, inter alia, a declaration that the plaintiff was entitled, as a licensee, to be accommodated at the earmarked premises of the airport restaurant at the Model Airport Terminal Building, at Guwahati, and that the plaintiff was entitled to extension of their period of contract to run the said restaurant for the period during which coercive situation existed on a account of deliberate and arbitrary acts of the defendants.

(ii) Pending disposal of the above suit, the O.P. of the present revision also filed a petition under Order 39, Rules 1 and 2 of the Code read with Section 151 thereof praying for, inter alia, ad interim temporary injunction restraining the defendants (i.e., the present revision petitioners) from settling/handing over possession of the balance portion of the earmarked space/room of the airport restaurant of the newly constructed Terminal Building of the Guwahati Airport to any person other than the plaintiff. Based on this application, which was supported by affidavit, Misc. (J) Case No. 36/02 was registered. Initially, on 21.2.2002, learned District Judge passed an order directing services of notices upon the present petitioners within 3 days fixing 8.3.2002 for service report and also for submission of show cause and hearing. Subsequently, however, on 28.2.2002, learned District Judge passed, on a petition filed by the plaintiff, an ex parte order directing the parties to maintain status quo pending disposal of the injunction petition.

(iii) Feeling aggrieved by the order, dated 28.2.2002, aforementioned, petitioners have, as indicated herein above, approached this Court with an application under Article 227 of the Constitution of India read with Section 151 of the Code, the case of the present revision petitioners being, briefly stated thus: The O.P. came into the possession of the said restaurant as a licensee on the strength of award letter, dated 28.9.1981. This licence was, initially, for 2 years commencing from

1.10.1981 to 30.9.1983. To ensure that the petitioners do not let out/settle the said restaurant with any other person at higher licence fee and with the object of keeping the restaurant in its occupation and use, the O.P. continued to fasten the petitioners in a number of frivolous legal proceedings and, on the strength of one judicial order or another, the O.P. has been maintaining its juridical possession over the subject of dispute. When the litigation was coming to an end with the issuance of NIT, dated 15.3.2000, which the petitioners had published in accordance with the judgment and order, dated 15.2.2002, passed in W.A. No. 233/ 98, the O.P. has, once again, started another round of litigation delaying thereby complete settlement of licence of the said restaurant in favour of legitimate offeree, whose offer already stands accepted by the petitioners. The present Title Suit No.2/02 aforementioned is one of the tactics adopted by the O.P. to defeat the purpose of the NIT, though no agreement between the parties subsists any longer and the learned District Judge, by passing the impugned order, dated 28.2.2002, directing the status quo to be made maintained by the parties, has committed serious illegality inasmuch as it is neither a speaking order nor does it satisfy the cardinal principles of law governing issuance of injunction. Allowing such an order to stand good on record will be abuse of the process of the Court.

(iv) The O.P. resisted the present revision petition by filing its affidavit-in-opposition, wherein the O.P. has challenged the maintainability of the present revision petition and at the same time, asserted, inter alia, that they have a right to file the suit aforementioned in the Civil Court for adjudication of their dispute with the revision petitioners.

5. I have carefully perused entire record including the impugned order. I have heard Mr. K.N. Choudhury, learned Senior Counsel appearing for the petitioner, and Mr. R.N. Choudhury, learned Senior Counsel appearing on behalf of the opposite party.

6. Mr. Choudhury has submitted that for enabling any Court to grant injunction, it has to feel satisfied that the person, seeking injunction, has a prima facie case to go into for trial, balance of convenience is in favour of granting injunction and that not granting of injunction will cause irreparable loss to the party seeking injunction. If one of the links in these three preconditions is not fulfilled, injunction, points out Mr. Choudhury, cannot be granted. In support of this submission, Mr. Choudhury has placed reliance on 1994 (2) GLJ 202 (Md. Safmlla Wakf Estate & Another v. Smt. Sara Devi Agarwalla). Mr. Choudhury has also submitted that in addition to the three golden principles governing grant of injunction, Courts have, now, added, with the help of judicial pronouncements, public interest and public policy as one of the aspects, which the Court has to bear in mind, while deciding whether a party, approaching the Court, is entitled to the relief of temporary injunction. Reference, in this regard, has been made by Mr. Choudhury to 1994 (1) GLJ 447 (State of Assam and Another v. M.S. Associates).

7. Mr. Choudhury has taken me through the entire revision petition and the various orders passed in different proceedings mentioned hereinabove and has, eventually, drawn my attention to the impugned order and contended that by the impugned order, learned Court below has, in effect, restrained the petitioner from entering into contract with any one other than the OP to run the restaurant at Guwahati, which has the effect of bringing to a grinding halt the process of settlement of the restaurant in favour of the parties from whom the petitioners have received offer of substantial amount of money as licence fees. Mr. Choudhury has submitted that the impugned order does not satisfy any of the golden principles governing grant of temporary injunction. Mr. Choudhury contends that not to say of a prima facie case, opposite party does not have any case at all to go in for trial nor is the balance of convenience in favour passing any restraint order against the petitioners. Mr. Choudhury has also submitted that the loss, which opposite party has projected can not be treated as irreparable loss inasmuch as their loss, if any, can be compensated in terms of money. Mr. Choudhury has further submitted that while granting injunction, the Court has also to bear in mind the object of public interest and public policy. Giving continued benefit to the opposite party, contends Mr. Choudhury, cannot be in public interest. It is submitted by Mr. Choudhury that when the petitioners have already gone for open tender on the strength of Court's order, it ought to have been allowed to go ahead in public interest so that only one individual, namely, the opposite party does not reap benefits and give thereby substantial loss not only to the petitioners, but also to the public exchequer by depriving efficient competitor from entering into the market.

8. Repelling the above submissions made on behalf of the petitioners, Mr. R.N. Choudhury has submitted that since an application has been made in Misc. Case No. 36/2002 aforementioned by the petitioners objecting to OP's prayer for temporary injunction, the petitioners are, now, legally not entitled to approach this Court in revision without, first, getting their objection petition disposed of. This apart, points out Mr. K.N. Choudhury, petitioners could have also challenged the impugned order in appeal under Order 43, Rule 1(r), but the petitioners, having not availed of any of these two efficacious remedies, cannot approach this Court to exercise re-visional powers u/s 115 of the Code or the power of superintendence under Article 227 of the Constitution of India. Reliance in support of this submission is placed by Mr. Choudhury on *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma* AIR 1979 SC 1046.

9. Controverting the above submissions made on behalf of the opposite party, Mr. K.N. Choudhury has drawn my attention to decision of Division Bench of this Court, delivered, on 29-07-1998, in MA (F) No. 101/98. (*Union of India and Ors. v. Subhash Mohan Dev*) wherein it has been held that order passed under Rule 3 of Order 39 is not appellable. Relying on this decision, Mr. Choudhury has contended that since the status quo order has been passed without notice to the opposite party, it is really an order of injunction passed under Order 39, Rule-3 and against this order, no appeal lies inasmuch as Order 43, Rule 1 provides for

appeal against orders passed under Order 39, Rules 1 and 2 and not against orders passed under Order 39, Rule 3. The present revision, therefore, submits Mr. Choudhury, is maintainable.

10. Shorn off lengthy details of the cases set up by the parties and the legal rhetorics, what needs to be noted is that the impugned order has arisen out of Title Suit No. 02/2002 aforementioned. In this suit, plaintiff/opposite party contend, inter alia, that under an agreement reached between the plaintiff and the defendants (i.e., the present petitioners), the defendants are bound to hand over promised space/room of the Airport Restaurant at Guwahati Airport to the plaintiff to enable him to run the restaurant as licensee, but the defendants are, now, trying to deprive the plaintiff of its business and livelihood by refusing to accommodate it as their licensee at the earmarked portion of the airport. Pending reliefs sought in the suit, plaintiff prayed for granting temporary injunction restraining the defendants from handing over the earmarked portion of the airport restaurant in the newly constructed terminal building to anyone other than the plaintiff. However, the learned District Judge, vide the impugned order, directed the parties to maintain status quo pending disposal of the injunction petition. The effect of the order is that the defendants can not, now, hand over the Airport Restaurant to the person/party, already selected in response to the NIT, which is said to have been issued in accordance with the directions of this Court. Viewed from this angle, the impugned order is nothing but an order of ex parte ad interim temporary injunction.

11. It is, no doubt, true that before passing any injunction order, the Court has to, normally, give notice to the party against whom relief of injunction has been sought, but if the Court is of the view that delay in granting the injunction may defeat the very object of seeking injunction, the Court may, with reasons assigned, pass necessary order of injunction. The question, now, is whether the impugned order is amenable to the revisional jurisdiction of this Court u/s 115 of the Code or can be interfered with under Article 227 ?

12. While answering the above question, it needs to be borne in mind that notwithstanding the decision in Subhas Mohan Dev's case (supra), relied upon by Mr. K.N. Choudhury, Full Bench of this Court in (1984) 1 GLR 133 (Akmal Ali and Ors. v. State of Assam and Ors.) has laid down the law on the subject in the following words :-

" If an order of ad-interim injunction is passed under Order 39 Rule 1 or 2 of the Code of Civil Procedure, whether ex parte or otherwise, it is appealable, as Order 43 Rule 1 (r) enables a party aggrieved by any order under Order 39 Rule 1 or 2 to prefer an appeal.....

In our opinion, therefore, the court can not refuse to entertain an appeal only on the ground that such orders are temporary or interim or provisional. Similarly, by their very nature ad interim injunctions passed under Order 1 or 2 are always rendered ex parte. Parliament being fully aware of the situation permitted

appeals against such orders. In our opinion, therefore, an ex parte order of temporary injunction, whether provisional, temporary or interim, are appealable, if rendered under Order 39 Rules 1 and 2. On perusal of Order 43, Rule 1(r) we notice that it speaks that an appeal, shall lie from an order" under Rule 1, Rule 2-A, Rule 4 and Rule 10 of Order 39. Therefore, any order under Rules 1, 2, 2-A and 4 is appealable.....

However, there is a line of decisions in which it has been held that an ex parte or ad interim order of injunction under Order 39, Rules 1, 2, 2-A is not appealable as it is temporary or ex parte or non-speaking. But in the same breath the High Courts recognise the right of petition against such orders under Order 39, Rule 4 of the Code. An ex parte non-speaking temporary or ad interim order of injunction is realisable but it is not appealable, although the characteristics of the impugned order are absolutely the same both in Order 39, Rule 4 as well as in Order 43, Rule 1 (r), seems to be irreconcilable. If it is an order of injunction, it is appealable as well. Similarly, if it is an order of injunction it is revisable under Order 39, Rule 4. Situated thus, we find it difficult to accept the line of reasoning and respectfully differ from the view. In our opinion, all ex parte ad-interim injunction are appealable under Order 43, Rule 1(r) as well as revisable under Order 39, Rule 4 of the Code.....

Any controversy as to whether reasons need be in injunction has been removed by the introduction of Rule 3, which provides that the Court after recording, reasons for its satisfaction that the object of granting injunction would be defeated by delay etc., may pass an order of ex parte ad interim injunction under Rules 1 and 2 of Order 39. It does not stand to scrutiny that an ad interim order devoid of reasons, - rendered in violation of the well known principles that a judicial order must contain reasons, and in violation of the mandatory provision of Rule 3 can escape the jurisdiction of the appellate Court, but the same order can be revised by the very same court. Judicial order must be reasoned order. After the amendment, it must contain reason. The trial Court must apply its mind to the materials placed before it, and, on being satisfied about the requirements of Order 39 Rules 1 and 2 make the order. Further, Rule 3 enjoins "reasons to be recorded". Under these circumstances when the trial Court is required by law state reasons, but does not furnish them in its order, it violates the provisions of "the Code". By its own inaction or intentional violation of the mandatory provisions of the Rules a Court can not take away the right of appeal of a person aggrieved by that order. As such, an. ex parte order of injunction, whether speaking, or non-speaking, is appealable." (Emphasis is added)

13. Since this Court is bound to follow the Full Bench decision in Akmal Ali's case (supra), there can be no escape from the conclusion that the impugned order is, indeed, an appealable order.

14. It is also important to note that under Order 39, Rule-3, a Court merely decides whether to grant injunction ex parte or after giving notice. If it decides to

give notice and passes injunction order after giving notice, the power is really exercised under Order 39, Rules-1 and/ or 2. If the Court, however, decides to pass injunction order without giving notice, then, too, the power of granting injunction really flows from Order 39, Rules 1 and/or 2. Thus, Order 39, Rule 3 merely gives option to the Court whether to issue injunction after giving notice or without giving notice and prescribes the procedure for granting injunction ex parte, the procedure being that the Court, if it decides to issue injunction without serving notice, has to assign reasons for its decision of not giving notice before issuing injunction.

15. In effect, thus. Rule 3 merely lays down procedure for granting injunction ; whereas Rules 1 and 2 combined together is repository of Court's power of granting injunction. I am guided to adopt this view from law laid down in Akmal Ali's case (supra).

16. As far as A.T. Sharma's case (supra), relied upon by Mr. R. N. Choudhury is concerned, suffice it to say that this case is wholly inapplicable to the facts of the case at hand.

17. Now, turning, to question whether the High Court can interfere under Article 227 and/or u/s 115 with an order of present nature, the answer has to be in the negative inasmuch as the impugned order, in the light of Akmal Ali's case (supra), is appealable. Moreover, the answer to the question so posed is, I find, fully covered by A. A. Venkatasubbiah Naidu Vs. S. Challappan and Others, wherein it has, been held as follows :-

"It is the acknowledged position of law that no party can be forced to suffer for the inaction of the Court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43, Rule 1 of the Code. He can not approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances, the party, who does not get justice due to the inaction of the Court in following the mandate of law, must have a remedy. So, we are of the view that in a case where the mandate of Order 39, Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the Appellate Court shall be obliged to entertain "the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3A. In appropriate cases the Appellate Court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days

mentioned in the Rule." (Emphasis is supplied).

18. In the case at hand, disposal of Misc. Case No. 36/2002 aforementioned appears to have got delayed, because of the nonavailability of the District Judge, Jorhat. In view of the fact that a District Judge is, now, functioning at Jorhat and the petitioners have already filed their objection to OP's application for temporary injunction, the matter needs to be disposed of by learned District Judge, Jorhat. The petitioners may, however, if so advised, approach the Appellate Court for necessary reliefs in accordance with the law laid down by the Apex Court in A. Venkatsubbiah Naidu (*supra*).

19. In the result and for reasons discussed above, this revision petition fails and the same is accordingly dismissed.

20. With the above directions, this revision petition shall stand disposed of.

21. No order as to costs.

22. Send forthwith a copy of this judgment and order to the learned Court below.