
(1998) 02 CAL CK 0036

In the Calcutta High Court

Case No : Civil Revisional Jurisdiction C.O. No. 62 of 1998

Angsuman Mukherjee

APPELLANT

Vs

M/s. Shyamalmoy Pal and Co. and Others

RESPONDENT

Date of Decision : 11-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 41 Rule 4, 80(2)

Citation : (1998) 2 CALLT 92

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : Mr. Bikash Ranjan Bhattacharyya, Mr. Dalip Kumar Chatterjee and Ms. Nabanita Ray, for the Appellant; Mr. Debasish Kundu, for the Respondent

Judgement

B.M. Mitra, J.—The instant revisional application is taken up for hearing on contest being directed against an order dated December 4, 1997 passed by the Second Court of Additional District Judge. SIIIguri in Misc. Appeal No. 36 of 1997 confirming Order No. 2 dated September 15, 1997 passed by the Civil Judge, Junior Division, SIIIguri in O.C. Suit No. 200 of 1997. It is not out of context to mention at the outset that the connected suit is for reliefs by way of multiple declarations that the conduct of the defendant No. 3 in settling the tender bid work is illegal and void, a further declaration that the candidature of defendant No. 9 is void as he is a disqualified person as per the documents, for a decree of declaration that the plaintiffs are the only qualified successful bidders as per bid documents and for a perpetual Injunction restraining the defendant Nos. 3 to 9 acting on the basis of decision of defendant Nos. 3, 4, 5 and 10 and for other consequential reliefs. The filing of the said suit is followed by filing of an application under Order 39 rules 1 and 2 of the CPC with a prayer for ad-interim/ temporary injunction restraining the defendant No. 9 from taking any action or further action on the basis of the purported bid documents dated June 2, 1997. A comparative glance at prayer (d) of the plaint and the prayer contained in the application for temporary Injunction will reveal that the original prayer in the

plaint has been modified to the extent by circumscribing it to a limited injunction against the defendant/opposite party No. 9.

2. The trial court had passed a composite order by allowing the petition u/s 80(2) of the CPC ex-parte and by an ad-Interim order of Injunction restraining the said defendant No. 9 from executing the tender work. The said order was passed on September 15, 1997 which was made returnable on November 21, 1997. Against the said order of ad-interim injunction, a misc. appeal was preferred before the Second Court of Additional District Judge. Slligurl and the appeal court has confirmed the decision of the trial court it is necessary to refer to a particular point sought to be agitated by Mr. Kundu, learned Advocate appearing on behalf of the opposite parties as, according to him. the connected misc. appeal was preferred only by the defendant No. 3 and it has been submitted that the restraint order of ad interim injunction is only limited to defendant No. 9. Mr. Kundu was trying to refer to the Civil Manual and he was trying to point out that the appellant in the connected misc. appeal could not figure himself as an appellant therein as he could not be deemed to be a party aggrieved. This court has felt the need of picking up the said point first in view of the contention raised by Mr Kundu that the appeal itself as well as the revisional application at the behest of the said defendant No. 3 is not maintainable. This court has given its anxious consideration to the grievance ventilated by Mr. Kundu about the technicality of locus stand! to prefer the petition and to file the appeal. In order to test the proposition raised by Mr. Kundu, this court on its own wants to make a reference to the provisions of Order 43 CPC which deals with appeals from orders and Order 43 rule 2 prescribes that rules of Order 41 CPC shall apply so far as it relates to appeals from orders. A reference may be made in this context to the provisions of Order 41 Rule 4 CPC which tends to contemplate that where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs as from two of the defendants, then any one of the plaintiffs or the defendants may appeal from the appellate decree and thereupon the appeal court may reverse or vary the decree made in favour of the plaintiffs or the defendants. This court has taken into account the aforesaid provisions and in view of the revisionist petitioner figuring as defendant No. 3 in the plaint of the suit itself and the said defendant can maintain an appeal under the provisions of Order 41 Rule 4 CPC.

3. Mr. Bikash Bhattacharyya. learned Advocate appearing on behalf of the revisionist petitioner, has first tried to Invoke the mischief of the provisions of section 80(2) CPC by contending Inter alia, that in a suit if a party desires to obtain an urgent and immediate relief against the Government or any public officer with regard to any act done by him in his official capacity, the same may be Instituted with the leave of the court without serving any notice but the court shall grant relief, whether interim or otherwise, except giving a reasonable opportunity of showing cause. Mr. Bhattacharyya has tried to contend before this court that in view of the provisions as contained in section 80(2) CPC, no relief whether interim or otherwise can be granted without serving notice. In the

Instant, case it appears from the trial court's order that the Interim order of injunction has been granted against the defendant No. 9, namely, Sri Uttamehand Sethla who is a party defendant and, therefore, the relief obtain is a relief by way of ad-interim order against a private person and not against the Government of the State or any public officer. As such, this court does not feel impressed that the rigours of section 80(2) CPC will operate as a bar for the courts concerned to pass Interim orders or otherwise and the courts are not likely to be inhibited by the provisions as they are couched in terms of the letters engrafting the provisions of section 80(2) CPC. The said point taken by Mr. Bhattacharyya does not appear to be convincing before this court because of the distinguishing feature with regard to the grant of interim order against a private person and not against a Government or a public officer.

4. This court while assessing the merits of the orders Impugned cannot but express its appreciation and/or surprise because of the Ingenuity in which the prayer for ad-interim order in the Interlocutory application has been couched presumably with a bid to bring it out of the mischief of section 80(2) CPC but such prayers of ad-interim nature though primarily directed against the defendant No. 9 have far reaching effect on other defendants and with regard to prosecution of a work in connection with tender or bid. It appears from the penultimate concluding portion of the trial court's order where it has been observed that the trial court is primarily satisfied that the civil right of the plaintiff is being threatened. Having regard to the facts and circumstances of the Instant suit, according to the opinion of the trial court, the plaintiff deserves to get an ad-Interlm order of injunction only against the private defendant. There is an element of a chain of causality in the penultimate observation of the trial Court between the premise and the conclusion and this court is not in a position to follow the chain of sequence of logical conclusion between the premise and the conclusion. At this Juncture on civil adjudication where ad-Interlm orders are capable of being passed under Order 39 rule 3 CPC. the same has been attempted to be explained and there are some leading decisions of the apex court which are holding in the field. It is salient to refer to in this context Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, where It has been observed that power to grant Injunction is an extra-ordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts are required to be more cautions when the said power has been exercised without notice or hearing where the party is to be affected by the orders so passed. It is a germane observation of the apex court which tends to include that by such observation where the persons are affected by such orders, they are required to be protected. It has been further opined by the apex court that such ex-parte orders should have resonance with the tune of reasoning and unless it is backed up by reasoning elucidated therein, that gravity of the situation is so much pressing that it cannot brook for any delay and, excepting such situation, the court cannot pass an ad-Interim order of Injunction. This is by way of elucidation of pith and inhered

substance of the provisions of Order 39 rule 3 CPC. A similar reference may be made to the case of Morgan Stanley Mutual Fund Vs. Kartick Das, and, in paragraph 36 thereof, seven criteria have been laid down by the apex court, where and only in presence of the seven criteria, an order of ad Interim ex-parte injunction has been conceived. It is significant to mention that the fact which is on the record of the apex court is about Irreparable loss or serious Injury. Criterion (b) wants to convey the same Impression in other mode of language. Criterion (g) has also covered within its dimension the principle of prima facie case. Now before dealing with the criterion as laid down by the Supreme Court, so far as the prima facie case is concerned, the trial court has gone to record its satisfaction about threat of civil right of the plaintiff. It is to be taken note of that the plaintiff is the participant in a tender and he has given a bid therein. The result is awaiting. Before result is declared, such offer . In the tender is not followed up by acceptance, the same does not ripen into a contract. In this context, a reference may be made to the case of Agriculture Produce Market Committee, Gondal and others Vs. Girdharbhai Ramjibhai Chhaniyara and others, where it has been opined in unambiguous terms that parties not having concluded contract cannot seek for its enforcement and for the aid of the same, the provisions of Order 39 rule 2 are not applicable. It has been further observed in the said Judgment that since the rights of the Parties are still in embryo, then Order 39 rule 2 is Inapplicable. In view of the said decision, it does not appear that a convincing prima facie case has been made out in aid of an ex-parte ad-Interim order. There has been a reference in the main revisional application as well as in both the orders Impugned that this tender has been floated for development scheme for which there is World Bank's subsidy or advance and if the same cannot be completed within a certain period, then it may escalate liabilities in terms of money for the State. That aspect though having been taken into account in both the Impugned Judgments have not been taken serious note of. It appears that the trial court should not have fixed the matter on a returnable date in spite of coinciding the annual vacation after the outer limit of 30 days. It should have placed it within a shortest possible time and by not having done so, the trial court's order also does not appear to be in conformity with clause (f) in paragraph 36 of the Judgment reported Morgan Stanley Mutual Fund Vs. Kartick Das, The appeal court has embarked into a Journey of speculation by opining that in most cases where fair investments are involved and in order to give implementation of the same, lands are required to be acquired wherein also there is likelihood of long drawn proceeding and, therefore it cannot be stated that it is a time bound project or it can be completed within the time as fixed or proposed by the investors. The Appeal Court seems to have missed the central point that the investors of money from foreign countries are not obsessed nor bothered about the eventualities which may lake place but, in the event of such change taking place, they may result in complete withdrawn and/ or erosion of Investment. The off-quoted user of the expression "public Interest" appears to be resonant with the sound of rhetoric and the same is required to be translated into reality because such technicalities of a probable

pending litigation will only bid goodbye to the scope of foreign Investments. It becomes very difficult for this court to accept such type of speculation by the court of appeal below without having the same on records. The court of appeal below ought not to have lost sight of that it is an ex-parte proceeding where the contesting opposite parties do not have chance to controvert the same by filing their objections. There cannot be any finding recorded about prima facie case unless the same can be opined without fear of contradiction by plain averments of the petition. Far fetched consideration ought not to be allowed to be incorporated in the domain of assessment of public interest which should not be done by way of illusory exercise on the part of harbinger of speculation. The Appeal Court has also highlighted about arbitrariness, want of fair play and violation of natural Justice in the matter of contract. The same is required to be followed as indicated by the Supreme Court in a civil suit with regard to concluded contract. If the contract is there and it is not implemented, then the remedy in a civil suit should be for specific performance of an agreement of contract. It is well-known that even under Specific Relief Act if alternative avenues are there, those should be considered to the application of scheme which is by way of Implementation of a proposed investment by an international agency like the World Bank. If the present defendant No. 3, who is the revisionist petitioner, is aggrieved by any malice or extraneous considerations, the same is required to be proved for which other remedies may be available to the petitioner but the same cannot be kept in abeyance by perpetuation of an ex-parte order of injunction of ad-Interim nature. Accordingly, this court feels that the orders Impugned are not backed up by a prerequisite layer of foundation as sought to be pleaded in the cases reported in Morgan Stanley Mutual Fund Vs. Kartick Das, This court is also of the view that parameters of Order 39 rule 3 about ex-parte order of ad-interim injunction as elucidated by the Supreme Court in recent past and the light emanating from the said decisions also do not impel this court to sustain the orders Impugned. Accordingly, the orders of ad-interim Injunction passed by the trial court and the subsequent order of confirmation passed in the misc. appeal are hereby set aside. However, in view of the pendency of the application for Injunction before the trial court, the parties are directed to intimate the court concerned being the trial court for fixing the date of filing of affidavits within ten days from the date of communication and the petition for injunction should be taken up for hearing on contest as early as possible, preferably by the second week of March 1998. In order to obviate delay, the learned Advocates of either of the parties can communicate the gist of the order after obtaining endorsement from the other side. Subject to the same, the revisional application stands allowed and the impugned order are set aside.

5. Mr. Kundu, learned Advocate for the opposite parties, has prayed for some marginal time to enable his clients to move to the Supreme Court at the earliest and, in view of the said prayer made by Mr. Kundu, which is seriously opposed by Mr. Bhattacharyya, learned Advocate for the petitioner, this court hereby grants stay of this order upto February 25, 1998.

6. Mr. Kundu, however, assures this court that his clients shall apply for urgent xerox certified copy of the order by day after tomorrow in the event whereof the office is directed to Issue the same preferably by February 17, 1998. Let the attention of the Copying Section be drawn to this part of the order so that the party concerned is not deprived of its remedy to explore its chance of redress before the higher forum if the party is so advised.

7. Petition allowed