
(1993) 04 GAU CK 0009
In the Gauhati High Court
Case No : Civil Revision No. 31 of 1993

Bhagawan Chandra Lakhar	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 01-04-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151, 39, 80

Citation : (1993) 04 GAU CK 0009

Hon'ble Judges : S.N. Phukan, J

Bench : Single Bench

Advocate : J.N. Sarma, K.K. Bhatra, M.K. Chaudhury and S. Sarma, for the Appellant; A.H. Saikai, Addl. C.G.S.C., for the Respondent

Judgement

S.N. Phukan, J.—This petition is directed against the judgment and order dated 25.1.93 passed by the learned Asstt. District Judge, No. 1, Kamrup at Guwahati in Misc. Appeal No. 61/92. By the said judgment the learned lower Appellate Court set aside the order dated 5.12.92 passed by the learned Sadar Munsif at Guwahati in Misc. (J) Case No. 106/92 arising out of T.S. No. 292/92.

2. The suit in question was filed by the present Petitioner as Plaintiff mainly against the All India Radio and the Executive Engineer, Civil Construction Wing. All India Radio, Guwahati, shortly stated the grievance of the Plaintiff is that the All India Radio, Defendant No. 2 has entrusted construction of building to the Executive Engineer, Civil Construction Wing, Defendant No. 3 for construction of staff quarter of the employees of Defendant No. 2 at Guwahati in a plot of land on eastern side of the house of the Plaintiff. The building is the R.C.C. building and the first floor has been constructed. Plaintiff apprehends that the construction of the building is not up to the mark considering that Guwahati is in the seismic zone and as such in case of earthquake the building of the Defendants may fall down endangering human life of the building now in occupation of the Plaintiff and other persons who may visit it. No notice u/s 80 CPC was served. But the petition was filed under Sub-section (2) of Section 80

Code of Civil Procedure. A copy of the petition was served on the Defendants and thereafter the learned Munsiff, took up the petition under Order 39 , Rules 1 & 2 passed the order on 5.12.92. It may be stated that the said petition was registered as Misc. (J) Case No. 106/92 in a Title Suit. The order runs as follow:

5.12.92-perused the petition u/s 39 Rules 1 and 2 read with Section 151 CPC praying for ad-interim temporary injunction. Heard the learned Advocate for both the parties. The learned Advocate for Union of India has verbally prayed time for filing objection. Prayer allowed. In the meantime, status quo regarding construction of the suit house as oh today is to be maintained. Let a copy of the petition be furnished to the Defendant. Fixing 18.12.92 for objection 18.12.92.

3. Against the said order an appeal was filed before the learned lower appellate Court and it was allowed on two grounds namely, that no reasonable opportunity was given under Sub-section (2) of Section 80 CPC and that the petition of Plaintiff did not make out a prima facie case and irreparable loss. While arriving at this question of prima facie case the learned lower appellate Court noted that between the boundary of the Plaintiff and the land of the Defendant No. 2, there is a vacant plot of land. It may be stated that Plaintiff also enclosed an opinion of Civil Engineer in this respect as stated in the plaint. But it was submitted before the learned lower appellate Court on behalf of the Defendant that the Court erred in law in accepting this opinion of a private Civil Engineer.

4. While this matter came out, this Court requested the learned standing counsel of the Guwahati Municipal Corporation, Mr. A.B. Choudhury to appear and assist this Court and also to submit necessary report. This order was passed in view of specific statement made that the house was constructed by the Defendants without obtaining prior permission of the Municipal Corporation.

5. First point that needs consideration regarding notice u/s 80 CPC Sub-Section (2) of Section 80 CPC inter-alia, provides that a suit to obtain an urgent or immediate relief against the Government or any public officer, may be instituted, with the leave of the Court, without serving any notice as required by Sub-section (1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

6. As stated above, notice was served on the Defendants before the petition was moved. The order of the learned Trial Court also indicates that the learned Counsel for the Defendants appeared before the Court. Therefore, first requirement of Sub-section (2) of Section 80 CPC has been fulfilled.

7. It has been urged that there is no specific order on the petition filed by the Plaintiff by the Court as required under Sub-section (2) of Section 80 CPC On perusal of the said Sub-section (2) of Section 80, it appears to me that for praying leave of the Court under this Sub-section, no mode has been prescribed and it is also not provided that a formal order has to be passed by the Court

granting leave under this sub-section. Granting of leave may also be implied. From the impugned order, it appears that the learned Trial Court ordered maintenance of status quo thereby implying that leave to file the suit under Sub-section (2) of Section 80 CPC was granted.

8. Mr. Sarma, learned Counsel for the Plaintiff Petitioner has placed reliance in the decision of Kerala High Court in T.V. Parangodan Vs. District Collector, Trichur and Others, . The Single Bench of the Kerala High Court after considering the expression "with the leave of the Court, without serving any notice as required by Sub-section (1)" held that leave need not be by a formal order and can be implied and could be gathered from what the Court does. It was also held that the mode and form of request or grant are not material. What is material is only the substance, whether there was a proper request and whether it was considered and granted. I am in respectful agreement with the above ratio as laid down.

9. Whether decision to which the attention of this Court has been drawn by Mr. Sarma is Harish Chandra (India) Pvt. Ltd. v. The Corporation Bank and Ors. AIR 1992, Del, 279. The Delhi High Court held that Court can grant liberty to file suit without serving notice if the suit would be frustrated if notice was to be served. In my opinion, this is the basic principle for which Section 80 CPC was amended and Sub-section (2) was incorporated by the Amending Act, 1976.

10. Therefore, in the case in hand, after the formal prayer or leave was made by filing the formal petition, the very fact that the learned Trial Court directed maintenance of status quo would imply that leave was granted by the Court. Now, the question is whether there was any violation of the provisions of Sub-section (2) of Section 80 CPC for not giving a reasonable opportunity of showing cause to the Defendants.

11. As stated above, the copy of the petition was served on the Defendants and learned Counsel for the Defendants also appeared. Therefore, it cannot be said that opportunity was not given to the Defendants before passing the order for maintenance of status quo. It is true that the counsel for the Defendants verbally prayed for time for filing objection and this prayer was also allowed. It has been urged that prayer could not have been allowed in view of this objection. I am unable to accept this as in my opinion the Court while granting status quo order gave a very short date of 5 days for filing objection. Within the above 5 days, the Defendants could have filed objection and get the matter finally disposed of. But instead of doing that, Defendants rushed to the appellate Court. I, therefore, hold that the finding of the learned lower appellate Court below is erroneous on the question of Section 80 Code of Civil Procedure

12. Various contentions were made before this Court regarding locus standi of the Plaintiff, illegality of the order of the Trial Court, granting maintenance of status quo and in this connection, in the defence of the parties, various extracts of different authorities have been annexed, It would not be proper for me sitting

in this revision to go in this matter. Mr. Saikia, learned standing counsel for the Union of India has urged at length that by this order of maintenance of status quo, the public interest is being stalled. I need not enter in this controversy as I find that construction of the house, in question, no formal permission was obtained by the Corporation and that apart Corporation has already issued notices directing the Defendants to stop construction.

13. Of course, Mr. Saikia has urged that application for permission was duly submitted before the Corporation and as within the statutory period the petition was not refused, it would be deemed that permission has been granted. On the other hand, Mr. A.B. Choudhury has produced the record from the Corporation from which it appears that after the application was filed by the Defendants, by letter dated 19.12.91, the Executive Engineer(C), Defendant No. 3, was asked to furnish more particulars. According to Mr. Saikia this was not received by the Defendants. On the other hand, Mr. Choudhary has shown the endorsement on the office copy of the said letter showing the receipt of the letter by the Defendants. This being a controversial matter, I think, I should leave it to the Trial Court to decide the point.

14. Admittedly, the Corporation asked the Defendants to stop construction. According to Mr. Saikia reply has also been sent and the matter is being taken up. Mr. Saikia has further urged that this matter is between the Defendants and the Corporation and a third party cannot agitate in this matter in the Court and on this basis no status quo can be granted. I do not want to make any observation on this submission but I would like to record that as there is a order asking the Defendants to stop construction if this Court now set aside the status quo order it would amount to ignoring an order passed by a Statutory Authority which I am afraid, I cannot do.

15. There is a full scale debate in the Court regarding the type of construction which the Defendants are going to make at Guwahati which falls within highly seismic zone. The technical report of the Corporation has also been placed before this Court by Mr. Choudhury alongwith records. According to the said report the thickness of the ground floor is insufficient for the reasons stated in the report and the space left between the boundary wall of the All India Radio and the building is less then the prescribed space in the building bye laws of the Corporation. This report has been disputed by Mr. Saikia on the ground that the report was not prepared after visiting the place, where the house is being constructed. Against this it may be stated that the plan of the building was available with the Corporation as it was submitted by All India Radio while praying for permission. Therefore, an expert can give opinion on the basis of the plan even without visiting the place of construction. Of course, this is my tentative view as this has to be decided by the Trial Court.

16. In view of what has been stated above, I am of the opinion that in this matter a full scale enquiry is necessary which can only be made by the Trial Court by giving parties chance to file affidavit and produce witnesses, if

necessary. The Trial Court may also appoint a technical person to ascertain whether the building is safe or not. However, considering the urgency of the matter, an immediate decision is called for. Therefore. I direct that both the parties shall appear before, the learned Trial Court on 5th of April, 1993 for obtaining orders and the entire matter should be disposed of within a month. This time limit shall be followed strictly by the Trial Court and if any parties tries to delay by praying for adjournment etc. the Trial Court shall be at liberty to reject it. The status quo order shall continue till the matter is disposed of as directed.

17. Within the above direction and observation, the petition is disposed of.