

(1982) 03 GUJ CK 0014

In the Gujarat High Court

Case No : Civil Revision Application No. 166 of 1982

Gujarat Electricity Board, Gandhinagar

APPELLANT

Vs

Maheshkumar and Co., Ahmedabad

RESPONDENT

Date of Decision : 25-03-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2, 115
Specific Relief Act, 1963 — Section 14, 20, 37, 38(3), 41

Citation : AIR 1982 Guj 289 : (1982) 2 GLR 479

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Advocate : B.R. Shah, for the Appellant; S.B. Vakil, for the Respondent

Judgement

1. This is a revision application by the original defendant of the Civil Suit No. 112 of 1981 pending in the Court of the Civil Judge (J. D.) at Gandhinagar. The opponent herein is M/s. Maheshkumar & Co., the plaintiff, who have filed the aforesaid suit for a declaration that the contract of lifting fly-ash alleged to be entered into between the parties was in operation for a period of three years and the plaintiff wanted an injunction, restraining the defendant, the Gujarat Electricity Board, from disturbing the plaintiffs while lifting the fly-ash from Gandhinagar Power Station belonging to the defendant Electricity Board. Along with the suit, an application, Ext.5, for an interim injunction was given by the plaintiffs. The learned trial Judge, after hearing both the sides, had refused to grant that injunction, Being aggrieved by the said order of the learned trial Judge, the Misc. Appeal No. 118/81 had come to be filed by the original plaintiff, seeking the injunction to operate till the disposal of the suit. The learned Extra Assistant Judge, Mr. H. P. Hathi, by his impugned order held as follows:-

"Appeal is allowed and respondent-defendant is restrained from disallowing the appellant-plaintiff to lift fly-ash till the decision of the suit on a condition that appellant-plaintiff would, if he succeeds, pay for fly-ash lifted, in pursuance of the terms decided by the Court and if he fails, he shall pay Rs. 40/- per truck

load and till the decision of suit, the appellant-plaintiff would be allowed to lift fly-ash during the pendency of the suit at the rate of Rs. 251- per truck load and furnish guarantee or surety in the Court to pay balance amount at the rate of Rs. 151- or any other rate that the our may decide truck load if the suit fails as such."

Being aggrieved by the aforesaid grant of injunction, the original defendant, the Gujarat Electricity Board, has invoked this High Court's revisional jurisdiction under S. 115 of the Civil Procedure Code.

2. A few facts require to be stated. The plaintiffs are a firm duly registered under the Partnership Act. The Gujarat Electricity Board, hereinafter referred to as "the Board" wanted to give a contract for lifting fly-ash (the residue of the coal used by the Board for generating steam for producing electricity) lying at Gandhinagar Power Station. The plaintiff gave its offer for lifting fly-ash as per their letter dated 6-2-81 and that the plaintiff specifically stated in that letter that the contract was to be operative for a period of three years. The plaintiffs then alleged that after the said letter, the plaintiffs were permitted to lift fly-ash with effect from 16-2-81, but about two months thereafter, that is, on 9-4-81, the Board addressed a letter informing the plaintiffs that the contract that commenced on 16-2-81 was to be operative only for a period of three months. As a result of this divergence, there ensued some correspondence between the parties and the Board had issued an advertisement, inviting offers and the original plaintiffs had given a notice, informing the Board that their action in inviting the offers was illegal, as his contract subsisted for three years. It is the say of the Board that thereafter the plaintiffs partner had seen the Board's executive and had made endorsement on the notice itself that he did not press the same and that the plaintiffs had also given their offer pursuant to the advertisement. It appears that the things went on up to 11-9-81 the plaintiff continued to lift fly-ash till then and then the plaintiffs was required to file the aforesaid suit. The matter obviously stands at the interim stage till this day.

3. The trial Court Judge concluded that there was no prima facie case to believe that the contract was for three years. He also, held that the contract was in respect of movable things, the breach of which could certainly be remedied by way of damages, The learned Judge further held as follows :-

"On the other hand, there is apparent loss to defendant as the Board gets much higher price, if injunction is granted. It is also to be noted that if plaintiff succeeds it shall not be inconvenient to recover the amount of damages from the Board which is a corporate body. But if plaintiff fails, then it shall be very inconvenient for the Board to recover damages from plaintiff-firm if injunction is granted and fly-ash is allowed to be lifted by plaintiff. The allegation of plaintiff that he will have to face various litigations is also not sound and is very vague. The alleged contract is a clear case of a contract for the non-performance of which compensation in money is an adequate relief. To summarise the facts, I hold that there is no sufficient evidence on record to prima facie believe plaintiff's case of contract for 3 years. Even if it is so believed it is a contract for

movable thing and any breach of such contract can be compensated by damages. There is no material also to show that plaintiff shall face inconvenience if injunction is not granted. Rather it is defendant who is likely to face inconvenience if injunction is granted"

4. When the matter was before the learned Appellate Judge, he viewed the matter before him in a cryptic manner and if I am allowed to express my opinion, he had dealt with a serious matter in a perfunctory manner. In Para 5, he has raised only one point for determination:

"Whether the appellant-plaintiff makes out a case for seeking relief of injunction as prayed for."

The reasons that he has given in support of his affirmative finding are in a nutshell as follows :-

"When the appellant-plaintiff came with a specific plea that contract was for the period of three years, while defendant contends that it was for the period of three months only, in absence of any documentary evidence on record emerging from respondent defendant that the contract was for the period of three months only, the letter dated 6-2-81 prima facie shows that contract was in fact offered for the period of three years, though it would be contestable issue as to whether it was a complete contract or not. At this prima facie stage, however, since the very question is contestable dispute as to whether time is for three years or three months, from letter dated 6-4-81 a prima facie pleading does arise in favour of appellant-plaintiff, which contention could be proved ultimately on merits as such. Even if endorsement on 10/3 (the plaintiffs abovementioned endorsement below the notice given by them and purporting to show that the notice was withdrawn) is considered as withdrawal of the notice, that at the same time does not disparage the plea of the appellant-plaintiff that the contract was for the period of three years and it would be question of merit as to the effect of endorsement, vis-a-vis the contents of letter dated 6-4-81. Further the very fact that respondent-defendant had permitted the appellant-plaintiff to work even after the period of expiry of three months shows the conduct and circumstance pointing to the credibility of the plea of the appellant that as a matter of fact the contract was for the period of three years though as I said here above, the truth otherwise could be proved ultimately on merits as such."

5. In view of what the learned appellate judge has stated in the substantial Part of his reasoned portion of his reasoned portion of the judgment, it could be said that the learned Appellate judge found that there was a prima facie case in the sense that there existed a triable issue between the parties as far as the factual averments went. The learned judge then proceeded to deal with there question and there all that has been stated by him, is what I reproduce below :-

"Under these circumstances, it would be the next question as to whether balance of convenience requires exercise of discretion by the Court in favour of the appellant-plaintiff while it is true that appellant-plaintiff could be compensated in

money, if ultimately it is proved that the contract was for three years and that by operation of obstruction, he had suffered monetary loss, as urged by learned counsel for the appellant/plaintiff, it would lead to multiplicity of proceedings and which multiplicity of the proceedings if could be avoided, be so avoided and that Court should exercise that discretion unless it could be shown that respondent-defendant would suffer, a loss which would be wholly compensable. Considered in context of nature of work, nature of contract, nature of parties(?), even if the injunction is operated and more specifically on the terms on which there is a tacit agreement though not admitted, in my opinion, the discretion would be so effective and operative that it would meet object of law and justice and more so because multiplicity of proceedings would be avoided and hence appeal deserves to be allowed and hence I answer the point No. 1 accordingly."

It is this judgment of the learned Appellate Judge, granting interim injunction for the first time on merits, that is called in question by invoking this High Court's in a way exceptional revisional jurisdiction.

6. At the outset, I would say that Mr. Vakil was right in emphasising that this High Court, s powers to interfere with the lower Court's findings is very limited. I also accept the legal position virtually declaring that except in the rarest of rare cases, this High Court would not be competent to disturb the findings of the Courts below, however grossly erroneous they might appear to this Court to be. If necessary, I may say that the legal position regarding the High Court's power exercising revisional jurisdiction are too well-defined and too well laid by judicial pronouncements.

7. I would briefly advert to some authorities, which dealt with this question. In the case of The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, the Supreme Court has observed as follows (at p. 77) --

"In our opinion, the High Court had no jurisdiction to interfere with the order of the first Appellate Court. It is not the conclusion of the High Court that the first Appellate Court had no jurisdiction to make the order that it made. The order of the first Appellate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate Court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction under S. 115 of the Code."

In this judgment, the earlier Supreme Court judgment in Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, is quoted with approval. I would, therefore, advert to that authority of the Supreme Court, which has dealt with the question a little more elaborately. In Pandurang's case (supra), the Supreme Court in para 10 observed as under :-

"The High Court cannot while exercising its jurisdiction under S. 115, correct

errors of fact, however gross they may be, or even errors of law. It can only do so when the said errors have relation to the jurisdiction of the Court to try the dispute itself. It is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. Points of law may arise which are related to questions of jurisdiction. A plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party which raises them would oust the jurisdiction of the Court. An erroneous decision on these pleas, therefore, can be said to be concerned with questions of jurisdiction fall within the purview of S. 115 of the Code. But an erroneous decision on a question of law having no relation to questions of jurisdiction will not be corrected by the High Court under S. 115."

It is, therefore, clear that points of law" which are related to questions of jurisdiction or which ultimately go to the root of the" jurisdiction of the Court, are certainly points which can be examined by this High Court! while exercising its revisional. jurisdiction. In one another judgment, in the case of Shri M.L. Sethi Vs. Shri R.P. Kapur, also, the same point is emphasised.

8. I would, therefore, approach this case from the above-mentioned rigid angles sufficiently elaborated by the Supreme Court. Even otherwise, the text of S. 115 of the Code, particularly after the insertion of the proviso thereto, speaks of the strict limitations on the powers of this High Court. All I would say is that I have kept those limitations laid down for the wider interest of the administration of justice before my eyes when proceeded to examine this case.

9. It is well-settled that the Court's power to issue interim injunctions are based on three relevant considerations, namely, (1) existence or non-existence of a prima facie case; (2) balance of inconvenience; and (3) possibility of compensating the party aggrieved by money value. Unless all the three grounds are there in favour of a party seeking interim injunction, the prayer cannot be granted. Though the learned appellate Judge appears to be conscious of the first and the third grounds, he is not fully alive to the second of the three requirements. As far as the question of prima facie case is concerned, the view taken by the learned appellate Judge can be said to be a sustainable one, even though I may be inclined to take it as a grossly erroneous view on facts. I am not understood to have expressed any opinion, one way or the other but I have examined this question only presumptively. What I have emphasised is that even if I hold this view on facts as grossly erroneous, I would not have been competent to disturb that finding. Mr. B. R. Shah appearing for the Board, however, very vehemently submitted that by any yardstick of common sense the view put forward by the plaintiff should not be sustained, but being all the while conscious of my lack of powers to interfere with a conclusion on a question of fact, I have remained unpersuaded by Mr. Shah's contentions. I do not think that

I have any competence to interfere with that finding.

10. Coming to the second question, I however, find that the learned appellate Judge has unfortunately grossly failed in keeping before his mind the requirements of law, which are associated with his power to exercise jurisdiction, namely, whether to grant or not to grant ad interim prayer. The learned Judge has recorded a categorical finding to the effect that the plaintiff claims movable property and that his claim could be monetarily evaluated. This is a finding of fact, which is in my view inevitable in the face of the record, as it stands before me today. Mr. Vakil appearing for the original plaintiffs submitted that the approach of the learned appellate Judge on this question was very unsatisfactory and he complained that the learned Judge had assumed this question of fact in favour of the defendant-Board. What I have stated about this Court's powers while dealing with the question of a prima facie case is to be repeated by me while dealing with this question of fact. Apart from this, it is evident that coal-ash or fly-ash is a commodity of market. What is the exact nature of that fly-ash was unfortunately not declared before me by the two learned advocates with one voice, but as a layman, I am in a position to say that it must be a residue or a left over of the coal consumed by the power station of the Board. I understand that it is popularly known as a coal ash and all bulk consumers of coal can be judicially noticed, disposing of this residue. To the extent that it is a sort of some residue, there was no controversy, but when Mr. Shah tried to equate it with coal ash Mr. Vakil joined issue with him, but to me this difference appears to be without any distinction. As far as the subject matter of this revision application is concerned, it is residue of burnt coal and there cannot be any controversy there. After having held that if the plaintiffs ultimately succeed in establishing that their contract was for three years and not for three months the plaintiff could be compensated in terms of money, the learned Judge should have seen that there lacked basically jurisdictional fact as far as the jurisdiction to grant an interim injunction is concerned. The learned Judge has not quoted any provisions of law, but from what has been extracted by me above from the judgment of the learned trial Judge and from what has been extracted from the judgment of the learned appellate Judge, it is clear that the well-known legal provisions that are at the base of the above-mentioned three pro. Positions, Particularly the last two ones, are rooted in the provisions of law, namely, Sections 14 and 41 of the Specific Relief Act. Whether those sections are named specifically or not is a question altogether not material, once we find that the principles provided for there in those sections were actually before the authorities below. I have to emphasise this fact because Mr. Vakil, who is shown on record to have argued the matter before the learned appellate Judge, asserted with his usual vehemence that these sections were not urged before the learned appellate Judge. When the question is pertaining to jurisdiction and a jurisdictional fact, the specific mention of these sections is uncalled for, because it is implicit that the Judges who deal with those aspects of the problem were dealing with the questions statutorily laid down. Section 14 of the Specific Relief Act categorically lays down as follows :-

"14 (1). The following contracts cannot be specifically enforced, namely:-

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) & (c) xx xx xx

(d) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise".

No doubt the above S. 14 deals with only the specific performance of the contract, but Section 41 specifically states as to when an injunction cannot be granted. Section 41(e) provides that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. So Sections 14 and 41 read together would show that a Court cannot grant an injunction in a case where the nonperformance can be duly compensated by the award of damages. Mr. Vakil, however, tried to urge that Section 41 and as a matter of fact the whole Chapter VIII in which Section 41 figures, dealt with perpetual injunctions and, therefore, according to him, it could be invoked while dealing with temporary injunctions. He invited my pointed attention to Section 37(1) and (2) of earlier, Chapter VII of the Act. Section 37(1) provides that the temporary injunction are such as are to continue until a specified time or until the further order of the Court and they are regulated by the Civil P. C., 1908 and sub-section (2) provides for a perpetual injunction by the decree made at the hearing and upon the merits of the suit. Mr. Vakil's submission, therefore, was that S. 41 was confined only to a perpetual injunction referred to in Section 37(2) and the corollary of his argument was that temporary injunctions have nothing to do with the principles that govern the grant of perpetual injunctions. It is difficult to agree with the submission, though vigorously put forward by Mr. Vakil. It is a settled principle of law that in a suit where there is no permanent injunction sought for, in the final analysis, ordinarily a temporary injunction cannot be granted. The principles that govern the grant of perpetual injunction, therefore, would govern the grant of a temporary injunction also. It is, therefore, too late in the day for Mr. Vakil to submit that the principles underlying Section 41 are not to be invoked while dealing with the case of a temporary injunction.

11. In this connection, Mr. Vakil's next submission was that the learned Judge and even the Board represented by Mr. B. R. Shah were assuming without any material averments or proof that this contract was such, the non-performance of which could be compensated in money. I had requested the learned Advocates to spare for me the copy of the plaint and the copy of the written statement in the suit, if any, but neither, could extend this helping hand, but reply to notice of motion was made available by Mr. Vakil himself to me and in that reply, it is made clear by implication that the fly-ash concerned here is an ordinary article of commerce. I say so because the dealings with various bodies are set out in the affidavit-in-reply. The prices are also referred to in the reply. Then in para. 7, the

following contention is specifically taken up:-

"The defendant will, therefore, suffer irreparable loss and injury on account of interim injunction granted by this Hon"ble Court".

Then in para 14, it has been stated that "the defendant says that the plaintiffs has no cause of action to file the suit". Then in, para 15, it has been specifically stated as

follows:-

"The defendant denies that the plaintiff will suffer irreparable loss if the plaintiff is not allowed to lift the fly-ash. The defendant says that the defendant has already received tenders as stated here in above and the defendant is going to finalise the contract with the contractors who have filled in the tenders. The defendant will suffer irreparable loss and injury for the reasons stated above"

The pleas that were advanced before the learned trial Judge as could be seen from the extract of his judgment also make it clear that the compensability of the question was there before the trial Court and it was very much there before the appellate Court also. u/s 10 of the Specific Relief Act, it is provided that the specific performance of any contract, which is by itself and from the nature in the discretion of the Court, is not to be enforced unless and until it is proved that the breach of the contract cannot be assessable in terms of money. Explanation appended to S. 10 then reads as follows :-

"Explanation : Unless and until the contrary is proved, the Court shall presume-

(i) xx xx xx

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:-

(a) where the property is not an ordinary article of commerce or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

12. From various circumstances set out in the affidavit-in-reply and even from the common sense point of view also, it can be said safely that coal ash or fly ash is a movable property, which is an ordinary article of commerce and it cannot be said to be a thing of special value or interest to the plaintiffs, though Mr. Vakil in the strain of his submission went to the extent of saying that fly-ash was a rare commodity. It was difficult to accept this submission of his, because in his submission he had also suggested that his clients would be put to great loss because they in their turn had entered into contract with other parties to sell this property. It was for the original plaintiffs to establish that this commodity was

not an ordinary article of commerce and I hold that the learned appellate Judge also because of these circumstances has found as a matter of fact that the plaintiffs could be compensated in terms of money. Section 20 of the Specific Relief Act also in the connection deserves to be referred to, because Mr. Vakil tried to base a little strange argument on this section. The said section provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Mr. Vakil wanted me to interpret the section to mean that despite all said before, the Court was always free in the exercise of that wide discretion to grant specific performance in any cases. When Section 14 in terms specify the cases in which specific performance cannot be granted, it cannot be understood that S. 20 is a departure from the rigours of S. 14. This sort of interpretation sought to be placed by Mr. Vakil on Section 20 runs counter to the" known canons of construction and I am unable to appreciate the force with which he tried to put forward this submission.

13. From what has been stated by the learned appellate Judge, it appears that he has been carried away by the consideration of assumed multiplicity of proceedings. He thought that if the plaintiff was not granted injunction, there would ensue multiplicity of proceedings. How the litigation would be multiplied is left to sheer conjectures. Mr. Vakil tried to amplify it. According to him the market price of this fly-ash would go on fluctuating day by day in the course of three years. The plaintiffs who used to expect the collection of about 10 truck loads per day, would be put to multiple calculations per day in order to assess the damage suffered by them de die in them throughout the course of three years. Mr. Vakil, therefore, urged that this would be the meaning of words "multiplicity of proceedings". This consideration is relevant while dealing with the question of multiplicity u/s 38 of the Specific Relief Act. Section 38(3)(d) lays a guideline when the defendant invades or threatens to invade the plaintiffs' right to or enjoyment of property, the Court may grant a perpetual injunction where the injunction is necessary to prevent a multiplicity of judicial proceedings. My view is that this provision also deals with a situation where injunction can be granted or cannot be granted, but when the Legislature has put its foot down in certain cases, the possibility of multiplicity of judicial proceedings is not a relevant consideration. When Section 41 says that injunction cannot be granted in such cases, what is prohibited by S. 41 cannot be mitigated by invoking S. 38(3)(d) of the Specific Relief Act. All the provisions of law are to be harmoniously construed. When we are left to conjecture about what multiplicity of proceedings is, the alternative suggested by Mr. B. R. Shah also deserves to be taken note of, as was taken note of, of the possible multiplicity of judicial proceedings elaborated by Mr. Vakil. Mr. Shah declared that it was open to the plaintiff to treat the contract as rescinded and sue at once for damages on the basis of the market rates, which are there prevalent for the contracts associated for the period of 3 years, 5 years or even 10 years. I was told that the new tender was for, the period of 10 years and the plaintiff was one of the offerors of

the bid at that tender. I refer to this circumstance because it is one of the arguments of the Board that the plaintiff after having made offer pursuant to the Public advertisement issued by the Board, had waived their right, if there existed any. Because this particular plea is there, I have permitted the consideration of Mr. Shah's argument that when a fixed price or an escalated price is there in such contracts stretched over 2, 3, 5 or 10 years, one-sitting assessment of damages by a man like the plaintiff is not a matter in any way difficult for a litigant to work out.

14. From what has been observed by me, above, it is crystal clear that the plaintiff under the guise of a temporary injunction wanted specific performance of the contract, which could not be granted by virtue of the mandate of law, namely, S. 14 of the Specific Relief Act, read with S. 41 of the Act. From, the synopsis of the prayers also, it appears that the plaintiff wanted an injunction restraining the defendant from disturbing the plaintiff from lifting the fly-ash from Gandhinagar Power Station. In my view, in such facts, the Courts would have no jurisdiction at all to grant the injunction. The learned appellate Judge, in my view, therefore, had grossly erred in clutching at the jurisdiction, when the jurisdictional fact itself showed pointedly that he had no authority to grant such an injunction.

15. Mr. Vakil had advanced one ingenious argument that this was not a contract of sale. The facts are otherwise. The fact that the plaintiffs were permitted to collect fly-ash against certain price would be a transaction of sale and nothing but sale. He had also contended that this was not a case of specific performance of a contract. I have already dealt with this argument by observing that the plaintiff wanted to achieve the very purpose in an ingenious way. During the time the injunction operated, the plaintiffs would go on getting the performance of the contract day by day and so to all intents and purposes, the plaintiffs' aim was to see that they got the fly-ash as per the contract.

16. Mr. Vakil's next argument was that it was not possible for the appellate Court to record a formal finding that the suit it self was not tenable. If for the purpose of deciding whether the Court has jurisdiction to grant a particular injunction or not, that question has to be gone into, it must be gone into. It was then alleged that the plaintiffs' suit on the refusal to grant an injunction would lose all its live force. In this argument implicit is the admission that the suit is essentially one for a permanent injunction and as held by me above, the principles that govern the grant of permanent injunction perforce can be attracted to a situation where the temporary injunctions are to be dealt with the suit, as it is, cannot be Proceeded with, it is open to the plaintiff to get it amended and converted into a suit for damages. I see no legal impediment in the way of the plaintiffs in doing so, but whatever remote apprehensions there might be in the mind of the plaintiff-firm, Mr. Shah, in order to allay them, categorically stated at the Bar on behalf of the Board that if and when the plaintiff sought any such amendment, the Board would willingly give its consent to such an amendment. With his

consent and at his behest, I have recorded this concession unequivocally made by Mr. Shah for the applicant Board and this takes away the contention put forward by Mr. Vakil for the plaintiffs.

17. The result is that the revision application is allowed by quashing the appellate order. Rule is accordingly made absolute with costs.

18. Application allowed.