
(1985) 02 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 17291 of 1984

Islamia Junior High School and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 06-02-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2(2), 80(1), 80(32)

Citation : AIR 1986 All 92 : (1985) 11 AWC 412

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : D.S.P. Singh, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Agarwal, J.—Respondent No. 5 borrowed certain amount as loan from the Industries Department of the State Government. For the recovery of the amount in arrear the State Government intended to proceed by way of attachment and auction of the property claimed to be belonging to the said borrower. The petitioners instituted a suit giving rise to these proceedings on Feb. 24, 1983, contending that the property which belongs to them and not to respondent No. 5 was intended to be sold in auction towards the recovery of loan against the said respondent and it was apprehended that the said petitioners may be dispossessed in pursuance of the auction sale thus made. To the suit the State of U. P. and the Tehsildar are also arrayed as co-defendants. The auction has since taken place though it has not been confirmed in view of the interim order granted by this Court. Upon the application made in this behalf by the petitioners before the trial Court, it granted leave as contemplated under Sub-section (2) of Section 80, Civil P. C. on Feb. 24, 1983. An application for temporary injunction was also made by the petitioners before the trial Court; this was, however, rejected. Against this rejection, the petitioners preferred an appeal. In the course of hearing of the appeal an objection was raised from the side of respondent No. 5, inter alia, to the effect that the suit could not be maintained in the absence of

notice required u/s 80(1) of the Code and the interim injunction could not be granted in view of Order 30, Rule 2(2)(f) of the Code as amended in Uttar Pradesh. The appellate Court remanded the matter for consideration to the trial Court setting aside the order whereby the temporary injunction had been declined. The trial Court this time took the view that the suit could not be maintained without notice u/s 80(1), C.P.C.; against this order the petitioners preferred a revision which has been dismissed by the revisional Court and aggrieved the petitioners have approached this Court under Article 226 of the Constitution.

2. The question arising in this petition in substance thus is whether in the case where in view of Clause (f) to the proviso to Order 39, Rule 2(2), C.P.C., as amended in Uttar Pradesh, temporary injunction cannot be granted, it is incumbent upon the trial Court to grant leave u/s 80(2) of the Code dispensing with the service of notice under Sub-section (1) of Section 80. A perusal of Sub-section (2) of Section 30, C.P.C. reveals clearly that the grant of leave is left to the judicial discretion of the trial Court. The proviso to Sub-section (2) clearly states that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of Sub-section (1). In the matter of grant of leave dispensing with the service of notice u/s 80(1), C.P.C., therefore, the trial Court is competent to consider whether on the ultimate analysis there is or not in existence urgency or likelihood of immediate relief being granted to the plaintiff. Where the Court considers that there is no such urgency existing or immediate relief cannot be granted, it is within its powers to decline to grant the leave. Clause (f) of the proviso to Order 39, Rule 2(2), aforementioned provides that no temporary injunction shall be granted to restrain any auction intended to be made or, the effect of any auction made, by the Government. Therefore, where from the averments of the plaint it appears that temporary injunction asked for amounts to restraining the holding of any auction or giving effect to the same, it would follow that no temporary injunction is grantable and where this is the position, the trial Court would be perfectly within its competence to decline to grant dispensing with the notice required u/s 80(1), C.P.C.

3. Learned counsel for the petitioners urged that leave had initially been granted in this case by the trial Court on 24th Feb. 1983 and though this was subject to objection, if any, there was no objection raised from the side of the State or even the respondent No. 5 for that matter. It would appear that the ex parte interim injunction asked for by the petitioners was declined by the trial Court against which they went in appeal and in that appeal respondent No. 5 had objected to the effect that the suit was defective for want of notice u/s 80(1) of the Code. It does not appear to me that this objection, even though raised at the appellate stage in the proceedings arising out of the refusal to grant temporary injunction, could be ignored or not taken notice of ultimately for deciding whether the leave had statutorily or properly been granted within the jurisdiction conferred upon

the trial Court. Even though there was no objection raised from the side of the State, respondent No. 5 was not precluded from raising such objection in view of the provisions of Sub-section (1) of Section 80, C.P.C. which says that no suit shall ordinarily be instituted without such notice being given. This is the general rule and the dispensing with of the notice under Sub-section (1) is conditional upon the leave being granted on the conditions shown to exist as appearing from Sub-section (2) of Section 80, C.P.C.

4. The next contention of the petitioners' learned counsel has been that in the suit brought by them the leave sought is against being dispossessed and not against the auction as such and also that the suit is in respect of property claimed to belong to the petitioners and not to respondent No. 5. This also does not assist the petitioners for the obvious reason that in sum and substance the averments in the plaint amount to saying that the property which is sought to be put to auction includes the property in dispute but that cannot in law be put to sale because that does not belong to the concerned respondent No. 5 and that in consequence of the auction made, if any, there is the apprehension or likelihood of the petitioners being unauthorisedly dispossessed of the same. The proviso to Order 39, Rule 2(2) is wide in so far as it restrains against the grant of temporary injunction which has the effect to restrain the auction or the effect flowing as a result thereof. This does not affect adversely the relief for permanent injunction sought in the plaint which is to be adjudicated ultimately on merits in a properly instituted suit. The question arising is in respect only of a temporary injunction and because, in view of the statutory provision no such temporary injunction can be granted in such a case, it should follow, in my opinion, that the service of notice u/s 80(1) of the Code could not be dispensed with by leave of the trial Court.

5. For the reasons given above, the petition fails and is dismissed accordingly. There will be no order as to costs.