

(1994) 05 GAU CK 0023

In the Gauhati High Court

Case No : Misc. Appeal (First) No. 159 of 1993

State of Assam and Another

APPELLANT

Vs

M.S. Associates

RESPONDENT

Date of Decision : 02-05-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Specific Relief Act, 1963 — Section 39

Citation : AIR 1994 Guw 105

Hon'ble Judges : Singh Neelam, J;J.N. Sharma, J

Bench : Division Bench

Advocate : A.G, for the Appellant; S. Medhi and P. Upadhy, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This appeal arises out of the order dated 24-8-1993 passed by the Assistant District Judge No. 2, Guwahati in Misc. (J) case No. 84 of 1993 arising out of the Title Suit No. 70 of 1993. By the impugned order, the learned Judge granted injunction as prayed for by the plaintiff.

2. The background of the case is that the plaintiff brought a suit against the State of Assam and Director of State Lotteries. The . suit was only for permanent injunction as will be evident from thue Cause Title. The prayers which were made are as follows:

(a) to restrain the defendants Nos. 1 and 2 from giving effect to the letter dated 26-8-1993;

(b) pass a permanent injunction restraining the defendants, their servants, agents and assigns from taking any action against the plaintiff on the basis of the letter dated 30th July, 1993 and also the letter dated 20th August, 1993 and also the letter dated 26-8-1993 to rescind, revoke, terminate and cancel the contract/ agreement entered into by the parties as have been detailed in the schedule below.

I. It is stated that the plaintiff entered into an agreement with the State of Assam through the Defendant No. 2 on 2-12-1991, whereby the plaintiff was appointed as the organising Agent for assisting the Government in conducting the lotteries in respect of Assam State Lottery for a period of 3 (three) years from the date of its first draw i.e. on 6-2-1992. The relevant conditions of the agreement are quoted in paragraph 4 of the plaint. We are not concerned for the disposal of this appeal with those clauses save and except clause 1 which will be discussed later on.

3. That the defendant as per agreement approved 15 numbers of lotteries as given in paragraph 7 of the plaint. The first draw of the lottery was held on 6-2-1992 as per schedule approved by the Government. It is stated that the plaintiff spent a huge sum of money to establish the Assam State Lottery in the market and it was because of the effort and endeavour of the plaintiff, that the lottery was organised in a proper manner. Suddenly on 30-7-1993 the defendant No. 1 served a notice on the plaintiff whereby the defendant No. 1 wanted to terminate the agreement mentioned above. The notice inter alia states as follows:

"Government is deeply concerned about numerous reports received on the harmful effect of lotteries, particularly, the daily draws where the winning last single digit offers a prize, from many parts of the State. Students organisations as well as women and Social Welfare Organisations have voiced their protests through letters and demonstrations and have expressed their deep anguish on the havoc caused in the lives of the people due to the lotteries.

The Government has considered these and has come to the conclusion that the continuation of State lotteries is bringing disrepute to the State Government. Therefore, as provided under clause 1 of the Agreement signed between the State Government and you on 2nd December, 1991, Government has decided to terminate the agreement entered with you for organising State Lotteries. Before giving effect to this, Government has decided to give you an opportunity of being heard, and if you have anything to say against the proposed action this may be communicated to the undersigned within a period of ten days from the receipt of this letter."

In reply to this notice, a reply was sent on 6-8-1993 where the plaintiff stated as follows:

"We hereby give you notice that in case you do not withdraw the threat contained in your letter under reply, we shall hold you responsible for wrongful termination of the contract. In that case, we shall be entitled to damages against loss of profit to us which will be quantified if the necessity so arises. In the meanwhile, we request you to please keep in mind the turn-over of the Daily Lotteries, on the basis of which, according to the judgment of the Hon'ble Supreme Court of India the loss of profit would be calculated @ 15% of the turn-over."

Thereafter by letter 26-8-1993 the agreement in question was terminated.

Hence, this suit.

4. In paragraphs 28 to 34 the plaintiff has stated that though the plaintiff's agreement is terminable in nature, in view of Section 42 of the Specific Relief Act, 1963 an injunction can be granted with regard to the negative terms of the contract and clause 26 of the agreement prohibits the Government from making any amendment in the agreement without the consent of the plaintiff. Clause 26 reads as follows:

"Any modification to this agreement shall be made only with the consent of both the parties to the agreement."

Clause 27 of the agreement provides for Arbitration. So, a bare perusal of Clause 26 will show that for termination of the agreement the consent is not necessary. The consent is necessary only when a modification to the agreement is sought to be made. The application under Order 39, Rules 1 and 2 which is filed contains only 6 paragraphs. Paragraph 3 speaks about suffering or irreparable loss and injury. Paragraph 2 speaks of regarding prima facie and balance of convenience. Nothing has been enumerated in this application for injunction how the balance of convenience is in favour of the plaintiff, nor it has been mentioned how the plaintiff will suffer irreparable loss and injury. The application for injunction was filed in a slipshod manner. Be that as it may, the objection was filed on behalf of the defendants wherein it was stated that the agreement for running lottery had to be cancelled because of lot of public complaints and because of the fact that it caused loss to the public in general. In the objection filed on behalf of the defendants in paragraph 5 of the objection it is stated as follows:

"That Government received various complaints from various organisations for stopping the lotteries in the State of Assam. There was/is wide spread discontents or agitation all over Assam by various organisations, including the All Assam Students Union for closing the Lotteries. The Press also criticised the Government for allowing to continue the Lotteries and for that purpose to terminate the agreement with the plaintiff the Government issued letter No. FTX 164/91/pt 1/255 dt. 25th August, 1993 and directed the plaintiff to stop the sale of lotteries tickets in the State of Assam, in respect of Assam Express Lotteries w.e.f. 31-8-1993 and other Lotteries w.e.f. 3-11-1993, but a show cause notice was given to the plaintiff giving them opportunity to file objection by letter No. FTX 164/91/pt/1/235 dt. 30th July, 1993."

Along with the objection a large number of paper cutting and other documents were filed to show how the complaints were received by the Government and how the Government was criticized for conducting the lottery. The whole contention of the Government was that these lotteries had to be banned for the public demand and for welfare of the public in general.

5. The learned Judge after hearing the parties granted the injunction as stated earlier. The learned Judge found as follows:

"The losses suffered going to be suffered by the plaintiff, its sub-organiser, agents, sub-agents financially and on reputation cannot be repaired in terms of money."

In this connection, the learned Judge referred to page 522 of Halsbury's Laws of England, 4th Edition Vol. 24. We will come to that aspect of the matter later on. The learned Judges found that though the lottery of the plaintiff was banned, other lotteries were being allowed to be run. Having arrived at this findings, in the last paragraph of the judgment, the learned Judge found as follows:

"Under such circumstances I hold that the plaintiff has established a prima facie case, balance of convenience and irreparable loss to the plaintiff". According, the prayer for injunction was granted.

6. We have heard Sri S. N. Bhuyan, learned Advocate General, Assam for the appellant and Sri S. Medhi, learned counsel for the respondents.

7. At this stage, the decision of this matter has become almost academic inasmuch as the agreement in question has not been renewed by the Government and the plaintiff is not entitled to run the lottery on the basis of the said agreement and the lottery has been completely banned by the State of Assam throughout the State. All such lotteries have been banned in the State of Assam. But, yet the learned counsel for both the parties argued the matter before us and as such we are going to decide the matter. The learned Advocate General of Assam argued as follows:

i) The contract is terminable as will be evident from Clause 1 of the agreement. As the contract is terminable, so u/s 14 of the Specific Relief Act, this contract cannot be specifically enforced and as this contract cannot be specifically enforced, the question of granting permanent injunction does not arise and that is also prohibited by Section 41(e) of the Specific Relief Act.

ii) The next argument of learned Advocate General is whatever was done by the State of Assam was done for the public and for the welfare of the people and in taking into consideration the public demand, the court ought not to have granted injunction and he submits that granting of injunction as was done in this case was absolutely arbitrary and capricious one and learned Judge did not apply his mind to the materials before him.

8. On the other hand, Sri Medhi, learned counsel for the respondent submits that under Clause 26 of the agreement, the agreement can be modified only with the consent of the parties. But in this case the consent was not taken and as such the impugned termination of the agreement is bad in law and he also relied on Section 42 of the Specific Relief Act and argued that the injunction which has been granted is within the jurisdiction and it does not require any interference from this appellate court.

9. What is public policy was considered by the Supreme Court in *Gherulal Parakh Vs. Mahadeodas Maiya and Others*, In paragraph 23 the Supreme Court pointed

out as follows at page 795:

"The doctrine of public policy may be summarised thus : Public policy or the policy of the law is an illusive concept it has been described as "untrustworthy guide," "variable quality", "uncertain one" unruly horse", etc. the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain, cases, the court may relieve them of their duty on a rule founded on what is called the public policy, for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies."

There is a judgment passed by the single Judge of this court in MA(F) No. 2 of 1991 (Azad Ali v. Housefed). The date of judgment is 3-2-1993 where this court pointed out that "in granting an injunction against the public authority, the court should be very cautious in considering the balance of convenience, the court should consider the matter regarding injunction in addition to other ingredients public interest is also to be looked into."

We approve this decision by the learned single Judge and we reiterate that when a question of granting injunction arises, not only the three ingredients for the grant of injunction should be considered, but in addition to it, the public interest and/or public policy also is to be considered. Otherwise, if the public interest or public policy is not considered, it will bring chaos to the society and cause distress to the public in general. The court cannot be used as an instrument/tool to cause injury to the society and/ or loss to the community, the requirement of the society, the demand of the society, must be considered, the court must be cautious if its order affects a large chunk of the society. By exercising equitable jurisdiction to give benefit to somebody a larger interest cannot be sacrificed. If injunction is granted, affecting the right of the community in general, it will be a dangerous precedent and court should not easily succumb to such prayer. The learned Judge relied on the passage of Halsbury's Laws of England, but he did not consider the passage in its entirety. The passage is quoted in page 926 and it reads as follows:

"926. Injury must be irreparable. Prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are an adequate remedy. Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon either of two distinct grounds,-first, that the injury is "irreparable, and second, that it is continuous. By "irreparable injury" is meant injury which is substantiate and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired. The fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question; and the

mere fact that, in order to avoid litigation, a party has offered to take a sum of money as the price of his rights does not preclude him from asserting that he will suffer irreparable damage from the continuance of the act complained of. However, if the plaintiff has himself shown by his conduct on a previous occasion, that the injury complained of is one which may in some way be compensated by money, the court may decline to grant an injunction."

Extracting a particular sentence from that passage to use in the cases of the plaintiff should not have been done by the learned Judge. The learned Judge should have considered the entire paragraph and should have decided the matter on the basis of the law enunciated in the paragraph.

10. A bare perusal of the reply to the notice dated 6th August, 1993 will show (this has already been quoted), the plaintiff assessed the damage if the agreement is terminated, as the plaintiff themselves assessed the damages as will be evident from the paragraph quoted above, the question of granting injunction does not arise, because the law is settled that if the damage can be assessed, in term of money which or it can be compensated the question of granting injunction does not arise. In that view of the matter also, the injunction ought not to have been granted. Further, the suit itself was for permanent injunction and in such suit temporary injunction must be granted in a cautious manner, because by granting temporary injunction relief in the suit is being granted. That should not be done by the court. No doubt, in specific cases temporary injunction may be granted. The procedure of granting temporary injunction should not be adopted as a general and normal course.

11. From whatever angle the matter is considered, this appeal is to be allowed. Accordingly, the injunction order dated 24-8-1993 passed by the learned Assistant District Judge No. 2, Guwahati in Misc. (J) No. 84/93 arising out of the Title Suit No. 70 of 1993 stands quashed. Prayer of injunction is rejected. We make no order as to costs.