
(1991) 03 GAU CK 0007
In the Gauhati High Court
Case No : Civil Revision No. 6 (SH) of 1991

Union of India

APPELLANT

Vs

Kalimullah Khan

RESPONDENT

Date of Decision : 12-03-1991

Acts Referred:

Arbitration Act, 1940 — Section 34, 34
Civil Procedure Code, 1908 — Section 115, 80
Civil Procedure Code, 1908 (CPC) — Section 115, 80
Constitution of India, 1950 — Article 227, 227

Citation : (1991) 1 GLJ 267

Hon'ble Judges : S.K.Homchaudhuri, J

Bench : Single Bench

Advocate : T.Yangi, S.R.Sen, B.P.Dutta, Advocates appearing for Parties

Judgement

1. A petition under section 115 CPC and/or under Article 227 of the Constitution was filed by the petitioner challenging the jurisdiction of the Court of learned Assistant District Judge as well as the orders impugned therein. Although the petition was also under Article 227 of the Constitution, petitioner did not make the Presiding Officer a party and leave was granted for amendment of the petition. Instead of approaching for the amendment, the petitioner has filed separate petition under Article 227 of the Constitution of India challenging the jurisdiction of the Court in the proceeding with T. S. No. 8 (H)/90 and of passing of the adinterim order in violation of the provision of section 80 CPC as well as entertaining the suit which is apparently grossly under valued, inasmuch as, while the suit has been valued at Rs. 10,00,000/ the adinterim order has effect of restraining the petitioner from recovering the amount to the extent of Rs, 3,00,000/.

2, Mr. S. R. Sen, learned counsel for the opposite party has raised the preliminary objection that the petition under section 115 CPC is not maintainable, inasmuch as, against the impugned order rejecting the application under section 34 of the Arbitration Act, an appeal lies. Mr, Sen has submitted

that the question of jurisdiction should have been raised before the Court of the learned Assistant District Judge. This point could not be allowed to be urged in the course of argument in an application under section 34 of the Arbitration Act. Similarly the question, as to whether the suit is under valued, ought to have been raised before the Court below. Mr. Sen has further submitted that the petition under Article 227 of the Constitution is not an alternative petition but a petition for conversion of the petition under section 115 CPC which is not permissible. In support of this contention Mr. Sen placed reliance in the decision of the Supreme Court in the case of Vishesh Kumar vs. Shanti Prasad (AIR 1980 SC 892). In para 22 of the said decision the Apex Court held s

"It has been urged by the appellant in Vishesh Kumar vs. Shanti Prasad (Civil Appeal No. 2844 of 1979) that in case this Court is of the opinion that a revision petition under section 115, Code of Civil Procedure is not maintainable, the case should be remitted to the High Court for consideration as a petition under Article 227 of the Constitution. We are unable to accept that prayer. A revision petition under section 115 is a separate and distinct proceeding from a petition under Article 227 of the Constitution and one cannot be identified with the other."

3. I have considered the submissions made by learned counsels for the parties on the preliminary objections. As regards maintain ability of the petition under section 115 CPC, I find sufficient force in the submission made on behalf of the opposite party and I hold that petition under section 115 CPC is not maintainable. This Court in the case of Ka Ktikibon Kharkongor vs. Deputy Commissioner and Collector, Khasi Hills reported in AIR 1981 Gauhati 72, where the petition was tiled under section 115 CPC and/or under Article 227 of the Constitution, although held that the petition under section 115 CPC was not maintainable, entertained the said petition application as an alternative petition under Article 227 of the Constitution of India. In entertaining that petition as alternative petition under Article 227 of the Constitution, this Court took into considerations of ratio of the decision of the Apex Court in the Vishesh Kumar, supra. In that case this Court held that when the impugned order was vitiated by errors of law apparent on the face of the record and/or passed in violation of the principles of natural justice, the order was amenable to judicial review under Article 227 of the Constitution.

4. In the instant case, a separate petition under Article 227 of the Constitution has been filed. On going through the contents of the petition I have no hesitation to hold that the petition under Article 227 of the Constitution of India, is an alternative petition and not a petition for conversion of the petition filed under section 115 CPC.

5. Now, it is to be seen as to whether the petitioner has made out a case for invoking jurisdiction of this Court under Article 227 of the Constitution of India. Mr.B.P. Dutta, learned counsel for the petitioner has submitted that the suit was filed on 24. 7. 90. By the order dated 26. 7. 90, the learned Assistant District Judge entertained the suit waiving the issue and service of statutory notice under

section 80 CPC on the defendants, who. are Union of India and Army Officers. The learned Assistant District Judge after hearing the petitioner and the learned Govt. Pleader of the State of Meghalay by the same order dated 26. 7. 90, issued injunction restraining the defendants from recovering the amount involved in the risk purchase on different dates from 1. 7. 90 onwards from the plaintiff's bill, security deposit, earnest money etc. By the said order the defendants were further restrained from resorting to risk purchase at a rate higher than the prevailing market rate without giving prior notice to the plaintiff for replacement by substitute items. Mr. Dutta has submitted that although in appropriate case, Court is empowered to waive issue of notice under section 80 CPC prior to institution of a suit against a Govt. or a Public Officer, the Court can not grant any relief in the suit, whether interim or otherwise, without giving th? Government or the Public Officer reasonable opportunity of showing cause In the instant case, apparently the defendants were not given any reasonable opportunity of showing cause before granting interim relief to the plaintiffopposite party by the impugned order. A State Government's Pleader was not the Standing Counsel of Union of India or of the defendants and that the Govt. Pleader who was not engaged by the defendants, had no authority to appear on behalf of the defendants.

6. The next submission of Mr.B.P. Dutta, learned counsel for the petitioner is that the suit has been arbitrarily valued at Rs.10,000/.. In the plaint, nowhere the extent of apprehended loss and injury in terms of money which the plaintiff was going to suffer, if the adinterim order of injunction was not granted has not been stated. In any view of the matter, the suit having been valued at Rs.10,000/, the Court below could not grant any relief, interim or otherwise, beyond Rs.10,000/. But by the impugned order the defendantpetitioners are restrained from recovering an indefinite amount much more than Rs.10,000/. The learned counsel for the petitioner has submitted that as per the accounts maintained upto the date of hearing of this case, defendantpetitioners are to recover the total amount of Rs. 2,52,000/ on account of risk purchase from the opposite party. Mr.Dutta has submitted that the learned Assistant District Judge has committed errors of law apparent on the face of the records in passing the order of adinterim injunction dated 26.7,90 and that the impugned order has been passed in total violation of the mandatory provisions of section 80 CPC and also denial of reasonable opportunity to the defendants as contemplated under section 80 CPC. As regards the impugned order dated i9.11.90, passed by the learned Assistant District Judge, rejecting the application under section 34 of Arbitration Act, the learned counsel for the petitioner has submitted that from the impugned order, it is clear that the learned Assistant District Judge committed manifest error of law apparent on the face of the record in rejecting the petition on ground that the petition under section 34 of the Arbitration Act has been filed after institution of the suit and the defendants could not resort to above petition when the suit had already been instituted.

7. Mr.S.R. Sen, learned counsel for the opposite party on the other hand, has

submitted that the learned Assistant District Judge has not committed any errors of law apparent on the face of the record in entertaining the suit by waiving issue and service of statutory notice under section 80 CPC, inasmuch as it is apparent from the pleading in the plaint, that the plaintiff instituted the suit to obtain urgent and immediate relief. Mr. Sen has further submitted that in the absence of the Standing Counsel in the lower/District Court in urgent matter, usually notices are served on the Government Pleader of the State even where the suit is against the Union of India. Govt. Pleader of the State having accepted notice on behalf of the defendants and appeared before the Court and having been heard before the" order dated 26.7.90 was passed, there was substantial compliance of provisions under section 80 CPC. On the question of suit valuation Mr. Sen has submitted that the petitioner may raise the question before the Court below and if it is adjudged that the suit has been uⁿder valued, the plaintiff would make necessary amendment in the suit. The suit valued at by the plaintiff can not be questioned in an application under Article 227 of the Constitution. As regards the impugned order dated 19.11.90, rejecting the application under section 34 of the Arbitration Act, Mr. Sen has submitted that the Court below has rightly rejected the application inasmuch as before making the application defendants had already submitted to the jurisdiction of the Court by praying for time to file written statement in applications. The learned counsel has further submitted that the petitioner has not made out any case for invoking jurisdiction of this Court under Article 227 of the Constitution.

8. I have considered the submissions made on behalf of the petitioner as well as on behalf of the opposite party and have perused the impugned order and other materials on record. Provision of section 80 CPC to serve notice to the respective Government and Public Officer is not an empty formality. Ordinarily, this provision is to be complied with before a suit instituted against Government or Public Officer. Court's power to entertain a suit by waiving issue of statutory notice under section 80 CPC is an exception to the normal procedure which is not to be exercised arbitrarily merely on being approached by the plaintiff by making an application. The Court must apply its mind to the entire facts and circumstances and derive satisfaction that the plaintiff was in need of obtaining urgent and immediate relief against the Government and should record the reason for being so satisfied. The learned Assistant District Judge has granted leave to the plaintiff to institute suit without issuing statutory notice under section 80 CPC with the following order : "

"Seen the petition No.457/90 under section 80 CPC to allow the petitioner to institute a suit/case against the opposite party without serving statutory notice is hereby waived."

In the petition No.457/90 the plaintiff (petitioner) had simply stated that the matter is being of very urgent nature, the plaintiff (petitioner) could not serve notice upon the defendants (opposite parties) under section 80 CPC. The application does not disclose anything to form the opinion that the plaintiff was in

need of urgent and immediate relief against the defendants. It is apparent that the learned Assistant District Judge simply on the prayer made in the petition had waived the requirement of the issue and service of statutory notice under section 80 CPC without deriving satisfaction or stating reason as to why the prayer was allowed. It is not disputed that Govt. Pleader of the State of Meghalaya engaged to look after the cases on behalf of the Government of Meghalaya in the District Courts, is neither a Standing Counsel of the Union of India nor an advocate engaged by the defendants. As such, Mr. Dutti, learned counsel for the petitioner, has rightly submitted that the said Govt., Pleader of the State of Meghalaya had absolutely no authority to accept notice on behalf of the defendants and to represent them in the suit. As such, service of notice on the Govt. Pleader of the State of Meghalaya and granting of interim relief against the Union of India and other defendants vide order of injunction dated 26.7.90, after hearing the said Govt. pleader, under no circumstances can be held to be as compliance of the mandates of section 80 CPC. The order of injunction, in fact has been passed without giving any opportunity, far less reasonable opportunity to the defendants to show cause and in clear violation of the provision of section 80 CPC. As such I have no hesitation to hold that the learned Assistant District Judge has committed manifest errors of law apparent on the face of the records in passing the order dated 26.7.90.

9. I have perused the impugned order dated 19.11.90 and I find that the learned Assistant District Judge has committed manifest errors of law in rejecting the application under section 34 of the Arbitration Act on the ground that the said application was filed after institution of the suit and the defendants could not resort to above petition once the suit was filed inasmuch as application under section 34 of the Arbitration Act can be made only after institution of suit and not before that.

For the foregoing reasons, the petition under Article 227 of the Constitution is allowed. The order of injunction dated 26.7.90 in Misc. Case 104(H)/90 in T.S.8 (H)/90 and the order dated 19.11.90 in Title Suit 8 (H) of 1990 passed by the learned Assistant District Judge, Shillong are set aside. The defendants may raise the question of jurisdiction of the Court and under valuation of the suit etc. before the Court of the learned Assistant District Judge by filing application and the learned Assistant District Judge shall decide the question as preliminary point, after hearing the parties and pass appropriate order. I make no order, to cost.