

(1970) 01 CAL CK 0011
In the Calcutta High Court
Case No : Civil Revision No. 3939 of 1965

Union of India (UOI) and Another

APPELLANT

Vs

Bajjnath Sarda

RESPONDENT

Date of Decision : 28-01-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299(1)

Citation : AIR 1971 Cal 56 : (1971) 1 CALLT 380

Hon'ble Judges : Sabyasachi Mukharji, J; A.K. Mukherjea, J

Bench : Division Bench

Advocate : Ajay Kumar Basu, for the Appellant; B.C. Dutt, B.N. Mukherjee and Mana K. Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Sabyasachi Mukharji, J.—On the 17th February, 1964 Bajjnath Sardas, the respondent herein, instituted Title No. 5 of 1964 in the 6th Court of the Subordinate Judge, Alipore against the Union of India and the Chief Operating Superintendent, South Eastern Railway. The plaintiff's case as made in the plaint, is as follows :--

The plaintiff is a mine owner and deals in minerals ores which he despatches to various places in and outside India and that he was given a private siding of 200 ft. at Noamundi on the South Eastern Railway for the purpose of handling of Wagons meant for the despatch of his goods.. The plaintiff further stated that on an application being made on or about 8th April, 1959 for an extension of the said siding by at least 1000 ft. or more, the defendants namely, the petitioners herein, had granted an extension by 250 ft. The plaintiff has asserted that the Railway Administration had agreed to extend the said siding by 650 ft. for which the plaintiff deposited necessary costs of preparation of plan and estimate but the said extension had not been granted. On the 19th of August, 1963 the Railway Administration issued a notice upon the plaintiff intimating that the said

siding which had been exclusively allotted to the plaintiff would be thrown open to the public within six months from the date of the notice, that is to say, from the 18th February, 1964. The plaintiff has further alleged that the extension of the siding was made at his own cost and if the said siding is not kept for his exclusive use and possession, his business would suffer. Since the Railway did not complete the construction to the extent of 650 ft. the plaintiff claims that the plaintiff is entitled to sue for specific performance of contract and/or damages and he reserved his right to institute a separate proceeding in respect of the same. In the context of the controversy that has to be resolved in the present rule, it is necessary to set out certain averments made in the plaint. Paragraphs 26 and 27 of the plaint are in the following terms :--

"26. The defendants' action in serving the said notice and/or in attempting to interfere with the plaintiff's aforesaid right to carry on business by stopping their siding is illegal, ultra vires and not according to law and the said illegal act has caused serious apprehension of invasion of plaintiff's legal rights and the plaintiff submits that unless the said act is restrained by appropriate injunction the plaintiff will suffer irreparable loss and damage. The matter is of very great urgency inasmuch as the loading of the plaintiff's wagons is essential for immediate supply to the ships due to arrive at the Calcutta Port and failure on the part of the Plaintiff would dislocate the entire contracts both inland as well as overseas.

27. That the cause of action for the suit arose on 19-8-63 and day to day thereafter the date on which the defendant No. 2 issued the impugned letter within the jurisdiction of this court at Garden Reach, the principal Office of the defendant No. 1 P. S. Matiaburuz Garden Reach Dist, 24-Parganas."

2. On the basis of the above averments the plaintiff has prayed for decree for permanent injunction restraining the defendants from giving effect to the notice dated 19th August, 1963 and from doing any act in implementation of the said letter dated 19th of August, 1963, for temporary and interim injunction on the lines indicated above and other necessary consequential reliefs.

3. After the institution of the suit the respondent filed an application on the 16th of February, 1964 under Order 39, Rule 2 of the CPC for temporary injunction restraining the petitioners from taking over the said siding and/or from throwing open to the public the said siding and also restraining the petitioners from giving effect to the notice dated 19th August, 1963 and from doing any act in implementation of the said notice. The learned Subordinate Judge granted an ex parte interim order on the 17th February, 1964. The petitioners filed written statement and also objected to the respondent's petition for temporary injunction on, inter alia, the following grounds :--

(a) that as no notice had been served u/s 80 of the CPC the suit was not maintainable and as such no relief could be granted to the respondent in that suit.

(b) that the alleged contract or agreement between the plaintiff and the defendants not having been executed or being made in accordance with law and/or in the form as required under Article 299 of the Constitution of India or u/s 175(3) of the Government of India Act, 1935 the alleged contract or agreement was neither enforceable in law nor binding on the Union of India.

(c) the injunction sought for by the respondent could not be granted in view of Section 56(d) of the Specific Relief Act.

(d) that balance of convenience was not in favour of the respondent.

4. The learned Subordinate Judge, 6th Court at Alipore, by his order dated 18th June, 1965 refused to grant temporary injunction upon his finding that apart from the suit being not maintainable for absence of service of notice u/s 80 of the CPC and any legal contract or agreement between the parties, the plaintiff will not suffer any injury as the Railway Administration will provide adequate siding facilities to the plaintiff in the public siding at Noamundi. The plaintiff filed an appeal against the aforesaid order which was registered as Miscellaneous Appeal No. 506 of 1965 and which was heard by the learned Additional District Judge, 1st Court, Alipore, who by his judgment dated 14th of August, 1965 allowed the appeal and granted a temporary injunction as prayed for by the respondent. Against the said order of the learned Additional District Judge, this Court was moved u/s 115 of the CPC and a rule nisi was issued.

5. The first point that requires consideration in this case, is, whether the suit is maintainable in view of the absence of notice u/s 80 of the Code of Civil Procedure. It is an admitted position in this case that no notice u/s 80 of the CPC has been served. Section 80 of the Code enjoins that no suit shall be instituted against the Government or against the Public Officer in respect of any act purporting to be done by such Public Officer in his official capacity until the expiration of two months next after the notice in writing has been delivered or left at the office of the appropriate Government. Mr. B. C. Dutt, learned Advocate for the respondent, contended that in a suit for injunction like the present type notice u/s 80 was not required to be served. He further contended that in any event whether notice u/s 80 is required to be served in a case of this type is a doubtful proposition and that ground should not disentitle the plaintiff from obtaining injunction until the disposal of the suit. We are unable to accept the said contention. In the case of *Bhagchand Dagadusa v. Secy. of State for India* in Council 54 IA 338 : (ATR 1927 PC 176), the Judicial Committee of the Privy Council held that Section 80 of the CPC applies to all forms of suit and whatever the relief sought including a suit for an injunction. Delivering the judgment of the Judicial Committee, Viscount Sumner observed at page 357 of the report (Ind App) = (at pp. 184-185 of AIR) :--

"The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connection with a

code fixing the admissibility of evidence or with a limitation section, recognizing rights but barring remedies. For this, however, there is no authority. The Act albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which (inter alia) an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. Considering how long these and similar words have been read throughout most of the Courts in India in their literal sense, it is reasonable to suppose that the section has not been found to work injustice, but, if this is not so, it is a matter to be rectified by an amending Act. Their Lordships think that this reasoning is right. To argue as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is mere procedure, is fallacious, for Section 80 imposes a statutory and unqualified obligation upon the Court. So, too, the contention that the "act purporting to be done by the Collector in his official capacity, in respect of which" the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued."

6. In view of the clear provision of the section and in view of the clear pronouncement of the Privy Council, we are of the opinion that in the facts and circumstances of the instant case, notice u/s 80 of the CPC was required to be served and the suit is bad because of non-service of the notice. Mr. Dutt drew our attention to the decision of the Patna High Court in the case of *The State of Bihar Vs. Raghunandan Singh and Another*, . In the said decision it has been held that notice u/s 80 is not necessary for a suit for permanent injunction restraining the Government from settling the ghat in suit in near future. Raj Kishore Prosad, J., observed at page 533 of the report, "The true meaning and the correct interpretation of the words, "in respect of any act purporting to be done", occurring in Section 80 of the Code, is that they cover only a past act and do not include a future act. Section 80, as such comes into play only when the suit begun is in respect of past acts, completed, or begun, but incomplete, but it does not apply to future or threatened acts." With respect we are unable to accept the aforesaid reasoning. Even in respect of future acts, in order to be a subject-matter of a suit, there must be a cause of action. Threat to commit an illegal or unlawful act gives rise to a cause of action under Specific Relief Act to sue for injunction in certain cases. Unless there is an invasion or a threat to invade the plaintiff's right or enjoyment there cannot be any cause of action for restraining future acts. The threat or an invasion to the plaintiff's right by Government or officers of the Government is an element that constitutes cause of action in a suit for injunction. Indeed, in the present case, the plaintiff's cause of action, as mentioned in the paragraphs 26 and 27, is the service of the notice dated 16th of August, 1963. This is an act which has been done by the defendants or the

officers of the defendants. Therefore, in the words of the judicial committee, though the act to be restrained is something apprehended in the future, but the act in respect of which a suit lies, if at all, is, in this case the notice dated 16th August, 1963, which is an act already completed and issued. Therefore, it is not possible, to accept the reasoning of the aforesaid Patna High Court decision. Mr. Dutt also drew our attention to a Bench decision of the Gujarat High Court in the case of Bai Jilekhabai Adreman and Another Vs. Competent Officer (Evacuee Interest Separation) and Others, . There the Gujarat High Court held that where the plaintiff does not seek to set aside any order of the public officers concerned or seek to declare illegal any of their acts but merely seeks an interim injunction pending the disposal of the suit to restrain them from parting with certain moneys, the suit is not in respect of any act done by the public officer or one in which an act of a public officer is either challenged or sought to be set aside and therefore is not a suit to which Section 80 of the CPC can apply. Gujarat High Court observed at page 785 of the report -- "We have to see whether these principles are applicable to the instant case. If we look at the plaint in the instant case, it is clear that in the plaint no act of either defendant No. 1 or defendant No. 2 is being challenged. The plaintiffs do not seek to set aside any order of either defendant No. 1 or defendant No. 2 or to declare illegal any of the acts of either defendant No. 1 or defendant No. 2. It merely seeks an interim injunction pending the disposal of the suit to restrain defendants Nos. 1 and 2 from parting with certain moneys. An interim injunction can always be prayed for even after the suit is filed. These facts are conceded both by the learned counsel for the appellants and the learned counsel for the respondents. The suit which is not in respect of any act done by a public officer and in which no act of a public officer is either challenged or sought to be set aside is not a suit to which Section 80, C. P. Code can apply-Even if the prayer for injunction is deleted from the plaint, the plaintiff could have applied for a temporary injunction after the suit was filed and during the hearing of the suit. We are, therefore, of the opinion that Section 80, C. P. Code is not applicable and the suit is not bad on the ground that no notice had been given to defendants Nos. 1 and 2."

7. The facts of that case are entirely different from the facts of the instant case before us. Therefore the principle enunciated by the Gujarat decision can have no application to this case. This is clearly a suit challenging the act of the Government in issuing notice dated 16th August, 1963 and it seeks injunction from giving effect to that notice which has already been issued on the 16th of August, 1963. That being the true character of the suit provisions of Section 80 clearly apply to the facts of this case. In that view of the matter the suit is not maintainable and as such in the suit the plaintiff was not entitled to any relief pending the disposal of the suit. We are therefore of the opinion that the learned Additional District Judge was clearly in error on this aspect of the matter.

8. The next question is, whether there is any formal document executed on behalf of the Union of India in compliance with Article 299(1) of the Constitution of India and if not, what is the consequence thereof in this application. The

learned Subordinate Judge had come to the conclusion that as there was no contract or agreement between the parties because of non-compliance with Article 299(1) of the Constitution the plaintiff was not entitled to any relief in the suit. Learned Additional District Judge came to the conclusion that it could not be said that the plaintiff has no prima facie case on this ground to go to trial. It may be mentioned that the plea that there was no document in compliance with Article 299(1) of the Constitution of India was not originally taken in the written statement by the Union of India. Later on by an amendment of the written statement the plea was introduced. The said amendment of the written statement was the subject-matter of a rule in this High Court. We were told that the said rule has since been disposed of and the order for amendment has been upheld. Learned Additional District Judge in his judgment referred to the decision in the case of Union of India (UOI) Vs. A.L. Rallia Ram, . No formal contract in the name of the President of India nor any formal document in compliance with Article 299(1) of the Constitution of India giving the plaintiff the rights claimed in the suit was shown to us. It appears that the siding in question was the property of the Railways. If the plaintiff has acquired any right in respect thereof it must be either by sale, lease, licence or by any contract. Mr. Dutt, learned Advocate for the respondent, has argued before us that there can be a contract between the Government and the plaintiff if that position has been accepted by the Government and work has been done even though there was non-compliance with Article 299(1) of the Constitution of India. Mr. Dutt relied on the decision in the case of Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, . Mr. Dutt next contended that there can be a contract by correspondence and as there were some letters in this case written on behalf of the Railways, it was apparent that there was a contract. Mr. Dutt lastly contended with reference to the rules and the forms contained in the Indian Railways Code that the notice given by the Railways in this case clearly indicated that the Railways were proceeding on the basis that there was a contract in respect of private siding with the plaintiff and the notice was given in terms of the same. Before the aforesaid contentions urged on behalf of the respondent are considered, it is necessary to state that this is not a suit based on either Section 70 or Section 65 of the Indian Contract Act. It is a suit based on assertion of the plaintiff's rights on the private siding which is the property of the defendant. Plaintiff's rights must therefore be the rights granted by transaction either in the nature of sale, or lease, or licence or contract. The observations of the Supreme Court in the case of Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others, upon which Mr. Dutt strongly relied were explained by the Supreme Court in the case of State of West Bengal Vs. B.K. Mondal and Sons, . Referring to the observations of Bose, J., in the aforesaid decision Gajendragadkar, J., in the last mentioned case at page 783 of the report observed :

"All that this Court meant by the said observation was that the contract made in contravention of Article 299(1) could be ratified by the Government if it was for its benefit and as such it could not take the case of the contractor outside the

purview of Section 7(d). The contract which is void may not be capable of ratification, but, since according to the Court the contract in question could have been ratified it was not void in that technical sense. That is all that was intended by the observation in question. We are not prepared to read the said observation or the final decision in the case of *Chatturbhuj Vithaldas Jasani Vs. Moreshwar Parashram and Others*, as supporting the proposition that notwithstanding the failure of the parties to comply with Article 299(1) the contract would not be invalid. Indeed, Bose, J., has expressly stated that such a contract cannot be enforced against the Government, and is not binding on it."

In the aforesaid decision the Supreme Court has observed that failure to comply with the mandatory provision of Section 175(3) of the Government of India Act, 1935 which is similar with the provision of Article 299(1) of the Constitution makes the contract invalid. In the case of *Union of India (UOI) Vs. A.L. Rallia Ram*, the Supreme Court has observed that there can be a contract in terms of Section 175(3) of the Government of India Act, 1935 by means of correspondence. Supreme Court observed at page 1689 of the report :

"Section 175(3) does not in terms require that a formal document executed on behalf of the Dominion of India, and the other contracting party, alone is effective. In the absence of any direction by the Governor-General u/s 175(3) of the Government of India Act prescribing the manner, a valid contract may result from correspondence if the requisite conditions are fulfilled. The contracts for sale of "War disposal" goods were not directed by the Governor-General to be made by a formal document executed on behalf of the Governor-General as well as by the purchasing party. It is true that Section 175(3) uses the expression "executed" but that does not by itself contemplate execution of a formal contract by the contracting parties. A tender for purchase of goods in pursuance of an invitation issued by or on behalf of the Governor-General of India and acceptance in writing which is expressed to be made in the name of the Governor-General and is executed on his behalf by a person authorised in that behalf would conform to the requirements of Section 175(3)."

9. In the case of *K.P. Chowdhary Vs. State of Madhya Pradesh and Others*, the Supreme Court has observed that in view of Article 299(1) of the Constitution, there can be no implied contract between the Government and any other person, the reason being that if such an implied contract between the Government and any other person were allowed, that would in effect make Article 299(1) useless, for then a person who had a contract with Government which was not executed at all in the manner provided in Article 299(1) could get away by saying that an implied contract may be inferred. The Supreme Court further observed that if the contract between the Government and another person was not in compliance with Article 299(1) it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. In the case of *Mulamchand Vs. State of Madhya Pradesh*, , the Supreme Court has held that the provisions of Section 175(3) of the Government of India Act, 1935 or the

corresponding provisions of Article 299(1) of the Constitution of India are mandatory in character and contravention of these provisions nullifies the contracts and makes them void. The Supreme Court further observed that in those circumstances there is no question of estoppel or ratification. Reliance was also placed on the decision of the Madras High Court in the case of *S. Rajam. Vs. The Indian Union, Ministry of Rehabilitation, New Delhi*, . It appears from the aforesaid decisions that the provisions of Article 299(1) of the Constitution are mandatory in character. Any contract upon which a person relies against the Government must be in compliance with that provision of the Constitution. There cannot be any question of ratification of such a contract, which is not in compliance with that provision. Such compliance with art. 299(1) of the Constitution may in a particular case be fulfilled even in a case where the contract has been entered into by correspondence provided taking the entire correspondence in the background of a particular case it appears that there has been compliance with Article 299(1) of the Constitution. In a particular case where the Government has received benefits in respect of an agreement which is not in compliance with Article 299(1) of the Constitution, the Government may be liable under certain provisions of law to the party from whom the benefits were received by it. Such questions might arise in a suit based on Section 70 or 65 of the Indian Contract Act. As mentioned hereinbefore there is no formal contract in compliance with Article 299(1) of the Constitution of India in this case, embodying the terms upon which the plaintiff now sues the defendant. Certain correspondence have been annexed with the petition and the affidavits and were placed before us. From such correspondence it does not appear that there was compliance with Article 299(1) of the Constitution in respect of any contract embodying the rights of the plaintiff upon which the plaintiff is now suing the Government.

10. There is however another aspect of the matter. Mr. Dutt, learned Advocate for the respondent, submitted before us that from the notice dated 16th of August, 1963 it appears that the Government was proceeding upon the basis that there was a contract between the parties. Mr. Dutt drew our attention to Rule 1804 in Chapter XVIII in the Indian Railway Code. He also placed before us the Appendix XIII appearing in the said Railway Code which gives specimen form of agreement for an assisted/private siding. It appears from Clause 11, Sub-clause (b) of that form that Railway can close a private siding by giving six months' notice. It further appears that the closure can be made if it is considered by the Railway Administration in the interest of the public that the siding should be closed, and such decision of the Railway Administration should be conclusive evidence. As mentioned hereinbefore no agreement in this form was produced before the learned Subordinate Judge or the learned District Judge or before us. We are prepared to give Mr. Dutt's client opportunity to produce before us such an agreement if there was such an agreement in existence. Mr. Dutt's client was unable to do so. Quite apart from the argument that there was no agreement in the form required and as such there was no contract between

the plaintiff and the Government it appears from the Sub-clause (b) of Clause 11 of the said specimen form of agreement that if there was such an agreement then the Government can close it down by giving six months' notice and on this aspect the decision of the Government would be considered final. If that is the agreement between the parties and the notice has been given in compliance with that clause we fail to appreciate how can it be said that the Government has acted illegally or how there can be an injunction restraining the Government from giving effect to that notice. It has to be noted further that there is no averment that the notice dated 16th of August, 1963 was issued without fulfilling any condition required to be fulfilled under Clause 11, Sub-clause (b) of the specimen form of agreement. This aspect of the matter, however, was not urged before nor considered by the learned Additional District Judge.

11. In view of the provisions of the Article 299(1) of the Constitution of India and in view of the several decisions referred to hereinbefore it appears to us that the plaintiff's case is of a very doubtful nature. It was not necessary for the Courts below and equally is it not necessary for us to determine at this interlocutory stage finally whether the plaintiff's suit would fail on this ground but it is important to bear in mind that on this aspect of the matter the plaintiff's case is not free from doubt and is of a very doubtful nature. As we have held the suit is not maintainable because of non-service of notice u/s 80 of the CPC and in view of the doubtful nature of the plaintiff's case for non-compliance with Article 299(1) of the Constitution of India, we are of the opinion that the plaintiff was not entitled to succeed in obtaining an injunction in the suit, which it appears has already continued over four years. We are therefore of the opinion that the learned Additional District Judge acted illegally and with material illegality in setting aside the order of the learned Subordinate Judge in an appeal from the decision of the learned Subordinate Judge of the 6th Court, Alipore, in view of the mandatory provision of Section 80 of the CPC and in view of the doubtful nature of the plaintiff's case under Article 299(1) of the Constitution. Learned Subordinate Judge had held that on a balance of convenience the plaintiff would not suffer if no injunction is granted. Learned Additional District Judge has reversed that finding of fact. In view of our decision on the first two points referred to hereinbefore, it is not necessary for us to consider this aspect of the matter, nor is it necessary for us to consider whether the suit is bad in view of non-compliance with Section 56, Clause (d) of the Specific Relief Act.

12. In the view we have taken this application must succeed. The Rule is accordingly made absolute and the order of the learned Additional District Judge dated 14th of August, 1965 is hereby set aside and the order No. 53 dated 18th of June, 1965 of the learned Subordinate Judge, 6th Court, Alipore, is restored. In the facts and circumstances of this case there will be no order as to costs. Let the records go down as soon as possible.

Arun K. Mukherjea, J.

13. I agree.