



GAHC010068252023

Page No.# 1/18



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/92/2023

RULI AHMED
D/O- ABDUR RASHID,
R/O- NASHIM HOUSING COMPLEX,
NILOMANI PHUKAN PATH,
CHRISTIAN BASTI, GUWAHATI,
781005, ASSAM.

VERSUS

GIRIN CHUTIA AND 2 ORS.
S/O- LATE GUNA KANTA CHUTIA,
VILLAGE- REGNMAI,
P.O.- RAJAPUKHURI, P.S.- SARUPATHAR,
DISTRICT- GOLAGHAT, ASSAM,
785601.

2:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM

TRANSPORT DEPARTMENT

DISPUR
GUWAHATI- 781006.

3:THE DIRECTOR
INLAND WATER TRANSPORT
ASSAM
ULUBARI
GUWAHATI- 781007

Advocate for the Petitioner : MR. B D DEKA



Advocate for the Respondent : SC, IWT

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. B. D. Deka. Advocate.

For the Respondents : Mr. D. Mazumdar, Addl. Advocate
General, Government of Assam.
Mr. S. R. Gogoi, Advocate.

Date of Hearing : 31.03.2023

Date of Judgment : 20.04.2023

JUDGMENT & ORDER (CAV)

1. Heard Mr. B. D. Deka, learned counsel for the petitioner. Also heard Mr. D. Mazumdar, learned Additional Advocate General, Assam representing the respondent Inland Water Transport Department, State of Assam. Also heard Mr. S. R. Gogoi, learned counsel appearing on behalf of the respondent No. 1/ Caveator. Caveat stands discharged.
2. The present revision petition under Article 227 of the Constitution of India is filed assailing an order dated 20.03.2023, passed by the learned Appellate Court (Civil Judge No. 2, Kamrup (M)) in Misc. Appeal No. 30/2022, whereby the order dated 02.09.2022, passed by the learned Trial Court (Munsiff No. 4, Kamrup (M)) in Misc. J. Case No. 289/2022 granting injunction in favour of the petitioner/plaintiff, was reversed.

3. The background fact:

- I. The petitioner is running a discotheque restaurant namely Kamakaazi in a pontoon named Ding Dinga belonging to the Inland Water Transport Department, Government of Assam.
- II. On the basis of a proposal by the petitioner made on 28.10.2003, the Director of the Inland Water Transport Department offered the petitioner to run restaurant and river cruise in the pontoon Ding Dinga for three years. Accordingly, an agreement was executed between the parties on 16.12.2003.
- III. Thereafter on 21.07.2004 the petitioner submitted an application before the competent authority for extending the aforesaid agreement for a period of 20 (twenty) years.
- IV. On the expiry of the agreement executed on 16.12.2003, a fresh agreement was entered into between the parties on 01.06.2006 for another period of three years, with a condition of renewal.
- V. Prior to the expiry of the aforesaid three years, the petitioner submitted an application on 12.01.2009, for extension of the agreement and it was contended that the petitioner has already made substantial investment in the pontoon.
- VI. Thereafter, the respondent No. 3, by the communication dated 25.01.2021 informed the petitioner that the Government has



decided to lease out the pontoon Ding Dinga through tender process.

- VII. Being aggrieved, the petitioner preferred a writ petition before this Court assailing such communication dated 25.01.2021, which was registered as WP(C) No. 1943/2021. However, as an interim measure, and as the tender process so proposed were not yet initiated, this Court directed the authorities to allow the petitioner to continue to operate the pontoon till the tender process is completed.
- VIII. Thereafter, on 18.12.2021, NIT was issued for hiring the commercial vessel Ding Dinga. The petitioner participated in the aforesaid tender process, however, she was unsuccessful and the respondent No. 1 was declared as highest tenderer.
- IX. Thereafter, the respondent No. 3 by his communication dated 30.03.2022 asked the petitioner to handover the pontoon at the earliest possible time as the tender process is completed. Being aggrieved, another writ petition was filed by the petitioner assailing the communication dated 30.03.2022. Subsequently, the order dated 30.03.2022, was withdrawn by another communication dated 11.04.2022. The writ petition assailing the order dated 30.03.2022 was dismissed being infructuous by this Court under its order dated 29.04.2022.
- X. Thereafter, the petitioner filed a Title Suit being Title Suit No. 356/2022 for declaration and permanent injunction. The declaration

sought for, amongst other were that the petitioner/plaintiff be declared as a lessee over the suit property (pontoon) and that the respondent No. 1/ defendant No. 3 the highest bidder is not eligible for award of the lease on account of non fulfilment of eligibility criteria.

- XI. Along with the aforesaid suit, an application under Order 39 Rule 1 & 2 of the CPC, 1908 was also filed seeking an injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit property until the lease is determined as per law. Such application was registered as Misc.(J) Case No. 289/2022.
- XII. In the meantime, the first writ petition which was filed assailing the order dated 25.01.2021 was withdrawn by the petitioner on 20.06.2022 and on the same date, a Letter of Intent was issued in favour of the highest bidder i.e. the respondent No. 1. leasing out the pontoon for a initial period of three years
- XIII. The learned trial Court by an order dated 21.06.2022, as an ad-interim measure, directed the parties to the suit to maintain status quo over the suit premises. Thereafter, the respondents filed objection in the Misc. Case and the learned trial Court below by its order dated 02.09.2022, disposed of the injunction application by directing the parties to maintain status quo with regard to possession of the suit property. It was further directed that the defendants should not evict and / or dispossess the petitioner from

the suit property without following due process of law.

XIV. Being aggrieved by the aforesaid decision, the respondent No. 1, preferred an appeal which was registered as Misc. Appeal No. 30/2022. The learned Appellate Court by its judgment dated 20.03.2023 reversed the finding of the learned trial Court by setting aside the judgment dated 21.06.2022. The same is under challenge in the present proceeding under Article 227 of the Constitution of India.

4. Argument advanced by the learned counsel for the petitioner:-

Mr. B. D. Deka, learned counsel for the petitioner submits the following:-

I. The learned first appellate Court has primarily reversed the finding of the learned trial Court on the premise that the suit property being a boat is not an immovable property and hence the benefits of a lessee cannot be extended to her. However, it is uncontroverted that that the suit property is permanently anchored and embedded in the shore/river bank. Such fact is also supported by a survey report of the Junior Engineer of the respondent No. 2 that the pontoon is at a dry-docked position at the river-bank and that the bottom plates are cemented. Therefore in terms of Section 3 (26) of the General Clauses Act, 1897 and Section 2(6) of the Indian Registration Act, 1908, the suit property, for all meaning and

purport is an immovable property.

- II. The Gauhati Municipal Corporation has also been levying property taxes including water tax in respect of the suit property which are leviable only in respect of land and buildings in terms of Section 149 of the GMC Act, 1971.
- III. Thus for all intents and purposes, the suit property must be construed to be an immovable property or a house. Moreover, the term 'house' cannot always be limited to mean regular buildings and the same can be given a wider interpretation as held in the decision of the Hon'ble Jammu and Kashmir High Court in the case of ***Jaideep –Vs- Jammu Municipality & Ors.*** reported in **(2002) KashLJ 530.**
- IV. Although the learned appellate Court after perusing the clauses of the agreement, more particularly the ones providing for river cruises, etc. came to a finding that the suit property was a vessel, it failed to take note of the admission of the respondents regarding the pontoon being dry docked and having no engine.
- V. As a matter of fact, the issue whether the property was movable or immovable was never categorically urged in the pleadings of the respondents. Therefore, the findings of the learned appellate Court is beyond the pleadings and is also perverse for non-consideration of the materials on record.



- VI. The appellate Court could have at best decided that question regarding the status of suit property by appointing a local commission.
- VII. It is an admitted position that as on date there is no decree of eviction against the petitioner. In the absence of any judicial order, the respondents are barred from evicting the petitioner without the due process of law by way of an executive order. This is so because it is a trite position of law that even a trespasser cannot be evicted without the due process of law let alone a lessee whose term has expired.
- VIII. The fact that the respondent No. 2/ lessor is the State the same does not admit of any exception to the said proposition of law. The same is settled by the Hon'ble Apex Court in the case of **State of U.P. –Vs- Maharaja Dharmander Prasad Singh & Ors.** reported in **(1989) 2 SCC 505.**
- IX. Further, it is an admitted position that the petitioner / lessee had continued in possession beyond the term of the lease and the respondent No. 2 lessor had been accepting rent from the petitioner. This affords the right of a tenant holding over as provided under Section 116 of the Transfer of Property Act, 1882.
- X. The learned trial Court had passed a detailed order taking note of the respective cases of the parties and has also offered reasoning for its findings. The scope of the appellate Court is very limited and

the appellate Court should not reassess the materials and interfere with the order of the learned trial Court only because a separate view is possible. In this regard, the petitioner begs to rely on the case of ***Wander Ltd –Vs- Antox India*** reported in ***1990 Supp. SCC 727*** and ***Bindeshwar Narayan Singh –Vs- Managing Committee, Sri Sundarmal High School,*** reported in ***AIR 1982 Gau 69.***

5. Argument advanced for the State respondents:

Mr. D. Mazumdar, learned Additional Advocate General, State of Assam submits the following:-

- I. The basic plank of the plaintiff claiming the pontoon to be a house to come under the purview of Assam Urban Areas Rent Control Acts, 1972 or is fallacious inasmuch as a pontoon cannot be treated either as an immovable property under the Transfer of Property Act or a house under Assam Urban Areas Rent Control Act. Therefore, the plaintiff is having no prima facie case for grant of injunction. Accordingly, the appellate Court has rightly decided the issue.
- II. The agreement by which the plaintiff has purportedly become a lessee is an unregistered document and therefore the same cannot be treated as a lease under Section 105 of the Transfer of Property Act., even if the said agreement is treated to be a lease.



- III. The bare perusal of the agreement on the basis of which the plaintiff is claiming the declaration, demonstrate the intention of the parties that the pontoon was leased out for ferrying people for pleasure with a floating restaurant and therefore, the same cannot be treated as an immovable property or as a house, even if by lapse of time the same is stationed at the same place. Therefore, the decision of the learned Appellate Court cannot be faulted with.
- IV. From the reading of the plaint, it is clear that the basic grievance of the plaintiff is the recovery of the alleged investment made in developing the Pontoon and such investment, even if returnable, can be returned and plaintiff can be compensated in as much as the agreement itself provides for development of the pontoon, the expenditure is to be made by the plaintiff and needs to return the Pontoon in the same condition as it was handed over. Therefore, there was no irreparable loss and injury and accordingly, the learned appellate Court below has rightly held so.
- V. From the pleading itself, it is clear that the plaintiff took a chance by participating in the tender process and when she became unsuccessful, approached the Civil Court by filing the suit inasmuch as the challenge to the tender process made before the writ Court was also withdrawn without a logical conclusion. Therefore, on this count alone, no injunction can be granted. The highest bidder has already been issued letter of intent after a transparent process of NIT, wherein the plaintiff herself unsuccessfully participated.



Therefore, the point of balance of convenience has also rightly been decided by the Appellate Court.

- VI. The matter involves the issue of State largesse inasmuch as the authority in the State Government has decided to lease out the pontoon through open public tender and therefore, if such procedure is stalled by way of an injunction, the same would be against public interest.

6. Arguments advanced on behalf of the respondent No.1

Mr. S.R. Gogoi, learned Counsel appearing for the respondent No.1 adopts the argument of Mr. D Majumdar, learned senior Counsel, with a further contention that pursuant to the finalisation of NIT, the respondent No.1 has already been issued the letter of intent. Therefore, balance of convenience is not in favour of the petitioner in as much as the petitioner herself participated in the tender process and therefore, she cannot be allowed to approbate and reprobate at the same time. The suit has been filed by taking a chance to avoid handing over of the suit property. Therefore, the petitioner is not entitled for any equitable relief.

7. Findings of the learned trial court:

- A. **Prima facie case:** The learned trial Court on the basis of the pleading and argument of the petitioner that the petitioners are tenant at sufferance came to a finding that the petitioner has been in possession of the suit property since the year 2003 and they continued to possess the suit property after expiry of such lease period.



Therefore, the status of the plaintiff/petitioner is that of a tenant at sufferance, his possession is juridical and he can be evicted only in accordance with law and not by force.

- B. **Balance of convenience:** determining the point of balance of convenience, the learned trial Court considered that if the injunction is not granted the petitioner along with staff members will be deprived of their livelihood. The further consideration was that the petitioner had made considerable investment which if remains unaddressed would definitely cause inconvenience to the petitioner and would inflict financial losses inasmuch as the respondent No. 1 will have no inconvenience as he has yet commenced any monetary investment pursuant to declaration as highest bidder in the tender process. Further consideration was that if the injunction is not granted then the suit would become infructuous.
- C. **Irreparable loss and injury:** Regarding irreparable loss and injury, the learned trial Court was of the view that that no irreparable loss shall be suffered by the respondent No. 1 i.e. highest bidder as he is yet to commence any monetary investment.

8. Findings of the learned Appellate court:

- A. **Prima facie case:** relying with the clauses 15 and 27 and the intent of the agreement, the learned appellate Court came to a finding that a



pontoon boat was given on hire to the plaintiff for the purpose to be used as restaurant / floating market and the said boat was also meant for river cruise as an usual programme to be carried out by the plaintiff. It was also the finding of the learned appellate Court that the agreement discloses that the subject matter of the agreement was a boat in a saleable condition which was to be maintained by the plaintiff and same is to be returned at the same condition at the time of returning back to the owners. In view of such clause, the learned appellate Court has come to a conclusion that during these years of the agreement, the plaintiff cannot change the nature and subject matter of the agreement on the basis of additional fact. Accordingly, the learned appellate Court was of the prima facie view that the subject matter of the agreement, the pontoon boat does not fall within the definition of immovable property. Therefore, Section 105 of the Transfer of Property Act is not applicable to the subject of the suit nor the same can be treated to be a house under Section 2(b) of the Assam Urban Areas Rent Control Act.

- B. **Balance of convenience:** dealing with the balance of convenience, the learned appellate Court taking note of the admitted fact that the plaintiff participated in the tender process came to conclusion that she had acquiesced her claim to retain the possession over the suit property on the strength of the agreement, which has already expired. By participating in the tender process she has bound herself to adhere to the outcome of the said tender process and cannot claim unfettered right to remain in possession by taking protection under Section 116 of

the Transfer of Property Act.

- C. **Irreparable loss and injury:** regarding irreparable loss, the learned Appellate Court was of the view that as both the parties had participated in the tender process and respondent No. 1 has become successful bidder, he has a right to enjoy the benefit arising out of the tender process and therefore, depriving him from enjoying the fruit of a lawful process will place him in a more inconvenient state.

9. Findings of this Court:

- I. The basic plea raised in the suit is that as the pontoon has been attached to the earth it has become an immovable property and accordingly, the plaintiff cannot be evicted without following due process mandated under the Transfer of Property Act. Such plea is based on certain report of Junior Engineer, which reveals that the pontoon is at a dry-docked position at the river bank and the bottom plates are cemented.
- II. The alternative claim of the plaintiff is that the suit property has become a house in terms of the definition given in the Assam Urban Areas Rent Control Act, 1972, is based on a fact that the suit property is having some rooms and the same has been assessed for levying property tax including water tax under Section 149 of the GMC Act, 1971.
- III. The agreement shows that the pontoon /vessel, at the time of



entering into the agreement was movable and the State Authorities permitted the plaintiff to do river cruise in the river Brahmaputra for entertainment purpose along with a floating restaurant. There is no prima facie material showing the intention of the lessor that by virtue of change of situation the suit property has become an immovable property. The report of the Engineer suggesting that the pontoon has been cemented to earth shall in the considered opinion of this Court cannot make a prima facie case that the vessel has become an immovable property more so, without such change been recognized by way of any fresh agreement inasmuch as whole claim of the plaintiff is based on the original agreement. Therefore, finding of the appellate Court as discussed hereinabove cannot be faulted with.

- IV. Further, payment of water and property tax shall not ipso facto change the nature of a property from movable to immovable one.
- V. The basic intention of the parties revealed in the contract/lease/hiring agreement, on the basis of which the plaintiff is claiming his right describes the suit property as a vessel with a permission for river cruise and floating restaurant. It further emphasises return of the vessel in the same condition.
- VI. While coming into the finding that the status of the plaintiff/petitioner is that of a tenant at sufferance, his possession is juridical and he can be evicted only in accordance with law and not by force, however, the learned trial Court has not even discussed



the intent of the lease agreement that the initial lease was in respect of a vessel, not in respect of any immovable property. The Court has also not dealt with the issue whether by virtue of the alleged cementing of a vessel, the same will transform itself to an immovable property from a movable one. But the Court presumed the lease to be in respect of immovable property and applied the protection given to tenant under Section 116 of the Transfer of Property Act. Therefore, in the considered opinion of this Court, the decision of the learned trial Court was not reasonable and therefore, this Court cannot find any fault with the finding of the learned appellate Court in holding that the plaintiff has failed to make out a prima facie case.

- VII. The other contention of Mr. Deka, learned counsel for the petitioner that the learned appellate Court has travelled beyond the scope of its jurisdiction by reassessing the materials and interfering with the order of the trial Court only on the ground that a different view is possible, also finds no favour from this Court.
- VIII. There is no quarrel on the principle that injunction orders are passed on the basis of equitable principle and it is a discretionary power. It is equally well settled that in an appeal against such equitable and discretionary order passed under order 39 Rule 1 & 2 of the CPC, 1908, the appellate Court generally shall not interfere with the exercise of discretion of the Court of the first instance and substitutes its own discretion. However, such principle is not

absolute and the first appellate Court shall have jurisdiction and power to interfere with such decision of the Court of first instance, when the order is shown to have been passed arbitrarily or capriciously or perversely or where the Court of first instance had ignored, the settled principle of law regulating grant or refusal of interlocutory application.

IX. In the case in hand and as discussed hereinabove, the learned trial Court has perversely determined issue of prima facie case. Also the learned trial Court ignored the fact that the basic plank of the plaintiff is recovery of investment made, which can be compensated in terms of money. The Court has not at all discussed the effect of participation of the plaintiff in the tender process, which was vital for exercise of discretion in granting an equitable relief. Thus, the learned trial Court has decided the issue of prima facie case, issue of balance of convenience and irreparable loss and injury in ignorance of settled principle of law regulating grant or refusal of interlocutory injunction as well as ignored the vital materials like the different terms and conditions of the lease/hire agreement, the participation of the plaintiff in the tender process etc. Therefore, it cannot be said that the learned appellate court interfered with the order of the trial Court only on the ground that it had a different opinion.

X. The decisions relied on by the learned counsel of the petitioner, therefore, are not relevant in the given facts of the present case.

10. In view of the aforesaid discussions, reasons and decision, the present



civil revision petition stands dismissed. Parties to bear their own cost.

11. While parting with the record, it is made clear that the observations made in this order is for the purpose of determination of the issue of injunction and should not be treated as observations touching the merit of the claim of the parties raised in the suit, which are to be determined in the suit on the basis of pleadings made and evidence led by the parties.

JUDGE

Comparing Assistant