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**(2019) 03 UK CK 0115**

**In the Uttarakhand High Court**

**Case No : Appeal from Order No. 119 Of 2015**

Amit Kumar Rathi

APPELLANT

Vs

Kisan Sewa Kendra

RESPONDENT

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**Date of Decision : 26-03-2019**

**Acts Referred:**

Code Of Civil Procedure, 1908 — Section 9, 151, Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r)

**Citation : (2019) 03 UK CK 0115**

**Hon'ble Judges : Lok Pal Singh, J**

**Bench : Single Bench**

**Advocate : Nikhil Singhal, Siddhartha Singh, Menka Tripathi**

**Final Decision : Allowed**

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## **Judgement**

Lok Pal Singh, J

1) Appeal from order under Order 43 Rule 1(r) of Code of Civil Procedure is directed against the order dated 28.01.2015, passed by Civil Judge (Sr. Div.), Laksar, District Haridwar, in O.S. no. 64 of 2014, Kisan Sewa Kendra vs Amit Kumar Rathi and others, whereby the ad interim injunction application filed by the respondent / plaintiff has been allowed.

2) Brief facts of the case are that respondent no. 2 Hindustan Petroleum Corporation Ltd., Dehradun (for brevity hereinafter referred to 'HPCL') invited applications from the interested persons to open retail outlet of petroleum products on National Highway no. 334A, known as Purkaji-Laksar Highway, in Village Buddhakhara, Pargana Jwalapur, Tehsil Laksar, District Haridwar. The appellant applied for the retail outlet of HPCL. The application submitted by the appellant was considered and after completing all the necessary formalities, HPCL granted the permission in favour of the appellant to open the retail outlet of the petroleum products.

3) Respondent no. 1 / plaintiff filed a suit for prohibitory injunction, being O.S.

no. 64 of 2014, Kisan Sewa Kendra vs Amit Kumar Rathi and others, stating therein, that the plaintiff is running a retail outlet of Indian Oil Corporation situated on land khasra no. 64, measuring 0.365 Hectare in village Pundarpur @ Pipli, Pargana Jwalapur, Tehsil Laksar, District Haridwar and contended that the permission has been granted to the appellant / defendant by respondent no. 2 within 1000 meters from the retail outlet of the plaintiff. Hence, the respondent no. 1 / plaintiff prayed for a relief of prohibitory injunction restraining the defendant not to install his retail outlet within 1000 meters from the retail outlet of the plaintiff.

4) The respondent no. 1 / plaintiff has placed reliance on the guidelines issued by the Indian Roads Congress known as 'Guidelines for Access, Location and Layout of Roadside Fuel Stations and Service Stations (Third Revision)' and would submit that aforesaid guidelines stipulates the norms for opening of the fuel stations. He has also placed reliance on clauses 3.2, 4.5 and 4.5.1. The same are extracted here-in-below for convenience:

"3.2 These norms are applicable to all Fuel Stations with or without other user facilities of rest areas, along un-divided carriage way and divided carriageway sections of all categories of roads i.e. National Highways, State highways, Major District Roads and Rural roads in plain, rolling and billy terrain, and passing through rural and urban stretches including towns and cities. For this purpose hilly or mountainous terrain would be, when the cross slope of the country is more than 25%. The urban stretches, only for the purpose of this guidelines, would be, where a highway passes through towns or cities which have been notified as Municipalities and Municipal Corporations.

4.5 In order to provide safe length for weaving of traffic, fuel stations along highways/roads shall be located at the minimum distance from an intersection (gap in the central median be treated as intersection), as given below. For single carriageway section, these minimum distances would be applicable for both sides. All the distances shall be measured between the tangent points of the curves of the side roads at intersections/the median openings and the access/ egress roads of the fuel stations, as is applicable, in a direction parallel to the centre line of the nearest carriageway of the highway.

The abovementioned distances are applicable for setting up of fuel stations along National Highways, State Highways and Major District Roads. In case of fuel stations along the Rural Roads in plain and rolling terrain, the distance from the intersection with NHs/SHs/MDRs can be reduced to 300 m in place of 1000 m depending on the level of traffic.

#### 4.5.1.1 Non-urban (Rural) stretches

##### (1) Plain and Rolling Terrain

##### (i) Intersection with NHs / SHs / MDRs/City Roads

##### (ii) Intersection with Rural Roads/approach roads to private and public properties

(2) Hilly/Mountainous terrain

(i) Intersection with NHs / SHs / MDRs

(ii) Intersection with all other roads and tracks.

5) An ad interim injunction application was filed by the respondent no. 1 / plaintiff under Order 39 Rules 1 and 2 read with Section 151 of CPC with the prayer that during the pendency of suit ad interim injunction be granted in favour of the plaintiff restraining the defendant not to install his retail outlet at the site, as the defendant is going to open the retail outlet against the guidelines within 1000 meters from the retail outlet of the plaintiff. It is also prayed that, in case, injunction is not granted, the plaintiff would suffer irreparable loss and injury.

6) Appellant / defendant filed his objection denying the averments of the plaint and specifically pleaded that the guidelines are not mandatory in nature and the Allahabad High Court has held in the judgment rendered in Writ Petition no. 43482 of 2010, that the said guidelines are not mandatory. It is further contended that the plaintiff has not come before the court with clean hands and he has no prima facie case, balance of convenience and irreparable loss in his favour, in case, interim injunction is not granted to him. It is further contended that, in case, injunction is granted then the defendant shall suffer irreparable loss and injury.

7) The learned trial court by impugned order has considered the necessary requirements for grant of ad interim injunction i.e. prima facie case, balance of convenience and irreparable loss. The trial court while considering the point of prima facie case has recorded the finding that the plaintiff has proved that he has a prima facie case and answered the same accordingly in favour of the plaintiff. Next point which was decided by the trial court was regarding the balance of convenience. While recording the findings on the second point, the trial court did not record any finding that there is balance of convenience in favour of the plaintiff. Rather, the trial court has recorded the finding that the defendant could not prove the fact that balance of convenience is not in favour of the defendant. The third point considered by the court below is regarding irreparable loss. The trial court did not record any finding that, in case, interim injunction is not granted, the plaintiff would suffer irreparable loss and injury. Instead of recording the finding that there is irreparable loss to the plaintiff, learned trial court has recorded the finding that the defendant could not prove that he would suffer irreparable loss and injury, and finally allowed the ad interim injunction application against the appellant / defendant.

8) Learned counsel for the appellant placed reliance on the judgment passed by Punjab and Haryana High Court, in the case of Bhagwan Oil Company (2000) 0 AIR (P&H) 175, Bhagwan Oil Company, Sonapat vs Rajesh. I have gone through the judgment (supra). Paragraph nos. 11, 12 and 13 of the said judgment are extracted here-in-below for reference:

"11. In the light of above orders of two different Division Benches of this Court, I am unable to see how could the first Appellate Court record that the order of the learned trial court was without merit and against law. No court can certainly compel a person to carry on his business which otherwise is not profitable or would result in his ruin. The oil company is the sole judge of the circumstances and grounds in which it would grant or decline permission for resitement of the petroleum out-let. Unless such permission was stated to be totally against law or was palpably arbitrary, it will not be appropriate for the court to interfere in carrying on of a commercial activity and its location, more particularly when any change therein is specifically permissible under the relevant policy or instructions of the Government. I have no hesitation in noticing that order of the Appellate Court is again ambiguous and lacks clarity.

12. After the order of the trial court dated 01.09.1998 it is claimed by the petitioners herein that they have already resited the retail out-let at the highway G.T. Road and the same is operative. However, the respondents herein contended to the contrary. It was stated at the bar during the course of hearing that even a contempt petition is pending against the petitioners herein. Keeping in view this fact, I would refrain from discussing this issue any further so as to avoid prejudice to either party in the contempt proceedings which are stated to be pending in the court. The learned counsel for the petitioner relied upon the case of Welfare Association, Section 7, Urban Estate, Faridabad vs Rajiv Kapoor, (1996) 4 JT (SC) 94 to contend that they should be permitted to carry on the business at the new site during the pendency of the suit and they would claim no equity at the time of disposal of the suit. The learned counsel also relied upon the observations of the Hon'ble Supreme Court in the case of Mithilesh Garg vs Union of India, AIR 1992 SC 443 in support of his case.

13. The application filed by the plaintiffs does not appear to be entirely bona fide. It certainly has element of bias and malice. Even correct facts have not been stated in the plaint. In the face of the orders passed by the Division Bench of this Court, there was hardly any choice left with the learned trial court to decline the interim injunction which it rightly declined.

The learned first Appellate Court has fallen in error in disturbing the well reached order of the learned trial court."

9) Per contra, learned counsel for respondent no. 1 placed reliance on paragraphs no. 22, 23 and 24 of the judgment rendered by Hon'ble Apex Court in Esha Ekta Apartments (2012) 4 SCC 689, Esha Ekta Apartments CHS Ltd. vs Municipal Corporation of Mumbai & another. The same are extracted here-in-below for convenience:

"22. The submission of Dr. Abhishek Manu Singhvi that the constructed area should be measured with reference to the total area of the plot cannot be accepted for the simple reason that the State Government had sanctioned change of land use only in respect of 13,049.45 sq. m.

23. In view of the above, we may have dismissed the special leave petitions and allowed the Corporation to take action in furtherance of the notices dated 19.11.2005 and orders dated 03.12.2005/08.12.2005, but keeping in view the fact that the flat buyers and their families are residing in the buildings in question for the last more than one decade, we feel that it will be in the interest of justice that the issue relating to the petitioners' plea for regularization should be considered by this Court at the earliest so that they may finally know their fate.

24. We, therefore, direct the petitioners to furnish the particulars of the writ petitions filed for regularization of the construction which are pending before the High Court. The needful be done within a period of two weeks from today. Within this period of two weeks, the petitioners shall also furnish the particulars and details of the developers from whom the members of the societies had purchased the flats. List the cases on 16.03.2012 (Friday)."

10) Relying upon the judgment (supra), learned counsel for the respondent no. 1 would submit that since the findings have been recorded by the learned trial court while allowing the ad interim injunction application, this Court should not upset the findings when the order impugned has been passed in the interest of justice.

11) I have gone through the ratio of the judgment (supra) which shows that the Hon'ble Apex Court has held in that case that the notices issued by the Municipal Corporation shall remain intact, however, the interest of the purchasers has been protected as the flat buyers and their families were permitted to reside in the buildings. The facts and circumstances of the case in hand are not like the facts and circumstances of the judgment (supra). In the aforesaid case the flat buyers were residing in the said buildings and to disturb them with an interim order would definitely affect their rights to a large extent, but in the case in hand, the trial court has granted ad interim injunction in favour of the plaintiff / respondent no. 1, who is afraid that if the defendant / appellant is permitted to open his retail outlet in terms of the NOC granted to him, not being the individual right of the plaintiff / respondent no. 1, the same will be in violation of the aforesaid guidelines which stipulates that a petrol pump be kept at a distance of 1000 meters away so that it may avoid accidents.

12) Another judgment relied by learned counsel for respondent no. 1 is the judgment passed by the Division Bench of Hon'ble Allahabad High Court in U.P. Public Service Commission (2000) 0 AIR (P&H) 175, Bhagwan Oil Company, Sonapat vs Rajesh. On the strength of said judgment he would submit that the Division Bench has decided the hierarchy of law in India.

13) I have gone through the judgment (supra) the ratio of the judgment is that if there is conflict between the rules / statutory notification and the advertisement prescribing the qualification then higher law shall prevail. There is no quarrel in regard to the hierarchy of higher law or law before the trial court as well as

before this Court. Thus, the ratio of the judgment (supra) is also not application to the context of the case in hand.

14) Learned counsel for the respondent no. 1 has also placed reliance on the judgment of this Court rendered in the case of Mohan Filling Station 2005 (59) ALR 94, Mohan Filling Station, Hardwar vs M/s Thakur Das Ramanand Filling Station, Hardwar. The facts of the judgment (supra) are that a suit was filed before the civil court by a retail dealer of the petrol pump restraining the sharing to the petrol pump of the defendant. Injunction was granted in favour of the plaintiff / appellant. When appeal was preferred, said appeal was allowed. It was held that in view of Section 9 of the Code of Civil Procedure, the suit is maintainable before the learned trial court. This judgment is also of no help to the respondent no. 1 as the ratio of this judgment is entirely different from the facts and circumstances of the present case, as the question of maintainability of suit is not involved here.

15) None of the judgments cited by learned counsel for respondent no. 1 have any applicable ratio in the present case.

16) Though it is stated in the guidelines issued by the Indian Roads Congress that the purpose of issuing said guidelines is to avoid the accidents on the National Highways, but the fact remains, that other activities of stopping the vehicles on the Highways for visiting the restaurants, hotels and shops opened on the Highways will also add to the misery of traffic congestion on the Highways as these vehicles will definitely will come to the Highway. Thus, I do not find these guidelines as mandatory. More particularly, when the respondent no. 2 invited the applications for opening retail outlets on a particular area, respondent no. 1 / plaintiff did not raise his voice at that time saying that the respondent no. 2 is inviting the applications within 1000 meters of the location of the plaintiff's retail outlet. The petitioner, who applied for the retail outlet, and completed all the formalities in obtaining the NOCs from the respective departments and the permission has also been issued in his favour.

17) A perusal of the impugned order would reveal that learned trial court though has answered point no. 1 in favour of the respondent no. 1 / plaintiff that he has proved his prima facie case, but while adverting to point no. 2 i.e. balance of convenience, learned trial court did not record any finding that the plaintiff has proved that balance of convenience is in his favour. Rather the court below has recorded the finding that the defendant could not prove that balance of convenience is in his favour. Learned court below has wrongly shifted the burden upon the defendant in this regard and committed illegality in recoding the finding on point no. 2 against the defendant.

18) The next point dealt with by the trial court is in regard to the irreparable loss. Learned court below has recorded the finding that the defendant could not prove what irreparable loss he would have to suffer. The court below again has shifted the burden to prove this point upon the defendant. Thus, the trial court

has also erred in law in deciding point no. 3 against the defendant.

19) It is settled position in law that in a suit filed by the plaintiff and for consideration of ad interim injunction application under Order 39 Rules 1 & 2 read with Section 151 of CPC the burden lies upon the plaintiff to prove the three ingredients, i.e., prima facie case, balance of convenience and irreparable loss caused to the plaintiff, in case, injunction is not granted in his favour. Unless the plaintiff proves all the three ingredients in his favour, the court is not supposed to grant ad interim injunction in favour of the plaintiff. In the present case, there might be a prima facie case in favour of the plaintiff, but neither the plaintiff has proved that there is balance of convenience in his favour, in case, injunction is not granted and he shall suffer irreparable loss and injury. The plaintiff could not prove prima facie case, balance of convenience and in case of non-grant of ad interim injunction he shall suffer irreparable loss and injury, but the court below has wrongly shifted the burden upon the defendant to prove all the three ingredients as envisaged under Order 39 Rules 1 & 2 in regard to the grant of ad interim injunction.

20) In view of the foregoing discussion, I am of the view that firstly the plaintiff could not prove his prima facie, balance of convenience and irreparable loss, in case, injunction is not granted in his favour and, secondly, the trial court has wrongly shifted the burden upon the defendant to prove the ingredients of balance of convenience and irreparable loss. It is settled proposition of law that plaintiff cannot succeed on the weakness of his opponent. The plaintiff for the final or interim relief has to stand on his own legs. The conduct of the plaintiff itself shows that he did not challenge granting of retail outlet at the time when HPCL invited applications for opening the same in respect of Village Buddhakhera, Pargana Jwalapur, Tehsil Laksar, District Haridwar. Thus, at that point of time the plaintiff has waived to resist the opening of the retail outlet in the vicinity of his retail outlet. Since the plaintiff could not prove the three essential ingredients required for grant of ad interim injunction and also the fact that the guidelines issued by the Indian Roads Congress are not mandatory in nature, the trial court has committed illegality in passing the impugned order. Therefore, the impugned order is liable to be set aside. The same is hereby set aside. Appeal from order is allowed. The application made by the plaintiff bearing no. 72C is hereby dismissed. No order as to costs.