

(1990) 03 CAL CK 0031
In the Calcutta High Court
Case No : C.R. No. 120 of 1989

Balailal Mookerjee and Co. (P) Ltd. and Others	APPELLANT
Vs	
Sea Traders Private Ltd. and Others	RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (1991) 1 CALLT 287

Hon'ble Judges : Umesh Chandra Banerjee, J

Bench : Single Bench

Judgement

Umesh Chandra Banerjee, J.—The law in regard to the grant of interlocutory injunction is now well-settled. Lord Diplock's speech in American Cinamid's case (1975 : 1 All ER 504) and the decision of the Supreme Court in the case of United Commercial Bank Vs. Bank of India and Others, as also of this Court in Damodar Valley Corporation Vs. Haripada Das and Others, go in the same vein and establish that only a prima facie case is needed at this juncture without even considering the chance of success at the time of the final disposal of the suit:-A reasonable or even a plausible case would be sufficient at this interlocutory stage., The decision, of this Court in the Preeti Singha Roy Vs. Calcutta Tramways Co. (1978) Ltd., also lend support to the view expressed above. Similar is the position in law as regards the grant of quia timet injunction since the apprehended damage ought not to be allowed to continue and the Law Courts ought to intervene and interfere in a given case to prevent such an apprehension. There is no statutory force in such an order of injunction, but the Courts in this country as well as in England have been following the English Common Law Rule that a threatened action, if designed to affect the plaintiff his right claim in the suit, Civil Courts ought not to hesitate in the matter of grant of an order of injunction so as to maintain status quo on the basis that a substantial question is to be investigated though ultimately plaintiff may fail in its effort to bring home the charges levelled against the defendant.

2. The plaintiff Nos. 2 and 3 and the defendant No. 5 are the sons of one Balailal Mukherjee since deceased. It appears from records that on and from 1868 one Prasanna Kumar Mukherjee carried on business under the name and style of Ram Nath Mukherjee & Co., as the sole proprietor and was engaged inter alia in the business of Stevedoring. After the death of Prosanna Kumar Mukherjee his son Balailal Mukherjee carried on the business as the sole proprietor thereof under the name and style of "Balailal Mukherjee & Co." The sole proprietorship business however continued upto the year 1950., By a deed of partnership dated April 18, 1950 made by and between the plaintiff No. 2, Balailal Mukherjee and the defendant No. 5 the business of the sole proprietorship firm was taken over by a partnership firm under the name and style of "Balailal Mukherjee & Co." The newly constituted firm also carried on with the, business of Stevadores, Ship Chandlars, Marine and Transport Contractors with Balailal Mukherjee having 50% share and defendant No. 5 and plaintiff No. 2 having 25% share each. Subsequently, however, the firm was reconstituted and the plaintiff No. 3 was admitted into the partnership with 25% share out of 50% standing in the name of Balailal Mukherjee.

3. On January 6, 1960 Balailal Mukherjee & Co. Pvt Ltd. was incorporated under the provisions of the Companies Act, 1956 to take over the business of the partnership firm "Balailal Mukherjee & Co." as a going concern and all the partners of the firm were subscribers to the Memorandum of the plaintiff No. 1 with the share-holding of the company being equally divided between the erstwhile partners of the firm. It appears from the records that after the death of Balailal Mukherjee, the share-holding pattern however changed and the plaintiff Nos. 2, 3 and the defendant No. 5 were having 31.667% share for each and Smt. Surabala Mukherjee, wife of Balailal Mukherjee, deceased having 5% share as nominee of her sons being plaintiff Nos. 2 and 3 and the defendant No. 5. It is the plaintiff's definite case however that the plaintiff No. 1 continued to be a partnership firm in the guise of a Limited Liability Company.

4. On the factual score it further appears that by writing dated February 15, 1962 the plaintiff No. 1 was appointed by an agreement in writing between plaintiff No. 1 and one Shinwa Kaiun Kaisha Limited, "Japan, to act as a principal agent in India of the foreign principal in regard to its business in India with authority to collect all freights and also to act as a principal agent in India in matters relating to taxation.;, Subsequently, however, there was also an agency agreement between the plaintiff No. 1 and the abovenoted foreign principal. Admittedly it was the specific term of the agreement that the agreement would be for a period of one year from 1st July 1977" and would be automatically renewed for successive years unless one of the parties notifies in writing to the other at least 90 days before the expiry, of its intention to terminate the same.

5. On the further factual score it emerges that by two letters both dated December 5, 1988 the defendant Nos. 3 and 5 resigned from their offices and severed all connections with the defendant No. 1. The resignations were however

accepted by the plaintiff No. 1 at its Board Meeting held on January 18, 1989. Subsequently, however, by two telex messages dated February 10, 1989, the foreign principal noted above terminated the agency. For convenience sake, the telex containing the termination notice is set out hereinbelow :

"Termination Notice for General Agency agreement.

Further our PLX 5227 of day please take notice that your agreement with our agencies Calcutta, Haldia, Paradeep, Visakapatnam and Kakinada is also terminated with immediate effect.

You are advised to settle our A/c with you uptodate and submit same to us upon receipt of this notice.

Please hand over all relevant A/c Records Books and files of general A/c matters including Cargo Claims etc. Against our vessel to our newly appointed agent M/s. Sea Traders Private Limited as well".

6. The plaintiffs contended that the termination is wrongful, illegal and void since the same is not in accordance with agreement between the parties. The plaintiff has also stated in no uncertain terms that the plaintiffs have not accepted the termination.

7. Subsequently, however, by two letters dated February 15 and February 17, 1989 and a telegram, the defendants demanded the accounting records, books and files, income tax correspondence and the claims together with the customs records relating to the above-noted foreign principal Shinwa Kaiun Kaisha Limited, Tokyo. The plaintiffs contended that there is no obligation on the part of the plaintiff to comply such a request but that has put the plaintiff on an enquiry and on such enquiry the plaintiff came to know that defendant No. 1 M/s. Sea Traders Pvt. Ltd. was incorporated in June 1981 and the defendant No. 5, defendant Nos. 3 to 7 were at all material times and still are employees, shareholders and the directors of the defendant No. 1 and the defendant No. 2 was established in July 1981 with defendant Nos. 3 and 4 as a partner thereof in equal share. The plaintiff's definite case is that the defendant Nos. 1 and 2 were established for the purpose of carrying on rival business to that of the plaintiff No. 1. Plaintiffs contended that there existed a fiduciary duty of the defendant Nos. 3, 4 and 5, but in breach thereof defendant Nos. 1 and 2 came into existence in order to make secret profit and illegal gains. The plaintiffs contended that it is the defendant nos., 1 to 7 which have wrongfully conspired and combined amongst themselves to defame and injure the plaintiffs in its said business and as a matter of fact have wrongfully procured and have induced the breach of the agreement noted above.

8. On the factual score it further appears that the plaintiff No. 1 has had various agency agreements with diverse foreign principals, a list of which has been annexed to the petition.

9. It is the plaintiff's definite case that in the manner the defendants are working

together, it leaves no manner of doubt that the defendants are bent upon procuring the breach of the agreements made by and between the plaintiffs and the above-noted principals. The plaintiffs" apprehended that the defendants Nos. 1 to 7 in collusion and conspiracy with each other will procure such a breach by unlawful means with intention to injure the plaintiffs and as such, plaintiffs instituted the instant suit for perpetual injunctions restraining the defendants from using or disclosing otherwise confidential informations or trade secrets as also from procuring or wrongfully inducing any breach of any agreement made by and between the plaintiffs and the foreign parties noted above. In this application for interim protection also the plaintiffs have prayed for an interim order to the effect noted above.

10. During the course of hearing leave was obtained for further disclosure of documents by the parties by, reason wherefor certain further telex messages both from the defendants as also from the foreign principals, were brought on record and on the basis of the above noted further disclosures the Plaintiffs contended that the factum of procurement of the breach has been categorically established. In order to appreciate the contentions raised it is worthwhile to note a few of them.

To : From : NIPPAN YUSEN KASHIHA SEA TRADERS, CALCUTTA 3-2, MARUN ONCHI 2 CHOME CHIYODAKU TOKYO-100 JAPAN

TEXT :

Roma intending submit guarantee yr behalf for an annual I/T this week end. You may advise them urgently not to apply until your further advise so that you will not be put into inconvenience letter if you intend to terminate their it agency.

Arunava Mukherjee/N. K. Ghosh.

TEXT:

We have information from Deputy Commissioner of I/Tax Range 13, Calcutta that Roma has filed for annual clearance your behalf inspite of your telex advise. We believe they intend create complications to force you to continue using their services this will get you into serious problem when legal action is taken against Roma"s current management therefore request you take immediate action warning Roma of responsibility of all consequences of taking unilateral action without principal"s consent. This is in your best interest because it will leave all options open to you when Roma withdraws application.

Arunava Mukherjee/N. K. Ghosh.

TEXT:

Have stopped attending Roma"s office from 25th February latest position of YRZC returns with RBI substantially remained unchanged though a ZC submitted upto March 87. RBI something still continuing with very little change of finalisation and clearance presently entire matter is handled by Amit you can easily realise

the quality of handling he is capable of. Suggest cancel money agency agreement of Roma Asap and start salvaging your funds from RBI cluntch. I am now devoting full time at C. Traders and shall be at your service to help you to clear up yr necessar state of affairs with RBI to clear yr funds.

N.K. Ghosh/Director

11. On the basis of the aforesaid, the plaintiffs contended that the balance of convenience is entirely in favour of the petitioners for an order of, injunction restraining the defendants from procuring or wrongfully inducing any breach of an agreement made by and between the plaintiffs and the parties referred to in Schedule "J" to, the petition in any manner whatsoever. The plaintiffs have further prayed for an order of injunction restraining the defendant from using or disclosing otherwise confidential informations and trade secrets acquired by them relating to matters contained in the agreement dated 15th February 1962 and July 1, 1977, also for an injunction otherwise carrying on any business by disclosing or using confidential informations or trade secrets acquired from the plaintiffs. A further prayer for injunction has also been made from restraining the defendant from entering into any agreement, arrangements or dealings with any of the principals of the plaintiffs and from carrying on any rival business in competition or otherwise to that of the plaintiffs in any manner whatsoever,

12. Incidentally it is to be noted that the doctrine of "balance of Convenience" mean and imply Convenience or inconvenience of both the parties and the Law Courts will pass order in whose favour the scale tilts and mere affectation of rights however will not do.

13. Mr. Mukherjee appearing in support of the application relied strongly on the observations of Lord Denning in the off cited Court of Appeal decision in the case of *Torquay Hotel Co. Ltd. v. Cousins* reported in LR (1969) 2 Ch. Div. In that decision Lord Denning observed :

The principle of *Lumley v. Gye* (1853) 2 E. & B. 216 is that each of the parties to a contract has a "right to the performance" of it: and it is wrong for another to procure one of the parties to break it or not to perform it. That principle was extended a step further by Lord Macnaghten in *Quinn v. Leathem* (1901) AC 495, so that each of the parties has a right to have his "contractual relations" with the other duly observed. "It is," he said at page 510. "a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." That statement was adopted and applied by a strong Board of the Privy Council in *Jasperson v. Dominion Tobacco Co.* (1923) AC 709. It included Viscount Haldane and Lord Sumner. The time has come when the principle should be further extended to cover "deliberate and direct interference with the execution of a contract without that causing any breach". That was a point left open by Lord Reid in *Stratford (J.T.) & Son Ltd. v. Lindley* (1965) AC 269, 324., But the common law would be seriously deficient if it did not condemn such interference."

Lord Denning however subdivided the principle into three elements :

First, there must be interference in the execution of a contract. The interference is not confined to the procurement of a breach of contract.

Second, the interference must be deliberate.

Third, the interference must be direct. Indirect interference will not do unless unlawful means are used.

In conclusion, Lord Denning observed :

"Other wrongs were canvassed, such as conspiracy and intimidation, but I do not think it necessary to go into these. I put my decision on the simple ground that there is evidence that the defendants intended to interfere directly and deliberately with the execution of the existing contracts by Esso and future contracts by Alternative Fuels so as to prevent those companies supplying oil to the Imperial Hotel. This intention was sufficiently manifest to warrant the granting of an injunction." The form of the injunction was criticised by Mr. Pain, but it follows the form suggested by Lord Upjohn in *Stratford v. Lindley* (1965) AC 269, 339, and I think it is in order.

I find myself in substantial agreement with the judge and would dismiss this appeal."

14. Reliance was also placed on the decision of the Court of Appeal in the case of *Exchange Telegraph Co. Ltd. v. Gregory & Co.* reported in LR 1896(1) QB 147. In that decision Lord Esher M.R., observed that though there must be some damage to support an action for infringement of the plaintiff's common right but it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff the proof of specific damage be not given. Lord Esher however, pointed out that necessary inferences may be drawn as to the affectation of the right and such an order of injunction passed by the Court below was right. In the last noted decision Lord Justice Kay as also Lord Justice Rigby were also of the same opinion.

15. In English Law "A" commits a tort if without lawful justification, he intentionally interferes with the contract between "B" & "C, (a) by persuading "B" to break his contract with "C or (b) by some other act proposes only tortious in itself which prevents "B" from performing its contract, (see *Winfield and Jolowicz on Tort*). It is now a settled law in England through a long catena of cases that the action for enticement is not confined to contracts between master and servant, but it applied also to those for rendering professional services. The later decision of the English Courts made it clear that intentionally and without lawful justification if one induce or procure anyone to break a contract whether of personal services or not is a tort actionable at the suit of the other. Lord Macnaughten in the early 20th Century in *Quinn v. Leathern* (1901) AC 495 observed that if the intention to procure the breach of contract is established, no other mental element is required and malice or spite or ill-will is not necessary at

all.

16. Before coming onto the facts of the case under consideration, two decisions of the English Courts seem to be very apposite, viz, the decision in the case of *Emareld Construction Co. v. Ldwithian* (1946(1) YLR 691) wherein, the defendants knew of the existence of the contract between the plaintiffs and their co-contractors, but they did not know its precise terms, though nevertheless the evidence showed that the defendants have determined to bring the contractual relationship to an end, if they could regardless of whether it was done in breach or not. The Court of Appeal held that this was sufficient to entitle the plaintiffs to any interlocutory injunction. The other decision is *D. C. Thomson & Co. Ltd. v. Deakia* LR (1952) Ch. 646 which also speaks of law in the same vein.

17. Having discussed the law as above, both in this country as well as in England, let us therefore, at this juncture now analyse the factual aspect of the matter under consideration in a little more greater detail so as to appreciate the contentions raised herein. A family business was being carried on in partnership with the brothers. Some of the brothers bring into existence a company for the purpose of carrying on similar and identical business without the knowledge, consent and approval of the other brother. The establishment of a rival business to that of the plaintiff No. 1 by itself is said to be contrary to all recognised principles of law and tortuous in nature. I am however, unable to accept the contention that establishment by itself is an actionable wrong which can be enforced in a court of law. While it is true that there existed a fiduciary duty but that per-se cannot be said to be of such a nature so as to warrant intervention of the law courts in the matter of an grant of an interlocutory injunction. There must always be an additional factor which would prompt a Court to intervene upon prima facie satisfaction of such an additional factor being a deliberate and direct interference with the execution of a contract. Incidentally, it is to be noted that at this stage the findings need only be prima facie in nature and not conclusive as such.

18. It is therefore required to analyse while considering the instant application as to whether there exists evidence of such a deliberate and direct interference to prompt the courts to deal with the matter in its proper perspective. The plaintiff has tendered before this court certain documentary evidence on the basis of which it has been claimed that the defendants have combined against themselves and wrongfully conspired to defeat and injure the plaintiffs in its business. It is the definite case of the plaintiff that the defendants as a matter of fact have procured and induced the breach of agreement with the foreign party to the utter detriment and prejudice of the plaintiff. To telex messages to the following effect ought to be dealt with at this juncture.

The first :

"Understand Roma intending submitting guarantee YR behalf for annual I/T this week end. You may advise them urgently not to apply until your further advise

so that you will not be put into inconvenience. Letter if you intend to terminate their I/T agency.".....

and the second :

".....We have information.....that Roma has filed for annual clearance on your behalf..... We believe they intend create complications to force you to continue using their services. This will get you into serious problems when legal action is taken against Roma's current management. You take immediate action warning Roma of responsibility of all consequences of taking unilateral action without principal's consent.....".

19. The issue therefore, arises for consideration in this interlocutory application as to whether the above noted telex messages can be termed to be unlawful-can it be said to be a mere advise or pursuation to sever all connections with the plaintiff: mere advise or a mere statement of drawing the attention of a state of facts to the foreign principals may not by itself be actionable, but pursuation to sever relationship in my view is actionable. It is nothing but a direct intervention or a direct pursuation which amounts to an interference with the existing relationship with a third party. Adoption of unlawful means strictly speaking cannot be termed to be a relevant factor in the event of there being a direct pursuation or a direct intervention in the matter of continuation of legal relationship. The intent to procure a breach is a good enough evidence for the purpose of an interlocutory application for injunction and in my view, neither malice nor adoption of an unlawful means need be gone into. What is required is the intent to procure the breach and once that is established even only prima facie, question of there being no further factor is of no consequence whatsoever.

20. Can it be said that the telex messages as above be termed to be a mere advise or a mere statement of certain facts ? In my view the answer is in the negative, though however, this view is only prima facie for ,the purpose of this application for interlocutory injunction since the law in regard to the grant of an interlocutory injunction is well settled to the effect that if there is a fair question to be tried at the time of final adjudication of disputes between the parties in the suit the plaintiff is entitled to an order. In my view sufficient evidence exist in the matter in issue for a fair question to be decided at the trial and the facts reveal though prima facie, that there was an attempt on the part of the defendants or at least an intention has been amply evinced in the matter of procurement of a breach of agreement between the plaintiffs and its foreign principals.

21. In the premises, there shall be an order of injunction restraining the defendants or their servants and agents from procuring or wrongfully inducing any breach of any agreement made by and between the plaintiffs and the foreign principals as mentioned in Schedule J to the petition in any manner whatsoever or entering into any agreements with the said parties as it appears from Schedule J to the petition relating to the matters forming subject matter of agreements still subsisting between the above noted parties and the plaintiffs in

any manner whatsoever. There shall also be an order of injunction restraining the defendants from otherwise disclosing or using confidential informations or trade secrets acquired from the plaintiffs. The plaintiffs shall, however, be entitled to costs of this application.