

(2018) 12 DEL CK 0498

In the Delhi High Court

Case No : Civil Suits (COMM) 675 Of 2017

Bharat Heavy Electricals Limited

APPELLANT

Vs

Egyptian Electricity Transmission Company & Ors

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4

Citation : (2018) 12 DEL CK 0498

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Amit Sibal, Prashant Mehta, Vasundhara Bhardwaj, Soham Kumar, Ravinder Sethi, Ajay Monga, Ateev Mathur, Amol Sharma, Jagriti Ahuja, Naresh Thanai, J.P.Singh, Khushboo Singh, Tushar Sharma

Judgement

Jayant Nath, J

IA No.6074/2018

1. This application is filed under Order 39 Rule 4 CPC by defendant no.3 seeking to vacate the interim order passed by this court on 3.10.2017. This court on 3.10.2017 passed an interim order directing the defendants to maintain status quo regarding the bank guarantees. Defendants No.2 and 3 were also restrained from transmitting to defendant No.1 the funds of the Bank Guarantee as noted in that order.

2. The case of the applicant/defendant No.3 in the present application is that defendant No.3 is a foreign entity formed and working in Egypt and it is not amenable to the jurisdiction of this court. The grievance of the applicant is that defendant No.2 is not releasing the amount of guarantees despite the same being invoked by defendant No.3 in view of the interim order passed in these proceedings. It is also pleaded that applicant/defendant No.3 has filed its written statement without submitting to the jurisdiction of this court and has filed the

present application seeking vacation of the interim injunction order dated 3.10.2017. It is pleaded that on the ex parte order been granted to the plaintiff it was mandatory for the plaintiff to deliver to the applicant a copy of the application for injunction together with copies of affidavit, plaint and documents being relied upon by the plaintiff. Plaintiff has failed to supply the same and has failed to comply with the mandatory provision of Order 39 Rule 3 CPC.

3. It is further pleaded that on 19.9.2017 defendant No.1 had made demands on the bank guarantees issued by defendant No.3. Therefore, defendant No.3 in turn made demands under the counter guarantees issued by defendant No.2. vide swift message sent on 28.9.2017. The applicant was it is pleaded obliged to discharge the guarantees issued by it by paying the guaranteed amount to defendant No.1. Hence, it is pleaded that defendant No.3/applicant released fund to defendant No.1 on 20.12.2017. Hence, the present application.

4. I have heard learned counsel for the parties. Learned counsel appearing for the applicant has vehemently submitted that there is no non-compliance of the provisions of Order 39 Rule 4 CPC and hence the interim order ought to be vacated. He relies upon the judgments of the Supreme Court in A.Venkatasubbiah Naidu vs. S.Chellappan and Others, (2000) 7 SCC 695 and; AGI Logistics Inc & Anr. vs. Sher Jang Bahadur & Anr., 163(2009) DLT 137.

5. Learned senior counsel appearing for the plaintiff has pointed out that immediately after the injunction order was passed by this court on 03.10.2017 they had by courier on 10.10.2017 in compliance of the provisions of Order 39 Rule 3 CPC dispatched the complete paperbook to defendant No.3. The paper book was received on 15.10.2017. Reliance is placed on a legal opinion filed by defendant No.3 dated 18.10.2017 which notes that the counsel were approached on 15.10.2017 for its opinion. This document it is pleaded shows that on 15.10.2017 courier has been delivered to the defendant No.3. He also relies upon judgments of the Division Bench in Himalaya Drug Company vs. SBL Limited, 194 (2012) DLT 536 and judgments of this court in Nat Organic Chemicals Industries vs. B.L.Industries, (1988) 34 DLT 232 and Ashwani Pan Products Pvt. Ltd. vs. Krishna Traders, 2012 (128) DRJ 592 to plead that unless grave prejudice is shown by the applicant/defendant No.3 there can be no reason to vacate the interim order.

6. Order 39 Rule 3 CPC reads as follows:-

"3. Before granting injunction, Court to direct notice to opposite party

The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be give to the opposite party:

15[Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by

delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file on the day on which such injunction is granted or on the day immediately following, that day, an affidavit stating that the copies aforesaid have been so delivered or sent.]"

7. The Supreme Court in *A.Venkatasubbiah Naidu vs. S.Chellappan and Others* (supra) held as follows:-

"15. What would be the position if a court which passed the order granting interim ex parte injunction did not record reasons thereof did not require the applicant to perform the duties enumerated in clauses (a) and (b) of Rule 3 of Order

39. In our view such an order can be deemed to contain such requirements at least by implication even if they are not stated in so many words. But if a party, in whose favour an order was passed ex parte, fails to comply with the duties which he has to perform as required by the proviso quoted above, he must take the risk. Non-compliance with such requisites on his part cannot be allowed to go without any consequence and to enable him to have only the advantage of it. The consequence of the party (who secured the order) for not complying with the duties he is required to perform is that he cannot be allowed to take advantage of such order if the order is not obeyed by the other party. A disobedient beneficiary of an order cannot be heard to complain against any disobedience alleged against another party."

8. Hence, the Supreme Court had noted that non compliance of such a procedure cannot be allowed to go without any consequence and the consequence would be that the party who is granted the interim order cannot be allowed to take advantage of such order if the order is not obeyed by the other party.

9. Similarly, this court in *AGI Logistics Inc & Anr. vs. Sher Jang Bahadur & Anr.* (supra) held as follows:-

"14. If the Court were to take a lenient view and not insist on strict compliance with the mandatory requirement of Order XXIX Rule 3, then it would be possible for most plaintiffs to continue to enjoy an ad interim ex parte stay in their favour for any length of time and plead genuine mistake by their counsel for non-compliance. Numerous suits accompanied by applications seeking urgent ex parte reliefs are filed in our courts everyday. The court, on a perusal of the

documents filed before it, forms a prima facie view for grant of an parte ad interim injunction against the opposite party, even in the absence of the opposite party. The Court at that stage has no means of knowing what the version of the opposite party is. The court, therefore, makes such interim order both time bound and conditional. The condition is that there must be compliance with Order XXXIX Rule 3 CPC within the time specified by the court. Although Order XXXIX Rule 3(b) CPC requires the filing of an affidavit of compliance 'on the day on which such injunction is granted or on the day immediately following that day', this Court has been granting a longer time accounting for the fact that the certified copy of the order passed by the court may not be available on the same day or even on the next date. However, there is no question of the plaintiff not being required to comply with the mandatory requirement of Order XXXIX Rule 3 CPC within the time granted by the Court. In the considered view of this Court, a strict compliance with the mandatory requirement of this provision must be insisted and any laxity shown to parties might well defeat the very purpose for which such provision has been inserted."

10. The court was of the view that a lenient view cannot be taken when there is failure to comply with order 39 Rule 3 CPC. In those facts as the plaintiff had not complied with the provisions of Order 39 Rule 3 CPC the interim order passed by this court was vacated.

11. A perusal of the reply filed by the plaintiff here would show that alongwith the reply a copy of the receipt issued by DHL had been attached which is purported to be proof of compliance of Order 39 Rule 3 CPC and which is said to have been dispatched on 10.10.2017. It has been pleaded that the complete paper book was dispatched.

12. At this stage, learned counsel for defendant No.3 raises a controversy that the total weight of the packet is only 0.05 gram and hence the complete paper book has not been sent.

13. In my opinion, the receipt which has been attached to the reply is prima facie proof of dispatch to defendant No.3. The weight of the packet is 0.5 kg. The applicant admittedly was aware of the interim order on 15.10.2017.

14. The next issue is as to whether there was delay in compliance of the Provisions of Order 39 Rule 3 CPC and if so what is the effect thereof. The fact is that compliance is purportedly made one week after the interim order was passed, namely, on 10.10.2017. Order 39 Rule 3 CPC requires that the party who has been granted injunction order must within 24 hours file an affidavit of having dispatched the necessary documents to the other side. In this case there is delay of 7 days. What would be the effect of such delay?

15. Reference in this context may be had to the judgment of this court in Nat Organic Chemicals Industries vs. B.L.Industries (supra). This court while dealing with Order 39 Rule 3 CPC held as follows:-

"8. Coming to the facts of the present case, the injunction was granted on 17th December 1987, 18th December, 1987 was the last working day when the Court functioned. According to the report of the Local Commissioner the defendant became aware of the injunction on 23rd December, 1987 when the Commissioner gave a copy of the injunction order to the representative of the defendant. It is true that there was delay on the part of the plaintiff in complying with the provisions of Order 39 Rule 3 proviso. According to the plaintiff, it got a copy of the order of this Court granting the injunction only on the evening of 18th December, 1987. Provisions of proviso to Order 39 Rule 3 does not require the plaintiff to send copy of the order to the defendant. The requirement of the proviso to Order 39 Rule 3 is to deliver to the opposite party or to send by registered post copy of the application of injunction, copy of the plaint etc. The plaintiff could and ought to have taken necessary action under the said proviso either on the day when the injunction was granted or on the following day. It appears that the plaintiff complied with the provisions of Order 39 Rule 2 proviso only on 26th December, 1987 when the said documents were sent by registered post. Thereafter the Court reopened after vacation and on 4th January, 1988 affidavit as provided by Order 39 Rule 3 proviso was filed by the plaintiff.

9. From the facts enumerated above, it does appear that there has been a lapse on the part of the plaintiff in not complying with the provisions of Order 39 Rule 3 proviso. The question which however, arises is that has that lapse resulted in any serious prejudice being caused to the defendant. As I have already noted above the Court closed for winter vacation after 18th December, 1987 and reopened on 4th January, 1988, though the Registry of the High Court opened on 2nd January, 1988 for the purpose of filing. It is before 2nd January, 1988 that the defendant had been served both with the order of injunction as well as copy of the application for injunction, plaint, affidavit in support of the injunction and copies of the documents on which the applicant relied. As such the defendant could take appropriate action either in filing a reply to the application under Order 39 Rules 1 and 2 and/or filing an independent application under Order 39 rule 4 immediately on the reopening of this Court. The delay in sending the documents to the defendant has not, in my opinion, caused any serious prejudice to the defendant."

16. Facts in the present case are somewhat identical to the facts of the above judgment. In that case, the court concluded as no serious prejudice was caused to the defendant, the interim order passed by this court would not automatically stand vacated. In the present case also, I may note, defendant No.3 has not been able to show what prejudice was caused to him by the delay of 6-7 days in despatch of the documents sent by the plaintiff.

17. However, I need not dwell further into this aspect in view of the conduct of defendant No.3. The case of defendant No. 3 is that they are outside the jurisdiction of this court and are not bound to comply with the interim orders passed by this court. It is an admitted fact that the injunction order of this court

dated 03.10.2017 was known to defendant No. 3 on 15.10.2017 though it claims that it received knowledge of this interim order from defendant No.2. Acting contrary to the interim order defendant No.3 has released payment to defendant No.1. It is manifest that no prejudice whatsoever was caused to defendant No. 3. Defendant No. 3 has not obeyed the interim order passed by this court but defendant No. 3 prays for vacation of the interim order on the ground that there was delay in compliance of Order 39 Rule 3 CPC. It is settled proposition of law that "He Who Seeks Equity Must Do Equity". Defendant No. 3/applicant himself has clearly stated that he is not bound to obey the interim orders. He himself is guilty of misconduct and cannot be heard to say that the plaintiff is guilty of misconduct and hence the defendant should be granted relief. He cannot now say that on non-compliance of the procedural requirement of Order 39 Rule 3 CPC, the interim order should be vacated.

18. I see no merit in the application and the same is dismissed.

IA No.14196/2017 & 15291/2017

List on 1.2.2019 at 3:15 PM for arguments.

IA No.17212/2018

Issue notice to defendant No.3. Learned counsel for defendant No.3 accepts notice. Reply be filed within three weeks. Rejoinder, if any, be filed within four weeks thereafter.

List on 1.2.2019.

CS(Comm.) 675/2017

None has appeared for defendant No.1. Defendant No.1 is proceeded ex parte. Written submissions have been filed by learned senior counsel for defendant No.2.

List on 1.2.2019.