

(1973) 05 CAL CK 0007
In the Calcutta High Court

Chira Ranjan Das

APPELLANT

Vs

Electric Lamp Manufacturer's India (Pvt) Ltd.

RESPONDENT

Date of Decision : 30-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227

Citation : AIR 1974 Cal 119 : 78 CWN 285 : (1974) 2 ILR (Cal) 70

Hon'ble Judges : Nikhil Chandra Talukdar, J

Bench : Single Bench

Advocate : B.K. Roy Choudhury and Narayandas Das, for the Appellant; Noni Coomar Chakravorty and Sailendra Bhusan Buxi, for the Respondent

Judgement

Mr. Justice Nikhil Chandra Talukdar

1. This Rule is at the instance of the plaintiff-petitioner and is directed against an order dated October 5, 1972, passed by Sri D. Dutta Gupta, Fifth Court, Alipore, district 24-parganas, rejecting the petitioner's prayer for ad interim injunction at that stage in connection with his application for injunction filed under order 39. Rules 1 and 2, Code of Civil Procedure, in Title Suit No. 195 of 1972.

2. The facts leading on to the Rule are rather chequered but can be put in a short compass. The case of the plaintiff-petitioner, inter alia is that he was appointed as an assistant store-keeper in the Engineering Department under the Electric Lamp Manufactures (India) Pvt Ltd. with the effect from December 1, 1967, on terms enumerated in the letter of appointment dated November 26, 1967, that following certain disputes between the employer and the employees, a charter of demand was submitted leading on to an appeal filled by the present petitioner before the authorities: that during the pendency of the said appeal the defendant No. 3, S. K. Biswas, Chief Engineer, Electric Lamp Manufactures (India) Pvt. Ltd., issued a letter dated March 27, 1972, stating, inter alia, that the plaintiff was transferred from the Engineering Department to the Packing Department (Lamp Factory) with effect from March 20, 1972, and was directed to report to the

Factory Manager immediately on receipt of the letter: and that being aggrieved by the said order dated March 27, 1972, as being mala fide, illegal and against the principles of natural justice, the plaintiff-petitioner filed Title Suit No. 105 of 1972 on March 30, 1972, in the Court of the learned Munsif, Fifth Court, Alipore, district 24-Parganas, praying, inter alia, for a declaration that the order dated March 27, 1972, was illegal, mala fide and not binding upon the plaintiff. An application for injunction was also moved before the learned Munsif on March 30, 1972, praying for a stay of operation of the order dated March 27, 1972, but he learned Munsif rejected the same. Being aggrieved thereby the petitioner moved a revisional application before this Court and obtained a Rule as also an interim order. The Rule ultimately was heard by Chittatosh Mookherjee J. who by his order dated June 6, 1972, disposed of the Rule with certain directions that the order was not to take effect for two weeks. This constituted the first chapter. On remand the learned Munsif heard the matter in the presence of both the parties on June 17, 1972, and ultimately dismissed the application for temporary injunction by his order dated June 21, 1972. A revisional application followed against the same and A. P. Das J. by his order 27, 1972, discharged the Rule being Civil Rule No. 2003 of 1972, and further rejected the prayer made on behalf of the petitioner for staying the operation of the order for 15 days. This closed the second chapter. Subsequent thereto, a notice dated June 23, 1972, was served on the petitioner calling upon him to show cause to the charges leveled against him as to why disciplinary action should not be taken against him, and pending the enquiry he was suspended from service with immediate effect till the enquiry and the final orders in the matter. On October 5, 1972, the plaintiff-petitioner filed an application under Order 39, Rules 1 and 2, Code of Civil Procedure, supported by an affidavit for an order of injunction restraining the defendant from giving effect to the order of suspension dated June 23, as to allow the petitioner to work at his old post. A prayer written statement also made for an ad interim injunction to the said effect till the disposal of the suit. The defendants having prayed for time to file their objection, the learned lawyer for the plaintiff-petitioner prayed for an order for interim injunction in the meanwhile. The learned Munsif by his order dated October 5, 1972, refused the prayer for interim injunction at the stage and called upon the defendants to file objections by November 16, 1972. The plaintiff-petitioner moved against the said order and obtained the present Rule along with an interim order as prayed for.

3. Mr. B. K. Roy Choudhury, Advocate (with Mr. Narayandas Das, Advocate), appearing in support of the Rule made a three-fold submission. He contended firstly that he learned Munsif had acted illegally and with material irregularity in the exercise of his jurisdiction on the question of irreparable injury; and secondly, that he further erred in his approach to the question of balance of convenience of the parties prejudicing thereby the plaintiff-petitioner. The third and last submission of Mr. Roy Choudhury is that injunction is an equitable relief and the learned Munsif should have allowed the prayer for ad interim injunction on the grounds of justice in favour of the plaintiff-petitioner, who is a harassed

employee in pursuit of justice and who cannot be suspended by the defendants-opposite parties, who have even rules and regulations of service in the absence whereof their action has been arbitrary. In any event, without the order for interim injunction the substantive application for injunction filed by the plaintiff-petitioner under Order 39, Rules 1 and 2, Code of Civil procedure, would be infructuous.

4. Mr. Noni Coomar Chakravorty, Advocate (with Mr. Sailendra Bhusan Buxi, Advocate), appearing on behalf of the defendants opposite parties joined issue. He raised a preliminary objection relating to the maintainability of the present Rule u/s 115, Code of Civil Procedure, besides giving his replies to the three-fold submission made by Mr. Roy Chowdhury on behalf of the plaintiff-petitioner and raising two other contentions on behalf of the defendants opposite parties to oppose the Rule. An affidavit-in-opposition affirmed on January 31, 1973, and an affidavit-in-reply thereto affirmed on February 5, 1973, were filed on behalf of the parties. Several cases were also cited by the learned Advocate appearing on behalf of the respective parties and the same would be considered the proper context.

5. I will take up for consideration the preliminary objection raised by Mr. Chakravorty in the first instance, as it goes to the very root of the case. The order dated October 5, 1972, passed by the learned Munsif, is an order refusing a prayer for ad interim, injunction and, as such, is undoubtedly appealable. The cloud raised at one stage over the point as to whether an appeal would lie before a revisional application is maintainable has since been removed by the imprimatur of judicial decisions and, without multiplying the number, a reference may be made in the first instance to a Division Bench decision of this Court in the case of (1) Saraju Prashad Singh Vs. Gangaprosad Shah and Others, wherein Roxburgh and K. C. Chunder JJ. held that the ad interim injunction passed in that case was clearly made under order 39, Rule 2 and was appealable under Order 43, Rule 1, Code of Civil Procedure. A more recent decision of this Court (2) in the case of Motilal Singh v. Shib Chandra Bose 75 CWN lends assurance to the said proposition, Salil Kumar Datta J. delivering judgment of the Court has observed that the order refusing an ad interim injunction is a final order and is appealable under order 43, Rule 1. Mr. Roy Choudhury, however, submits that the Rule cannot be discharged on that point because the dominant test for consideration in such case is as to whether an appeal against the order did lie to the High Court or to the Court below. If it did lie to the High Court, it came in terms within the mischief of the provision of section 115 of the CPC but otherwise not and the point for consideration in the second group of cases would be whether the ends of justice compelled consideration in cases where the appeal in the Court below was skipped over. Mr. Roy Choudhury relied on the case of (2) Maj. S. S. Khanna (in both the appeals) v. Brig. F. J. Dillion in both the appeals shah J. for himself and A. K. Sarkar J. (as his Lordship then was) delivering the majority judgment observed that -

If an appeal lies against the adjunction directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded.

In a more recent decision of the Calcutta High Court in the case of (3) Rashbehari Dutta and Others Vs. Panchanan De and Others, P. N. Mookerjee, J. and A. K. Dutt. J, followed the aforesaid observations of the Supreme Court and held ultimately that

The expression "no appeal lies thereto" in Section 115 must be interpreted to mean and include only those cases where no appeal, either directly or indirectly, lies to the high Court. In other words, the revisional power u/s 115 of the Code, cannot be exercised by the High Court in cases where an appeal lies to it, either directly, or indirectly, that, is either by way of a first or first miscellaneous appeal or a second or second miscellaneous appeal, its revisional power will not be excluded merely because there may be an appeal to some other court.

This sums up the position in law with regard to a revisional application filed in the High Court, skipping over an appeal which otherwise did lie before the Court below. I will refer in this connection also to another case, viz. (4) Maharaja Sashi Kanta Acharyya Bahadur v. Nasirbad Loan office Co., 63 CLJ 105(107) wherein R. C. Mitter, J. observed as follows: -

In my judgment the revisional power u/s 115 is a bar only when an appeal lies to this Court. The fact that an appeal lay to the lower Appellate Court will not take away the powers of this court to revise the order of the Munsif.

Mitter, J. ultimately proceeded to dispose of the Rule on the well-settled principles of *Ubi jus ibi remedium* (where there is a right there is a remedy). I respectfully agree with the said observations and I hold that the present application cannot be thrown out merely on the ground that an appeal was not preferred before the learned District Judge, 24 Parganas. I must observe, however, that Mr. Chakraborty also, in his fairness, did not ultimately press his preliminary objection in view of the unequivocal observations of the Supreme Court. The preliminary point is accordingly disposed of.

6. I will now turn to the three-fold submission raised by Mr. Roy Choudhury in support of the Rule and the replies made thereto by Mr. Chakravorty. As to the first point raised by Mr. Roy Choudhury, it is pertinent to consider the definition or "irreparable injury" in the backdrop of the law of injunctions. It has been observed by Joyce in *The Doctrines and Principles of the Law of Injunctions* that

an injunction is a writ remedial, issuing by the order of a Court of Equity, in those cases where the plaintiff is entitled to equitable relief.

A person who sought the aid of a Court of Equity is required to satisfy the Court that its interference is necessary to protect him from irreparable or at least

serious injury, before the legal rights could be established at the trial. It is observed in Spelling's Injunction and Other Extra-ordinary Remedies (2nd Edn., Vol.1, Chap.1 section 13) that

in its technical sense, an injury irreparable either that no legal remedy furnishes full compensation or adequate redress, owing to the inherent ineffectiveness of such legal remedy, or that, owing to the delay incident to the prosecution of an action of law to final judgment and obtaining service thereon, such judgment and process would prove fruitless of beneficial results.

A reference may also be made to Halsbury's Laws of England (3rd ed., Volume 21, section 739) wherein it is stated that-

By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages.

In the well-known case of (5) Messers. Begg, Dunlop & Co. Anr. v. Satish Chandra Chatterjee, 23 CWN 677 the Division Bench relied on the observations by Kerr on Injunction (5th edition, para19) and observed that-

By the term "irreparable injury", however, it is not meant that there must be no physical possibility of repairing the injury: all that is meant is that the injury would be a material one and one not adequately reparable by damages.

Mr. Chakravorty has submitted that there is no question of any irreparable injury caused to the plaintiff-petitioner in the facts and circumstances of the case and that the transfer of the petitioner from the Engineering Department is only a transfer from one assignment to another. For ascertaining the true import of the term irreparable injury, a reference may also be made to the observations of Lord Coleridge, C. J. in the case of (6) Mogul Steamship Co. v. Gregor, Gow & Co., (1885) 15 QBD 476 that-

It may be that they will suffer some damages: it may be that they will for a time have a difficulty in carrying on their china trade or may have to carry it at a loss. But injury of that sort differs altogether from the injury which is called "irreparable", to prevent which injunctions have therefore been granted in the Court of Chancery and are now allowed to issue from this Court.

I respectfully agree and on an anxious consideration of the materials on record uptil now it is difficult for me to hold that the refusal of ad interim injunction at this stage before hearing the substantive application for injunction on proper materials would cause irreparable injury to the plaintiff-petitioner. The first contention of Mr. Roy Choudhury, accordingly, fails. The second branch of Mr. Roy Choudhury's submissions does not stand on any better footing. The balance of convenience should not ultimately be an imbalance. It is an essential ingredient of the triple test required for granting injunction, viz., prima facie cases, balance of convenience and irreparable injury or loss. The learned Munsif, as Mr. Chakravorty rightly submitted, did not reject the substantive application for injunction but he merely granted time to the defendants to file requisite

objection and fixed a date for it. He only refused the prayer for ad interim injunction in the meanwhile. An order for ad interim injunction at the said stage will merely hold up the pending proceedings and thereby delay and defeat justice. The balance of convenience at the stage reached is not ultimately in favour of the plaintiff-petitioner and, therefore, the second contention raised in this behalf of Mr. Roy Choudhury also fails. The third dimension of Mr. Roy Choudhury's argument is that the facts and circumstances of the present case bring to light a veritable odyssey on the part of a harassed employee in pursuit of justice. More so, when the defendants opposite parties have got no rules and regulations of service in the absence whereof their action has been arbitrary as they have no right to suspend the plaintiff-petitioner when the matter is pending and that also in his absence. Mr. Chakravorty joined issue and relied on the averments made in the affidavit-in-opposition affirmed on January 31, 1973. The point for my consideration in this Rule is whether the order refusing the ad interim injunction at this stage is a tenable one. The ultimate determination on merits would only be made by the learned Munsif when he disposes of the substantive application for injunction under Order 39, Rules 1 and 2, Code of Civil Procedure. The principles on which the Court acts in such contingencies have been laid down by the various authorities and have also received an imprimatur of judicial decisions which have been referred to before. Sri John Woodroffe in his *The Law Relating to Injunctions* (Tagore Law Lectures, 1897, chapter III, section 35) observed that

the power to issue an ex parte injunction no doubt exists, but the greatest care should be employed in its exercise.

It has also been observed in Halsbury's Laws of England (3rd edition volum, 21, section 763) that-

In cases of interlocutory injunctions in aid of the plaintiff's right, all the Court usually has to consider is whether the case is so clear and free from objection on equitable grounds that it ought to interfere without waiting for the right to be finally established.

It is of course difficult to lay down any general rule and the ultimate consideration depends on a variety of circumstances. I would also refer to sec 815 wherein it has been observed by Halsbury that-

An injunction will not, in general, be granted without notice and that-

The granting of ex part injunction is the exercise of a very extraordinary jurisdiction.

Mr. Chakravorty has further contended in this context that, in the facts and circumstances of the case, it cannot be held that the learned Munsif in passing the order impugned had acted in the exercise of his jurisdiction "illegally or with material irregularity" as alleged or at all. In this context he referred to the case of (7) Keshab Chandra Datta Vs. Ballygunge Estate Pvt. Ltd., wherein the

Division Bench laid down that

unless the error is a jurisdictional error, either of law or of fact, while exercising our powers u/s 115 of the Code, we cannot interfere with the order passed by him.

The principles in this context are now well-settled. The observations of Sri Barnes Peacock in the case of (8) *Rajah Amir Hassan Khan v. Sheo Baksh Singh*, 11 IA 237 that,

whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity,

have been approved of in a series of decisions later on. Sri John Beamont did so in two cases, namely, in the case of (9) *N. S. Venkatagiri Ayyangar v. Religious Endowment Board, Madras*, 76 IA 67 and (10) *Joy Chand Lal Babu v. Kamalaksha Chaudhury & Ors.*, 76 IA 139. The cloud, if any, has finally been removed by the observations of Mahajan, J. (as his Lordship then was) in the case of (11) *Keshardeo Chamaria v. Radha Kishan Chamaria & Ors.*, 53 SCR 136 (153) that the words "illegally" and "material irregularity" do not refer to the decisions arrived at but to the manner in which it has reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. Mr. Chakravorty has further submitted that the present application is not also maintainable under Article 227 of the Constitution of India, the provisions whereof are more circumscribed. He referred to the case of (12) *The Maharashtra State Road Transport Corporation Vs. Babu Goverdhan Regular Motor Service and Others*, wherein it was observed by Vaidialingam, J. delivering the judgment of the Court that-

under Article 226 the High Court has power to quash an order when the error committed by a Tribunal or authority is one of law and that is apparent on the face of the record. Similarly the powers of judicial supervision of a High Court under Article 227 of the Constitution are not greater than those under Article 226 and must be limited to seeing that the Tribunal functions within its authority.

I agree with Mr. Chakravorty and I hold that in the facts and circumstances of the case the present application does not come within the ambit of section 115(c), Code of Civil Procedure, or under Article 227 of the Constitution of India. On an anxious consideration of the facts and circumstances of the present case, I ultimately hold that the refusal to grant an ad interim order by the learned Munsif at the stage reached before a consideration of the substantive application for injunction has not been unwarranted and untenable. The third and last dimension also of Mr. Roy Choudhury's contention accordingly fails.

7. Besides his replies, as above, to the grounds urged by Mr. Roy Choudhury in support of the Rule, Mr. Noni Coomar Chakravorty also raised two other points in

opposing the rule. The first dimension of his contention in this context is that the suit filed by the plaintiff-petitioner in the Court below, being Title Suit No. 195 of 1972, is not maintainable in law, inasmuch as on ultimate analysis the subject-matter of the dispute relates to contracts of personal service. Mr. Chakravorty in this connection referred to the case⁴ of (13) Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi, . Mr. Justice Vaidialingam delivering the judgment of the Court observed: -

A contract for personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or for breach of contract.

His Lordship further held that-

This is the normal rule and that was applied in *Barbar's* case, (1958) 1 All ER 322.

Mr. Chakravorty further referred to the case of (14) *India Air Lines Corporation v. Sukhdeo Rai*, AIR SC 1828 (1833) wherein Shelat, J. delivering the judgment of the Court observed: -

But all rules and regulations made by authorities in pursuance of a power under a statute do not necessarily have the force of law

If validly made such a bye-law has the force of law within the sphere of its legitimate operation.

The Supreme Court proceeded to observe that-

The regulations contain terms and conditions which govern the relationship between the Corporation and its employees. Though made under the power conferred by the statute, they merely embody the terms and conditions of service in the Corporation but do not constitute a statutory restriction as to the kind of contracts which the Corporation can make with its servants or the grounds on which it can terminate them.

It was ultimately held that the case before the Supreme Court, accordingly, did not fall under any of the three well-recognised exceptions and, therefore, the Respondent was only entitled to damages and not to the declaration that the dismissal was null and void. A further reference was made by Mr. Chakravorty to the case of (15) *Shri Vidya Ram Misra Vs. Managing Committee, Shri Jai Narain College*, K. K. Mathew, J. delivering the judgment of the Supreme Court observed that-

To put it in other words, the terms and conditions of service mentioned in Statute 151 have *proprio vigore* no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract, they have no vitality and can confer no legal rights.

It was further observed that-

Statute 151 does not law down any procedure for removal, of a teacher to be incorporated in the contract, so, clause 5 of the contract can, in no event, have even a statutory flavour and, for its breach, the appellant's remedy lay elsewhere.

On a consideration of the facts and circumstances of the present case and, in view of the averments made in the plaint, the dispute according to Mr. Chakravorty ultimately related to a contract of personal service and, accordingly, the application for injunction itself was not maintainable. Mr. Roy Choudhury joined issue and submitted that the facts were distinguishable and the present suit was quite maintainable in law. He further submitted that this was a new point not raised in the Court below by the defendants-opposite parties. A decision on this point is, however, not necessary in view of the ultimate order going to be passed and it is left open for being decided by the learned Munsif in accordance with law.

8. The second dimension of Mr. Chakravorty's contention is based on the findings arrived at by the learned Munsif in his order dated October 5, 1972, to the effect that the prayer for injunction as filed by the plaintiff is based on a different cause of action which should have been made the subject-matter of a separate suit. The steps of reasoning of Mr. Chakravorty in this behalf are that the cause of action which forms the subject-matter of the prayer for ad interim injunction is different from that forming the subject-matter of Title Suit No. 195 of 1972; that a reference to the record would make it abundantly clear that the suit instituted had challenged the order of transfer from one department to another and the prayer for injunction which is only an ancillary one referred to the same; that the present prayer for interim injunction is to restrain the defendants-opposite parties from giving effect to the order of suspension dated June 23, 1972, that was passed after March 30, 1972, when the present suit was instituted. Mr. Roy Choudhury appearing in behalf of the plaintiff-petitioner has contended, however, that the present application for injunction does come within the ambit of an ancillary order subsequent to the order of transfer and, as such, it is a relevant one for which a separate suit need not be instituted. There are cases in support of both the views including that of (16) Rai Charan Mandal & Anr. v. Biswa Nath Mandal & Ors., 20 CLJ 107, where Sir Asutosh Mookherjee delivering the judgment of the Division Bench observed: -

A suit is to be tried in all its stage in the cause of action as it existed at the date of its commencement. An exception to this rule, namely, that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties in the basis of the altered conditions, is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties.

The determination again on this point is not necessary in view of the findings already arrived at before, and I leave it open for decision by the learned Munsif at the time of disposing of the substantive application for injunction under order 39, rules 1 and 2, Code of Civil Procedure. I make it only clear that I have made no observations on the merits.

9. in the result, I discharge the Rule; uphold the order dated October 5, 1972, passed by Sri D. Dutta Gupta, Munsif, Fifth Court, Alipore, in Title Suit No. 105 of 1972, rejecting the prayer for ad interim injunction made on behalf of the plaintiff-petitioner; and I direct that the petition under order 39, Rules 1 and 2 shall be disposed of expeditiously and in accordance with law, giving an opportunity to the defendants to file their objection within three days of the date of receipt of notice of the arrival of the records in the Court below and to the plaintiff to file his reply thereto, if any, within two days thereafter; and dispose of the application for injunction within seven days after the said period.

There shall be no order as to costs. The order shall go down expeditiously.