
(1993) 07 CAL CK 0028
In the Calcutta High Court
Case No : Suit No. 146 of 1993

Makhanlal Natta

APPELLANT

Vs

Tridib Ghosh and another

RESPONDENT

Date of Decision : 02-07-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Contract Act, 1872 — Section 27, 6
Specific Relief Act, 1963 — Section 38, 39, 40, 42

Citation : AIR 1993 Cal 289

Hon'ble Judges : S.K. Hazari, J

Bench : Single Bench

Judgement

1. This is an application filed by the plaintiff Makhadlal Natta, carrying on business under the name and style of "Natta Company Jatra Party", inter alia, praying for an order of injunction restraining the defendants from publishing any announcement or giving any insertion in any newspaper or publishing to the public any statement or announcement that the defendant No. 1 Tridib Ghosh is no longer connected with Natta Company Jatra Party and also for an injunction restraining the defendant No. 1 from joining or continuing to be connected with the defendant No. 2 Bharati Opera and for other reliefs.

2. The case of the petitioner is that the petitioner is the sole proprietor of Natta " Company Jatra Party which carries on business as producers of Jatra and dramatic and musical performance on stage for reward. Defendant No. 1 Tridib Ghosh is an actor and artiste by profession who gives dramatic performances on stage and participates in Jatra for consideration. The further case of the plaintiff is that on 25th October, 1992 corresponding to 8th Kartick 1399 B.S., the defendant No. 1 agreed to work as an artiste and/ or actor with the plaintiffs Jatra Party at a monthly remuneration of Rs. 36,000/- for a period commencing from Durga Puja 1400 B.S. upto Jaistha 1401 B.S. on certain terns and conditions as mentioned in paragraph 3 of the petition. The defendant No. 1 executed an agreement (Chuktipatra) wherein the defendant No. I agreed that

he will not join any other theatre, Jatra or cinema company or help any such party in any manner and if he assists any Theatre or Jatra Party or Cinema Company, then he will be liable to pay damages to the petitioner. In pursuance of the said agreement the defendant No. 1 was paid a sum of Rs. 2105/- as earnest and/or advance. On the same date i.e. 25th October, 1992 the petitioner entered into another agreement with the defendant No. 1 wherein the defendant agreed to work as an actor in plaintiff's Jatra Party from Aswin 1401 B.S. to Jaistha 1402 B.S. and under the said, agreement the petitioner paid the defendant No. 1 a sum of Rs. 1001/- by way of advance and/or earnest money. Under the said agreement the defendant-No. 1 is- also, to receive a sum of Rs. 1500/- per appearance or performance during the period of the second agreement, plaintiff's further ease is that on the basis of the said agreements the plaintiff planned to launch a Jatra performance in the name of "OJON KORA BHALOBASA" under his banner of "Natta Company Jatra Party" to be staged during the coming Jatra season i.e. from Aswin to Chaitra. The petitioner invested a large sum of money for launching the above mentioned new jatra and the investments are in the nature of appointment of writer, preparation of script engagement of other artistes, appointment of singers, appointment of dancers, appointment of orchestra hands, technical supervisors, costumes, design etc.

3. The defendant No. 2 also carries on business of producing Jatra and dramatic and musical performances on stage for reward. The plaintiff was surprised to read an advertisement published in the Ananda Bazar Patrika on 11th April, 1993 wherein it transpired that the defendant No. 1 is to continue with the Jatra Group of the defendant No. 2 as an artiste of the Jatra "PHANSIR MANCHE MATIR MAA" to be launched by the defendant No. 2 and the said Jatra was also scheduled to be performed during the season 1400 B.S. to 1401 B.S. There was another publication on 14th April, 1993 in the Ananda Bazar Patrika intimating the public that the defendant No. 1 would act as an artiste of the Jatra "PHANSIR MANCHE MATIR MAA". Ultimately the plaintiff brought the present suit. Copies of the, Bengali agreements with translations are annexed to the petition and the publications made in the Ananda Bazar Patrika are also annexed to the petition.

4. The defendant No. 1 contested the application by filing affidavit-in-opposition. The defendant No. 1 denied that on 25-10-1992 he agreed to work as an artiste and/or actor with the petitioner's Jatra Party at a monthly remuneration of Rs. 36,000/- for the period commencing from Durga Puja 1400 B.S. upto Jaistha 1401 B.S. It is further stated that since the document prepared by the plaintiff was signed only by the defendant No. 1 and not by both the parties, there was no valid contract between the parties.: It is further stated in the said affidavit that the Manager of the Natta Company paid a sum of Rs. 2001/- as token money to the defendant No. 1 and gave an assurance to pay a further sum of Rs. 25,000/- as an advance and/or initial money and upon receipt of the said sum of Rs. 25,000/- the defendant No. 1 will sign necessary agreement which is to be prepared by the plaintiff on a Rs. 10/- non-judicial stamp paper for performing the Jatra Show in the year 1400 B.S.; but the Manager of the Natta Company did

not comply with the said assurance and did not pay Rs. 25,000/-. The defendant No. 1 wrote a letter dated 19th Agrahayan 1399 B.S. stating that since the plaintiff did not pay the defendant No. 1 the initial amount? for the performance of the Jatra Show, the defendant No. 1 cancelled the said documents and returned the sum of Rs. 2001/- by money order. Thereafter the defendant No. 1 addressed two letters but all the letters returned back to the defendant No. 1. The further case of the defendant No. 1 is that the defendant No. 1 entered into an agreement for service as an actor in the Bharati Opera on 5th March, 1993 corresponding to 21st Phalgun 1399 B.S. for performing Jatra Show in the Bharati Opera during the year 1400 B.S. and onwards. But the plaintiff with mala fide intention issued a publication in the Ananda Bazar Patrika On 14-4-1993 alleging that the defendant No. 1 will perform the Jatra Show for Natta Company for the year 1400 B.S. at the play "OJON KORA BHALOBASA" written by Sri Bhairav Gangopadhyay and the defendant No. 1 filed Title Suit No. 731 of 1993 before the learned 8th Judge, City Civil Court, Calcutta, on 19-4-1993 and moved an application for injunction on 20-4-1993 and an order of injunction was passed restraining the present plaintiff from further making any publication in the name of the defendant No. 1 as an actor for the purpose of performing the Jatra Show under the banner of Natta Company. A copy of the agreement between the defendant No. 1 and the defendant No. 2 is annexed to the affidavit-in-opposition wherein it transpires, that the defendant No. 2 was to pay an annual salary of Rs. 80,000 / - to the defendant No., 11 out of which the defendant No. 2 paid a sum of Rs. 20,000/ - as advance.

5. The defendant No. 2 is also contesting the application by filing affidavit-in-opposition which is affirmed by one Kalipada Ghosh who is the proprietor of "Bharati Opera" and in the said affidavit it has been stated that the purported document is not an agreement under the law since it is not signed by both the parties. Furthermore, the defendant No. 1 having revoked the said agreement by notice dated 4-12-1992, there is no more existence of the said agreement and as such the injunction application is not maintainable at law.

6. It is submitted by Mr. Kapur, learned Advocate for the plaintiff that there was an oral contract between the plaintiff and the defendant No. 1 and thereafter the terms and conditions of the contract was confirmed in the "Chukti Patra" dated 8th Kartick 1399 B.S. It is further submitted that the plaintiff paid Rs.2005/- to the defendant No. 1, which will appear from the form provided by the plaintiff to the defendant No. 1 and signed by the defendant No. 1 on two revenue stamp papers, He also submitted that the contract for performing Jatra can be made orally. But, this is a case where the terms of the contract were reduced in writing in the "Chukti Patra" and the same was confirmed by the defendant No. 1 and on the same day there were two oral contracts and there were two forms, one for the year 1400-1401 and the other for the year 1401-1402 and for the second contract the plaintiff advanced the sum of Rs. 1001/- and then signature of the defendant No. 1 is not denied. Therefore, there was a complete binding contract and the defendant No. 1 cannot say that the contract is not binding. There is no

stipulation in the contract that a sum of Rs. 25,000/- will be payable by the plaintiff as alleged in the affidavit-in-opposition of the defendant No. 1. The said allegation is false and an afterthought.

7. Mr. Kapur relied on a letter dated 4-12-92 written by the defendant No. 1 to the plaintiff, which is annexed to the affidavit-in-opposition of the defendant No. 1, wherein the defendant No. 1 has admitted that he has "agreed to act in the Jatra Party of the plaintiff and since he was not contracted for a long period by the plaintiff, he was not feeling well and the decision which the defendant No. 1 took to act as a player in the Jatra Party of the plaintiff, would be unable to act as a player and, as such, he is returning the sum of Rs.2001/- and as a matter of fact, the defendant No. 1 sent Rs.2001/- by Money Order to the plaintiff. It is submitted by Mr. Kapur that from the said letter it is clear that the defendant No. 1 agreed to act as an actor in the Jatra Party of the plaintiff and then he wanted to get rid of the agreement and there is no mention of the sum of Rs. 25,000/- as appearing in the affidavit-in-opposition of the defendant No. 1, and, as such, the same is an afterthought. Though the defendant No. 1 set three letters to the plaintiff but the plaintiff could not reply as the plaintiff was hospitalised during that period, which will appear from postal endorsements -- "Party addressee in hospital, hence left, 18-12-92."

8. It is further submitted by Mr. Kapur that there is a negative covenant and the defendant No. 1 had agreed not to work in any other theatre or cinema or Jatra during the subsistence of the contractual period and, as such, the plaintiff is entitled to an order of injunction, as prayed for.

9. Mr, Gautam Chakraborty, learned Advocate appearing for the defendant No. 1, submitted that "Chukti Patra" is not a contract. It is a letter containing the signature of the defendant No. 1 and, as such, it cannot be said that the said agreement is a binding contract. It is merely an offer and the offer was withdrawn by letter dated 4-12-92 before the said offer was accepted by the plaintiff.

10. Mr. Chakraborty relied on a decision reported in Viswesardas Gokuldas Vs. B. K. Narayan Singh and Another, wherein it has been held in para 3 of the said judgment:--

"3. This document though worded as an agreement was in point of law an offer only. As a matter of fact, on September 2, 1957 the plaintiffs had not agreed to purchase the mining lease. Until both parties were bound there could be no concluded contract. The promise to keep the offer open for three months was not supported by any consideration. The defendant was at liberty to revoke the offer at anytime before its acceptance by the plaintiffs. On October 31, 1957, the defendant posted a letter to the plaintiffs revoking the offer. This letter reached the plaintiffs on November 6, 1957. Before that date the plaintiffs did not accept the offer either orally or by any letter sent to the defendant."

11. It is submitted by Mr. Chakraborty that the test is that had the defendant

No. 1 filed a suit on the basis of the said "Chukti Patra", whether the defendant No. 1 could have obtained a specific performance of the contract against the plaintiff? It is submitted by Mr. Chakraborty that the answer is "no", as there is nothing in writing that the plaintiff agreed to appoint the defendant No. 1 as an artist or agreed to pay Rs. 36,000 / - per month with other amenities as contained in the said "Chukti Patra". As such, the said "Chukti Patra" was merely an offer and not a contract.

12. Mr. Chakraborty also relied upon a decision reported in Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others, and submitted that the plaintiff may be entitled to damages and not an injunction.

13. Mr. Chakraborty also referred to S. 6 of the Contract Act and submitted that an offer can be revoked if the communication of the said revocation is made before the offer is accepted. It is further submitted by Mr. Chakraborty that this is a speculative suit and since there is no contract, either in law or in fact, the application and the suit are not maintainable in law.

14. Mr. P. K. Das, learned Advocate for the defendant No. 2, refers to S. 27 of the Contract Act and submitted that an agreement by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Mr. Das also adopted the arguments made by Mr. Chakraborty on the point of invalidity of the agreement relied upon by the plaintiff and submitted that even assuming, there was a valid contract, then no injunction can be granted in the present case.

15. Mr. Das relied upon a decision reported in Shree Gopal Paper Mills Ltd. Vs. Surendra K. Ganeshdas Malhotra, wherein it has been held in para 19 of the said judgment :--

"19. It is, therefore, for the Court to decide whether there is a restraint and whether the restraint is valid or justified. The validity of a restraint has to be tested. The tests are twofold. First, what is the restraint directed against?, Secondly, is the restraint justified? A covenant of restraint is designed to protect the legitimate proprietary interests of the covenantee. An employer may protect his trade secrets against their disclosure or revelation by an employee. A buyer of the goodwill of a business may protect it from the competitive activities of the seller. In no case will the law allow a covenant merely to avoid competition. Nor will law allow a restraint wider than the protection of the proprietary interests requires. In the Nordenfelt Case 1894 AC 535 it was held to be reasonable in the interests of the parties to restrain, Nordenfelt from trading in guns, gun mountings or carriages, gun powder, explosives or ammunitions since the business that he had sold for a large sum of money consisted in the manufacture of those very things. This part of the covenant was held to be reasonable in the interests of the public since it secured to England the business and inventions of a foreigner and thus increased the trade of the country. On the other hand the covenant to restrain Nordenfelt from engaging in any business competing or

liable to compete in any way with that for the time being carried on by the company was unreasonable since it was wider than was reasonably necessary to protect the proprietary interests that the company had bought. That part of the covenant was severed from the rest and declared void. In cases of covenant relating to sale of the goodwill of a business restraints are imposed more readily and more widely upon the vendor of a business in the interests of a purchaser for if the vendor is free to Continue his trade with his own customer "the purchaser" may lose much of the value "of "the business of proprietary interests acquired."

16. Mr. Das also relied upon a decision reported in *Superintendence Company of India (P) Ltd. Vs. Sh. Krishan Murgai*, and submitted that in the instant case the negative covenant cannot be enforced.

17. Mr. Das, then, referred to S. 40 of the Specific Relief Act, which is set out here-under:--

"40(1). The plaintiff in a suit for perpetual injunction under S. 38, or mandatory injunction under S. 39, may claim damages either in addition to, or in substitution for, such injunction and the Court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint;

Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach."

and submitted that if no injunction is granted then the plaintiff can very well get the relief by way of damages if he suffers any damages at all. The Court will have to consider the reasonableness of the matter and also the balance of convenience.

18. Mr. Das also relied upon a decision reported in AIR 1984 Delhi 119 (*Modern Food Industries India Ltd. v. S.K. Bottlers Pvt. Ltd.*). It is submitted by Mr. Das that according to S. 42 of the Specific Relief Act the only test to be laid down by the Courts for granting an injunction is the test of reasonableness and not the principles governing issuance of temporary injunction under 0.39, R. 1 and R. 2 of the C.P.C. Firstly it must be reasonable in reference to, the interest of the contracting parties and, secondly, it must be reasonable in reference to the interest of the public. In the said case it-has been held in para 28 as follows:

"An injunction if otherwise properly granted may have the effect of inducing or tempting the employee to go back to the service of his employer but that is not the object for which injunction can be granted by the Court. It must, therefore, be seen whether the enforcement of the negative stipulation is reasonably

necessary for the protection of the legitimate interest of the employer. If it is not going to benefit the employer in any legitimate manner, the Court would not injunct the employee from exercising his skill, training and knowledge merely because the employee has agreed to it. Of course, when we say this we do not for a moment wish to suggest that in such cases sanctity of contract may not be respected or may be violated with impunity. The question is only one of remedy. The employee having agreed to the negative stipulation the negative stipulation must be held binding on him and if there is breach of the negative stipulation, the employer would have his remedy in damages, if any, but the Court would not grant the extraordinary remedy by way of an injunction because by doing so, beyond a mere enforcement of contractual obligation, no legitimate object or purpose would be advanced."

19. I have carefully considered the petition filed by the plaintiff and the documents annexed thereto and the two affidavit-in-opposition filed by the defendant No. 1 and 2 respectively along with the documents annexed thereto and also the affidavit-in-reply filed by the plaintiff. Here, it appears that the defendant No. 1 is to get a monthly salary of Rs. 36,000/- for the first year, i.e., from Durgapuja 1400-1401 and by the second contract i.e., 1401-1402 the defendant No. 1 would be entitled to Rs. 1500/- per performance. During the course of argument it is submitted that there are about 300 performances a year -- Sometimes it is less and sometimes it is more. Sometimes there may be two performances in a day or there may be break. Be that as it may, the fact remains that under the first contract, which is subject-matter of the present suit, the defendant No. 1 would be entitled to Rs. 36,000/- per month from the plaintiff, whereas from the affidavits of the defendant No. 1 and the defendant No. 2 it appears that the defendant No. 2 Bharati Opera, will be paying a sum of Rs. 80,000/- for the whole year 1400-1401 B.S. to the defendant No. 1, which comes to Rs. 6,600/- per month. It is very strange and difficult to understand why the defendant No. 1 wants to perform in the Jatra Party of the defendant No. 2 and is not willing to perform in the Jatra Party of the plaintiff and thereby he will be getting a sum of Rs. 6,600/- and odd instead of Rs. 36,000/- per month.

19A. No doubt, on the question of injunction and principle governing negative covenant, the Court has discretion. In a proper case, the Court has got a right to refuse injunction if the Court is satisfied that there is lack of reasonableness and balance of convenience and inconvenience heavily weighs in favour of the defendant in not granting the injunction. But, in the instant case, after entering into the agreement on 25-10-92 for a monthly salary of Rs. 36,000/- why another agreement was entered into by the defendant No. 1 with the defendant No. 2 in March, 1993 for a monthly salary of Rs. 6,600/- and odd remained unexplained and it appears that the said first contract has not been superseded or annulled. So, I do not find any reasonableness in the case of the defendant No. 1 nor I find any balance of inconvenience in favour of the defendant No. 1. The principles upon which the interim injunctions are issued are well settled. In order to obtain an injunction the applicant must establish a prima facie case that

he will succeed at the final hearing of a probability of success or that there is a serious question to be tried at the hearing, balance of convenience there are other factors which are of considerable importance are fairness and reasonableness. It often happens that a Court of equity is called upon to refuse specific performance on the general grounds of unreasonableness or of unfairness. Whether there has been unreasonableness or unfairness is to be determined by reference to all the circumstances in which the material rights were created or affected. In order to establish the defence of unreasonableness and/or on fairness by defendant it is necessary to point out the matters concerning the creation or qualification of the material " contractual obligation which render it foot fair and honest: to call for its execution, it is not needful that there was any intentional unfairness or dishonesty at that time. In order to lead to the refusal of injunction on the ground of unreasonableness or unfairness it is necessary to show that at the material time the defendant was at such a substantial disadvantage and through that disadvantage, he entered into an agreement of such a nature that in all circumstances it would be unjust and unreasonable to grant the plaintiff relief in question. In this case it is clear that the defendant could not establish a defence of unreasonableness or unfairness. On the basis of the materials placed before me it appears that there is no material circumstances which gives rise to a position of undue influence, hardship or of any kind of the nature. In the absence of special circumstances relief could not be refused on the ground of unreasonableness and unfairness. The agreement in question was reasonable, the terms and conditions were also reasonable and it does not appear to be unjust and unreasonable. On the contrary in the instant case the plaintiff has been able to make out a case that the agreement in question was fair and the agreement in question does not impose any undue responsibility. Circumstances do not appear to be unjust or unreasonable to refuse the injunction. It does not also appear that any substantial disadvantage had been caused to the defendant in such a way that would be unjust to refuse injunction in favour of the plaintiff. It was not a case where the defendant has entered into a contract in ignorance. In the facts and circumstances of the case it cannot be said that the damages can be assessed for the loss or injury the plaintiff may suffer if the injunction is not granted. Damage is a relevant factor for refusing injunction but in the instant case damage is not at all appropriate relief and unless the injunction is granted the plaintiff's right under the contract in question would be prejudiced and irreparable loss may cause to the plaintiff. One of the grounds on which the Court intervened for protection of: the legal rights of the plaintiff is an inadequacy of the damages and in the facts and circumstances of the case it is clear that the damage is not appropriate relief that could be said to be a proper and adequate relief. Where the injury done to the plaintiff cannot be estimated and substantially compensated for by damages or is so serious and material that the restoration of things with their formal condition is the only method whereby justice can be adequately done by granting an injunction. In the instant case the plaintiff has been able to demonstrate that there are substantial grounds for granting an order of injunction for protecting

him against the irreparable injury. It was a just and proper case where the court should grant an order of injunction as prayed for by the plaintiff against the defendant on the basis of well settled principles applying on the facts of the case.

20. In no way it transpired that there was any stipulation to pay an advance of Rs.25,000/- though in the affidavit of the defendant No. 1 a case has been made out that since the advance of Rs.25,000/- was not paid, he had to resign from the contract. I do not find any document or any evidence whatsoever of any nature that the plaintiff was liable to pay Rs. 25,000/- by way of advance. Therefore, the ground for which the defendant No. 1 wanted to avoid the contract is baseless and unfounded.

21. From the facts and circumstances of the case and from the wording of the "Chukti Patra" and the subsequent conduct of the parties, I hold that there was a binding contract between the plaintiff and the defendant No. 1 to hold Jatra performance and the defendant No. 1 agreed to act as a player for the period 1400-1401 B.S. at a monthly salary of Rs. 36,000/- plus other amenities as contained in the said agreement, and the said agreement is enforceable against the defendant No. 1. If there is a subsisting agreement between the plaintiff and the defendant No. 1 then the agreement between the defendant No. 1 and the defendant No. 2 which was entered into for the self same period in the month of March 1993 automatically becomes illegal and void.

22. Considering the facts and circumstances it is ordered that the defendant No. 1 is restrained by an order of injunction from. joining and/or continuing to act and/or perform as an artiste with the defendant No. 2 or any other Jatra Party or cinema or any concern whatsoever during 1400-1401 B.S. The defendants Nos. 1 and 2 are further restrained from publishing and/or announcing and/or giving any insertion in any newspaper any statement or any publication that the defendant No. 1 is connected with the defendant No. 2 and will perform Jatra with any other party other than the plaintiff.

23. The plaintiff is directed to furnish a bank guarantee for a sum of Rs. 2,50,000/-being the six months remuneration and the said bank guarantee will remain in force unless the entire salary at the rate of Rs. 36,000 / - from the month of Durga Puja, October, 1993 to March, 1994 is paid and after the payment of salary for six months the bank guarantee will be reduced by Rs. 36,000/- every month simultaneously with the payment of the monthly salary to the defendant No. 3. If the plaintiff furnishes a bank guarantee as stipulated above, within 19-7-1993 then the interim order will continue and if the plaintiff fails to furnish the said bank guarantee then the interim order will stand vacated and the defendant No. 1 will be at liberty to perform Jatra with the defendant No. 2 or any other company whatsoever and the defendant No. 2 will be entitled to make such publication in the newspaper or any other magazine as they desire.

24. The application is, thus, disposed of. There will be no order as to costs.

25. All parties are to act on a signed copy of the minutes of the operative part of

the judgment on the usual undertaking.

26. Order accordingly.