

(1984) 12 MAD CK 0024
In the Madras High Court

S. Sundaram Pillai and Others

APPELLANT

Vs

P. Govindaswami and Another

RESPONDENT

Date of Decision : 14-12-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 7, 115
Companies Act, 1956 — Section 106(1), 108, 82, 84
Specific Relief Act, 1963 — Section 39

Citation : AIR 1985 Mad 199 : (1987) 62 CompCas 414 : (1984) 97 LW 630

Hon'ble Judges : M.N. Chandurkar, C.J

Bench : Single Bench

Judgement

M.N. Chandurkar, C.J.—This revision petition is direct against a wholly unsustainable order which has the effect of divesting the petitioner

of ownership of 12, 387 shares by an ad interim mandatory injunction which has been almost mechanically passed by the trial court.

2. It is not necessary to go into the merits of the suit which the plaintiff-respondent No.1 has filed in the city Civil Court, Madras, in which

substantially the plaintiff's case is that the first and second defendants (petitioner Nos. 1 and 2) on behalf of defendants Nos. 3 to 21 (petitioner

Nos. 3 to 21) in the suit had agreed to transfer to the plaintiff 16,387 equity shares of M/s. Century Flour Mills Ltd., Madras, respondent No. 2

herein.

3. Respondent No. 2 herein is a public limited company. hereinafter referred to as "the company", in which admittedly defendants Nos. 1 to 20

had obtained 12, 387 shares in pursuance of an agreement between the plaintiff and defendants dated December 12, 1976. One of the terms of

the agreement date December 12, 1976, was that the first, second and third

defendants were to be made directors, out of whom the first defendant was to be the full- time director of the company. According to the plaintiff, these shares were transferred to defendants No. 1 in pursuance of an agreement under which defendant No. 21 had advanced a loan to the plaintiff, and it was agreed that defendant No. 2 was to be eligible only to the interest and other benefits arising out of these shares. The plaintiff has already filed a suit, C.S.No. 453 of 1983, on the original side of this court for a deceleration of ownership of those shares and an injunction has been issued to defendant No. 21 restraining him from dealing in any manner with those 4,000 shares. That order has later been vacated, and an appeal filed by the plaintiff against the order vacating the injunction was later with drawn.

4. The plaintiff's case is that at the annual general meeting held on July 22, 1983, the first three defendants were not elected as directors; and, consequently, the first defendant had automatically vacated office as wholetime director of the company. There is some dispute between the parties with regard to the meeting held on July 22, 1983, and some of the defendants, including defendants No. 21, have already file in this court, company Petition No. 17 of 1983.

5. It may be, at this stage, conveniently state that in Company Application Nos. 397 and 398 of 1983 in Company Petition No. 17 of 1983, by an order dated August 22, 1984, a learned single judge of this court has held that no valid annual general meeting was held on July 22, 1983, and that petitioner Nos. 1, 5, and 6 in the company petition, who are defendants Nos. 1,2 and 3 in the suit , continued to be the directors as per the unamended article 97. The learned judge has further held that since there was no annual general meeting on July 22, 1983, the term of directors had t be reckoned form September 30, 1982. Accordingly, the learned judge made an order that the respondents in the company petition would be restrained by an injunction from interfering in any manner with the three defendants functioning as directors of the company , and the first defendants discharging his duties as a wholetime director of the company. A further injunction was issued against the first respondent in the company petition from convening or holding meeting of the board of the first respondent- company without due notice in writing by registered post

to petitioner Nos. 1,5, and 6 in the company petition. It appears that after this order was passed by the learned single judge, the suit came to be

filed on September 6, 1984, in which surprisingly, no reference has been made to the order of the learned single judge, but averments have been

made to the contrary that the three defendants have ceased to be directors of the company. However, the substantial relief which is asked for in

the plaint is that by way of settlement of some money transactions between the parties through the good offices of one Sri. N.P. Ramaswami

Udayar, an agreement has been arrived at between the parties, by which the first two defendants, on behalf of the remaining defendants, agreed to

transfer 16,387 equity shares of the company to the plaintiff. The details of the holding of each of the defendants were given in the plaint as a

schedule. These are not relevant for the purpose of this revision petition. It was also alleged that some cash payments were made, and since the

defendants were not transferring the shares, the plaintiff was forced to file the suit. In the suit, as many as eight substantive reliefs had been sought.

The main relief is one of declaration that the plaintiff is the owner of 16,387 equity shares of M/S. Century Flour Mills Ltd., Madras. The other

relief is for a direction to the defendants to deposit the share certificates in the court. The third relief is that the defendants should deposit the share

transfer forms of the shares, and the company should be prohibited from entertaining any application for transfer in the name of any person other

than the plaintiff. There was also a prayer for direction to the company to issue duplicate shares in lieu of 12,387 shares standing in the name of

defendants Nos. 1 to 20. In his own right, defendant No. 21 had 4,000 shares. A direction was sought against defendant No. 21 for transferring

those 4,000 shares. An additional relief was sought, namely, that defendants Nos. 1 to 20 should be restrained from dealing in any manner with

12,387 shares by way of sale, hypothecation, pledge, mortgage, transfer, etc., till the final disposal of the suit. An injunction was also sought that

defendants Nos. 1 to 20 should be restrained from exercising their voting rights in respect of the said 12,387 shares.

6. At this stage, it has to be mentioned that in Company Petition No.17 of 1983, the plaintiff in this suit has filed an application for recording the

terms of the compromise, under which, according to the plaintiff, the defendants were under an obligation to transfer the shares. This application is

C.A. No. 583 of 1984 (page 10 of the paper book). In this application, the details as to how the compromise has been arrived at have been given,

and it is stated that several drafts were exchanged between the parties, and the final terms arrived at between the plaintiff and defendants Nos. 1 to

3 were recited. It was stated that the defendants were unwilling to abide by the terms and that is why it became necessary to file the application for

directions under rule 9 of the Companies (Court) Rules, 1959, and Order 23, rule 3, Civil Procedure Code, read with section 402 of the

Companies Act to record the compromise and issue suitable directions giving effect to the terms concluded between the parties. A judge's

summons was taken out. For this purpose, along with the affidavit, "memo of settlement arrived at between the petitioner and respondents" was

filed. This was done in August, 1984, i.e., prior to the suit. However, this finds no reference in the plaint itself.

7. Now, on the day on which the suit was filed, three separate interim applications came to be filed by the plaintiff, viz., I.A. Nos. 16444 of 1984

that that application was received at 5 p.m. on September 6, 1984. Since chronologically, the other two applications bear later numbers, at best,

they must have been received at the same time or a few minutes later. On receipt of these three applications which have endorsements of the

counsel that there is no caveat in the suit register, the Registrar seems to have registered those applications and they were put up before the court

almost immediately. The endorsements made by the Registrar on the three applications were, therefore, to have taken some time, and all this

obviously happened after 5 p.m. The learned judge granted all the three applications by making interim orders almost immediately after they were

filed, and the three orders are identical in terms. It is enough to reproduce the order on I.A. No. 16444 of 1984, which reads as follows :

Heard.. Perused case records. Satisfied that the object of granting the interim injunction would be defeated by the delay. Hence, ad interim

injunction and notice 8.10.84.

Sd/.....

8.10.1984..

8. There is intrinsic evidence in this record to indicate how mechanically these orders have been made without any application of mind, because the

order in I.A. No. 16446 of 1984 renders wholly ineffective the orders made on Applications Nos. 16444 and 16445 of 1984 on the same day

and at the same time. Application No. 16444 of 1984 was intended for the relief of an ad interim injunction restraining defendants Nos. 1 to 20

from disposing of in any manner 12,387 shares by sale, mortgage, gift, pledge or otherwise till the disposal of the suit. This order which is at page

73 of the paper book had in effect frozen the shares. I.A.No. 16445 of 1984 was made of an ad interim injunction restraining defendants Nos. 1

to 20 from exercising voting rights in respect of 12,287 shares of M/S. Century Flour Mills Ltd. The occasion for exercising voting rights would

arise only if and when a meeting of shareholders would be held. This injunction was granted and defendants Nos. 1 to 20 were restrained from

exercising voting rights in respect of the disputed shares. The combined effect of these two orders is that defendants Nos. 1 to 20 were prevented

from exercising their rights as either shareholders or the first three defendants functioning as directors of the company. Also virtually, the effect of

these two orders was that order of the learned single judge in Company Applications Nos. 307 and 308 of 1983 which was made about two

months prior to the date on which the trial judge granted the injunction was completely set at naught. It is also obvious that these orders were

obtained by the plaintiff without disclosing the fact that there was already an order of the High Court holding that the three defendants continued to

be directors of the company.

9. What is surprising is that after having made these orders, the learned judge has also made an order, which is challenged in this revision petition,

on the same day directing Century Flour Mills Ltd., which is described as ""garnishee"" to issue forthwith duplicate shares in respect of 12,387

shares of M/S. Century Flour Mills Ltd. standing in the name of defendants Nos. 1 to 20 to the plaintiff. The learned judge has made a further

order directing that the said 12,387 shares should be immediately transferred in the name of the plaintiff. The result of this order is that there are

now no shares in respect of which the order made on the two earlier applications on which those orders can operate. The effect of this order also

is that the suit filed by the plaintiff substantially stands decreed on the very day on which the suit has been filed at the end of the day. This order of

mandatory injunction has been challenged in this revision petition.

10. When the matter came up for admission, since allegations were made against the learned judge in the memorandum of revision as well as in a

complaint made to me for being dealt with administratively that the injunction order was made after court hours and without notice to the parties

who would be seriously affected by such an injunction, I directed the learned judge to make a report as to how such an order came to be passed

ex parte. The learned judge has sent a report that at the time when he made the order, he was satisfied that the object of granting the order would

be defeated by the delay, and that he bona fide thought that an interim order could be made which could be reversed. In this report, however, he

has further stated that he now realised that he should not have passed the ad interim order of mandatory injunction.

11. Mr. Gandhi, who appears on behalf of the original plaintiff, has, at the outset, contended that the revision petition filed by the defendants should

be dismissed, because no appeal or revision petition lies against an interim order, and he has placed his reliance on a Division Bench decision of this

court in *Abdul Shukoor v. Umarchander*, AIR 1976 Mad 350. The Division Bench has, in *Abdul Shukoor's* case, AIR 1976 Mad 250, held

that no appeal will lie against an ex parte ad interim injunction, but the specific remedy available on Order 39, rule 4, Civil Procedure Code, has to

be availed of by the interdicted party so that a final reasoned order could be obtained in the trial court itself against which the Code has provided

an obvious appeal under Order 43, rule 1(r). That was a case in which against an ad interim temporary injunction restraining the defendants from

interfering with the plaintiff's peaceful possession and enjoyment of the suit property, the defendants filed an appeal before the Subordinate Judge,

and the Subordinate Judge passed an order suspending the interim injunction. This order of the Subordinate Judge was challenged in the revision

petition. While holding that the order of ad interim injunction was not appealable the Division Bench held that the order of the Subordinate Judge

was absolutely without jurisdiction, because no appeal lay against the ad interim order, and the order of the Subordinate Judge was set aside..

Now, it is true that the Division Bench has held in *Abdul Shukoor's* case, AIR 1970 Mad 350, that no appeal will lie against an order of ad interim

injunction. But to accept the contention of the plaintiff in the present case that the defendants should first appear before the trial court and move

the trial court for setting aside the injunction would really have the effect of permitting the plaintiff to have the benefit of an order which is patently

erroneous and to say the least, perverse and has been obtained by suppressing material facts. In any case, the High Court, in the exercise of its

revisional jurisdiction u/s 115 of the Civil Procedure Code, cannot allow an order which amounts to an abuse of the powers vested in the trial court

to stand once such an order comes to the notice of the High court.

12. It is apparent that there are several infirmities in the order of ad interim mandatory injunction made by the trial court. The petition seeking an

order of ad interim mandatory injunction purports to have been "under section 151, Civil Procedure Code, read with Order 39, rule 7". Originally,

the petition appears to have been made under Order 39, rules 1, 2 and 7, but the figures "1, 2" and the word "and" have been struck off. Now, it is

true that if there is power in the court to grant a relief, mention of a wrong provision of law in the petition will not deprive a party of his right to a

relief if he is otherwise entitled to such relief. But when positively, a petition is filed under Order 32, rule 7, Civil Procedure Code, the learned

judge should have applied his mind to the question as to whether the case before him really fell within Order 39, rule 7, Civil Procedure Code.

Order 39, rule 7, Civil Procedure Code, which has the marginal heading "Detention, preservation, inspection, etc., of subject-matter of suit",

enables the court to make three kinds of orders specified in clauses (a), (b) and (c). Order 39, rule 7(1), Civil Procedure Code, reads as follows :

7 (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit, -

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question

may arise therein ;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to

such suit ; and

(c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may

seem necessary or expedient for the purpose of obtaining full information of evidence.

13. Mr. Gandhi, appearing on behalf of the plaintiff, was fair enough to concede that the ad interim mandatory injunction could not have been

asked for under Order 39, rule 7, of the CPC at all. The learned judge has obviously not applied his mind to the correct provision of law under

which the plaintiff was asking for as order of ad interim mandatory injunction.

14. The second infirmity in the order is that the order of ad interim mandatory injunction is made against ""Messrs Century Flour Mills Limited

which is not even a party to the suit. Messrs Century Flour Mills Limited is a public limited company and merely by adding the name of Messrs

Century Flour Mill Limited as respondent No. 22 in the petition for ad interim mandatory injunction, it would not empower the court to issue an

injunction against Messrs Century Flour Mills Limited directing it to issue duplicate shares. In paragraph 10 of his affidavit, in support of his

application in IA No. 16446 of 1984, the plaintiff has stated :

I am taking this application impleading M/S. Century Flour Mills Ltd., having its registered office at Indian chamber Buildings, First Floor,

Esplanade, Madras 600 001, as the garnishee so as to help this Hon"ble Court to pass necessary orders directing the garnishee, M/S. Century

Flour Mills Ltd., Madras, to issue duplicate shares in respect of 12,387 shares standing in the name of defendants Nos. 1 to 20 and also direct the

garnishee, M/S. Century Flour Mills Ltd., Madras, to transfer the above 12,387 shares in the name of the plaintiff and save him from irreparable

loss and damages"".

15. It is not known as to how Messrs Century Flour Mills Limited was described as a ""garnishee"" and in what proceedings, Messrs Century Flour

Mills Ltd. was a garnishee. Technically, assuming that Messrs Century Flour Mills Ltd. was under the control of the plaintiff, the trial court could

not have made an order on order of ad interim mandatory injunction without Messrs Century Flour Mills Limited being a party to the suit. The fact

that an ad interim order of mandatory injunction has been made against the company which is no even a party to the suit, and not against the

defendant itself, indicates that the interim mandatory injunction has been issued in a most casual manner without any application of mind.

16. The learned judge seemed to have completely lost sight of the fact that the ad interim order of mandatory injunction was in this case of a very

peculiar type and the right of the plaintiff to get such an ad interim injunction could not be determined without reference to the provisions of the

Companies Act. The right of a party to have duplicate shares issued or to have his name entered in the register of members of a public limited

company has to be determined with reference to the provisions of the Companies Act. The ""shares"" in a company are movable property. Section

82 of the Companies Act provides that the shares or other interest of any member in a company shall be movable property, transferable in the

manner provided by the articles of the company. Transfer of shares is a matter in respect of which there is an express statutory provision in section

208 of the Companies Act. Section 106(1) which provides that the transfer of a share is not to be registered except on production of the

instrument of transfer, reads as follows :

A company shall not register a transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and

executed by or on behalf of the transferor and by or on behalf of the transferee and specifying the name, address and occupation, if any, of the

transferee, has been delivered to the company along with the certificate relating to the shares or debentures, or if no such certificate is in existence,

along with the letter of allotment of the shares or debentures :

Provided that where, on an application in writing made to the company by the transferee and bearing the stamp required for an instrument of

transfer, it is proved to the satisfaction of the board of directors that the instrument of transfer signed by or on behalf of the transferor and by or

on behalf of the transferee has been lost, the company may register the transfer on such terms as to indemnity as the board may think fit :

Provided further that nothing in this section shall prejudice any power of the company to register as a shareholder or debenture holder any person

to whom the right to any shares in, or debentures of, the company has been transmitted by operation of law.

17. This provision shows that a company is prohibited from registering the transfer of shares in the company, unless there is a proper instrument of

the transfer which is duly stamped and which is executed by or on behalf of the

transferee is delivered to the company along with the certificate relating to the shares or debentures, as the case may be. However, under the provision, if it is proved to the satisfaction of the board of directors that the instrument of transfer signed by or on behalf of the transferor and by or on behalf of the transferee has been lost, the company may register the transfer on such terms as to adamant as the board may think fit, but this can be done only on an application in writing to the company by the transferee and bearing the stamp required for an instrument of transfer. However, if the shares of a company have been transmitted by operation of law, the company is entitled to register as shareholder or debenture holder, the person to whom the shares have been transmitted by operation of law. Sub-section (1A) of section 108 requires the instrument of transfer of shares to be in the prescribed form. There is an elaborate procedure prescribed u/s 108 which has to be complied with before a transferee of a share could have his name registered in the books of the company. The provisions of section 108 would, therefore, show that the title of the transferee to get on the register of shareholders consists in the possession of the share certificates, together with the transfer form signed by the registered holder (see AIR 1926 38 (Privy Council)). The combined effect of section 82 read with section 108 of the Companies Act is that though the shares of a company are "movable" property, in so far as the company is concerned, unless there is a valid deed of transfer in accordance with section 108 of the Companies Act, the transferee cannot claim to have his name entered in the register of members of the company.

18. Even so far as the issue of duplicate shares of the company is concerned, the right to get a duplicate share is regulated by section 84. u/s 84(1), a certificate, under the common seal of the company, specifying any shares held by any member, is prima facie evidence of the title of the member to such shares. Sub-section (2) of section 84 reads as follows : "A certificate may be renewed or a duplicate of a certificate may be issued, if such certificate -

- (a) is proved to have been lost or destroyed, or
- (b) having been defaced or mutilated or torn is surrendered to the company.

19. The learned judge has not considered the effect of section 84 or section 108

of the Companies Act when he went on to make an order that duplicate shares should be issued, and the said shares should be immediately transferred in the name of the plaintiff. The learned judge was bound to consider whether he could issue an injunction against a company which is not a party, and whether the plaintiff was entitled to bypass the provisions of the Companies Act when he asked for the several reliefs as prayed in the plaint. He should have considered these matters on his own even if the plaintiff's counsel had not referred to them.

20. Important questions of law are involved in the suit. The plaintiff's right to get the ownership of the shares in question itself is not beyond doubt.

Such a right is not founded on any document and will have to be decided only on oral evidence. It could not even be prima facie said that the

plaintiff had any present undisputed right on the basis of a compromise which even according to the plaintiff himself, the concerned defendants

were not accepting. There was clear suppression of facts on the part of the plaintiff when he did not disclose to the court the fact that he has applied

for the alleged compromise being recorded in the company court. He has also not disclosed that there was already an adjudication in the company

court before the filing of the suit and that the three defendants continue to be the directors of the company. Injunction is an equitable relief and the

suppression of the above facts was, in my view, enough to deprive the plaintiff of the right to get the relief of injunction.

21. There are not only disputed questions with regard to the present right of the plaintiff to the ownership of the shares in question, but as already

pointed out, important questions of law are involved in respect of the provisions of the Companies Act, and it was wholly improper on the part of

the trial court to make an order of ad interim mandatory injunction in the present case. A mandatory injunction is an order compelling a defendant

to restore things to the condition in which they were when the plaintiff's complaint was made. Salmond defines "mandatory injunction" as an order

requiring the defendant to do a positive act for the purpose of putting an end to a wrongful state of things created by him or otherwise in fulfillment

of the legal obligations, for example, an order to pull down a building which he had already erected to the obstruction of the plaintiff's rights.

Mandatory injunction" are dealt with in section 39 of the Specific Relief Act

which reads as follows :

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the

court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

22. A mandatory injunction can, therefore, be issued in order to compel the performance of certain acts in order to prevent the breach of an

obligation which the court is capable of enforcing. It is true that the obligation may flow from a contract. But then, an agreement enforceable at law

has to be there between the parties on the basis of which the obligation can be ascertained. In the instant case, the agreement on which the plaintiff

is relying is itself to be established.

23. The object of an injunction is prevention (sic) and the maintenance of the status quo ante. Normally, this object is achieved by merely a

restrictive order which forbids the carrying out of a threat of injury, or the repetition of an injurious act. In the given case, however, the acts

committed by the defendant may leave an abiding injury, and it may be difficult to restore the status quo ante unless that which has been done is

undone. A mandatory injunction is issued to undo the effect of an injurious act. A very familiar example of such an injury is where the defendant

erected a building which causes a perpetual obstruction to the access of light to the plaintiff's house, to which amount of light he has a legal right. In

such a case, it is obvious that restoration of the parties to their former condition is impossible except by ordering the demolition of the building.

Sometimes in order to prevent the breach of the legal right, and to compel the performance of certain acts, the defendant is ordered to undo that

which he has done. A mandatory injunction is granted only in rare cases, and normally, a mandatory injunction is granted, if at all, only to restore

the status quo and not to establish a new state of things differing from the state which existed at the date when the suit was instituted. The effect of a

mandatory injunction, so far as the defendant is concerned, is more serious than in the case of a prohibitory injunction, because, where by a

mandatory injunction, the defendant is enjoined to do any particular act, he may be put to expenses and trouble which may be very considerable.

That is why, though the power to grant injunction has to be exercised with great

caution, much greater caution is necessary in the case of making an order of mandatory injunction which is very rarely granted.

24. The present case is an illustration of what harm a mandatory injunction can cause when passed in a casual manner, as a matter of course. The plaintiff has still to establish his right to the shares in question. The factum of the compromise in pursuance of which the plaintiff claims that the defendants had promised to transfer the shares to him is itself the subject-matter of an application under Order 23, rule 3, Civil Procedure Code, before the company court. The averments in the plaint which will have to be established before the plaintiff can claim any right to the shares in question, are disputed questions of fact on which evidence will have to be recorded when the suit goes to trial, because the main issue in the suit relates to the factum of the compromise on which the plaintiff relies. Even on the averments in the plaint, it cannot be said that the plaintiff has made out any prima facie case of a mandatory injunction, and yet the defendants have been summarily divested of the ownership of the shares in question of the value of more than Rs. 10 lakhs by one stroke of the pen of the learned judge. In the view I have taken, the order of mandatory injunction made by the trial court is set aside and Application No. 16446 of 1984 is rejected.

25. Before parting with the case, it is necessary to observe that the trial courts must realise that injunctions, whether prohibitory or mandatory, should not be granted as a matter of course, and the trial court must exercise extreme caution and care before an order of injunction is made, and it has to decide the question relating to the grant of an ad interim injunction according to well-established principles. The trial court, even at the stage of making an ad interim order of injunction, has to apply its mind seriously to the question whether the plaintiff has made out a prima facie case for the grant of an injunction. The circumstance that an ad interim order can be vacated after the defendant appears and contests the correctness of the order of injunction is no justification for issuing an injunction as a matter of course.

26. Accordingly, the order of the trial court made in I.A. No. 16446 of 1984 is set aside. The revision petition is allowed with costs. Counsel's fees are computed at Rs. 500.

27. I am informed that the defendants have already moved the company court

for the transfer of the suit to its file. Giving regard to the manner in which the trial court has dealt with matter, it will be in the interest of justice to withdraw the suit from the court and transfer the suit to the file of the Principal Judge, City Civil Court. Till such time as the company court decides the application for transfer of the suit from the City Civil Court, the suit shall not be tried by the Principal Judge, City Civil Court, Madras. If the suit is not transferred to the High Court, the suit will continue for trial in the court of the Principal Judge.