
(1995) 04 CAL CK 0030
In the Calcutta High Court
Case No : F.M.A.T. No. 3081 of 1993

Smith Stanistreet Pharmaceuticals Ltd.	APPELLANT
Vs	
Prabir Kumar Sengupta	RESPONDENT

Date of Decision : 21-04-1995

Acts Referred:

Constitution of India, 1950 — Article 12, 133(1)(AJ), 134A, 311, 311(2)

Citation : (1995) 2 ILR (Cal) 389

Hon'ble Judges : Satyabrata Sinha, J; Basudeva Panigrahi, J

Bench : Division Bench

Advocate : Pradosh Kumar Mallick, O.K. Sengupta, Shipon Das, S.S. Saha and P. Mitra, for the Appellant; Kashikanta Maitra, Arunava Ghosh and Ranajit Talukdar, for the Respondent

Judgement

Satyabrata Sinha, J.—This appeal is directed against an interim order dated August 26, 1993, passed by Susanta Chatterji J. in CO. No. 10472(W) of 1993, whereby and whereunder the said learned Judge, inter alia, directed that the pendency of the writ petition will not prevent the writ Petitioner from filing a reply to the second show-cause and the Respondent will proceed with the enquiry and pass a final order and communicate the same to the Petitioner, but no effect should be given to the final order without the leave of the Court.

2. The writ Petitioner/Respondent herein filed a writ petition, inter alia, questioning a notice issued to him whereby and whereunder he was asked to show cause as to why he should not be dismissed from services.

3. Before proceeding to consider the rival contentions of the parties, the following fact may be noticed.

A charge-sheet was issued to the writ Petitioner/Respondent on August 6, 1990, where to he submitted his reply on August 27, 1990. A notice of enquiry was served on him on June 5, 1991, whereupon the writ Petitioner raised an objection with regard to the appointment of the enquiry officer. A writ petition

was filed by the Respondent on December 12, 1991, inter alia, questioning the legality or validity of the said charge-sheet as also the propriety of appointment of the said enquiry officer who was said to be below in rank to the writ Petitioner. In the said writ petition an interim order was passed on December 19, 1991, to the following effect: The Respondent shall change the Enquiry Officer and appoint a disinterested officer to be the Enquiry Officer in this case.

The enquiry shall be proceeded strictly in accordance with appropriate service rules and giving all necessary reasonable opportunity to the Petitioner to defend the case. It is for the Respondent to lead evidence first and thereafter the Petitioner shall be directed to enter into the defence.

4. The said order has been acted upon and the writ Petitioner/Respondent has derived benefits there from. The Appellant changed the enquiry officer and upon holding the enquiry, an enquiry report was submitted.

5. Thereafter a second show-cause notice was issued to the Petitioner on August 16, 1993. The Petitioner prayed for time to submit his second show-cause.

6. On August 26, 1993, the Respondent filed the instant writ application whereupon the impugned interim order dated August 26, 1993 has been passed. This appeal has been preferred on December 3, 1993.

7. Mr. Mallick, appearing on behalf of the Petitioners, states that the writ petition was heard on August 12, 1994 and August 22, 1994. The learned Counsel submitted that the interim order was passed by the learned Single Judge should be set aside, inter alia, on the ground that the Respondent company is not a State within the meaning of Article 12 of the Constitution of India.

8. The learned Counsel in this connection has relied upon several decisions of the Supreme Court of India as also of this Court. The learned Counsel contended that so far as the Appellant is concerned it does not have any public duty to discharge, and thus it is not amenable to writ jurisdiction of this Court. It was submitted that even if it be held that the Appellant is a State within the meaning of Article 12 of the Constitution of India, the right of the Petitioner being within the realm of private law as contra-distinguished from public law, the writ petition should not be entertained. Reliance has been placed upon the case of Anupam Ghosh v. Union of India 1991 Lab.I.C. 2261 It was submitted that, in any event, the impugned order passed by the learned trial Judge being not in conformity with the order passed by Ahmed J. on December 19, 1991, the same should be set aside.

9. Mr. Kashi Kanta Maitra, the learned Counsel appearing on behalf of the Respondents, however, submitted that the Appellant being a statutory authority having its existence in terms of Smith Stanistreet & Company Ltd. the Acquisition and Transfer of Undertakings Act, 1977, must be held to be a "State" within the meaning of Article 12 of the Constitution of India. According to the learned Counsel, in that view of the matter, the condition's of services of the Petitioner

must be held to. be protected under the said Act, as the" contract of service has emanated there from. The learned Counsel has stated that the first writ application has already been withdrawn by the writ Petitioner on December 23, 1994. It was submitted. that the writ petition is maintainable also against the second show-cause notice. The learned Counsel in this connection urged that during the enquiry no witness was examined by the company. He in this connection had drawn our attention to the findings of the enquiry authority. According to the learned Counsel, despite the aforementioned findings, the impugned notice has been issued, from a perusal whereof it would appear that the disciplinary authority has prejudged the whole issue.

10. It was next contended that, in any event, the Appellant is not prejudiced by reason of the impugned order inasmuch as it can seek leave of the learned Trial Judge to pass an order in the disciplinary proceedings. It was further submitted that this Court being an Appellate Court should be slow to interfere with the order passed by the learned trial Judge whereby he was exercised his discretion. The learned Counsel in this connection relied upon the decision in the case of Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, wherein it has been held that? And an appellate power interferes not when the order appealed is not right but only when it is clearly wrong. The difference is real though fine.

11. Mr. Maitra further relied upon a. Division Bench of this Court in India Photographic Co. Ltd. v. Soumitra Mohan Kumar 1384 (I) L.L.J. 471 wherein it has been held that? We ourselves might on the same set of facts have come-to a different conclusion then what was arrived at by the learned Chief Judge, but as a Court of appeal, we cannot set aside the decision of the learned trial Judge if the view taken by him is a possible view and that had been arrived at on the application of the correct principles of law. Since we are unable to go so far as to hold that such a view could not have been taken at all as was taken by the learned Chief Judge, we are unable to interfere? with his decision. That principle is the basic limitation of a Court of Appeal in a case like the present one as pointed out by the Privy Council in the case of Rehamatunnissa Begum and Ors. v. Price and Ors. reported in AIR 1917 P.C. 116.

12. There cannot be any doubt so far as the aforementioned proposition of law is concerned, Mr. Maitra submitted that a writ application against the issuance of second show-cause notice is maintainable if it can be shown that the findings arrived at by the enquiry officers is perverse. Reliance in this connection has been made to Monindra Nath Ghosh v. State of West Bengal and Ors. 1980 (I) L.L.J. 46. The learned Counsel further submitted that the scope and object of the present writ application . is absolutely different from that of the first writ application. The Petitioner questioned the charge-sheet as also the appointment of the enquiry officers, in "the earlier writ application, whereas in the present writ application the second show-cause notice is in question.

13. It is further submitted that this Court is a Court of equity and thus it has the

necessary jurisdiction to grant relief to the writ Petitioners in this writ application.

14. For the purpose of disposal of this application, in our opinion, it is not necessary to consider the submissions made by the learned Counsel for the parties in details inasmuch as the aforementioned question would certainly fall for consideration before the learned trial Judge. Before a Court passes an order of injunction, it has not only to consider where there a triable issue has been raised in the writ application but also is required to consider the question of balance of convenience and irreparable injury. We cannot lose sight of the fact that a contention has been raised that the Appellant is not a State within the meaning of Article 12 of the Constitution of India. In the event, ultimately the writ petition is held to be not maintainable by the learned trial Judge, the parties cannot be put back to the same position in view of the fact that the writ Petitioner has been continuing in service by reason of the interim order-passed by the learned trial Judge, whereas in the event of success he can be adequately compensated in monetary terms.

15. In the event the writ petition succeeds, he may be held to be entitled to all consequential benefits including the back wages. Thus the balance of convenience, in our opinion, lies in refusal to grant injunction in such a case. The learned Judge while passing the impugned order has not taken into consideration the said principles of law. It is now also well-known that injunctions in such matters are not usually granted.

16. An employer is entitled to impose punishments upon its employees. If a direction is given that the said order is not to be implemented, it would amount to passing an order of mandatory injunction by reason whereof the writ itself would be held to be allowed. It is also well-settled that the Court normally does not pass an interim order which cannot be granted in the main writ application. Except in a case where the services of an employee are protected under Article 311(2) of the Constitution, or his service conditions are governed by Statute, an order granting specific performance of contract of service is not normally granted.

17. In *Executive Committee of Vaish Degree College, Sahamli and Ors. v. Lakshmi Narain and Ors.* AIR 1976 S.C. 888 the Supreme Court held:

17. On a consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced-and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employee. This rule, however, is subject to there well-recognised exceptions; (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

18. In *Syed Iqbal Ali Imam Raza Vs. State of Bihar and Another* a Bench of five

Judges stated:

26. In *Francis v. Municipal Councilors of Kuala Lumpur*, (1962) 3 All E.R. 633 Lord Morris held?

When there has been purported termination of contract of service, a declaration to the effect that the contract of service still subsisted will rarely be made. This is a consequence of the general principle of law that the Courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the Court.

Besides that, the instant case stands on a different footing from cases where a Government servant is dismissed, compulsorily retired or otherwise removed from service before expiry of his normal tenure of service, say, before reaching the age of superannuation. The age of superannuation of the judicial officers stands extended upto 60 years but is not automatic. The right to continue, in service is not absolute. It is nudged in by the liability to be (compulsorily) retired at the age of 58 on assessment and evaluation, in addition to the compulsory Retirement at the earlier stages under the Service Rules. The Evaluation Committee decided not to extend the benefit of the increased superannuation age to the Petitioner. The decision of the Committee is subject to ratification/enforcement by the Full Court. If the Full Court ratifies/endorse the decision of the Evaluation Committee it will necessarily relate back to 31st January 1994, i.e., the date on which the Petitioner attained the age of 58 years. Granting consequential relief by directing that the Petitioner will be deemed to continue in service will result in anomalous situation and will be contrary to the judgment of the Supreme Court. The Petitioner cannot claim any right except these under the two judgments of the Supreme Court. Public interest and expediency should deter this Court giving any such relief at this stage. I am satisfied that no consequential relief of any kind can be granted.

19. Moreover, from the facts set out hereinbefore, it is evident that Mr. M.R. Mallick J. passed the aforementioned interim order on December 19, 1991.

20. The writ Petitioner did not question the said order by preferring an appeal. The said order was operative when the Petitioner filed the second writ application on August 26, 1993.

21. Thus, conflicting orders had been passed. It is now well-known that no Court passes any interim order which would be contrary to or inconsistent with another interim order which has been passed by a Court of competent jurisdiction.

22. In *Law of Injunctions* by Lewis & Spelling, the law has been stated in the following terms:

Conflict and Loss of Jurisdiction.

Where a Court having general jurisdiction and having acquired jurisdiction of the

subject-matter has issued an injunction, a Court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a Court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject-matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one Court having refused to grant an injunction, while such refusal does not exclude another co-ordinate Court of Judge from jurisdiction, yet the granting of the injunction by a second Judge may lead to complications and retaliatory action. The jurisdiction to afford the relief is not lost by the fact that during the pendency of the suit the act which it was sought to enjoin, has been done, in such case the Court may require restoration by the Defendant of the status existing at the time jurisdiction was acquired, even through no preliminary injunction or restraining order had been issued. And speaking generally, it may be said that though a party filing a bill for an injunction may fail to procure a preliminary injunction, yet any act after the Court has acquired jurisdiction will be subject to the power of the Court to compel restoration of the former condition or to enforce some other proper relief. On the same principle the jurisdiction one acquired is not ousted by the fact that pending the "suit the right to a permanent injunction is lost by something, transpiring beyond control of the Court and parties to the litigation.

23. Keeping in view of the fact that a Court has to maintain a judicial comity, in our opinion, the order impugned in this appeal cannot be sustained.

24. Before parting with this case, we may note that the interlocutory order has to be passed upon taking into consideration all relevant facts and legal principles. Before an interlocutory order, can be passed particularly an ex parte interim order, the legal principles, namely, existence of prima facie case, balance of convenience and irreparable injury have to be considered.

25. Reference in this connection may be made" to State of Uttar Pradesh and others Vs. Km. Ramona Perhar, wherein it has been held:

This Court has" emphasised in several decisions that passing of interim orders - more particularly of a mandatory nature like the present one - is neither a matter of course nor a matter of charity. The power to grant interim orders is coupled with the duty to consider all the relevant facts and legal principles relevant in that behalf. Admissions to educational institutions should not be granted by interim orders, at any rate, not without fully hearing the Respondents.

26. The Supreme Court has also, inter alia, held that an ex parte interim order should not be passed which would be prejudicial to the Respondents.

27. In Morgan Stanley Mutual Fund Vs. Kartick Das, it has been held that no ex parte interim order should be passed which may seriously prejudice the Respondents. The law has been stated thus:

As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the Court in the grant of ex parte injunction are:

- (a) whether irreparable or serious mischief will ensue to the Plaintiff;
- (b) whether the refusal or ex parte injunction would involve greater injustice than the grant of it would involve ;
- (c) the Court will also consider the title at which the Plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented ;
- (d) the Court will consider whether the Plaintiff had acquiesced for sometime, and in such circumstances it will not grant ex parte injunction;
- (e) the Court would expect a party applying for ex parte injunction to show utmost good faith in making the application ;
- (f) even if granted, the ex parte injunction would be for a limited period of time ;
- (g) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

28. For the reasons aforementioned this appeal succeeds and the order dated August 26, 1993, passed by the learned trial Judge is set aside. However, it would be open to the writ Petitioner to question the order of punishment which may be imposed upon him, if any, by filing an application for amendment of the writ petition.

29. The learned trial Judge is also hereby requested, keeping in view the peculiar facts and circumstances of this case to dispose of the said writ application at an early date and preferably within a period of one month from the date of communication of this order.

30. In the facts and circumstances of the case, there will be no order as to costs.

(Later)

31. After the judgment was delivered the learned Counsel for the writ Petitioner/Respondent prays for stay of the operation of the judgment as well as the certificate for leave to appeal in terms of Article 133(1)(AJ) read with Article 134A of the Constitution of India. In our opinion, no substantial, question of law of general importance is involved, inasmuch as this appeal has been decided in terms of the decision of the Supreme Court of India.

32. In this view of the matter, the prayer of the learned Counsel for the writ Petitioner/Respondent to stay of operation of the judgment as well as the certificate for leave to appeal before The Supreme Court is refused.

Basudev Panigrahi, J.

33. I agree.