(1983) 05 GAU CK 0012

In the Gauhati High Court

Case No : M.A. (F) Nos. 1, 2 and 15 of 1983

Tapan Kumar Guha; Md.Shamsul Huda APPELLANT

Vs

Ballabh Narayan Daga and Other RESPONDENT

Date of Decision : 23-05-1983

Acts Referred:

Civil Procedure Code, 1908 — Order 39 Rule 2, Order 39 Rule 3, 151, 94
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2, Order 39 Rule 3, 151, 94

Citation : (1983) 2 GLR 197

Hon'ble Judges : D.Pathak, C.J. and K.N.Saikia, J

Bench : Division Bench

Advocate : A.K.Choudhury, B.K.Jain, B.R.Dey, D.K.Deka, N.M.Lahiri, J.P.Bhattacharjee, P.K.Goswami, S.K.Sen, M.Z.Ahmed, Advocates appearing for Parties

Judgement

Saikia, J.—These three analogous appeals are from the common judgment dated 22.11.82 of the District Judge, Manipur at Imphal making the ad interim injunction absolute, in the matter of the Original suit No. 47 of 1982 in the Court of the Subordinate Judge No. II, Manipur, later transferred to the District Judge, Imphal

2. Original Suit No. 47 of 1982, hereinafter referred to as the suit was filed in the Court of the Subordinate Judge No. II, Manipur, later transferred to that of the District Judge, Imphal by Shri Ballabh Narayan Daga, rule proprietor of M/s. B. N. Daga, Gauhati and of M/s. Jhankar Films, Dharamsala Road, Imphal, as plaintiff against (1) Shri Tapan Kumar Guha, rule proprietor of M/s. Lal Films, No. 1, British India Street, Calcutta; (2) Md. Samsul Huda, rule proprietor of M/s. S. H. Films Production, Aminpatti, Nowgong, Assam; (3) M/s. Yakohoma Production, a firm carrying on business at 36, Sea Palace, Juhu Tara Road, Bombay400049 (4) M/s. Hind Cinema, a business firm carrying on Film Exhibition business, at Ganesh Chandra Avenue Calcutta, as defendants and (5) Eastern India Motion Pictures Association, having its registered office at 98E, Chowringhee Street, Calcutta700072, as proforma Defendant. It has been stated in the plaint, inter

alia, that the plaintiff has teen running his cinema business under the name and style of Jhankar Films at Dharamsala Road, Imphal the first defendant and the second defendant carry on cinema business in the territories of Manipur, Assam, Nagaland, Mizoram, Meghalaya, and Arunachal Pradesh the third defendant is the producer of the film ''KHUDDAR''; the fourth defendant is a cinema exhibitor and the 5th (Proforma) Defendant is an Association of persons engaged in the production, distribution and exploitation of cinematograph films and is registered under the provisions of the Companies Act, 1956.

3. It has been averred in the plaint that pursuant to an agreement arrived at between the first defendant on the one hand and the third defendant on the other, the latter as the producer of the film ''KHUDDAR'', granted to the first defendant the rule right of its distribution, exhibition and exploitation in the territory which is known to the film trade as ''eastern circuit'', which includes the territory of Assam, Manipur, Nagaland, Mizoram, Meghalaya and Arunachal Pradesh that the first defendant in his turn by an agreement dated 7.8.82 between him and the plaintiff assigned to the plaintiff the rule rights of distribution, exhibition and exploitation of the said film ''KHUDDAR'' for the ''Assam territory'' which includes, Manipur, Nagaland, Mizoram), Meghalaya, Assam and Arunachal Pradesh, which is referred to in the plaint as the contracted territory, for consideration of a sum of Rs. 7,25,000/ Rs. 25,000/baving been paid on signing the said agreement and the balance payable ten days before the release of the picture at Calcutta and he applied for registration of the agreement to the fifth defendant. It further averred that on or about 13th or 14th August, 1982 the plaintiff learnt that the 2nd defendant also made an application to the 5th defendant for the registration of his agreement with the 1st defendant dated 14.4.82 for distribution, exhibition and exploitation of the same picture in the same contracted territory. The suit prays for:

(a) Declaration that the plaintiff has rule and exclusive copyrights and the right to distribute, exhibit and exploit the said picture ''KHUDDAR'' in the said contracted territories;

(b) restraining by a parpetual injunction the defendant and agents from in any manner either directly or indirectly committing breach of the said agreement dated 7th August 1982 and/or infringement and/or interference of the plaintiff''s aforementioned rights including copyright in the said picture "KHUDDAR" insofar as it extends to distributing, exhibiting and exploiting the said picture in the said territories including the release of the same at Calcutta on 10.9.82;

(c) a decree for a mandatory injunction and order directing the 1st defendants to take all steps to have the said rights of the plaintiff registered with the 5th defendants association and directing the 2nd defendant to withdraw his application for registration of his alleged rights with the 5th defendants association and the 5th defendants to register the said rights of the plaintiff with the 5th defendant;

(d) a decree that the defendants, their servants and agents be restrained by perpetual order and injunction from in any manner releasing the said picture in the territory of Assam as known in the film trade which includes Manipur, Nagaland, Mizoram, Meghalaya, Arunachal Pradesh and NEFA or at Calcutta before the first deliveries of 6 prints of the said picture "KHUDDAR" to the plaintiff;

(e) pending the hearing and final disposal of the suit the defendants, their servants and agents be ordered and restrained by an interim order in terms of prayers (b), (c) and (d) above;

(f) For interim and ad interim relief''s in terms of prayers (c) above;

(g) For costs of the suit be provided for; and

(h) For such other and further relief''s as the nature and circumstances of the case may require.

4. In the suit the plaintiff filed applications, which were registered as Judicial Misc. Case No. 108 of 1982/11 of 1982 and No.III of 1982/12/82/56/82 for ex parte orders of interim injunction.

5. Judicial Misc. Case No. 108/82/12/37 of 1982 was registered on the application of the plaintiff for passing an order under Order 39 Rules 1, 2 and 3 read with Sections 151 and 94 of the Civil Procedure Code praying for an exparte interim injunction against the defendants, their agents and their privies from releasing the said picture ''KHUDDAR'' on 10.9.82 at the picture house of defendant No. 4 or any other day at any picture house before the delivery of the prints to the plaintiff or till the disposal of the suit. The constituted Attorney of the defendant No. 1 filed an affidavitinopposition thereto annexing a copy of their agreement dated 14.4.82 with the defendant No. 2 and other relevant documents. The plaintiff filed a written objection thereto. Judicial Misc. Case No. III of 1982/12/82 was an application by the plaintiff praying for interim injunction orders. One Sukesh Das, constituted Attorney of the defendant No. 1 filed an affidavitinopposition thereto annexing a copy of their agreement with defendant No. 2 dated 14th April, 1982.

6. It was stated in the applications of the plaintiff that unless the defendants were restrained from committing breach of the said agreement, directly or indirectly, by releasing the said picture at the picture house of defendant No. 4 and also from releasing and exhibiting the said picture within the eastern region comprising of Bihar, Orissa, West Bengal, Assam, Manipur etc. the plaintiff would suffer irreparable loss that the balance of convenience was in his favour. On the said applications exparte orders of interim injunction were passed by the learned Subordinate Judge No. II on 7.9.82 and 15.9.82 where after the suit along with the connected miscellaneous cases were transferred.

7. Defendant No. 1 filed an application under Order 39 Rule 4 of the Code of Civil Procedure for discharging and/or varying and/or setting aside the ex pane ad

interim order dated 15.9.82 and a written objection thereto was filed on behalf of the plaintiff. An application was also filed by the defendant No. 2 under Order 39 Rule 4 of the Civil Procedure Code read with Section 151 of the Civil Procedure Code for vacating the ex parte order obtained by the plaintiff and the same was registered as Judicial Misc. Case No. 35 of 1982 annexing photostate copies of their agreement dated 14.4.82 and other relevant documents. These were the materials before the learned District Judge for consideration while passing the impugned order.

8. In the impugned judgment it was rightly observed that the considerations which should weigh with the Court in deciding the prayer for temporary injunctions are (i) whether the plaintiff has made out a prima facie case (ii) whether the balance of convenience lies in favour of the plaintiff and (iii) whether the plaintiff would suffer an irreparable injury if the prayer for temporary injunction is disallowed, and that all the three conditions must coexist before the relief sought can be granted.

9. It was also argued before the Court that the Court had no jurisdiction to entertain the suit and for that matter the application for injunction. The learned District Judge, on consideration of the materials and submissions before him has held that his Court has both territorial and pecuniary jurisdictions to entertain the plaintiff''s suit that there is a serious question to be tried and therefore the plaintiff has a prima facie case and that plaintiff is likely to suffer irreparable loss if the injunction is refused. Accordingly the ex parte orders of temporary injunction passed on 7.9.82 and 15.9.82 have been made absolute by the impugned judgment dated 22.11.1982.

10. From the aforesaid judgment the first defendant Shri Tapan Kumar Guha has filed M.A. (F) Nos. 1 and 2 of 1983 impleading the plaintiff as well as the other defendants in the suit as respondents. The second defendant has filed M.A. (F) No. 15 of 1983 impleading the plaintiff and the other defendants as respondents. These three appeals are, therefore, heard analogously and disposed of by this common judgment.

11. Mr. N.M. Lahiri, the learned Advocate General, Meghalaya, appearing for the appellantsecond defendant, submits that ''while making the order of ad interim injunction absolute the case of the second defendant was not at all considered and this has materially prejudiced his interest. Counsel submits that the learned Court considered the case of the plaintiff visavis the first defendant without bearing in mind the vital interest of the second defendant, who has already paid a huge sum to the first defendant under the agreement as such he would suffer irreparable injury if the injunction is not vacated. It is also submitted that by the impugned order the learned District Judge in Manipur could not have restrained the defendants from exhibiting the picture ''KHUDDAR'' in any other States of the contracted territory far less in the rest of the eastern circuit; and that if the film gets old without being displayed it will not be for the benefit of any of the parties to the suit.

12. Mr. S.K. Sen, the learned counsel appearing for the first defendant, appellant in M. A. (F) Nos. 1 and 2 of 1983, adopts the arguments of Mr. Lahiri and further submits that it was a genuine mistake on the part of the first defendant to have entered into the agreement with the plaintiff being totally ignorant of the fact that his Manager and authorised representative, Shri Apurba Kumar Bhowmick, has already entered into an agreement for distribution of the film ''KHUDDAR'' in the same Assam Zone with the second defendant and that as soon as he came to know about it he immediately wrote to the plaintiff cancelling the agreement and refunding the amount of Rs.25,000/ which, however, the plaintiff refused to receive. Counsel submits that by this cancellation the first defendant has been loser by about Rs. 75.000/ the consideration in the agreement with the plaintiff being higher than that of his agreement with second defendant.

13. Mr. J. P. Bhattacharjee, the learned Advocate General, Nagaland, appearing for the plaintiffrespondent, submits, inter alia, that the learned District Judge while making the ad interim injunction absolute, has considered all the relevant point and has correctly come to the conclusion that there is a prima facie case as there is a serious question to be tried that the balance of convenience is in favour of the plaintiff and that if the injunction was not granted the plaintiff would suffer an irreparable injury. Counsel further submits that the agreement dated 14.4.82 between the first defendant and the second defendant was unauthorised being executed by the first defendant''s Manager, Shri Bhowmick, who had no authority to execute the same and he did it without the knowledge of the first defendant who, admittedly, was ignorant of the same. According to counsel there was no transfer of any distribution right by virtue of that agreement and the agreement stood automatically rescinded, revoked or cancelled by the first defendant''s agreement with the plaintiff dated 7.8.82 which the plaintiff entered into in good faith for valuable consideration and is valid and binding on the parties and that any exhibition of the film contrary to this agreement would cause irreparable injury to the plaintiff. According to the counsel the case of the second defendant was sufficiently considered by the Court. Order 39 Rules 1 and 2, C.P.C. deal with temporary injunctions. Rule 1 provides, inter alia, for granting temporary injunctions to restrain alienation, sale, removal or disposition of the property in dispute in the suit. Under Rule 2(1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Under subrule (2) the Court may by order grant such injunction, on such terms as to the duration, keeping of accounts, giving security, or otherwise, as the Court thinks fit.

14. While analysing a contractual obligation, for granting an injunction it is important to bear in mind the nature of an executory consideration as distinguished from an executed consideration. A consideration in a contract may be executory a promise given for a promise or it may be executed, am act or forbearance given for a promise. If the consideration is executed on one side, there will be a right on one side and an outstanding liability on the other. If the consideration is executory on both sides, there will be outstanding rights and liabilities on both sides. Where the consideration is executory, the contract is binding as soon as the promises are exchanged Consideration is executed when an act is performed for a promise, and in such a case, liability will be outstanding on one side only unlike in executory consideration where liability will be outstanding on both sides. A contract arises on an executed consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that he is bound to do for the contract, leaving the outstanding liability on one side only. An executory consideration on the other band, consititutes of a promise to do, forbearance or suffered, given in return for a like promise.

15. When injunction is prayed for protection of contractual rights, it is necessary to ascertain the contract or the covenants contained in them, which may be either affirmative or negative, or partly affirmative and partly negative. As a general rule the proper remedy of a person seeking to enforce the observance of a positive contract or covenant is by way of an action for specific performance, unless it is of a kind which the court will not specifically enforce. On the other hand, where the contract or covenant is negative, his proper remedy is by way of an injunction to restrain the breach, although the indirect result may be to enforce a positive stipulation in the contract. In the case of a positive contract, the court will sometimes import a negative covenant not to do anything inconsistent with the contract, and grant an injunction to restrain the breach of this implied covenant.

16. Thus, the question of granting an injunction in matter of a contract is often ancillary to that of specific performance, for the purpose of restraining the defendant making use of some illegal interest or right vested in him in a way inconsistent with the equity claimed by the plaintiff, or embarrassing the plaintiff by dealing with the property during the pendency of the action, or obstructing the parties of some act incidental to the execution of the contract. In this respect the jurisdiction of the Court in injunction, as Fry observes, is connected with the specific performance of executory contract in three ways : (1) Sometimes injunction is the instrument by which the Court specifically enforces the contract itself or some part of it (2) sometimes the injunction is merely incident or ancillary to the performance of the contract and (iii) sometimes the injunction is used for the purpose of giving affect to rights resulting from the nonperformance of the contract. It is evident, as Fry points out, that whenever the Court grants an injunction restraining the breach of any express or implied term of a contract it thereby pro tanto specifically enforces the performance of the contract. Where

the contract contains express negative as well as positive terms and the positive terms are capable of specific performance by the Court, the Court may and naturally will enforce by injunction the observance of the negative terms for by so doing it promotes the complete performance of the contract as a whole. In such cases injunction, therefore, may be granted upon interlocutory application and until the trial, on the plaintiff showing a prima facie case for specific performance. It is not necessary that it should be clear that the plaintiff will succeed at the trial, it is sufficient if there is ground for supposing that relief may be given. For on this application the Court will not decide delicate points, nor allow it to be resisted on points, such as delay, which can only be decided at the trial. The Court may, in some cases, restrain even third persons, whose rights are independent of the contract, from acting in a manner which would prejudice the plaintiff in respect of the property. The Court may restrain by injunction acts inconsistent with the due performance of the contract. The Court may also in a proper case, grant an injunction for the purpose of enforcing a right resulting to the applicant from the nonperformance of the contract. In short, an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, but does not in terms extend this wide power to the grant of injunctions at the trial. The Court may grant an injunction at any stage of any case where it would, according to sufficient legal reasons or on settled legal principles, be right or just or convenient to do so.

17. In Halsbury''s Laws of England, 4th ed. Volume 24, para 988, we read: "Injunction is granted subject to equitable principles. It is not every breach of contract or convenant that the court will restrain by injunction. The mere fact that the obligation and the breach are clear is not of itself sufficient to warrant interference, unless the obligation is itself of such a nature that it can be enforced consistently with the rules and principles upon which the court acts in granting relief. Thus the court will not restrain the breach of a covenant which would involve the court''s supervision. An injunction will not be granted to restrain the breach of an indefinite, ambiguous and uncertain or vague covenant, or of a negative covenant which is coupled with other terms so vague and loose that the court cannot execute them. Nor will the court interfere where the covenant is oppressive or harsh towards the defendant, nor if the agreement in respect of which the breach has been committed is illegal.

Relief will also generally be refused if the damage apprehended from the breach is not irreparable or is susceptible of pecuniary compensation, or if the parties themselves treated the nonperformance of the agreement as a subject for pecuniary compensation. The fact that compensation has been accepted for a violation will not debar the plaintiff from obtaining relief if there is in other respects a continued violation and there has been no acquiescence in that violation".

"In exercising its jurisdiction by way of interlocutory injunction, the court acts upon the principle of preventing irreparable injury. In a strong case where serious injury is likely to arise from the act complained of the Court will interfere before the hearing to restrain the breach, but if the contract or covenant is obscure, or the breach doubtful, and no irreparable damage can arise to the plaintiff, then the question involves itself into a question of comparative injury, whether the defendant will be mere damnified by the injunction being granted or the plaintiff by its being withheld". (Halsbury''s Laws of England, 4th ed. para 990).

18. The words "just or convenient" must be read "just, as well as convenient". They do not mean that the court can grant an injunction simply because it thinks it convenient, but mean that it should grant an injunction for the protection of rights or the prevention of injury according to legal principles. They confer no arbitrary no unregulated discretion on the court, and do not authorise it to invent new modes of enforcing judgments in substitution for the ordinary modes.

19. On application for granting interlocutory injunction in aid of a plaintiff''s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course. The tendency, as observed in Halsbury''s Laws of England, 4th Ed. volume 24, para 53, is to avoid trying the same question twice and to grant injunctions only in clear cases. However, where there is no doubt as to the legal rights an interlocutory injunction will be granted, and it is no objection that the relief so granted is substantially the same as the whole relief claimed in the action except that it is only to endure until the hearing of the action. It is not necessary that the court should find a case which would entitle the plaintiff to relief at all events it is quite sufficient for it to find a case which shows that there is a substantial question to be investigated, and that the status quo should be preserved until that question can be finally disposed of.

19. An interlocutory injunction will be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent, or where mischief of an overwhelming nature is likely to be done, especially destructive operations. Where the plaintiff is asserting a right he should show a strong prima facie case, at least, in support of the right which he asserts. The test appears to be whether there is a serious question to be tried. In this context it may be observed that the mere fact that there is a doubt as to the existence of the right which the plaintiff is asserting is not sufficient to prevent the court from granting an interlocutory injunction, although it is a matter of serious attention. Where the application is to restrain the exercise of an alleged right, the plaintiff should show that there are substantial grounds for doubting the existence of the right. It requires a very strong case indeed to induce the court to interfere with an

admitted right upon an alleged equity. In a matter merely pecuniary, the plaintiff must establish not merely that there is a case to be tried but that there is some probability of his succeeding at the trial.

20. It is equally important to consider the balance of convenience. In the language of Halsbury where any doubt exists as to the plaintiff''s right or if his right is not disputed but its violation is denied, in determining whether an interlocutory injunction should be granted, the court takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted end he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer if it is granted lies on the plaintiff. Where there is a clear breach the question of balance of convenience does not arise".

21. In the instant case while considering the question of injunction the interest of a third party, other than the plaintiff and the first defendant, namely, the second defendant who also entered into agreement with the first defendant has necessarily to be considered, because any order of injunction is bound to affect his interest and the first defendant''s obligation arising out of that contract which is prior to that between the plaintiff and the first defendant. Under these circumstance the comparative convenience will mean not only between the plaintiff and the first defendant, but also between the plaintiff and the second defendant, and between the first defendant and the second defendant.

22. We have set out the prayers made by the plaintiff in the original suit No. 47 of 1982 and also in his application for injunction. The suit is under Section 34 of the Specific Relief Act for declaration that the plaintiff has agreed to execute copyrights and print rights to distribute the picture ''KHUDDAR'' in the contracted territories by virtue of his agreement with the first defendant dated 7.8.82 in which he agreed to pay to the first defendent a sum of Rs. 7,25,000/ out of which he is said to have paid a sum of Rs. 25.000/ only on signing of the said agreement and the balance sum of Rs. 7,00,000/ is to be paid ten days'' before the release of the said picture at Calcutta, as stipulated in Clause II thereof.

23. The first defendant''s case is that soon after signing of the aforesaid agreement on 7.8.82 he learnt that the second defendant applied for registration of subdistribution rights of the said picture ''KHUDDAR'' by virtue of his agreement with the first defendant manager dated 14.4.82, for the territories of Assam, Meghalaya, Nagaland, Arunachal Pradesh and Mizoram, before the tribunal for registration of subdistribution rights of Eastern India Motion pictures Association, and the fifth defendant in their bulletin Vol. 12, No. 18 dated July

16,1982 circulated the said application inviting objections against grant of such registration and the plaintiff being member of the said Association was in the know of the aforesaid agreement in the bulletin which was circulated among the members of the Eastern India Motion Pictures Association. It was clear that there being a business dealing with the first defendant and the second defendant in respect of the said picture '' KHUDDAR'' for the Assam Zone and the plaintiff being a member of the Association had the knowledge of the same. The first defendant, however, had no knowledge of the aforesaid agreement dated 14.4.82 which was entered into by Shri Apurha Kumar Bhowmic, his manager and authorised representative with the same defendant and when he was in Bombay without such knowledge, the plaintiff approached him for distribution right, and both parties purported to have entered into the aforesaid agreement on or before 7.8.82 to transfer subdistributor right of the said film for a total consideration of Rs. 7,25,000/ and pursuant thereto a sum of Rs. 25,000/ was paid by the plaintiff to the first defendant on that very date. By a letter dated August 14, 1982 by the Advocate for the plaintiff to the first defendant with copies to the second, third and fifth defendants it was brought to the notice of the first defendant, proceeding having already been initiated by the second defendant for registration with the fifth defendant the subdistribution rights for the film ''KHUDDAR'' in the territory of Assam zone the factum of the aforesaid agreement dated 14.4.82 for which application was already made for registration of subdistribution right with the fifth defendant. The first defendant realised his mistake in entering into the said purported agreement dated 7.8.82 with the plaintiff, his mistake being due to ignorance as to the prior agreement dated 14.4.82. Realising his bonafide mistake on his part, without any loss of time he wrote to the plaintiff on August 14, 1982 explaining the situation, regretting the mistake and cancelling the said purported agreement dated 7.8.82 and returned the sum of Rs. 25,000/ by means of bank draft/pay order dated August 16,1982 in the name of the plaintiff and tendered the same. However, the draft is said to have been returned. Thus, as regards the contract between the plaintiff and the first defendant the consideration on the part of the first defendant is executory while that of the plaintiff may also be said to be such except for Rs. 25.000/ which was paid and said to have been returned but refused to be received. In point of time the agreement between the plaintiff and the first defendant dated 7.8.82 is posterior to that between the first defendant and the second defendant dated 14.4.82.

24. The second defendant in his application under Order 39 Rule 4 read with section 151 of the Civil Procedure Code for vacating the exparte order, which was registered as Judl. Miscellaneous case No. 35/82, said that Shri Apurba Kumar Bhowmic, the manager and the authorised representative of the first defendant within the scope of his employment and in course of business of the first defendant entered into the agreement with the second defendant for and on behalf of the first defendant on 14.4.82 whereby he transferred the rule right of distribution, exploitation and exhibition of the said film ''KHUDDAR'' over the

Assam Zone covering the States of Meghalaya, Nagaland, Manipur and Union territories of Arunachal Pradesh and Mizoram for a period of 9 years on payment of royalty of a sum of Rs. 6.51 lakhs and thereafter a formal agreement was executed by the parties incorporating the agreed terms. It was further stated that pursuant to the aforesaid agreement the second defendant had paid a sum of Rs. 25,000/ on 15.4.82, which was duly acknowledged by the first defendant and a sum of Rs. 76.000/ only on 2.9.82; and a further sum of Rs. 24,000/ on the same date. Again on 7.9.82, 13.9.82 and 15.9.82 the second defendant paid sums of Rs. 10,000/ Rs. 45.000/ and Rs. 5,000/ respectively on account of royalty payable for the said film. The second defendant also paid another sum of Rs. 80,000/ to the first defendant and that on 2.9.82 in terms of the agreement the first defendant duly delivered print and publicity materials in respect of the film ''KHUDDAR''. The second defendant also applied in From ''A'' to the fifth defendant for registration of his name as sole distributor on receipt where of the fifth defendant issued a circular to all concerned members inviting objections but instead of objecting, the plaintiff hurried to obtain the purported agreement dated 7.8.82 with the first defendant. The articles of agreement are annexed as Annexure ''A'' to the written statement of the first defendant in the original suit. In clause 10 there of the first defendant agreed to deliver tae print of the said picture to the second defendant on or before 31st August, 1982 with a grace period of 30 days. This agreement dated 14.4.82 is prior to that of the agreement between the plaintiff and the first defendant. In this case the consideration can be said to be partly executed both on the part of the first defendant and the second defendant inasmuch as the second defendant having paid part of the consideration the first defendant also delivered the print and publicity material pursuant to the agreement. It is, therefore, a concluded contract.

25. Section 34 of the Specific Relief Act provides that any person entitled to any legal character of to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right and the court may in its discretion make therein a declaration that he is so entitled, and plaintiff need not in such suit ask for any further relief provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The plaintiff''s suit is for a declaration on the basis of contract and not for breach of contract, and we agree with the learned District Judge that there is a serious question to go to trial and as such the test of a prima facie case is satisfied.

26. As regards the balance of convenience we have already observed that under the facts and circumstances of this case the question is one of comparative convenience between the parties rather than between the plaintiff and the first defendant only. The first defendant having taken the said stand that he has already cancelled the agreement dated 7.8.82 and has tendered to return the amount of Rs. 25,000/ he is to abide by the consequences of his acts. The first defendant has further said that his manager and authorised representative

having already entered into the prior agreement with the defendant No. 2 on 14.4.82 in respect of distribution of the said film ''KHUDDAR'' in the Assam Zone he cannot get rid of the obligations arising out of that prior agreement. The first defendant has not disowned this contract with the second defendant. The second defendant having already so far performed his part of the agreement, he is entitled to fulfilment of the obligations on the part of the first defendant which he can discharge only by delivering the films. Some of the printing and publicity materials are already said to have been handed over to the second defendant. It the conveniences are compared among these three parties, it would appear that the plaintiff would be entitled to his remedies under the agreement with the first defendant. That agreement, however, did not contain any express negative covenant of course the positive covenant to deliver the films by implication contained the negative covenant not to deliver the same to anybody else. Under the circumstances an injunction may be meant only to prevent its breach. The first defendant, of course, has said that he has already cancelled the agreement. That agreement was also posterior to that of between the first defendant and the second defendant. That anterior agreement has created obligations on partly executed consideration on the parts of both the parties. The second defendant having already paid the consideration so far payable and the first defendant having already performed his part of the agreement so far, the seconddefendant''s interest may not be subjected to the obligations arising out of the posterior agreement which again is said to have been cancelled by the first defendant. The plaintiff has not sued for cancellation of the agreement of the second defendant dated 14.4.82, though he contends that it automatically stood superseded by the subsequent agreement dated 7.8.82. Thus on a comparative analysis the balance of convenience is in favour of the second defendant, in other words, in allowing him to exhibit the film materials already received rather than in favour of the plaintiff, as the rights under his posterior agreement are yet to be ascertained.

27. Then comes the question of irreparable injury. So far the plaintiff is concerned in his agreement there is no express negative covenant, nor is there any stipulation by way of penalty. The first defendant, a party to the agreement having already expressed that he cancelled the contract and tendered the refund of the amount advanced the plaintiff shall have his interest protected by remedy available for breach of contract. From the terms of the agreement themselves it does not appear to be one which cannot be compensated by way of damages. No strong case appears to have been made out before the learned District Judge for specific performance of the agreement. If pending decision of the suit the film is not allowed to be exhibited and the second defendant suffers loss thereby there may be no remedy available to him against the plaintiff and similar may be his case against the first defendant also who admittedly has not broken the contract but has already delivered some print and publicity materials to the second defendant pursuant to the agreement. The injury suffered by the second defendant may therefore be irreparable. The learned District Judge has not

considered this aspect of the question. We are accordingly inclined to hold that the injuries to be suffered by the second defendant by reason of an injunction restraining him to exhibit the film the print and publicity materials which have already been delivered to him would be irreparable.

28. In the above circumstances we are inclined to hold that it would not be just and convenient to grant an injunction in this case, and the impugned orders granting injunction are not in accordance with law and accordingly we set them aside and vacate the and interim injunction orders pending decision of original Suit No. 47 of 1982.

29. As it has been held that there is a serious question to go to trial pending disposal of the suit, without any possibility of compensation, in the event of the plaintiff winning his suit, his victory may prove to be barren worthless. To guard against such an eventuality we are inclined to think that it would be necessary for the second defendant to keep correct and comprehensive profit and loss accounts in respect of the film ''KHUDDAR'' from the beginning of its exhibition in different houses till the disposal of the suit so that such profits may abide the decision in the suit. Mr. N. M. Lahiri has fairly agreed to keep such accounts and we direct the second defendant accordingly to do so and furnish copies of the profit and loss accounts to the trial Court.

30. As we have already set aside the interim injunction orders we do not consider it necesrary to go into the question of jurisdiction of the District Court to have passed the impugned order in the matter of injunction.

31. In the result, we allow these appeals, but under the facts and circumstances of the case, we make no order as to costs. Appeals allowed.

