

(2008) 04 CAL CK 0055

In the Calcutta High Court

Case No : A.P.O. No. 101 of 2008, A.P.O.T. No. 115 of 2008, G.A. No. 1001 of 2008 and C.S. No. 28 of 2008

Usha Infotech Pvt. Ltd.

APPELLANT

Vs

Salora International Ltd. and Another

RESPONDENT

Date of Decision : 01-04-2008

Acts Referred:

Citation : (2008) 3 CALLT 390 : (2008) 3 CHN 265

Hon'ble Judges : Surinder Singh Nijjar, C.J.;Indira Banerjee, J

Bench : Division Bench

Advocate : Abhrajit Mitra, Sarbapriya Mukherjee and Subhendu Sinharoy, for the Appellant;Ranjan Bachawat, Sanjoy Ginadia, Manoj Tiwari, Pritwiraj Sinha and Preeti Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

1. The appellant had moved an interlocutory application in a pending suit seeking an injunction restraining the invocation of the bank guarantee. The plaintiff had suggested that the conduct of the defendant No. 1 had been fraudulent. Learned single Judge after considering the entire matter in details has come to the conclusion that in fact it was the plaintiff who had not come before the Court with clean hands and had tried to overreach the Court. After examining the matter, the learned single Judge has observed as follows:

For a party to approach Court and require the Court to make an order in its favour without inviting the party sought to be affected by the order, there is a high degree of duty that is required to be discharged. It would not do for a plaintiff obtaining an ex parte order to come back and say that the relevant material were all in the voluminous papers that were presented to Court. A party seeking an ex parte order is required not only to include all relevant facts in its petition but also to point out such relevant material to Court so that the Court can weigh the facts before assessing whether the ex parte order is warranted. When an order is sought in the presence of an adversary, the duty is much less.

But the Court demands an exalted degree of candour from a suitor seeking an ex parte order. This plaintiff, as it now appears, had failed to discharge such obligation and whether or not the first defendant concedes to the continuation of the order of injunction in the limited way, the plaintiff cannot be rewarded by the continuation of the order in any form.

On the basis of what now appears, it seems that the best arguable case of the plaintiff is bound to fail. If the bank guarantee is unconditional and if the first defendant is entitled to invoke it without assigning any reason, there is no need for the injunction to be continued but with liberty to the first defendant to invoke it only upon HSBC lodging a claim on the first defendant. Ordinarily, the limited concession that has been made would have been accepted if the plaintiff was otherwise found deserving of the order.

The plaintiff here is found wanting on all counts and the best arguable case of the plaintiff, even without any affidavit being called for from the first defendant, is not good enough. No affidavits are necessary. The interim order is vacated. The plaintiff's Advocate on record will return the money received in terms of earlier order. The petition is dismissed with costs assessed at 5000 G Ms.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

2. In our opinion, these observations of the learned single Judge are in accordance with the law settled by the Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, . In the aforesaid decision the Supreme Court held as follows:

7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the Court. The High Court, however, went haywire and made observations, which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff-to come to Court with a true case and prove it by true evidence. The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gain indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right, to approach the Court. He can be summarily thrown out at any stage of the litigation.

8. The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the Court. A fraud is an act of deliberate deception with the design of securing something by taking unfair

advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jaganath was working as a clerk with Chunilal Sowcar. He purchased the property in the Court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the Court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party.

3. Mr. Abhrajit Mitra, learned Counsel for the appellant, has submitted very strenuously that the learned single Judge was not justified in imposing costs which have been assessed at 5000 G.Ms. Learned Counsel submitted that the learned Single Judge has not given any reason as to how such heavy cost had been imposed. In our opinion, the learned single Judge has correctly observed that there is a high degree of duty that is required from a party seeking an ex parte order. In our opinion, it is the bounden duty of a litigant to make a full and fair disclosure of all the materials touching the controversy involved in the proceedings. The party seeking discretionary relief is clearly under a duty to disclose even the material which may be apparently unfavourable. Upon disclosing the material it would always be open to the party seeking the ex parte order to make an effort to explain the material that may be apparently not in its favour. In the present case, no effort was made by the appellant either to disclose the entire material or to explain the material that was unfavourable. Therefore, we are entirely in agreement with the view expressed by the learned single Judge, on facts as well as law. The ratio of law laid down by the Supreme Court as noticed above, would leave no manner of doubt that the discretion exercised by the learned single Judge cannot be said to be either arbitrary or unreasonable.

We, therefore, find no merit in the appeal.

The appeal is, thus, dismissed.

Xerox certified copy of this order be made available to the parties, upon compliance of usual formalities.