

(2001) 05 CAL CK 0046

In the Calcutta High Court

Case No : G.A. No. 1492 of 2000 and C.S. No. 130 of 2000

Usha Martin Telekom Limited

APPELLANT

Vs

Ajit Kumar Mallick

RESPONDENT

Date of Decision : 02-05-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Criminal Procedure Code, 1973 (CrPC) — Section 144(2), 2(14), 2(2)
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44

Citation : 106 CWN 695

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Hirak Mitra and S. Sen, for the Appellant; A. Sarkar, for the Respondent

Judgement

Amitava Lala, J.

This application is made on 11th of April, 2000. This is an interlocutory application arising out of the aforesaid commercial suit. In the instant application, the petitioner prayed for the following reliefs:

- a) The petitioner, its men, servants and agents be permitted to take possession and remove the equipment as mentioned in annexure "P" hereof with the assistance of the Bidhannagar Police Station, 24 Parganas (North);
- b) Injunction restraining the respondent from interfering with ingress and egress from and out of the said premises by the men, servants and agents of the petitioner in any manner whatsoever;
- c) Injunction restraining the said respondent from causing any interference and/or hindrance and/or obstruction to the Technicians and Personnel of the petitioner from removing the equipment from the site in any manner whatsoever;
- d) Ad-interim order in terms of prayers (a) to (c) above;

- e) Costs of this application be borne by the respondent;
- f) Such further order or orders be passed and/or direction or directions be given as this Hon"ble Court may deem fit and proper.

At the interim stage, a Single Bench of this Court was pleased to direct to adjudicate the matter on affidavits on adjourned date and passed a limited order that the petitioner shall be entitled to attend the machinery and equipment for the purpose of maintenance upon notice to the defendant-respondent as and when the petitioner would consider it necessary. There was a prior suit instituted by the defendant-respondent on 23rd March, 2000 in the Court of Civil Judge, Junior Division 3rd Court at Sealdah. 24-Parganas (North) being T.S. 90 of 2000 claiming inter alia as follows:

- (a) A decree for declaration against the defendant Nos. 1 and 2 that they have made several wrongs in respect of the property at DD-30A, Salt Lake City, P.S. Bidhannagar, Calcutta-700064, in complete breach of contract dated 28-03-1995 making them liable jointly and severally.
- b) Permanent order of injunction restraining the defendants their men, agents and servants not to remove any goods from the premises no. DD-30A, Salt lake City. Calcutta-700064 (ill the disposal of the suit.
- c) Temporary Injunction, in terms of prayer (b);
- d) Inventory;
- e) Costs of the suit;
- f) Any other relief or reliefs.

2. Immediately after filing of the suit, on 24th March, 2000, the respondent made an application u/s 144(2) of the Code of Criminal Procedure in the Court of Learned Executive Magistrate at Bidhan Nagar, 24-Parganas (North) in which a direction was obtained to maintain peace in between the parties in respect of premises in question. Subject to enquiry a report will be filed by the appropriate Police authority. On 24th April, 2000 a further interim order was passed directing the plaintiff-petitioner herein not to do any unlawful act in the premises. Both the parties were directed to maintain peace and tranquility in the premises.

3. However, on 11th April, 2000 the plaintiff/petitioner instituted this suit in the High Court by making the plaintiff in the suit or the subordinate Court as party defendant upon obtaining leave under Clause 12 of the Letters Patent. The reliefs claimed in such suit are as follows:

- (a) Mandatory injunction as prayed for paragraph 17 above in order to enable the plaintiff to remove all its equipment and accessories described in Schedule "I" now lying at Premises No. DD-3A, Sector-I, Salt Lake, Calcutta;
- b) Damages and/or enquiry into damages and a decree for such sums as may be found due upon such enquiry;

- c) Enquiry into damages as claimed in paragraph 22 above;
- d) Decree for a sum of Rs. 1.41 lacs as claimed in paragraph 14;
- e) Decree for a sum of Rs. 2.07 lacs as claimed in paragraph 15;
- f) Injunction;
- g) Receiver; h) Costs;
- i) Such further and other reliefs.

4. Immediately thereafter instant application was moved and obtained such limited interim order. However having regard to the fact that the Civil Court order will bind upon the Criminal Court, to parties were definitely guided by such limited interim order unless and until further order or orders passed by the higher courts which I shall discuss later on.

5. If I take the prayer (a) of the Plaint of the suit in the High Court and prayer (b) of the suit in the subordinate Court, arena of dispute will be understood as common in nature. When one is interested to remove the goods the other is interested not to remove the goods. Therefore both the suits are likely to be heard in an analogous hearing. But I am surprised that neither of the parties did take any step to get the suits transferred in one forum for analogous hearing. It is crystal clear that if either of the reliefs is granted in favour of either of the parties the other will be automatically rejected. The other claims are virtually in the nature of damages or enquiry as regards the same and the same are also common in nature.

6. However, from the initial order, an appeal was preferred before a Division Bench of this Court. In disposing such appeal and application in connection thereto such Division Bench was pleased to pass an order on 20th April, 2000 modifying the interim order of the Single Bench and appointed an Advocate of this Court as Receiver with a further direction upon him to shift the equipment from the respondent's premises to a suitable place to be provided by the appellant i.e. the plaintiff-petitioner herein. For this purpose the Receiver will apply to take assistance from the concerned police station, if necessary, and the Officer-in-charge of the concerned local police station will render necessary assistance to the Receiver in carrying out this order. The appellant i.e. plaintiff-petitioner shall use the said equipment under the supervision and control of the Receiver. The Receiver shall visit the place where the equipment will be shifted and fixed, at least twice a week after giving prior notice to the respective Advocates-on-Record of the parties.

7. Being aggrieved by and/or dissatisfied therewith such order the defendant-respondent made a SLP before the Supreme Court of India when by an order dated 12th May, 2000 the hearing of the petition was adjourned to a subsequent date. Simultaneously therewith the defendant-respondent also made an application in the Division Bench of this court on 17th May, 2000 for obtaining

direction upon a Receiver to shift the equipment and to restore it to the original position under tenancy. The Appeal Court was pleased to observe that (a) undoubtedly the equipment were the property of the appellant i.e. plaintiff-petitioner hereunder; (b) the defendant-respondent had merely provided the roof space to the appellant i.e. the plaintiff-petitioner to use for installing the plant and machinery on an agreement at a monthly rental basis and no amount is due under rental; (c) the agreement is terminable by giving three months' notice from the either side and the Division Bench was pleased to observe that the agreement had actually been terminated. Thereafter it is recorded that the defendant-respondent has no right over the plant and machinery nor has any legitimate grievance with regard thereto. He is not even to explain the cause of objection about such removal. Accordingly, the application was dismissed. Certain inadvertent mistakes were corrected by the Court on 9th June, 2000. The SLP was also dismissed on 13th November, 2000 and upon observing the fact that under the supervision of the Receiver the goods had already been removed and there is no reason to interfere with the order under challenge.

8. Against this background, the learned Counsel appearing for both the parties argued at length on affidavits for final disposal of the matter. Factual submission is rested in a short compass. According to the petitioner, since the equipment have already been removed by the Receiver and kept in a suitable place provided by the petitioner and they are using the same, supervision and control of the Receiver is an idle formality. Therefore, there is no embargo of discharging the Receiver. On the other hand, the respondent sought for some direction upon the Receiver to shift the equipment to the original place as it was made previously before the Division Bench of this Court which is inviolable in nature. Hence the remaining questions whether discharge of the Receiver at this stage will be as good as final relief in the suit or not. Whether such final order in the form of a decree can be passed in an interlocutory application or not.

9. The Learned Counsel appearing for the plaintiff/petitioner relied upon a Division Bench judgment of this Court reported in *Indian Cable Company Limited Vs. Smt. Sumitra Chakraborty*, where to it was held that if a Court is called upon to grant any relief on any interlocutory application which is granted, would mean granting substantial relief claimed in the suit, the Court will be very slow and circumspect in the matter in granting such prayer. It is indeed true that such a relief should be granted only in exceptional cases. Though exercise of such a discretion should be limited to rare and exceptional cases, still at the same time no Court should think that in law there is any bar to the Court granting such a relief.

10. In (1986)3 ALL ER (Film Rover International Ltd. & Ors vs. Cannon Film Sales Ltd.) a Chancery Bench held that in granting a interlocutory Injunction the question for the Court is not whether the injunction sought was mandatory or prohibitory but whether the injustice would be caused to the defendant if the plaintiff was granted an injunction and later failed at trial outweighed the

injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at trial Where the injunction was undisputably "mandatory" that same test applied to determine whether the case was normal (in which case the Court was required to feel a high degree of assurance that the plaintiff would succeed at trial before an injunction would be granted) or exceptional in that because withdrawing a injunction carried with it a greater risk of injustice than granting it. The injunction should be granted even if the Court did not feel a high decree of assurance that plaintiff would succeed at trial. Therefore, according to the parameter of consideration is balance of convenience not the procedure.

11. From the other judgment reported in (1969) 2 ALL ER 692 (Luganda vs. Service Hotels Ltd.) I find that by analysing the facts the Court of appeal, Civil Division of England presided by Lord Denning, M.R. upheld the order of the Trial Court wherein at the interlocutory stage on an application of plaintiff for obtaining an order of injunction the Court held that prima facie the plaintiff has a right of possession and since he was within the statute which affords protection to the tenants of furnished rooms the Judge granted an injunction so as to enable him to go back to such rooms and also to prevent the defendants from stopping him having access.

12. In Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, a suit relating to Section 44 of the Transfer of Property Act read with Section 4 of the Partition Act various English judgments were thoroughly considered. In Evans Marshall & Company Ltd. vs. Bertola SA (1973) 1 ALL ER 992 the Court of Appeal was pleased to hold that although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at trial was a factor which would normally weigh heavily against the grant of an interlocutory injunction it was not a factor which as a matter of law, precluded its grant. There is also (1966) 3 ALL ER 772, (Supra) wherein the observation of Hoffmann J. is that the principal dilemma about the grant of interlocutory injunction whether prohibitory or mandatory is that there is a definite risk that the Court may make the "wrong" decision to granting an injunction to a party who fails to establish his right at the trial or alternatively in failing to grant an injunction to a party who succeeds or would succeed at trial. A fundamental principle is, therefore, that the court should take whichever course appears to carry the lower risk of justice if it should turn out to have been "wrong" in the sense His Lordship has described. The guidelines for granting of both kinds of interlocutory injunctions are derived from this principle.

13. On the test to be applied in granting mandatory injunction on interlocutory application it is described in 24 Halsbury's Laws of England within 4th Edn. Para 984 that a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempts to steal a march on

the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.

14. Even the law in United States is the same and it may be found in 42 American jurisprudence 22nd Edn. Page 745 etc. Several other High Courts have also held in the similar line. Therefore, in granting an injunction the Court had to determine whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was not proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the Court should consider as to where the balance of convenience lies and whether it is desirable that the status quo should be maintained while accepting that it does not have any jurisdiction to issue an ad interim injunction of a mandatory character. Therefore, in giving relief of interlocutory mandatory injunctions the Supreme Court framed certain guidelines which are as follows:

- 1) The plaintiff has a strong case for trial i.e. it shall be of a higher standard than the prima facie case is normally required for a prohibitory injunction;
- 2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money;
- 3) The balance of convenience is in favour of one seeking such relief;

Being essentially an equitable relief, grant or refusal of an interlocutory mandatory injunction rests on sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant or refusal of such injunction would be a sound exercise of a judicial discretion.

15. Recently in 1998(2) Cal LT 562 (HC) [Premier Industries (India) Ltd. vs. Alliance Credit and Investments] a Division Bench of our High Court held as follows:

The Courts have held consistently that in certain circumstances particularly when there is no dispute as to the right of the plaintiff to the property there is no bar to passing an interim order even if it amounts to decreeing the suit.

16. Therefore, if I take the totality of the discussions either before the Supreme Court or before the High Courts and similarly either before the English Courts or before the American Courts, principal ratio decidendi is the same. Court can grant a final relief which amounts to decree at the interlocutory stage in a given situation. Court cannot be debarred in granting such relief at any interlocutory stage upon evaluating the situation because the Court has an inherent power to do so. I am confident that such power is moving like a pendulum from one end of

the ends of justice to the other end of abuse of process of Court It is for the Judge who is judging the fact situation in what way it is to be applied. This is the nerve centre of Jurisprudence, Such jurisprudence, cannot automatically evaporate at the cost of procedure. An innocent of law may make his wishful thought about the same but not the court of law. Whatever substantial justice is required to be done, Court has to keep it preserved for the purpose of justice and justice alone. Court can not preserve orthodoxy for Civil Jurisdiction but liberalisation for constitutional jurisdiction. Court can not adopt any dual policy, only on the ground of intervening procedure. Court also can not retrain from taking judicial notice that substantial summary disposal is the desire of the society. But curtailment of the jurisdiction of the Civil Court and hand it over to the respective tribunals is not the only alternative mode to adopt by shunting our eyes. The real alternative is to make justice free from the procedural jugglery. Therefore, the principal of law is that there is no bar for the Court of Law in granting justice at any time so required on the fact situation. The same may be interlocutory or the same may be final or the same may be in the form of decree. The only requirement is that the Court will be cautions in using inherent power of the Court in passing final order. Final order of the Court of Civil in passing final formal expression of an adjudication which, so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Such expression, is "Decree" u/s 2(2) of the Code of Civil Procedure. On the other hand the "Order" means the formal expression of any decision of a Civil Court which Is not a decree as per 2(14) of the Code. Now the question is what is the basic difference? Both are formal expressions determine right of the parties. Even then if an order is passed which conclusively determining the right of the party in the suit at any interlocutory stages of the suit it has to be called as order but for the redundant description in the definition as per section 2(14) of the code..... which is not a decree". This is not the true interpretation of statutes. Decree means an order by one in authority, a judicial decision etc. Decree in equity is a sentence or order of the Court. Decrees in equity are either final or interlocutory. Saving provision u/s 151 of the CPC says that nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. According to me, in each and every litigation an appropriate court has to fulfil two conditions i.e. audi alteram partem and balance of convenience. One is to notify a person to be present in the Court and another is justify a person present in the Court. If both the conditions are satisfied court will come to a conclusion in any form whatsoever in an appropriate case. Procedure is made to maintain the discipline not to defeat the justice. Even if we keep the procedure above the substantial justice it will be neverending process in disposing civil litigations finally. Situation is alarming. Therefore the Court cannot ignore from taking judicial notice why the people at large are slow and hesitant in instituting civil litigations in the court of Law and Legislature is not only interested to amend the code but also to take

several steps by way of eliminating jurisdiction of the Civil Courts and forming various tribunals for expeditious hearing of suits and proceedings in connection therewith by summary manner. Hence the issue can not be left for the academicians only but to make it lively for the real fulfilment or principles of *audi alteram partem* for the sake of procedure and consideration of balance of convenience for the sake of justice on the basis of the available scenario.

17. Coming back to the fact situation I find that the Division Bench already determined right, title, interest of the movable properties in favour of the plaintiff/petitioner. Receiver was appointed to remove such goods removed by the Receiver from the place of the defendant/respondent to the place of the plaintiff/petitioner. The plaintiff/petitioner was only the user of the space provided by the defendant/respondent as against the monthly rental and there is no arrear of rental. The agreement for the same has already been terminated. Therefore I do not find any reason of success of the defendant/respondent on the issue of reverting back the goods to the original space provided by the defendant/respondent at the trial of the suit leaving aside the question of declaration and determination of quantum of damages, if any. Under such circumstances I do not find any reason why the Receiver will not be discharged formally recording delivery of such plant and machinery to the plaintiff/petitioner by the order of the Division Bench formally. Hence such order will be virtually disposal of prayer "a" of the plaint in the suit instituted in High Court having binding effect of the order of the Division Bench. On the other hand by such binding effect the prayer "b" of the defendant/respondent in his suit in the subordinate Court in the nature of permanent injunction not to remove such goods becomes redundant. Upon visualising the balance of convenience I have to hold that it is a cast-iron case in which final relief to favour of the plaintiff/petitioner can be granted even at this stage.

18. Under such circumstances, the issue this regard is finally resolved. The Receiver, so appointed in this respect, stands discharged subject to filing of the report as to the delivery of the goods i.e. plant and machinery etc. to the plaintiff/petitioner and upon receiving the payment of final remuneration of 500 G.Ms, equivalent to Rs. 8,500/- and incidentals, if any, incurred by the Receiver for the purpose of carrying out the order or orders in this connection. Such remuneration and incidentals, if any, will be paid by the plaintiff/petitioner and will be added to its further claim in the suit. Thus, the application stands disposed of. However, no further order is needed to be passed as to the costs.

19. This order will be drawn up expeditiously.

20. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites for the purpose of drawing up and completion of the order and certified copy in connection thereto. All parties are to act on a signed copy minute of the operative part of the judgment on the usual undertaking and subject to satisfaction of the officer of the Court in respect as above.