_____ vs

Maruti on 9 August, 2019

Author: Jyotsna Rewal Dua

Bench: Jyotsna Rewal Dua

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HON'BLE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA

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CMPMO No. : 369 of 2019

Decided on : 09 .08.2019

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Parmod Singh Chauhan .....Petitioner

Versus1

Punjab National Bank and Ors. .....Respondent

Coram:

Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.

Whether approved for reporting? Yes

For the petitioner : Mr. Naveen Awasthi, Advocate.
For the respondents : Mr. Gulzar Singh Rathore,
Advocate.

Jyotsna Rewal Dua, Judge (Oral)

Mr. Gulzar Singh Rathore, learned counsel, waives service of notice on behalf of respondents No. 1 to 3. With the consent of learned counsel for the parties, matter is taken up for final disposal.

2. The petitioner is aggrieved against the order dated 10.06.2019, passed by learned Addl. District Judge-I, Kangra at Whether the reporters of the local papers may be allowed to see the judgment?

Dharamshala, H.P., in Civil Misc. Appeal No. 07-D/XIV/2019, whereby the appeal, filed by respondent against the order passed .

under Order 39 Rule 1 and 2 CPC by learned Civil Judge, Court No. 2, Dharamshala was allowed, resultantly the application filed by the plaintiff under Order 39 Rule 1 and 2CPC, stands rejected.

3.

3(i) to The facts of the petition, in brief, are that:-

> Petitioner is a retired Staffee. Post his retirement, he was appointed as External Concurrent Auditor (ERO) by the respondent-Bank, vide letter dated 29.11.2016. Petitioner was assigned for a period of three years or up to the age of 65 years, whichever was earlier. Learned counsel for the respondent has brought on record a Non Disclosure (Confidentiality Agreement) (Appendix) executed between the parties on 29.11.2016, inter-
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> alia, containing following term and condition:-
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> "10. Other terms and conditions .....In the event you wish to withdraw from the assignment, at least one month's prior notice be given to the Bank but the bank has the right to withdraw the assignment without any prior notice."

This agreement (Appendix) is duly signed by the petitioner.

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3(ii). On 1.11.2018, the respondents sent a communication to the petitioner to the effect that tenure of concurrent audit for ERO shall be for one year, extendable for a further period of one year i.e. overall for two years. On r to completion of maximum period of two years, ERO shall be on cooling period for minimum one year. This letter dated 1.11.2018 was issued on the basis of concurrent audit policy for 2018-19.

3(iii). Feeling aggrieved against the letter dated 1.11.2018, curtailing his alleged original assigned period of three years, in terms of Annexure P-1 dated 29.11.2016, the petitioner filed a civil suit, praying for decree of declaration to the effect that he is entitled to remain as External Concurrent

Auditor (ERO) for a period of three years or up to the age of 65 years, whichever is earlier, in terms of appointment letter dated 29.11.2016. Application under Order 39 Rule 1 and 2 CPC, filed by the petitioner, seeking ad interim injunction against his removal from the post of ERO, was allowed by learned Civil Judge, Court No. 2, Dharamashala, vide order dated 19.2.2019, whereunder respondent-Bank was restrained from removing the .

applicant/petitioner from the post of ERO and the operation of order/letter dated 1.11.2018 was also stayed during the pendency of the civil suit.

3(iv). The appeal filed by the respondent-Bank against this order has been allowed by learned Addl. District Judge, Kangra at Dharamshala, on 10.6.2019, thereby dismissing the application preferred by the petitioner under Order 39 Rules 1 and 2 CPC. Hence, this petition under Article 227 of the Constitution of India, has been preferred by the petitioner.

4(i). I have heard learned counsel for the parties and have gone through the appended record.

4(ii). It is not in dispute that at the time of issuance of appointment letter dated 29.11.2016, an agreement was also separately executed between the parties, as Appendix, to the extent that respondent-Bank will have the liberty to withdraw the appointment/assignment given to the petitioner without any prior notice.

4(iii) It is the case of the respondent-Bank that the earlier policy of 2016-17 under which, petitioner was issued .

appointment on 29.11.2016 and assigned for three years or 65 years of age whichever was earlier, stands substituted with the concurrent audit policy for 2018-19, under which, tenure of concurrent audit for ERO has been replaced from earlier tenure of three years to one year extendable for a further period of one year, i.e. overall two years. It is not the case of the petitioner that he has not been allowed to complete two years of service in terms of audit policy for 2018-19. In fact, petitioner has already completed 2 years as ERO on 28.11.2018. The contention of the petitioner is that audit policy for 2018 can not be retrospectively applied to him, he having been appointed under 2016-17 policy.

Learned counsel for the petitioner relied upon (2009) 11 SCC, 229, titled Kishorsinh Ratansinh Jadeja Vs. Maruti Corporation and Others., wherein Hon'ble Apex Court observed as under:-

> "36 .It is well established, that while passing an interim order of injunction under Order 39 Rules 1 and 2 CPC, the court is required to consider three basic principles, namely,
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> (i) prima facie case;
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> (ii) balance of convenience and inconvenience; and

(iii) irreparable loss and injury;

None of the said principles have been considered by the .

High Court while passing the second and third interim orders dated 22.4.2008 and 7.5.2008, nor has the High Court taken into account the long silence on the part of Respondent 1 Corporation in filing a suit after 19 years."

4(iv)(a). Above is settled legal position for considering the application under Order 39 Rule 1 and 2 CPC.

However, in my considered view, the facts of instant case do not satisfy the parameters for grant of injunction. Whether 2018 policy is applicable to the petitioner or not, is to be adjudicated by the learned trial Court on the basis of respective pleadings and the evidence to be adduced by the parties during trial.

Presently, it is not disputed that while accepting his appointment vide letter dated 29.11.2016 for assignment as ERO for a period of 3 years or 65 years of age (whichever is earlier), petitioner had also signed Non Disclosure/Confidentiality Agreement with the respondent bank, giving the right to respondent bank to withdraw the assignment from him (petitioner) without any notice whatsoever. Petitioner has already completed 2 years of assignment as on 28.11.2018 i.e. maximum period permitted for ERO in terms of letter dated 1.11.2018. Having completed maximum period of assignment under communication dated 1.11.2018, petitioner is presently not in service with respondent .

bank. In case petitioner would succeed in his civil suit, he can be suitably compensated monetarily. Grant of injunction, as prayed for, would also amount to decreeing the very suit at this stage.

4(iv)(b). It is beneficial to refer to (1994) 4 Supreme Court Cases 225, titled Morgan Stanley Mutual Fund Vs. Kartick Dass, wherein Hon'ble Apex Court has observed as under:-

> 37. In United Commercial Bank v. Batik of India, this Court observed: (SCC pp. 787-88, paras 52-53) "No injunction could be granted under Order 39, Rules 1 and

2 of the Code unless the plaintiffs establish that they had a prima facie case, meaning thereby that there was a bona fide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a prima facie case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on tile material on record that the plaintiffs have a prima facie case. It cannot be disputed that if the suit were to be brought by the Bank of India, the High Court would not have granted any injunction as it was bound by the terms of the contract. What could not be done directly cannot be achieved indirectly in a suit brought by the plaintiffs."

Even if there was a serious question to be tiled, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rs 85,84,456. The fact remains that the payment of Rs 36,52,960 against the first lot of 20 documents made by the appellant to the Bank of India was a payment under reserve while that of .

Rs 49,31,496 was also made under reserve as well as against the letter of guarantee or indemnity executed by it. A payment 'under reserve' is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

It has further been observed by Hon'ble Apex Court in (2009) 10 SCC, 388, titled Zenit Mataplast Private Limited Vs. State of Maharashtra and Others., in paras No. 30, 32 and 33 as under:-

> "30.....Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is, to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. (vide Anand Prasad Agarwalla v. State of Assam vs. Tarkeshwar Prasad & Ors. AIRB 2001 SC 2367; and Barak Upatyaka D.U. Karmachari Sanstha
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> 32. In Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd., AIR 1999 SC 3105, this court observed that the other considerations which ought to weigh with the Court hearing the application or petition for the grant of injunctions are as below :
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> (i) Extent of damages being an adequate remedy;
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> (ii) Protect the plaintiff's interest for violation of his rights .

though however having regard to the injury that may be suffered by the defendants by reason therefor ;

(iii) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the others;

(iv) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case- the relief being kept flexible;

(v) The issue is to be looked from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) Whether the grant or refusal of injunction will adversely affect the interest of general public which can or cannot be compensated otherwise."

33. In Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors., AIR 1993 SC 276, the Supreme Court explained the scope of aforesaid material circumstances, but observed as under:-

> "The phrases `prima facie case', `balance of convenience' and ` irreparable loss' are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts rest eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience....."

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It has further been observed by Hon'ble Apex Court in (2013) 9 SCC, 221, titled Mohd. Mehtab Khan and Others Vs. Khushnuma Ibrahim Khan and Ors., in paras No. 17, 18 and 19 as under:-

> "17.....It is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate.
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> Such a stance by the courts is neither feasible nor practicable. Courts, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any straitjacket formula or any precise laid down norms. Courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit alongwith the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the Court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible. Though experience has shown that observations and clarifications to the effect that the findings recorded are prima

facie and .

tentative, meant or intended only for deciding the interim entitlement of the parties have not worked well and interim findings on issues concerning the main suit has had a telling effect in the process of final adjudication it is here that strict exercise of judicial discipline will be of considerable help and assistance. The power of self-correction and comprehension of the orders of superior forums in the proper perspective will go a long way in resolving the dangers inherent in deciding an interim matter on issues that may have a close connection with those arising in the main suit.

18. There is yet another dimension to the issues arising in the present appeal. The interim relief granted to the plaintiffs by the Appellate Bench of the High Court in the present case is a mandatory direction to handover possession to the plaintiffs.

Grant of mandatory interim relief requires the highest degree of satisfaction of the Court; much higher than a case involving grant of prohibitory injunction. It is, indeed, a rare power, the governing principles whereof would hardly require a reiteration inasmuch as the same which had been evolved by this Court in Dorab Cawasji Warden vs. Coomi Sorab Warden and Others has come to be firmly embedded in our jurisprudence.

19. Paras 16 and 17 of the judgment in Dorab Cawasji Warden (supra), extracted below, may be usefully remembered in this regard:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of .

such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial.

That is, it shall be of a higher standard than a prima facie case that 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 the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the 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 prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

5. In view of the aforesaid observations/discussion, I find no merit in the instant petition. Hence, no interference is called for in the impugned order passed by learned Addl. District Judge-I, Kangra at Dharamashala, H.P. Accordingly, the petition .

is dismissed alongwith pending application if any. However, it is made clear that the observations, made hereinabove are only for the purpose of deciding instant petition and these will not affect the rights and contentions of the parties and the merits of the civil suit pending before the trial Court.

(Jyotsna Rewal Dua) Judge August 9, 2019 (Anant Parihar)