

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE Ms. JUSTICE J. UMA DEVI

CIVIL MISCELLANEOUS APPEAL NO.459 OF 2017

DATED:23-06-2017

Between:

M/s. Mahaveer Infoway Limited
Rep. by its Director Mr. Ashok Kumar Jain
Hyderabad
and another ... Appellants

And

M/s. Tech Minfy Info Solutions LLP,
Rep. by its Partner Mr. Anand Tirumani
Hyderabad
and others ... Respondents

COUNSEL FOR THE APPELLANT: Mr. Vedula Venkataramana,
Senior Counsel,
for M/s. Bharadwaj Associates

COUNSEL FOR THE RESPONDENTS: Mr. S. Niranjan Reddy,
Senior Counsel,
for Mr. A. Venkatesh

THE COURT DELIVERED THE FOLLOWING:

JUDGMENT: (per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)

This civil miscellaneous appeal is directed against an *ex parte* interim order dt.18.5.2017 in O.P. No.4 of 2017 on the file of the Vacation Civil Judge-cum-IX Additional Chief Judge, City Civil Court, Hyderabad.

2. The facts giving rise to this appeal, precisely stated, are as follows. Respondent No.1 is a limited liability partnership firm (LLP) incorporated under the provisions of the Limited Liability Partnership Act, 2008 (for short, 'the Act'). Appellant No.1, which is represented by its Director, appellant No.2, is a 50% shareholder in the LLP, while respondent No.2 holds the balance 50% share therein. The LLP was formed on 16.12.2014 under a partnership deed and was accordingly incorporated under the Act. Respondent Nos.1 and 2 filed O.P. No.4 of 2017 in the Court of Chief Judge, City Civil Court, Hyderabad, under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the Arbitration Act').

3. The main allegation of respondent Nos.1 and 2 against the appellants is that the appellants in collusion with respondent Nos.3 and 4, the sons of appellant No.2, who formed respondent No.5 company, are indulging in the business similar to that of respondent No.1 in gross violation of the LLP and that thereby the appellants are causing huge loss to respondent Nos.1 and 2 not only in terms of monetary aspects but also in terms of reputation loss as well. It was further alleged that appellant No.2 is not allowing the designated employees of respondent No.1 to the office space so as to work on the prospects of respondent No.1 and is interfering with their works. It was further averred that respondent No.2 being the 50% partner of respondent No.1 is entitled to have access to APN Portal apart from having access to credentials, servers, portals, websites, emails etc., and that the same is being deliberately denied by appellant Nos.1 and 2 in collusion with respondent Nos.3 and 4. It was

also alleged that the appellants in order to camouflage their illegal activities are deliberately not providing access to respondent No.2 and/or sharing the details of respondent No.1 with respondent No.2. That if respondent Nos.1 and 2 continue to have access to the resorts, hotels, accounts, etc., the illegal activities of the appellants would have been got exposed. By claiming that respondent Nos.1 and 2 are entitled to initiate legal action against the appellants by way of arbitration proceedings, they have averred that pending initiation of such proceedings there is every possibility that the appellants, in order to cover up their illegal acts and also render the arbitration proceedings a fait accompli, may resort to manipulation of records by denying access to respondent Nos.1 and 2 to credentials, servers, websites, AWS Accounts, APN Portals, Zoh Books etc. On the aforementioned averments, respondent Nos.1 and 2 claimed the following reliefs:

"...to grant an interim injunction pending the present O.P. as follows:

- a. Directing the Respondents from not disabling the Google email server access to the petitioner No.2 and thereby enabling the petitioner No.2 from having full access to the administrative rights [Techminfy domain (www.techminfy.com), Amazon Partner Network (APN), Portal Alliance Lead] to the petitioner No.1.*
- b. Directing the respondent Nos.2 to 5 from not doing similar business as to that of M/s. TechMinfy Info Solutions LLP, i.e., petitioner No.1, by using its credentials.*
- c. Directing the respondents from diverting the clients of M/s. Techminfy Info Solutions LLP to respondent No.5 as well as any other company in which the Respondents have similar interests directly or indirectly.*
- d. Restraining the Respondent Nos.1 & 2 from denying access to designated employees of the petitioner to the office space of M/s. Techminfy Info Solutions LLP;*
- e. Direct Respondent No.5 to render accounts;*
- f. Pass such other order or orders as this Hon'ble Court may deem fit and proper in the interest of justice and equity;*
- g. To award costs in the O.P."*

4. By the order under appeal, the Court below, while issuing notice to the appellants and directing respondent Nos.1 and 2 to comply with the requirements of Rule 3 of Order XXXIX of the Code of Civil Procedure, 1908 (CPC), has granted the reliefs claimed in (a), (b) and (d) by way of an *ex parte* ad interim order and posted the case to 05.6.2017. Feeling aggrieved by this order, respondent Nos.1 and 2 in the O.P. filed this appeal.

5. We have heard Mr. Vedula Venkata Ramana, learned Senior Counsel, for the appellants, and Mr. S. Niranjan Reddy, learned Senior Counsel, for respondent Nos.1 and 2.

6. The learned Senior Counsel for the appellants submitted that the order under appeal is in violation of the principles governing the grant of *ex parte* ad interim injunction as adumbrated under the proviso to Rule 3 of Order XXXIX CPC, as, no reasons whatsoever were assigned by the Court below for choosing to grant an ad interim order, instead of issuing notice under Rule 3. The learned Senior Counsel also submitted that the Court below has failed to discuss the elements of *prima facie* case, balance of convenience and irreparable injury before granting the *ex parte* ad interim injunction order. He has also submitted that though the relief was couched in the form of prohibitory relief, in reality, the reliefs claimed are mandatory in nature, which ordinarily are not granted without notice to the other side. In support of his submissions, the learned Senior Counsel referred to and relied upon *Shiv Kumar Chadha v. Municipal Corporation of Delhi*¹ and *Kasuganti Anantarao v. Kasuganti Aruna*².

7. Mr. S. Niranjan Reddy, learned Senior Counsel for respondent Nos.1 and 2, while opposing the above submissions sought to justify the order of the Court below. While conceding that the Court below has not

¹ (1993) 3 SCC 161

² 1985 (2) ALT 339

assigned reasons for granting *ex parte* ad interim order in express terms, he has however submitted that from a reading of the order as a whole the reasons are discernable. Alternatively he has submitted that while granting ad interim order in exercise of its power under Section 9 of the Arbitration Act the Court may not be strictly bound by the provisions of Rule 3 of Order XXXIX CPC and as such, the order of the Court below is not liable to be interfered with on the ground of violation of the provisions contained in proviso to Rule 3 of Order XXXIX CPC. He has disputed the submission of the learned Senior Counsel for the appellants that the Court below has granted the reliefs which are mandatory in nature and further submitted that they are prohibitory in nature only, which the Court found necessary to grant such reliefs in order to protect the interests of the parties pending the service of notice on the other side and passing a final order. He has further submitted that as the power to grant interim relief is comprehended within the scope of the powers conferred on the Court under Section 9, and the Court below, having exercised its discretion in favour of granting interim relief, the appropriate remedy for the appellants lies in approaching the lower Court itself seeking vacation of the interim order. He has further pointed out that the appellants have already entered appearance and sought time for filing counter affidavit. In support of his submissions, the learned Senior Counsel has placed reliance on the judgment of the Supreme Court in *A. Venkatasubbiah Naidu v. S. Chellappan*³, and judgments of this Court in *East India Udyog Limited v. Maytas Infra Limited*⁴, *Bilasraika Sponge Iron Pvt. Ltd. V. Devi Trading Company*⁵, and *I. Sudershan Rao v. Evershine Builders Private Limited*⁶.

³ (2000) 7 SCC 695

⁴ 2015 (5) ALD 446 (FB)

⁵ 2011 (5) ALD 327 (DB)

⁶ 2012 (5) ALD 715 (DB)

8. From the respective submissions of the learned Senior Counsel for the parties, the following points emerge for consideration.

- (i) Whether the Court exercising jurisdiction under Section 9 of the Arbitration Act is under obligation to record reasons?
- (ii) Whether the appeal is maintainable?
- (iii) Whether the order under appeal is liable to be set aside?

Re Point No.(i).

9. Section 9 of the Arbitration Act empowers the Court to grant certain interim measures in favour of a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 of the said Act. Such interim measures include interim injunction. The Arbitration Act does not contain any provision laying down principles governing the discretion of the Court while granting such reliefs either by way of ad interim orders or as a final relief. In the absence of any guiding principles under the Arbitration Act, the Court has to necessarily fall back upon the provisions of Order XXXIX CPC which apply to every application filed for grant of temporary injunctions and interlocutory orders. This must be so, for, the Court which is conferred with the jurisdiction to grant an order of injunction under Section 9 of the Arbitration Act, is also the Court which is governed by the provisions of the CPC. Merely because the Court has derived the power to grant an injunction from an additional source under a special enactment, such as the Arbitration Act, it nevertheless cannot ignore the principles underlying the provisions of Order XXXIX CPC. Rule 3 of Order XXXIX CPC embodies principles of natural justice. Proviso to the said provision is an exception to the Rule. This being so, the Court is under obligation to act in a fair manner, even while dealing with applications under a special enactment, such as the Arbitration Act,

consistent with the procedure being followed by it while disposing of applications under Order XXXIX CPC. It would be paradoxical if the same court while considering grant of similar reliefs applies varying standards of procedure depending upon the enactment under which it exercises its powers. Viewed in this manner, we have no hesitation to hold that even if the proviso to Rule 3 of Order XXXIX CPC does not per se apply, the analogous procedure must be followed by the Court, dealing with an application for injunction under Section 9 of the Arbitration Act. This point is accordingly answered in the affirmative.

Re Point No.(ii)

10. In view of Rule 4 of Order XXXIX CPC, which enables the party who suffered an *ex parte* order of injunction to make an application for discharge, varying or setting aside of such order, ordinarily appeal is not maintainable. However, the Courts have carved out certain exceptions to this Rule. The Supreme Court in *A. Venkatasubbaiah Naidu* (3 supra) held that where the Court which granted an injunction order flouted the mandate of Rule 3A of Order XXXIX, the aggrieved party can maintain an appeal against the *ex parte* injunction order and the appellate court is bound to decide the case on merits.

11. Deriving support from the ratio in *A. Venkatasubbaiah Naidu* (3 supra), a Division Bench of this Court in *Innovative Pharma Surgicals v. Pigeon Medical Devices (P) Ltd.*⁷ held that as a matter of course, no appeal lies against an ad interim injunction order, except in extraordinary circumstances, such as non-compliance of the mandatory provisions, or the rarest of the rare cases where the order is perverse or biased or it suffers from lack of jurisdiction. The ratio in *Innovative Pharma Surgicals*

⁷ 2004 (3) ALD 228 (DB)

(7 supra) was reiterated by a Division Bench of this Court in *Jagdamba Phosphate v. Coromandel International Ltd.*⁸

12. In *Gautam Chand Chordia v. Majida Hasany*⁹, a Division Bench of this Court, speaking through one of us (Justice C.V. Nagarjuna Reddy), has allowed the appeal filed against an *ex parte* injunction order on the ground that the Court which passed the said order has committed a serious jurisdictional error in failing to comply with the mandatory requirement of the proviso to Rule 3 of Order XXXI C CPC (giving reasons for dispensing with notice) and also in failing to discuss the essential elements of *prima facie* case, balance of convenience and irreparable injury.

13. From the case law discussed above, it is evident that an appeal lies against an *ex parte* ad interim injunction order, if the order does not satisfy the mandatory requirement of giving reasons in terms of the proviso to Rule 3 of Order XXXIX CPC.

Re Point No.(iii)

14. A perusal of the docket order of the Court below shows that it is bereft of any reasons whatsoever. While we agree with the learned Senior Counsel for respondent Nos.1 and 2 that there is no requirement of literal reproduction of the language of the proviso to Rule 3 of Order XXXIX CPC for granting *ex parte* interim injunction order, a reading of the order as a whole must, however, indicate proper application of mind by the Court below and its satisfaction that the nature of the relief claimed by the party is such that by giving notice to the adversary party, the purpose of filing the application will be defeated. A careful reading of the judgment of the Court below in its entirety does not show that such application of mind has been reflected therein. Nowhere in the order, the Court below

⁸ 2016 (6) ALT 537 (DB)

⁹ 2017 (3) ALT 412 (DB)

has even remotely indicated that issue of notice without granting an *ex parte* interim injunction would make the application *fait accompli* and cause prejudice to the interests of respondent Nos.1 and 2. We therefore reject the submission of the learned counsel for respondent Nos.1 and 2 that the reasons for dispensing with for granting *ex parte* interim order are discernable from a reading of the order.

15. In *Shiv Kumar Chadha* (1 supra), a three Judge Bench of the Supreme Court went into the legislative history of Order XXXIX CPC and observed that before the proviso to Rule 3 of Order XXXIX CPC was introduced by the 1976 amendment, the Code as a rule provided for issuance of notice before granting interim order of injunction and that the proviso enabled the Court to grant an *ex parte* interim injunction, provided, it is satisfied that the object of granting injunction would be defeated by delay and the Court must record reasons in that regard. It has further held that having regard to this background, the requirement of recording reasons for grant of *ex parte* injunction, cannot be held to be a mere formality and that this requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. That the party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the *ex parte* order. In the case on hand, in the absence of any reasons recorded by the Court below for granting ad interim injunction, the order under appeal does not conform to the principles laid down by the Apex Court in *Shiv Kumar*

Chadha (1 supra). We therefore hold that absence of reasons justifying the granting of ad interim injunction before issuing notice vitiates the order under appeal.

16. As regards the judgments cited by the learned Senior Counsel for respondent Nos.1 and 2, there is no quarrel on the proposition that the Court, while exercising jurisdiction under Section 9 of the Arbitration Act, is empowered to grant interim relief also. However, while existence of power is one thing, the manner in which the Court exercised such power is another thing. As the Court below has failed to record reasons for granting *ex parte* interim injunction, the judgments on which the learned Senior Counsel for respondent Nos.1 and 2 has placed reliance, do not help his clients in seeking to sustain the injunction order granted by the Court below. In the light of the findings rendered hereinbefore, rest of the submissions of the learned Senior Counsel for the appellants need not be considered.

17. For the aforementioned reasons, the order under appeal is set aside. The Court below is directed to dispose of the application for interim relief as expeditiously as possible and not later than two months from the date of receipt of this order. The civil miscellaneous appeal is accordingly allowed.

As a sequel to disposal of the appeal, C.M.A.M.P. No.780 of 2017 filed by the appellants for interim relief shall stand disposed of as infructuous.

C.V. NAGARJUNA REDDY, J

J. UMA DEVI, J

23-06-2017

Note: LR copies to be marked.

(B.O)

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