IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.188 OF 2022
WITH
INTERIM APPLICATION NO.1230 OF 2022
IN
APPEAL FROM ORDER NO.188 OF 2022

Future Enterprises Limited ...Appellant

Versus

1. IDBI Trusteeship Services Limited
2. Fairvalue Advisors Private Limited
3. Central Departmental Stores Private Limited
4. Kishore Biyani ...Respondents

....

Mr. Ravi Kadam, senior Advocate with Mr. Vikram Nankani, Mr. Ameet Naik, Mr. Abhishek Kale, Ms Gulnar Mistry, Mr. Sumeet Nankani, Ms Nisha Kaba and Ms Soumya Gulati with Mr. Dhruv Nyayadhish i/b. M/s. Naik, Naik and Co. for the Appellant.
Mr. C. Navroz Seervai, senior counsel with Mr. Birendra Saraf, Mr. Piyush Raheja with Mr. Shaswat Rai, Ms Alefiyah S. i/b. M/s. Keystone Partners for Respondent No.1.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 7th MARCH, 2022.

P.C. :-

1. The Appellant (original Defendant No.1) challenges order dated 25/02/2022 whereby the learned Judge has granted ex-parte injunction in S.C. Suit(stamp) No.1864 of 2022 filed by Respondent No.1(original Plaintiff).

2. The Respondent No.1 /Original Plaintiff-IDBI Trusteeship Services Limited is a company interalia engaged in the business of providing trusteeship services. Respondent No.2 /original Defendant No.1 vide Debenture Trust Deed and debenture trust agreement dated 27/11/2018 appointed Respondent No.1-Plaintiff to act as a debenture trustee vide Non Convertible Debentures (NCD) for and on behalf of and for further benefit of the NCD holders. Respondent No.2/Defendant No.1 had issued NCDs in principal amount of Rs.10,00,000/- each in an aggregate principal amount of approximately 1070 crores (Indian Rupees One Thousand and Seventy Crores) by way of private placement in one or more tranches.

3. It was alleged that as on the date of the suit outstanding amount due and payable to NCD holders was Rs.16,82,82,64,226/-.

4. The Respondent No.1-Plaintiff claimed that the Appellant and Respondent Nos.2 and 3 are group of companies belonging to the Future Group. The Plaintiff claimed that Respondent No.2(Defendant No.1) is a subsidiary of Respondent No.3/Defendant No.2, which is currently holding approximately 12.67% of share holding of Appellant/Defendant

No.3, which is an Indian listed company. It is averred that Respondent No.2 /Defendant No.1 and Respondent No.3/ Defendant No.3 had undertaken several undertakings and obligations under the Debenture Trust Deed and the Letter of Support in reliance of which NCD holders have provided monies to Respondent No.2/Defendant No.1. One such undertaking provided by Respondent Nos.2 and 3 is to ensure that the Appellant -Defendant No.3 and its affiliates interalia maintained a prescribed minimum shareholding in Future Generali India Insurance Company Ltd (FG). The Respondent No.1-Plaintiff claims that in breach of such undertaking on 26/1/2022, the Appellant/Defendant No.3 made a regulatory filing to the stock exchange to the effect that it had agreed to sell 25% stake in Future Generali to Generali Participation Netherlands N.V. for a cash consideration of INR 1252.96 crores plus an additional consideration i.e. linked to the date of closing of the transaction. The Respondent -Plaintiff alleged that transaction contemplated under FEL disclosure is not permitted to be undertaken without its prior consent and such transaction, without consent, is in blatant breach of the terms and obligations set out in the Debenture Trust Deed and Letter of Support. Respondent No.1 therefore issued letters dated 04/02/2022 and 14/02/2022 to Respondent Nos.2 and 3 with copy to the Appellant, calling upon them to ensure that there is no breach of confidence

/obligation under Debenture Trust Deed and Letter of Support. Respondent No.1- Plaintiff did not receive any response from the Appellant and Respondent Nos.2 and 3. Respondent No.1 -Plaintiff claimed that failure on the part of Respondent Nos.2 and 3 to comply with the obligation under the documents to ensure that the Appellant - Defendant No.3 and its affiliates maintaining minimum share holding in FG would be in complete breach of contractual obligation under Debenture Trust Deed and Letter of Support.

5. Apprehending that the Appellant-Defendant No.3 would sell/alienate shares of reference entity, Defendant No.3(Future Generali) / Respondent No.1-Plaintiff filed a suit for declaration that Respondent Nos.2 and 3 and particularly Appellant/Defendant No.3 are not entitled to sell or enter into any agreement to sell their stake in FG with any third party during the subsistence of Debenture Trust Deed. Respondent No.1 also sought to restrain the Appellant (defendant No.3) and its affiliates by way of perpetual injunction from selling their stake in FG during the subsistence of Debenture Trust Deed. Respondent No.1-Plaintiff also filed a notice of motion seeking interim injunction.

6. By the impugned order the Trial Court granted ad-interim

relief in favour of Respondent No.1-Plaintiff and thereby restrained the Appellant-Defendant No.3 from selling its stake in FG till the next date of hearing. Being aggrieved by this order the Appellant-Defendant No.3 has filed this appeal.

7. Mr. Ravi Kadam, learned senior counsel for Appellant-Defendant No.3 and Mr. Nankani, learned counsel for Respondent No.2 and 3 submit that there was no privity of contract between the Appellant and Respondent No.1-Plaintiff. Learned counsel for the Appellant and Respondent Nos.2 and 3 further submit that the Trial Court has not followed the principles laid down by the Apex Court in ***Morgan Stanley Mutual Fund Vs. Kartick Das (1994) 4 SCC 225.*** It is submitted that Respondent No.1-Plaintiff had not sure shown pressing urgency so as to insist on passing of exparte order.

8. Per contra, Mr. Seervai, learned senior counsel for Respondent No.1 submits that Respondent No.2 is a subsidiary company of Respondent No.3, which is currently holding approximately 12.66 shareholdings of the Appellant. He submits that at the time of execution of Debenture Trust Deed and Letter of Support Respondent Nos.2 and 3 had undertaken and ensured that the Appellant /Defendant No.3 and its

affiliates would maintain a prescribed minimum shareholding in FG. He submits that the Appellant was well aware of this undertaking given by Respondent Nos.2 and 3. He further submits that vide letters dated 04/02/2012 and 14/02/2012 the Respondent No.1-Plaintiff had called upon the Defendant Nos. 1 and 2 not to breach terms of the undertaking and assurance given by Defendant Nos. 1 and 2. The Plaintiff has not received any response from the Appellant and Respondent Nos.2 and 3 with respect to the said letters. He submits that the Company of the Appellant to initiate the process of selling his stake in Future Generali is in breach of covenant prescribed in the Debenture Trust Deed and Letter of Support and would be detrimental to NCD holders represented by Respondent No.1-Plaintiff. It was under these circumstances that Respondent No.1-Plaintiff had sought urgent ad-interim relief.

9. Perused the records and considered the submissions advanced by the learned counsel for the respective parties.

10. At the outset, it may be mentioned that in the case of ***Morgan Stanley*** *(supra)* the Hon'ble Supreme Court has enunciated the principles which govern the grant of interim injunction. The principles which have been laid down are thus:-

36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are-

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court.

37. In United Commercial Bank v. Batik of India5, 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?.....

38. This Court had occasion to emphasise the need to give reasons before passing ex parte orders of injunction. In Shiv Kumar Chadha v. 5 (1981) 2 SCC 766 Municipal Corpn. of Delhi6, it is stated as under: (SCC pp. 176-77, paras 34-35) "... the court shall 'record the reasons' why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. 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 '1, the procedure prescribed under the proviso has been followed. The party which invokes the Jurisdiction of the court for grant of an order of restrain 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. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or *not all. This principle was approved and accepted in well-known cases of Taylor v. Taylor', and Nazir Ahmed v. Emperor8. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke v. Govind Joti Chavare9.*

As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed."

11. In the instance case the order of the learned Judge reads thus:-

"P*erused the draft NM which is supported by an affidavit. Also perused the plaint and documents annexed therein. I have perused the plaint and documents annexed therein. I have perused the document at page 174(Exh-F) annexed to the plaint. The document at page 180 (Exh.-G) shows about communication dt.04/02/2022, Also a document at Exh. H at page 182 dt. 14/02/2022. It is submitted on affidavit that neither of this letter have been replied. I find substance in the argument of the ld. Adv for the plf that if no protection is granted it would be defeated by the delay. The main suit is for declaration and injunction. Deft. no.3 appears to be the central part of composition transaction involved in the group companies from carrying out the transaction. Considering this till next date deft. no.3 is restrain from selling their stake in Future Generali India Insurance Company Limited. ....*"

12. In the instant case the Plaintiff-Respondent No.1 had sought interim relief as against Appellant-Defendant No.3 on the basis of the undertaking/assurance given by Respondent Nos.2 and 3 in Debenture

Trust Deed and Letter of Support. It is to be noted that the Appellant was not a party to the said Deed or Letter of Support. There was no privity of contract between the Appellant and Respondent No.1-Plaintiff. The Plaintiff neither averred nor produced any material before the Trial Court to prima facie prove that the Appellant-Defendant No.3 was bound by the undertaking given by Respondent Nos.2 and 3. Hence, prima facie Respondent No.1 has no contractual right as against Appellant-Defendant No.3.

13. It is also pertinent to note that the cause of action as pleaded in paragraph 34 of the Plaint had accrued on 26/01/2022. Respondent No.1-Plaintiff had therefore knowledge of the disclosure of the transaction with FG on 26/01/2022. Respondent No.1-Plaintff had issued notice dated 04/02/2022. The Respondent No.1 -Plaintiff did not approach the civil court even though the Respondent Nos.2 and 3 had not replied to the said notice but it issued yet another notice dated 14/02/2022 and filed a suit on 02/03/2022. The fact that respondent No.1- Plaintiff had waited for almost a month to file the suit itself indicates that there was no pressing or eminent urgency for grant of ad-interim relief. The learned Judge was therefore not justified in granting ad-interim relief. Consequently, the impugned order cannot be sustained.

14. Hence, the appeal is allowed. The impugned order is quashed and set aside.

15. In view of disposal of the Appeal, the interim application does not survive and hence stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)