

27.06.2023

S.R.

FMAT 218 of 2023
with
IA NO. CAN 1 of 2023

Sanjay Goswami
Vs.
Ajay Kumar Agarwala & Ors.

Mr. Anindya Bose
Mr. Subhayu Das
Mr. Diptendu Mondal
... For the appellant.

The plaintiff/appellant has assailed the order no. 2 dated 2nd May, 2023 passed by the learned Judge-in-charge, 11th Bench, City Civil Court at Calcutta in Title Suit No. 816 of 2023 whereby the learned Court below refused to pass *ex parte* order of injunction, as prayed for.

The facts giving rise to this appeal, in brief, are that the plaintiff/appellant (hereinafter referred to as the plaintiff) filed a suit for declaration and permanent injunction contending, *inter alia*, that the plaintiff owned 12.45% share in the proforma defendant company and from a reliable source the plaintiff came to learn that an application under Section 9 of the Insolvency and Bankruptcy Code 2016 read with Rule 6 of the Insolvency and Bankruptcy Rules, 2016 has been preferred before the learned National Company

Law Tribunal (in short, NCLT) by the defendant no.3 against the proforma defendant company. In the midst thereof, the defendant nos.1 and 2 being the directors of the proforma defendant company having a total 0.76% share in the proforma defendant company has entered into a terms of settlement with the defendant no.3 and agreed to pay a sum of USD 1,72,000.00/- to the defendant no.3 though they have no right to enter into such sort of terms of settlement. Hence, the plaintiff was constrained to institute the suit praying for declaration that the said terms of settlement was null and void and a decree of permanent injunction also prayed for to restrain the defendant from giving effect to such terms of settlement. One application under Order 39 Rules 1 and 2 was also preferred in which the prayer for *ad interim order* of temporary injunction was sought for but the learned Court refused to pass *ex parte* order of injunction. Aggrieved thereby, the appellant has preferred this appeal.

Mr. Bose, learned advocate appearing for the appellant submits that if the defendant nos.1 and 2 are allowed to give effect to such terms of settlement, the plaintiff shall suffer irreparable loss and injury and considering this aspect the learned Court below should have granted the *ex parte* order of injunction.

Order impugned postulates that the learned Court below refused to grant *ex-parte* order of injunction on the premise that opportunity of being heard was required to be afforded to the defendants since from the paragraph 4 of the application for interim order, it appeared that one Green Valley Steel Industries has 61.59 per cent stake and two directors being the defendant nos. 1 and 2 are having stake of 0.38 per cent in the company.

Contour of the controversy centered around the present appeal is whether the learned Court fell in error in not granting *ex parte* order of injunction!

For better understanding of the issue involved in the present appeal, the Rule 3 of Or. 39 of the Code of Civil Procedure, 1908, which deals with the procedure to be followed by the Court once the order of temporary injunction is prayed for under Rules 1 and 2 of Or. 39 of the Code, is extracted hereunder:

‘3. Before granting injunction, Court to direct notice to opposite party- The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

Provided that, where it is proposed to grant an injunction without giving notice of the application to the

opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.'

The words '*in all cases*' indicate that whenever application for interim order of injunction is filed, notice to the opposite party or parties is a must. But in an exceptional case, if the party applying for injunction makes out a case of extreme urgency and the delay on account of time consumed in service of notice would have the effect of defeating the very object of granting the order of temporary injunction, Court can grant an *ex parte* order of temporary injunction. Legislative fiat

is that the Court shall record reasons for its opinion that object of granting injunction would be defeated by delay.

It is no longer *res integra* that *ex parte* order of injunction should be granted only in exceptional circumstances. To grant *ex parte* order of injunction, Court shall consider the general principles like *prima facie* case, balance of convenience and irreparable loss and injury and in addition thereto, the Court shall also consider- i) whether irreparable or serious mischief will ensue to the plaintiff; ii) whether the refusal of *ex-parte* injunction would involve greater injustice than the grant of it would involve; iii) at which time the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented; iv) whether the plaintiff had acquiesced for sometime and in such circumstances, the Court will not grant *ex parte* injunction. (See, case of *Morgan Stanley Mutual Fund -vs- Kartick Das* reported in (1994) 4 SCC 225).

From paragraph -8 of the application for interim order, it appears that the terms of settlement, which was executed on 28.8.2021, was filed before NCLT on 30.8.2021 and the suit has been filed in 2023. The plaintiff had notice of such terms of settlement since long back. Hence, the claim of the appellant that delay

in granting an order of injunction would frustrate the object of granting injunction is unfounded.

Having considered the facts and circumstances of the case, we are of the view that plaintiff/appellant has not been able to make out any case leading us to infer that plaintiff/appellant was entitled to *ex parte* order of injunction. We have not found any infirmity in the approach and decision of the learned Court below.

For the reasons discussed above, the appeal and the connected application are dismissed.

There shall, however, be no order as to costs.

The learned trial Judge shall dispose of the injunction petition as expeditiously as possible without being influenced by any of the observations made in this order.

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)