SUPREME COURT OF INDIA

Best Sellers Retail (India) Pvt. Ltd.

Vs.

Aditya Birla Nuvo Ltd.

C.A.No.4313-4314 of 2012

(A. K.Patnaik and Swatanter Kumar, JJ.)

08.05.2012

JUDGEMENT

A. K. Patnaik, J.

1. Leave granted.

2. These are appeals by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 25.08.2010 of the High Court of Karnataka in MFA No.4060 of 2010 and in M.C. No12036 of 2010 and in M.C. No.12036 of 2010.

3. The relevant facts briefly are that Aditya Birla Nuvo Ltd., respondent no.1 in both the appeals, filed a suit O.S. No.1533 of 2010 against Liberty Agencies, a partnership firm and its partners, in the Court of the City Civil Judge at Bangalore. The case of the respondent no.1 in the plaint was as follows: The respondent no.1 was engaged in the business of readymade garments and accessories under various reputed brand names and in the year 1995 had appointed Liberty Agencies as an agent to conduct its business of readymade garments and accessories with the reputed brand name Louis Philippe. Thereafter, on 02.03.2005 respondent no.1 entered into a fresh agreement with Liberty Agencies under which Liberty Agencies agreed to sell the products of the respondent no.1 in the suit schedule property and also agreed to retain the possession of the suit schedule property until the expiry of the term of agreement and Liberty Agencies was not to sell any other articles or goods other than that supplied by the respondent no.1. Under the agreement dated 02.03.2005 (for short the agreement), Liberty Agencies was entitled to a fixed commission of Rs.7,50,000/- per month and by an addendum dated 01.07.2008 the fixed commission payable to Liberty Agencies was increased to Rs.9,62,500/-. Thereafter, the respondent no.1 notified to Liberty Agencies various breaches of the terms and conditions of the agreement but Liberty Agencies did not set right the breaches. As a result, the respondent no.1 suffered huge financial losses.

The respondent no.1 issued a legal notice on 06.02.2010 calling upon Liberty Agencies to comply with the terms of the agreement. Liberty Agencies, however, sent a letter dated 26.02.2010 claiming that the constitution of the partnership firm has changed and that its partner A.C. Thirumalaraj had retired and that A.C. Thirumalaraj as the owner of the suit schedule property had terminated the tenancy of the suit schedule property in favour of Liberty Agencies and initiated a collusive eviction proceeding with an intention to defeat the claim of the respondent no.1. The respondent no.1 thus prayed for specific performance of the agreement and in the alternative for damages for expenses and losses amounting to Rs.20,12,44,398/- if the specific performance of the agreement was refused by the Court.

4. Along with the suit, respondent no.1 also filed an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure (for short the CPC) praying for a temporary injunction restraining the defendants from leasing, sub-leasing, alienating or encumbering the suit schedule property in any manner pending disposal of the suit. Liberty Agencies and A.C. Thirumalaraj filed their objections to the application for temporary injunction and stated, inter alia in their objections that the possession of the suit schedule property had been delivered to Best Sellers Retail (I) Pvt. Ltd. The Additional City Civil Judge heard the parties and by order dated 24.04.2010 allowed the application for temporary injunction and restrained Liberty Agencies and its partners including A.C.Thirumalaraj from leasing, sub-leasing, alienating or encumbering the suit schedule property in any manner pending disposal of the suit.

5. Aggrieved, A.C. Thirumalaraj filed a Miscellaneous Appeal under Order 43 Rule 1 of the CPC against the order of temporary injunction before the High Court. While the Miscellaneous Appeal was pending, it was brought to the notice of the High Court in I.A. No.1 of 2010 that in spite of the temporary injunction granted in favour of the respondent no.1, A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd., were opening a shop in the suit schedule property in the name of Jack & Jonesand by an order dated 16.07.2010 the High Court restrained Best Sellers (I) Pvt. Ltd. from carrying on business in the suit schedule property until further orders of the High Court. Best Sellers Retail (I) Pvt. Ltd. then filed an application M.C. No.12036 of 2010 for vacating the interim order dated 16.07.2010. By the impugned judgment, however, the High Court dismissed the Miscellaneous Appeal and rejected the appeal for vacating the interim order but directed the respondent no. 1 to give an undertaking to the trial court that in case respondent no.1 fails in the suit, it will compensate the loss to A.C. Thirumalaraj and Best Sellers Retail (I) Pvt. Ltd. for not using the suit schedule property. Aggrieved, A.C. Thirumalaraj and Best Sellers (I) Pvt. Ltd. have filed these Civil Appeals.

6. Mr. Altaf Ahmed and Mr. A.K. Ganguly, learned senior counsel appearing for the two appellants, submitted relying on the decision of this Court in *Kishoresinh Ratansinh Jadeja v. Maruti Corporation & Ors*[1]that while passing an order of temporary injunction under Order 39 Rules 1 and 2 CPC, the Court is to consider (i) whether the plaintiff has a prima facie case; (ii) whether balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff will suffer irreparable loss and injury if an order of injunction was not passed. They submitted that the respondent no.1 itself has claimed damages of Rs.20,12,44,398/- as alternative relief in the event the suit for specific performance of the contract is not decreed. They argued that as the plaintiff itself had made a claim for damages for the alleged breach of the agreement by the defendants, the Court should not have granted the temporary injunction in favour of the plaintiff.

7. Learned counsel for the appellants further submitted that Section 14(1) of the Specific Relief Act, 1963provides in clause (b) that a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms, such a contract cannot be specifically enforced. They submitted that similarly Section 14(1) in clause (d) provides that a contract, the performance which involves the performance of a continuous duty which the court cannot supervise, is a contract which cannot be specifically enforced. They submitted that the agreement between Liberty Agencies and respondent no. 1 is a contract of agency and is covered under clauses (b) and (d) of Section 14(1) of the Specific Relief Act, 1963 and is one which cannot be specifically enforced. They submitted that Section 14(1) of the Specific Relief Act, 1963 in clause (c) further provides that a contract which is in its nature determinable cannot be specifically enforced. They argued that on completion of six years from the date of the agreement, Liberty Agencies could terminate the agreement and the six years period had expired in the year 2011 and hence the Court cannot specifically enforce the contract. They submitted that Section 41 (e) of the Specific Relief Act, 1963 clearly provides that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be enforced.

8. Learned counsel for the appellants cited the decision in *Indian Oil Corporation Ltd. v. Amritsar Gas Service & Ors*[2]in which this Court has held that a contract which is in its nature determinable cannot be enforced by the Court. They also cited the decision in *Percept D Mark (India) (P) Ltd. v. Zaheer Khan & Anr*[3]in which this Court has held relying on the judgment of the *Chancery Division in Page One Records Ltd. v. Britton*[4]that where the totality of the obligations between the parties give rise to a fiduciary relationship injunction

would not be granted because the performance of the duties imposed on the party in the fiduciary relationship could not be enforced at the instance of the other party.

9. Learned counsel for the appellants further submitted that the agreement between Liberty Agencies and the respondent no.1 was an agency agreement and it did not create any interest whatsoever in the suit schedule property and, therefore, the respondent no. 1 was not entitled to any injunction restraining the owner of the suit schedule property from dealing with the property in any manner with a third party. They submitted that in any case since the defendants had clearly stated in their objections to the application for temporary injunction that possession of the suit schedule property had already been delivered to a third party, Best Sellers Retail (I) Pvt. Ltd., the trial court should not have granted any injunction without the third party being impleaded as a defendant. Learned counsel for the appellants submitted that the interest of the third party has been totally ignored by the trial court and the High Court and this is a fit case in which the order of temporary injunction should be set aside.

10. Mr. K. K. Venugopal, learned senior counsel appearing for the respondent no.1, on other hand, submitted that under clause B-2 of the agreement, Liberty Agencies had given a warranty that the suit schedule property is owned by it and that it will retain possession of the suit schedule property until the expiry of the agreement. He submitted that under clause D of the agreement the duration of the agreement was for a period of twelve years from the date of the agreement and this period was to expire in 2017 and, therefore, it is not correct, as has been contended by the learned counsel for the appellants, that the period of the agreement has expired. He argued that under clause E-2 of the agreement only the respondent no. 1 company had the right to terminate the agreement by giving a written notice of not less than three months after the end of six years from the date of the agreement and hence Liberty Agencies had no right to terminate the agreement. He submitted that no contention can, therefore, be raised on behalf of Liberty Agencies that the contract was determinable in nature or that the contract had expired.

11. In reply to the contention that under Section 14(1)(b) and (d) of the Specific Relief Act, 1963 the agreement cannot be specifically enforced, Mr. Venugopal cited Bowstead and Reynolds on Agency for the proposition that in exceptional cases specific performance of a contract of agency can also be decreed by the Court. He argued that Section 42 of the Specific Relief Act, 1963 makes it abundantly clear that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implead, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. He also cited the decision of the Chancery Division in Donnell v. Bennett reported in 22 Ch.D. 835 where it has been held that where there is a

negative clause in the agreement, the Court has to enforce it without regard to the question of whether specific performance could be granted of the entire contract. He referred to clause B-5 of the agreement which provides that Liberty Agencies shall only sell the products supplied by the respondent no.1 company and shall not sell any other articles/products manufactured by any other person/Company/Firm in the premises during the period of the agreement unless approved by the respondent no.1 company. He submitted that this is not a case where the appellants are entitled to any relief from this Court under Article 136 of the Constitution of India.

12. It is not necessary for us to deal with the contentions of learned counsel for the parties based on the provisions of Sections 14, 41 and 42 of the Specific Relief Act, 1963 because Section 37 of the said Act makes it clear that temporary injunctions are to be regulated by the CPC and not by the provisions of theSpecific Relief Act, 1963. In fact, the application for temporary injunction of respondent no. 1 before the trial court is under the provisions of Order 39 Rules 1 and 2 read with Section 151 of the CPC. It has been held by this Court in Kishoresinh Ratansinh Jadeja v. Maruti Corporation & Ors. (supra) that 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 (i) whether there is a prima facie case in favour of the plaintiff; (ii) whether the balance of convenience is in favour of passing the order of injunction; and (iii) whether the plaintiff will suffer irreparable injury if an order of injunction would not be passed as prayed for. Hence, we only have to consider whether these well-settled principles relating to grant of temporary injunction have been kept in mind by the trial court and the High Court.

13. On a reading of clause B-2 of the agreement, we find that Liberty Agencies had given a warranty that the suit schedule property was owned by it and that it will retain the possession of the suit schedule property until the expiry of the agreement. Clause D of the agreement clearly stipulated that the duration of the agreement shall be for a period of twelve years from the date of the agreement unless terminated in accordance with the provisions of the agreement. Clause E-2 further provides that respondent no. 1 and not Liberty Agencies could terminate the agreement by giving a notice of not less than three months after the end of six years from the date of the agreement and respondent no. 1 had not terminated the agreement under this clause. Before the expiry of six years from the date of the agreement, Liberty Agencies sent the letter dated 26.02.2010 to the respondent No.1 committing a breach of clause B-2 of the agreement which provided that Liberty Agencies will retain possession of the suit schedule property until the expiry of the agreement. This was the breach of the agreement which was sought to be prevented by the trial court by an order of temporary

injunction. The trial court and the High Court were thus right in coming to the conclusion that the respondent no. 1 had a prima facie case.

14. Yet, the settled principle of law is that even where prima facie case is in favour of the plaintiff, the Court will refuse temporary injunction if the injury suffered by the plaintiff on account of refusal of temporary injunction was not irreparable. In *Dalpat Kumar & Anr. v. Prahlad Singh & Ors*[5]this Court held:

Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in irreparable injury to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages.

15. In the present case, the respondent no.1 itself had claimed in the plaint the alternative relief of damages to the tune of Rs.20,12,44,398/- if the relief for specific performance was to be refused by the Court and break-up of the damages of Rs.20,12,44,398/- claimed in the plaint was as follows:

> "I. Net Book stock amount on 28.02.2010 is Rs.1,15,97,638/-.
>
> II. Loan amount due as on 27.01.2010 is Rs.44,81,584/-.
>
> III. Amount due as per Statement of Accounts as on 28.02.2010 is Rs.20,65,176/-.
>
> IV. Projected Loss of profit on sales, for the balance 7 year term of the Agency Agreement amounts to a sum of Rs.10,31,00,000/-.
>
> V. Loss of Goodwill, Reputation including amount spent on advertisement Rs.2,00,00,000/-.
>
> VI. Loss of amount which Plaintiff would incur for relocating the store to other place in the Brigade Road, Bangalore and to continue its business for rest of the term 7 years would amount to Rs.6,00,00,000/- along with simple interest at the rate of 24% p.a. from the date of payment till realization as the same being a commercial transaction."

16. Mr. Venugopal, learned counsel appearing for the respondent no.1, however, submitted that future profits and loss of goodwill of the respondent no.1 cannot be calculated in terms of the money, but the aforesaid statement of damages claimed by the respondent no.1 in the

plaint would show that the respondent no.1 has itself calculated a projected loss of profit for the balance seven year term of the agreement as Rs.10,31,00,000/- and has also assessed loss of goodwill at Rs.2,00,00,000/- besides the loss of Rs.6,00,00,000/- in relocating the store to another place in Brigade Road, Bangalore.

17. Despite this claim towards damages made by the respondent no.1 in the plaint, the trial court has held that if the temporary injunction as sought for is not granted, Liberty Agencies may lease or sub-lease the suit schedule property or create third party interest over the same and in such an event, there will be multiplicity of proceedings and thereby the respondent no.1 will be put to hardship and mental agony, which cannot be compensated in terms of money. Respondent no.1 is a limited company carrying on the business of readymade garments and we fail to appreciate what mental agony and hardship it will suffer except financial losses. The High Court has similarly held in the impugned judgment that if the premises is let out, the respondent no.1 will be put to hardship and the relief claimed would be frustrated and, therefore, it is proper to grant injunction and the trial court has rightly granted injunction restraining the partners of Liberty Agencies from alienating, leasing, sub-leasing or encumbering the property till the disposal of the suit. The High Court lost sight of the fact that if the temporary injunction restraining Liberty Agencies and its partners from allowing, leasing, sub-leasing or encumbering the suit schedule property was not granted, and the respondent no.1 ultimately succeeded in the suit, it would be entitled to damages claimed and proved before the court. In other words, the respondent no.1 will not suffer irreparable injury. To quote the words of Alderson, B. in The *Attorney-General vs. Hallett*[6] I take the meaning of irreparable injury to be that which, if not prevented by injunction, cannot be afterwards compensated by any decree which the Court can pronounce in the result of the cause.

18. For the aforesaid reasons, we set aside the order of temporary injunction passed by the trial court as well as the impugned judgment and the order dated 16.07.2010 of the High Court. The appeals are allowed with no order as to costs.

Judgment Referred

[1]*(2009) 11 SCC 229*
[2]*(1991) 1 SCC 533*
[3]*(2006) 4 SCC 227*
[4]*(1968) 1 WLR 157: (1967) 3 All ER 822*
[5]*(1992) 1 SCC 719*
[6]*1847] EngR 239; [153 ER 1316: (1857) 16 M. & W.569*