CALCUTTA HIGH COURT

Nandan Pictures Ltd

Vs.

Art Pictures Ltd

A.F.O.D. No. 33 of 1956

(Chakravartti, C.J. and Sarkar, J.)

22.03.1956

JUDGMENT

Chakravartti, C.J.

1. We think that in all the circumstances of the case the order of the 12th, of March last ought not to be sustained. It is true that the order has spent itself, because what was directed by it was only that the appellant should hand over the prints of the film and the relevant publicity materials to the Indira Cinema by 11 o'clock of the 13th of March last. When the appellants lodged their appeal and moved for an interim stay of the order, it appeared to us that there were 'prima facie' grounds for thinking that exceptions to the order could justly be taken and accordingly we granted an interim stay. The result has been that the 13th of March has come and gone and so far as the particular order passed on that date is concerned, whether it is sustained or held to have been wrongly passed, is of no practical consequence to anyone. It has, however been represented to us that the basis of the order nevertheless remains and it is necessary and proper that we should express our views thereon, as it may ground another order. Since all the parties interested in the matter addressed us at considerable length, we consider it right that we should express our views briefly on the order complained of.

2. Mr. Meyer, who appeared For the appellants, framed his complaint against the order on the basis that it was a mandatory injunction. On that basis he argued that there were several reasons why the order could not have been made at all or at least ought not to have been made. He recalled the frame of the suit in which the order had been made and the form of the prayers contained in the plaint and contended that the plaintiffs not having asked for any specific performance in the present suit but having asked only for injunctions of a restrictive character, were not entitled to obtain an interim order of mandatory injunction, directing the appellants to deliver the prints to them, There could not be, it was said, an 'ad interim' order of a positive character in aid of a negative injunction which was the only permanent injunction asked for in

the suit. It was next contended that there were also several other questions which would have to be carefully examined before any injunction of a mandatory character could be granted and those matters having received no consideration the grant of the injunction had not been proper. The appellants, it was said, wished to contend that the plaintiffs were not entitled to claim delivery of the prints on the basis of the contract relied upon, they not having been ready and willing to perform their part of the contract. They wished also to contend that the prayers in the present suit were barred under the provisions of Order 2, Rule 2, Civil Procedure Code. These, it was said, were serious questions which any Court would have to go into even For the purpose of considering whether a 'prima facie' case for a mandatory injunction existed and the learned Judge had made the order without applying his mind to those questions or giving an opportunity to the appellants to make their submissions on them. The main argument of Mr. Meyer, however, was that there could not be or at least ought not to have been a mandatory injunction of an 'ad interim' character, in view of the prayers contained in the plaint, and also the terms of an 'ad interim' injunction previously granted and still subsisting.

3. Mr. Dey, who appeared For the Indira Cinema, contended, though somewhat feebly, that even regarded as a mandatory injunction, the order had been made with, jurisdiction and had been properly made. As far as I could understand him he did not ultimately persist in that contention, but based his defense of the order on another ground to which I shall advert in a moment.

4. It appears to me that regarded as a mandatory injunction, the order complained of cannot be held to have been properly made. I need not refer to any of the collateral questions to which Mr. Meyer referred, because each one of them is of a controversial character and remains to be decided in the suit or in the application for an injunction during the pendency of the suit which is still pending before the learned trial Judge. I consider it sufficient to point out that it is only in very rare cases that a mandatory injunction is granted on an interlocutory application and instances where such an injunction is granted by means of an 'ad interim' order pending the decision of the application itself are almost unknown. I do not wish to say, because it is not necessary For the purposes of this case to say so, that in no circumstances will the Court have any jurisdiction to issue an ad interim Injunction of a mandatory character pending the disposal of an, application for an injunction. Injunctions are a form of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case. No Court, therefore, ought to lay down absolute propositions when such are not necessary and forge fetters for itself. At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the Courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued en an interlocutory application is where, with notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction

issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the Court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit. As far as I have been able to find, even such an order has been made only when the application for an ad interim injunction pending the disposal of the suit 5s finally disposed of and not during the pendency of the application itself as made in the present case. Here an ad interim injunction of a restrictive character was in fact granted on the 7th of March pending the disposal of the application and what was done on the 12th of March was to make another order of the nature of an injunction by way of implementing what was thought to have been the ad interim order made on the earlier date. The order was not made on the basis of anything done by the appellants since the institution of the suit and with notice of the plaintiff's claim and, therefore, the basis on which ad interim injunctions of a mandatory character are generally granted under the approved practice was lacking.

5. Mr. Dey, however, relied mainly, and in the end exclusively, on a different ground. He contended that the order of the 7th of March comprised an undertaking given by the Counsel For the appellants as embodied in that order and consequently the learned trial Judge had complete jurisdiction to enforce the undertaking, which was all that he had done. Alternatively, it was contended that even if what was said by the learned Counsel For the appellants did not amount to an undertaking, it at least amounted to a statement make to the Court and the learned trial Judge was equally competent to enforce the observance of the conduct which the appellants had stated that they were prepared to follow. It is this argument of Mr. Dey, which requires some consideration.

6. Before proceeding further, it would be useful to set out the order of the 7th of March in which a reference to the statement made by the learned Counsel For the appellants is to be found. It reads thus :

> "Ad interim injunction in terms of clause (b) of notice. Injunction against Ujjala Cinema restraining them from selling further tickets For the Picture in dispute. Mr. Meyer states that his clients have already delivered prints and publicity of Ujjala Cinema and are willing to deliver the prints and publicity to applicant as early as possible. A/O by 13-3-56, A/R by 16-3-56 Adjourned till 19-3-56."

7. I may explain that Ujjala Cinema is the rival show-house which is engaged in the present squabble with Indira for priority in exhibiting the film 'Saheb-Bibi-Golani' in the south sector of Calcutta. The applicant referred to in. the order is the Indira Cinema. The undertaking or statement relied on by Mr. Dey is the assertion of Mr. Meyer incorporated in the order to the effect that the appellants were "willing to deliver the prints and publicity" to the applicants; "as

early as possible."

8. Mr. Meyer did not deny that he had made the statement incorporated in the order, but added that he had made it in a particular context and the context was the discussion that was going on For the settlement of the dispute between all parties and he had made the statement on the basis that a settlement was going to be effected. His point was that the statement made by him was only a statement of the nature of tentative statements which Counsel often made in Court in the course of discussions for a settlement, but it was not a statement incorporating an undertaking given by his clients to be carried out by them in all circumstances. Mr. Meyer complained that the statement should have gone down into the minutes at all, because it was not a statement of the position which his clients were adopting, irrespective of any other circumstance and he submitted that when the settlement discussed between the parties failed to materialise, the statement ceased to have any effect or relevancy at all. It was contended that in view of the stage at which, the context in which and the end for which, the statement had been made, it was not right that it should have been embodied in the order, except perhaps as a record of one of the items in the chronology of events which had taken place in the Court and that it was not right that the statement should have been made the basis of a mandatory order on his clients.

9. A decision as to the true nature of the statement is a matter of some difficulty for this Court. There is no practice in this country of requesting a trial Judge to be so good as to furnish to the Appeal Court his own notes of the proceedings before him, if any such notes existed. The Appeal Court has to proceed on what appears in the order itself and in the supporting judgment, if there be any. Although there may be affidavits by the parties, it is not easy to make use of them, because the matter is one lying not merely between the parties, but also between the parties and the learned trial Judge. Fortunately, we have in the present case a judgment delivered by the learned Judge in support of his order and we have an admission from Mr. Dey which appears to me to be of some assistance.

10. The admission made by Mr. Dey is that the statement made by Mr. Meyer was made within five or six minutes of the opening of the hearing of the matter. Thereafter, a statement appears to have been mooted and the learned trial Judge tried to assist the parties by suspending the hearing for some time and allowing them to go out of the Court room in order to discuss the matter between themselves. No settlement, however, could be arrived at land it was after the failure of the negotiations had been reported to the learned Judge that the order of the 7th of March was made. The statement of Mr. Dey which he very fairly and frankly made to us as to the stage at which Mr. Meyer made his statement docs lend support to Mr. Meyer's contention that what he had stated to the Court was in view of the prospect of a settlement between the parties of all their disputes.

11. Turning now to the judgment of the learned Judge, I think there is some indication in it as to the circumstances in which he had made the order of the 7th of March and as to the manner in which he regarded Mr. Meyer's statement. I shall Quote the relevant passage which runs thus :

"I wanted the parties to come to a mutual agreement to the benefit of all concerned, so that only the necessary ad interim order in terms of prayer (to was issued at first For the reason that the date when that order was made wag the 7th and the other date was the 14th March, 1956, when the release was expected." I think I ought to explain the reference to 14-3-1956. The case of the Indira Cinema is that when Mr. Meyer stated that his clients were willing to deliver the prints and the publicity materials to Indira "as early as possible", it meant "so early as to make it possible for Indira to exhibit the film on 14-3-1956". The 14th, I would add, was the date which Indira had offered earlier to Mr. Meyer's clients For the exhibition of the film in their house, cause the distributors of the film 'Sagarika', which was then being exhibited, had agreed to withdraw it with effect from the 14th of March and thus clear the board For the exhibition of 'Saheb-Bibi-Golam' on that date, provided the latter film, was actually exhibited and not any other film.

12. To revert now to the passage I have quoted from the learned Judge's order, it seems to me to mean that he made an order in terms of prayer (b) of the petition before him in order to aid the conclusion of a mutual agreement between the parties and it seems also to me to mean that the statement made by Mr. Meyer was one of the factors which had led him to make his order. The learned Judge's statement as to how he understood the statement of Mr. Meyer must obviously be accepted as final, but it seems to me, with great respect, that there was some misunderstanding. I may recall that the statement was made when a settlement was being discussed or about to be discussed and that the learned Judge's order was made after the expected settlement was reported to have failed. The injunction issued in terms of prayer (b) of the petition, granted by the order made on the 7th of March, restrained the defendants (including of course the appellants) from releasing the picture 'Saheb-Bibi-Golam' for exhibition thereof in the Ujjala Cinema House or in any cinema house situated in the south sector of Calcutta other than the Indira Cinema on 9-3-1956, or on any other date, unless the picture was simultaneously released for exhibition in the Indira Cinema House on 14-3-1956 or any other date which might be mutually agreed upon between the Indira Cinema House of the one part and the appellants of the other part or which might be fixed by the appellants upon thirty clear days' notice in respect thereof being given by the appellants to the Indira Cinema House. It will be noticed that the injunction which appears to be a combination of clauses (c), (d) and (e) of para 9 of the plaint, itself provided for three options, namely, simultaneous release for exhibition on the 14th of March or release for such exhibition on any other agreed date or release for such exhibition on a date which might be fixed by the appellants on thirty days' notice. If the main injunction, with which, the order of the 7th of March commenced, itself provided for release on dates subsequent to 14-3-1956, provided it was simultaneous, it is not easy to adjust to that injunction an undertaking given by the appellants to deliver the prints and publicity materials to the Indira Cinema House in order to make exhibition of the film by them on the 14th of March possible. There could not be three options, side by side with compulsion as regards one of the alternatives, accepted by giving, an undertaking to the Court to exercise it. I am, therefore, inclined to think, with respect to the learned Judge, that there was an unfortunate misunderstanding on his part as to the true nature and effect of the statement

made by Mr. Meyer and that the fact that main injunction itself provides for three options, shows that no undertaking to deliver the prints and the publicity materials on the 14th in any circumstances could have been intended to be given and also that the learned Judge himself does not appear to proceed on any such basis in the earlier part of the order. If an undertaking was given, to deliver the prints and the publicity materials at such time as would enable the Indira Cinema House to exhibit the film on the 14th of March next, one would expect that date alone to appear in the injunction, because copies of the prints and the relevant publicity materials having already been delivered to Ujjala, a simultaneous exhibition on the 14th of March; by Indira and Ujjala would be possible if Ujjala had no other film on its hands and was agreeable to the date. Ujjala, according to the present order, was thought to be agreeable, because it is said that the 14th was "the other date". The addition of the two further options would in that event be unnecessary.

13. There is another circumstance which, bears not so much upon how the learned Judge regarded the statement, but upon how the Indira Cinema House regarded it. As I have already stated, an appeal was filed before this Court from the order of the 7th of March and in connection with that appeal, a prayer for an ad interim stay was made. We disposed of the matter on the 9th of March when we declined to grant a stay, but directed the Indira Cinema House to give security in the sum of Rs. 20,000/- for covering, such loss, if any, as the Ujjala Cinema House might suffer by being restrained under the injunction which we were maintaining For the time being. The appropriate quantum of the security was discussed in great detail and it was computed by reference to the period between the 9th of March and the 19th of March to which the application before the learned trial Judge stood adjourned, that is to say, on the basis of ten days and on the basis that till the 19th when the learned Judge would hear the application, there would be no release of the film in either of the cinema houses. If, as is now contended, Mr. Meyer's statement meant an undertaking to hand over the prints and the relevant publicity materials by such time as would enable Indira to exhibit the film on the 14th, it is surprising to a degree that not a word about such undertaking should have been said to us and that it should not have been suggested that the damages ought to be computed by reference to a period ending on the 14th of March when Indira was going to exhibit the film upon getting the prints and the publicity materials from the appellants which they had undertaken before the learned trial Judge to supply and when Ujjala also would be free to exhibit the film. The injunction, it will be remembered, was an injunction against any release other than simultaneous release and, therefore, by exhibiting the film on any date before the 19th, Ujjala would not violate the injunction, provided Indira commenced exhibition simultaneously. The complete omission on the part of the Indira Cinema House to make any reference to any undertaking given by the appellants before the learned trial Judge and to the probability of the film being released for exhibition on the 14th in both the houses, seems to me to establish completely that up to that time, at least, the Indira Cinema House was not taking that view of Mr. Meyer's statement, which its owners and advisers took subsequently. Having been completely silent before us on the point on the 9th of March when it was material to them to refer to the statement, they rushed into action on the 10th and sent a letter to the appellants, complaining of the non-delivery of the prints and the publicity materials as

undertaken by them before the learned trial Judge and notifying them that the matter would be mentioned before him on Monday following.

14. We are, however, primarily concerned with how the learned Judge regarded the statement and whether there was any unfortunate misunderstanding on his part. If the statement of Mr. Meyer as recorded could be construed, as a matter of language, as an unqualified undertaking, it would have to be held that the learned Judge had complete jurisdiction to enforce it. An undertaking, however, is usually given when by giving it, the party concerned obtains some benefit, which may even be the saving of prestige, as in cases where a stay of execution is avoided by undertaking not to execute a decree. I am unable to see that the appellants obtained any benefit by making the statement or that the statement, as recorded, can fairly be construed as an undertaking. All that Mr. Meyer is recorded as having stated was that his clients were "willing to deliver the prints and publicity to applicant as early as possible. In form, it is only a statement regarding the then condition of the mind of the clients and their preparedness to follow a particular course of conduct, but there is no promise to the Court that anything in particular shall be done by any particular date or at all. As regards any benefit on the basis of the statement, Mr. Dey, I presume, felt the difficulty and said that it was possible that the appellants had come to think that by releasing the prints and the publicity materials of the film to the Ujjala Cinema House without notice to Indira, they had placed themselves in the wrong and they wanted to avert the consequences of such wrongful conduct by making amends as early as possible. All that, however, is pure speculation, because whether or not the appellants had acted wrongly in delivering the prints and the publicity materials to Ujjala remains to be decided. If, next, one takes the statement as a mere statement to the Court and not an undertaking, it has to be seen whether the Court was led or misled by it into making an order which it would not have otherwise made. If it could be said that it was because of the statement made by Mr. Meyer and only because of such statement that the learned Judge made any part of his order of the 7th of March, it, would undoubtedly be right to hold the appellants to that statement. I cannot, however, see, in view of the various options contained in the main order of injunction to which I have already referred, that any impression created by the statement made by Mr. Meyer really went into the shaping of the order at all. Even if it did, I am, of opinion, For the reasons I have already stated, that there was a misunderstanding of the statement on the part of the learned Judge, caused undoubtedly by the confusion created by the parties seesawing before him between a mood, to right and a mood to settle.

15. Mr. Dey contended that the statement made by Mr. Meyer had gone into the Court minutes and that if he thought that it should not have been incorporated therein, he ought to have promptly made a representation to that effect to the learned Judge. In view of what I regard as the true nature of the statement made by Mr. Meyer, I do not consider it necessary to say anything on this point, but it is fair to place on record Mr. Meyer's statement that he was not aware that the statement made by him had gone into the minutes and that he never suspected that it could have gone in. As regards the true nature of the statement, I shall only add that its real character appears

to me, even as recorded, from what precedes it. The whole statement of Mr. Meyer is recorded as follows :

> "Mr. Meyer states that his clients have already delivered prints and publicity to Ujjala Cinema and is willing to deliver the prints and publicity, to applicant as early as possible." It should be borne in mind that Mr. Meyer's clients are the distributors who had to supply the prints to the exhibitors and that an injunction restraining them from handing over the prints, except in certain circumstances, had been asked for. In that situation the appellants had to state how and to what extent they had already dealt with the prints, which they did by saying that Ujjala had already been supplied and then, in that context, they stated that they were also willing to deliver the prints and the publicity materials to the Indira Cinema House, their Interest being to have the film exploited as far as possible and to obtain out of it the maximum returns. It appears to me that the statement was merely a statement of fact so far as Ujjala was concerned and a statement of an attitude of the appellants so far as Indira was concerned provided, now that the matter had been brought to Court, it was settled.

16. The argument addressed to us by the parties concerned covered a great many matters and indeed went over the whole range of the various contentions which they considered as respectively open to them. We do not desire to refer to any of those contentions, because the scope of the present appeal is of an extremely limited character and because those contentions remain to be considered in a more appropriate context in various proceedings still pending. The suits themselves are awaiting decision and what I may call the fundamental points of Mr. Meyer will have to be decided there. The appeal from the order of the 7th of March is also pending before this Court and the application before the learned Judge in which he made the order of the 7th of March is itself still pending. In those circumstances, we must walk warily and avoid saying anything which might embarrass either the learned trial Judge or ourselves or the parties in subsequent proceedings.

17. I think, however, that I have said enough to indicate our reasons for holding that whether regarded as a mandatory injunction, properly so-called or an order of the Court by way of enforcing a statement make to it, the order of 12-3-1956, ought not, with respect to the learned Judge, be maintained.

18. My learned brother reminds me that Mr. Dey also relied upon a statement in 'Deniell's Chancery Practice', based upon the decision in - '*Knight v. Bowyer*[1]', I do not think that either the statement of law by Daniell or the decision on which it is based has any bearing on the question before us. All that the case decides and all that the learned author restates is that if there is an offer contained in a Bill of Rights, the plaintiff cannot be allowed to withdraw it, if the offer is accepted toy his adversary. I cannot find any analogy between an offer or admission contained in the Bill of Rights which is the same thing for all practical purposes as a plaint and of which the

defendant is entitled to take advantage and the statement made to the Court on the present occasion. It is interesting to notice that even in the case relied on, the offer contained in the Bill was not enforced, because the Court considered it unreasonable to do so in the circumstances of the case. It is one thing for a party to make an admission or an offer in a plaint or Bill of Rights and For the Court to hold the plaintiff to such admission or offer and quite another thing to take a statement made by a Counsel in the course of or as a preliminary to discussions for a settlement and make it a basis of a mandatory order against the client except, however, when an undertaking, properly so called, is given in unqualified terms or when the statement leads the Court into making an order which would not otherwise be made. I have already explained that neither is the position in the present case.

19. I think I ought to say a word about one observation contained in the learned Judge's order as to the proceedings in this Court when the stay application in connection with the appeal from the order of the 7th March was being heard. It is stated that Mr. Banerji, Solicitor For the Ujjala Cinema, represented before the learned Judge that when the matter was being argued before this Court, his client had entered into an engagement For the exhibition of the film 'Father Panchali'. On that the learned Judge's comment is : "This fact was concealed from the Appeal Court is For the first time revealed now." If Mr. Banerji made that statement, he certainly drew upon, himself the remark made by the learned Judge, but I may point out that, in fact, the position appears to me to have been otherwise. We were hearing the application for an 'ad interim' stay on the 9th March and the film 'Saheb-Bibi-Golam' was due to be released at the Ujjala Cinema at the 2-30 show on the same day. We were requested before the midday adjournment to be kind enoughs to resume our seats early, so that it might be known before the hour For the commencement of the show arrived whether Ujjala would be free to exhibit the film or not. We complied with that request, that the hearing went on till after 3 o'clock. We are informed that no engagement about the exhibition of 'Father Panchali' had been entered into till then and indeed it is stated - and Mr. Dey does not deny it - that Ujjala had to go without any show of any kind on the 9th, either in the afternoon or in the evening. There

[1](1858) 2 De G and J 421 (447)

was thus no concealment of any fact in regard to this matter from the Appeal Court.

20. For the reasons given above, this appeal is allowed. The order made by the learned Judge on 12-3-1956, is set aside.

21. The appellant's costs as also the costs of the supporting respondents, namely, the Ujjala Cinema Limited and Sarkar Production, will be costs in the cause.

22. Certified for two Counsel.

23. No separate order is necessary on the application.

Sarkar, J.

24. I agree.

Appeal allowed.