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High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 3079 of 1996

American President Lines Limited		APPELLANT
	Vs	
Punjab Concast Steels Limited		RESPONDENT

Date of Decision: April 22, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3
- Specific Relief Act, 1963 - Section 39

Citation: (1998) 118 PLR 566 : (1997) 3 RCR(Civil) 514

Hon'ble Judges: V.K. Jhanji, J

Bench: Single Bench

Advocate: H.L. Sibal, for the Appellant; M.L. Sarin, for the Respondent

Final Decision: Allowed

Judgement

V.K. Jhanji, J.
This is defendant"s revision directed against order dated 1st August, 1995 passed by the Additional Senior Sub Judge, Ludhiana, and order dated 11th May, 1996 passed by the Additional District Judge, Ludhiana, in appeal. By these orders, defendants have been directed to transport the goods from Bombay Port Trust, Bombay to ICD, Ludbiana Terminal.

2. In brief, the facts are that respondent (plaintiff) namely, Punjab Concast Steels Limited on 1st September, 1993 filed in the Court of Shri B. J. Nangli, Sub Judge Ist Class, Ludhiana, a suit for permanent injunction ordering and directing the petitioners to specifically deliver to the plaintiff at Ludhiana, 36 containers of steel scrap, which the petitioners had carried and/or transported from the port of Kuwait to the port of Bombay. The suit came to be filed on the basis of a contract which the plaintiff had entered into with one M/s. Mohammed and Nassari and Company, Kuwait (hereinafter referred to as

sellers) through their indenting agent Shree Bharat International Private Limited, an indent for the purchase of approximately 2000 metric tonnes of Heavy Melting Steel Scrap. The said indent was confirmed on 4th March, 1993 whereupon the contract came to be concluded between the plaintiff and the said sellers. Under the said contract, sellers had agreed to supply and deliver to the plaintiff at Bombay 2000 metric tonnes of steel scrap. Pursuant, to the contract, plaintiff on 22nd March, 1993 duly opened with its bankers. State Bank of Patiala, in favour of the said sellers a Letter of Credit for U. S. Dollars 2,56,000. The said letter was to be operational upon the sight of inter alia, Bills of Lading evidencing despatch of the said steel scrap from "any Kuwait Port to Bombay/Nhava Sheva". It is the case of the petitioners that out of the said 2000 metric tonnes steel scrap, 1300 metric tonnes was carried to Ludhiana through the intermediary of another carrier. In respect of the balance quantity the said sellers approached the petitioners (who are carriers by sea) and requested them to carry to and deliver at Bombay 36 containers containing the steel scrap with a further option to the plaintiff to have the goods carried to Ludhiana at its cost. For that purpose, the said sellers handed over to the petitioners Kuwait agents the drafts/specimen forms containing the requisite particulars of the contract of carriage as per desire of the sellers. Further, according to the petitioners, the said draft/specimen forms, inter alia provided Tort of Discharge" as "Bombay/Nhava Sheva" and "Final destination" as "ICD Ludhiana". The draft/specimen Bills of Lading contained the sellers offer, It is also the case of the petitioners that the petitioners are carriers by sea and are not concerned and also not desirous of taking upon themselves the responsibility of the onward carriage of the said Cargo to Ludhiana (the land leg). Petitioner''s Kuwait Agents declined to accept the offer/proposal contained in the draft/specimen forms. Petitioner''s Agents also declined to deliver the Cargo to the Port of Nhava Sheva (mentioned as an alternative Port in the form/specimen) and agreed to transport to and deliver the said Cargo only at the Port of Bombay. Petitioners have averred that they, therefore, duly scored/etched out the reference to "Final Destination" "ICD Ludhiana" and "Port of Discharge" "Nhava Sheva" and returned the said draft/specimen form of the Bills of Lading to the said seller. It is also the case of the petitioners that the said sellers acceded to and accepted the petitioners'' Kuwait Agents counter proposal and consequently approached them once again to issue Bills of Lading in accordance with the specimen form as amended Petitioners'' Agents thereupon accepted the said amended proposal and after making endorsement of the freight payable issued to the sellers the Bills of Lading. It is further the case of the petitioners that they are in due performance of their obligations under the Bills of Lading transported to and discharged at the Port of Bombay the said 36 containers. Out of the said 36 containers, 19 containers were landed by the vessel Eagle Prestige on its arrival at Bombay on 29th May, 1993 while the remaining 17 containers were landed by the vessel Eagle Nova on its arrival on 30th May, 1993. The said containers were discharged and delivered in the custody of Bombay Port Trust, who are statutory bailees under the provision of the Major Port Trusts Act, 1963. It is averred by the petitioners that upon the same being done the petitioners had duly performed their obligations under the said Bills of Lading and stood discharged from all further obligations and liability. Petitioners

despatched to the plaintiff on 28th May, 1993 and 2nd June, 1993 under, Certificate of Posting a computer generated intimation of the arrival of the said containers. Petitioners have alleged that their Delhi representative also had telephonic conversations with the employees of the plaintiff who were continuously kept abreast of the arrival of the said containers at Bombay and the petitioners'' stand in the matter. Petitioners have averred that, they did not hear from the plaintiff for a considerable period of time and so, they again by their letter dated 9th'' August, 1993 wrote to the plaintiff informing it about the arrival of the said containers and requested it to lift the said containers.

3. It is further the case of the petitioners that instead of taking delivery of the containers, plaintiff on Ist September, 1993 filed in the Court of Sub Judge Ist Class, Ludhiana, a suit for mandatory injunction against the petitioners and Shree Bharat International Private Limited (indenting agent of the sellers) ordering and directing the petitioners to specifically deliver to the plaintiff at Ludhiana, the said containers. The Subordinate Judge on 4th September, 1993, granted ad-interim ex-parte mandatory injunction directing the petitioners to specifically deliver the goods to the plaintiff at Ludhiana. Upon receipt of the said injunction order, petitioners filed their written statement in the suit and also the affidavit and reply to the injunction application and applied for vacation and setting aside of the order. Simultaneously, the petitioners filed Civil Revision No. 933 of 1994 in this Court. The revision petition was disposed of by this Court on 17th January, 1995 staying the operation of the injunction order till such time the application of the plaintiff was heard and decided by the Subordinate Judge, The injunction application was heard and decided by the Subordinate Judge on 1st August, 1995 and the petitioners were directed to deliver the goods in question to the plaintiff after getting-delivery from the Port Authorities on payment of demurrage and other charges. On the other hand, plaintiff was asked to furnish bank guarantee to the tune of Rs. 50 lacs, to indemnify the petitioners for the amount paid by them to the Port Authorities toward demurrage and other charges and expenses incurred through connected carrier, in case the plaintiff remains unsuccessful in the trial of its suit. In appeal by the petitioners, the Additional District Judge vide order dated 11 th May, 1996 upheld the order of the Subordinate Judge and allowed mandatory injunction against the petitioner, but partially allowed the planitiff''s appeal. Plaintiff instead of furnishing bank guarantee was directed to furnish security. Hence, the present revision petition.

4. Shri H. L. Sibal, Senior Advocate, counsel for the petitioners, has contended that the learned Subordinate Judge has disposed of and decreed the suit without a trial and granted full relief to the plaintiff. He contended that there is no privity of contract between the plaintiff and the petitioners and therefore, the Courts below have acted illegally in exercise of their jurisdiction in granting injunction in favour of the plaintiff. He further contended that the plaintiff has filed the suit on false and frivolous grounds and so, he is not entitled to the relief of injunction. He also referred to various documents to show that the plaintiff has no case much less prima facie, entitling the plaintiff to seek discretionary relief of injunction. In answer to these submissions, Shri M. L. Sarin, Senior Advocate,

counsel for the plaintiff, has contended that even if this Court finds that the orders of the Courts below are wrong and are not in accordance with law, then also this Court should not interfere in its revisional jurisdiction. For this, he has cited judgment of Supreme Court in The Managing Director (MIG) Hindustan Aeronautics Limited, Balanagar, Hyderabad and Anr. v. Ajit Prasad Tarway, Manager (Purchase and Stores), Hindustan Aeronautics Limited, Balanagar, Hyderabad AIR 1997 S.C. 76. He has also contended that petitioners being the carriers were under an obligation to deliver the goods to the plaintiff and therefore, the Courts below have rightly directed the petitioners to deliver the goods to the plaintiff at Ludhiana.

5. After heating the learned counsel for the parties and going through the record, I am of the view that not only the Subordinate Judge vide his order dated 4th September, 1993 granted ex-parte interim injunction without complying with the provisions of Rule 3 of Order 39, Code of Civil Procedure, but subsequently too, on contest by the petitioners, the Subordinate Judge and the Additional District Judge vide orders dated Ist August, 1995 and 11th May, 1996 have granted injunction without applying their mind to the facts and circumstances of the case and without having regard to the well settled principles for grant of temporary injunction in mandatory form. The suit was presented on Ist September, 1993. Injunction application was taken up by the Subordinate Judge on the 4th September, 1993. The Subordinate Judge without issuing notice and without recording reasons as envisaged by Rule 3, granted ex-parte injunction. The ex-parte injunction was granted not only against the petitioners, but directions were also given to the Bombay Port Trust to permit the petitioners to transport the goods from the Bombay Port Trust, Bombay to ICD Ludhiana Terminal. Order dated 4th September, 1993 reads as under:-

"Whereas the Plaintiff has filed a suit for decree of mandatory injunction directing the Defendant Nos. 1 and 2 their officials, employees, servants and agents to despatch the goods, as "detailed in para 9 of the plaint attached" from Bombay Port to ICD Ludhiana Terminal and the Assistant Manager, Bombay Port Trust, Bombay to allow defendant Nos. 1 and 2 to transport the goods from Bombay Port Trust, Bombay to ICD Ludhiana terminal;

Whereas, alongwith the suit, the plaintiff has moved an application under Order 39 Rules 1 and 2 read with Section 151 CPC for the grant of ad-interim injunction, on which it is ordered that you, Defendant Nos. 1 and 2 are directed to transport the goods from Bombay Port Trust, Bombay to ICD Ludhiana Terminal and the transportation charges shall be paid by the plaintiff on the arrival of goods at Ludhiana, as detailed in para 9 of the plaint. Copy of the plaint is attached.

It has been further ordered that you, the Assistant Manager, Bombay Port Trust, Bombay are directed to allow the defendant Nos. 1 and 2 to transport the goods from Bombay Port Trust, Bombay to ICD Ludhiana Terminal forthwith.

Given under my hand and seal of the Court, on this 4th day of September, 1993."

6. Under the proviso the Rule 3 of Order 39. added by Amendment Act of 1976, when ex-parte injunction is proposed to be given then the Court has to record reasons for coming to the conclusion that the object of granting injunction would be defeated by delay. Resultantly, it was obligatory on the part of the Court to record reasons for issuing injunction without notice to the other side and also as to how the object of granting injunction itself would be defeated if an ex-parte order is not passed. In this case, a reading of the order shows that no such reasons were recorded. As a matter of fact, the Subordinate Judge acted in haste in granting ex-parte injunction not only against the petitioners but also against the Bombay Port Trust which admittedly was not a party to the suit. In Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, , the Apex Court while dealing with Rule 3 Order 39, Code of Civil Procedure, has stated: -

"Power to grant injunction is an extra-ordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. By the CPC (Amendment) Act, 1976, a proviso has been added to the said rule saying 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.....

The imperative nature of the provision has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid as introduced, Rule 3 said "The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by its delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party". The proviso was introduced to provide a condition, where Court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that 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 an 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 udder 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. The party who 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 the Court has to consider briefly these factors in the ex-parte order."

It is thus, settled that under Order 39 Rule 3, Code of Civil Procedure, it is only in cases where it appears to the Court that the object of granting injunction would be defeated by delay, that a notice to the opposite party is dispensed with. Order dated 4th September, 1993 does not disclose this. It was the duty of the Subordinate Judge under this rule to record reasons that object of granting injunction would be defeated, if not granted ex-parte. The order without recording reasons is, therefore, unsustainable.

7. By the orders impugned in this revision, on contest by the petitioners the Courts below have granted injunction in favour of the plaintiff in mandatory form by directing the petitioners to deliver the goods lying in custody with Bombay Port Trust at ICD Ludhiana Terminal after paying, demurrage and other charges.

8. Section 39 of the Specific Relief Act, 1963 (hereinafter referred to as 1963 Act) lays down the principles which guide the Courts in considering the question of granting mandatory injunctions in appropriate cases. Section 39 provides-

"39. Mandatory Injunctions. - When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

From a reading of this section, it is clear that when an injunction is sought in respect of an obligation arising from a contract, injunction will be granted only when specific performance can be granted. It follows as a necessary deduction therefrom that an injunction cannot be granted to prevent breach of a contract, the performance of which is not specifically enforceable. Section 10 of the 1963 Act enumerates the cases in which specific performance of a contract is enforceable. Section 10 reads:-

" 10. Cases in which specific performance of contract enforceable. - Except otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced-

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief

Explanation.-Unless and until the contrary is proved, the Court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be relieved except in the following cases:

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff."

Section 14 enumerates the contracts that cannot be specifically enforced, while Section 41 provides the cases in respect of which injunction cannot be granted. Sections 14 and 41 insofar as they are relevant, read:

"14. Contracts not specifically enforceable.-(l) The following contracts cannot be specifically enforced, namely:

(a) a contract for the non-performance of which compensation in money is an adequate relief (b) to (d).....(2) and (3).....

41. Injunction when refused-An injunction cannot be granted (a) to (d).....

(e) to prevent the breach of a contract the performance of which would not be specifically enforced. (f) to (j).....

A reading of Section 10 makes it clear that in cases where there exists no standard for ascertainment of the damages caused by the non-performance of the act agreed to be done or where compensation in money would give no adequate relief to the aggrieved party for the non-performance of the act, the Court may in its discretion enforce the specific performance of the contract. The Explanation to this section lays down a rule of presumption and enacts that in cases of breach of a contract to transfer moveable or Immovable or property, where the goods or articles are of special value or interest to the plaintiff or are such which are rare, curios and are not easily obtainable from the market. The Court shall presume; that breach of such contracts cannot be adequately compensated in terms of money and may, in its discretion, enforce specific performance of such contracts. Likewise u/s 14, contracts cannot be specifically enforced for the non-performance of which compensation in terms of money is an adequate relief, While u/s 41, an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced.

9. The Courts have also recognised that on an interlocutory application, injunction in a mandatory form can be issued by the Civil Court, but at the same time it has also been recognised that such a power has to be exercised in very rare cases and with due care and caution and on in exceptional circumstances. The Courts have also held that before granting injunction in mandatory form, the Court must satisfy itself that the injury complained of is immediate and pressing and irreparable and clearly established by proofs. The prayer for temporary injunction is not to be allowed if grant of mandatory injunction is in doubt as temporary injunction can be granted in aid of the main relief prayed for in the suit. The Apex Court in Dorab Cawasji Warden Vs. Coomi Sorab Warden and others, , has laid down the guidelines to be followed by the Courts while

granting the relief of interlocutory mandatory injunctions. The Court observed:-

"16. The relief of interlocutory mandatory injunction are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining it. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, Courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief."

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as pre-requisite for the grant of refusal of such injunctions would be a sound exercise of a judicial discretion."

10. Now coming to the merits of the case, I find from the pleadings and the documents made available to me by the counsel for the parties that in the plaint it is the case of the plaintiff itself that the contract had been entered into between the plaintiff and M/s. Mohammed and Nassari and Company, Kuwait: Under contract dated 4th March, 1993, the sellers had agreed to supply to the plaintiff 2000 metric tonnes Heavy Melting Steel Scrap, Grade-I, for re-melting. The contract contains the conditions in regard to the quantity, packing, price, shipment, country of origin, payment, insurance and other matters connected with the supply of steel scrap. The petitioners are neither parties nor privy to the contract dated 4th March, 1993. The specimen for the Bills of Lading, on which reliance has been placed heavily by the Courts below, shows that the column of Port of Loading, country shown is Kuwait, and in the column of Port of Discharge, "Bombay" is mentioned. In this column, reference to "Nhava Sheva Port" and in the column of Final Destination, "ICD Ludhiana" has been scored off, which prima facie shows that the petitioners had not taken upon themselves the responsibility of the onward carriage of the cargo to Ludhiana. The Bills of Lading prepared on the basis of the draft/specimen form mention "Port of Discharge" as "Bombay". The column in the Bill of

Lading specifying "Place of Delivery" has been left blank. I fail to understand as to how the first appellate Court came to observe that the petitioners cannot make any capital of the omission "ICD Ludhiana" in the column of place of Delivery when in the body of Bills of Lading they have specified the Final Destination as "ICD Ludhiana". While observing this, the first Appellate Court has failed to take into consideration the case of the petitioners that since the goods were to be ultimately transported to Ludhiana by the plaintiff and the plaintiff would require custom clearance at Bombay for transporting the goods to Ludhiana, the sellers requested that this fact be recorded in the Bills of Lading in the column "Description of Goods". If the said Bills of Lading are read in conjunction with its draft/specimen form and also letter of credit dated 22nd March, 1993 opened by the plaintiff with their bankers, State Bank of Patiala, the same would show that the Port of Lading was described as "Kuwait" and Port of Discharge as "Bombay". It was for that matter, in the Billls of Lading it was mentioned that "ICD charges from Bombay Port via New Delhi to ICD Ludhiana Terminal will be to buyer"s account." It may be mentioned that for carrying the goods from Kuwait to Bombay, the freight had already been paid to the petitioners whereas the freight from Bombay to Ludhiana was to be borne by the plaintiff. The very fact that in the column of "Place of Delivery" was left blank in the Bills of Lading, prima facie shows that it was Port to Port contract. The Ports of Loading and Discharge were the places of commencement and termination of contract of carriage. Apart from this, while granting injunction the Courts below have also not taken into consideration the delay on the part of the plaintiff to file the suit. The goods were unloaded by the ships on 29th May, 1993 and 30th May, 1993 and the information of the same was given to the plaintiff on 28th May, 1993 and 2nd June, 1993, but the suit came to be filed on Ist September, 1993. Plaintiff has not submitted any explanation with regard to the delay in filing the suit and has also not produced on record any proof to show the steps the plaintiff had taken to mitigate the demurrage or other charges accrued for not taking delivery of the goods from the Port Authorities within five days of the unloading of the goods. The Courts below have also failed to appreciate that the injury complained of in the case is non-supply and non-delivery of steel scrap which can be adequately compensated in damages as the goods in question are easily obtainable from the market. Moreso, petitioners being, not privy to contract, dated 4th March, 1993 cannot be held responsible for the breach thereof. Right, if any, of the plaintiff may be under the Bills of Lading and assuming that the petitioners have committed breach of their obligation by not delivering The goods at ICD Ludhiana, the remedy for enforcing such an obligation is not by way of granting injunction because of the prohibition contained in Sections 14(a) and 41(e) of the 1963 Act. u/s 10 also, the-Court can order the performance only of those acts which are capable of enforcing. Accordingly, I am of the view that the acts complained of in this case being not enforceable in law, the Courts below have acted illegally and with material irregularity in exercise of their jurisdiction in granting injunction. The Courts have also consciously disregarded the material on record and the principles for grant of temporary injunction. I am further of the view that plaintiff has failed to bring any material on record to show that plaintiff has a better and higher standard than that of a prima facie case required for prohibitory injunction, i.e. it has a higher possibility of success in suit

when compared with prohibitory injunction.

11. In fairness to the counsel for the respondent, it may be stated that the judgments in Syndicate Bank Vs. The Africana Co. (Private) Ltd. and Others, and Goverdhandas Kalidas Vs. New Dholera Steamships Ltd. and Others, , cited by him have no application to the facts of the present case.

12. It is however, made clear that observations made herein shall not be construed to be an expression on the merits of the case.

13. Consequently, this revision petition is allowed with costs and the orders under revision are set aside. Costs are quantified at Rs. 10,000/-.