* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.07.2018
Pronounced on: 28.09.2018

\+ **FAO (OS) 92/2018 & C.M. APPL.23799/2018**

PUSHP SHARMA ……Appellant

Through: Sh. Prashant Bhushan with Sh. Amit Agrawal and Sh. Satyajit Sarna, Advocates.

Versus

D.B. CORP. LTD. AND ORS. ……Respondents

Through: Sh. Sajan Poovayya and Sh. Neeraj Malhotra, Sr. Advocates with Sh. Biju Mattam, Ms. Aastha Chawla, Ms. Ankita Bafna, Sh. Priyadarshi Banerjee and Sh. Pratibhanu. S. Kharola, Advocates.

\+ **FAO (OS) 93/2018 & C.M. APPL.23811/2018**

FORUM FOR MEDIA AND LITERATURE AND ANR.

……Appellants

Through: Sh. Kapil Sibal, Sr. Advocate with Sh. Pramod Kumar Dubey, Sh. Kotla Harshavardhan, Ms. Mansi Sood, Sh. Nizam Pasha and Sh. Nishoonk Matroo, Advocates.

Versus

D.B. CORP. LTD. AND ORS. ….Respondents

Through: Sh. Sajan Poovayya and Sh. Neeraj Malhotra, Sr. Advocates with Sh. Biju Mattam, Ms. Aastha Chawla, Ms. Ankita Bafna, Sh. Priyadarshi Banerjee and Sh. Pratibhanu. S. Kharola, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

%

1. These two appeals are by defendants, in a suit for permanent injunction. The plaintiff in the suit, which publishes the Dainik Bhaskar group of newspapers and periodicals (hereafter "DB group" or "the plaintiffs" variously, complained of attempt at defamation in what they term to be false news and information and sought permanent injunction against the defendants from publishing it in any manner. The impugned order granted the injunction, *ex parte.*

2. The impugned order, which granted *ex parte* temporary injunction for the duration of the suit, is as follows:

> *"Learned senior counsel for the plaintiff argues that telecommunications conversations between persons since in many cases, and was in this case, without any intention necessarily for the same to be a correct position in fact, the defendants cannot rely upon the same as if it was the only and the correct intention of the persons with whom the defendant no. 1 and its agents had with the persons stated in the e-mail dated 10.5.2018. It is also argued that essentially either the stand of the defendants will be of fake news being generated or news generated which would reflect a particular ideology whereas the fact of the matter is that there does not arise at all any issue of any fake news, with the fact that having an ideology which is not illegal cannot prevent, assuming for the sake of arguments such a situation existed, to have a particular ideology. It is argued that entire object of the defendants is to sully the reputation of the plaintiff company which is a company having established reputation because it publishes the Dainik Bhaskar Group of Publications. It is also argued that in the e-mail dated 10.5.2018 and the related communications there is a whiff/scent of the endeavour of the defendants to arm-twist the plaintiff for illegal benefit. It is also argued on behalf of the plaintiff that it is not necessary that any and every talk of*

an agent or employee or staff of the plaintiff company necessarily should be taken as that of the plaintiff company itself and which has a separate and independent existence apart from individuals who may be holding different positions of employment in the plaintiff company. It is further argued on behalf of the plaintiff that defendants are, if not anything else, only intending to enter into area of sensationalism and sensational journalism, and once if the said e-mail dated 10.5.2018 or the documentary "Operation 136: Part II" is allowed to be released in public domain, then, irreparable loss and injury will be caused to the reputation of the plaintiff which cannot be undone. It is argued that the defendants are going to release the documentary "Operation 136: Part II" on 25.5.2018, and therefore, the plaintiff if is not granted the ex parte interim orders, the suit itself would become infructuous. It is also argued that whereas irreparable loss and injury will be caused to the plaintiff if no ex parte interim orders are granted, no such injury will be caused to the defendants because in case this Court finds after hearing the parties that the said documentary or the e-mail dated 10.5.2018 or any other information ought to be released in the public domain, thereafter it can be so done by the defendants.

3. In view of the arguments urged on behalf of the plaintiff, till further orders unless varied by the Court, defendants are restrained from in any manner releasing in public domain the documentary "Operation 136: Part II" in any manner including at the Press Club of India on 25.5.2018 at 3.00 P.M. and defendants are also further restrained from in any manner releasing in public domain the e-mail dated 10.5.2018 and other related telecommunications. Plaintiff will comply with the provision of Order 39 Rule 3 of Code of Civil Procedure, 1908 (CPC) within three days.

4. Summons in the suit and notices in the application be issued to the defendants, on filing of process fee, both in the ordinary method as well as by registered post AD, returnable on 4th July, 2018."

3. The plaintiff is a company incorporated under the Companies Act, 1956; it claims to be one of the most reputed print media houses, established in Bhopal in 1958. Under the flagship of DB group, publishes 62 daily newspaper editions in 14 States; besides, it also claims significant presence in the radio, digital and mobile applications. The first defendant (hereafter "Forum") a registered Society which owns and operates a website in the name and style – "Cobrapost.com"; the second defendant is the founder and editor-in-chief of Forum; the third defendant [hereafter "Pushp Sharma"] claims to be a senior journalist associated with Forum.

4. According to the suit allegations, on 10.05.2018, the plaintiff received an email from "Team Cobrapost/newsdesk@cobrapost.com" to the effect that Pushp Sharma had recorded conversations with eight persons associated with the DB group, revealing partisan ideologies and that the defendants tried to portray them as that of the plaintiff; it also claims that the email contained covert threat of publicizing the conversation through defendant's program – "Operation 136: Part-II" with a clear suggestion that the said ideologies are endorsed by the plaintiff. The suit further alleged that on 18.05.2018, the DB group learnt that the Forum had published an invitation in its website for exclusive screening of its Documentary *"Operation 136: Part-II"* on 25.05.2018 at 3.00 P. M. at the Press Club of India, New Delhi followed by a panel discussion and address by the second defendant. The said invitation claimed that the documentary would allegedly expose biggest names in the Indian media. Thereafter, the plaintiff started receiving queries from public and the media enquiring about the veracity of the claims made by the defendants meaning thereby that the plaintiff had already published the false contents.

5. The plaintiff denied the allegations which the defendants were proposing to make public. It stated that the proposed revelations were based on blatant falsifications/deceptive operation, to defame plaintiff and is *malafide*. It further claims it is not in public interest, besides causing irreparable loss and injury to the goodwill and reputation of the plaintiff which cannot be measured in terms of money, and also raises certain moral and ethical questions. It also amounts to media trial and gravely contravenes the principles of free speech and expression. The conversations, even if assumed to have taken place, would reveal the views of the respective individuals and not of the plaintiff.

6. The plaintiff also claims to have sought specific responses from the individuals named in the e-mail, all of whom denied the allegations and further clarified that such allegations need not necessarily be a subject matter of concern since they have been made without the knowledge, endorsement and consent of the plaintiff. *The plaintiff also submitted that the individuals whose conversations were allegedly recorded were responsible for advertisement sales and have no role in publications, which are firstly screened and approved by the respective editors.*

7. The DB group stated that the cause of action arose on 10.05.2018 (the date of receiving the email and attachment); on 18.05.2018 (the date of publication of invitation for the documentary by the defendants); also when it started receiving queries from the public and media as to the veracity of the contents of the alleged conversation.

8. The appellants (i.e all the three defendants in the suit) allege that the learned single judge could not have granted what is termed as a "super-injunction" which freezes publication of what is essentially news, for the

entire duration of the suit. The impugned order, made *ex parte* is faulted on two counts: firstly, that it does not discuss, even to the bare minimum extent, the *prima facie* strength of the plaintiff's case, nor does it deal with hardship or balance of convenience. According to the appellant's senior counsel, the impugned order operates for the entire duration of the suit and according to established authority, should have dealt with why such a temporary injunction was necessary, after setting out the factual basis.

9. The second, more serious submission made was that the impugned order amounts to impairing the valuable right to free speech. Learned counsel emphasized that what neither Parliament nor the executive can do – either directly (or even indirectly) – i.e pre-censorship of the media (either print or electronic) the courts, which are guardian of the liberties cannot do, through the medium of an injunction. Learned counsel submit that authorities in India and in other free democracies uniformly lay down that the threshold of a pre-publication injunction is extremely high. Learned counsel for the defendant/appellants rely on the Division Bench ruling in *Khushwant Singh and Anr. v Maneka Gandhi* AIR 2002 Del 58; *S. Rangarajan Etc. v P. Jagjivan Ram* 1989 (2) SCC 574; *R. Rajagopal v. State of T.N.,* (1994) 6 SCC 632; *S. Khushboo v Kanniammal & Anr.* 2010 (2) SCC 600 and *Tata Sons Ltd v Greenpeace International and Anr.* 178(2011) DLT 705.

10. Learned counsel submitted that *Bonnard v Perryman* 1891-95 All ER 965 is an authority that is uniformly followed in courts throughout the free world; it prescribes the standard that courts should apply, while considering whether to grant pre-publication injunction. Learned senior counsel emphasized that the plaintiff was given the opportunity to state its version,

which the Forum would have carried, as part of fair comment. The plaintiff was given over two weeks to respond; instead it sought injunction, preferring not to state its version in the public domain.

11. It was submitted that without a discussion on the merits or the facts, an injunction order, as wide as the impugned order, amounts to a blanket censorship, which cannot be countenanced in a free country which cherishes its liberties and free speech. Learned counsel relied on *Delhi Development Authority v Skipper Construction Company (P) Ltd. & Anr.* AIR 1996 SC 2005 to submit that under Order 39, Rules 1 and 2 Code of Civil Procedure (CPC), injunction orders cannot be granted *ex parte* without reflecting the *prima facie* merits of the case. Reliance is also placed on *A. Venkatasubbiah Naidu v S. Chellappan* 2000 (7) SCC 695, for the proposition that an appeal against a blanket injunction order is maintainable.

12. The plaintiff, which was represented in advance on caveat, made submissions through its learned senior counsel. It was contended that the materials on record, in the form of the email attachment, were sufficient for the learned single judge to conclude that if published, the plaintiff's reputation and standing as a leading and independent print media house would be irrevocably prejudiced. It was also highlighted that the plaintiff did not sue for damages, but sought permanent injunctive relief. Learned senior counsel submitted that even *arguendo* if the appellant's assertions of having interacted with named individuals and employees (of the plaintiff) were correct, the fact remained that what they said could not be accepted, or ascribed to the plaintiff, because they were not part of the editorial or publishing unit, but rather were part of the commercial sections.

13. Learned counsel for the plaintiffs submitted that though the impugned order does not spell out reasons for the injunction, there were good and sound reasons for it. It was submitted that the judgements in *R.K Anand* v. *Registrar, Delhi High Court* 2009 (8) SCC 106 and *Shreya Singhal v. Union of India* 2015 (5) SCC 1 have clearly established that the electronic media has great reach and influence and if it is not used for proper ends, the harm can be incalculable. *Shreya Singhal (supra)* was relied on for the proposition that for electronic media or internet, through which information can be spread instantaneously, the criteria for prior restraint of speech can be different. Plaintiff's counsel also relied on the public interest litigation order in *Court on its own motion v State* ILR (2008) II Del 44 to say that "sting" operations are suspect at the least and illegal; they cannot be used by the media to vilify anyone.

14. Two issues are of importance, in these appeals: one, the correctness of the impugned order, which facially does not discuss or dwell upon cursorily even, the facts or merits – and the *prima facie* strength of the plaint allegations; and two, whether temporary injunction of the kind – which has the effect of stifling exercise of the right to free speech, by the press, could have been issued.

15. On the first issue, there can hardly be any debate in the opinion of this court. Clearly, an unreasoned order granting ex-parte injunction for the entire duration of the suit, is impermissible. In *Morgans Stanley Mutual Fund* v. *Kartick Das* 1994 (4) SCC 225 the Supreme Court laid down the salient principles which every court in India must follow, before granting *ex parte* ad interim injunction:

"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."

16. These principles have been endorsed and insisted upon, for application, in a large number of subsequent judgments (*Anita International v Tungabadra Sugar Works Mazdoor Sangh* 2016 (9) SCC 448; *Ramrameshwari Devi & Ors vs Nirmala Devi* 2011 (8) SCC 249 and *Maria Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira (D)* 2012(5) SCC 370). In the light of these principles, the court is of opinion that the *ex*

parte injunction, which the impugned order gave, to subsist during the entirety of the pendency of the suit, was unjustified.

17. Having regard to the final order this Court proposes, it would be inexpedient to consider the merits of this particular case. The only caveat which this Court wishes to add is that the threshold for granting an ex-parte relief where the plaintiff seeks pre-publication injunction, is necessarily of a very high order. This is evident from the judgment in *Khushwant Singh (supra)* where a Division Bench had held as follows:

> *"....However, the question is not of the documents being public documents but the subject matter being in the ambit of public domain in terms of there being prior reporting of the matter is controversy and the comments on the same....*
>
> *67..... There is force in the contention of Mr. Sundaram, learned counsel for the appellant, that a close and microscopic examination of the private lives of public men is a natural consequence of holding of public offices. What is good for a private citizen who does not come within the public gaze may not be true of a person holding public office. We have seen various examples of rights of public men being closely scrutinised by the press not only in our country but all over the world including of the President of the United States of America. What a person holding public office does within the four walls of his house does not totally remain a private matter. It may however, be added that the scrutiny of public figures by media should not also reach a stage where it amounts to harassment to the public figures and their family members. They must be permitted to live and lead their life in peace. But the public gaze cannot be avoided which is necessary corollary of their holding public offices....*
>
> *73. People have a right to hold a particular view and express freely on the matter of public interest. There is no doubt that even what may be the private lives of public figures become*

mattes of public interest. This is the reason that when the controversy had erupted there was such wide publicity to the same including in the two editions of India Today. As observed in Silkin vs. Beaverbrook Newspapers Ltd. & another (supra), the test to be applied in respect of public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury.

74. It is interesting note that the Fraser's case (supra) while considering the proposed publication of Sunday Times, Lord Denning had noted that the Sunday Times had been frank enough to admit that the article would be defamatory of the plaintiff yet Sunday Times claimed that the defense would be that the facts are true. In the present case the first plea is that the statement is not defamatory apart from the fact that it has been published and commented upon in the past. The second plea is that the appellants will prove the truth of the said statements. Lord Denning had observed that the courts will not restrain the publication of an article even where they are defamatory once the defendants expressed its intention to justify it or make a fair comment on the matter of public interest."

18. In *Khushwant Singh* (supra) the court had relied on *Bonnard* (supra). In *Bonnard* (supra) the Court of Appeal stated the principle as follows:

"But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of

libel for dealing most cautiously and warily with the granting of interim injunctions.
In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable."

19. This court notes that the Supreme Court in *Rajagopal* (supra) approvingly quoted *Fraser v Evans* 1969 (1) QB 349, which had relied on the *Bonnard* principle. In *Fraser* (supra) it was held that:

".....the court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since Bonnard v. Perryman. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out..... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest....."

20. Two learned single judges – in *Greenpeace (supra)* and in another subsequent ruling in *Dr. Shashi Tharoor v. Arnab Goswami* 2017 SCConline (Del) 12049 have accepted *Bonnard (supra)* principle.

21. The plaintiff's position that the *Bonnard (supra)* principle cannot apply under all circumstances, especially when the content which is to be published or disseminated through electronic media or the internet requires closer scrutiny. New technology undoubtedly possess new challenges. This challenge highlights the necessity of the Court's duty to balance the rights

rather than to dilute them. *Dr. Shashi Tharoor (supra)* dealt with this aspect, in the light of all the relevant case law, including the judgment of the High Court of Australia in *Australian Broadcasting Corporation v. O'neill* 2006 HCA 46. *Bonnard (supra)* principle has been accepted and continued to apply in Canada in *Compass Group Canada (Health Services) Ltd. v. Hospital Employees Union*2004 BCSC 128 ACWS (3d) 578 which states that the alleged defamation should be restrained in exceptional cases, only in the rarest and clearest cases" and that the burden upon the plaintiff is to demonstrate that the material complaint was manifestly defamatory and that any jury verdict to the contrary would be considered perverse by the Court of law." It was also emphasized later in *Hutchens v. SWCAM.Com* 2011 ONSC 56 that the plaintiff should be able to demonstrate – in order to obtain interlocutory relief – that the defendant when given the chance would be unable to fine it imposes to justify the content of this speech.

22. Undoubtedly, the new age media, especially the electronic media and internet posts greater challenges. That *per se* ought not to dilute valuable right of free speech which, if one may say so, is the lifeblood of democracy. The salutary and established principle in issues that concerned free speech are that public figures and public institutions have to fulfil a very high threshold to seek injunctive relief in respect of alleged libel or defamation [see *R. Rajagopal (supra)]*. Also, the judgment in *Kartar Singh v. State of Punjab* 1956 SCR 476 underlines that "*those who fill public positions must not be too thin-skinned in respect of references made upon them*". This court is also of the opinion that the mere frame of the relief – of permanent injunction does not alter the principle. The cause of action which the plaintiffs base their suit upon, is alleged defamation. Therefore, the ordinary

principles of injunctive relief, at the *ex parte* stage, having regard to the nature of the subject matter, i.e. restraint of speech, would be the same. Another interpretation would mean that the plaintiff can at will change the governing principles, by the mere device of claiming a different relief and arguing that if refused, the suit would be defeated. It is not uncommon that in a suit for permanent injunction, the plaintiff is unable to secure temporary injunction. That *per se* would not disentitle the plaintiff, if otherwise entitled, to any relief. Much depends on what is actually proved.

23. We feel that adding further would not be appropriate except to say that whenever interlocutory or *ex parte* injunctive relief of the kind which this Court is now concerned with, is sought, the threshold for considering the *prima facie* strength has to necessarily be of a very high order. The consequence of not following established rules and principles would be that the Courts unwittingly would, through their orders, stifle public debate. The Members of the public and citizens of this country expect news and fair comment as to whether a public institution – including a media house or journal (which cannot claim any exemption from being public institutions as they are the medium through which information is disseminated, and are one of the pillars of democracy) functions properly. In case there are allegations which result in controversies as to the reliability of the news which one or the other disseminates to the public, that too is a matter of public debate. Unless it is demonstrated at the threshold that the offending content is malicious or palpably false, an injunction and that too an *ex-parte* one, without recording any reasons should not be given. Democracy presupposes robustness in debates, which often turns the spotlight on public figures and public institutions – like media houses, journals and editors. If courts are to

routinely stifle debate, what cannot be done by law by the State can be achieved indirectly without satisfying exacting constitutional standards that permit infractions on the valuable right to freedom of speech.

24. For the above reasons, the impugned order is hereby set aside. The matter is remitted to the learned Single Judge who shall consider the question of grant of interim relief on the basis of the pleadings and contentions of the parties. Parties shall be present before the concerned learned Single Judge, on 3rd October, 2018. All observations made in the course of this judgment do not in any manner reflect on the merits of the facts which are yet to be decided by the learned Single Judge. The appeals are accordingly allowed.

Order *dasti* under the signatures of the Court Master.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

SEPTEMBER 28, 2018