

MANDATORY INJUNCTION : ITS TRUE NATURE

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CAN MANDATORY injunction be granted directing the defendant to perform a positive covenant in a contract? Mandatory injunction in private law is a counterpart of mandamus in public law. Once the obligation to perform the public duty is established the performance of the duty is only a ministerial act and in such a case mandamus is available as of right and the court has no discretion to refuse it.¹ Otherwise it is a discretionary remedy.

Injunction by its very dictionary meaning is a preventive relief. The principles for the grant of a temporary injunction dealt with by order XXXIX of rule 2 of the Code of Civil Procedure 1908 are generally applicable to the issue of a permanent injunction.²

Order XXXIX deals only with preventive and not with mandatory injunction. It may, therefore, be inferred that mandatory injunction is only an aid to a preventive injunction which is the main purpose of an injunction. This inference is borne out by section 55 of the Specific Relief Act 1877, now replaced by section 39 of the Specific Relief Act 1963 which is the only provision specifically dealing with the issue of a mandatory injunction. Both these sections make it clear that mandatory injunction can be issued only to help obtain the main relief of a preventive injunction. This is why both these sections begin with the words "[w]hen to prevent the breach of an obligation, it is necessary to compel the performance of certain acts". Thus, the compulsion to perform any act must be with a view to prevent the breach of an obligation. Without such an objective, a mandatory injunction merely to compel the performance of an act cannot be issued. The importance of these words which govern the grant or relief under old section 55 was emphasized by a division bench of the Allahabad High Court in *Raghunath v. Municipal Board*.³ The court said :

Under S. 55, Specific Relief Act, a mandatory injunction can be

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1. S.A. de Smith, *Judicial Review of Administrative Action* 558 (4th ed. 1980). de Smith, however, points out that there are many factors to be considered by the courts which would give them the discretion to grant or not to grant mandamus in a particular case.

2. Mulla's *The Code of Civil Procedure* 873 (11th ed. 1982).

3. A.I.R. 1952 All. 465.

issued to "prevent the breach of an obligation." No doubt an obligation is co-related to a legal right and normally one would expect that the prevention of the breach of an obligation has reference to the obligation owed to the plaintiff. But there may be an obligation which is not directly co-related to a legal right in the plaintiff but is a condition precedent to the enforcement of that right. In order to provide relief to the plaintiff and securing (*sic*) him the right to which he is entitled it may be necessary to prevent a breach of a certain obligation the performance of which is a condition precedent to the securing of the plaintiff's right and in such a case the Court has power to prevent the breach of the obligation.⁴

In that case the right of the plaintiff to get back the land acquired from him by the government for municipal board arose only when the obligation cast on the board was performed, that is to say, after the board relinquished the land in favour of the collector. The plaintiff's right could not be defeated because the board chose not to perform the obligation and in such circumstances the court had power to prevent the breach of an obligation by granting mandatory injunction against the government and the board to enforce its statutory liabilities under the U.P. Municipalities Act 1916.

What is the distinction between specific performance of a contractual obligation and a mandatory injunction? The remedy of specific performance is available when the plaintiff avers a right given to him by the contract and the defendant denies it. The existence and validity of the contract have to be established by the former before he can get the latter to perform the contract, for instance, by executing a sale deed or by doing some other act or by paying a fixed sum agreed to be paid under the contract. The reason is that for filing a suit for specific performance it is not necessary that the existence and validity of the contract should already have been established. The purpose of the suit is to establish it and then to get the remedy of performance of the contract by the defendant.

On the other hand, an injunction to prevent a breach of contract cannot be granted if the existence and validity of the contract are themselves in dispute. It was settled long ago that "[b]efore such injunction is granted .. the applicant must satisfy the Court that there is a *completed* contract under which he has acquired a right."⁵ This is why whenever the existence and validity of a contract are in dispute they will have to be established for a suit for specific performance and till that is done an injunction

4. *Id.* at 469.

5. W.W. Chitale and V.B. Bakhale, *The Code of Civil Procedure* (A.I.R. Commentaries), vol. IV, note 2 at 633 (9th ed. 1977) citing *Bhikaji Sabaji v. Bapu Saju*, (1876-77) 1 I.L.R. Bom. 550 at 554 and *Abdul Allaraki v. Abdul Bacha*, (1882) VI I.L.R. Bom. 5 at 7.

cannot be claimed. Hanbury and Maudsley in *Modern Equity*⁶ observe as follows :

The principle is that an injunction will not be granted if that would amount to indirect specific performance of the positive terms [of a contract].⁷

They observe further :

Unlike injunctions, the remedy of specific performance is confined to the enforcement of positive contractual obligations.... A prohibitory injunction is appropriate to restrain the breach of a negative contract, while a mandatory injunction is used to force the defendant to take positive steps to undo an act already done in breach of contract.⁸

Thus, it is only when the status quo is altered by the defendant that mandatory injunction can be issued to him to restore the status quo. It follows that when the status quo has not been changed by the defendant a mandatory injunction cannot be issued to him to perform a contract and thus change the status quo for the first time. The modern law is stated as follows :

Very often the compulsion of some positive action involving a change of existing conditions is necessary....

The court may, by its mandate, compel the restoration to the moving party of that which was wrongfully taken from him, or compel the undoing of those acts that have been illegally done...⁹

The illustrations to old section 55 of the Specific Relief Act 1877 show in what circumstances a mandatory injunction is issued :

Illustration (a) :

A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

This meant that when the right to access and use of light had been already acquired for an old building by the plaintiff, the defendant was restrained from obstructing the said light by the construction of the new building. In aid of such preventive relief that part of the new building which obstructed the light and thus made the preventive injunction ineffective was ordered to be pulled down. Thus a mandatory injunction was granted only to make the preventive injunction effective.

6. (11th ed. 1981).

7. *Id.* at 128.

8. *Id.* at 39.

9. *American Jurisprudence*, vol. 42, s. 16 at 745-46 (2nd ed. 1969).

Illustration (b):

A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

This showed that preventive injunction could be granted to prevent the projection of eaves by the defendant on the land of the plaintiff as that would have been a clear act of trespass. To make this preventive relief effective so much of the projection of the eaves as hung on the land of the plaintiff was ordered to be pulled down.

The rest of the illustrations prove the same point.

It is this ancillary nature of a mandatory injunction to help obtain the main relief of the preventive injunction which is responsible for the language in which old section 55 was and new section 39 is enacted. The key words of both these sections are those which point out the only object for which a mandatory injunction can be issued. This object is, in the words of these sections, "to prevent the breach of an obligation."

It, therefore, follows that if the plaintiff claims that he has a contract with the defendant which he refuses to perform, then the former has the right to sue the latter for the specific performance of the contract. This will mean, for instance, execution of a sale deed by the defendant. A contractual right is only an inchoate title. It is only when a contract is turned into a conveyance or a deed that the title becomes complete. Injunction cannot be granted unless title is already complete. This is why it is said that the plaintiff must have a legal right before he can ask for an injunction.

If a suit for mandatory injunction is entertained for the purpose of compelling the defendant to perform the positive covenants of the contract with the plaintiff, then the remedy of a mandatory injunction will be used as a principal relief. This will make the remedy of specific performance totally unnecessary. It will also mean that an injunction is not mainly a preventive relief as it is now. It will mean that an injunction is mainly a mandatory relief which is contrary to the very object of injunction as preventive relief. The object of an injunction is to protect the status quo and to prevent the defendant from changing the status quo. If the status quo is to be changed for the first time, then the only remedy is to ask for specific performance. This has been made clear by the House of Lords in *Redland Bricks Ltd. v. Morris*¹⁰ wherein Lord Upjohn observed :

The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be "as of

10. [1970] A.C. 652.

course"... [W]here the defendant has acted without regard to his neighbour's rights, or has tried to steal a march on him or has tried to evade the jurisdiction of the court or, to sum it up, has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his wanton and unreasonable acts by doing positive work *to restore the status quo*...¹¹

The decisions of the Supreme Court also bring out the central point that any right which the plaintiff claims on the basis of a contract is not a title in itself. First, a suit for specific performance of the contract is to be filed to establish the existence and the validity of the contract. It is only when such a suit is decreed that the consequential reliefs regarding the passing of the title can be given. This has been explained lucidly with reference to the development of the law in *Babu Lal v. Hazari Lal Kishori Lal*.¹² Prior to the enactment of section 22 of the Specific Relief Act 1963 there were two views regarding the nature of a decree for specific performance. One view was that such a decree entitled the plaintiff only to the execution of the sale deed by the defendant, and the other was that after the execution of the sale deed the consequential reliefs such as delivery of the possession might also be granted. The present section 22 combines both these views. On the one hand the relief of possession is not to be granted unless it is expressly claimed and the decree is to be only for the execution of the document on the basis of the contract. On the other hand if the relief for possession is expressly claimed in addition to the relief of specific performance, then such a relief also can be granted by the court in the same suit. As was pointed out by the court, it is only after the sale deed is executed that the right of the purchaser under section 55 of the Transfer of Property Act 1882 to the delivery of possession by the seller arises.¹³

This will show that a suit cannot be filed straight away for a mandatory injunction compelling the defendant to deliver possession or to refund money etc. Prior to such a relief the plaintiff has to claim the relief of specific performance which will make the defendant or the court on his behalf execute the sale deed by which alone the title will pass to the plaintiff. It is only then that the right to the consequential reliefs will arise. If a suit for mandatory injunction for the grant of the consequential reliefs is to be entertained then, the court will be landed in an illegality. It will be granting reliefs to the plaintiff without first declaring the title of the plaintiff and without first conferring on him such a title by the execution of a sale deed or other deed of title. This is the central reason why the relief for the mandatory injunction cannot be allowed to circum-

11. *Id.* at 665-66. Emphasis added.

12. A.I.R. 1982 S.C. 818.

13. *Id.* at 822.

vent the prior condition of obtaining a relief for specific performance of the contract.

The decision of the Supreme Court in *Dhanlaxmi v. Sushila*¹⁴ brings out this precise point. The court accepted the contention of the counsel for respondent 1 that in the absence of a sale deed the defendant could not rely on any right of obtaining possession. The document which was produced was only an agreement. The court observed that the learned counsel for the respondent was right in that the appellant could not rely on a mere agreement. If at all any right was reserved in favour of the defendant, it should be spelt out from the sale deed which was not produced. A clear distinction was thus made between an agreement of sale and the sale deed, and it was held that the right to delivery of possession could not be claimed on the basis of the agreement.¹⁵ The reason is that a suit has to be first filed for the specific performance of the agreement of sale. It is only after the existence and validity of the agreement have been upheld by the court that it can get the document of title executed by the defendant. It is only then that the title will pass to the plaintiff and he will be entitled to consequential reliefs such as that of possession on the basis of such title.

The decision of the Supreme Court in *Viswantha Pillai v. Shanmugham Pillai*¹⁶ is no exception to this rule. In this case the real owner obtained a declaration against the *benamidar* that the plaintiff was the real owner of the motor vehicle and therefore the permits for plying the vehicle issued in the name of the *benamidar* should really be held to belong to the plaintiff. Since the title of the plaintiff was established by the declaration, the consequential reliefs of transferring the title deeds to the plaintiff by the defendant was granted by the court by way of a mandatory injunction.¹⁷ It is to be noted that the plaintiff did not claim the transfer of these permits to him by the defendant before claiming a declaration of his title.

This decision also, therefore, supports the settled law that the relief of mandatory injunction is either consequential on the major relief for declaration or a decree for the specific performance of a contract and that mandatory injunction is invoked only to support the grant of a prohibitory or preventive injunction as envisaged by section 39 of the Specific Relief Act 1963. Mandatory injunction cannot be claimed as the only and the major relief in a suit without first claiming either a declaration of title or specific performance of the contract.

Injunction as a remedy has also developed in the field of public law considerably. Here also the distinction between a prohibitory and mandatory injunction has been maintained. In his leading treatise on

14. A.I.R. 1981 S.C. 478.

15. *Id.* at 479.

16. A.I.R. 1969 S.C. 493.

17. See *id.* at 496.

administrative law¹⁸ de Smith has stated the law as follows :

Until late in the nineteenth century all injunctions were worded in a prohibitory form (*e.g.* not to allow an obstruction to continue to interfere with the plaintiff's rights), but the direct mandatory form (*e.g.* to remove the obstruction) may now be used.¹⁹

In other words the mandatory form is to be used only for restoring the status quo. An obstruction had disturbed the status quo and the removal of the obstruction is to restore the status quo. It is only in that limited sense that the mandatory injunction can be used. The learned author has further observed :

In respect of other matters within their jurisdiction an injunction may be granted by way of ancillary relief, and possibly as an independent form of relief where the claim for an injunction has been combined with a claim for other relief which the court has jurisdiction to grant but has refused. But it is doubtful whether there are any other circumstances in which a plaintiff can properly sue in a county court for an injunction alone in the absence of explicit statutory authorisation.²⁰

These observations also bear out the two propositions of law canvassed above, *viz.*, (1) a mandatory injunction can be issued only to restore the status quo; and (2) it can be issued only as an ancillary relief and not as the only relief.

18. See *supra* note 1.

19. *Id.* at 434.

20. *Id.* at 436-37.