

JSN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.1216 OF 2016
IN
SUIT NO.965 OF 2015

Sopariwala Exports and Another	... Applicant
<i>In the matter between</i>	
Sopariwala Exports and Another	... Plaintiffs
<i>Versus</i>	
Firdoshhussain M Malik trading as	... Defendant
M/s. Zarina Exim	

Mr. Makrand M, OSD with Mr. A.D. Kamble, Master Officer of Court Receiver present.
Mr. V. Tulzapurkar, Senior Advocate, with Ms. Smriti Yadav i/b Khaitan and Company for the Applicant.
Ms. Archana Singh, Defendant is present.

CORAM: G.S. PATEL, J
DATED: 2 nd August 2016

PC:-

1. This is the Plaintiffs' application under Order 39 Rule 2 A of the Code of Civil Procedure, 1908 ("CPC"). A number of orders have been passed in this matter which set out its history and background.

2. There is the first order of 1st October 2015, which referenced previous orders of 10th and 20th July 2015. On 10th July 2015, Mr. Justice Kathawalla found a *prima facie* case to have been made out in trade mark and copyright infringement. The Defendants were directed not to export the infringing goods. The Court Receiver was appointed to make an inventory. The Defendants were then served. The matter was moved again on 20th July 2015. The Plaintiffs filed an additional Affidavit seeking further directions. There were some goods with the impugned mark and label awaiting transshipment to Damascus, Syria from Mundhra Port. The order of that day, 20th July 2015, directed the Additional Commissioner of Customs, Mundhra to withhold the proposed export.

3. Then came an additional Affidavit dated 2nd August 2015 pointing out that the container had already reached its destination. The Plaintiffs applied for a return of the container to India. They corresponded with the shipping line MAERSK requesting a return of the container. The shipping line responded by email on 14th September 2015 saying that any such return was the responsibility of the consignee i.e., the Syrian customer. At that time, I said that there was reason to believe that that the Syrian consignee was a sister concern of the Defendant. On 16th September 2015, the Plaintiffs called upon Defendants to comply with the Court orders. There was no reply. The consignment continued to remain at Damascus port. Delivery was never effected to the consignee.

4. The application of 1st October 2015 was for a direction to the Defendant or his Company to ensure that the shipping line returned

the container to India. I passed an order in those terms on 1st October 2015.

5. It is this order of which breach is complained. On subsequent dates I have adjourned the matter from time to time. I have given Ms. Singh on behalf of Defendant ample opportunity to comply. No appeal has been filed. No application for recall has ever been made. I have directed an Affidavit be filed by the Defendant to disclose all his assets. I have noted that the Defendant did not approach MAERSK for a return of the container.

6. The present Affidavit filed today, affirmed on 15th July 2015, shows that the only approach made to MAERSK by the Defendant was on 30th March 2016, six months after the 1st October 2015 order. In my order dated of 16th March 2016, I noted that the Defendant was in deliberate and wilful breach of 1st October 2015 order, and it was on that basis the Plaintiffs sought and were granted an order of disclosure.

7. The matter was taken up again on 4th April 2016. On that day I issued notice under Rule 5 of the Bombay High Court (Contempt of Court Rules), 1994. I deferred the question of attachment since no ad-interim order was possible in those terms. I then also directed the Defendant to take such steps as necessary to bring the container back to India. I specifically observed that the Defendant was in breach and could not continue to disobey orders of this Court. I granted the relief in terms of prayer clause (c) of the present Notice of Motion.

8. There remains therefore now the question of prayers (a) and (b). Mrs. Singh files a further Affidavit dated 25th July 2016. This carries the matter no further. In fact parts of it make it worse, because now the Defendant says that the order of 1st October 2015 was “snatched” from the Court. It was not; and the Defendant did nothing to carry the matter in appeal or to make any application to have it varied, modified, recalled or set aside. Subsequent orders have built on that first order. They have confirmed it and carried it further. There is simply no excuse for the Defendant’s conduct.

9. I notice that there is an Affidavit dated 26th March 2016 as part of the Notice of Motion (pages 34 to 68). At page 35, the Defendant has disclosed certain movables that are in his name. In the name of his private limited company there are only computers and accessories. There is no question of moving against household articles; and even the Omni Van and two wheeler, Mr. Tulzapurkar for the Plaintiffs says, are probably best left alone. I agree. However as regards the commercial machines listed in the second part i.e., One Hydraulic Press Machine, Manual Press Machines (20 Units) and One DG set, I see no reason why order should not made against them. There is no question that such an order of attachment is clearly contemplated under Order 39 Rule 2A of the CPC. That Rule also provides for an imprisonment term, but at Ms. Singh’s request I will let that pass.

10. Having found the Defendant to be guilty of deliberate disobedience of the order of 1st October 2015, the following order is made: the properties mentioned above, viz., one Hydraulic Press Machine, Twenty Manual press machine and one DG set shall be

attached by the Court Receiver, High Court, Bombay. This attachment will continue till 28th July 2017. If by that time the Defendant has not complied with the order of 1st October 2015, these items will be sold. The sale proceeds held by the Court Receiver will be invested in the usual form. The Court Receiver will effect the sale by public auction after following the usual process. The Court Receiver will then place a report before the Court as to the question of compensation, if any, to be awarded to the Plaintiffs.

11. The Notice of Motion is disposed of in these terms. In addition, the Plaintiffs will be entitled to recover the actual costs of this Notice of Motion from the sale proceeds, if any. If the Defendant complies with the order of 1st October 2015 before then, he will also be liable to pay to the Plaintiffs the actual costs of this Notice of Motion.

12. The goods when seized by the Court Receiver are to be stored in an appropriate location or warehouse at the initial cost of the Plaintiffs. These costs shall also be recoverable from the sale proceeds of the goods. In the event if the Defendant complies, these costs will also have to be paid by the Defendant.

13. Show cause notice stands discharged in view of the above.

(G. S. PATEL, J.)