

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

% **Date of decision: 4th July, 2017**

+ **CM(M) 546/2016 & CM No.20837/2016 (for stay)**

PRIMORDIAL SYSTEMS PVT LTD Petitioner

Through: Mr. Prashant Mehta & Mr.
Alok Tripathi, Advs.

Versus

INDIAN NEWS PAPER SOCIETY & ORS Respondents

Through: Mr. B.B. Gupta, Sr. Adv. with Mr.
Raghav Kacker, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the judgment dated 9th February, 2016 of the learned Additional District Judge (ADJ) vacating the order (under Order XXXIX Rules 1 and 2 of the CPC) dated 22nd November, 2011 of the Civil Judge, Delhi in favour of petitioner / plaintiff by allowing the appeal preferred by the respondent no.1 / defendant Indian Newspaper Society (INS) allowing the application of the petitioner / plaintiff.

2. The petitioner / plaintiff carrying on business of providing educational services had engaged M/s Hype N Hike as an advertising agency *inter alia* for placing advertisements of the petitioner in the print media. According to M/s Hype N Hike, the petitioner owed certain monies to M/s Hype N Hike and which the petitioner was failing to pay. M/s Hype N Hike approached the respondent no.1 INS to issue an advisory to newspapers and advertising agencies not to deal with the petitioner. The respondent no.1 INS found merit in the said representation / complaint of M/s Hype N Hike and issued an

advisory dated 24th August, 2011 to all its member publications and accredited advertising agencies “not to release any advertisements of the petitioner till further advice”.

3. Aggrieved from the aforesaid advisory, the petitioner / plaintiff instituted the suit from which this petition arises impugning and seeking stay of the said advisory.

4. The suit was accompanied with an application for interim stay.

5. The learned Civil Judge found merit in the application of the petitioner for interim injunction and vide order dated 22nd November, 2011 supra granted the stay of the said advisory dated 24th August, 2011.

6. The respondent no.1 INS preferred an appeal under Order XLIII Rule 1(r) of the CPC against the said order and which appeal was allowed. Resultantly, the interim stay of operation of the advisory dated 24th August, 2011 stood vacated and the advisory remains in force.

7. The counsel for the petitioner / plaintiff states that owing to the said advisory none of the advertising agencies and print media are ready to carry the advertisements of the petitioner. Resultantly, this petition under Article 227 of the Constitution of India.

8. Though interim relief was claimed in this petition but has not been granted as yet.

9. The counsel for the petitioner / plaintiff and the senior counsel for the respondent no.1 INS have been heard.

10. Though HT Media Ltd. and The Times Group were also impleaded by the petitioner as defendants in the suit and are respondents no.2 and 3 to this petition but none appears for them. On enquiry it is informed that they are not contesting the suit either. The senior counsel for the respondent no.1 states that HT Media Ltd. did file a written statement to the suit but has not been appearing.

11. I have enquired from the counsel for the petitioner/plaintiff, whether M/s Hype N Hike have instituted any proceeding for recovery of their dues from the petitioner.

12. The counsel for the petitioner states that the petitioner/plaintiff, besides the suit for injunction from which this petition arises, has also instituted a suit for recovery of damages of about Rs.45 lacs from M/s Hype N Hike and in which suit M/s Hype N Hike have filed a counterclaim for recovery of their dues of about Rs.22 lacs from the petitioner. Besides the said proceedings no other proceeding is stated to be pending though the senior counsel for the respondent no.1 INS points out that the petitioner had earlier filed a complaint with the Competition Commission of India (CCI) with respect to the same advisory but sought to withdraw the same; however CCI nevertheless observed that it had no jurisdiction.

13. I have enquired, whether the petitioner is challenging the advisory *per se* on the ground of the respondent no.1 INS being not entitled to issue such advisory.

14. The counsel for the petitioner states that that is not his contention and he is challenging the advisory on the ground that

without the claim of M/s Hype N Hike being adjudicated, the business of the petitioner cannot be throttled by depriving the petitioner from advertising rights.

15. I have further enquired, whether not the issue has already been considered by this Court in several judgments.

16. The counsel for the petitioner has referred to ***Century Plyboards (India) Ltd. Vs. The Advertising Standards Council of India*** MANU/MH/0030/2000 and particularly to para no.7 thereof wherein in the context of the power of the Advertising Standards Council of India (ASCI) to issue directions to its members, it has been held that if the directions have the effect of adversely affecting a non-member or profession of a non-member, the direction would be without jurisdiction.

17. I have however enquired from the counsel for the petitioner whether not the dicta of this Court in ***R.K.B Herbals (P) Ltd. Vs. Enterprises Advertising (P) Ltd.*** AIR 1989 Del 253 and the view taken by me in ***Metro Tyres Ltd. Vs. The Advertising Standards Council of India*** 2017 SCC Online Del 7504, is different from the view taken by the High Court of Bombay in the judgment supra and after considering the same.

18. The counsel for the petitioner then refers to ***Tata Press Ltd. Vs. Mahanagar Telephone Nigam Ltd.*** (1995) 5 SCC 139 holding that commercial advertising is protected under Article 19(1)(a) of the Constitution.

19. However the said judgment does not deal with the issue as has arisen in this case.

20. I have however enquired from the counsel for the petitioner/plaintiff, whether not the relief sought by the petitioner in the suit from which this petition arises as well as in this petition is to the prejudice of M/s Hype N Hike at whose instance the respondent no.1 INS issued the advisory and how can the petitioner institute a suit prejudicing the rights of a person without impleading that person and would not that amount to the petitioner obtaining a walk over.

21. The counsel for the petitioner states that the challenge in this suit is to the advisory of the respondent no.1 INS only and M/s Hype N Hike is not a necessary party to the suit.

22. I am unable to agree. It is admitted that the advisory has not *suo motu* been issued by respondent no.1 INS but is on a complaint of M/s Hype N Hike and has been issued after granting an opportunity of hearing to M/s Hype N Hike as well as the petitioner (the counsel for the petitioner states that while issuing advisory the contentions of the petitioner have not been dealt with). When an industrial body in accordance with its rules issues such advisories at the instance of its members, the person aggrieved therefrom cannot challenge the advisory without impleading the party at whose instance advisory has been issued. If the contentions of the counsel for the petitioner were to be accepted, then in no appeal/revision petition before this Court, the adversary party would be required to be impleaded and only the

Court passing the impugned order would be impleaded as the respondent.

23. I am further of the view that if the power to issue the advisory is *per se* not under challenge, the grant of interim stay on the operation of the advisory can only be on taking a *prima facie* view whether the monies owing to non-payment whereof advisory has been issued are *prima facie* due or not and after obtaining a security for recovery thereof in the event of being found to be due. For this reason also, I am of the view that M/s Hype N Hike at whose instance the advisory has been issued is a necessary party because only they will be able to satisfy this Court that they have a *prima facie* claim against the petitioner.

24. The respondent no.1 INS cannot be expected to make any submission on this ground.

25. The counsel for the petitioner has also contended that the respondent no.1 INS in its written statement has not taken the plea of non-maintainability of the suit owing to non-joinder of the necessary party.

26. Even if that be so, the Court before granting the relief sought from it is obliged to see that the person / party likely to be affected by such order is before this Court and cannot grant relief to the prejudice of the party behind its back.

27. The counsel for the petitioner at this stage states that the petition be adjourned to enable the petitioner to implead M/s Hype N Hike.

28. Impleading M/s Hype N Hike in this petition alone would not serve the purpose when M/s Hype N Hike is not a party to the suit. Once the counsel for the petitioner impleads M/s Hype N Hike as party to the suit, the application for injunction will necessarily have to be heard afresh.

29. Accordingly, this petition is disposed of with liberty to the petitioner / plaintiff to move an appropriate application before the Court before which the suit from which this petition arises is pending, for impleading M/s Hype N Hike as defendant to the suit; if the said application is allowed, the petitioner shall be entitled to address fresh arguments on the application for interim relief and which respondent no.1 INS as well as the other existing defendants and the newly impleaded defendant if any shall be entitled to oppose and the aggrieved party shall have appropriate remedies thereagainst.

No costs.

JULY 04, 2017
'gsr'

RAJIV SAHAI ENDLAW, J.