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

+ FAO(OS) 77/2018, CAV.No.441/2018 & CM Nos.19037-38/2018

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Date of decision : 10th May, 2018

BHARTI AIRTEL LTD

..... Appellant

Through : Mr. P. Chidambaram and Mr.
Rajiv Nayyar, Sr. Advs. with
Mr. Harsh Kaushik and Mr.
Abhay Chattopadhyay, Advs.

versus

RELIANCE JIO INFOCOMM LTD Respondent

Through : Dr. Abhishek Manu Singhvi
and Mr. Dayan Krishnan, Sr.
Advs. with Mr. K.R.
Sasiprabhu, Mr.Gaurav Mitra,
Mr.Hiten Sampat, Mr.Amit
Bhandari, Mr.Vishnu Sharma,
Mr.Avishkar Singhvi,
Ms.Aakashi Lodha and
Ms.Rashmita Roy Choudhuri,
Advs.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

CAV.No.441/2018

1. Ld. counsel for the caveator has put in appearance on advance

notice and has been heard.

2. The caveat stands discharged.

CM No.19038/2018

Allowed, subject to just exceptions.

The application is disposed of.

FAO(OS) 77/2018 & CM No.19037/2018

1. The respondent herein filed a suit, being CS(OS)No.156/2018, on the Original Side of this court, against the present appellant alleging that the advertisements issued by the appellant in the media, with regard to an offer for its 4G customers during the T20 cricket matches, were deceptive, misleading and misrepresentative to the consumers inasmuch as the disclaimers in the said advertisements did not make it clear to the intending customers that the subscription is free only for the *Hotstar* application and that the consumers were still required to pay data usage charges when they viewed the matches on the said applications.

2. Along with the plaint, the plaintiff/respondent filed an application being I.A.No.4933/2018 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure seeking the following prayers :

*“a) Pass an interim ex parte **injunction** in favour of the plaintiff **restraining the defendant**, their representatives, from in any manner **publishing/airing/televising or propagating in any mode or manner either orally / writing / publishing / telecasting or airing the Subject Advertisements or any similar advertisement** claiming to offer free live streaming of cricket T20 matches during the pendency of the present suit.*

b) Pass an interim ex parte injunction in favour of the plaintiff and against the defendant, their employees, agents,

*officers, assigns, representatives directing and/or commanding them to forthwith **suspend/from their website**, inter alia being www.airtel.in, and from the website www.youtube.com and from such **other website belonging to the defendant and/or other websites** which are available for access and viewing to the general public, **the subject advertisements** and all material / articles / stories / news / report etc. which relate to the Subject advertisements and/or any related advertisement campaign claiming that the defendant offers “free” live viewing/streaming of cricket T20 matches to subscribers/consumers during the pendency of the present suit.”*

(Emphasis supplied)

3. The above application came up for consideration on the 13th of April 2018 (page 47) before the Id. Single Judge when the appellant/defendant was represented on advance notice and submissions were made on its behalf which have been noted in para 6 of the order recorded on that date. These submissions deserve to be noted in extenso and read as follows :

*“6. The learned senior counsel appearing on behalf of the defendant on advance notice argued the plaintiff is jealous competitor and what is meant by ‘free subscription’ is free subscription of HOTSTAR network and whereas the advertisement specifically provides if one intends to watch the game one has to use data as per the plan taken by him/her. However, **during the course of the arguments, the learned senior counsel for the defendant, under instructions, agreed the defendant would include the following in its advertisement in bold letters:-***

- a) the subscription of HOTSTAR shall only be free; and*
- b) the data charges will be as per subscriber’s tariff plan.”*

(Emphasis supplied)

4. The Id. Single Judge appears to have accepted the submissions made on behalf of the defendant and in para 7, directed as follows :

*“7. Needless to say **this shall be without prejudice to the respective rights and contentions of both the parties.** The changes shall be carried out by the defendant immediately in their ongoing subject advertisements.”*

(Emphasis supplied)

5. It is apparent from the above that the relief granted by the Id. Single Judge on the 13th of April 2018 was premised strictly on the concession made on behalf of the appellant/defendant, as noted in para 6 of the order, and the directions limited to the above extent. No further prayer, as was made by the plaintiff in I.A.No.4933/2018 as extracted above, was granted.

6. It is submitted by the appellant before us that it had fully complied with the requirement of the order dated 13th April, 2018 and incorporated the necessary changes in its advertisements.

7. However, not satisfied with the changes effected by the defendant, the plaintiff appears to have filed I.A.No.5554/2018 under Order XXXIX Rule 2A of the Code of Civil Procedure seeking appropriate directions *qua* alleged disobedience and breach by the defendant of the order dated 13th April, 2018 in all mediums of advertisements which are newspapers, bill boards, hoardings, videos, etc. The contention of the plaintiff/respondent *inter alia* was that the disclaimer incorporated by the defendant was not visible to a normal sighted person reading marketing communications once from a reasonable distance and at a reasonable speed. The plaintiff had also placed reliance on the guidelines issued by the Advertising Standards

Council of India ('ASCI' Guidelines) with regard to the disclaimer which has to be issued in an advertisement.

8. The ld. Single Judge heard counsels for the parties on I.A.No.5554/2018.

9. Let us first and foremost examine the submissions made on behalf of the defendant on the 2nd of May 2018 which stand extracted in paras 6, 7 and 8 thereof and read as follows :

“6. The learned senior counsel appearing on behalf of the defendant argued the defendant has fully complied with the order dated 13.04.2018 and the disclaimer is now being shown in bold letters in every advertisement. He refers to page 121 and 122 of the documents attached to its reply which contain advertisement issued pre and post order dated 13.04.2018 to show the disclaimer later is in bold. He further argued though the plaintiff has no right under the common law and is not able to cite any violation of its legal right but yet in order to solve the controversy the defendant has agreed to a concession as is recorded in order dated 13.04.2018 and may even go further to increase the size of the disclaimer in its advertisement from 10 pixels to 12 pixels. The learned senior counsel for the defendant has handed over a comparative chart qua the size of the advertisement(s) as per the ASCI guidelines and as to how the defendant has been advertising in hoardings, bill boards etc. It is as under:

Media	ASCI Code	Defendant's Advertisements prior to order dated 13.04.2018	Defendant's Advertisement post the order dated 13.04.2018
Television-standard definitions	<i>For standard definition images, the height of the text lower case</i>	<i>In the defendant's advertisement s, the height of the text</i>	<i>In the Defendant's advertisements the height of the text lower</i>

	<i>elements shall be NOT LESS THAN 12 pixels [12 lines] in a 576 line raster</i>	<i>lower case elements is, at least 12 pixels</i>	<i>case elements is, at least 12 pixels. Further, the text has been modified in accordance with the Order dated 13.04.2018</i>
Television-High Definition	<i>For high definition images, the height of the text lower case elements shall be NOT LESS THAN 18 pixels [18 lines] in a 1080 line raster.</i>	<i>In the Defendant's advertisement s the height of the text lower case elements is at least 20 pixels.</i>	<i>In the Defendant's advertisements the height of the text lower case elements is at least 20 pixels. Further, the text has been modified in accordance with the Order dated 13.04.2018.</i>
Hold Duration for disclaimers in Television Commercials/Videos	<i>Disclaimer shall remain in the screen for MORE THAN 4 seconds for every line, and additional 2 seconds for every additional line. If the claim is presented as a voice over ("VO"), then disclaimer should be displayed in sync with the VO.</i>	<i>Complied with, in the case of the defendant's advertisement s with the disclaimer in the Defendant's advertisement s being lower than required under the ASCI code, and remains for the entire duration of the VO</i>	<i>Complied with, in the case of the Defendant's advertisements, with the disclaimer in the Defendant's advertisements being lower than required under the ASCI Code, and remains for the entire duration of the VO. Further, the text has been modified in accordance with the order dated</i>

			13.04.2018.
Print Advertisem ent	The font size of disclaimers shall be NOT LESS THAN 7 point for advertisements of 50 cc or less, NOT LESS THAN 9 point for advertisements of 100 cc or less and NOT LESS THAN 10 point for advertisements of more than 100 cc.	The Defendant's advertisement s have employed the use of 10 font size, as per the ASCI Code.	The Defendant's advertisements have employed the use of 10 font size, as per the ASCI Code. Further, the text has been modified in accordance with the Order dated 13.04.2018 and the letters have been made bold.

7. The learned senior counsel for the defendant further argued though **the plaintiff** is aggrieved of the size of the font of disclaimer of the defendant but is **itself using even a lesser font size for its disclaimer in its advertisements**. One of such advertisement of the plaintiff herein is shown and the same is not even in bold. It is argued as the defendant has complied with order dated 13.04.2018 and as its advertisements are as per the ASCI standards it cannot be held for contempt. He even relied upon **Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed and Others 1976 (1) SCC 671** wherein the Court held:

“47. Thus, in substance, the appellant's stand is that the setting up of a rival cinema house in the town will adversely affect his monopolistic commercial interest, causing pecuniary harm and loss of business from competition. **Such harm or Loss is not wrongful in the eye of law, because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity.** Juridically, harm of this description is called *demnum sine injuria*, the term *injuria* being here used in its true

sense of an act contrary to law(1). The reason why the law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large.

48. In the light of the above discussion, it is **demonstrably clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully affect his title to something. He has not been subjected to a legal wrong. He has suffered no legal grievance. He 'has no legal peg for' a justiciable claim to hang on. Therefore he is not a 'person aggrieved' and has no locus standi to challenge the grant of the No objection Certificate.**"

8. **The crux of the argument of the defendant is though they have a good case on merits as the plaintiff has no legal right to sue but yet it has given a concession and are further open to any reasonable amendment to their advertisement.**"

(Emphasis supplied)

10. In view of the above submission on behalf of the appellant/defendant on the 2nd May 2018, the Id. Single Judge directed as follows :

"9. Considering the contentions/rival contentions it would be appropriate if instead of using the font size 10 pixels in its disclaimer the defendant use 12 pixels in print media and that too in a prominent and visible place and not at the bottom. So far as the video clips/ television advertisements are concerned the disclaimer should start running from the word the girl says "Seasonal Pass-----" and it should be displayed in sync with the voice over. The disclaimer in bill boards and hoardings be also at prominent place and be visible as per ASCI guidelines."

11. The appellant has before us assailed both the orders dated 13th April, 2018 and 2nd May, 2018 *inter alia* contending that the Id. Single Judge has passed the above directions without recording any finding with regard to any violation by the defendant of the order dated 13th April, 2018; that the order was without any basis in facts or law; that the respondent had no legal right which was actionable in law and it had not suffered any actionable legal injury; that there was not even an iota of evidence of legal injury; that the order dated 2nd May, 2018 purported to rely on a concession made on behalf of the appellant/defendant and therefore, had to be confined, to the specific concession alone; that the suit itself was not maintainable and hence the plaintiff was disentitled to any interim relief therein as well.

12. Inasmuch as the present appeal can be disposed of on a basic issue going to the root of the matter, we do not propose to examine the other issues which have been pressed in support of the appeal by Mr. P. Chidambaram and Mr. Rajiv Nayyar, Id. Senior Counsels for the defendant/appellant.

13. It is trite that an order premised on consent of parties has to strictly confine itself to the contours of the concession by a party and cannot go beyond it.

14. As noted above, the relief granted to the plaintiff on the 13th of April 2018 (breach whereof was complained by way of I.A.No.5554/2018) was restricted to changes in the advertisements, as stated in para 6 of the said order.

15. It is also to be noted that the plaintiff/respondent made no grievance and sought no further directions after the passing of the

order dated 13th April, 2018. The plaintiff was satisfied with the order despite no order having been passed with regard to the specific prayer of airing/televising/broadcasting in any manner or mode of advertisements.

16. On an examination of the order dated 2nd May, 2018, we find that the appellant/defendant had, without prejudice to its rights and contentions, made a concession beyond what was recorded on 13th April, 2018 and expressed an agreement to “*increase the size of the disclaimer in its advertisement from 10 pixel to 12 pixel*”. No other concession whatsoever was recorded.

17. The order dated 2nd May, 2018 does not return any finding by the Id. Single Judge that the appellant was in breach of the order dated 13th April, 2018.

18. On the 2nd of May 2018, the concession made by the appellant was strictly restricted to the use of font size of 12 pixel in its advertisements. The order on the application under Order XXXIX Rule 2A of the Code of Civil Procedure on 2nd May, 2018 is clearly premised on the consent of the defendant and had to be confined to the same.

19. While considering an application under Order XXXIX Rule 2A of the Code of Civil Procedure, only the issue as to whether the defendant was in breach of the order or not, is before the court. The scope of consideration of an application under Order XXXIX Rule 2A of the Code of Civil Procedure is also well settled. The jurisdiction exercised by a court while considering an application under Order XXXIX Rule 2A of the Code of Civil Procedure is executory and the

court would have no jurisdiction to pass fresh directions as if it was considering an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure.

20. It is submitted by Dr. Abhishek Manu Singhvi, Id. Senior Counsel for the respondent that the order dated 13th April, 2018 has to be considered “*holistically*” keeping in view the submissions made by the respondent/plaintiff. As noted above, the Id. Single Judge, on that day, has simply noted the submissions without even recording any *prima facie* finding thereon. We are of the view that the order dated 13th April, 2018 was also specific and confined to the concession noted in para 6 and cannot be expanded to include the submissions made on behalf of the plaintiff.

21. It has further been submitted by Dr. Abhishek Manu Singhvi that the defendant had understood the order dated 13th April, 2018 to include the visual and electronic media and for this reason has effected changes in the advertisements in the electronic media as well. This has no bearing so far as the order, breach whereof was being complained by the plaintiff.

22. For the purposes of the present appeal, we are not required to consider anything that the appellant/defendant may have undertaken voluntarily inasmuch as the court was required only to examine violation of the orders passed by the Id. Single Judge. The conduct of the defendant in effecting modifications beyond what was directed cannot impact our consideration to the import of the said orders.

23. The respondent is unable to dispute the limited nature of the concession granted by the appellant/defendant as stands noted in both

the orders dated 13th April, 2018 and 2nd May, 2018.

24. The ld. Senior Counsel for the respondent/plaintiff is also unable to point out any finding returned by the ld. Single Judge on the submissions made by either parties. It is quite clear that both the orders are premised on the specific concession on behalf of the counsels for the appellant.

25. Therefore, keeping in view the specific concessions made on behalf of the defendant, as noted in para 6 of the impugned order and the scope of Order XXXIX Rule 2A of the Code of Civil Procedure, the other directions made in the order with regard to the “*prominent and visible place*” regarding the advertisement in the print media as well as video clips and television advertisements could not have been passed. .

26. In view of the above, we uphold the direction made by the ld. Single Judge in para 9 of the order dated 2nd May, 2018 only to the extent it directs the appellant to use the font size of only 12 pixel in the print media.

The rest of the directions made in para 9 of the order dated 2nd May, 2018 are hereby set aside and quashed.

27. So far as the challenge to the order dated 13th April, 2018 is concerned, it is premised on consent of the appellant/defendant, as noted in para 6 of the said order. I.A.No.4933/2018 whereon this order was recorded is still pending. We therefore, reject the challenge to the order dated 13th April, 2018.

28. It is made clear that nothing herein shall be considered as an expression of opinion on the merits of the contentions made by either

parties. The ld. Single Judge shall proceed with the matter, uninfluenced by the present order.

29. This appeal is disposed of in the above terms. In view of the disposal of the appeal, the application does not survive for adjudication and is disposed of.

Dasti under signatures of the Court Master.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

MAY 10, 2018

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