



\$~70

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO (COMM) 196/2024**
KAILASH KUMAR JAINAppellant

Through: Mr. Neeraj Malhotra, Sr. Adv.
with Mr. Satish Kumar, Mr.
Umesh Mishra, Mr. Nimish
Kumar & Mr. Yashodahara
Raina, Advs.

versus

M/S KUNDAN ELECTRO POWER
PVT. LTD.Respondent
Through: Mr. Anirudh Bakhru, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% **30.09.2024**
CM APPL. 57528/2024

Exemption allowed, subject to all just exceptions.

Application shall stand disposed of.

FAO (COMM) 196/2024, CM APPL. 57526/2024(Stay) & CM
APPL. 57527/2024(addl. Docs.)

1. This appeal is directed against the order dated 07 August 2024 pursuant to which the Trial Judge has proceeded to frame an ex parte injunction in the following terms:-

“30. As a result, ad-interim injunction is granted in favour of the plaintiff and against the ad-interim injunction restraining the defendant by himself as also through individual proprietor/partner, agents, representatives, distributors, assigns, licensees, heirs, successors, stockiest and all others acting for and on his behalf from using, selling, soliciting, manufacturing, marketing, importing, exporting, displaying, advertising, or by any other mode or manner dealing in the course of trade in the physical or online marketplace including by way of export and import, packaging and distributing under the impugned trademark/label FIREWOOD



or any other trademark/label identical with or deceptively similar to the Plaintiffs said



trademark/label NORWOOD in relation to the impugned goods and business of electrical goods and appliances and allied and related goods and from doing any other acts or deeds amounting to or likely to Infringement of plaintiffs registered Trade Marks bearing registration nos. 1460344 and 2313097 in class 09 and 146034 7 in class 11 or copyright in the artwork of said trademark/label; passing off their goods as those of the plaintiff; dilution, falsification and unfair and unethical trade practices, till next date of hearing.”

2. Apart from the above, the Trial Judge has also framed detailed directions for the Local Commissioners to execute. Those are comprised in paragraphs 32 to 39 of the impugned order and are extracted hereinbelow:-

“32. The commission shall be carried out within 15 days from today after giving notice of the commission to the defendant at the spot. Local Commissioners to submit report within two weeks of the execution of the commission. The complete paper book be provided to the Local Commissioners by the plaintiff alongwith copy of this order well in time.

33. The Local Commissioners shall seize/take in custody all impugned goods including other incriminating materials like stationery, packing material, pouches, cartons, blocks, containers, advertising material, dies or blocks, semifinished, packed and unpacked impugned goods or any other documents, wrapper etc

bearing the impugned trademark/label FIREWOOD



and/or any other trademark/label wherein the word/mark/label FIREWOOD forms essential part being identical with and/or deceptively similar to the plaintiff's said trademark/label NORWOOD.

34. After preparing inventory of the material/ stock, the same be released to the defendant on Superdari or in case of non-



availability of defendant, the seized material/stock may be given on Superdari to the representative of the defendant.

35. Ld. Local Commissioners to also visit the places mentioned against their names and other premises in the nearby vicinity on the identification of the plaintiff/its authorized representative where the impugned activities are being carried on by or on behalf of the defendants or where the impugned goods / materials are expected to be found.

36. The Local Commissioner shall sign the account books, if any, of the said defendants including ledger, cash register, stock register, invoice, books etc.

37. The Local Commissioner shall be at liberty to get the locks, if any, broken in execution of the duties as such.

38. On the request made by Local Commissioner, the concerned SP/SSP/SHO/ shall immediately provide police aid to the Local Commissioners for smooth performance of duties as such.

39. The plaintiff/ applicant may also arrange for videography, photography, photocopy etc, if required.”

3. On going through the order impugned, we find that the case of plaintiff/respondent was with respect to “NORWOOD”, its registered trademark label and “FIREWOOD”, which had been adopted by the appellants. While holding in favour of the plaintiff/respondent, the Trial Judge has observed as follows:-

“28. The Court has carefully considered the submissions advanced by the Id. counsel for the plaintiff in the light of above pronouncements of Superior Courts and has also perused the documents filed along with plaint, which is duly supported with statement of truth. It is true that the trademark of the defendant is registered, but in the judgment of **S. Syed Mohideen Vs. P. Sulochana Bai (Supra)**, Hon’ble Supreme Court observed that passing off, being a common law right, is a broader remedy than infringement and may be pressed even in case an impugned mark is registered.

29. From the averments made in the plaint and the documents placed on record, I find that the plaintiff has prima facie in its favour. The balance of convenience also lies in favour of plaintiff and if ad-interim injunction is not granted in favour of the plaintiff, and against the defendants, it will suffer irreparable loss and injury



and damage in its business.”

It is thereafter that the ad interim and *ex parte* injunction came to be granted in terms noted above.

4. As we go through the order impugned, we find that there has been an abject failure on the part of the Trial Judge to assign even rudimentary reasons in support of its conclusion that an *ex parte* injunction was warranted. We bear in consideration the following pertinent observations as were rendered by the Supreme Court in **Shiv Kumar Chadha v. Municipal Corpn. of Delhi**¹:-

“30. It need not be said that primary object of filing a suit challenging the validity of the order of demolition is to restrain such demolition with the intervention of the court. In such a suit the plaintiff is more interested in getting an order of interim injunction. It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles — ex debito justitiae. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

.....

32. Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the court shall, before grant of an injunction, direct notice of the application to be given to the opposite-party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a

¹ (1993) 3 SCC 161



proviso has been added to the said rule saying that “where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay...”.

33. It has come to our notice that in spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant.

34. The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said “the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite-party”. The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite-party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court “shall record the reasons” why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that



there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. This principle was approved and accepted in well-known cases of Taylor v. Taylor [(1875) 1 Ch D 426 : 45 LJ Ch 373] and Nazir Ahmed v. Emperor [AIR 1936 PC 253 (2) : 63 IA 372 : 37 Cri LJ 897] . This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke v. Govind Joti Chavare [(1975) 1 SCC 559 : AIR 1975 SC 915] .

35. As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

“Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion....

An ex parte injunction should generally be until a certain day, usually the next motion day....”

5. We also take note of the following principles on grant of *ex parte* injunction that were enunciated in **Morgan Stanley Mutual**



Fund v. Kartick Das²:-

“36. 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.”

6. We in **Hulm Entertainment Pvt. Ltd. vs. SBN Gamin Network Private Limited and Ors³** had an occasion to reemphasise the aforementioned principles while at the same time clarifying the significance of the power that stands vested in courts to frame orders of injunction ex parte where situations so warrant. The obligation to record reasons, we had reasoned, was a salutary safeguard placed in the statute to enable a party to discern the factors which had weighed upon the court in issuing an injunction while awaiting service of notice upon a defendant. However, as explained in *Hulm Entertainment*, that statutory imperative does not detract from the power of the court to proceed ex parte where circumstances so require. The balance thus liable to be struck in the exercise of that power was

² (1994) 4 SCC 225

³ FAO (COMM) 209/2023 decided on 11 October 2023



explained by us in the following terms:-

“5. As is manifest from the above, paragraphs 8 and 11 of *Dabur India* cannot possibly be construed as interdicting a court from considering the grant of ad interim or ex parte reliefs, if circumstances and the facts of that particular case so warrant. The conclusion of the learned Judge that *Dabur India* bids courts to “avoid” passing an ad interim order prior to the defendant being afforded an opportunity is clearly incorrect. This Court in *Dabur India* neither propounds such a rule nor does it enunciate such a “standard” as observed by the learned Single Judge. The learned Judge also appears to have erred in understanding *Dabur India* enunciating a rule that injunction must be refused if it be found that the infringing product has been on the market for some time. The observations made in this regard were liable to be appreciated bearing in mind the stand of the appellant there who had asserted that its product had been in the market since 2006.

6. The Court was constrained to interfere with the order which formed the subject matter of challenge in *Dabur India* in the facts that obtained therein and upon it coming to the conclusion that the learned Single Judge had clearly failed to ascribe or record reasons which would have justified the grant of ad interim injunction. One cannot possibly dispute or question the requirement of reasons being recorded in support of the imperatives underlying the grant of ex parte or ad interim injunctions. As the learned Judge rightly observes in the order impugned before us, there may be myriad situations such as counterfeiting, marketing and distribution of spurious drugs, harm to public interest or detriment to the commercial interests of a plaintiff, to name a few, which may warrant the issuance of ex parte or ad interim injunctive reliefs. Ultimately, the grant of an injunction would have to be evaluated on the facts and circumstances of each case. All that need be observed is that *Dabur India* neither propounds a “test” nor did it lay down a “standard” against the grant of injunction, ex parte or ad interim.

7. In view of the above and since we are of the considered opinion that the order of the Division Bench in *Dabur India* has been clearly misconstrued, we set aside the order dated 10 October 2023 and remit the injunction application to the learned Single Judge for considering the issue afresh and in light of the observations appearing hereinabove.”

Tested on the aforesaid principles, it becomes apparent that the impugned order would not sustain and is liable to be set aside on this short score alone.



7. Faced with the aforesaid conclusion, Mr. Bakru, learned counsel appearing for the respondents submitted that rather than the appeal being retained on the board of this Court, the end of justice would warrant the matter being remitted for fresh consideration of the Trial Judge.

8. Accordingly, and for reasons assigned hereinabove, we allow the instant appeal and set aside the impugned order dated 07 August 2024.

9. The application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 moved by the plaintiff/respondents shall stand revived before the board of the Trial Judge, to be taken up for consideration afresh. We direct the appellants to ensure that their reply to the Order XXXIX Rules 1 and 2 application is filed on or before next date fixed before the Trial Judge. The interim injunction application may thereafter be considered and disposed of in accordance with law.

10. All rights and contentions of respective parties on merits are kept open. Though needless to state, we clarify that this order is not liable to be construed as an expression of opinion on the merits of the case of respective sides. It shall thus be open for the Trial Judge to proceed further in accordance with law.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 30, 2024/neha