
(2016) 03 DEL CK 0195
In the Delhi High Court
Case No : FAO (OS) (COMM) 8/2016

Entertainment Network (India) Ltd.

APPELLANT

Vs

HT Media Limited

RESPONDENT

Date of Decision : 21-03-2016

Acts Referred:

Citation : (2016) 5 ADDelhi 464 : (2016) 229 DLT 129 : (2016) 1 MIPR 373 : (2016) 66 PTC 194 : (2016) 5 RAJ 249

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Sandeep Sethi, Prathiba M. Singh, Sr. Advocates instructed by Sudeep Chatterjee, Jaya Mandelia and Nupur Lamba, Advocates, for the Appellant; A.M. Singhvi, Amit Sibal, Sr. Advocates instructed by Rajshekhar Rao, Meghna Mishra, Nakul Sachdeva, Ankit Rajgar

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—1. Entertainment Network (India) Ltd. (in short "Entertainment Network") instituted a suit against HT Media Limited which was registered as CS (Comm) No. 179/2016. The prayer made was to grant a declaration that plaintiff's trademark "PEHLA NASHA" is a well known mark and by using the trademark "NASHA FM", "RADIO NASHA", "NASHA 91.9. FM" AND "NASHA 107.02" the defendant was guilty of passing of and therefore should be restrained by issuing a permanent injunction against it, its agents, franchisees etc. restraining them from using, in any manner, trademark identical or deceptively similar to the plaintiff's trademark "PEHLA NASHA" either as radio channel titled "RADIO NASHA" or as a mark or as a domain name in relation to any service/product especially for broadcast, re-broadcast, radio broadcast, internet broadcast, make available for listening, and/or in any other form whatsoever.

2. Plaintiff having applied for its trademark to be registered and registration not being granted till when the suit was filed, it is obviously an action for passing of.

3. The claim of Entertainment Network in the plaint is that it is operating Online Internet Radio Station using the mark "PEHLA NASHA" since the year 2014 and it has gained immense popularity and goodwill. By launching "RADIO NASHA", HT Media is infringing its right in the trademark "NASHA" for which its application for registration was pending before the Registrar of Trademarks. The suit was brought after it came to the knowledge of Entertainment Network that HT Media had applied for trademark registration for several marks including "NASHA FM", "RADIO NASHA", "NASHA 91.9 FM", "NASHA 107.02" etc. in relation to radio and television broadcasting services.

4. Along with the suit, Entertainment Network filed I.A. No.3316/2016, under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure seeking ex-parte ad-interim injunction against HT Media from using the word/trademark "RADIO NASHA" or any other trademark/trade name which is deceptively similar to the plaintiff's mark "PEHLA NASHA".

5. The suit came up for admission on March 11, 2016 when it was adjourned for March 14, 2016. Having inkling that a suit may be filed against it, HT Media entered appearance on March 14, 2016 to oppose grant of any ex-parte ad-interim injunction. Entertainment Network pressed for an injunction to be issued forthwith and HT Media opposed it. To defeat the grant of an ad-interim injunction HT Media was granted time to file an affidavit because its counsel stated that a large number of service providers were using the word "NASHA" as a part of their trademark, and if this was prima-facie correct, it may be difficult to grant an ad-interim injunction. The debate had then to be postponed to a date when pleadings were completed and a holistic view could be taken by the Court.

6. HT Media accordingly filed an affidavit on March 14, 2016 listing numerous parties who were using the word "NASHA" in the field of music including internet Music Streaming Websites. The affidavit lists a number of radio stations/music streaming websites/persons who are using the word "NASHA" as a part of their domain name in the entertainment sector, of which nine are presently available. In response to this affidavit dated March 14, 2016, Entertainment Network filed an affidavit on March 16, 2016 whereafter the matter was heard and order pronounced on March 17, 2016 by the learned Single Judge.

7. The learned Single Judge has dealt with the singular issue :

Whether case was made out to grant a pro tem interim order while granting time to HT Media to file their pleadings.

8. When the present appeal came up for hearing before us on March 18, 2016 both parties did not have the benefit of the reasoning in the order dated March 17, 2016 and thus awaiting the order to be placed in the file of the suit, the appeal was adjourned for hearing on March 19, 2016, on which date arguments were heard and it was indicated that judgment would be pronounced today.

9. Vide impugned order, the learned Single Judge has noted that the issue was in

respect of grant of a pro tem ad-interim order till completion of pleadings by the parties.

10. The learned Single Judge has come to a prima-facie conclusion that at this stage at least the playlists of "Nepali Nasha" and "Haroon Ka Nasha" in the website of "8tracks.com" are existing since the years 2012 and 2013 and of "nashamusic.com" since 2006, which websites have existed prior to adoption by the plaintiff in the year 2014 of the trademark "PEHLA NASHA" containing the word "NASHA". The learned Single Judge has held that the ratio of the decision reported as , ILR 2009 (VI) Delhi 415 Goenka Institute of Education & Research vs. Anjani Kumar Goenka would apply; preventing the Court from granting any ad-interim order, more so having the effect of decreeing the suit at this stage by stopping an existing working radio station of the defendant under the trademark "RADIO NASHA".

11. Noting the contentions of the learned senior counsel for Entertainment Network, the learned Single Judge has held that the issue at that stage was with respect to whether others prior to the plaintiff have been using the word "NASHA" and hence of adoption by the defendant not being relatable to the adoption of the word "NASHA" by the plaintiff but adoption of "NASHA" from other music/song suppliers and channels and who are not objecting to the user of the word "NASHA" by the defendant. Distinguishing the judgment reported as , 2012 SCC OnLine Delhi 4645 Exide Industries Limited vs. Exide Corporation the learned Single Judge has held that the judgment in the said case was passed at the final arguments stage where after leading the evidence it was found and held that the plaintiff in that case had exclusive ownership of "EXIDE" in the territory of India whereas the present suit was at the threshold stage where even pleadings were not completed. Thus the learned Single Judge declined to grant any pro tem ad-interim order and directed the parties to complete the pleadings. Hearing of IA No. 3316/2016 has been adjourned.

12. Contentions of learned Senior Counsel for Entertainment Network are that the appellant/plaintiff is an online internet radio station, that is, like any other radio station which is connected through internet. Entertainment Network being a prior adopter and user of trademark "NASHA" it is entitled to all common law rights over the same. HT Media had applied for trademark registration for several marks including "NASHA FM", "RADIO NASHA", "NASHA 91.9 FM", "NASHA 107.02" etc. and such other formatives of mark "NASHA" and in relation to radio, television and broadcasting services including internet broadcasting rights. When it came to the knowledge of Entertainment Network that HT Media had applied for approval for the name "NASHA" in relation to the FM Radio channel with the Ministry of Information and Broadcasting, Entertainment Network informed the Ministry of its prior adoption and use of trademark "PEHLA NASHA". In reply to the affidavit filed by HT Media, Entertainment Network has clarified that there is a vast difference between an Online Radio Station and a Playlist inasmuch as for an Online Radio Station the entire schedule for songs,

programmes, sound bites, jingles, placement of advertisements etc. are created by the Radio Station itself "PEHLA NASHA" in this case and a user/listener has no control over the songs/sequence of content that is being aired thereon. Whereas a playlist is simply a list of songs which can be played in a sequential or shuffled manner or any song from a playlist can be randomly selected by the user/listener. In a playlist, the user/listener has full control over which song he or she may decide to listen to at any given point of time. Further for setting up of an online radio channel huge investment are required besides setting up of infrastructure in the form of hardware, software and promotional expenditure.

13. According to the affidavit of Entertainment Network "8tracks.com" is a website whose concept is to streaming of user-curated playlists of 8 tracks. Nashamusic.com is private website of two music artists based in the United States by the name Fazal and Sangeeta who have named their music album/label as "NASHA", 8tracks.com/explore/haroon_ka_nasha is a link that allows user to create their own playlists. Partymap.in/nasha/ is again a link which relates to website which is an online booking service for Bollywood music artists for performances, Nashaonline.com is United States based internet website which provides services for online booking of Indian DJs for performance at weddings, special events, dhol nights, live shows, corporate events etc. in the United States only. Thus describing each of the websites/links mentioned in the affidavit, Entertainment Network has sought to distinguish the other users of word "NASHA" stating that "PEHLA NASHA" launched by Entertainment Network in the year 2014 is the only internet based radio station. Reliance is placed on the decisions reported as , 2007 ILR (1) Delhi 615 Ishi Khosla vs. Anil Aggarwal & Anr., , 2010 (44) PTC 293 (Del) Kirorimal Kashiram Marketing and Agencies Pvt.Ltd. vs. Shree Sita Chawal Udyog Mill, , 211(2014) DLT 466 Procter & Gamble Manufacturing (Tianjin) Co.Ltd. & Ors. vs. Anchor Health & Beauty Care Pvt.Ltd. and , ILR (2002) I Delhi 220 M/s. Info Edge (India) Pvt. Ltd. & Anr. vs. Shailesh Gupta & Anr.

14. Learned counsel for the HT Media on the other hand contends that the test to be applied in the present case is whether there were users of the trademark "NASHA" even prior to the plaintiff's user and HT Media has successfully demonstrated the prior users of this mark. To an extent even HT Media is a prior user of the mark "NASHA" for the reason it applied for registration of domain names www.nasha.fm.in and www.radionasha.com prior to Entertainment Network. Word "NASHA" is an activity neutral/substance neutral word therefore more generic. Entertainment Network has filed the suit alleging passing off and not infringement, however no evidence has been placed on record to show that there was confusion between the users of "PEHLA NASHA" and "RADIO NASHA". No reputation and goodwill has been proved by Entertainment Network so as to base the claim of passing off. The decisions relied upon by learned counsel for Entertainment Network have no application to the facts of the present case. The judgments relied upon relate to goods and services with a difference. Reliance is placed on the decisions reported as , (1986) 1 SCC 465 American Home Products

Corporation Vs. MAC Laboratories Pvt. Ltd. & Anr., (2012) 186 DLT 234 Bhole Baba Milk Food Industries Ltd. Vs. Parul Food Specialities Pvt. Ltd. and , (2007) 140 DLT 758 Time Warner Entertainment Company, L.P. & Ors. Vs. RPG Netcom & etc.

15. We have noted the rival arguments but this is not the stage to deal with them for the reason in the absence of pleadings of HT Media, it is not a case where Entertainment Network has made out such a strong prima-facie case that an injunction must ensue as a sequitur thereto. The law in relation to the scope in an appeal against non grant of interim injunction is well settled as noted in the decision reported as , 1990 (supp) SCC 727 Wander Ltd. & Anr. Vs. Antox India P. Ltd. The Supreme Court cautioned the Division Benches noting that the Appellate Court will not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the court has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. It was held that the appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court below was reasonably possible on the material.

16. To interfere against an order declining to grant pro tem ad-interim injunction, perversity has to be demonstrated in the finding of the learned Single Judge. The debate of both sides as noted above itself gives a good reason to conclude that present was not a case where an ad-interim injunction should have been granted by the learned Single Judge, who committed no error in postponing the same till HT Media files written statement and reply to the injunction application along with documents.

17. The appeal is accordingly dismissed but with the usual clarification that the facts which we have noted are the one which have to form the backdrop of our opinion and nothing stated by us would be construed as an expression on the merits of the case of the rival parties. We have noted the facts and the legal position to simply bring out that it is not a case where denial of a pro tem ad-interim injunction, pending hearing of the injunction application, was an erroneous exercise of jurisdiction by the learned Single Judge.

18. No costs.

CM No. 10355/2016 (Stay)

Application is dismissed as infructuous.