

**(1997) 08 DEL CK 0093**

**In the Delhi High Court**

**Case No : FAO (OS) 70/97**

F.A.B. Axles (P) Ltd.

APPELLANT

Vs

F.A.G. Rugelfischer Georg Schafer

RESPONDENT

**Date of Decision : 01-08-1997**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 148A

**Citation :** (1997) 5 AD 637 : (1997) 2 ARBLR 453 : (1997) 68 DLT 433 : (1997) 42 DRJ 517

**Hon'ble Judges :** Kripa Shankar Gupta, J;Devinder Gupta, J

**Bench :** Division Bench

**Advocate :** MuKul Rohatgi and H.P. Singh, for the Appellant; Arun Jaitley and Dalia Sen Gupta, for the Respondent

**Final Decision :** Dismissed

## Judgement

Devinder Gupta, J.—This appeal by the defendant is against an order passed on 4.2.1997 by learned Single Judge in is 6064/96 and is 6065/96 (in Suit No.1516/96). On 4.2.1997 learned Single Judge passed the following orders in the suit as well in the two misc. applications:

"S.No.1516/96

2. One Mr. Devinder Singh appears for defendant FAB Axles Pvt. Ltd. He says that he has filed a caveat through Singh Bhatia Chatterjee but now he does not propose to engage a counsel.

3. Since caveat had been filed by Singh Bhatia Chatterjee, notice to go to him as to why he had refused to take notice saying that he had nothing to do with caveat.

4. Let written statement be filed within four weeks with advance copy to plaintiff.

5. Re notify for 26.7.1997.

is 6064/96

6. This is an application under Order 39 Rules 1 & 2 read with Section 151 of the Code of Civil Procedure. Representative of defendant seeks six weeks" time to file reply.

7. Time granted.

8. Heard.

9. Considering the facts and circumstances of the case, till the next date of hearing i.e. 26.7.1997, defendant is restrained from using "FAB" as a trade mark or as a part of its corporate name or trading style.

10. List on 26.7.1997 for hearing and disposal.

is 6065/96

11. This is an application of plaintiff under Order 26 Rule 9, Order 39 Rule 7 read with Section 151 of the CPC for appointment of a Local Commissioner to visit the premises of defendant and to prepare inventory of the products lying therein with trade mark "FAB" and for confiscation of the same.

12. Mr. Ashish Kumar, Advocate, R/o 1332 Dayanand Vihar, Delhi-110092 Telephone No.2141295 is appointed as a Local Commissioner to visit the premises/go-downs as mentioned in paragraph 5 of the plaint and shall prepare an inventory of the goods lying therein with trade mark "FAB" and shall submit report within ten days.

13. Fee of the Local Commissioner is fixed as rupees five thousand plus to and fro expenses.

14. LA. is disposed of.

15. dusty as well"

16. The grievance of the appellant is that the learned Single Judge was not justified in granting ex-parte ad-interim order of injunction in view of the fact that caveat had been lodged by the defendant-appellant, who ought to have been provided with an opportunity to file written statement and reply and of being heard before proceeding to grant ex parte order of injunction.

17. Counsel for the parties were heard at length.

18. The facts in brief are that on 13.5.1996 a Caveat u/s 148A of the CPC was lodged on behalf of defendant-appellant in this court, inter alia, alleging that Caveator is an established manufacturer and marketer of inter alias front axle bearing for motor cars and anticipates that non-caveat or (SAB Axle Pvt. Ltd., who is the plaintiff-respondent) is likely to file a suit under the Trade and Merchandise Marks Act, 1958 and apply for ex-parte injunction to restrain the caveator from carrying on its established activity under the trade mark "FAB". It

was stated that a copy of caveat had been sent to the non-caveat or. M/s Singh Bhatia Chatterji, Law Officer filed their Vakalatnama as counsel for the Caveator, who also lodged the caveat in this Court. The Vakalatnama is signed by Rajvinder Singh, Suchinto Chatterji and Gurkamal Hora, Advocates respectively on 10.5.1996.

19. Taking note of the caveat (Caveat No. 544/96) the plaintiff-respondent on 25.5.1996 while instituting suit sent along with a covering letter a copy of plaint along with application under Order 39 Rules 1 & 2 of the C.P.C. and the application under Order 26 Rule 9 of the Code to the defendant-appellant stating that suit was being instituted and was likely to be listed in Court on 3.7.1996 wherein a prayer has been made for grant of interim injunction against mis-use of trade mark FAG and appointment of Commissioner for confiscation of goods. Copy of postal receipt was also appended to the plaint.

20. The suit was taken up by learned Single Judge on 4.7.1996. Summons in the suit and notices in the misc. applications were directed to be sent to the defendant by ordinary process as well as by registered A.D. covers, returnable on 6th November, 1996. Ex-parte order was not granted. On 6.11.1996 the case could not be taken up and the same was adjourned to 28.11.1996 on which date it was noticed that the defendant had not been served. Fresh summons/notices were directed to be issued for 30.1.1997 on which date the Court also noticed that there was a caveat lodged and accordingly directed that summons and notices be also served through counsel, who had lodged the caveat. Part B of the file reveals that the advocates, who had lodged the caveat, namely, Singh Bhatia Chatterji, Advocates, declined to accept the summons and notices when the same were sought to be served for 30.1.1997 upon them stating that the case does not pertain to them, the report on the summons/notices is dated 10.1.1997. On 30.1.1997, when the case was taken up the Court noticed the report of the Registry that the caveator had not been served. Learned counsel for the plaintiff slated that process-server had gone to the firm, which had lodged the caveat but the partner of the firm had refused to accept the notice saying that they were not concerned with the caveat. In these circumstances the Court directed summons & notices to be given dusty for service on the defendant. Fresh summons were taken for service on the defendant since it was reported that earlier it could not be served. dusty notices were also obtained and were served upon one Devinder Singh, the Manager of defendant-appellant company on 2.2.1997 at about 4.00 P.M. On 4.2.1997 when case was taken up, the impugned order was passed, which has been quoted above. It was passed in presence of the said Devinder Singh.

21. It is worthwhile to mention here that pursuant to the order passed on the application under Order 26 Rule 9 C.P.C. appointing Mr. Ashish Kumar, Advocate, as local commissioner to visit the premises/godown and to prepare an inventory of the goods etc., the local commissioner in his report dated 13.2.1997 recorded:

"In compliance of the order of this Hon'ble Court the undersigned visited the

premises of the Defendant On 10.2.1997. First of all the undersigned went to the factory of the Defendant at D-I/5, Mayapuri Phase II, New Delhi. Mr. Ashvin Julka, Advocate for the plaintiffs, Mr. Devinder Pal Singh, Director of the Defendant Company, Mr. Devinder Singh, Manager of the Defendant Company and Mr. Rajvinder Singh, Advocate for the Defendant Company were present on the spot."

22. Submission on behalf of the appellant was that when the Manager of the firm had put in appearance before the learned Single Judge on 4.2.1997, a request was made by him to grant time to file replies/written statement and not to grant any ex-parte order of injunction but the learned Single Judge proceeded to grant an ad-interim order of injunction, which order is bad in law.

23. Considering the submission made on behalf of defendant-appellant, we do not find any illegality in the impugned order particularly in the facts and circumstances of the case.

24. The object of introduction of Section 148A of lodging a caveat in the Court by the CPC (Amendment Act) 1976 is to safeguard the interest of a person against an order that may be passed on an application filed or expected to be filed by a party in a suit or proceedings instituted or about to be instituted.

25. The question is that whether before grant of the order of injunction due and adequate opportunity was allowed to and available with the defendant-appellant, who had lodged the caveat in this court before institution of the suit and that whether the order can be said to be an ex parte order of injunction in which it was necessary for the court to have recorded reasons as contemplated in Rule 3 of Order 39 of the CPC as explained by the Supreme Court in Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, and in Morgan Stanley Mutual Fund Vs. Kartick Das, .

26. There is enough material on record and the fact is also not disputed that on being served with a copy of the Caveat the plaintiff did serve copies of plaint, documents and of misc. applications with due intimation to the defendant of the institution of the suit and of prayer for injunction and appointment of local commissioner and of the fact that such a suit was likely to be posted before the Court on 3.7.1996. There is also no dispute that such an intimation was not received by the defendant. Despite information nobody appeared for the defendant on 4.7.1996 when the case was posted or on subsequent date. As such notices were directed to be issued for 30.1.1997 for which date the same were sought to be served upon the lawyers representing the defendant, who had lodged the caveat in this court. The report dated 10.1.1997 says that the notice was offered for service on the lawyers firm, namely, Singh Bhatia Chatterji, Advocates, at 14, Arjun Nagar, Safdarjung Enclave, New Delhi but they declined to accept it. The second notice could not be served since on 22.1.1997, when notice was taken to 14-Arjun Nagar, somebody informed that the advocates had no chamber in the said premises and the chamber was at Tis Hazari Courts,

namely, Chamber No.769. Again on 27.1.1997 the notice was sought to be served at the given address at Tis Hazari Court's Chamber. It was reported that there was no lawyers' firm by the name M/s Singh Bhatia Chatterji. In these circumstances the learned Single Judge relying upon the report of the registry that the notices could not be served upon the counsel for the caveators, directed the same to be served on the defendant-appellant, which was duly served on 2.2.1997 on Devinder Singh, the Manager of the company, who did put in appearance on the appointed day and Court. In the facts and circumstances as noticed in the order learned Single Judge rightly appears to have formed an opinion that it was a case in which caveator was playing hide and seek. As such in the facts and circumstances it was necessary to grant injunction as prayed for and, thus, proceeded to pass the impugned order granting injunction and appointing local commissioner. Learned Single Judge also took note of the statement made by the Manager, who had put in appearance on 4.2.1997, that though the defendant had lodged the caveat through M/s Singh Bhatia and Chatterji, advocates but it was proposed not to engage them as a counsel. While taking note of this statement learned single Judge also directed notice to be issued to M/s Singh Bhatia and Chatterji to show cause as to why they had refused to accept notice saying that they had nothing to do with the caveat. It was in connection with the report on the notice dated 10.1.1997. Needless to add the local commissioner, who had been appointed when visited the company premises of the defendant on 10.2.1997 noticed the presence of Mr. Ravinder Singh, Advocate of M/s Singh Bhatia and Chatterji. It is so recorded in his report which has been quoted above.

27. In the aforementioned circumstances it cannot be said that no notice or opportunity was given to the caveator or that the opportunity afforded to the caveators before grant of injunction was inadequate or that it is an ex-parte order of injunction in which the Court was required to record reasons as envisaged in rule 3 of Order 39 of C.P.C. Proper remedy in the facts and circumstances for the defendant-appellant in this case would have been to apply for vacation of the order of injunction under Order 39 Rule 4 of the CPC and not to prefer an appeal against the said order.

28. Considering the facts and circumstances of the case, we are not inclined to interfere with the impugned order since there is no illegality or irregularity in the order passed by the learned Single Judge, who in the facts and circumstances, after noticing the conduct of the defendant-appellant passed the order that issuance of injunction was necessary. The appeal as such deserves dismissal.

29. Resultantly the appeal is dismissed. However, it will be open for the defendant-appellant to apply for vacation of injunction by putting an appearance before learned Single Judge.