

(2017) 07 BOM CK 0242
In the Bombay High Court
Case No : 1 of 2017

Fomento Resorts and Hotels Limited	Vs	APPELLANT
Novex Communication Private Limited		RESPONDENT

Date of Decision : 26-07-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 39 Rule 3](#), [Order 39 Rule 8](#)

Citation : (2017) 07 BOM CK 0242

Hon'ble Judges : F. M. Reis, Nutan D. Sardessai

Bench : DIVISON BENCH

Advocate : J. E. Coelho Pereira, Vinod Vishnu Korgaonkar, N. Pai, N. Kholkar, Priti Naik

Judgement

1. Heard Mr. J. E. Coelho Pereira, learned Senior Counsel appearing for the appellant and Mr. N. Pai, learned counsel appearing for the respondent.
2. The office objection stands waived and the Registry is accordingly directed to register the above appeal.
3. Admit.
4. Heard forthwith with the consent of the learned counsel.
5. The learned counsel appearing for the respondent waives service.
6. The challenge in the above appeal is to the ex-parte order dated 22.06.2017 passed by the learned District Judge-1, Panaji, which reads thus :

"This application is allowed on hearing the advocate for the plaintiff. Issue notice to advocate Shri Vivek Rodrigues, Panaji to remain present in this Court, as he is appointed as a commissioner."
7. The brief facts of the case relevant to decide the matter in controversy at this stage are that the respondent claiming to have copyrights over musical works

filed a suit against the appellant for different reliefs claiming that there was an infringement of such copyrights. Along with the suit, the respondent filed an application for interim relief and inter alia sought for the following reliefs at para 4 which read thus :

- i. An order of ad-interim injunction restraining the defendant, partners, directors, their servants, employees, agents, assignees, licensees representatives or any person claiming through them or acting on their behalf, from publicly performing or in any manner communicating the sound recordings works which are assigned and authorized to the plaintiff;
- ii. And to the public or allowing their premises or any premises under their control to be used for the said purposes, without license from the plaintiff, or otherwise infringing copyright in the work owned and protected by the plaintiff;
- iii. An ex-parte order and direction appointing a Commissioner to seize all the musical works in the possession of the defendant at Hotel Cidade De Goa located at Donapaula, Goa and file a report disclosing all the musical works found in possession of the defendant;
- iv. An ex-parte order and direction directing the Superintendent of Police, North Goa to assist the Court appointed Commissioner in terms of prayer Clause (iii) to seize all the musical works in the possession of the defendant at Hotel Cidade De Goa located at Donapaula, Goa and file a report disclosing all the musical works found in possession of the defendant;
- v. An order of ex-parte ad interim temporary injunction in terms of prayer (i) to (iii) made above, during the pendency of the present application;
- vi. Any further orders, as this Hon"ble Court deems fit and proper in the facts and circumstances of the present case, be passed in favour of the plaintiff and against the defendant.

8. When the application for ex-parte relief was moved before the learned Judge, apparently by the impugned order the relief sought by the respondent came to be allowed. Being aggrieved by the said order, the appellant preferred the present appeal.

9. Mr. Coelho Pereira, learned Senior Counsel appearing for the appellant took strong objection in the manner in which the impugned order came to be passed as according to him the order is totally without application of mind and without giving any reasons which is mandatory requirement in terms of Order 39 Rule 3 of the Civil Procedure Code. The learned Senior Counsel further submits that the respondent themselves filed earlier a suit against the appellant which came to be withdrawn unconditionally though a false statement was made in the plaint that such suit was withdrawn based on an undertaking of the appellant. The learned Senior Counsel further submits that the appellant seriously disputes that the respondent have any copyrights to the musical works and as such without rendering a prima facie findings with that regard, the learned Judge proceeded to

pass the impugned order. The learned Senior Counsel has also taken strong objection to the manner in which armed with such ex-parte order, the respondent proceeded to implement such order. The learned Senior Counsel further points out that the suit itself is an abuse of process of Court and the application for temporary injunction is vexatious and based on false grounds. The learned Senior Counsel has thereafter taken us through the pleadings in the plaint to point out that the averments therein itself do not disclose prima facie that any copyrights are in favour of the respondent. The learned Senior counsel as such points out that the impugned order be quashed and set aside.

10. On the other hand, Mr. N. Pai, learned counsel appearing for the respondent has disputed the contention of Mr. Coelho Pereira, learned Senior Counsel appearing for the appellant. It is pointed out that the respondent have copyrights in their favour in respect of the musical works which is infringed by the appellant without payment of any amount to the respondent. It is further pointed out that the respondent is entitled for the relief sought in the application for temporary injunction as well as for appointment of a Commissioner under Order 39 Rule 8 of the Civil Procedure Code and that the learned Judge upon being satisfied that there was a prima facie case in favour of the respondent proceeded to pass the impugned order. The learned counsel however submits that without prejudice to the rights and contentions, the matter be remanded to the learned Judge to take a fresh view after hearing the parties.

11. We have duly considered the rival contentions and we have also gone through the records. We do not propose to examine the merits of the rival claims in connection with the subject copyrights. The only aspect we propose to consider is whether the impugned order is sustainable considering the mandate of the provisions of the Civil Procedure Code. The Order 39 Rule 3 of the Civil Procedure Code reads thus :

"3. Before granting injunction, Court to direct notice to opposite party.-

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:

[Provided 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, and require the applicant-

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.]"

12. On plain reading of the said provisions, it clearly provides that when the Court desires to proceed to grant an ex-parte relief, it enjoins a mandate that reasons be recorded as to how refusal of such relief would defeat the purpose of the relief sought. On perusal of the impugned order, we find that no such reasons have been recorded and consequently the mandate of the provisions of Order 39 Rule 3 of the Civil Procedure Code have not been complied with.

13. We do not appreciate the manner in which the learned Judge has dealt with the matter in proceeding to grant such relief and even appointing a Commissioner under Order 39 Rule 8 of the Civil Procedure Code without giving any reasons what necessitated to take such view in the facts and circumstances of the case. The Calcutta High Court in the judgment reported in 2013 SCC OnLine Cal 2699 in the case of Ruby General Hospital Limited v/s Sarkar Soumitra & Company, has relying upon the judgment of the Apex Court with regard to giving reasons while granting an ex-parte order has observed at para 7 thus :

"7. Though the Supreme Court in Morgan Stanley Mutual Fund (supra) had held that " As a principle, ex parte injunction could be granted only under exceptional circumstances" (paragraph 19) and had enumerated certain factors in which such injunction can be granted, in the instant case, however, no cogent reason, far from any specific reason, has been recorded while passing the order of injunction. In this context it is appropriate to refer to the judgment in Secretary and Curator, Victoria Memorial Hall (supra) wherein it has been held that "Absence of reasons renders the order indefensible/ unsustainable particularly when the order is subject to further challenge before a higher forum"(paragraph 32). Though the Apex Court in Shiv Kumar Chadha (supra) had held that "When the statute itself requires reasons to be recorded, the Courts 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" (paragraph 33) and though in Supratik Ghosh (supra) it has been held that "A bare reading of Rule 3 shows that the Court shall in all cases before granting an injunction, direct notice of the application for the same to be given to the opposite party. But one exception has been made to this rule. The exception is where it appears to the Court that the object of granting the injunction would be defeated by the delay, the Court may propose to grant an injunction without giving notice of the application to the opposite party and in such event the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay" (paragraph 13), yet in spite of the settled principles of law, the First Appellate Court chose not to give any cogent reason in support of the ad interim order passed. The principles of law laid down in paragraph 6 of the

judgment in Estralla Rubber (supra) cited on behalf of the respondent furthers the case of the petitioner since if the order under challenge is sustained it would cause grave injustice as it is against the settled principles of law with regard to proviso to Order 39 Rule 3 of the Code. The judgment in NEPC Micon Ltd.(supra) is not applicable to the instant case in hand as therein the Division Bench of the High Court was considering an order passed by a learned Single Judge of the High Court in the light of the unconditional power of the High Court on its Original Side under Chapter XX Rule 3 of the Original Side Rules."

14. Taking note of the said observations, it cannot be disputed that the Court can pass an ex-parte relief in exceptional circumstances but only after having applied its mind as to the existence of a prima facie case and only upon recording its due satisfaction that delay will defeat the very purpose of passing such relief. In the present case, we find that the learned Judge did not at all record any satisfaction with that regard and as such the impugned order dated 22.06.2017 cannot be sustained and deserves to be quashed and set aside.

15. The learned counsel appearing for the respondent however submits that the suit is fixed for hearing on 29.08.2017 and the respondent wants to press for an interim relief. In such circumstances, the parties are directed to appear before the learned Judge, by consent on 04.08.2017 at 2.30 p.m. The learned Judge after hearing the parties shall proceed to examine the relief sought by the respondent in accordance with law. All contentions of both the parties on merits are left open.

16. In view of the above, we pass the following : O R D E R

- (i) The impugned order dated 22.06.2017 is quashed and set aside.
- (ii) The learned Judge shall to proceed to consider the application for interim relief filed by the respondent after hearing the parties in accordance with law.
- (iii) The parties are directed to appear before the learned Judge, by consent on 04.08.2017 at 2.30 p.m.
- (iv) All contentions of both the parties on merits are left open.
- (v) The appeal stands disposed of accordingly.