

(2017) 01 KAR CK 0004

In the Karnataka High Court

Case No : Writ Petition Nos. 65908 and 65909 of 2016 (GM-CPC)

Paramvah Studios

APPELLANT

Vs

Lahari Recording Company

RESPONDENT

Date of Decision : 11-01-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 3
Constitution of India, 1950 — Article 226

Citation : (2017) 2 AirKarR 749 : (2017) 2 ICC 475 : (2017) 2 KantLJ 210

Hon'ble Judges : B. Veerappa, J.

Bench : Single Bench

Advocate : Sri. Udaya Holla, Senior Counsel for Vivek Holla, Advocate, for the Petitioner; Smt. Yovini Rajesh Rohra, Advocate for M/s Chander Kumar and Assts, for the Respondent

Final Decision : Disposed Off

Judgement

B. Veerappa, J.—The parties herein are referred to as per their rankings before the Trial Court.

2. These writ petitions are filed by the defendants against the order dated 28-12-2016 passed on I.A. No. 3 in O.S. No. 8718 of 2016 on the file of Presiding Officer, Vacation Judge, City Civil Court, Bangalore, restraining the defendants from using the song "HEY WHO ARE YOU" in the movie "KIRIK PARTY" which is said to have been copied from the plaintiff's song "MADHYA RATRILI" till next date of hearing.

3. The brief facts of the case are as under:

The respondent, who is plaintiff before the Trial Court filed O.S. No. 8718 of 2016 for permanent injunction restraining the defendants, their agents, etc., from releasing the movie "KIRIK PARTY" in any Cinema Hall/Theatre/Multiplex/Satellite/TV/Cable TV/DVD/VCD or any mode of communication to the General public in Karnataka and outside Karnataka with the song "HEY WHO ARE YOU"

and pass orders in the facts and circumstances of the case.

4. The plaintiff-respondent contended that it is a partnership firm carrying on business of manufacturing, selling and recording of audio cassettes, compact discs, VCDs, DVDs, dealing in blank and pre-recorded cassettes, compact discs, VCDs, DVDs, leasing of audio rights and other such allied businesses since several decades (over 30 to 40 years) and is a reputed firm known in the field of Music and Film Industry.

5. It is the further case of the plaintiff that defendant No.1 is a production house, having its Registered Office in Bangalore and is engaged in the business of film making. It is represented by defendant No.2, who is its Managing Director/Director, most active and responsible for its day-to-day business/functioning and also having complete knowledge of its affairs. Defendant No.2 is not only its Managing Director or most active Director, but also a producer of Kannada Movie "KIRIK PARTY" which was released on 29-12-2016. Further, he has also acted as the hero in the said movie "KIRIK PARTY" apart from writing dialogues of the said movie. Plaintiff also contends that they are the exclusive copyright owners, inter alia, of the Kannada song "MADHYA RATHRILI", the music and lyrics of which, are composed by Sri Hamsalekha, and sung by the every popular and reputed professional artists and singers - Sri S.P. Balasubrahmanyam and Smt. S. Janaki and the said song is incorporated in the Kannada Movie -"SHANTHIKRANTHI", directed by Sri Ravichandran, who is very popular. The plaintiff further states that the music in the said song was first composed by Sri Hamsalekha and Sri Eshwari Productions was the first person, who made the said song, sound recording and musical work. It is further case of the plaintiff is that the said work originated from Sri Eshwari Productions which is not in dispute. In the public knowledge, the said Sri Eshwari Productions was the first owner of copyright as per Section 17 of the Copyright Act, 1957 (hereinafter referred to as "the Act"). The plaintiff further states that the said Sri Eshwari Productions, who was the first and original copyright owner of the said song, assigned the said rights exclusively to the plaintiff under the valid written agreement dated 20th July, 1990, etc. Therefore, the plaintiff filed a suit for the relief sought for in the plaint.

6. Along with the plaint, the plaintiff has also filed an application I.A. No. 3 for temporary injunction.

7. The learned City Civil Judge by the impugned order dated 28-12-2016, allowed I.A. No. 3 in part, and granted an ex-parte temporary injunction restraining the defendants from using the song "HEY WHO ARE YOU" in the movie "KIRIK PARTY" which is said to have been copied from the plaintiff's song "MADHYA RATHRILI" till next date of hearing. The plaintiff was also directed to comply with the mandatory provisions of Order 39. Rule 3(a) of Code of Civil Procedure, 1908 and emergent notice on I.A. Nos. 2 and 3 and suit summons returnable by 7-1-2017, were issued to the defendants. Hence, these writ petitions are filed by the defendants-petitioners.

8. I have heard the learned Counsel for the parties to the lis.

9. Sri Udaya Holla, learned Senior Counsel representing the defendants, vehemently contended that the impugned ex-parte order passed by the Trial Court on I.A. No. 3 is in utter violation of provisions of Order 39, Rule 3 proviso of the Code of Civil Procedure. He further contended that in the entire impugned order, the Trial Court has not recorded any reasons as to why the Trial Court has dispensed with notice/summons to defendants and it has also not considered the balance of inconvenience and irreparable injury while passing the ex-parte temporary injunction. He further contended that defendants have not relied upon any song and they have not copied any song viz. "MADHYA RATRILI" in song "HEY WHO" ARE YOU" in the movie "KIRIK PARTY". In support of his contentions, the learned Senior Counsel has relied upon the dictum of the Hon'ble Supreme Court in the case of Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others (1993)3 SCR 522 : (1993)3 SCC 161. Therefore, he sought to quash the impugned order passed by the Trial Court.

10. Per contra, Smt. Yovini Rajesh Rohra for M/s. Chander Kumar K. Associates, representing the plaintiff sought to justify the impugned order and contended that as per the provisions of Section 17 of the Copyright Act, 1957 the plaintiff has got every right of the song. Without the consent of the plaintiff, the defendants have included the song in the film called "KIRIK PARTY" which is impermissible in law. She further submits with regard to the copy of the song "MADHYA RATRILI" in the "KIRIK PARTY", that it has to be decided only after adjudication between the parties before the Trial Court. Therefore, she sought to dismiss the writ petitions.

11. In view of the rival contentions urged by the learned Counsel appearing for both the parties, the only point that arises for consideration in the present writ petitions is:

"Whether the Trial Court is justified in granting ex parte temporary injunction without recording reasons for dispensation of notice/summons to the defendants/petitioners in the facts and circumstances of the present case?"

12. I have given my thoughtful considerations to the arguments advanced by the learned Counsel for the parties and perused the entire material on record carefully.

13. It is an undisputed fact that the present respondent, who is the plaintiff before the Trial Court had filed a suit for permanent injunction restraining the present petitioners/defendants from releasing the movie "KIRIK PARTY" in any Cinema Hall/Theatre/Multiplex/Satellite/TV/Cable I TV/DVD/VCD or any mode of communication to the general public in Karnataka and outside Karnataka with the song "HEY WHO ARE YOU", etc.

14. It is also not in dispute that before issuing summons to the defendants, II the Trial Court by the impugned order dated 28-12-2016 allowed I.A. No. 3 in

part and granted temporary injunction which reads as under:

"Heard on I.A. No. 3.

Perused the plaint averments and affidavits and also other materials placed by the plaintiff.

The plaintiff Counsel submits that defendants without paying royalty are using the music of plaintiff song "MADHYA RATHRILI" in the defendant song in the song "HEY WHO ARE YOU" in the movie "KIRIK PARTY" which is to be released on 30-12-2016 and plaintiff has no objections to release the film "KIRIK PARTY" without the song "HEY WHO ARE YOU" which is copied from plaintiff's song "MADHYA RATHRILI". Considering the grievance of plaintiff and facts and circumstances of the case, it is just and proper to pass the following:

ORDER

I.A. No. 3 is partly considered. The defendants shall not use song "HEY WHO ARE YOU" in the movie "KIRIK PARTY" which is said to have been copied from the plaintiff's song "MADHYA RATHRILI" till next date of hearing.

Plaintiff shall comply mandatory provisions of Order 39, Rule 3 (a) of CPC.

Issue emergent notice of I.A. Nos. 2 and 3 and suit summons to the defendants returnable by 7-1-2017."

15. By a plain reading of the impugned order passed by the Trial Court, it is clear that the Trial Court has not followed the procedure as contemplated under the proviso to Rule 3 Order 39 of the Code of Civil Procedure which reads as under:

"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."

(emphasis supplied)

16. The provisions of Order 39, Rule 3 , proviso of the Code of Civil Procedure clearly depicts that before granting ex-parte temporary injunction, the Trial Court should record the reasons as to why the notice to the defendants has been dispensed with. In the present case, no such reasons are assigned by the Trial Court for dispensation of notice/summons to defendants/petitioners before passing the impugned order which is erroneous and contrary to the provisions of Order 39, Rule 3 of the Code of Civil Procedure. The requirement of giving reasons for the opinion of the Court that the object of granting the injunction would be defeated by delay, as laid down in the proviso, is mandatory and if it is not complied with, the order is illegal.

17. The Hon''ble Supreme Court in the case of Morgan Stanley Mutual Fund v. Kartick Das (1994) 4 Supreme Court Cases 255, while considering the principles which govern the grant of ex-parte injunction by a Court, as follows:

"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."

18. The Hon''ble Supreme Court while considering the provisions of Order 39, Rule 3 of Code of Civil Procedure in the case of Shiv Kumar Chadha v. Municipal Corporation of Delhi and Others, (1993)3 SCC 161, at paras 34 and 35 has held as under:

"34. The imperative nature of the proviso has to be judged in the context of Rule 3 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 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 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 L.J. Ch 373 and *Nazir Ahmed v. Emperor*, AIR 1936 PC 253(2): 63IA 372:1937 Cri. L.J. 897 (PC). 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*, AIR 1975 SC 915 : (1975) 1 SCC 559.

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 Practise, 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 "

19. The defendants (now represented by the learned Counsel before this Court) are directed to file written statement on or before the next date of hearing i.e., 6-2-2017. For the reasons stated above, the point raised in the present writ petitions is answered in the negative, holding that the impugned order dated 28-12-2016 passed on LA. No. 3 is contrary to the mandatory provisions of Order 39, Rule 3 , proviso of the Code of Civil Procedure.

20. In view of the above, the writ petitions are allowed. The impugned order dated 28-12-2016 made on LA. No. 3 in O.S. No. 8718 of 2016 on the file the City Civil Court, Bengaluru is hereby quashed. The matter is remanded to the Trial Court for fresh consideration on LA. No. 3 after giving sufficient opportunity to both the parties in accordance with law. The Trial Court is directed to dispose of LA. No. 3 as expeditiously as possible.

21. A sum of Rs. 10 lakhs deposited by the defendants before the City Civil Court, Bengaluru in O.S. No. 8718 of 2016 in pursuance of the interim order dated 29-12-2016, granted by this Court shall be subject to the result of the suit pending adjudication between the parties.

22. The Registry is directed to circulate a copy of this order to all the learned Judges who are handling the Civil matters for proper adjudication.