

(2006) 05 DEL CK 0092

In the Delhi High Court

Case No : FAO (OS) No. 250 of 2006 and CM No. 5762 of 2006

The Bombay Metal Works (P) Ltd.

APPELLANT

Vs

Tara Singh and Others

RESPONDENT

Date of Decision : 15-05-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2A, Order 43 Rule 1

Contempt of Courts Act, 1971 — Section 10, 11, 12, 19, 2

Citation : (2006) 131 DLT 327

Hon'ble Judges : V.K. Jain, Acting C.J.; S.N. Aggarwal, J

Bench : Division Bench

Advocate : Sudhir Chandra, Hemant Singh, Nisha Bagchi and Dushyant K. Mahant, for the Appellant; Amar Vivek and Jasbir Singh Malik, for the Respondent

Final Decision : Allowed

Judgement

Vijender Jain, J.—The order challenged by the appellant in this appeal has been passed by a learned Single Judge on 29.03.2006 in CCP No. 122/2005. Vide impugned order the learned Single Judge has not only discharged the respondents from notice of contempt but has virtually reviewed the injunction order dated 12.02.2002.

2. Vide impugned order dated 12.02.2002, the respondents were restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in cycle parts under the impugned Ball Head Racers and Screw Head Racer or any other packaging which could be deceptively similar with or substantial reproduction of Ball Head Racers and Screw Head Racer of the appellant till the disposal of the suit being suit No. 127/2002. Despite said injunction order, respondent No. 1 continued manufacturing and selling goods packaged in injuncted cartons from 2002 onwards in flagrant violation of order dated 12.02.2002 as well as the orders dated 20.12.2002 and 21.03.2003

3. Aggrieved by the continuous breach of injunction order committed by the

respondents, the appellant filed an application u/s 2(a), 11 & 12 of the Contempt of Court Act before the learned Single Judge and prayed for initiating the contempt proceedings against them for violating the order of the Court. The learned Single Judge has decided this application vide order dated 29.03.2006 absolving the respondents not only from notice of contempt but also gave a finding that the impugned packaging of the respondents can not be considered as deceptively similar to the packaging of the appellant. Aggrieved by this order of the learned Single Judge, the appellant has filed this appeal.

4. The counsel for the respondents has contended that the present appeal is not maintainable as appeal u/s 19 of the Contempt of Court Act lies only when the High Court has punished the contemnor and in no other case. In support of his submission, he has relied upon the two judgments reported in D.N. Taneja Vs. Bhajan Lal, & State of Maharashtra Vs. Mahboob S. Alibhoy and another, .

5. On the other hand the learned senior counsel appearing for the appellant has contended that this appeal is maintainable as what was brought to the notice of the Court by way of contempt application was disobedience of the interim injunction order dated 12.12.2002. The learned Counsel has submitted that the order impugned in this appeal in fact is being passed by the learned Single Judge under Order 39 Rule 2 A CPC which confer powers on the Court to punish the erring party for disobedience of the interim injunction order of the Court. He has submitted that since this appeal has arisen out of order passed by the learned Single Judge under Order 39 Rule 2 A CPC, the present appeal is maintainable in view of provisions contained in Order 43 Rule 1(r) of the Code of Civil Procedure, 1908. We tend to agree with the above reasoning in relation to maintainability of the present appeal advanced before us on behalf of the appellant. We find that the appellant has filed this appeal not as a contempt appeal but as a FAO (OS) and rightly so as the order restraining the respondent was passed in proceedings under Order 39 Rules 1 & 2 CPC. We find that the impugned order has been passed by the learned Single Judge not pursuant to the jurisdiction of the High Court under Article 215 of the Constitution of India. Though the appellant had filed an application u/s 2(a), 11 & 12 of the Contempt of Court Act but in substance what it did was to bring the disobedience of the injunction order dated 12.12.2002 to the notice of the Court and thereby invoke the jurisdiction of the Court under Order 39 Rule 2A CPC. We are of the view that it is substance of the application that matters and not the nomenclature given in the cause title of the application. Citing of wrong provisions in the title of the application can not be an obstacle for granting a relief made out from the contents of the application. In the present case the appellant by way of its application filed u/s 2(a), 11 & 12 of the Contempt of Court Act had brought it to the notice of the Court that the respondents had been manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in cycle parts under the impugned Ball Head Racers and Screw Head Racers despite injunction order passed by the Court against them on 12.02.2002 as well as on 20.12.2002, 21.03.2003 & 30.04.2003. We have gone through all these orders passed by the learned Single Judge in

pending suit No. 127/2002. We have no hesitation in saying that this appeal is maintainable as it has not been filed under the Contempt of Courts Act but u/s 10 of the High Court Rules as FAO (OS).

6. On a perusal of interim orders dated 12.02.2002, 20.12.2002, 21.03.2003 & 30.04.2003, we have found that parties have virtually settled their dispute regarding use of packaging cartons for marketing their respective products. It appears that the respondents are not adhering to their undertaking given by them to the Court for changing the colour scheme and out look of their packaging used by them for marketing their products. In order to appreciate the controversy between the parties, it would be necessary to refer to the orders passed by the learned Single Judge on 20.12.2002, 21.03.2003 & 30.04.2003 and the same are reproduced here-in-below:

Order dated 20.12.2002

Heard the learned Counsel appearing for parties. Respondents No. 1 & 2 are present in Court in person. I have also heard the said respondents. The said respondents state that they are ready and willing and are prepared to change the colour combination of the packaging as appearing at Annexure D, pages 1 and 2 of the contempt application. The said respondents undertake to change the black background and the orange bordering and the letterings of the infringing packaging, specimen of which are placed at Annexure D pages 1 & 2 of the application under Order 39 Rule 2 A of the Code of Civil Procedure. The aforesaid undertaking is accepted.

The said respondents are directed to change the colour combination in terms of the undertaking given to this Court by using blue colour in place of black colour and any other colour except orange for bordering and letterings appearing in the said specimen at pages 1 & 2 of the application within one month's period.

A grievance also is raised by the petitioner also in respect of the specimen copy put in page three of the application wherein for another packaging the respondents have used orange and black colour combination. So far as the said grievance is concerned, I feel that the arguments of the parties shall have to be heard. Personal appearance of the respondents 1 & 2 for the next date stands dispensed with. However, they shall be present in Court personally as and when further orders for such presence in future is passed.

Let the application be listed for arguments on 21st March, 2003.

Order dated 21.03.2003

Petitioner has filed the present petition alleging disobedience and non-compliance of the order dated 12.02.2002. By the said order, the respondent contemnors were restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in cycle parts under the impugned Ball Head Racer and Screw Racer packaging or any other packaging which could be deceptively similar with or substantial reproduction of Ball Head Racer and Screw Head Racer

packaging of the plaintiff till the disposal of the suit. Pursuant to the order passed on 20.12.2002, the respondent Contemnors had carried out certain changes in their packaging.

Parties are agreed that in so far as the black packaging of the petition is concerned, respondent No. 1 has already made changes which are to the satisfaction of the petitioner.

The grievance of the petitioner is confirmed to the red packaging. Mr. Hemant Singh, counsel for the petitioner points out that the product Ball Head Racers in red packaging of the petitioner as well as of the respondent is usually stacked sideways. He petitioner's product as well as the respondent's product used the same words, namely, Ball Head Racers, 10 set, "set of three" on the side in their respective packagings. Mr. Singh submitted that considering the visual similarities and especially in the size and shape, the fact that consumers of the product who were bicycle owners, there was likelihood of deception.

After some arguments, it was put to learned Counsel for the respondent that he could introduce the same three circles of the product as are shown in white in space in front of the carton on the sides also which would make a distinguishing feature from that of the petition's product. Both the counsels are agreeable to this.

Accordingly, the respondent No. 1 is given 50 days time to comply with the directions.

In view of this agreement being reached, the CCP is dismissed as not pressed.

Order dated 30.04.2003.

In compliance with the agreement reached in CCP No. 127/2002 and as recorded in order dated 21.03.2003, the defendant who is present in person states that he attempted to have three rings printed on the side flip. However, the printer indicated that it would not be possible to do so. In this view of the matter, learned Counsel Mr. Sanjay Abbut states that defendant would again approach the printer for shifting the logo "Rajis" to the extreme right side and Ball Head Racers on the extreme left. In between the space he would have three small circles. Counsel for the plaintiff is agreeable to the same. Defendant would also do the same modification with regard to the packaging in the blue colour. Counsel to file an application under Order 23 Rule 23 CPC within 15 days. Parties be present in person.

Adjourned to 23.05.2003.

7. It is apparent from the above interim orders that the respondents had agreed to change the colour scheme and design of their packaging but a reference to the packaging of the respondents at pages 110 & 111 of the appeal paper book would show that there is a prima-facie breach of the interim injunction order on the part of the respondents. Hence we direct that once the respondents

themselves have agreed to modify their packaging cartons in the manner indicated in the above interim orders, they are estopped from acting contrary to their undertaking by which they are bound as on date. The respondents are not entitled to market their products i.e. Ball Head Racers and Screw Head Racers in packaging which is deceptively similar to the packaging of the appellant till the suit pending before the learned Single Judge is finally disposed of.

8. In view of the above, the impugned order is set aside and this appeal is allowed to the extent mentioned here-in-above.