

MANU/DE/0649/2009

Equivalent Citation: 2009(40)PTC622(Del)

IN THE HIGH COURT OF DELHI

FAO (OS) 167/2009 and CM 6299/2009

Decided On: 29.05.2009

Appellants: **Super Cassettes Industries Ltd.**
Vs.

Respondent: **Punit Goenka and Anr.**

Hon'ble Judges/Coram:

Vikramajit Sen and Rajiv Shakdher, JJ.

Counsels:

For Appellant/Petitioner/plaintiff: Dushyant Dave, Sr. Adv., Jagdish Sagar and K.K. Khetan, Advs

For Respondents/Defendant: Harish Salve, Rajiv Nayyar, Sr. Advs., Pratibha M. Singh and Sudeep Chatterjee, Advs.

Subject: Civil

Subject: Intellectual Property Rights

Acts/Rules/Orders:

Copyright Act, 1957 ;Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 1, Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 2, Code of Civil Procedure, 1908 (CPC) - Order 39 Rules 3

Cases Referred:

Entertainment Network(India) Ltd. v. Super Cassette Industries Ltd. 2008 (37) PTC 35(SC) : JT 2008 (7) SC 11 : 2008 (9) Scale 69; Micolube India Ltd. v. Maggon Auto Centre 2008(36) PTC 231(Del) : 150(2008) DLT 458

Citing Reference:

Discussed	■	1
Mentioned	■	1

Disposition:

Appeal dismissed

Case Note:

Intellectual property Rights – Temporary Injunction - Order XXXIX Rules 1, 2 and 3 of the Code of Civil Procedure, 1908 – Single judge by an order granted time to defendant to file written Statement and reply to application under OrderXXXIX Rules 1, 2 CPC - Ordered to deposit outstanding or unpaid amount of royalty due for previous year, and maintenance of accounts - Hence, this Appeal – Whether a Single Judge could pass an order of an ex-parte ad-interim relief pending disposal of application under CPC – Held, Order XXXIX Rule 1,2 does not speak of an ex parte ad interim injunction - Single Judge had not jeopardized interests of plaintiff while declining to pass interim order - Impugned Order had not disposed of application under Order XXXIX CPC — Procedure followed by Single Judge was not contrary to law - Appeal had been argued, as if it was Appeal against Order deciding Application under said order, which, was impermissible and improper - It had not been argued that Single Judge had no alternative but to grant an ex parte ad interim injunction pending disposal of the Application - Single Judge had balanced equities between parties – Appeal Dismissed.

Ratio Decidendi:

One can not ask Court to decide in his favour before an opportunity of being heard is given to other party.

JUDGMENT

Vikramajit Sen, J.

manupatra 1. This Appeal assails the Order of the learned Single Judge passed on 30.4.2009. At the very commencement of the Order, the learned Single Judge has firstly granted the request made on behalf of the Defendants for filing the Written Statement as well as the Reply to the Application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 ('CPC' hereinafter) within two weeks. Secondly, having done so, and briefly considering the submissions made by learned Counsel for the parties, the learned Single Judge has ordered the Defendant to deposit the outstanding or unpaid amount of royalty due for the previous year, together with Rupees Four crores, as a security amount for the continued usage of the copyrighted work. Thirdly, the learned Single Judge has ordered for the maintenance of accounts separating the usage of the works involved in the proceedings pending before him. It is this Order which has been assailed before us. A perusal of the Memorandum of Appeal will show that the gravamen of the Appellant's case is that the learned Single Judge should have granted an ex parte ad interim injunction restraining the Defendants from using the subject copyrighted material. In our view, this is not the norm prescribed by law.

2. Order XXXIX of the CPC lays down in Rule 1 the circumstances in which a temporary injunction can be passed; it does not speak of an ex parte ad interim injunction. This is also the position as regards Rule 2 of Order XXXIX of the CPC, which postulates the passing of an injunction to restrain the repetition or continuance of the breach of a contract. In the present case, prima facie, no contract has been breached for the reason that the fulcrum of the Appellant's argument is that since the parties have failed to reach any agreement on the lump sum price payable by the Defendants to the plaintiff, an injunction must perforce be granted. The position stands clarified on a reading of Rule 3 of Order XXXIX of the CPC which ordains that 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 to be given to the opposite party. Obviously, this is to enable and elicit the response of the Defendants vis-à-vis the fact of the case and the law applicable thereto. In the present case, no doubt, an adjournment of one day had been granted to the learned Counsel for the Defendants. On the following day, submissions pertaining to facts, as well as to law, were indubitably made before the learned Single Judge which obviously fortified his view that the injunction prayed for should not be given without scrutinizing the defence of the Defendants as would be presented in its Written Statement and Reply to the Application for injunction. This is a matter essentially of discretion which ordinarily should not be interfered with, especially in a precipitate or premature appeal.

3. Mr. Dave, learned Senior Counsel for the Appellant, has argued that from the correspondence available on the record it is manifestly clear that the intention of the Defendants was to delay and dilate the deliberations so that the contract period would elapse without a fresh understanding being in place. It is in these circumstances that he has argued that an injunction must be granted by the Court immediately, because the valuable proprietary rights of the plaintiff stand endangered and jeopardized. He has also submitted that it is not essential or mandatory that a contract for the entire year must be executed. The Defendant could also pay in accordance with Rate Card, that is, on the basis of exactly the number of times the copyrighted material is used by the Defendant. Mr. Dave has also taken us through the provisions of the Copyright Act, 1957 which we do not think it proper to analyse in detail at this stage since it would be improper to influence the thinking of the learned Single Judge even before he decides the pending application for temporary injunction. On behalf of the Defendants it has been contended by Mr. Harish Salve, learned Senior Counsel for the Respondent, that the dispute stands concluded in favour of the Defendants in *Entertainment Network(India) Ltd. v. Super Cassette Industries Ltd.* MANU/SC/2179/2008 : MIPR2008(2)129 . For the same reasons we also think it expedient not to analyse this precedent threadbare, because of the view we are taking herein.

4. During the hearing of the Appeal, it has transpired that the Appellants have deposited a sum of Rupees 4,69,00,000/- with the Registrar-General of this Court in compliance with the impugned Order dated 30.4.2009. A copy of the Compulsory Licence Application dated 15.5.2009 filed by Defendant No. 2 before the Copyright Appellate Board has also been filed. The plaintiff/Appellant has also placed on record a copy of the Objections filed in response thereto.

5. The sum of Rupees 4,00,00,000/- seems to have been arrived at, keeping in perspective the contractual payments for the previous year agreed upon by the two parties. The impugned Order does not state whether it is for the entire year or for one month or for one quarter etc. Rupees 69,00,000/- (approximately) is the amount alleged to be due to the plaintiff and payable by the Defendant for the previous contractual year.

6. Viewed in any way, the learned Single Judge has not jeopardized the interests of the plaintiff while declining to pass an interim order. The impugned Order does not dispose of the application under Order XXXIX of the CPC. That Application, it is clear, would be decided by the learned Single Judge after the Defendant files the Written Statement and Reply to the Application within the period allowed for the purpose, and the plaintiff files the Replication and Rejoinder. This procedure followed by the learned Single Judge is not contrary to the law and, in fact, is in consonance with the spirit of the law articulated in Rule 3 of Order XXXIX of the CPC. The present Appeal has been argued as if it is an Appeal against an Order deciding an Application under Order XXXIX of the CPC, which, in our view, is impermissible and improper. It has not been argued that the learned Single Judge had no alternative but to grant an ex parte ad interim injunction pending disposal of the Application. Assuming that such an argument had been raised, we would be unable to hold in favour of the Appellant since, in our view, the learned Single Judge has balanced the equities between the parties as he has expressed in so many words.

manupatra 7. Mr. Dave has vociferously contended that the learned Single Judge had erred in directing the amount of Rupees 4,69,00,000/- to be deposited with the Registrar-General of this Court. It is his submission that it ought to have been released to the plaintiff. Since the Application under Order XXXIX is still pending, these submissions should properly be made before the learned Single Judge. We are in no manner of doubt that if it is so done, the learned Single Judge will respond with alacrity and expedition.

8. It is trite that where the copyrighted material has been put into the public domain, on the failure to arrive at a price for the exploitation thereof, the remedy is provided in the shape of a motion before the Copyright Board. As noted above, this action has been taken. It has not been disputed before us that the interim Orders of the nature, prayed for before the learned Single Judge, cannot be passed by the Copyright Board. We make no observations on this issue. We are certain that all these factors will be kept in mind by the learned Single Judge when he decides the Interim Application No. 5670/2009 filed under Order XXXIX of the Code of Civil Procedure, 1908.

9. Some discussion has been generated on the change of the date from 29.5.2009 to 2.7.2009, that is, immediately on the reopening after the Summer Recess. It goes to show that the learned Single Judge had not lost sight of the imperatives of a speedy disposal to the injunction application.

10. Our attention has been drawn by learned Senior Counsel, to the decision in Micolube India Ltd. v. Maggon Auto Centre MANU/DE/0180/2008 : 150(2008)DLT458 . In that case the Court was perturbed with an unhealthy trend on the part of the plaintiff to array the main Defendant as Defendant No. 2. It had been held in such instances that the plaintiff stands disentitled to the grant or confirmation of the injunction. We entirely agree with this exposition of the law, for the reason that a party seeking a particular relief must approach the Court with clean hands. Since the learned Single Judge is yet to decide the injunction application, these arguments should be raised before that Court.

11. For these manifold reasons we find no merit in the Appeal which we consider premature. It is dismissed with no order as to costs. Pending application also stands dismissed.