

MANU/DE/0866/2012

**Equivalent Citation:** 20125AD(Delhi)368, 188(2012)DLT432, 188(2012)DLT432, 2012(128)DRJ592, 2012(50)PTC58(Del)

**IN THE HIGH COURT OF DELHI**

CS (OS) No. 284/2012

Decided On: 02.03.2012

Appellants: **M/s Ashwani Pan Products Pvt. Ltd.**

**Vs.**

Respondent: **M/s Krishna Traders**

**Hon'ble Judges/Coram:**

Hon'le Mr. Justice Manmohan Singh

**Counsels:**

For Appellant/Petitioner/Plaintiff: None

For Respondents/Defendant: Ms. Prathiba M. Singh, Adv. with Mr. Ashwin Kumar, Adv.

**Subject: Intellectual Property Rights**

**Acts/Rules/Orders:**

Trade Marks Act, 1999 - Section 17; Code of Civil Procedure (CPC) - Order 39 Rule 1; Code of Civil Procedure (CPC) - Order 39 Rule 2; Code of Civil Procedure (CPC) - Order 39 Rule 3; Code of Civil Procedure (CPC) - Order 39 Rule 4

**Cases Referred:**

Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors. MANU/SC/0522/1993 : (1993) 3 SCC 161; M/s. Marbal Udyog Ltd. v. M/s. P & O Indian Agencies (P) Ltd. 1995 III AD (Delhi) 812; M/s. Interlink Services Pvt. Ltd. v. Shri S.P. Bangera Sole Prop MANU/DE/0640/1997 : 65 (1997) DLT 228; AGI Logistics INC & Anr. v. Sher Jang Bhadur & Anr. MANU/DE/2372/2009 : 163 (2009) DLT 137; A. Venkataubbiah Naidu v. S. Chellappan MANU/SC/0581/2000 : AIR 2000 SC 3032; Himalaya Drug v. SBL Ltd. MANU/DE/0748/1996 : 1996 III AD (Delhi) 853

**Citing Reference:**

Discussed

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**Case Note:**

**Civil - Compliance of mandatory provisions - Interim injunction - Order XXXIX Rule 3 of Civil Procedure Code, 1908 (CPC) - Court passed interim order restraining Defendant from manufacturing, selling, offering for sale or otherwise dealing in "Chewing Tobacco" under trade mark "MADHU BAHAR" or any other trade and ex-parte order was granted to Plaintiff to comply with provisions of Order XXXIX Rule 3 CPC - Hence, this Suit - Whether, Plaintiff had complied with mandatory provisions contained under Order XXXIX Rule 3 CPC - Held, it was settled that in event there was non compliance with mandatory provisions contained in Order XXXIX Rule 3 CPC to supply to opposite party copy of application for temporary injunction, together with other relevant documents relied upon by applicant in support of said application, immediately after order granting ex parte interim injunction was passed, said order was liable to be vacated, for said provision was mandatory in nature - However, Plaintiff had failed to comply with mandatory provisions contained in Order XXXIX Rule 3 CPC, as Plaintiff had not sent complete set of paper book and documents admittedly on basis of record available in matter - Therefore, order passed on 06th February 2012 was liable to be suspended - Since no one appeared on behalf of Plaintiff to argue interim application same was dismissed - Suit dismissed.**

**Ratio Decidendi**

**"Party in suit is required to complied mandatory provisions for final disposal of suit."**

**JUDGMENT**

**Manmohan Singh, J.**

1. The present suit has been filed by the plaintiff for permanent injunction, infringement of trademark, passing off, rendition of accounts and damages against the defendant seeking to restrain it from using the trademark MADHU BAHAR in respect of chewing tobacco.
2. The suit along with interim application was listed on 06.02.2012. The court passed an interim order thereby restraining the defendant from manufacturing, selling, offering for sale or otherwise dealing in "Chewing Tobacco" under the trade mark "MADHU BAHAR" or any other trade mark which may be deceptively similar to that of the plaintiff. Today the matter was listed for disposal of the pending applications and arguments on behalf of the plaintiff as the learned counsel for the defendant already made her submissions on 29.02.2012. The following points were raised by the counsel for the defendant:
  - (a) The compliance of Order XXXIX, Rule 3 CPC has not been made by the plaintiff, as provided under the said provision.
  - (b) The plaintiff has never used the green colour label as filed in Court along with the suit and it has been filed by the plaintiff in order to obtain the ex parte order.
  - (c) The sale figures given by the plaintiff in the pleading do not tally with the sale figures pertaining to the said trade mark in the affidavit filed by the plaintiff in Trade Mark Office.
  - (d) The two trademarks "MADHU" and "MADHU BAHAR" are different. There is no separate registration in favour of the plaintiff for word per-se. The plaintiff has merely got the registration as a label mark. Hence, there is no infringement under the provisions of Section 17 of the Trade Marks Act, 1999.
  - (e) As the defendant is also holding the license of the said trade mark through United Traders, therefore, the suit for infringement of the trade mark is not maintainable.
3. After the completion of the arguments, the Court enquired about the compliance of Order XXXIX Rule 3 CPC from Mr Ashok Mittal, Advocate, who appeared on behalf of the plaintiff. He submitted that in compliance of Order XXXIX Rule 3 CPC, an affidavit of the plaintiff's counsel was filed in the Registry. However, he agreed that the weight of the entire paper book filed before Court is more than 2.5 k.g. and the parcel sent under the compliance of Order XXXIX Rule 3 CPC is about 1 k.g. He also undertook before Court to produce relevant record of the green colour label if it has been used by the plaintiff at any point of time with cogent evidence. He was unable to give any justification as to why the sale figures produced by the plaintiff in Court did not tally with the sale figures filed in the Trade Mark Office.
4. The counsel for the plaintiff stated that the affidavit of compliance was filed in the Registry and the copy of the same was shown to the Court along with postal receipt. However, as per the report of the Registry, the said affidavit has not been filed.
5. When the ex-parte order was granted on 06.02.2012, one week's time was granted to the plaintiff to comply with the provisions of Order XXXIX Rule 3 CPC. According to the learned counsel for the plaintiff, the affidavit was filed within one week. But, the fact remains that the complete set of paper book was not sent under the said compliance. The learned counsel for the defendant argued that there is a total non-compliance of mandatory provision contained under Order XXXIX Rule 3 CPC.
6. Order XXXIX Rule 3 CPC provides in unambiguous terms that in cases where the court proposes to grant an ex parte interim injunction in favour of a party, it shall require the applicant to comply with the provisions contained in the said rule by delivering 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 a copy of the affidavit filed in support of the application, a copy of the plaint, and copies of documents on which the applicant relies.
7. Order XXXIX Rule 3 CPC provides for two mandatory conditions which have to be followed, while sending the relevant documents and pleadings to the opposite party, i.e., (a) the pleadings and documents have either to be delivered to the opposite party (obviously envisaging a situation where hand delivery is effected), or (b) the pleadings and documents have to be sent to the opposite party by registered post.
8. It is settled law that in the event there is a non compliance with the mandatory provisions contained in Order XXXIX Rule 3 CPC to supply to the opposite party copy of the application for temporary injunction, together with other relevant documents relied upon by the applicant in support of the said application, immediately after the order granting ex parte interim injunction is passed, the said order is liable to be vacated, for the said provision is mandatory in nature.
9. A three Judge Bench of Supreme Court of India in Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors. , MANU/SC/0522/1993 : (1993) 3 SCC 161 while emphasizing upon the mandatory nature of the provisions contained in Order XXXIX Rule 3 CPC, has held thus :

32. Power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed....

34. The imperative nature of the proviso has to be judged in the context of Rule 3 of 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...."

If it is held that the compliance of 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 purpose. Proviso to Rule 3 of 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. ....

10. Following the abovementioned law laid down by the Supreme Court, this Court in *M/s. Marbal Udyog Ltd. Vs. M/s. P & O Indian Agencies (P) Ltd.*, 1995 III AD (Delhi) 812, has held thus:

2. Order 39 Rule 3 CPC enjoins upon the applicant 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 a copy of the affidavit filed in support of the application; a copy of the plaint; and copies of documents on which the applicant relies and to file, on the day, on which such injunction is granted or the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent... In the instant case, specific order was made on 28th February, 1995, while granting ex parte order of injunction without notice to the opposite party, calling upon the plaintiff to comply with the requirements of Order 39 Rule 3 CPC and the Court's order, the plaintiff ought to have, within two days of passing the order filed an affidavit in court stating that copies of the plaint, documents annexed with the plaint application and affidavit have been duly served upon the defendants or sent to them by registered post immediately after the grant of the order of injunction, which was not done.

3. In *Shiv Kumar Chadha (Supra)* Supreme Court held that Rule 3 of Order 39 of the Code is mandatory in character. It was observed that the proviso to Rule 3 of Order 39 CPC 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... The plaintiff till date has not been able to satisfy the court as to the compliance with the order and there is also no material on record as to the compliance of Order 39 Rule 3 CPC. No affidavit has been placed on record by the plaintiff as required under Order 39 Rule 3 CPC. There is also no proof on record that documents were duly sent or served on the defendants. In these circumstances, there is no option left with the court except to vacate the ex parte order of injunction dated 28th February, 1995, which is hereby vacated.

11. This Court in *M/s. Interlink Services Pvt. Ltd. Vs. Shri S.P. Bangera Sole Prop*, MANU/DE/0640/1997 : 65 (1997) DLT 228, while following the abovementioned two decisions held thus :

45. Order 39 Rule 3 Civil Procedure Code enjoins upon the applicant for injunction to deliver to the opposite party or to send to him by registered post immediately after the order granting ex-parte injunction has been made, a copy of the application for injunction together with other relevant documents as mentioned therein on which applicant relies and file on the date on which such injunction is granted or on the date immediately following that date an affidavit that such copies as aforesaid were so delivered or sent. In *Shiv Shankar Chadha Vs. Municipal Corporation of Delhi*, 1993 (93) SCC 161, it was held that the compliance of this provision is mandatory. Following this judgment this Court in *M/s. Marble Udyog Ltd. M/s. P & O India Agency Pvt. Ltd.* 1995 (3) AD Delhi 812 has held that for non compliance of this provision there was no option left with the Court except to vacate the ex-parte order of injunction. For this reason also the temporary injunction is liable to be vacated...."

12. Further, this Court in *AGI Logistics INC & Anr. Vs. Sher Jang Bhadhur & Anr.*, MANU/DE/2372/2009 : 163 (2009) DLT 137 in this regard has held thus :

10. It is plain that the Plaintiffs, after obtaining an ex parte ad interim injunction against the Defendants, failed to deliver to the Applicants/Defendants or to send them by registered post within one week, a copy of the application for ad interim 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 the documents on which the Plaintiffs rely upon. The statutory requirement is unambiguous. Every document

filed by the Plaintiffs themselves, on the basis of which they obtained an ad interim ex parte injunction, has to necessarily be "delivered" to the Defendant. The word `deliver? would necessarily mean actual physical delivery on the Defendant. The only alternative mode that the provision envisages is dispatch by registered post, immediately after the order granting injunction has been made. The dispatch by registered post as again would be of the entire set of documents as set out under Clause (a) to the proviso to Order XXXIX Rule 3 CPC. There can be no escape from complying with this provision.

12. The mandatory nature of the requirement of the provision has been emphasized by the Supreme Court in *A. Venkataubbiah naidu v. S. Chellappan* MANU/SC/0581/2000 : AIR 2000 SC 3032 and this Court in *Himalaya Drug v. SBL Ltd.* MANU/DE/0748/1996 : 1996 III AD (Delhi) 853. There is a logic behind insisting that a Plaintiff who obtain an ex parte ad interim injunction order should, at the earliest point in time, deliver to the party against whom such injunction has been granted, all the documents on the basis of which such injunction was granted. This is to enable the opposite party to know what the case against it is and to approach the court at the earliest point in time to seek, if necessary, a variation of the interim order.

After making a reference to the decision of the Supreme Court of India in *Shiv Kumar Chadha's* case (supra), this Court held thus :

14. If the Court were to take a lenient view and not insist on strict compliance with the mandatory requirement of Order XXIX Rule 3, then it would be possible for most Plaintiffs to continue to enjoy an ad interim ex parte stay in their favour for any length of time and plead genuine mistake by their counsel for non-compliance. Numerous suits accompanied by applications seeking urgent ex parte reliefs are filed in our courts everyday. The court, on a perusal of the documents filed before it, forms a prima facie view for grant of an parte ad interim injunction against the opposite party, even in the absence of the opposite party. The Court at that stage has no means of knowing what the version of the opposite party is. The court, therefore, makes such interim order both time bound and conditional. The condition is that there must be compliance with Order XXXIX Rule 3 CPC within the time specified by the court. Although Order XXXIX Rule 3(b) CPC requires the filing of an affidavit of compliance "on the day on which such injunction is granted or on the day immediately following that day", this Court has been granting a longer time accounting for the fact that the certified copy of the order passed by the court may not be available on the same day or even on the next date. However, there is no question of the Plaintiff not being required to comply with the mandatory requirement of Order XXXIX Rule 3 CPC within the time granted by the Court. In the considered view of this Court, a strict compliance with the mandatory requirement of this provision must be insisted and any laxity shown to parties might well defeat the very purpose for which such provision has been inserted.

15. The filing of process fee in this Court for service of summons/notice upon Defendants, no doubt, is another mandatory requirement of law. However, that alone is not enough. If the Plaintiff wants to take the benefit of an ex parte ad interim injunction, then there is no escape from complying with the mandatory requirement of Order XXXIX Rule 3 CPC.

16. Since it is plain that the Plaintiffs have not complied with the requirement of Order XXXIX Rule 3 CPC, the interim order passed by this Court on 22nd July 2009 hereby stands vacated. IA No. 9768 of 2009 is accordingly allowed.

13. From the facts and circumstances of the case, it is clear in the present case that the plaintiff has failed to comply with the mandatory provisions contained in Order XXXIX Rule 3 CPC, as the plaintiff has not sent a complete set of paper book and documents admittedly on the basis of the record available in the matter. Therefore, I am of the view that the order passed on 06.02.2012 is liable to be suspended. Since no one appears on behalf of the plaintiff to argue the interim application, being I.A. No. 2222/2012, the same is dismissed.

14. Consequently, the application, being I.A. No. 2846/2012, is also disposed of.

CS (OS) No. 284/2012

No one appears on behalf of the plaintiff. However, in the interest of justice, renotify on 24.05.2012 for further consideration.