

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.SOMARAJAN

WEDNESDAY, THE 31st DAY OF AUGUST 2022 / 9TH BHADRA, 1944

FAO NO. 94 OF 2022

AGAINST THE EX-PARTE ORDER OF INJUNCTION IN I.A.No.2/2022 IN OS
No.4/2022 OF ADDITIONAL DISTRICT COURT-IV, THIRUVANANTHAPURAM

APPELLANTS/DEFENDANTS/RESPONDENTS:

- 1 G.M. SHEIK, AGED 28 YEARS,
S/o ABDUL HOSEN, VILL - KESHABPUR TENAPARA,
P S - ISLAMPUR DISTRICT - MURSHIDABAD,
WEST BENGAL - 722 304.
- 2 MEHURNEZA, AGED 20 YEARS,
D/o MUKUL S.K., VILL + PO - UPAR FATHEPUR,
PS - LALGOLA, MURSHIDABAD DISTRICT,
WEST BENGAL - 742 148.
- 3 FAROOK ABDULLA, AGED 30 YEARS,
S/o ABDUL HOSEN, TRIVANDRUM BUILDING AND DEVELOPER,
HARISREE, THIRUVANANTHAPURAM, KERALA ALSO HAVING F & L
TRADERS, KP VII/236, NEAR VELLAYANI DEVI TEMPLE,
KANAYAKUMARI ROAD, NEMOM, PALLICHAL VILLAGE,
THIRUVANANTHAPURAM - 695 020.

BY ADVS. V.G.ARUN (K/795/2004)
V.JAYA RAGI
R.HARIKRISHNAN (KAMBISSERIL)
NEERAJ NARAYAN

RESPONDENTS/PLAINTIFFS/PETITIONERS:

- 1 M/s RAJA BIRI PRIVATE LTD., PUTIKHALI KRISHNAGANJ,
MAJADIA, NADIA DISTRICT, WEST BENGAL, REPRESENTED BY
MANAGING DIRECTOR HAREKRISHNA BISWAS,
S/o SADANATHA BISWAS, RAIL BAZAR P.O., MAJADIA,
NADIA DISTRICT, WEST BENGAL - 741 507.
- 2 MUGAL TRADE LINKS, T.C.NO.100/950-3,
PANACHAMOOTTIL VEEDU, STATIONKADAVU, KAZHAKOOTTAM P.O.,
THIRUVANANTHAPURAM - 695 582, REPRESENTED BY ITS
PROPRIETOR SUDHEER S.
- 3 GREEN KERALA MARKETING, THIRUVATHIRA COMPLEX,
NEAR RTO CHECKPOST, ATTUPURAM, UCHAKKADA P.O.,
THIRUVANANTHAPURAM - 695 506, ALSO HAVING BUSINESS AT

3/1090, GROUND FLOOR, KALLUKUZHI JUNCTION,
UMAYANALLOOR P.O., KOLLAM, KERALA, PIN - 691 589.

4 ZIYAS TRADERS, CHALI KOTHUVAL STREET,
THIRUVANANTHAPURAM, ALSO HAVING BUSINESS AT
PRAVACHAMBALAM, NEMOM, THIRUVANANTHAPURAM - 695
020.

5 MUTHU STORE, MARKET ROAD, KATTAKKADA,
THIRUVANANTHAPURAM - 695 571.

6 M/s H.ENTERPRISES, TC 6/606, NLRA 25,
ULLOOR, MEDICAL COLLEGE P.O.,
THIRUVANANTHAPURAM - 695011.

7 M/s N.S.MARKETING, NEAR PRAVACHAMBALAM,
NEMOM, THIRUVANANTHAPURAM - 695 020.

R1 & R2 BY ADVS. VAISAKHI V
BABU KARUKAPADATH(B-13)
M.A.VAHEEDA BABU(V-4)
P.U.VINOD KUMAR(K/647/2002)
ARYA RAGHUNATH(K/000474/2018)
T.M.MUHAMMED MUSTHAQ(K/000261/2018)
AJWIN P LALSON(K/001394/2018)
KARUKAPADATH WAZIM BABU(MAH/8319/2019)
P.LAKSHMI(K/001868/2021)
AISWARYA ANN JACOB(K/001838/2021)

R3 & R7 BY ADV. G.SREEKUMAR (CHELUR)

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR
ADMISSION ON 31.08.2022, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

CR

JUDGMENT

This appeal came up for hearing today. Heard both sides. The dispute is pertaining to alleged infringement of trade mark and name of Raja Biri and Raja Bidi.

2. The preliminary objection raised that the appeal will not stand as there is no provision for it against an ex parte interim order cannot be sustained in view of the legal position settled by the Apex Court in **A.Venkatasubbiah Naidu v. S.Challappan and Ors. (AIR 2000 SC 3032)**.

3. Before issuance of notice to the defendants/counter petitioners, an ex parte ad interim injunction was granted restraining the defendants from doing their business. The suit was filed on 31/05/2022. Interim ex parte injunction was granted on 01/06/2022 before issuing notice to the appellants/counter petitioners. The defendants/appellants entered appearance and filed

their counter on 27/06/2022. But, the matter was not heard on merit within the time schedule of 30 days. It was adjourned to 02/7/2022 and then to 13/07/2022. The appellants/defendants hence filed an application for early hearing under Order XXXIX Rule 3 A C.P.C.. But in spite of the said application, the matter was not heard on merit. The trial court in the meanwhile appointed a Commission to collect the materials belonged to the defendants supplied to various shops and afforded police protection to the Commissioner. The Commissioner in turn collected all the materials belonged to the defendants supplied to various shops, with police protection and thereby the trial court has implemented the interim ex parte injunction granted without notice to the counter petitioners, who are the appellants herein.

4. It is submitted that the trial court is well within the jurisdiction of granting even an ex parte ad interim injunction without notice to

the counter petitioners/appellants by virtue of Section 135 of the Trade Marks Act, 1999, which is extracted below for reference:

"Relief in suits for infringement or for passing off

(1) *The relief which a court may grant in any suit for infringement or for passing off referred to in section 134 includes injunction (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits, together with or without any order for the delivery-up of the infringing labels and marks for destruction or erasure.*

(2) *The order of injunction under sub-section(1) may include an ex parte injunction or any interlocutory order for any of the following matters, namely:--*

(a) *for discovery of documents;*

(b) *preserving of infringing goods, documents or other evidence which are related to the subject-matter of the suit;*

(c) *restraining the defendant from disposing of or dealing with his assets in a manner which may adversely affect plaintiff's ability to recover damages, costs or other pecuniary remedies which may be finally awarded to the plaintiff.*

(3) *Notwithstanding anything contained in sub-section(1), the court shall not grant relief by way of damages (other than nominal damages) or on account of profits in any case--*

(a) *where in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification trade mark or collective mark; or*

(b) where in a suit for infringement the defendant satisfies the court--

(i) that at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use; and

(ii) that when he became aware of the existence and nature of the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods or services in respect of which it was registered; or

(c) where in a suit for passing off, the defendant satisfies the court--

(i) that at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark for the plaintiff was in use; and

(ii) that when he became aware of the existence and nature of the plaintiff's trade mark he forthwith ceased to use the trade mark complained of."

(emphasis supplied)

5. The scope of grant of ex parte injunction under Section 135 of the Act is limited to the matters enumerated under clauses (a) to (c) of sub-section (2), subject to the exception carved out under sub-section (3) of the Act. Admittedly, the interim order granted would not come under the purview of clause (a) or (b) of Section 135(2) of

the Act. It is submitted that it is by virtue of clause (c) of Section 135(2), an ex parte ad interim injunction was granted by the trial court. But clause (c) of Section 135(2) of the Act, can be applied only for the purpose of preserving the property and assets of the defendant as a precautionary measure so as to satisfy the damages, costs or pecuniary remedies that may be awarded in the suit. The purpose of Section 135(2) (c) of the Act is akin to that of an attachment before judgment under Order XXXVIII Rule 5 C.P.C.. It is for the purpose of preserving and protecting the interest of the plaintiff and the award that may be passed for payment of damages, costs and other pecuniary remedies, the property of the defendant or his assets can be preserved and protected by way of an ad interim injunction and not for the purpose of preventing any violation of passing off or infringement. The order of injunction granted by the trial court for preventing sale of goods belonged to the defendant

in contravention of alleged trade mark or name and by collecting the goods by appointing a Commission, would not come under the purview of Section 135(2)(c) of the Act. There is only a limited scope under Section 135 of the Trade Marks Act to grant interim injunction and it should be pertaining to the matters incorporated in clause (a) to (c) of Sub-Section (2) of that section. It cannot have any exhaustive application. Hence, the court must be more vigil and cautious while granting an ad interim injunction without notice to the counter petitioner/defendant. It would be too adventurous to implement an ex parte ad interim injunction order passed without notice to the defendants/counter petitioners.

6. Yet another interesting question is also involved in the present case as to whether an ex parte ad interim order of injunction can be executed through the court by exercising jurisdiction under Section 36 of C.P.C. and whether it can be treated in par with an order

passed on its merits after hearing both the parties or an ex parte order, in which one of the parties remained ex parte after notice. There is lot of confusion in the user of the word "ex parte" to an ad interim injunction granted before issuance of notice to the counter petitioner under Order XXXIX C.P.C.. Rule 3 of Order XXXIX C.P.C. says that before granting ad interim injunction, court has to issue notice to the opposite party. It is by virtue of the proviso attached to Rule 3, the court can issue interim injunction without giving notice to the opposite party, for which reason should be stated. An order of ad interim injunction granted under the proviso to Rule 3 without giving notice of the application to the opposite party would also be an "ex parte" order though normally the said expression is used to refer orders or decree passed in the absence of opposite party. In fact, the expression "ex parte" stands for and signifies something done or said by one person, not in the presence of his opponent.

This term is applied in law to refer any order or a decree that was passed in the absence of the opposite party. It is laid down by the High Court of Madras in **Gorakonda Venkatasubbiah v. Deliparthi Lakshminarasimham (AIR 1925 Mad.1274)** that the term "ex parte" merely means "in the absence of other party", to which the Apex Court had given approval in **Sangram Singh v. Election Tribunal, Kotah (AIR 1955 SC 425)**. An ex parte decree stands for a decree granted by the court on the basis of evidence of plaintiff due to the non-appearance of contesting defendant. The provisions contained in C.P.C. to set a party ex parte and to set aside ex parte also proceeds on the very same pedestal and hence it can be safely concluded that the expression "ex parte" stands for a decision taken by a court or Judge or a Tribunal in the absence of other party. An ad interim injunction granted without notice to the respondent would also come under the purview of "ex parte" order. This would make the position clear that the term

"ex parte" stands for an order passed or a decree passed in the absence of other party. There may be atleast two occasions in the larger sense for passing an ex parte order i.e. (i) without issuing notice to the opposite party including an order passed under the proviso attached to Rule 3 of Order XXXIX C.P.C. and (ii) after issuing notice to the opposite party, who remained absent in spite of notice. If the absence is without any lawful excuse, the ex parte order or decree would stand binding on the opposite party. In the latter case, every order passed after affording opportunity of being heard would stand binding on the opposite party. But in the former case, it may not have any such binding force on the opposite party, since it is deprived of "*audi alteram partem*" - the right to be heard, which is the fundamental requirement in the legal parlance to make it binding on the parties. The only exception to this fundamental principle is with respect to administrative matter when there is no

occasion for causing prejudice to the opposite party, and also in the exercise of legislative authority. But if it is pertaining to judicial or quasi judicial functions, being exercised under any legislative authority, it requires the compliance of the noble principle, *audi alteram partem* based on natural justice. But at the same time, though the ex parte order passed without notice would not have any binding force, being an order issued by a competent court or authority, it shall be respected and honoured till it was merged in the final order after notice to the opposite party. The "right to be heard" in the legal parlance especially in litigation is the most valuable right, which cannot be defeated in any manner except on the default of the opposite party. The principle behind the maxim "*audi alteram partem*" is well recognised and adopted in the judicial system as one of the fundamental guiding principles. The Apex Court in **Nawabhkhan Abbaskhan v. State of Gujarat (AIR 1974 SC 1471)**

had laid down that it is obligatory on the part of the judicial authority to hear, expressly or by implication by giving an "opportunity to be heard" as a natural justice, otherwise, the impugned act or order was never valid. But, it may not have any application, where the authority is acting in exercise of the legislative powers (**Tulsipur Sugar Company Ltd. v. Notified Area Committee (1980) 2 SCC 295**). The Apex Court in **Union of India v. Tulsi Ram Patel [(1985) 3 SCC 398]** had emphasised the importance of "right to be heard" and laid down the law that the "*audi alteram partem*" rule in its fullest amplitude means that a person against whom an order to his prejudice may be passed, should be informed of the allegations and the charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him. The Apex Court in **Union of India v. W.N.Chadha (AIR 1993 SC 1082)** has

discussed the application of said rule in administrative law in the following lines:

"The rule of audi alteram partem is a rule of justice and its application is excluded where the rule will itself lead to injustice. There is exclusion of the application of audi alteram partem rule to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case. This rule cannot be applied to defeat the ends of justice or to make the law "lifeless, absurd, stultifying and self defeating or plainly contrary to the common sense of the situation" and this rule may be jettisoned in very exceptional circumstances where compulsive necessity so demands.

The fact that a decision, whether a prima facie case has or has not been made up, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full fledged enquiry follows is a relevant - and indeed a significant - factor in deciding whether at that stage, there ought to be hearing which the statute did not expressly grant.

The rule of audi alteram partem is not attracted unless the impugned order is shown to have deprived a person of his liberty or his property."

7. Necessarily, 'right to notice' for affording "right to be heard" is an indispensable right, which would be the very basis of binding

force of any order or decree that may be passed on the respective parties including the opposite party. In short, what actually governs a "binding force" or "binding nature" is really resting on the "right to be heard" and not on the authority or jurisdiction vested with any court in the matter of issuance of any ad interim order or precautionary measure, without notice to the opposite party or to the person who will stand prejudiced by the order affecting his interest. But there shall not be any misunderstanding with the jurisdiction of the court to pass orders/directions, to summon a document or a witness and it shall not be placed in par with any adjudicatory order or decree. The orders, which were issued before giving notice to the opposite party or without affording a right of hearing though would fall under the category of ex parte order, the legal consequences that may flow out of the said orders is quite different from that of an order or an ex parte decree passed after notice to

the opposite party, which is capable of execution in terms with Section 36 and Order XXI of C.P.C.. This might be the reason why the legislature has incorporated provision for dealing with the issue regarding violation/disobedience of ex parte ad interim orders under Rule 2 A of Order XXXIX C.P.C.. An order passed without issuing notice to the opposite party hence cannot be brought under the purview of Section 36 C.P.C. and it cannot be executed through court until the same is merged in a subsequent order after notice to the opposite party. As discussed earlier, the binding force or the binding nature of any order or decree is resting on the principle of "right to be heard" and notice thereof. When there is default on the part of the opposite party to appear and answer, the consequent order passed ex parte would stand binding upon him, but when no notice was issued and no opportunity of hearing was given, the ex parte orders passed either by way of ad interim injunction or otherwise would fall under the ambit

of Order XXXIX Rule 3 A C.P.C. and for violation of the order, the opposite party can be prosecuted. It is not permissible to treat an ex parte order of ad interim injunction granted before notice to opposite party under the proviso to Rule 3 of Order XXXIX C.P.C.. in par with other ex parte orders/decrees. The question of implementation of an ad interim injunction can be done only after making it absolute after service of notice to opposite party. Then only, it will get a binding nature on the respective parties. Till that time, it cannot be executed through the court either under Section 36 or under Order XXI C.P.C., but the court can prosecute the opposite party for its violation under Order XXXIX Rule 2 A C.P.C..

8. Strange enough, the court below had implemented the ex parte ad interim injunction passed before issuance of notice to the party by appointing a Commissioner and by giving police protection without hearing the counter

petitioners/defendants, though they have entered appearance and filed their counter. It is a naked violation of the mandate under sub-section (3) of Section 135 of the Trade Marks Act, besides the mandate under Order XXXIX Rule 3 A C.P.C.. The matter was not heard by the trial court in spite of an application submitted for early hearing and even after the lapse of 30 days and thereby violated the mandate under Order XXXIX Rule 3 A C.P.C. and it would fall under the mischief recognized by the Apex Court in **A.Venkatasubbiah Naidu v. S. Challappan and Ors. (AIR 2000 SC 3032)**. The relevant portion of the judgment is extracted below for reference:-

" So we are of the view that in a case where the mandate of Order 39 Rule 3A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate Court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate Court in complying with the provisions of Rule 3A. In appropriate

cases, the appellate court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex-parte temporary injunction shall, for the purposes of the appeal, be deemed to be the final order passed on the application for temporary injunction, on the date of expiry of thirty days mentioned in the Rule."

9. Further, in a matter of alleged infringement of or passing off trade mark or trade name, the court should be more cautious and vigilant while passing ex parte interim orders by virtue of Section 135 of the Trade Marks Act. An injunction can be granted only pertaining to the matters included in clause (a) to (c) to sub-section (2) of Section 135 of the Trade Marks Act. While ordering ad interim injunction and ex parte ad interim injunction, the court must be more vigilant and cautious about the exception carved out under sub-section (3) and there should be a prima facie satisfaction that the matter would not

fall under the exception so carved out, besides the grounds available for exercise of jurisdiction under sub-section 2 of Section 135 of the Act. An ad interim injunction shall not be granted in derogation of the right of opposite party. The exercise of jurisdiction to issue an ex parte ad interim order before notice to the opposite party must reflect the proper consideration of all the abovesaid aspects. In the said circumstances, the request for transferring the case to the Principal District and Sessions Court, Thiruvananthapuram is allowed. There will be a direction to the Principal District Court to dispose of the interim injunction application within a time schedule of ten days from the date of re-opening of court after Onam holidays. The parties shall appear before that court on the re-opening date. The Additional District Court, Thiruvananthapuram shall transmit the entire records to the Principal District Court, Thiruvananthapuram forthwith. The interim stay

granted by this Court will stand extended till the disposal of the application by the said court.

The appeal is disposed of accordingly. No costs.

Sd/-

P. SOMARAJAN
JUDGE

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