
AIR 2012 Cal 1 : (2012) 1 CHN 187

Calcutta High Court

Case No: C.O. No. 676 of 2011

M/s. Info Edge (India)
Pvt. Ltd. and Another

APPELLANT

Vs

Sumanta Bhattacharya
and Others

RESPONDENT

Date of Decision: Aug. 12, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 32, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 2(3), Order 39 Rule 2A
- Constitution of India, 1950 - Article 227
- Contempt of Courts Act, 1971 - Section 10

Citation: AIR 2012 Cal 1 : (2012) 1 CHN 187

Hon'ble Judges: Joymalya Bagchi, J

Bench: Single Bench

Advocate: Sakti Nath Mookherjee, S.P. Roy Chowdhury, Jiban Ratan Chatterjee, Hiranmoy Bhattacharya and Dipayan Choudhury, for the Appellant; Sakya Sen, Suvadeep Sen and Ms. Srinanda Sen, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Joymalya Bagchi, J.

This application under Article 227 of the Constitution of India is directed against the Order No. 132 dated 11-2-2011 passed by the learned Judge, 13th Bench, City Civil Court, Calcutta in Misc. Case No. 572 of 2004 whereby the learned Judge turned down the prayer of the petitioner/defendants for dismissing the application under Order 39, Rule 2-A of the CPC filed by the plaintiff/opposite parties herein.

2. The factual matrix leading to the instant dispute is as follows:

- (a). On or from March 1997 the petitioner/ defendants claimed to be the proprietor/ owner and the lawful user of domain name "NAUKRIE.COM."
- (b). On or about September 2002, the plaintiff/opposite party No. 1 registered a domain name "NAUKRIE.COM" in his name.
- (c). Being aggrieved by such registration of a deceptively similar mark in favour of the plaintiff/opposite party No. 1, the petitioner/defendants filed a civil suit being C.S. (O.S.) No. 2169 of 2003 against the plaintiff/opposite party No. 1 before the Delhi High Court for declaration and permanent injunction.
- (d). On 18th December, 2003, the Delhi High Court passed an ad interim order of injunction restraining the plaintiff/opposite party No.1 from using the domain name "NAUKRIE.COM".
- (e). On 23rd December, 2003, copy of the aforesaid order along with the plaint and the injunction application and all accompanying documents filed before the Delhi High Court were served upon the plaintiff/opposite party No.1.
- (f). On 12th January, 2004, the plaintiff/ opposite party No. 1 filed an application under Order 39, Rule 4 read with Section 151 of the CPC for vacating the aforesaid ad interim order passed by the Delhi High Court.
- (g). On 28th January, 2004, the Delhi High Court refused to vacate the said order of injunction.
- (h). On 9th February, 2004, the plaintiff/ opposite party No. 1 filed the instant suit being Title Suit No. 178 of 2004 before the City Civil Court at Calcutta, praying for a declaration that he is the exclusive owner of the domain name "NAUKRIE.COM" and a permanent injunction against the petitioner/ defendants from using and/or transferring the said domain name (hereinafter referred to as the instant suit).
- (i). On the self-same day, the petitioner/ defendants moved an application being I. A. No. 821 of 2004 before the Delhi High Court seeking an injunction to restrain the plaintiff/opposite party No. 1 from interfering and/ or intermeddling with the ownership, use and possession and/or entering into any communication, oral or written, with Network Solutions in respect of said domain name, "NAUKRIE.COM."
- (j). On 10th February, 2004, the Delhi High Court in presence of the learned lawyer for the plaintiff/opposite party No.1 passed such order of injunction against him, as prayed for.
- (k). On the self-same day i.e. on 10th February, 2004, an injunction application was moved before the learned Judge-in-charge, City Civil Court, Calcutta in the instant case being Title Suit No. 178 of 2004 and an ex parte ad interim order of injunction was

obtained against the petitioner/defendants restraining them from using and/or transferring the domain name "NAUKRIE.COM" till 9-3-2004.

(l). Being aggrieved by such ex parte order of injunction dated 10th February, 2004, the petitioner preferred an appeal being F. M. A. T. No. 485 of 2004 before this Court. A Division Bench of this Court by order dated 18th February, 2004 passed an order of stay of operation of the said order of injunction dated 10th February, 2004 for a period of three months. The said order of injunction dated 10th February, 2004 was, therefore, in force for eight days.

(m). On 8th March, 2004, the petitioner/ defendants filed an application for staying the instant suit u/s 10 read with Section 151 of the Civil Procedure Code.

(n). On 6th April, 2004, alleging violation of the aforesaid order of injunction which was in force for eight days, the plaintiff/opposite party No.1 filed an application under Order 39, Rule 2A read with Section 151 of the CPC before the trial Court being Misc. Case No. 575 of 2004 (hereinafter referred to as the said Misc. Case).

(o). On 28th May, 2004, a Division Bench of this Court disposed of the aforesaid appeal being F. M. A. T. No. 485 of 2004 directed against the ad interim order of injunction dated 10th February, 2004 by directing both the parties to maintain status quo as it prevailed immediately preceding the institution of the instant suit being Title Suit No. 178 of 2004. In effect, ad-interim order of injunction dated 10th February, 2004 stood vacated.

(p). On 31st March, 2005, the trial Court stayed the proceeding in the instant suit u/s 10 of the Civil Procedure Code. The plaintiff/opposite party No.1 preferred an appeal against such order before this Court which stood dismissed.

(q). On 21st December, 2005, the trial Court dismissed the application under Order 39, Rules 1 and 2 of the CPC filed by the plaintiff/defendant No. 1 in the instant suit on merits.

(r). Between 2006 and 2010, the trial Court continued to hear the application under Order 39, Rule 2A and presently the matter is pending for recording further evidence of opposite party witness No. 1.

(s). After a lapse of four years, on 7th August, 2010, the instant application u/s 151 of the CPC was filed by the petitioner/defendants, praying for dismissal of the said Misc. Case on the ground that the ad interim order of injunction dated 18th February, 2010 was obtained on the basis of fraud and suppression of material facts. Another application for stay of the proceeding in the Misc. Case till disposal aforesaid of the application u/s 151 of the CPC was also filed.

(t). By the impugned order dated 11-2-2011 the trial Court dismissed the said applications on the ground that the issue of fraud and misrepresentation of facts are to be determined

on evidence.

3. Arguing in support of the application Mr. Sakti Nath Mookherjee, Sr. Advocate, appearing with Mr. S. P. Roy Chowdhury, Sr. Advocate, Mr. Jiban Ratan chatterjee, Sr. Advocate, Mr. Hiranmoy Bhattacharya, learned Advocate and Mr. Dipayan choudhury, learned Advocate, submitted that apart from the grounds of fraud and suppression that have been pleaded in the aforesaid application before the trial Court, the aforesaid Misc. Case ought to be dismissed on the ground that the trial Court did not have any jurisdiction to proceed with the same since the order of injunction which was allegedly breached was no longer in existence and there was nothing left for the Court to enforce. He submitted that the scope and ambit of an application under Order 39, Rule 2A of the CPC is exclusively executory in nature and the provisions for attachment or detention in civil prison as provided therein, are only for the purpose of enforcing/executing the said order and not for punishing the defaulting party.

4. To buttress his arguments, he referred to Sections 51(c) and 58 of the Civil Procedure Code. Referring to the said provisions, Mr. Mookherjee, argued that the purpose of detention under the scheme of the Code is merely to execute the decree and immediately on the execution or satisfaction of the decree, the judgment-debtor has to be released.

5. He submitted in cases of grave breach of an order of temporary injunction, punitive measures may be resorted to under the Contempt of Courts Act and not under Order 39, Rule 2A of the Code.

6. He further submitted that in the instant case since the order of injunction having stood vacated by this Court, the continuation of the proceeding under Order 39, Rule 2A of the CPC is an abuse of process of the Court and the same ought to be dismissed.

7. In support of his argument, Mr. Mookherjee referred to the decision, reported in [The State of Bihar Vs. Rani Sonabati Kumari](#), . Drawing my attention to paragraph 23 of the said decision, Mr. Mookherjee submitted that the Supreme Court in the said decision has observed that the proceeding under order 39 Rule 2(3) of the CPC (presently Order 39 Rule 2A) is in substance designed to effect the enforcement of and to execute the order.

8. He also relied on a decision of this Court in the case of Rabindra Kumar Ghosh v. Sukomal Mukherjee, reported in 1974 (1) CHN 215, wherein this Court held that when it has been proved that the petitioner has obeyed the order it was not proper, if not permissible under the law, to start a proceeding under Order 39, Rules 2(3) or to continue it.

9. Relying on [T. Arivandandam Vs. T.V. Satyapal and Another](#), Mr. Mookherjee eloquently submitted that it was the duty of the trial Court to nip this vexatious Misc. Case in the bud.

10. Mr. Sakya Sen, learned advocate appearing with Mr. Suvadeep Sen, learned advocate and Ms. Srinanda Sen, learned advocate for the plaintiff/opposite parties submitted that the scope of a proceeding under Order 39, Rule 2A of the CPC is not exclusively executory in nature but the same has a punitive import too. He submitted that the issue before the Court in an application under Order 39, Rule 2A is whether the order of injunction while it was in force had been breached or not. The jurisdiction of the Court to entertain such an application is wholly independent of the fact whether such order of injunction was subsequently set aside or not.

11. He, however, admitted that such subsequent event would be relevant for considering the grant of final relief on the said application but definitely does not impinge on the jurisdiction of the Court to entertain such application.

12. He further submitted that the issue of fraud and suppression are mixed questions of fact and law and the same have not been conclusively decided either in the order dated 20th May, 2004 passed by the Division Bench of this Court in F. M. A. T. No.. 485 of 2004 or in the Order dated 21st December, 2005 whereby the prayer for injunction was dismissed.

13. In support of his contentions he relied on the following decisions:

(a). [Tayabbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc.,](#)

(b). [Samee Khan Vs. Bindu Khan,](#)

14. In reply, Mr. Mookherjee submitted that Tayabbhai"s case (supra) was clearly distinguishable on facts. In that case, the order of injunction was in force for more than six years and the respondent was found guilty of having violated such order when such order was subsisting. He further submitted that the judgment was delivered while interpreting Section 9(a) of Maharashtra Amendment Act, which has no application to the instant case.

15. Mr. Mookherjee also submitted that the ratio of Samee Khan"s case (supra) was also not applicable to the facts of the instant case.

16. I have considered the rival submissions of both the parties.

17. The issue which falls for decision is whether the trial Court had jurisdiction to entertain an application under Order 39, Rule 2A of the CPC and proceed with the same when subsequently such order of injunction which was alleged to be violated is set aside and even the suit stayed.

18. In Tayabbhai"s case (supra), similar issue had fallen for decision. Therein the Supreme Court was called upon to decide whether a person who disobeyed an interim order of injunction could be punished under Order 39, Rule 2A of the CPC when it is

ultimately found that the Civil Court had no jurisdiction to entertain and try the suit.

19. In the said case, the Supreme Court unequivocally laid down that a Court had jurisdiction to proceed with an application under Order 39, Rule 2A of the CPC in spite of a finding that the Court had no jurisdiction to entertain the suit. In arriving at such conclusion, the Supreme Court clarified that the same conclusion could be arrived at on first principles too independent of the applicability of Section 9(a) of Maharashtra Amendment to the Civil Procedure Code. In the words of the Supreme Court the said provision of the Maharashtra Amendment, "merely states the obvious" and "makes explicit what is implicit in law." I, therefore, hold that the lack of support from that local amendment does not stand in the way of applying the ratio of the aforesaid case to the instant one.

20. It is apposite to mention that the order of injunction which was violated was not in existence when the issue fell for decision before the Supreme Court. Hence, the ratio of the said decision applies with full force to the facts of this case.

21. In the said decision the Supreme Court observed that the argument that no one can be punished, for violating an interim order while it is in force, after it is set aside would seriously erode the dignity and authority of the Courts. Any order passed as a consequence of such violation, however, does not seek to enforce the same after it is set aside, as the Supreme Court succinctly clarified:--

....Punishing the defendants for violation of the said orders committed before the said decision (Vishanji Viriji Mepani) does not amount, in any event, to enforcing them after the said decision. Only the orders are being passed now. The violations are those committed before the said decision.....

22. From the aforesaid ratio, it is amply clear that in order to uphold the dignity and authority of judiciary, the Courts have jurisdiction to entertain and proceed with an application under Order 39, Rule 2A of the CPC for punishing parties who have violated an order of injunction while it was in force even after the same has been set aside. In this perspective, whether the order survived for eight days (as in this case) or six years (as in the cited case) does not affect the jurisdiction of the said Court but is an issue on merits which is to be considered by the trial Court while arriving at a final decision.

23. Similarly in [Samee Khan Vs. Bindu Khan](#), while deciding the scope and object of an application under Order 39, Rule 2A, the Supreme Court made a distinction between Order 21, Rule 32 and Order 39, Rule 2A of the CPC in the following words:--

But once the decree is enforced the judgment-debtor is free from the tentacles of Rule 32. A reading of that Rule shows that the whole operation is for enforcement of the decree. If the injunction or direction was subsequently set aside or if it is satisfied the utility of Rule 32 gets dissolved.

But the position under Rule 2-A of Order 39 is different. Even if the injunction order was subsequently set aside the disobedience does not get erased. It may be a different matter that the rigour of such disobedience may be toned down if the order is subsequently set aside.

24. Highlighting the penal consequence in the said provision, the Supreme Court elucidated:--

Thus even under Order 39, Rule 2-A the attachment is a mode to compel the opposite party to obey the order of injunction. But detaining the disobedient party in civil prison is a mode of punishment for his being guilty of such disobedience.

25. Hence, in Samee Khan's case too the Apex Court held that subsequent setting aside of an order of injunction which is alleged to be violated is not a jurisdictional issue but would only be relevant in toning down the rigours of such violation.

26. In the case of [The State of Bihar Vs. Rani Sonabati Kumari](#), this issue did not fall for decision at all. The issue before the Supreme Court in that case was whether a State Government could be proceeded against under Order 39, Rule 2(3) of the Civil Procedure Code. Even while dealing such issue, the Supreme Court recognised that "undoubtedly proceedings under Order 39, Rule 2(3) of CPC have a punitive aspect,.

27. Further at paragraph 44 of the said judgment, the Supreme Court clearly observed that it was the duty of all persons bound by an order of injunction to obey the order so long as it stands since disobedience of the same would tend to the subversion of orderly administration and civil Government.

28. In the case of Harsh Kumar v. Soma Dey & Ors., Reported in 1997 (2) CHN 182 : (1997 Cri LJ 4615), cited by Mr. Mookherjee, it appears that no law has been discussed or declared therein and the said case was decided on its facts. Hence, I am persuaded to follow the ratio laid down by the Supreme Court in Tayabbhai and Samee Khan's case to decide the present issue before me.

29. The ratio of the aforesaid decisions leave no room for doubt that the Courts have jurisdiction to entertain and proceed with an application under Order 39, Rule 2A even if the order of injunction (alleged to be violated) is subsequently set aside or it is found that the Court lacked jurisdiction to entertain the suit. To hold anything to the contrary would seriously erode the dignity and authority of the Court and would tend to subvert orderly administration and civil governance. Judged from this angle, I am of the opinion that the existence of power u/s 10 of Contempt of Courts Act, does not denude the jurisdiction of the Court to deal with "past breaches" of its own orders although the said order presently may not be in existence.

30. I further hold that neither the provisions of Order VII, Rule 11 of the CPC nor the principles analogous thereto can be applied to dismiss the instant Misc. case. The

averments in the application under Order 39, Rule 2A of the CPC clearly disclose a cause of action for entertaining and proceeding with the same. The ratio in the case, reported in [T. Arivandandam Vs. T.V. Satyapal and Another.](#), does not appear to be applicable in the present factual matrix.

31. That apart, the said Misc. case is at a matured stage. In fact, evidence of opposite party witness (OPW No. 1) is in progress. The petitioner/defendants had submitted to and were participating in the proceeding for the last four years. Only at a belated stage, the petitioner/defendants have filed the application u/s 151 of the CPC for dismissing the said Misc. Case. Powers under Article 227 of the Constitution of India being discretionary in nature, I do not feel that an interference is called for at this belated and ripe stage of the said proceeding pending before the trial Court.

32. I am also in agreement with the submission advanced by Mr. Sen that the issues of fraud and suppression as raised before the trial Court are mixed questions of law and fact and can only be decided at the final hearing of the matter.

33. I am, therefore, not inclined in exercising the powers under Article 227 of the Constitution of India to set aside the impugned order or to dismiss the said Misc. case.

34. I, however, hasten to point out that I have not considered the issue whether the order of injunction was procured on the basis of fraud or misrepresentation/suppression of material facts on merits. I further hold that the conduct of the parties in the instant and related proceeding and the subsequent vacation of the ex parte ad interim order and stay of the civil suit, though not jurisdictional facts, are relevant and germane issues to be considered by the trial Court while finally disposing of the said Misc. case.

35. I dispose of the instant application by directing that the issues raised before this Court as well as the trial Court in the application u/s 151 of the CPC are kept open and may be agitated by the petitioner along with any other issue that may be available to them and the trial Court shall dispose of the application under Order 39, Rule 2A of the CPC positively within a month from the date of communication of this order without being any way influenced by any finding or observation made by it in the impugned order dated 11-2-2011.

36. There shall be no order as to costs.

37. Urgent certified photostat copy of this order be given to the parties, if applied for, subject to compliance with all necessary formalities.