

B.L. and Co. and Others Vs. Pfizer Products Incl.

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Court : Delhi

Decided On : Jun-30-2001

Reported in : 93(2001)DLT346

Judge : Manmohan Sarin and; J.D. Kapoor, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rules 1, 2, 3 and 4

Appeal No. : FAO(OS) No. 276 of 2001

Appellant : B.L. and Co. and Others

Respondent : Pfizer Products Incl.

Advocate for Def. : Mr. C.M. Lal, Adv.

Advocate for Pet/Ap. : Mr. Kapil Sibbal and; Mr. Rajiv Nayyar, Sr. Advs.,; Ms. Rub

Disposition : Appeal allowed

Judgement :

ORDER

Manmohan Sarin, J.

1. The appellants have preferred this appeal, assailing the ex parte order dated 1.6.2001, passed by the learned Single Judge by which the appellants have been

restrained from manufacturing, marketing their medicinal product 'PENEGRRA'. The ex parte order had been passed on the application of the respondent under Order XXXIX Rules 1 and 2 CPC in a suit for injunction and damages for passing off, instituted by the respondent. The operative part of the order dated 1.6.2001 is as under:

'I am satisfied that the plaintiff has made out a case for ex parte injunction. The defendants, its directors, principals, proprietors, franchises, representatives and assigns are restrained from producing, manufacturing, advertising, promoting, displaying for sale, offering for sale, sale, or distributing any articles of merchandise, or for any purposes whatsoever, the trade mark VIAGRA or any colorable imitations thereof or any mark confusingly or deceptively similar thereto, with the blue trade dress including the distinctive blue diamond shaped tablet or any other tablet trade dress that is confusingly similar thereto, or in any other manner whatsoever from passing off their goods as and for the goods of the plaintiff.

Provisions of Order XXXIX Rule 3 CPC be complied within one week.'

2.(i) The respondent instituted suit bearing No. 1165/2001, claiming to be a global research based pharmaceutical company, which had in 1998 introduced a revolutionary product 'sildenafil citrate' for the treatment of the male erectile dysfunction (ED), referred to as impotence.

(ii) The respondent has been marketing and selling it under the trade name 'VIAGRA'. Respondent claimed that VIAGRA is a fanciful and coined word that was created by the respondent. The trade mark had inherently become distinctive both to the trade and the consuming public world wide. The respondent claims that 'VIAGRA' had become the most widely used treatment for erectile dysfunction (ED) and by end April, 2001 it had been prescribed more than 40 million times to more than 13 million men world wide. It was averred that the drug under the trade mark 'VIAGRA' is sold in more than 100 countries. The world wide revenue from sales was claimed to be in the range of US \$ 1344 million in the year 2000.

(iii) M/s. Pfizer Inc., the proprietor of trade mark 'VIAGRA' vide an assignment deed dated 3.6.1999 for a consideration of US \$ 100 assigned the said trade mark for India to the respondent herein and plaintiff in suit. An application had been submitted for registration of the trade mark 'VIAGRA' in India which is pending with the Registrar of trade mark.

(iv) It is averred that the trade mark ' VIAGRA' has been registered and/or is pending registration in 147 countries. It has been extensively advertised in International Magazines, medical books and journals, which were circulated and read in India also widely. The product of respondent with trade mark 'VIAGRA' had received extensive publicity and media attention in India. It is claimed that despite respondent not having commenced marketing or selling 'VIAGRA' in India, by virtue of extensive use world wide, it has become famous in India also and was associated only with products/goods of respondent.

(v) It is claimed in the suit that the fame and good will of respondent was not just limited to the trade mark 'VIAGRA', but also extended to the unusual and unique diamond shape and blue colour of the tablet.

3. The respondent averred in the suit that the defendants /appellants had introduced a product under the name 'PENEGR' some time in January, 2001. It is claimed that the respondent/appellant learnt of the same through an internet search recently done. Respondent came across numerous reports of the appellants product being described in the media as 'INDIAN VIAGRA'. It is claimed that the trade mark 'PENEGR' was deceptively and confusingly similar to the respondents renowned mark 'VIAGRA' and had been deliberately chosen with a view to deceitfully cash upon the good will and reputation of the respondents. Besides it is claimed that the blue shape tablet had been copied. Respondent also claimed that the appellants had launched a website under the domain name [www. 'PENEGR' .com](http://www.PENEGR.com). Several features of this website had been directly lifted and copied from the respondent's website.

4. Based on the above averments the respondent sought a restraint on the appellants from manufacturing, selling or offering for sale any article of merchandise with the VIAGRA trade mark or any colorable imitations thereof or

any mark confusingly or deceptively similar thereto, but not limited to the name PENEGR. Rendition of accounts was also claimed. Respondents indicated that they expected to be entitled to an amount in excess of Rs. 50 lacs.

5. The appeal had come before the Bench on 22.6.2001, when show cause notice was issued, which was accepted on the same date by the counsel for the respondents. The appellant was posted for hearing on 27.6.2001. Reply and note of written submissions has been filed by respondent.

6. The challenge to the impugned order by the appellant may be categorized under the following main heads for facility of reference.

(i) Impugned order of restraint has been passed in negation of well settled principles of grant of ex parte injunction. The factum of appellant successfully manufacturing and selling its product under its mark 'PENEGR' with the existing shape, colour and design of wrappings and packaging for the last 5 months to the knowledge of respondent does not appear to have been considered or given the consequential legal effect.

(ii) The absence of launch, marketing and sale of its product 'VIAGRA' by and through the respondent in India, especially in an action for passing off as opposed to one for infringement of trade mark does not appear to have been considered. Passing off action generally presupposes the availability of product of the plaintiff, which was missing in the instant case. This rendered chances of alleged deception and passing off remote.

(iii) Respondent did not discharge the initial burden of showing that the mark, used by the appellant so nearly resembled the trade mark of respondent as was likely to deceive or cause confusion. This was especially so since the marking, packing and wrappers of the two products were strikingly different.

(iv) The learned Judge erred in not noticing that the balance of convenience was in favor of the appellant. The need of the appellant to be protected against injury on being prevented from exercising its legal rights was far more than the need to protect the respondent who could be compensated adequately by damages.

(v) Delay in seeking the injunction was fatal as far as grant of ex parte restraint was concerned.

(vi) The impugned order was passed in contravention of provisions of Order XXXIX rule 3, CPC. Impugned order does not record the reasons for satisfaction, that the object of injunction would be defeated if ex parte restraint was not granted. The impugned order in addition does not record either the respondent having a prima facie case or the balance of convenience being in its favor.

7. At this stage, before considering the appeal on merits, an objection raised by respondent to the entertainment of the appeal may be considered. Mr. Chander M.Lal, learned counsel for the respondent submitted that upon grant of ex parte injunction on 1.6.2001, notice had been issued for the 11 June, 2001. On the said date, counsel for appellant no.2 appeared. A direction was issued for supply of paper book to appellant no.2 within 2 days. Time was sought for filing of written statement, which was directed to be filed within 2 weeks. Case was adjourned to 10.7.2001 and interim order was continued. In -stead of filing the written statement and reply, the appellant has chosen to file this appeal, while the learned Single Judge is seized of the same. He submitted that in these circumstances, the appeal ought not to be entertained. He urged that by filing this appeal, the appellant are attempting to frustrate the hearing before the learned Single Judge on 10.7.2001. Learned Counsel for the respondent submitted that two other similar suits were also listed before the Single Judge on 11.7.2001.

It is true that a party can move an application under Order XXXIX Rule 4 CPC for vacation or variation of the ex parte order, in case of any concealment or willful misrepresentation. However the the pendency of the matter before the Single Judge would not preclude the right of a party to challenge an ex parte order in appeal. Even though matter is pending before the learned Single Judge, if the urgency and circumstances so justified such an appeal would be entertained. We find that in the instant case, by an ex parte order the production and manufacture of a drug which the appellant had launched after development and clinical trial etc. of over a year has been brought to a halt. Appellant claims monthly sales of Rs. 80 lacs. The damage to the appellant's good will and reputation and market share

could be irreparable. We find this to be an appropriate case where the appeal against an ex parte order, despite the matter being fixed before the learned Single Judge in the near future, deserves to be entertained.

8. Learned senior counsel for the appellant Mr. Sibal submitted that ex parte order had been granted of inter-locutory injunction. Further the impugned order did not consider the effect of absence of marketing, sale and availability of the product 'VIAGRA' of the respondent necessary in a passing off action. It is stated that appellant No.1 is a retailer chemist while appellant No.2 is a well established reputed pharmaceutical company. Appellant No.2 is a market leader in pharmaceutical in India. Appellant No.2. Mr. Sibal submits that the appellant No.2 had been carrying out extensive trials and research since April, 2000 for their products 'PENEGRAS' containing the Chemical 'sildenafil citrate'. After successful clinical trials, appellant No.2 was granted a drug license and it commenced manufacture with the first sale itself being on 9.1.2001. Mr. Sibal stated that in January, 2001 itself the sales of 'PENEGRAS' product of the appellants had touched Rs. 26 lacs and at present were approximately Rs.80 lacs p.m., growing from month to month. The appellant has been manufacturing and marketing this drug for 5 months, when the respondent instituted the present suit and obtained the ex parte restraint order.

Learned counsel submitted that the respondent was fully aware all through of the appellant's research activities and its plans for introducing its product 'PENEGRAS' in India. The development had commenced in April, 2000 and the same had been the subject matter of several articles in the media, health magazines etc. The respondent has belatedly filed the suit without even serving a notice. The suit was filed after a gross delay, which itself disentitles it from obtaining an ex parte injunction. Significantly the respondent though claiming, immense good will for its product 'VIAGRA', immense good will for its product 'VIAGRA', admits that the same has not been introduced, marketed or sold in India by it. The respondent in the voluminous documents filed along with the suit has not shown a single advertisement or any invoice of the same in India. Mr. Sibal submitted that the respondent's drug VIAGRA is not available through the respondent in India. Besides the drug happens to be a schedule H drug, which can be sold only on the

prescription by a Doctor. Further in the case of 'sildenafil citrate' as per the instructions of the Drug control authorities in India, it is only a urologist, psychiatrist or endocrinologist, who can prescribe the said drug and not every physician. Hence the chances of any deception or confusion are far remote.

Learned counsel next submitted that on the respondent's own admission as contained in the plaint and evident from the documents filed with the plaint, it was clear that the plaintiff knew all along about the development plans of the appellants and the introduction and commencement of manufacture. He referred to document at page No.5 of the documents wherein the respondent's Vice President, Mr. S. Ramakrishna is quoted in respect of marketing of 'VIAGRA' in India. An extract from the said report is as under:

But despite the apparent demand, the Pfizer drug company that VIAGRA is not yet ready to enter the market. Another leading newspaper the Hindustan times quoted Mr. S. Ramakrishna Vice President (Corporate Affairs) of Pfizer as saying

'I would say that India is still not prepared for the drug (Viagra). The launch of this kind of a drug in any market requires an enormous amount of investment which has not been done here (in India) so far.'

'And the clones Viagra has spawned in India do not worry the Company. 'We are not perturbed by the launch of Viagra's clones in the India market. It will never be too late for us to launch the original Viagra in India.' Ramakrishna added.

Mr. Sibal submitted that from the foregoing it would be apparent that the respondent themselves realised that launching of their product in India would require enormous investment and it chose to wait. On the other hand, appellant invested for development of the market for its drug, advertising for the same and launched it after obtaining necessary approvals. It is rather the respondent who is acting out of malice with a view to frustrate the success obtained by the appellant. In the beginning of January itself, it was widely reported in the media and that the Government had approved and granted permission to Zydus, Cadila as well as Torrent pharmaceutical for manufacture of the said drug. Learned counsel submitted that assuming but not admitting that the delay was not fatal to the suit

based on a cause of action for passing off on the basis of trans-border good-will and reputation, the conduct of respondent disentitled it to obtain an ex parte restraint against appellants, who had been marketing and selling their product PENEGRRA in India, especially when the respondent's drug was neither marketed nor sold or available through them in India.

Learned counsel in this connection placed reliance on *Wander Ltd. Vs . Antox India Pvt. Ltd* reported at , to which we shall advert later. Reliance was also placed on *The Financial Time Ltd. v. Evening Standard Co. Ltd.* reported at *Fleet Street Reports (1991)* page 7 and *The Boots Company Limited v. Approved Prescription Services Limited* reported at *Fleet Street Reports (1988)* page 45. He further submitted that respondents' action was not for infringement but for passing off, which normally pre-supposes availability of the other product. Learned counsel also submitted that there was no possibility of any deception or confusion on account of the price structure also. While the appellant's drug 'PENEGRRA' was priced at Rs. 18/- per tablet, respondent's product was priced approximately at \$ 10. In fact the non-feasibility of selling the respondents products at Indian prices was one of the factors for its non-introduction in India.

9. Learned counsel for appellant submitted that respondent had failed to discharge the initial burden of showing that the mar of appellant so nearly resembled the trade mark of respondent so as to deceive or cause confusion. There was no deceptive similarity. The pronunciation of word 'PENEGRRA' and 'VIAGRA' was altogether different. The words were neither similar in look nor in sound. The presence of suffice 'gra' will not make both the words nearly similar or deceptively similar. There was no phonetic or literal similarity which could cause confusion. Learned counsel also produced in court the original products with the packings and wrappings to urge that there were no deceptive similarities between the two. He submitted that respondents product itself was sold even in different packings and in bottle also. While the appellants product was not sold in any bottle and even the wrappings and blister packing was totally different. He urged there could be no scope of any confusion. The appellants packing carried as a photograph of a couple on the right corner. It did not have a blue strip covering on the left of the box, which was one of the distinctive features of the appellant's packing. The

blister strips of the appellant carried the trade mark PENEGRA and Zydus Alladc,, which were the trade names of the appellants; with which its products were associated in India. He submitted that the packings were of different sizes and the tablets also, though having the blue colour, the same was of a different shade, the shape of the tablet was also not diamond shape as is the respondent's product.

Learned counsel for the respondent refuted the submissions and laid emphasis on the blue colour of the tablet, diamond shape having been copied, which itself apart from other similarities was sufficient to cause deception and confusion. We have looked at the original products and their packings.

The submissions of the learned counsel for the appellant require consideration and cannot be said to be devoid of merit as several striking dissimilarities appear to be apparent. We are refraining from expressing any opinion on this aspect, since the learned Single Judge is yet to dispose of the injunction application Under Order XXXIX Rule 1 and 2 CPC and we are confining ourselves to the order granting ex parte restraint.

10. Learned counsel for the appellant submitted that the balance of the convenience was entirely in favor of the appellant. The respondents action was intended to disturb and interrupt the life cycle of the appellant's product, the demand for which has been growing from month to month. The respondent was a foreign entity having no stake and no accountability in India, while the appellant was incurring huge losses by the restrain order. In case respondent was to succeed ultimately in the suit, he could be adequately compensated for alleged loss of profit or good-will by damages. The need of the appellant, who had been manufacturing its product for 5 months for protection, from injury by restraint order, was far greater than that of respondent. The appellant stood to lose its market share for its product and good-will, which it had assiduously built. There would be loss of confidence. Be-sides non-availability of the drug would cause inconvenience to the users and members of public. Restraint on the appellant was even against public interest.

11. Learned counsel next submitted that the delay of over 5 months in institution of the suit despite the admitted knowledge about appellants, manufacturing and

selling its product under the trade mark 'PENEGRA' with the existing blister packing was fatal as far as grant of ex parte restrain was concerned. He placed reliance on 'The Law of passing off' by Christopher Wadlow. Reference was also made to the decision in *The Financial Times Ltd, v. Evening Standard Co.* reported at Fleet Street reports (1991) page 7, where a delay of few days was considered critical and adversely commented upon.

12. Lastly, learned counsel for the appellant urged that the impugned order was liable to be set aside as it failed to comply with the provisions of Order XXXIX Rule 3 CPC in as much it did not record the satisfaction of the court that the object of granting injunction would be defeated by the delay if notice was given.

13. Learned counsel for the respondent vehemently opposed the appeal. He submitted that the appellants deceitfully wanted to encash on the good-will and marketing of the respondent's product 'VIAGRA' which could not be permitted. He reiterated the case of respondents as set out in the plaint with regard to the world wide and international reputation which the respondent's product had acquired. It is not necessary to note the several authorities relied on with regard to the maintainability of an action for passing off and damages, even in the absence of physical trading. In the days of international trade it was urged that the good will strolls over international boundaries and the reputation is sufficient to warrant an injunction. No trading was required in a country of action before good-will could be said to exist. He submitted that apart from the deceptively similar trade mark which was liable to cause confusion, the dishonest conduct of the appellant was apparent from its adapting the unique blue colour and diamond shape of the tablet of the respondent. The whole intention was to pass off product of the appellant as that of the respondents. He further submitted that the dishonest conduct was further evident from the act of the appellant in copying and adapting the material in almost identical terms from the website of the respondent. He argued that the order passed by the learned Single judge was fully justified and warranted ex parte injunction in these circumstances. He further submitted that the physical presence or sale of the produce was no essential and place reliance on a decision of the Division Bench of this Court in *N.R. Dongre and others Vs . Whirlpool Corporation* another : (1996)5SCC714 . Reliance was also placed on *Daimler Benz*

Aktiegesellschaft and another v. Hybo Hindustan reported at 1994 PTC 287.

14. Learned counsel for the respondent next contended that the learned Single Judge was seized of the matter and the issued with regard to deceptive similarity of the trade mark and the packaging as well as the colour and shape of the tablets were to be argued and canvassed before him. He further submitted that the Appellate Court should not interfere with the discretion exercised by the learned Single Judge in granting ex parte stay unless it is shown that discretion has been exercised arbitrarily, capriciously or perversely or where the court was ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. Reliance was placed on Allied Nippon Ltd. and another v. Allied Motors reported at 1999 PTC (19) 425. He further urged that the Appellate Court would not take into consideration any new material and that the hearing in appeal should be confined to finding out whether the original court was justified or not in granting ex parte order of injunction on the material available before it.

Regarding the respect of delay learned counsel submitted that the delay was not of 5 or 6 months as contended. He submitted that it was only recently that the respondents while doing an internet search came to know about the launch of the product of the appellant in January 2001. He submitted that there were several decisions where delay of over a year even had not been held to be fatal.

15. Learned counsel also argued that it was common knowledge that despite products being schedule H drugs, they could be obtained over the counters. This factor alone cannot be taken as a factor to decline an ex parte relief to the plaintiff. Learned counsel painstakingly argued that the Appellate Court if it is persuaded to take a different view, which might be another possible view, the same would not be ground for interference in the exercise of discretion of the learned Single Judge. He submitted that the Appellate Court should not look into the case which the appellant might set up as defense to that of the respondents. The appropriate stage for that would be when the appellant files that written statement and appears before the learned Single Judge. He submitted that there was no such unwarranted delay which disentitled the respondent from the relief. He prayed for dismissal of the appeal.

16. Having heard the learned counsel for the parties and the submissions made and analysed above we find merit in the Appeal filed by the appellants. The impugned order does not appear to have considered or taken note of relevant factors for grant of ex parte restraint; i.e. the appellants had launched their product PENEGR and had been manufacturing and marketing the same since January, 2001 while the respondents product had neither been introduced, nor marketed nor sold by them.

Even if the monthly sale figures of the product PENEGR, as submitted by the appellants in Appeal were not to be considered on the ground that this material was not on record before the Single Judge, yet based on the documents filed by the respondents itself the following stands admitted:-

- i) There was an ever growing demand for such product as recognised in the media reports and surveys to the knowledge of the respondent.
- ii) Government approvals had been obtained for manufacture by the appellant and other manufacturers.
- iii) The respondents, on their own admission, were not unduly concerned or worried on this account. The respondents of their own volition preferred not to enter the market as they believed that they could do so at any subsequent stage without any disadvantage.
- iv). The learned Single Judge erred in not noticing this aspect and passed an ex parte order without taking this into account.

That the aforesaid factor and consideration is a relevant one, is recognised by the Hon'ble Supreme Court in Wander Limited and another Vs . Antox India Pvt. Limited reported as . The Supreme Court observed:-

Usually, the prayer for grant of an interlocutory injunction is at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and

discretionary. The object of the interlocutory injunction, it is stated.

'... is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where the 'balance of convenience' lies.'

The interlocutory remedy is intended to Preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those apply to a case where the defendant is yet commence his enterprise, are attracted.'

17. As regards the delay in institution of the suit and its effect for the purpose of grant of ex parte restraint, the settled legal position is that while the delay in institution of a suit for an action for passing off may not be fatal, it is one of the important and relevant considerations before granting an ex parties/interlocutory injunction. Reference in this regard is invited to the 'THE LAW OF PASSING-OFF' by Christopher Wadlow. Learned Author while dealing with the motions of interlocutory relevance has observed as under:-

'Delay in applying for interlocutory reliefs is a very serious matter. As a rule of thumb, delay of up to about a month, or perhaps six weeks, generally has no adverse effect on an inter parties application and delay of up to twice that period need not be fatal if it can be explained and the plaintiff's case is otherwise strong. On an ex parte application even delay of a few days can be critical. Unjustified delay of more than a few months is almost always fatal to the plaintiff's case, even though delay of this order has no effect on the plaintiff's rights at trial. Unlike many

of the issues which can arise on motion, the existence of delay does not normally admit of much argument. Delay, if present, is therefore a short, safe and simple basis for refusing relief. This means that applications for interlocutory injunctions in which there is significant delay are unlikely even to get as far as a hearing, and those that do are quite likely to be refused without going into the merits or the balance of convenience.'

18. The above observations apply appropriately to the instant case. We may also observe that there is no merit in the respondent's contention that it only recently came to know of the appellant's launch of its product PENEGR in January, 2001. The respondent claims to be a multi-national Corporation with turn over in Billions of Dollars with its products being sold in over 147 countries in the world. Such a Corporation can be expected to have its extensive communication network where it constantly surveys the markets and devises its future plans and strategies. In these facts, it is idle to contend that it was only in a recent internet search that the respondent learnt of the launch of the appellants product in January, 2001. In fact the respondent's own documents belie this assertion as its Vice-President (Corporate) issued the Statements, wherein he commented on the launch of similar products as that of the respondent's VIAGRA and commented that such products pose no danger any they could enter the market at any subsequent time. The respondents knew all along as is evident from the documents filed by the respondents on record of the launch of the appellant's product, but they chose to wait till the appellant had developed them for any year and had obtained the requisite permission for its manufacture. Even after commencement of manufacture, the respondents did not take action for nearly 5 months and came to the Court only on 31.5.2001.

19. We find merit in the submission of the learned counsel for the appellant that the respondents rather waited for the appellant to incur promotional and other expenses on trials etc. launching of the product and thereafter they chose to file the present suit perhaps with a view to stem the growing sales and market of the appellant's product. The factor of delay alone should have been sufficient to deny the respondents an ex parte restraint. The learned Single Judge erred in not noticing this aspect of the matter and passed an order of ex parte restraint which

was likely to cause irreparable injury to the appellants. Learned Single Judge in our view with respect, failed to consider the matter in the light of the above principles. Learned Single Judge did not take into account the factor that the respondents were neither marketing nor selling their product in India, while the appellant/defendant had been manufacturing and selling the same for over 5 months. Besides, the injury resulting to the appellant/defendant would be far greater than any possible loss or injury to the respondent for which the latter could be compensated. In these circumstances, no ex parte restraint was warranted in the light of the aforesaid discussion. This of course is not to undermine the appellant's case with regard to there being no deceptive similarity in the trade mark, packaging and shape of the tablet.

20. We also find merit in the submissions of the appellant that the learned Single Judge has erred in not complying with the provisions of Order 38 Rules 3 CPC. The impugned order does not disclose that the learned Single Judge has found prima facie a case in favor of the respondents or the finding with regard to the balance of convenience. The order also does not disclose or record the satisfaction of the learned Judge that the object of granting the injunction would be defeated by the delay entailed in giving of a notice. The general rule is that an interlocutory injunction should be granted only after hearing both the parties, but if it appears to the Court the object of granting injunction would be defeated by the delay the Court is empowered to pass an ex parte injunction. However the condition is that it shall record the reasons for its opinion that the object of granting the injunction would be defeated by the delay. This is followed by the requirement of sending the copies of the plaint, application and documents to the defendant within the period or as directed by the Court.

In a recently decided case, the Division Bench of this Court in case in FAO(OS) 249/2001 in M/s Spectrum Power Generation Company Limited v. Spectrum Technologies USA Inc. and others while dealing with the provisions of Order 39 Rule 3 CPC made the following observations:-

'Power to grant injunction was held to be 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. That is why Rule 3 of Order 39 of the Code requires that in all cases the court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that 'where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay'.

21. We may also note the observations of the Supreme Court in Shiv Kumar Chadha Vs . MCD & others : [1993]3SCR522 in this regard with the provisions of Order 39 Rule 3. The observations are as under:-

'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'. The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court 'shall record the reasons' why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and factors in the ex parte order'.

22. In the instant case we find that the learned Single Judge has not recorded the reasons for his satisfaction for the entitlement of the respondents to an ex parte restraint except observing that he is satisfied that a case for ex parte restraint is made out. The impugned order is, therefore, liable to be set aside on this ground also.

23. In view of the foregoing discussion we find that the impugned order is not sustainable and we set aside the same.

24. At this stage, we may also note that the learned counsel for the appellant with a view to demonstrate the appellant's bonafides has submitted that to dispel even the slightest doubt, the appellant No. 2 undertakes to change the colour of their tablet from BLUE to another colour henceforth. Further the appellants would also not use and display their website till it was modified to ensure that there is no substantial adaptation whatsoever from website of the respondents. Learned counsel further undertakes that the appellants would maintain records and file them in Court with regard to the manufacture and sales of their products PENEGR and abide by such directions as may be given by the Court.

25. We accept the above undertakings. The appellants shall duly file monthly statement giving details of the total number of PENEGR tablets manufactured in different strengths, prices thereof and the sales revenue there from.

26. The Appeal is allowed in the above terms. The record be returned to the learned Single Judge for disposal of the application under Order 39 Rule 1 & 2 CPC on merits. Any observation made herein shall not tantamount to expression of opinion on merits of the application before the learned Single Judge.