

**Albatross Pharma Vs. Cipla Limited**

**Albatross Pharma Vs. Cipla Limited**

**SooperKanoon Citation :** [sooperkanoon.com/703404](http://sooperkanoon.com/703404)

**Court :** Delhi

**Decided On :** Aug-23-2005

**Reported in :** 123(2005)DLT339; 2005(31)PTC551(Del)

**Judge :** B.N. Chaturvedi, J.

**Acts :** Companies Act; Code of Civil Procedure (CPC) - Order 39, Rule 3

**Appeal No. :** FAO No. 200/2005 and CM Nos. 9855-56/2005B.N. Chaturvedi, J.

1. Instant appeal embraces in its fold an issue relating to legal implication arising out of non- compliance with requirement of proviso to Order XXXIX Rule 3 CPC in regard to recording of reasons for grant of an ex parte ad interim injunction.

2. The appellant/defendant is aggrieved by an ex parte order dated 28th June, 2005 restraining it from manufacturing and selling etc. its pharmaceutical preparation under the trademark 'MINPECIA' or any other trademark which is identical or deceptively similar to respondent/plaintiff's trademark 'FINPECIA'. The aforesaid ex parte order was passed on a suit for permanent injunction against passing off and rendition of accounts etc. filed by the respondent/plaintiff, M/s Cipla Limited, a company incorporated under Indian Companies Act which adopted the trademark 'FINPECIA' in the year 1997 in respect of one of its pharmaceutical preparations and launched its pharmaceutical products under the said trademark in the month of June 1999. It applied for registration of the trademark 'FINPECIA' which is pending consideration. For the last five years the respondent/plaintiff is alleged to have been using its said trademark 'FINPECIA'

continuously and exclusively throughout India.

3. In the third week of November, 2004 the respondent/plaintiff came to know for the first time that the appellant/defendant was claiming to be using the trademark 'MINPECIA' in respect of pharmaceutical preparations, on receipt of a copy of a notice of opposition filed by it against respondent/plaintiff's application for registration of an identical trademark 'MINPECIA' made on 9th December, 1998. On receiving the said notice of opposition, Legal Department of the respondent/plaintiff telephonically got in touch with the proprietor of the appellant/defendant firm asking him to immediately desist from using the trademark 'MINPECIA'. It is alleged that the proprietor of the appellant/defendant firm assured that it would immediately stop further production of impugned pharmaceutical preparation and that old stocks would be exhausted in 6/7 months. The appellant/defendant is further alleged to have had also agreed to withdraw the opposition filed by it against registration of trademark 'MINPECIA' applied for by the respondent/plaintiff. On such assurance, it is pleaded, the respondent/plaintiff did not pursue the matter further as it was under the impression that the appellant/defendant would honour its commitments.

4. The appellant/defendant instead of acting on its aforesaid assurance rather filed a Civil Suit No. 6/2005 against the respondent/plaintiff in Ahmedabad District Court on 18th June, 2005 for restraint against passing off in respect of trademark 'MINPECIA' alleging that it had been using the trademark 'MINPECIA' since the year 2003. The respondent/plaintiff came to know about the pendency of the aforesaid suit on 18th June, 2005 on receiving summons with a copy of plaint from the Court of Addl. District Judge, Ahmedabad, Gujarat.

5. Finding that the appellant/defendant had gone back from its alleged commitment of discontinuing the manufacturing and marketing of the impugned pharmaceutical preparation, filed present suit on 16th June, 2005 in the District Court wherein impugned ex parte order came to be passed on 28th June, 2005. The appellant/defendant instead of moving the court concerned seeking vacation of impugned ex parte ad interim injunction preferred to file instant appeal.

6. In the course of hearing on appeal, learned counsel for the appellant/defendant assailed the impugned ex parte order solely on the ground that in view of respondent/plaintiff's own admission it had come to know of the use of trademark 'MINPECIA' by the appellant/defendant as back as in the third week of November, 2004 but did not choose to file any suit and it was only on appellant/defendant filing opposition to the application filed by respondent/plaintiff for registration of trademark 'MINPECIA' that it rushed to file the present suit and succeeded in obtaining an ex parte ad interim injunction against it even though there was no urgency to justify such an order without notice to it as required under Order XXXIX Rule 3 CPC. It was contended that the learned court below acted illegally by passing impugned ex parte order without recording its reasons for doing so as mandated by proviso to Order XXXIX Rule 3 CPC.

7. Learned counsel for the respondent/plaintiff sought to defend the impugned order by referring to a single bench decision of this court in Hindustan Pencils Pvt. Ltd. v. India Stationery Products Co. and Anr. (1989-PTC-61) as well as a Division Bench decision in Century Traders v. Roshan Lal Duggar & Co. PTC (Supp) (1) 720 (Del) . In addition, he also cited Supreme Court decisions in Midas Hygiene Industries Pvt. Ltd. and Anr. v. Sudhir Bhatia and Ors. : 2004(28)PTC121(SC) and Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. 2001 PTC 300 (SC) in support of his contention. Sudhir Bhatia's case (supra) was relied upon to counter the argument to the contrary advanced on behalf of appellant/defendant and to plead that delay in taking action is not sufficient to defeat the grant of injunction. Other decisions deal with law governing grant of temporary injunction and in none of these cases the ground on which the impugned order is being questioned was dealt with.

8. On delay in approaching the court for the relief of ad interim injunction and the guiding principles in relation to grant thereof, the learned counsel for the appellant/defendant particularly sought support from a Supreme Court decision in Morgan Stanley Mutual Fund v. Kartick Das, : (1994)4SCC225 . Besides, several other decisions in Century Traders v. Roshan Lal Duggar and Co., : AIR1978 Delhi250 , Cadila Laboratories Ltd. v. Dabur India Limited 1997 PTC (17), Biofarma and Anr. v. Sanjay Medical Store and Anr. 1998 PTC (18) , Himalaya

Drug Co. v. S.B.L. Limited 1996 PTC (16), F. Hoffmann La Roche and Co. Ltd. v. Geoffry Manners and Co. Pvt. Ltd. 1982 PTC 335, Khandelwal Laboratories Ltd. v. FDC Limited 2001 PTC 864 , Bloom Dekor Limited v. Subhash Himatlal Desai and Ors.; : (1994)6SCC322 , were also referred to in the course of arguments by learned counsel appearing for the appellant/defendant. No assistance can however, be derived from these decisions as well in resolving the issue on hand.

9. The precise plea raised on behalf of the appellant/defendant was that in the absence of any urgency and reasons recorded for its opinion that the object of granting injunction would be defeated by delay, the impugned ex parte injunction granted by the learned court below could not be sustained.

10 Relevant part of Order XXXIX Rule 3 CPC reads thus :

'Order XXXIX Rule 3. : Before granting injunction, Court to direct notice to opposite party -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 :

Provided 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....'

11. Rule 3 as a general rule provides for issue of notice to the opposite party before grant of an injunction. An exception is however made where it appears that the object of granting injunction would be defeated by the delay. But in such an eventuality, it is enjoined upon the Court to record the reasons for its opinion that the object of granting the injunction would be defeated by delay. This requirement of recording of reasons was held to be imperative in nature in Shiv Kumar Chadha v. Municipal Corporation of Delhi and Ors.; : [1993]3SCR522 . It was held that the requirement of recording the reasons for grant of ex parte injunction cannot be held to be a mere formality. It was observed :

'34 ...the requirement for recording the reasons for grant of 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 court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39....'

It was laid down :

'35. As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed....'

12. Here it appears appropriate also to take note of another decision of Supreme Court in A. Venkatasubbiah Naidu v. S. Chellappan and Ors; : AIR 2000 SC3032 wherein in the context of provisions of Rule 3 of Order XXXIX CPC the following observations were made :

'15. What would be the position if a court which passed the order granting interim ex parte injunction did not record reasons thereof did not require the applicant to perform the duties enumerated in clauses (a) and (b) of Rule 3 of Order 39. In our view such an order can be deemed to contain such requirements at least by implication even if they are not stated in so many words....'

13. It would thus appear that even if the reasons for granting ex parte injunction without notice to the opposite party are not recorded in so many words, the order can be deemed to contain the same by implication. The facts and circumstances of each case, would become relevant in finding if from the very nature of relief sought, an element of urgency was inferable so as to justify grant of an ex parte order without notice to the other side. In the present case, in terms of plaintiff's own admission it had come to know of appellant/defendant's claim regarding use of the trademark 'MINPECIA' in the third week of November, 2004 and thereafter its Legal Department got in touch with the proprietor of the appellant/defendant firm and allowed it 6/7 months time to exhaust its old stock under the trademark 'MINPECIA' on an assurance being given that the appellant/defendant firm would immediately stop further production of impugned pharmaceutical preparations. If the respondent/plaintiff could afford to wait for 6/7 months there was really no urgency for grant of impugned ex parte injunction without notice to the appellant/defendant. In the facts and circumstances, it is difficult to say that the delay of a week or two, in granting ex parte injunction would have defeated the object of grant of injunction. Thus even by implication no reason, which the learned Trial Court was otherwise required to record, could be deemed to exist to justify passing of impugned ex parte order.

14. In the result, the appeal has to be allowed and impugned order is liable to be set aside. Ordered accordingly.

15. Since the interim protection granted in favor of the respondent/plaintiff ceases to be available to it by virtue of impugned ex parte order being set aside, the learned Trial Court shall endeavor to expedite the disposal of the application, in accordance with law within a reasonable time frame.