

2009 (3) G.L.H. 49
M. R. SHAH, J.

3 I Infotech Cosumer Services Ltd.....Appellant

Versus

Gujarat Narmada Valley Fertilizers Co. Ltd. & Anr. ...Respondents

Appeal from Order No. 249 of 2009

With

Civil Application No. 7707 of 2009

In

Appeal From Order No. 249 of 2009

An appeal from Order against Ex-parte adinterim injunction granted by the Trial Court below Ex. 5 by Ld. Presiding Officer F.T.C. No. 2 Ahmedabad (Rural) in Regular Civil Suit No. 147 of 2009.

D/- 21.07.2009

CIVIL LAWS - Code of Civil Procedure, 1908 - O. 39, R. 3 - Ex-parte ad-interim injunction - Grant of - While exercising powers of granting Ex-parte ad-interim injunction, Trial Court is obliged to record the reasons for doing so - All the relevant factors including as to how the object of granting of injuction would be defeated if an ex-parte order is not passed should be taken into consideration by the Court - Mere forming an opinion and observing that the entire object of the suit shall stand defeated if Ex-parte ad-interim injunction is not granted, would not be sufficient.

Thus considering the aforesaid decisions of the Hon'ble Supreme Court as well as this Court, while exercising powers of granting ex-parte ad-interim injunction without notice or hearing parties who is to be affected by the orders so passed, not only the trial Court is obliged to record the reasons for doing so, however, the trial Court should take into consideration, while passing an order of injunction all the relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex-parte order is not passed. At that stage, mere forming an opinion and observing that the entire object of the suit shall stand defeated if the ex-parte ad-interim injunction is not granted, would not be sufficient but the learned Judge is required to record reasons for forming the said opinion. Under the circumstances, the ad-interim injunction without issuing notice upon the appellant - original defendant Nos. 1 and 2 and without recording any reasons for dispensing with the notice as required under Order 39 Rule 3 of the Code of Civil Procedure deserves to be quashed and set aside. ([Para 30](#))

Cases Referred:

1. Wander Ltd. and Another v. Antox India P.Ltd. 1990 (Supplementary) SCC 727 ([Para 12](#))
2. Dorab Cawasji Warden v. Coomi Sorab Warden and others (1990) 2 SCC 117 ([Para 12](#))
3. Shiv Kumar Chadha v. Municipal Corporation of Delhi & others (1993) 3 SCC 161 ([Para 12](#))
4. Nautamswami Guru Vasudev v. Harjihai Nanjibhai Bhimani. 2004 (1) GLR 827 ([Para 12](#))
5. Mrs.Vijay Srivastava v. Mirahul Enterprises and others. AIR 1988 Delhi 140 ([Para 12](#))
6. A.Venkatasubbiah Naidu v. S.Chellappan and others, (2000) 7 SCC 695. ([Para 21](#))
7. Binod Kumar Gupta and others v. Rajendra Prosad Shukla, AIR 2003 Calcutta 68 Relied ([Para 22](#))
8. Talod Gruh Udhyog v. Bahuchar Gruh Udhyog 2009(1) GLH 229 ([Para 36](#))

Appearances :

Mr. Mihir Thakore With Mr. Bijal Chhatrapati For Singhi & Co. for Appellant 1
Mr.P. K. Nanavati With Mr. K. S. Nanavati For Nanavati Associates for
Respondent : 1 None for Respondent : 2

PER : M.R. SHAH, J. :-

1. ADMIT.
2. Mr.P.K.Nanavati, learned Advocate appearing with Mr.K.S. Nanavati for Nanavati Associates, who is on caveat waives the service of notice of admission on behalf of the respondent No.1 - original plaintiff.
3. With the consent of the learned Advocates appearing on behalf of the respective parties and in the facts and circumstances of the case and as the Appeal From Order is against the ex-parte adinterim injunction granted by the learned trial Court and next date of hearing of the application Ex.5 before the learned trial Court is 27/7/2009, the present Appeal From Order is taken up for final hearing today.
4. Heard Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant - original defendant No. 1 and Mr.K.S.Nanavati, learned senior Advocate appearing on behalf of the respondent No.1 - original plaintiff extensively and at length.
5. Present Appeal From Order under Order 43 Rule 1 of the Code of Civil Procedure has been preferred by the appellant - original defendant No.1

challenging the impugned ex-parte adinterim injunction granted by the learned Presiding Officer, FTC No.2, Ahmedabad (Rural) dtd. 13/7/2009 below application Ex.5 in Regular Civil Suit No. 147 of 2009, by which, the learned trial Court has granted ex-parte ad-interim injunction in terms of para 57(c) of the application Ex.5, by which the defendants are restrained and directed to remove from its website on the Internet, Intranet or any other Computer Network its present CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application Form for applying for Digital Signature Certificate or any document substantially and/or materially similar to the plaintiff's CPS, Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement and Application form for applying for Digital Signature Certificate till 27/07/2009, which according to the appellant herein - original defendant No.1 is mandatory in nature.

6. The respondent No.1 - original plaintiff (hereinafter referred to as "the plaintiff") has instituted Regular Civil Suit No. 147 of 2009 in the Court of learned District Judge, Ahmedabad (Rural) against the defendants alleging copy right infringement and praying, inter-alia for an order of injunction restraining the appellant - original defendant No.1 and respondent No.2 - original defendant No.2 from plaintiffs Certification Practice Statement, Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application Form for applying for Digital Signature Certificate or any documents substantially and/or materially similar to that of the plaintiff.

7. As the application Ex.5 is yet to be decided and disposed of by the learned trial Court, this Court is not further narrating the facts of the case. However, suffice it to mention that it is alleged by the plaintiff that the defendants have used computer, computer network, internet or other electronics means to download and/or copy right the plaintiff's CPS, Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application form for applying for Digital Signature Certificate and for again used computer or other electronics means to substantially and materially retained plaintiff's CPS, Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application Form for applying for Digital Signature Certificate and thus the defendants have used the computer and other electronics means in the illegal acts and piracy of copy right infringement. Thus, basically the suit is for infringement of copy right and for declaration and permanent injunction.

8. In the said suit, the plaintiff submitted application Ex.5 for interim injunction on 4/7/2009 and the same was placed before the learned trial Court for, preliminary hearing and/or first hearing on 13/7/2009 and the learned trial Court passed the following ex-parte ad-interim injunction and ordered to issue notice to the defendants on 27/7/2009:-

"Heard the learned Advocate for the plaintiff. Perused the Record and proceedings of the case. I have also read the citations of the Hon'ble Superior Courts cited by the plaintiff. The plaintiff has filed this application for getting injunction against the defendants till final disposal of the suit. The plaintiff is manufacturing and marketing operations by setting up in 1982 and since its inception, it has worked towards an extensive growth as a corporation. The plaintiff has submitted that the defendants have also copied the other said original literary works of the plaintiff such as the Local Registration Authority Agreement, the Subscriber Agreement, the Relying Party Agreement and the Application form for applying for Digital Signature Certificate. Therefore, the plaintiff has filed the suit for declaration, permanent injunction, rendition of accounts, delivery up, etc. and along with the suit the plaintiff has filed temporary injunction application Ex.5. Considering the facts and circumstances of the case, at this juncture it would be just and proper to partly allow this application and to grant ad-interim injunction as prayed for in para 57(c) of the application. Therefore, the defendants are hereby restrained and directed to remove from its website on the Internet, Internet or any other Computer Network its present CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application form for applying Digital Signature Certificate or any document substantially and/or materially similar to the Plaintiffs CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application form for applying Digital Signature Certificate till 27/7/2009. It is hereby also ordered to issue notice to the defendants returnable on 27/7/2009 on payment of P.F."

Being aggrieved by and dissatisfied with the impugned ex-parte ad-interim injunction granted by the learned trial Court below application Ex.5, the appellant -original defendant has preferred the present Appeal From Order.

9. Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant - original defendant No.1 has submitted that the impugned order passed by the learned trial Court granting ex-parte ad-interim injunction without even issuing prior notice is contrary to the provisions of Order 39 Rule 3 of the Code of Civil Procedure. It is submitted that the learned Judge has failed to comply with the mandatory provisions of Rule 3 of Order 39 of the Code of Civil Procedure. It is submitted that the ex-parte ad-interim injunction granted by the learned trial Court is mandatory in nature which ought not to have been granted by the learned trial Court ex-parte. It is submitted that the ex-parte injunction is an exception to the general rule being that the order be passed only after hearing both the parties. It is submitted that it is only in rare case where the Courts finds that the object of granting injunction would be defeated by delay, the Court can issue an injunction ex-parte, but that too only after recording reasons. It is submitted that as the agreements in question on the net by the defendant No. 1 are since the year 2008, it cannot be said that this is such a case where delay would have defeated the grant of injunction. It is submitted that as such no reasons are recorded by the learned trial Court

while granting ad-interim injunction to the effect that if the ex-parte ad-interim injunction is not granted, the object of granting injunction would be defeated by delay and therefore notice to the other-side is dispensed with prior to issuing of such an injunction.

10. Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant - original defendant No.1 has further vehemently submitted that even the learned trial Court has not recorded any prima facie finding with respect to the prima facie case, balance of convenience and irreparable loss while granting such an ex-parte ad-interim injunction which is mandatory in nature. It is further submitted that from the bare reading of the impugned order, it can be seen that there is no prima facie finding/observation of the learned Judge that he has considered both the agreements and that prima facie case of infringement of copy right has been made out which entitles the plaintiff to injunction/ ex-parte ad-interim injunction.

11. Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant - original defendant No. 1 has further submitted that the work of the appellant - defendant No. 1 is independent and not copies from plaintiffs work and the work of me defendant No.1 does not constitute infringement of plaintiff's work. It is submitted that, as such, the appellant is in the business of offering digital signature and solution and has been using the Certificate Practice Statement, Local Registration Authority Agreement. Subscriber Agreement, Relying Party Agreement, Application Form for applying for Digital Signature Certificate etc. since November,2008 and that the plaintiff is well aware of the said aspect but has chosen to approach the Court only now after a period of about eight months and that too choosing time when 31/7/2009 is nearer. It is submitted the fact that the plaintiff is aware about the appellant's activities is also evident from the documents at Sr.No.2 of the List of Documents produced by the plaintiff himself. It is submitted that the said document which is a profile of the appellant, has been downloaded by the plaintiff from the appellant's website as back as on 18/5/2009 and the plaintiff has been aware that the appellant provide E-Filing Facility for Income Tax Returns and the same is evident from the documents downloaded by the plaintiff on 10/6/2009, which is produced at [Sr.No.32](#) of the List of Documents filed by the plaintiff. Therefore, it is submitted that this being so, there was no urgency in granting the ex-parte adinterim injunction in favour of the plaintiff that too dispensing with the notice more particularly when the plaintiff has approached the Court after sizable delay. It is further submitted that even the application Ex.5 has been filed/verification has been done on 4/7/2009 and the learned Judge has passed the impugned order on 13/7/2009. It is submitted that if the plaintiff can wait for 9 days after filing the application Ex.5, in that case, the learned trial Court ought to have even issued short notice before granting such an ex-parte adinterim injunction and ought to have given opportunity to the defendants before granting such an ex-parte ad-interim inunction. Under the circumstances, it is submitted that the learned

Judge has committed an error in granting such an ex parte ad-interim injunction which is mandatory in nature.

12. Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant - original defendant No. 1 has relied upon the following decisions of the Hon'ble Supreme Court as well as the learned Single Judges of this Court:-

(i) 1990 (Supplementary) SCC 727 (relevant para 9) (Wander Ltd. and Another v. Antox India P.Ltd).

(ii) (1990) 2 SCC 117 (para 19 and 24) (Dorab Cawasji Warden v. Coomi Sorab Warden and others)

(iii) (1993) 3 SCC 161 (para 32) (Shiv Kumar Chadha v. Municipal Corporation of Delhi & others).

(iv) Unreported decision of the learned Single Judge (Coram : Hon'ble Mr.Justice J.M. Panchal, as the then he was) in Appeal From Order No.29 of 1994.

(v) 2004 (1) GLR 827 (para 5.2) (Nautamswami Guru Vasudev v. Harjibhai Nanjibhai Bhimani).

(vi) AIR 1988 Delhi 140 (Mrs.Vijay Srivastava v. Mirahul Enterprises and others).

13. Relying upon the decision of the Hon'ble Supreme Court in the case of Wander Ltd. and Another (supra), Mr..Mihir Thakore, learned senior Advocate appearing on behalf of the appellant - defendant No. 1 has submitted that as observed by the Hon'ble Supreme Court interlocutory remedy is intended to preserve in statusquo, the rights of parties which may appear on a prima facie case. It is submitted that the Hon'ble Supreme Court in the said decision has observed that the Court also, in restraining a defendant from exercising 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 that apply to a case where the defendant is yet to commence his enterprise, are attracted.

14. Relying upon the decision in the case of Dorab Cawasji Warden (supra), Mr.Mihir Thakore, learned Senior Advocate appearing on behalf of the appellant -defendant No.1 has submitted that as observed by the Hon'ble Supreme Court, relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status-quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally

done or the restoration of that which was wrongfully taken from the party complaining.

15. Relying upon the decision of the Hon'ble Supreme Court in the case of Shiv Kumar Chadha (supra), Mr.Mihir Thakore, learned senior Advocate appearing on behalf of the defendant No.1 has submitted that as observed by the Hon'ble Supreme Court in the said decision, power to grant injunction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. However, 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. It is submitted that as observed by the Hon'ble Supreme Court in the said decision, as provided under Rule 3 of Order 39 of the Code of Civil Procedure, 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.

16. Relying upon unreported decision of the learned Single Judge of this Court in Appeal From Order No.29 of 1994 it is submitted that as observed by the learned Single Judge where the Court proposes to grant an injunction without giving notice of the application to the opposite party, the Court must record the reasons for its opinion that the object of granting injunction would be defeated by delay. It is submitted that as observed by the learned Single Judge forming an opinion on the aforesaid aspect is not sufficient, but learned Judge has to record reasons for forming the said opinion.

17. Relying upon the decision of the Delhi High Court in the case of Mrs.Vijay Srivastava (supra), it is submitted that as held by the Delhi High Court, though there is no bar to the Court's granting interlocutory relief in the mandatory form, in doing so, the Court should act with greatest circumspection and such powers can be exercised only in rare and exceptional cases. A mandatory injunction can be granted on an interlocutory application only after notice to the defendant and after hearing the parties.

18. Making above submissions and relying upon the above decisions, Mr.Thakore, learned senior Advocate appearing on behalf of the defendant No.1 has submitted that the impugned ex-parte ad-interim injunction granted by the learned trial Court deserves to be quashed and set aside. It is submitted by him that the appellant - original defendant No.1 has no objection at all in fixing time schedule and directing the learned trial Court to decide and dispose of the application Ex.5 at the earliest. It is submitted by him that the appellant - original defendant No.1 shall serve reply to the application Ex.5 on the plaintiff and/or its Counsel on or before 24/07/2009 and file the same before the learned trial Court on 27/07/2009 and thereafter application Ex.5 can be directed to be heard at the earliest and within stipulated time as may be

directed by this Court. Therefore, it is requested to allow present Appeal From Order with suitable directions as narrated hereinabove.

19. Present Appeal From Order is opposed by Mr. K.S. Nanavati, learned Senior Advocate appearing on behalf of the original plaintiff. It is submitted that having perused the record and proceedings of the case when the learned Judge was satisfied that it is fit case for granting ad-interim injunction, as what is alleged is the infringement of the copy right and accordingly when the judicial discretion has been exercised judiciously, present Appeal From Order against the ex-parte ad-interim injunction may not be entertained. It is further submitted that all the agreements in question have been copied ditto-to-ditto from the agreements of the plaintiff and, therefore, when a prima facie case of infringement of copy right was made out, the learned Judge has rightly granted ad-interim injunction which is not required to be interfered with. It is submitted by Mr.Nanavati, learned Counsel appearing on behalf of the plaintiff that as such the impugned ex-parte ad-interim injunction cannot be said to be mandatory in nature, as by the impugned order the defendants are restrained and therefore, it cannot be said to be mandatory in nature as alleged by the defendant No.1.

20. Mr.Nanavati, learned Senior Advocate appearing on behalf of the plaintiff has further submitted that merely because the learned Judge has committed error and/or failed to record reasons for dispensing with the notice and recording finding that if the ex-parte ad-interim injunction is not granted, the same would defeat the purpose of granting ad-interim injunction, the plaintiff should not be made to suffer.

21. Relying upon the decision of the Hon'ble Supreme Court in the case of A.Venkatasubbiah Naidu v. S.Chellappan and others, reported in (2000) 7 SCC 695. Mr.Nanavati, learned senior Advocate appearing on behalf of the plaintiff has submitted that as observed by the Hon'ble Supreme Court in the said decision, no party can be forced to suffer for the inaction of the Court or its omission to act according to the procedure established by law. Therefore, it is submitted that not recording of the reasons as required under Order 39 Rule 3 of the Code of Civil Procedure, would not render the impugned order illegal. It is submitted that in any case, because of the omission on the part of the learned trial Court to record reasons, the plaintiff cannot be made to suffer. It is submitted that when the learned Judge has issued notice below application Ex.5 making it returnable on 27/07/2009 itself it is requested not to entertain the present Appeal From Order and not to disturb the ex-parte ad-interim injunction granted by the learned trial Court and has requested to relegate the parties more particularly defendant No. 1 to approach the learned trial Court and go for hearing of the application Ex.5. On the said aspect, Mr.Nanavati,learned Senior Advocate for the original plaintiff has relied upon two unreported decisions of the learned Single Judges of this Court rendered in Appeal From Order No. 350 of 2005 and in Appeal From Order No. 192 of 2008

and submitted that in both the aforesaid Appeal From Orders, which were against the ex-parte ad-interim injunction granted by the learned trial Court, the learned Single Judge did not interfere with the ex-parte ad-interim injunction and relegated the parties to approach the learned trial Court for hearing of the application Ex.5 within scheduled time.

22. Mr.Nanavati, learned senior Advocate has relied upon the decision of the Calcutta High Court in the case of Binod Kumar Gupta and others v. Rajendra Prosad Shukla, reported in AIR 2003 Calcutta 68, in support of his submission that omission to record reasons as provided under Order 39 Rule 3 of the Code of Civil Procedure and not containing reasons in detail is neither without jurisdiction nor in exercise of jurisdiction with material irregularity and therefore, not liable to be interfered with.

23. Mr.Nanavati, learned senior Advocate appearing on behalf of the original plaintiff has submitted that the original plaintiff has no objection and cannot have any objection in proceeding further with the hearing of the application Ex.5 and if suitable direction is issued directing the learned trial Court to decide and dispose of the application Ex.5 at the earliest and/or fixing some time bound programme. It is further submitted by him that the original plaintiff shall file rejoinder to the reply to the application Ex.5 submitted by the defendant No. 1 on 27/07/2009 itself and the learned trial Court may be directed to decide and dispose of the application Ex.5 at the earliest.

24. Heard the learned Counsel appearing on behalf of the respective parties at length.

25. Present Appeal From Order under Order 43 Rule 1 of the Code of Civil Procedure has been preferred by the appellant herein - original defendant No.1 challenging the ex-parte ad-interim injunction granted by the learned trial Court below application Ex.5 in Regular Civil Suit No. 147 of 2009. At the outset, it is required to be noted that the original plaintiff had instituted the aforesaid suit along with application Ex.5 on 4/7/2009 and the learned Judge has granted the impugned ex-parte ad-interim injunction on 13/7/2009 i.e. after a period of 9 days of instituting the suit and application Ex.5. By the impugned order, the learned trial Court has granted ex-parte ad-interim injunction in terms of para 57(c) of the application Ex.5, by which the respondents are restrained and directed to remove to from its website on the Internet, Intranet or any other Computer Network its present CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application Form for applying for Digital Signature Certificate or any document substantially and/or materially similar to the plaintiffs CPS. Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement and Application form for applying for Digital Signature Certificate. The impugned ex-parte ad-interim injunction granted by the learned trial Court below application Ex.5 is as under:-

"Heard the learned Advocate for the plaintiff. Perused the Record and proceedings of the case. I have also read the citations of the Hon'ble Superior Courts cited by the plaintiff. The plaintiff has filed this application for getting injunction against the defendants till final disposal of the suit. The plaintiff is manufacturing and marketing operations by setting up in 1982 and since its inception, it has worked towards an extensive growth as a corporation. The plaintiff has submitted that the defendants have also copied the other said original literary works of the plaintiff such as the Local Registration Authority Agreement, the Subscriber Agreement, the Relying Party Agreement and the Application form for applying for Digital Signature Certificate. Therefore, the plaintiff has filed the suit for declaration, permanent injunction, rendition of accounts, delivery up, etc. and along with the suit the plaintiff has filed temporary injunction application Ex.5. Considering the facts and circumstances of the case, at this juncture it would be just and proper to partly allow this application and to grant ad-interim injunction as prayed for in para 57(c) of the application. Therefore, the defendants are hereby restrained and directed to remove from its website on the Internet, Internet or any other Computer Network its present CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application form for applying Digital Signature Certificate or any document substantially and/or materially similar to the Plaintiffs CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application form for applying Digital Signature Certificate till 27/7/2009. It is hereby also ordered to issue notice to the defendants returnable on 27/7/2009 on payment of P.F."

Thus, considering the aforesaid ex-parte ad-interim injunction, it appears that the same is mandatory in nature. It is not in dispute that the aforesaid ad-interim injunction has been granted by the learned trial Court without issuing any notice upon the defendants. It is the case on behalf of the appellant - original defendant No.1 that the impugned ex-parte injunction granted by the learned trial Court without giving notice of the injunction application to the appellant and the respondent No.2, is in breach of the provisions of Order 39 Rule 3 of the Code of Civil Procedure. Considering the impugned order it also appears that while issuing the ex-parte injunction and dispensing with giving the notice of injunction, no reasons for its opinion that the object of granting injunction would be defeated by the delay, has been expressed by the learned trial Court. Order 39 Rule 3 of the Code of Civil Procedure expressly contemplates that "The Court shall in all cases except where it appears that object of granting injunction would be defeated by delay, before granting an injunction, direct notice of application for the same to be given to opposite party... provided that where it is proposed to grant any injunction without giving notice of the application to the opposite party, the Court shall record reasons for its opinion that an object of granting injunction would be defeated by delay." On bare reading of the impugned order, no such opinion is recorded by the learned trial Court to the effect that the Court is satisfied that if the ex-parte injunction is not granted, object of granting injunction would be defeated

by delay. Thus, the impugned order passed by the learned trial Court granting an ex parte ad-interim injunction without forming such an opinion and recording such reason is without complying with the mandatory provisions of Order 39 Rule 3 of the Code of Civil Procedure.

26. Mr.K.S. Nanavati, learned senior Advocate appearing on behalf of the original plaintiff, while relying upon the observations made by the Hon'ble Supreme Court in the case of A.Venkatasubbiah Naidu (supra) has submitted that it is the omission on the part of the learned trial Court to record the reasons dispensing with the notice as required under Order 39 Rule 3 of the Code of Civil Procedure and for such an omission on the part of the Court, plaintiff should not be made to suffer. Mr.Nanavati, learned senior Advocate appearing on behalf of the original plaintiff has submitted that as observed by the Hon'ble Supreme Court in the aforesaid decision "no party can be forced to suffer for the inaction of the Court or its omission to act according to the procedure established by law" and therefore, merely because the learned trial Court has omitted to record the reasons for dispensing with the notice before issuing ex-parte ad-interim injunction as contemplated under Order 39 Rule 3 of the Code of Civil Procedure, the plaintiff should not be made to suffer. The aforesaid submission seems to be attractive but has no substance at all. The entire judgement is required to be read as a whole. It cannot be disputed that any observations in the judgement is required to be considered in light of the controversy raised in the case. Any observation made by the Court in a Judgement is required to be considered with Reference to context and the controversy and the lis between the parties. The controversy before the Hon'ble Supreme Court in the said case was that whether a party can approach the appellate or revisional Court during the pendency of the application for grant or vacation of the temporary injunction? It was sought to be contended that only against the order passed under Rules 1, 2, 2(a), 4 or 10 of Order 39 of the Code of Civil Procedure, Appeal From Order Under Order under 43 Rule 1 of the Code of Civil Procedure would be maintainable and with respect to that context and controversy, the Hon'ble Supreme Court observed that no party can be forced to suffer for the inaction of the Court or its omission to act according to the procedure established by law and to that the Hon'ble Supreme Court has held and observed that in such circumstances, party which does not get justice due to the inaction of the Court in following mandate of law must have a remedy and accordingly the Hon'ble Supreme Court held that in a case where the mandate of Order 39 Rule 3 of the Code of Civil Procedure is flouted, aggrieved party shall be entitled to right of the appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction against the order remained in force. Considering the aforesaid decision of the Hon'ble Supreme Court as a whole, the Hon'ble Supreme Court has never held that even if in a case where there is a non-compliance of the Order 39 Rule 3 of the Code of civil Procedure and despite the fact that the learned trial Court has granted ex-parte ad-interim injunction dispensing with the notice of application, without recording the reasons as required under Order 39 Rule 3

of the Code of Civil Procedure, ex-parte ad-interim injunction can be held to be legal. If this contention is accepted, in that case, every party in whose favour an order has been passed in clear violation of the provisions of the law and without complying with the statutory requirement, he can say that it is the omission on the part of the Court for which he should not be made to suffer. Under the circumstances and considering the decision of the Hon'ble Supreme Court in the case of A.Venkatasubbiah Naidu (supra) as a whole, it can not be said that an absolute proposition of law has been laid down by the Hon'ble Supreme Court as sought to be canvassed on behalf of the plaintiff that irrespective of non-compliance of statutory requirement and the omission on the part of the trial Court to record the reasons as required under Order 39 Rule 3 of the Code of Civil Procedure, order passed by the learned trial Court is not required to be quashed and set aside on the ground that the plaintiff should not be made to suffer for such omission. Under the circumstances, the reliance placed upon the decision the Hon'ble Supreme Court in the case of A.Venkatasubbiah Naidu (supra) would not be of any assistance to the plaintiff.

27. Somewhat identical question came to be considered by the learned Single Judge of this Court (Coram : J.M. Panchal. J. as he then was) in Appeal From Order No.29 of 1994. In the case before the learned Single Judge, the Appeal From Order was preferred against ex-parte ad-interim injunction granted by the learned trial Court below application Ex.5 and in that case the learned trial Court granted exparte injunction without any prior notice of application to the defendants. In the case before the learned Single Judge, as such, the learned trial Court observed that if the urgent and immediate reliefs as sought are refused at this stage, the entire object of the suit shall stand defeated and hence, he dispenses with the notice and after recording the above, the learned trial Court granted ex-parte ad-interim injunction. Considering the above facts situation and the order passed by the learned trial Court, the learned Single Judge has observed as under:-

"except bald assertion in the order to the effect that if the urgent and immediate reliefs are refused at this stage the entire object of his suit shall stand defeated, the learned Judge has not given any reasons as to how and in which manner the object of filing of the suit was going to be defeated by refusal of mandatory ad-interim injunction without issuing notice to the other side. In the case of Shiv Kumar Chandra (supra), the Supreme Court has examined the scheme of provisions of order-39 rule-3 of the Code of detail and after noticing full effect of issuance of ex-parte ad-interim injunction without notice to the other side, the Supreme Court has laid down binding guideline to be followed by the Courts before exercising power of issuing ex-parte ad-interim injunction. As per the said decision where the Court proposes to grant an injunction without giving notice of the application to the opposite party the Court must record the reasons for its opinion that the object of granting injunction would be defeated by delay. In the present case the learned Judge has solely formed

an opinion that the entire object of the suit shall stand defeated, but the learned Judge has not recorded any reasons for forming the said opinion."

28. In the case of Shiv Kumar Chadha (supra), while considering the power of the Court to grant injunction more particularly, ex-parte injunction without notice or hearing the party who is to be affected by the order, in para 32 to 35, the Hon'ble Supreme Court has observed and held as under-

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

33. It has come to our notice that in spite of the aforesaid statutory requirement, the Courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the order side that Court has prejudiced the issues involved in the suit. According to us, this is a misconception about the nature and the scope of the interim orders. It need to be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the provision to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the Court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant.

34. The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said "the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite-party". 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. 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 of ex-parte injunction, cannot be held to be a mere formality- This requirement is consistent with the principles 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. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that Court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all. This principle was approved and accepted in well-known cases of Taylor V. Taylor and Nazir Ahmed V. Emperor. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke V. Govind Jyoti Chavare.

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. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

"Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion...."

An ex parte injunction should generally be until a certain day, usually the next motion day..."

29. Identical question came to be considered by this Court in the case of Nautamswami Guru Vasudev (supra), while considering the requirement to give notice to the opposite party before grant of injunction, the learned Single Judge has observed and held that ad-interim injunction granted by the learned trial Court without complying with the provisions of Order 39 Rule 3 and without recording reasons as to how the delay would frustrate the object of granting injunction deserves to be quashed and set aside.

30. Thus considering the aforesaid decisions of the Hon'ble Supreme Court as well as this Court, while exercising powers of granting ex-parte ad-interim injunction without notice or hearing parties who is to be affected by the orders so passed, not only the trial Court is obliged to record the reasons for doing so, however, the trial Court should take into consideration, while passing an order of injunction all the relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex-parte order is not passed. At that stage, mere forming an opinion and observing that the entire object of the suit shall stand defeated if the ex-parte ad-interim injunction is not granted, would not be sufficient but the learned Judge is required to record reasons for forming the said opinion. Under the circumstances, the ad-interim injunction without issuing notice upon the appellant - original defendant Nos. 1 and 2 and without recording any reasons for dispensing with the notice as required under Order 39 Rule 3 of the Code of Civil Procedure deserves to be quashed and set aside.

31. Even otherwise, considering the nature of ex-parte injunction granted by the learned trial Court that too without expressing any prima facie opinion on prima facie case, balance of convenience etc. and without assigning any reasons as to grant of such an ex-parte ad-interim mandatory injunction deserves to be quashed and set aside. On considering the ex-parte injunction reproduced hereinabove, it appears that by such an ex-parte injunction, the learned trial Court has granted mandatory injunction and the appellant - defendant No.1 is directed to remove from its website on the Internet, Intranet or any other Computer Network its present CPS, local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement, and Application Form for applying for Digital Signature Certificate or any document substantially and/or materially similar to the plaintiffs CPS, Local Registration Authority Agreement, Subscriber Agreement, Relying Party Agreement and Application form for applying for Digital Signature Certificate. On considering the entire order, it is clear that there is no observation by the learned trial Court that as such he has considered both the agreements and whether they are similar in nature or not. There is no opinion formed by the learned trial Court with respect to prima facie case and/or balance of convenience while granting ex-parte ad-interim injunction which is mandatory in nature. As

observed by the Delhi High Court in the case of Mrs. Vijay Srivastava (supra), a mandatory injunction can be granted on an interlocutory application only after notice to the defendants and after hearing the parties. As observed by the Delhi High Court in the said decision, there is no bar to the grant of interlocutory relief in the mandatory form though in doing so, the Court should act with greatest circumspection and such powers can be exercised only in rare and exceptional cases. It is to be noted that the aforesaid observations are with respect to interlocutory relief in the mandatory form while exercising the powers under Order 39 Rule 1 of the Code of Civil Procedure. Therefore, while granting interlocutory relief in mandatory form such powers can be exercised only in rare and exceptional cases and before granting ex-parte ad-interim injunction, Court must issue notice to the defendants and only after hearing the parties, such a mandatory injunction can be granted.

32. In the case of *Wander Ltd. and Another* (supra), in para 9 the Hon'ble Supreme Court has observed as under:-

"9. 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 the 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 favour 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 right of parties which may appear on a prima facie case. The Court also, in restraining the defendants from exercising what he considers his legal rights but what the plaintiff would like to be prevented, put 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 that applied to a case where the defendant is yet to commence his enterprise, are attracted."

33. In the case of *Dorab Cawasji Warden* (supra) while considering the question of grant of interlocutory mandatory injunction under Order 39 Rule and 2 of the Code of Civil Procedure the Hon'ble Supreme Court has observed

that relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status-quo of the last non-contested status which preceded the pending the controversy until the final hearing when full relief may be granted or to compel the undoing of those act that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. The Hon'ble Supreme Court has held that while exercising power of granting interlocutory mandatory injunction the following guidelines are required to be considered:-

[i] The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

[ii] It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

[iii] The balance of convenience is in favour of the one seeking such relief.

It is required to be noted that the aforesaid guidelines are required to be considered while granting interlocutory mandatory injunction after hearing the parties. Therefore, such a mandatory injunction cannot be granted and normally should not be granted without prior notice of application to the defendants. As stated hereinabove, while granting such ex-parte mandatory injunction, the learned Judge has neither observed that there is any prima facie case in favour of the plaintiff nor the learned Judge has stated that balance of convenience is in favour of the plaintiff.

34. Under the circumstances and considering the impugned ex-parte ad-interim injunction order passed by the learned trial Court, it appears that such an ex-parte ad-interim mandatory injunction cannot be sustained and the same deserves to be quashed and set aside.

35. Even otherwise also, in the facts and circumstances of the case, more particularly when it is alleged that the agreements by the appellant - original defendant No. 1 are on Net since long time, the learned trial Court is not justified in granting such a mandatory ex-parte ad-interim injunction that too without even prior notice to the appellant herein.

36. However, considering the nature of controversy and considering the statements of the learned Counsel appearing on behalf of the respective parties recorded hereinabove, to the effect that the appellant herein shall serve reply to the application Ex.5 on the plaintiff and/or its Counsel on or before 24/7/2009 and then file the same before the learned trial Court on 27/7/2009 and that the original plaintiff shall file rejoinder to the reply to the application Ex.5 to be submitted by the defendant No.1 on 27/7/2009 and the learned trial Court is

to be directed to decide and dispose of the application Ex.5 at the earliest and within stipulated time.

As observed by this Court in the case of TALOD GRUH UDHYOG v BAHUCHAR GRUH UDHYOG reported in 2009(1) GLH 229, normally interlocutory injunction application in a suit for infringement of trademarks, infringement of copyright and/or passing off action shall be decided at the earliest.

37. For the reasons stated above present Appeal From Order is allowed. The impugned ex-parte ad-interim injunction order by the learned Presiding Officer, FTC No.2, Ahmedabad (Rural) dtd.13/7/2009 below application Ex.5 in Regular Civil Spit No. 147 of 2009, in terms of para 57(c) of the application Ex.5 is hereby quashed and set aside. Let the appellant - defendant No. 1 serve copy of the reply to the application Ex.5 to the plaintiff and/or its Counsel on or before 24/7/2009 and file the same before the learned trial Court on 27/7/2009 and let the original plaintiff file rejoinder to the Affidavit-in-reply to the application Ex.5 to be filed by the original defendant No. 1 before the trial Court on 27/7/2009 and the learned trial Court is hereby directed to decide and dispose of the application Ex.5 within a period of four weeks thereafter in accordance with law and on merits, without in any way being influenced by any of the observations made by this Court in the present order, as this Court has not expressed any opinion on merits in favour of either parties and the observations made by this Court in the present order is with respect to grant of ex-parte ad-interim injunction without following requirement of Order 39 Rule 3 of the Code of Civil Procedure on only Present Appeal From Order is accordingly allowed. In view of the disposal of the Appeal From Order, no order in the Civil Application and the Civil Application is also accordingly disposed of. In the facts and circumstances of the case, there shall be no order as to costs.

(SAD) (Appeal allowed)

