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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.75 OF 2008

in
NOTICE OF MOTION NO.1648 OF 2007
in
SUIT NO.1253 OF 2007

Star (India) Limited .. Appellant
(Orig.Deft no.1)

vs

1.Zee Entertainment Enterprises Limited
2.Mr.Gajendra Singh
3.Ms.Karuna Raju Samtani
.. Respondents

Mr.Ravi Kadam Advocate General with
Mr.V.V.Kanade i.b Kadam & Company for
Appellant
Mr.Darius Dalal,Ms.Hemlata Marathe, Ms
Rashmi Thakur Iyer i.b M/s Jehangir
Gulabbhai & Bilimoria & Daruwalla, Advocates
and Solicitors for Respondent no.2 (Gajendra
Singh)
Mr.Rahul Chitnis i.b.M/s PDS Legal for
Respondent no.1

CORAM: D.K.DESHMUKH &
 ANOOP V.MOHTA, JJ
DATE: 19th April, 2011

P.C. (Per D.K.Deshmukh, J)

1. By this Appeal, the appellant who is original defendant no.3 challenges the order dated 8th October,2007 passed in Notice of Motion No.1648 of 2007 in Suit No. 1253 of 2007. That suit is filed by the present respondent no.1. The Notice of Motion in which order has been passed was also taken out by the plaintiff-Respondent no.1. The suit is filed for a perpetual injunction restraining the defendants from infringing the plaintiff s copyright in the literary work and cinematograph film embodying the television game show Titan Antakshari being broadcast on its television channel Zee since September, 1993 by the defendant no.3 broadcasting the television game show Antakshari- The Great Challenge. and/or using the content and/or presentation and/or the word Antakshari in relation to any television game show so as to pass off such show as being a television game show Titan

Antakshari . The Plaintiff has also sought damages and order for delivery and destruction of the infringing material.

2. The plaintiff sought by the Notice of motion temporary injunction restraining the defendant no. 3 basically from broadcasting and telecasting the game show Antakshari-The Great Channel. The learned Single Judge framed the following questions :

(I) Whether during the period 23.6.1992 to 1.4.1999 Defendant no.1 worked with the plaintiff under a contract of service ?

(II) Whether the concept note Exhibit G to the Plaint was prepared, as alleged by the plaintiff ?

(III) Assuming the answer to question (II) is in the affirmative, whether the plaintiff has established that it has a copyright in the Concept Note ?

(IV) Whether the breach of a copyright in a film can be committed only by duplicating the film itself ?

(V) Whether the plaintiff has established that the Defendants are guilty of passing off their game show as that of the plaintiffs game show ?

3. The learned Single Judge has answered Question No. (I) in the affirmative. The learned Single Judge has answered Question Nos. II, III, and IV in negative. The learned Judge has answered Question No.(V) in the affirmative and has granted temporary injunction restraining defendant no.3 from telecasting the game show. The learned Judge has held that the defendants are guilty of passing off the alleged game show as that of the plaintiffs game show. The learned

Judge in para 133 has considered the allegations in the plaint in that regard which are as follows :

133. " This brings me to the Plaintiff s case of passing off. The plaintiff s case is that the Defendants have slavishly copied the content and presentation of its television game show and that the Defendants game shows constitute passing off since making and broadcasting thereof inherently tantamounts to the Defendants misrepresentating to the members of the public and the trade that they are associated with the plaintiff. The misrepresentation on the part of the Defendants in making and broadcasting the television game show Antakshari-The great Challenge is calculated to damage and erode the plaintiff s exclusive proprietary rights and goodwill in the television game shows Close Up Antakshari and Titan Antakshari , the content and/or presentation and the word Antakshari in relation to any television game show. The Plaintiff has also specifically averred that the advertisements for the television game shows Close Up Antakshari and Titan Antakshari have resulted in accrual of

an enviable reputation and goodwill in the television game shows and their association with the plaintiff. Further the Plaintiff contends that the Defendants by their aforesaid acts are also indulging in unfair competition. The Plaintiff therefore submits that it is entitled to a perpetual order and injunction restraining the Defendants from making and broadcasting the television game show Antakshari-The Great Challenge and/or using the content and/or presentation and/or the word Antakshari in relation to the television game show so as to pass off the Defendants television game show Antakshari-The Great Challenge as being a television game show associated with and/or authorized by and/or in any manner connected with the plaintiff.

4. The learned Single Judge has considered certain documents. In paragraph 153 the learned Judge refers to entry in the Limca Book of Records in relation to the plaintiff's show. In paragraph 154 the learned Judge refers

to the statements/interviews of the first defendants which he had annexed to his affidavits. These statements/interviews were published in the newspaper. The learned Judge in paragraph 154 observes:

I would not normally rely upon newspaper articles or such publications. However, these publications have been relied upon by the first defendant himself and he certainly cannot deny the contents thereof or object to the same being referred to.

5. The learned Single Judge in paragraph 156 refers to the newspaper article titled Games people play which was published in the publication titled Entertainment Guide of August, 1996. The learned Single Judge then in paragraph 159 records a finding that there is no likelihood of sponsors

thinking that the third defendant's game show is in fact that of the plaintiff. In paragraph 160 the learned Single Judge records that there is no likelihood of the viewers being confused. Then, in paragraph 161 the learned Judge observed thus :

161. " The matter however does not rest there while considering a case of passing off in respect of television shows. It is not that a show can only be telecast on a particular channel. The same show can be telecast on one or more channels, at the same time or at different times. It is entirely a matter of agreement between the owner of the show and the owners of the TV channels. The question therefore is whether viewers think or are likely to think that the Plaintiff is associated with the programme being telecast by the third Defendant or has permitted the same or that a programme though telecast by the third Defendant actually belongs to or is the work of the plaintiff.

6. Thus, the learned Single Judge proceeds to consider the question whether the viewers are likely to think that the plaintiffs is associated with the programme being telecast by third third defendants. For that purpose, the learned Judge compares the contents of both the programmes and after comparing the contents of both the programmes in detail, the learned Single Judge observed thus:

There are no doubt differences between the two programmes. In substance, the concept of the show/programme is a test of the contestant s knowledge and memory of Hindi film music. The Plaintiff is not entitled to a monopoly in the concept of testing a person s knowledge and memory of Hindi film music. It is the manner in which the contestant s

knowledge and memory is tested, which accounts for novelty. The question is whether there is any novelty in the manner in which such tests are conducted by means of a television game show.

In paragraph 187, the learned Single Judge observes :

187 On the question of similarity between the two shows, it is evident that the corresponding rounds of the Plaintiff s and the Defendant s shows are not identical. There are differences.....

There is however, a great deal of similarity at least in respect of round nos. 4 and 5. There is also a great deal of similarity between the plaintiff s round no.1 and the third Defendant s round no.9 and the plaintiff s round no.10 and the Defendant s round no.12. Then the learned Judge observes :

188. " I will presume that that by itself is not sufficient for the plaintiff to maintain an action for passing off.

There are however three additional factors which I find of considerable importance. These three factors, though not individually, when considered together, clearly tilts the balance in the Plaintiff's favour.

7. Thus, the learned Single Judge finds after comparison of the contents of the shows that the similarities found in the two shows considered the number of dissimilarities thereby the plaintiff would not be entitled to temporary injunction. The learned Judge however observes that if the similarities coupled with dissimilarities in the content of the programmes with the three factors named by him are considered then the plaintiff becomes entitled to temporary injunction sought by the plaintiff. The

first of the three factors is the newspaper articles dated 6th January, 2007 and 12th January, 2007. The second aspect is that anchor of the show is Annu Kapoor and third aspect is that defendant no.1 is the producer of the show.

8. The learned Single Judge relying on these three factors holds that a case of passing off has been made out and granted temporary injunction in terms of prayer clause (b) of the Notice of Motion which restrained the defendant no.3 from telecasting the game show.

9. This is an Appeal filed by the defendant no.3. Learned counsel

appearing for the appellant submits that even assuming that the finding recorded by the learned Single Judge in relation to the similarities and dissimilarities in the content of the two shows is correct, then also according to the learned Single Judge the plaintiff does not become entitled to temporary injunction. According to the learned Single Judge, the plaintiff becomes entitled to temporary injunction if similarities and dissimilarities are considered in the light of the content of the newspaper articles dated 6th January, 2007 and 12th January, 2007. Learned counsel relying on the judgment of the Supreme Court in the case of LAXMI RAJ SHETTY

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Supreme Court Cases 319 submits that newspaper articles without examining the author of those articles are not admissible in evidence and therefore the learned Single Judge could not have relied on the two newspaper articles.

10. Learned counsel further submits that even assuming that the learned Single Judge is right in holding that because those articles were produced before the court along with affidavit by the defendant no.1, he cannot deny those articles the learned Judge has not given any reason in the order why those articles can be used by the learned Judge against defendant no.3.

Learned counsel submits that the finding recorded by the learned Single Judge that Annu Kapoor is predominant figure of both game shows is not correct. Annu Kapoor was only a co-anchor of the show and he was not the sole anchor and in the order the learned Single Judge has not given any reasons why only because defendant no.1 is producer of the show it amounts to passing off.

11. Learned counsel appearing for the plaintiff-respondent no.1 on the other hand submits that the learned Single Judge has considered the similarities in the content of the two programmes. In support of this submissions, he took

us through several paras of the judgment. He submits that as newspaper articles on which the learned single Judge has relied were produced by the defendant no.1 the learned Judge was justified in referring to the contents of those newspaper articles. The learned counsel submits that as respondent in this Appeal he is entitled to contend that the findings recorded by the learned Single Judge against him in the impugned order on Question nos. 2,3 and 4 is incorrect. In support of his contention, he relied on the judgment of the Supreme Court in the case of RAVINDER KUMAR SHARMA vs STATE OF ASSAM (1999) 7 Supreme Court Cases 435. The learned counsel however

did not contend that the contents of the newspaper articles could have been used against the defendant no.3. In any case he did not show any reasons given by the learned single Judge for relying on these articles against the defendant no.3.

12. We however, did not permit the learned counsel to argue that the findings recorded by the learned single on Question nos. 2,3 and 4 is incorrect because there was no prior notice given by the respondent no.1 to the Appellant about his intention to argue that the findings recorded against him in the impugned order on Question nos. 2,3 and 4 are incorrect.

13. It is true that a successful plaintiff in Appeal filed by the defendant against a decree without filing any cross objections supports the decree in his favour on grounds other than ones which are mentioned in the judgment. He can also urge that the findings that has been recorded against him in the order are incorrect and for that purpose it is not necessary that he files cross-objections. In our opinion, however in order to entitle a respondent to argue this, the respondents will have to comply the principles of natural justice. He will have to give reasonable notice to the Appellant of his intention to argue at

the final hearing of the Appeal that the findings recorded against him in the order which is in his favour are wrong. Without the respondents giving such notice to the Appellant, the respondent cannot be permitted to urge such a ground for the first time at the final hearing of the Appeal because, if the respondents is permitted to do that it will take the Appellant by surprise which will be violative of the principles of natural justice. If the respondent no.1 intends to argue that the findings recorded on Question nos. 2,3 and 4 are wrong, it was for him to give prior notice to the appellant of his intention to do so. Otherwise permitting respondent no.2 to argue

that would be violative of the principles of natural justice.

13. When an Appeal is filed against the judgment and decree, what is basically challenged is the finding recorded against the Appellant in the judgment. When a party to the suit wants to challenge the findings recorded in the judgment against it in appeal, it has to file a memorandum of appeal. Sub-Rule 2 of Rule 1 of Order 41 lays down that The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively. This requirement is obviously included to give clear notice to the Respondent as to on which grounds the findings recorded in the order are

being challenged. In our opinion, the provisions of Rule 2 of Order 41 are also relevant. They read as under:

2. Grounds which may be taken in appeal.- The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

At the hearing of the Appeal only the grounds which are mentioned in the memorandum of appeal can be argued. Rule 3 of Order 41 lays down that if the memorandum which is not drawn up in the manner provided by Order 41 may be rejected by the Court.

Thus, the scheme of Order 41 is that if any finding recorded by the trial court in the judgment is to be challenged elaborate ground is to be taken in the memorandum of appeal, so that the Respondent gets notice as to what is being argued for challenging the finding. In our opinion, when the Respondent in an appeal wants to challenge the finding recorded against him by the trial court, it would be the requirement of natural justice that the Appellant in whose favour the finding is recorded is given adequate notice of two things; (i) that the Respondent wants to challenge the finding recorded in favour of the Appellant and (ii) the ground on which the finding is being challenged. This has to be done at such point of time as would give the Appellant a reasonable notice. In our opinion, if this procedure is not followed, it will result in violation of principles of natural justice,

inasmuch as, the Appellant would not know which of the findings recorded in his favour by the trial court are being challenged by the Respondent and the grounds on which they are being challenged. Rule 22 of Order 41 is an enabling provision which makes it possible for the Respondent to challenge the finding recorded by the trial court against him without filing an appeal. Order 41 does not lay down any procedure to be followed in the Respondent exercising that right given by Rule 22. Therefore, that right will have to be exercised by the Respondent in consonance with the principles of natural justice. Because there is nothing to be found in Order 41 Rule 22 which would indicate that it was the intention of the Legislature to exclude observance of the principles of natural justice in the Respondent exercising his right under Rule 22 of Order 41.

14. Therefore, the only question now to be considered by us is whether the learned Single Judge really was justified in relying on the newspaper articles to record a finding that the third defendant has made a representation indicating a connection between the two game shows. The learned Single Judge has himself observed in paragraph 181 of his order that though there are dissimilarities in the content of the two game shows in view of the representation made by the third defendant indicating a connection between the two game shows a finding has to be recorded that the third defendant tried to pass off its show as

that of the Plaintiff.

15. In its judgment in the case of **LAXMAN RAJ SHETTY** supra is concerned in relation to admissibility of newspaper articles in evidence the Supreme Court in para 26 of that judgment has recorded a clear finding that the statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported.

16. The observations of the Supreme Court found in paragraphs 25 and 26 of that judgment in our opinion are relevant

they read as under :

25. "We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence unless proved by evidence alone. A report in a newspaper is only hearsay evidence. "

26. " A newspaper item without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. " (Emphasis supplied)

Thus, it is clear that newspaper articles are clearly inadmissible in evidence and therefore, the learned single Judge was not at all justified in relying on the newspaper articles without there being any affidavit filed by the author of the statement found in those articles.

17. So far as question whether the contents of those articles could have been used against the present appellants-third defendant is concerned, the learned single Judge has observed that because the articles were produced by the first defendant he cannot deny truth of those articles. Even accepting the observations at face value and as correct, in our opinion the learned Single Judge was under a duty to give reasons why he finds that the contents of those articles are binding on the third defendant also. Admittedly, the third defendant has not produced those articles before the Court nor the third

defendant was relying on those articles.

18. If those newspaper articles on which the learned single Judge has placed reliance are left out of consideration two factors remain (1) Anoo Kapoor is anchor and (2) defendant no.1 is producer.

So far as the role played by Annu Kapoor is concerned, it has come on record that he is not the sole anchor. He was one of the anchors and to show that presence of Annu Kapoor in the show is significant on record there is no material except the articles. If the articles cannot be relied on for

any number then there is no material on record to show that Annu Kapoor plays a significant role in the game show. To establish the importance of defendant no.1 in relation to the show again the only material on record is the newspaper articles. In any case, in the order impugned in the Appeal there is hardly any discussion on this aspect independently of what is said in the newspaper articles.

In our opinion, therefore as the newspaper articles cannot be relied on, there is nothing on record to support the findings recorded by the learned single Judge in relation to the role played by Annu Kapoor and defendant no.

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19. The learned single Judge in paragraph 188 of his order which we have quoted above, has himself observed that had the three factors not been present, he would not have granted temporary injunction on a finding that a case of passing off has been made out. We find that even accepting the findings recorded by the learned single Judge in relation to similarity and dissimilarity, in the two game shows temporary injunction cannot be granted because the newspaper articles which have mainly weighed with the learned single Judge in granting temporary injunction are inadmissible in

evidence.

20. In the result, therefore Appeal succeeds and the order impugned in the Appeal is set aside. Notice of Motion No.1648 of 2007 is disposed of.

At this stage, a request is made by the respondent no.1 to stay the operation of this order. According to him, temporary injunction granted by the learned single Judge was operating for the last four years. Learned counsel appearing for the defendant no. 3-appellant on the other hand pointed out that the show of the plaintiff for protection of which temporary

injunction was sought itself is not being telecast for the last four years. Therefore, continuation of the temporary injunction will not serve any useful purpose. Learned counsel appearing for the plaintiff is not in position to dispute the statement made on behalf of the appellant that show of the plaintiff is not being telecast for the last four years. In this view of the matter, therefore continuation of the operation of the temporary injunction will not serve any useful purpose. Hence, request rejected.

Anoop V.Mohta, J

D.K.Deshmukh, J

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