

ORISSA HIGH COURT : CUTTACK

F.A.O. NO. 169 OF 2012

From an order dated 19.3.2012 passed by Shri D.Rout, learned District Judge, Khurda at Bhubaneswar in I.A. No. 13 of 2012 (arising out of C.S. No. 1 of 2012).

NATUREPRO BIOCARE INC
AND ANOTHER

..... Appellants.

-versus-

M/s. Naturoma Herbal Pvt. Ltd.
and others

..... Respondents

For Appellants : M/s. S.P. Singh, Sr. Advocate,
U.C.Patnaik, S.D. Mishra &
S.Patnaik.

For Respondents : M/s. S.P.Mishra, Sr. Advocate,
B. Mohanty,
S.K. Samantray,
S.K. Sahoo & S.Das.

Decided on 20.04.2012

P R E S E N T :

THE HONOURABLE MR. JUSTICE M. M. DAS

M.M. DAS, J.

The appellants as plaintiffs have instituted a civil suit being C.S. No. 1 of 2012 in the court of the learned District Judge, Bhubaneswar seeking for a decree declaring that plaintiffs are sole and/or exclusive user of the trade name/brand name/trade mark of "NATUREPRO" for its cosmetic products and for a decree for permanent injunction restraining the defendants – respondents from

interfering, marketing, selling and advertising by using the trade name as aforesaid or any other name similar to it and for permanent injunction restraining the defendants-respondents from pursuing any application for grant of trade mark before the competent registering authority for the trade mark “NATUREPRO” and for appointment of receiver of the goods of the defendants which are manufactured and marketed in violation of the provisions of the trade mark of the plaintiffs under the provisions of the Trade Marks Act, 1999 (for short, ‘the Act’). Along with the paint, the appellants as plaintiffs, filed an application under Order XXXIX, Rules 1 and 2 C.P.C. which was registered as I.A. No. 13 of 2012. A petition was filed by the plaintiffs under Order XXXIX, Rule – 3 C.P.C. praying to grant an ad interim ex parte injunction in the said interim application for restraining the defendants from manufacturing, marketing/distribution/selling/advertising any product using the trade mark of “NATUREPRO HERBAL” and/or “NATUREPRO” as well as from pursuing any application for grant of trade mark before the competent registering authority for registration of the trade mark “NATUREPRO HERBAL” and/or “NATUREPRO”. The learned District Judge upon hearing the said interim application passed an ex parte order of ad interim injunction on 3.2.2012 by elaborately discussing the facts of the case and the various litigations in which the parties are involved and entangled. In the said order, the learned District

Judge came to the conclusion that prima facie there appears to be an act of passing off as alleged by the plaintiffs. He also concluded that the loss that would be caused by such act cannot be calculated in terms of money and may be irreparable. He found that the balance of convenience tilts in favour of the plaintiffs. Thus finding, the learned court gave the reason that the materials on record justify passing of an ex parte ad interim order of injunction till the defendants appear and make their submissions. The court directed that the defendants are restrained from interfering/marketing/distributing/selling or advertising their products by using the aforesaid trade name, i.e., "NATUREPRO" and "NATUREPRO HERBAL" till 16.3.2012. In the said order, the learned court directed the appellants-plaintiffs to comply the provisions of Order 39 Rule 3 C.P.C. By order dated 19.3.2012, the learned District Judge finding that there is non-compliance of Rule 3 of Order XXXIX C.P.C., which is mandatory and such non-compliance has serious consequences, rejected the contentions of the petitioners (appellants) before him and refused to extend the order of injunction granted ex parte earlier, for which the appellants filed an application before him. Thereafter, the learned District Judge directed as follows:-

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"The impugned order was passed on the petition filed under Order 39 Rule 3 C.P.C. The interim application filed under Order 39 Rule 1 and 2 C.P.C. is pending. The suit has been adjourned to 5.4.2012 for filing of written statement as mentioned in the order. Therefore, call on that date when the

opposite parties shall file their objection, if any, and for further orders.”

2. It, therefore, transpires from the records that on 16.3.2012, an application was filed on behalf of the appellants-plaintiffs to extend the ex parte order of injunction till final hearing of the interim application under Order XXXIX, Rules 1 and 2 C.P.C. The respondents, who were the opp. parties, also filed a petition with a prayer to vacate the ex parte ad interim order of injunction passed against them, on the ground that the appellants having not complied with the provisions of Order XXXIX, Rule 3 C.P.C within the time stipulated therein, the ex parte ad interim order of injunction is liable to be vacated.

3. At the out-set, Mr. S.P. Mishra, learned senior counsel appearing for the respondents raised the question of maintainability of the appeal. He contended that under Order 43, Rule 1 (r) C.P.C., an order under Rule 1, Rule 2, Rule 2(A), Rule 4 or Rule 10 of Order XXXIX C.P.C. is appealable. This being not an order within the meaning of the said rules, the appeal cannot be maintained.

4. Mr. Singh, learned senior counsel appearing for the appellants, on the other hand, contended that the ex parte order of injunction having been varied/vacated by the impugned order dated 19.3.2012, the same would amount to an order under Rule 4 of Order XXXIX C.P.C. and, therefore, squarely comes under sub-rule (r) of Rule 1 of Order 43 C.P.C.

5. At this stage, it would be appropriate to extract the provisions of Order XXXIX, Rules 3 and 4 C.P.C. which are as follows:-

“39. (1)	xxx	xxx	xxx
2.	xxx	xxx	xxx
2A.	xxx	xxx	xxx

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 and require the applicant

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with-

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and,

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent).

3A.	xxx	xxx	xxx
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4. Order for injunction may be discharge, varied or set aside.- Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

(Provided that if in an application for temporary injunction or in any affidavit supporting such application a party has knowingly made a false or misleading statement in relation to material

particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party)".

6. Admittedly, by the impugned order, the ex parte ad interim order of injunction passed earlier on 3.2.2012, has been vacated.

7. A court during pendency of the suit can grant a temporary injunction if the conditions under Rule 1 of Order XXXIX C.P.C. are satisfied by the plaintiff. Under Rule 2 of Order XXXIX C.P.C., the court during pendency of the suit can restrain the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not and a plaintiff may at any stage of the suit, after its commencement, make an application to the court for a temporary injunction to restrain the defendant from committing breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The power under Rules 1 and 2 requires that the same can be exercised in all cases after directing notice of the application to be given to the opp. party, the exception being, as provided under Rule 3 C.P.C. quoted

above. Hence, when a court exercises the power conferred on it to grant interim injunction under Rules 1 and 2 of Order XXXIX C.P.C. ex parte by applying the provisions of Rule 3, such an ex parte order of ad interim injunction is passed only by exercise of the substantive power under Rules 1 and 2 as, Rule 3 does not independently empower the court to pass an order of injunction and it only lays down the procedure and the manner in which such order of injunction can be passed under Rules 1 and 2 C.P.C. ex parte, i.e., before issuance of notice to the opp. party.

Rule 4 of Order XXXIX C.P.C. gives power to the court to discharge, vary, set aside the order of injunction on an application made thereto by any party dissatisfied with such order.

8. It may be noted that by the impugned order, the court having discharged the order of ex parte ad interim injunction passed by it earlier, it has exercised power under Rule 4 of Order XXXIX C.P.C. which is appealable under sub-rule (r) of Rule 1 of Order 43 C.P.C. I, therefore, on considering the nature of the impugned order find that the said order, for the above reason, is an appealable order and the F.A.O. is maintainable.

9. Bereft of the question of maintainability, the only other point which was raised before me in this appeal is as to whether in the event of non-compliance of the provisions of Order XXXIX, Rule 3 C.P.C. proviso, should the court automatically vacate the ex parte

ad interim injunction order passed earlier only on the ground of non-compliance of the said proviso without entering into the merits of the application under Order XXXIX Rules 1 and 2 C.P.C. as has been done by the learned District Judge in the impugned order. The provisions of the Code under Order XXXIX do not provide that non-compliance of the proviso to Rule 3 will entail vacation of the ad interim ex parte injunction order passed earlier by the court. The facts in the present case reveal that the ex parte ad interim injunction order was passed on 3.2.2012 and admittedly, the requirements of the proviso to Rule 3 were not complied by the appellants on the day when the order was passed or on the day following immediately. An explanation was given by the appellants that they were not aware of the ad interim ex parte injunction order, until they obtained the certified copy of the said order on 10.3.2012 and immediately thereafter, they complied with the proviso to Rule 3.

10. Mr. S.P. Mishra, learned senior counsel appearing for the respondents relying upon the judgment of the Delhi High Court in the case of ***M/s. Aswani Pan Products Pvt. Ltd. v. M/s. Krishna Traders***, passed in C.S. (O.S) No. 284/2012 on 2.3.2012 and another judgment of the said Court in the case of ***Interlink Services Pvt. Ltd. v. S.P. Bangera***, 65 (1997) DLT 228 as well as the judgment in the case of ***S.B.L. Limited v. Himalaya Drug Co.***, AIR 1998 Delhi 126 submitted that the Delhi High Court in the aforesaid decision

has clearly laid down that in the event of non-compliance of the mandatory provisions of Order XXXIX, Rule 3 C.P.C., there is no option left with the court except to vacate the ex parte order of injunction.

11. In the case of Interlink Services (P) Ltd. (supra), the Delhi High Court was considering an interim application in its original side, filed in a suit, for a decree for permanent injunction restraining the defendant directly or indirectly from dealing with or entering into contract, agreement or understanding with any of the principals of the plaintiff including Sidel and Husky contrary to the agreement dated 28.7.1995 for a period of three years commencing from 1.8.1996 and for a preliminary decree for rendition of accounts in respect of any dealings which might have taken place between the defendant and the said principals of the plaintiff. An ex parte injunction was granted in the I.A. before appearance of the defendant in the said case. The defendant after appearing contested the claim of the plaintiff both in the suit as well as in the application for interim injunction contending that, both the suit and the interim application are liable to be dismissed and the ex parte injunction granted is also liable to be vacated. The Delhi High Court considering the merits of the case with regard to grant of interim injunction and analyzing the facts of the said case, came to the conclusion that for the reasons assigned in the judgment, the plaintiff is not entitled to an order of

interim injunction. After holding thus, it considered the submissions made on behalf of the defendant that the plaintiff has not complied with the mandatory provisions of Order XXXIX, Rule 3 C.P.C. inasmuch as the affidavit in compliance of the same was not filed by the plaintiff. In that context, the Delhi High Court proceeded to interpret Order XXXIX, Rule 3 C.P.C. and held as follows:-

“Order 39 Rule 3 Civil Procedure Code enjoins upon the applicant for injunction to deliver to the opposite party or to send to him by registered post immediately after the order granting ex parte injunction has been made, a copy of the application for injunction together with other relevant documents as mentioned therein on which applicant relies and file on the date on which such injunction is granted or on the date immediately following that date an affidavit that such copies as aforesaid were so delivered or sent. In *Shiv Shankar Chadha vs. Municipal Corporation of Delhi*, it was held that the compliance of this provision is mandatory. Following this judgment, this Court in *M/s. Marble Udyog Ltd. v. M/s. P & O India Agency Pvt. Ltd.*, 1995 (3) AD Delhi 812 has held that for non-compliance of this provision, there was no option left with the Court except to vacate the ex parte order of injunction. For this reason also the temporary injunction is liable to be vacated. However, the plaintiff has been found to be not entitled to temporary injunction on merits”

12. In *M/s. Ashwani Pan Products Pvt. Ltd. (supra)*, the Delhi High Court also in its original side dealing with an interim application filed in a suit, relying upon the decision in the case of ***Shiv Kumar Chadha etc. etc. v. Municipal Corporation of Delhi and others***, (1993)3 SCC 161 and other decisions of the said High Court, while concluding that provisions of Order XXXIX, Rule 3 C.P.C. are mandatory, held that it is well settled law that in the event there is a

non-compliance with the mandatory provisions contained in Order XXXIX, Rule 3 C.P.C. to supply to the opp. parties the copy of the application for temporary injunction together with other relevant documents relied upon by the applicant in support of the said application, immediately after the order granting ex parte interim injunction is passed, the said order is liable to be vacated as the said provision is mandatory in nature. In S.B.L. Limited (supra) , the Delhi High Court also was of the view that if the Court is satisfied of non-compliance by the applicant with the provisions contained in the proviso, then, on being so satisfied the Court which was persuaded to grant an ex parte ad interim injunction confiding in the applicant that having been shown indulgence by the Court, he would comply with the requirements of the proviso, it would simply vacate the ex parte order of injunction without expressing any opinion on the merits of the case leaving it open to the parties to have a hearing on the grant or otherwise of the order of injunction but bi-parte only. The applicant would be told that by his conduct (misconduct to be more appropriate) he has deprived the opponent of all opportunity of having an early or urgent hearing on merits and therefore, the ex parte order of injunction cannot be allowed to operate any more.

13. In Shiv Kumar Chadha (supra), the Supreme Court was dealing with the question of sealing and/or demolition of buildings at Delhi. The owners/occupiers/ builders filed an appeal before the

Hon'ble Supreme Court against the order passed by the Delhi High Court directing the Municipal Corporation of Delhi to issue appropriate notices to the owners/occupiers/builders of the buildings where illegal constructions have been made. The High Court gave liberty to them to file fresh building plans with the Corporation in conformity with the existing bye-laws and directed that the building plans as filed are to be examined in accordance with law. The Corporation was directed that if it finds that the constructions are beyond the compoundable limits, then to seal the same and to demolish thereafter. The appellants were aggrieved by this part of the order. But they sought interference of the Hon'ble Supreme Court with the part of the order where the Delhi High Court said that no civil suit will be entertained by any court in Delhi in respect of any action taken or proposed to be taken by the Corporations with regard to the sealing and/or demolition of any building or any part thereof and any person aggrieved by an order of sealing or demolition which is passed, shall, however, have the right of filing an appeal to the Appellate Tribunal under the Municipal Act. The other part of the order in respect of which the appellants preferred appeal was , where the Delhi High Court directed the Corporation to approach those courts which have already issued injunction "for variation and vacation of the injunction order in the light of" the said order. While considering the questions raised in the appeals with regard to

maintainability of the suit filed against orders of demolition, taking note of the provisions of Section 343 (1) of the Corporation Act, the Supreme Court observed that in terms of the said provisions, the court should not ordinarily entertain a suit in connection with the proceedings initiated for demolition by the Commissioner and it should direct the persons aggrieved to pursue the remedy before the Appellate Tribunal and then before the Administrator in accordance with the provisions of the said Act. But the Court should entertain a suit questioning the validity of an order passed under section 343 of the Corporation Act only if the court is of the prima facie opinion that the order is a nullity in the eyes of law because of any “jurisdictional error” in exercise of the power of the Commissioner or that the order is out side the Corporation Act. With regard to grant of temporary injunction in such suits, the Supreme Court observed that the primary object of filing such suits challenging the validity of the order of demolition is to restrain such demolition with the intervention of the court. In such suit, the plaintiff is more interested in getting an order of interim injunction. In that context, it held that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to

the plaintiff during the pendency of the suit. Thus observing, the Supreme Court held and directed as follows:

“.....The purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principles – *ex debite justitiae*. Before any such order is passed the Court must be satisfied that a strong *prima-facie* case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him. Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The court should be always willing to extent its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.

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

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 other side that Court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not 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 proviso 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. 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 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 who 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 thereof 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 of the proviso aforesaid is 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 purpose. 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* (1875) 1 Ch. D. 426, *Nazir Ahmed v. Emperor*, AIR 1936 PC 253. 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 *Ramachandra Keshav Adke v. Govind Joti Chavare*, AIR 1975 SC 915. 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

Accordingly we direct that the application for interim injunction should be considered and disposed of in the following manner :-

(i) The Court should first direct the plaintiff to serve a copy of the application with a copy of the plaint along with relevant documents on the counsel for the Corporation or any competent authority of the Corporation and the order should be passed only after hearing the parties.

(ii) If the circumstances of a case so warrant and where the Court is of the opinion, that the object of granting the injunction would be defeated by delay, the Court should record reasons for its opinion as required by proviso to Rule 3 of Order 39 of the Code, before passing an order for injunction. The Court must direct that such order shall operate only for a period of two weeks, during which notice along with copy of the application, plaint and relevant documents should be served on the competent authority or the counsel for the Corporation. Affidavit of service of notice should be filed as provided by proviso to Rule 3 of Order 39 aforesaid. If the Corporation has entered appearance, any such ex parte order of injunction should be extended only after hearing the counsel for the Corporation.

(iii) While passing an ex parte order of injunction the Court shall direct the plaintiff to give an undertaking that he will not make any further construction upon the premises till the application for injunction is finally heard and disposed of.

In the result, the appeals are allowed to the extent indicated above. In the circumstances of these cases, there shall be no order as to costs.

Appeals allowed.”

14. On an analysis of the aforesaid decisions cited at the Bar, this Court is of the clear view that now it is well settled in law that the provisions of Rule 3 of Order XXXIX C.P.C. are of mandatory in nature. However, as observed by the Delhi High Court in the aforesaid decisions that non-compliance of the said provision will entail automatic vacation of the ex parte order of ad interim injunction passed by the court is not what has been laid down in the decision of the Supreme Court in the case of Shiv Kumar Chadha (supra). This Court respectfully dis-agrees with the view of the Delhi

High Court that on non-compliance of the proviso of the Order XXXIX, Rule 3 C.P.C. when an ex parte ad interim injunction order is passed, the court would be bound to vacate such order automatically.

15. As earlier observed, what Order XXXIX, Rule 3 C.P.C. provides is that the ad interim injunction order as sought for by the plaintiff, to be passed by exercising jurisdiction under Order XXXIX, Rules 1 and 2 C.P.C., can be passed ex parte if the plaintiff shows the urgency in the matter disclosing that non-passing of such an order ex parte would not only prejudice him but would cause irreparable injury to him. Only when such a case is shown, the order of ad interim injunction which is always discretionary can be passed by a court ex parte, provided, the court records the reasons for passing such an ex parte order. Only when such an ex parte order is passed, the requirements under the proviso to Rule 3 is to be complied with mandatorily.

16. The compliance of the requirements of the proviso is for the purpose of intimation of the ex parte order of injunction to the other party so that the said order can be given effect to and will become enforceable and binding on the other party, the moment the conditions in the proviso are observed and intimation of the order is received by the other party.

17. Thus, when such conditions are strictly observed after the court passes an ex parte ad interim order of injunction by giving

reasons for passing such order under Order XXXIX, Rule 3 C.P.C. it would not be open for the other party to say that it had no knowledge of such order and continue to act contrary to the ex parte ad interim order of injunction. In other words, the mandatory provision of Order XXXIX, Rule 3 proviso if not complied with, the plaintiff subsequently cannot allege violation of the said order against the opp. party by filing an application under Order XXXIX Rule 2-A C.P.C. Further, as already observed by this Court, if the court has passed an ex parte order of ad interim injunction by exercising jurisdiction under Order XXXIX, Rules 1 and 2 C.P.C., on assigning reasons, such an ex parte order of injunction cannot be discharged, varied or set aside, unless opp. party files an application for the above purpose under Order XXXIX Rule 4 C.P.C. Hence, this Court is of the view that once an order of ad interim ex parte injunction is passed by assigning reasons as contemplated under Order XXXIX, Rule 3 C.P.C., such an order can only be varied, discharged or set aside when an application is filed by the opp. party for that purpose under Rule 4 of the said Order XXXIX. Non – compliance of the provisions of Order XXXIX, Rule 3 C.P.C. with regard to delivering or sending by registered post, a copy of the application for injunction, a copy of the affidavit filed in support of the application, a copy of the plaint and copies of document on which the plaintiff relies can only tantamount to the fact that such an ex parte order will not be binding on the opp. party. Therefore,

the question of plaintiff's enjoying the fruits of such order will not arise even if the opp. party appears in the said proceeding and files his objection/application for vacating the order. Therefore, the ex parte ad interim order of injunction passed by the court in accordance with Rule 3 will be operative against the opp. party only when he appears in the proceeding and having knowledge of the said order files an objection or application to vary or vacate the same.

18. The Supreme Court in the case of Shiv Kumar Chadha (supra), thus, while holding that the provisions of Rule 3 of Order XXXIX C.P.C. are mandatory in nature, disposed of the appeals directing that the application for interim injunction should be considered and disposed of in the manner stated therein (as quoted above). Following the above ratio, in the instant case, this Court, therefore, feels it appropriate that the learned court below is not correct in straightway vacating the ex parte ad interim order of injunction passed by it earlier only on the ground of non-compliance of the provisions of Order XXXIX Rule 3 C.P.C. Hence, the said order is set aside and it is directed that the appellants-plaintiffs, who though state to have already sent the required documents as per the proviso to Order XXXIX Rule 3 C.P.C. by registered post to the opp. parties, shall provide copies of the interim application supported by affidavit and the documents on which they rely along with copy of the plaint to the defendants and the learned court below shall call upon

the defendants to file its objection, if any, thereto and take up the application for interim injunction for final disposal, since the opp. parties – defendants have already entered appearance in the suit. Till such copies of the application, plaint and documents are supplied to the opp. parties – respondents, it cannot be presumed that they are bound by the ex parte ad interim order of injunction from the date when it was passed till the date, when copies of the documents as per the proviso to Rule 3 are supplied to them or to their learned counsel. However, the said ex parte ad interim order of injunction passed by the court earlier, can only be varied, discharged or confirmed in the final order to be passed by the learned trial court in the application for interim injunction under Order XXXIX, Rules 1 and 2 C.P.C. as per the provisions of Rule 4 of the said Order XXXIX.

19. The FAO is accordingly disposed of.

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M. M. Das, J.

Orissa High Court, Cuttack.
April 20th ,2012/Biswal.
