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**REPORTABLE**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
IN ITS COMMERCIAL APPELLATE DIVISION  
COMMERCIAL APPEAL (L) NO. 31992 OF 2022  
IN  
INTERIM APPLICIATION (L) NO. 28715 OF 2022  
IN  
COMMERCIAL IP SUIT (L) NO. 28710 OF 2022  
WITH  
INTERIM APPLICATION (L) NO. 31993 OF 2022  
IN  
COMMERCIAL APPEAL (L) NO. 31992 OF 2022**

- 1. KEWAL ASHOKBHAI VASOYA,**  
D- 301, Nilkanth Height, Surat,  
Varachha Surat, Gujarat 394 101.
- 2. NIRAV PATEL,**  
C 3072, 3073, 3074 Floor, Radha Raman  
Textile Market, Near Bharat Cancer  
Hospital Kadodara Main Road, Saroli,  
Surat, Gujarat 395 010 and Lift 2, 4th  
Floor, 3072 to 75 RRTM, Textile  
Market, Saroli, Surat.

**... APPELLANTS**  
(ORIG DEFENDANTS)

~ VERSUS ~

**SUARABHAKTI GOODS PVT LTD,**  
a registered company under Indian  
Companies Act, 1956 having its  
registered address: 227 Nita Building,  
Dr Annie Besant Road, Worli, Mumbai  
400 025

**...RESPONDENT**  
(ORIGINAL PLAINTIFF)

**APPEARANCES**

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<b>FOR THE APPELLANTS</b>	<b>Mr Alankar Kirpekar, i/b Amit Kukreja &amp; Haseena Khan.</b>
<b>FOR RESPONDENT</b>	<b>Mr Bhupesh Dhumatkar, i/b Mansi Patel.</b>

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**CORAM : GS Patel &  
Gauri Godse, JJ**

**DATED : 7th October 2022**

**ORAL JUDGMENT (Per GS Patel J):-**

1. The original Defendants in the Commercial Intellectual Property Suit have come in appeal against a without notice ad-interim order dated 15th September 2022 by RI Chagla J. That order was passed on the application of the original Plaintiff, which is the Respondent to the Appeal.
2. By the impugned order, Chagla J granted a time-limited ad-interim injunction and appointed a Court Receiver for a limited

purpose. He also passed the necessary directions under Order 39 Rule 3 of the Code of Civil Procedure, 1908 (“CPC”). The order is operative only until 19th October 2022. Specific liberty is reserved to the Defendants to apply for a variation of the order with 72 hours prior written notice to the advocates for the Plaintiff.

3. The suit is a trademark infringement action combined with a cause of action in passing off. A Leave Petition under Clause 14 of the Letters Patent to combine the two causes of action is pending.

4. Mr Kirpekar for the Defendants in appeal says that the Plaintiff’s application could not have been granted without notice. He claims says that there is extensive suppression in the plaint, including, importantly, that the Defendant are registered proprietors of the rival mark although the registration is subsequent to that of the Plaintiff. Mr Kirpekar also says that while the Plaintiff mentioned in the plaint that it applied for cancellation of the Defendants’ mark there is ‘nothing annexed’ to the plaint.

5. There are two questions that arise for our immediate consideration since Mr Kirpekar relies on the order by one of us (GS Patel J) on 3rd August 2021 in *Rizwana Abdul Aziz Farooqui and Ors v Limra Realty and Ors*.<sup>1</sup> That order culls out certain principles of the law relating to applications moved without notice; specifically, the need for a fair disclosure of material particulars in the Plaint or the application for ad-interim relief without notice. The relevant portion of the Order in *Rizwana Abdul Aziz* was based on an order

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1 Interim Application (L) No. 14556 of 2021 in Suit (L) No. 14555 of 2021.

dated 7th June 2021 in *Sun Pharmaceutical Industries Ltd v Emil Pharmaceutical Industries Pvt Ltd and Anr.*<sup>2</sup>

6. To begin with, it is necessary to clarify that the popular and widespread understanding of the expression ‘ex parte’ is misleading. Black’s Law Dictionary<sup>3</sup> has these definitions:

**Ex parte** (eks pahr-tee), *adv.* [Latin, “from the part”] **On or from one party only, usu. without notice to or argument from the adverse party** <the judge conducted the hearing ex parte>.

**Ex parte**, *adj.* **Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested** <an ex parte hearing> <an ex parte injunction>.

An ‘ex parte injunction’ is also defined:

***ex parte injunction.* A preliminary injunction issued after the court has heard only the moving party.**

*(Emphasis added)*

7. The CPC itself does not use this expression. What we are concerned with is an application made *without notice* to the other side. To put it briefly and to get this aspect out of the way, an ex parte application is one-sided, without notice to the opponent. Where a party does not appear despite notice, and therefore, by conduct, declines to present its case, such an order is not, strictly speaking, ‘ex parte’. A court can compel notice. It can compel attendance. It cannot compel argument. There are many legal

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<sup>2</sup> Interim Application (L) 10937 of 2021 in Commercial IP Suit (L) No. 10928 of 2021.

<sup>3</sup> 7th edition, 1999.

situations where the word *ex parte* is used to mean that there is only a party without an opponent — frequently in uncontested testamentary matters, for example, where though there is no opponent, yet a court order or direction is sought. For the rest of this order, therefore, we prefer not to use this expression. Instead, we will use the phraseology of the CPC: *with notice* and *without notice*.

8. Since we are dealing with injunctions, we must first look at the provisions of Order 39 Rules 1, 2 and 3 of the CPC:

ORDER XXXIX

*Temporary Injunctions and Interlocutory Orders*

*Temporary injunctions*

**1. Cases in which temporary injunction may be granted.**

—Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,
- (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in

relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

**2. Injunction to restrain repetition or continuance of breach. —**

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the 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.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

**2A. Consequence of disobedience or breach of injunction. —**

(1) In the case of disobedience of any injunction granted or other order made under rule 1 or rule 2 or breach of any of the terms on which the injunction was granted or the order made, the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the

disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.

**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.

*(Emphasis added)*

9. The general rule, therefore, is that both sides must be heard before an interlocutory order is made under Order 39. Moving without notice is the exception to the rule. But this casts a burden on the plaintiff who seeks to move without notice. Among other things, Order 39 Rule 3 and its proviso sets out the requirement that the court must record its reasons that the purpose of the injunction would be defeated by the delay, i.e., the delay in giving notice. Then there are the provisions of sub clauses (a) and its further sub clauses (i) to (iii), and sub clause (b) of Order 39 Rule 3. This proceeds on the principle that where a court is being asked to give an order without notice, the duty of the plaintiff and its advocate is to present to the Court a fair picture so that the balanced order can be made.

10. In *Shiv Kumar Chadha v Municipal Corporation of Delhi & Ors*,<sup>4</sup> a case relating to an application for an ex parte interim injunction against demolition of a building under the Delhi Municipal Corporation Act, the Supreme Court set out the law relating to temporary injunctions under the CPC. Allowing the appeals, the Supreme Court observed:

- (a) General principles must be considered in the grant of a temporary injunction: a prima facie case being made by the applicant, balance of convenience and irretrievable injury likely to be caused to the applicant if the injunction was refused.
- (b) The object of introducing the proviso to Rule 3 of Order 39, CPC was so that when there is a departure from the general rule in the legislation — notice to be

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4 (1993) 3 SCC 161.



served on the other party — reasons should be recorded by the judge as to why the delay would frustrate the object of grant of injunction. The requirement of recording reasons is no mere formality. It is mandatory.

- (c) The legal principle “*ex debito justitiae*” underlies the practice to be followed by courts in granting injunctions, whether interim or ad-interim.

11. The Supreme Court’s decision in *Morgan Stanley Mutual Fund v Kartick Das*<sup>5</sup> dealt specifically with matters of injunctions sought without notice. The Supreme Court formulated the benchmark or guiding principles for such without notice injunction applications. The decision reiterates the classical trinity test, and the principle that notice is the norm, and moving without notice is the exception.

12. In *ICICI Ltd v Grapco Industries Ltd & Ors*,<sup>6</sup> the Supreme Court held that an ad-interim injunction without notice should be for a short duration and must also consider its consequences. The Court should also decide the without notice application order with some intent of final disposal once the defendant has entered appearance. It should compensate the defendant if the injunction was based on unjustifiable reasons. A without notice injunction must not continue indefinitely.

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5 (1994) 4 SCC 225.

6 (1999) 4 SCC 710.

13. The Supreme Court deprecated the prolonging of injunctions obtained without notice in *Ramrameshwari Devi & Ors v Nirmala Devi And Ors*.<sup>7</sup> This was a misuse by the applicant to prolong the ‘fruits of such relief’ almost indefinitely.<sup>8</sup> Here, too, the Supreme Court noted that the norm is with notice, and that without notice applications are clearly the exception. Being the exception, such orders (without notice) should be of a short duration — preferably one week or so; and if the applicant finally failed, he or she would have to compensate the defendant for loss suffered because of the injunction. These principles were reaffirmed in *Maria Margarita Sequeira Fernandes & Ors v Erasmo Jack De Sequeira & Ors*.<sup>9</sup>

14. There are many notable decisions of this Court too regarding these principles. We note two that seem to us apposite:

- (a) *Dalal Engineering (Private) Ltd v Ram Rao Bhimrao Sawant & Ors* (BN Srikrishna J, as he then was):<sup>10</sup> Reiterates the principles that injunction orders without notice are the exception to the with-notice norm. Such without notice orders should be time-limited. The Court referred to the Division Bench judgment in *Kaushalybai v State of Maharashtra*,<sup>11</sup> which held as unjustified a without notice interim order by the

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7 (2011) 8 SCC 249.

8 In *Microsoft Corporation & Anr v Dhiren Gopal & Ors*, [2009 SCC OnLine Del 3961] a learned single Judge of the Delhi High Court (SN Dhingra J), held that getting such an order vacated was a Herculean task — the plaintiff always seeks to delay the final disposal.

9 (2012) 5 SCC 370.

10 1991 SCC OnLine Bom 400.

11 1987 SCC OnLine Bom 315.

Industrial Tribunal under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.

- (b) *Sopan Maruti Thopte & Anr v Pune Municipal Corporation & Anr*:<sup>12</sup> The Division Bench held that a without notice interim injunction is a discretionary and equitable relief to be granted only in exceptional circumstances. The Court must record reasons for grant of such injunction without notice that why the refusal would frustrate the object of grant of such injunction. This is not an empty formality. This was followed and reaffirmed in *Nagorao & Ors v The Nagpur Improvement Trust & Ors*.<sup>13</sup>

15. While we take these principles as settled, they appear to us to indicate that in applying for an injunction without notice, there is a duty that falls on the applicant. These duties and their underlying principles were culled out in paragraph 5 of *Sun Pharmaceuticals*:

5. To avoid ambiguity, I take the liberty of briefly summarizing the key principles I believe apply to every ex parte application. I do so because I believe an application for leave to move ex parte can never be granted for the asking or automatically.

(a) **The general principle is that the Court will hear both sides before rendering a decision. This is the essence of any adversarial justice-delivery process and based on the fundamental rule of natural justice and fairness, *audi alteram partem*. An ex parte application,**

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12 1996 SCC OnLine Bom 46.

13 2001 SCC OnLine Bom 177.

without notice to or hearing, the other side is, therefore, the exception, a derogation from this general principle.

(b) It is every advocate's and every court's paramount duty, of the very first importance, to ensure the integrity of the judicial process. When, therefore, a court is asked to depart from the general and general rule, it must be able to rely on the applicant (who or which is appearing without an opponent on notice) to present its case fairly and evenly. This means that the applicant's case must contain a disclosure or statement of an anticipated defence or arguments likely in opposition. In turn, this means that an applicant seeking an ad-interim relief without notice must make a full and reasonably accurate disclosure of material facts and must invite the court's attention to factual, legal and procedural issues. On the factual issues to be disclosed, the applicant need only disclose as much — but every bit as much — as is within his knowledge, or that which, with reasonable efforts, he could discover. Material in the public domain, including in open registries, falls within this class of factual material.

(c) The disclosure and statement in the application or plaint must be neutrally and objectively presented so that the court has confidence in the case brought. Merely annexing a slew of documents does not, of itself, serve this purpose.

(d) Necessarily, this means that the applicant must be shown to have made the necessary and proper enquiries, within the bounds of reason, before making the application. This material can be in a supporting affidavit, but it must be before the court. Some level of investigation and enquiry must be demonstrated. This duty of disclosure includes matters of which the applicant would have been aware had he made

**reasonable enquiries.** Specific to IPR matters, for instance, is the requirement for a search in the registry as to what, if anything, the defendant has done in regard to the competing mark, service, product or thing. For trademarks: has the defendant sought registration? When and with what effective date? With or without a disclaimer? There must be market information too: how long has the defendant been in the market with the rival product and mark? In what area? In what manner?

**(e) Ex parte applications are, by definition, moved in urgency. This must be demonstrated too. The compilation of relevant material may be less than optimally organized in view of the urgency, but the urgency does not excuse the need for a sufficient disclosure. The requirement is not of the fullest and most complete disclosure but enough to make the court cognisant of the likely issues and possible defences. A detailed analysis of every single possible point is not required. Undoubtedly, the requirement of disclosure relates to *relevant* material, and kept within sensible limits. The disclosure must be proportionate, and the task is not the pursuit of perfection (for it will always be argued that the disclosure might have been bettered). The disclosure requirement is, above all, a safeguard to ensure that the court is not misled on a material and relevant aspect.**

*(Emphasis added)*

16. We believe this to be only a summation of long-settled law. It has been the law in this country and in England, where orders without notice are common. These include freezing orders in Mareva injunctions, frequently granted without notice on affidavit material alone, and Anton Piller search-and-seizure orders, typically

without notice. The underlying principles were succinctly set out in a decision of 26th July 2019 by the Hon'ble Mrs Justice Carr, sitting in the Commercial Court of England and Wales, a Division of High Court in *Alexendar Tugushev v Vitaly Orlov & Ors.*<sup>14</sup> She had before her a non-disclosure application, i.e., an application saying that the plaintiff had failed to make the required disclosures. Saying the law was not contentious, Carr J set out the general principles in this way:

7. The law is non-contentious. The following general principles can be distilled from the relevant authorities by way of summary as follows:

**i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;**

**ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;**

**iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete**

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14 [2019] EWHC 2031 (Comm).

**confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;**

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. **The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made.** The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) **Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;**

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

**vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;**

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

**ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;**

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;

**xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;**



**xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice.** Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

**xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.**

(See in particular *Memory Corporation plc and another v Sidhu and another (No 2)* [2000] 1 WLR 1443 at 1454 and 1459; *Behbehani v Salem* [1989] 1 WLR 723 at 735 and 730; *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] EWHC 1615 (Comm); [2009] 1 All ER (Comm) 479 at [62]; *Bank Mellat v Nikpour* [1985] FSR 87 at 89 and 90; *Kazakhstan Kagazy plc v Arip* [2014] EWCA Civ 381; [2014] 1 CLC 451 at [36] and [42] to [46]; *Todaysure Matthews Ltd v Marketing Ways Services Ltd* [2015] EWHC 64 (Comm) at [20] and [25]; *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2018] 2 WLR 1125 at [71] and [73]; *Banca Turco Romana SA v Cortuk* [2018] EWHC 662 (Comm) at [45]; *PJSC Commercial Bank PrivatBank v Kolomoisky and others* [2018] EWHC 3308 (Ch) at [72] and [73] to [75]; *National Bank Trust v Yurov* [2016] EWHC

1913 (Comm) at [18] to [21]); *Microsoft Mobile Oy v Sony Europe Ltd* [2017] EWHC 374 (Ch) at [203].)

8. There is no suggestion that the same principles do not apply to a without notice application for permission to serve out as they do on a without notice application for a freezing order (as confirmed for example in *PJSC Commercial Bank PrivatBank v Kolomoisky and others (supra)* at [169] and *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [52]).

*(Emphasis added)*

17. We take this branch of the law as now firmly settled.

18. Another aspect, often overlooked, is the duty that this places on a court when asked to pass an injunctive order (or to appoint a receiver) without notice. It is the court that must be satisfied that there is a sufficient disclosure to warrant such an order. But this itself presents something of a dilemma for the court. For the court has no means of knowing what the opponent has to say on the subject. It has to rely at that moment on what is placed before it by the plaintiff. It is true that the Court must satisfy itself that there are adequate disclosures in the plaint, but this does not mean that the defendant is prevented from saying at a later stage that the disclosures were inaccurate, insufficient, misleading or that false statements were made by the plaintiff. It also does not mean that the court is necessarily bound hand and foot to continue its without notice order.

19. In the format of without notice orders, especially in intellectual property matters, that we follow in this court, some

aspects are notable. *First*, that such without notice orders are always time-limited. There is a fixed date and the order in question is said to continue only until that date. In other words, the order has an in-built auto-expiry. On that date, it must be continued by the court, or it lapses. *Second*, the defendant who went without notice always has liberty reserved to it to move urgently to vacate, modify or vary the without notice order, but it is the defendant who is now required to give some notice, usually about 72 hours, to the plaintiff who sought and obtained that order without notice. This is important because it is not as if the defendant is entirely without remedy before the single Judge. Those remedies and safeguards are part of the without notice order.

20. When a defendant comes up in appeal against such a without notice order, accusing the plaintiff of suppression, falsehood or worse, what the defendant is essentially doing is making an application at a very early stage that is indistinguishable in its conceptualization from an application under Order 41 Rule 27 of the CPC for the appeal court to receive additional material directly. What the defendant now says is that the without notice ad interim time-limited order must be vacated or set aside *on material that was never placed before the Single Judge, and to which the single Judge had no opportunity to apply his or her mind*. This is not a practice that should be encouraged. It is indeed to be thoroughly deprecated. The reasons are self-evident. It is always, and we would say invariably, impermissible for an appeal court to reverse the order of a single Judge on material that was not before him or her, barring the most exceptional circumstances contemplated by the CPC. This

introduction of fresh material in appeal should never be assumed to be readily allowable, nor should it be allowed for the asking.

21. Further, as we have noted, these without notice orders have inbuilt safeguards and checks and balances. They are meant precisely to facilitate a defendant applying to the single Judge himself or herself by making out an appropriate case to vacate entirely, or to modify or limit the without notice ad interim order.

22. Another aspect that arises is whether it is *invariably* necessary for a defendant against whom there is such a time-limited temporary ad interim order to file a substantive application under Order 39 Rule 4. That rule with its two provisos reads thus :

**“4. Order for injunction may be discharged, 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 a 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.”**

*(Emphasis added)*

23. The two provisos are exactly in line with the formulation of Carr J set out earlier. It is true that Order 39 Rule 4 speaks of an ‘application’. But the first and second provisos are exceptions. They operate in distinct fields. The first proviso is a situation where an injunction has been obtained without notice. The second proviso contemplates a situation where an injunction has been made after notice and both sides were heard. We are of the considered view that an Order 39 Rule 4 substantive application by the defendant is *not* invariably necessary or mandatory where a case falls under the first proviso. To be perfectly plain about this, when there is a time-limited ad interim injunction and the matter is listed on a specific date, it is open to the defendant to file an Affidavit in Reply to show on that day why that ad interim order should not be continued or should be varied. After all, the purpose of listing the matter after a few days is precisely to consider whether the ad-interim injunction ought or ought not to be continued. The court is not denuded of the power to continue the injunction irrespective of any questions of disclosures if it feels that the interest of justice so demands — and this is precisely the summation by Mrs Justice Carr in the case referred to above. Nothing prevents the defendants from filing an Order 39 Rule 4 application, but we hold that this is not a requirement that can be insisted on. The submissions in the Affidavit in Reply by a defendant opposing the continuance of a without notice ad-interim time-limited injunction cannot be ignored

by a court on the basis that no substantive application under Order 39 Rule 4 has been filed.

24. Such an application is however necessary in the circumstances set out in the second proviso. There, both sides have been heard before the injunction is passed. Usually, that injunction would be one pending the suit. That is the reason why the second proviso speaks of changed circumstances warranting an application.

25. There is a final important distinction between the two provisos. The second proviso requires an application by the party seeking modification, variation, recall etc. The first proviso does not contemplate an application by the defendant at all. The application that it speaks of is the initial application by the plaintiff, the one in which the without notice injunction was granted. The first proviso it casts a duty on the court to vacate the injunction if the conditions in the first proviso are met, i.e., once the defendant shows that the party seeking the injunction knowingly made a false or misleading statement in relation to a material particular.

26. We also interpret this phrase “*knowingly made a false or misleading statement in relation to a material particular*” as being precisely that requirement of a fair disclosure that we have noted above, and which was also noted by Mrs Justice Carr. In other words, Order 39 Rule 4 and its first proviso precisely contemplate that a plaintiff seeking a without notice injunction must not make a false or misleading statement in relation to material particulars.

27. In the present matter, the impugned order in question is operative until 19th October 2022 just a few days from now. In paragraph 39, liberty has been reserved to the defendants to apply for a variation of the order.

28. It is in these circumstances that we see no reason to interfere with the impugned order at this stage. We have made no assessment of the rival contentions on merits. The liberty or liberties reserved to the defendants in appeal are preserved intact, and the Defendants may avail of them in any manner contemplated by the impugned order, that is to say by giving notice of 72 hours and moving, or opposing the Plaintiff's interim application on the returnable date of 17th October 2022.

29. The appeal is disposed of in these terms. In the facts and circumstances of the case there will be no order as to costs. However, we note that since this is a Commercial Appeal, the general rule is to award costs. Instead of doing so, we set the parties at liberty to seek an appropriate order of costs before the learned single Judge.

30. In view of disposal of appeal, the pending interim application also stands disposed of.

31. The Respondent's Advocates will file their Vakalatnama within one week from today.

**32.** For statistical purposes, the appeal and the interim application in the appeal are to be finally numbered within one week from today without insisting on curing filing defects.

**(Gauri Godse, J)**

**(G. S. Patel, J)**