

RULINGS IN CHAMBERS

1973

NESTLE'S PRODUCTS, LTD., et al., Petitioners, v.
GALLINA BLANCA, S.A., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI.

Decided July 12, 1973.

1. When a preliminary injunction has been granted, an order vacating a temporary restraining order obtained on motion in the same matter will be deemed inapplicable to the case and will itself be vacated.
2. A defendant enjoined by a preliminary injunction may move at any time on notice to plaintiff to vacate or modify the injunction.

Petitioners instituted an action in the lower court for damages for infringement of trademark rights. Simultaneously therewith plaintiffs moved for a preliminary injunction, which was granted by the court. Thereafter, defendants moved to vacate the "temporary restraining order." The motion was granted and the order was vacated by the court. Plaintiffs applied to the Justice presiding in chambers for a writ of certiorari, contending that the judge had vacated an order which never existed, since he had granted a preliminary injunction. The Justice agreed with the argument and consequently *vacated* the order, allowing respondents time to move properly for the relief they sought from the reinstated preliminary injunction.

Counsel not indicated.

WARDSWORTH, J., presiding in chambers.

During proceedings for a preliminary injunction instituted in the Sixth Judicial Circuit, Civil Law Court,

Montserrado County, by petitioners, an application for a writ of certiorari was filed during the March 1973 Term in the chambers of the presiding Justice, praying for a review of the record of the court in the case and a reversal of an order of the judge, named as respondent herein. The issuance of a writ of certiorari was granted and the case was assigned for hearing of argument on June 27, 1973.

Petitioners herein instituted a still-pending action of damages for infringement of their trademark right against Gallina Blanca and Helou Brothers, on June 14, 1972. Petitioners, concurrently with the damage suit, moved for a preliminary injunction. The judge in the exercise of his discretion ordered the writ issued. The notice of the motion for said preliminary injunction together with the writ of injunction were both served on Gallina Blanca and Helou Brothers at the same time. The complaint and summons were also served on Gallina Blanca and Helou Brothers.

Respondents moved to vacate, as they termed it, an ex parte restraining order, averring that the order of the judge, as applied for by plaintiffs and granted by the court, was not a preliminary injunction but instead was in the nature of a temporary restraining order because it was granted ex parte, without notice to the defendants and without an opportunity for a hearing.

The motion further alleged that plaintiffs did not comply with the statutory provisions for obtaining a temporary restraining order, for the law directs that before a defendant can be restrained without notice and without a hearing, the plaintiff must first show in his motion and affidavit that "immediate and irreparable loss or damages will result unless the defendants are restrained before a hearing can be had."

Petitioners in their resistance to the motion to vacate alleged they had moved for a preliminary injunction which had been properly granted by the court and the

interlocutory writ was ordered issued. It was further averred by the petitioners that the statute clearly affords relief either by preliminary injunction or by a temporary restraining order, to protect the rights of parties aggrieved, as in the case herein.

Finally, petitioners contended that the statutes of Liberia provide that a defendant enjoined by a preliminary injunction may move at any time on notice to plaintiff to vacate or modify it. The defendants should have either moved to vacate or to modify the preliminary injunction but not to vacate an ex parte temporary restraining order as they sought to do, for no temporary restraining order was ever prayed for or ordered by the court.

The motion was heard and the presiding judge granted the motion to vacate the temporary restraining order, intending thereby to dissolve the injunction granted by him and served on the defendants. Thereafter petitioners applied to the Justice presiding in chambers for a writ of certiorari to have said ruling reviewed.

What we have to determine herein is whether a preliminary injunction was in fact granted and served on the respondents as prayed for by petitioner herein, and if so, whether it was in accord with the law.

The language of the motion made June 12, 1972, and the judge's order of June 14, are both unequivocal and unambiguous. The plaintiffs applied for a preliminary injunction to enjoin the defendants from the importation and distribution of bouillon packaged or named in a manner to confuse it with plaintiffs' product named "Maggi," pending hearing of the suit in damages. The judge commanded the clerk of the court to have said writ issued and served.

The respondents are contending that the order of the judge was not a preliminary injunction but a temporary restraining order, because it was granted ex parte, without notice of the motion and without an opportunity for a hearing.

Our Civil Procedure Law governs the issuance of a preliminary injunction.

"A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of the act which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." Rev. Code 1:7.61.

"A preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served either prior to the commencement of the action or at any time prior to judgment." *Id.*, 1:7.62.

In addition, the statutory requirements for obtaining a temporary restraining order are specific.

"If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice." *Id.*, 1:7.64(1).

There appears to be no requirement for the presence of the defendant when a motion is filed for a preliminary injunction. Nor is there a requirement for a hearing on the motion. All that is required is a showing, supported by affidavit, that the defendant against whom the injunction is sought threatens, or is about to do, or is doing, or procuring or suffering to be done, an act in violation of plaintiff's rights respecting the subject of the action, and tending to render a judgment ineffectual.

A review of the record shows that a motion was duly filed along with an affidavit and the required bond. In

granting the preliminary injunction, the judge ordered it issued with notice to be served on defendants. The respondents' contention that the process was in fact a restraining order cannot be sustained.

Section 7.65 of the Civil Procedure Law provides a remedy for the defendant in preliminary injunction proceedings. A defendant enjoined by a preliminary injunction may move at any time on notice to plaintiff to vacate or modify the injunction. In spite of the relief afforded, the respondent moved to vacate a temporary restraining order, with the intention of dissolving a preliminary injunction properly applied for and legally granted, countenanced by the judge who grants the motion.

The record fails to show a motion by plaintiff for a temporary restraining order nor the granting of such an order. Therefore, it seems in error for the judge to have granted a motion to vacate an order which was never issued.

The ruling of the trial judge is hereby reversed and the case remanded without prejudice, that is to say, the respondents may pursue their legal remedies for dissolution of the injunction, provided they so act within 10 days after receipt of this mandate by the trial court. The Clerk is hereby ordered to send a mandate to the trial court commanding the judge to resume jurisdiction and proceed in accord herewith.

Order vacated.