

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+FAO(OS) NO. 379/2009 and CMs NO. 12341/2009 and 12344/2009

Date of Decision : September 22, 2009

M/S. PARUL HOMEOPATHY LABORATORY PVT. LTD. Appellant

Through : Mr. Sanjeev Singh and Mr. Ambuj Kumar,
Advocates.

versus

SMT. RAJ RANI AGGARWAL Respondent

Through : Mr. S.K. Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

% **JUDGMENT (ORAL)**
22-09-2009

MUKUL MUDGAL, J.

1. This appeal challenges the ex-parte order dated 4th February, 2009
passed by the learned Single Judge in CS(OS) NO. 239/2009.
2. The case put forth by the appellant is as under:

a) The appellant company has been manufacturing homeopathic drugs and medicines and has adopted the Trade mark '**HEIGHTEX**' in the year 1994. It has since then been marketing the said homeopathic drugs and medicines under the said trademark. The appellant had adopted the said trademark through its predecessor M/s Parul Homeo Laboratories, a partnership concern, which was subsequently converted into a private limited company.

b) The appellant had obtained drug license for the trademark '**HEIGHTEX**' in the year 1994 and the drug license registration has been renewed from time to time.

c) In the year 1998, the appellant applied for the registration of trademark and eventually it was registered and thus, became effective from the year 1998. Though there was a cancellation on technical grounds of the said registration, that cancellation was set aside by this Court under its writ jurisdiction.

d) In September, 2003 the appellant came to know of the use of the trademark '**HEIGHTEX**' by the respondent and on 26th September 2003 sent a cease-and-desist notice and the respondent in its reply denied the

claim of the appellant and stated that the respondent was using the said trademark since 1992.

e) On 5th November 2004, a rectification application filed by the respondent against the registration of the appellant's trademark was dismissed as premature by the Intellectual Property Appellate Board. Even though the respondent filed a caveat in 2008 in this Court that fact was concealed in the averments made in Suit No.239/2009 so as to aver a fresh cause of action and for uncalled for urgency which suit resulted in the impugned order against the appellant.

f) A reference was also made to the order passed by the Appellate Board staying the registration number of the appellant as his counsel was absent.

g) A Suit No.239/2009 was filed by the respondent in this Court on 27th January 2009 seeking injunction against the appellant from using the trademark '**HEIGHTEX**' leading to the impugned order.

2. The impugned order of the learned Single Judge reads as under: -

“IA No. 1594/2009 (exemption)

Allowed subject to all just exceptions.

Application stands disposed of.

IA NO. 1593/09 (exemption)

Original documents have not been placed on record. Same be placed on record within 30 days.

The application stands disposed of.

CS(OS) 239/2009 and IA No. 1592/09 (u/O 39 R.1 and 2 CPC)

Issue summons/notice of the suit/application by ordinary process, registered AD post as well as through approved courier to the defendants, returnable for 5th may, 2009.

In the meantime, defendants are restrained from using carton/label of 'HEIGHTEX' for marketing height increasing Homeopathic tablets."

3. The learned counsel for the appellant has contended, and in our view rightly, that the order does not comply with the provisions of Order 39 Rule 3 of the Code of Civil Procedure, which reads as follows: -

"ORDER XXXIX

1. XXX XXX XXX

2. 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.”

4. A perusal of the impugned order clearly demonstrates that for passing an ex parte order the Court is required to record reasons that the object of injunction would be defeated by delay. No such reason and indeed no reason whatsoever has been recorded in the impugned order. Furthermore, we have noticed the fact that on merits also the appellant had issued a legal notice to the respondents in the year 2003, the reply to which did not state that the application for registration, filed by the respondent was in the year 1996, though it was stated in the said reply that the user of the respondent/plaintiff was from the year 1992. In these circumstances, the veracity of the averment regarding the application of 1996 filed by the respondent/plaintiff was required to be looked into seriously before any order was passed granting an injunction which stops the business of the appellant in the disputed product. We are, therefore, satisfied that the order

of the learned Single Judge cannot be sustained and the same is accordingly set aside.

5. Parties are directed to appear before the Judge Incharge (Original Side) for directions, after obtaining orders of Hon'ble the Chief Justice, on 3rd December, 2009.

(MUKUL MUDGAL)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

September 22, 2009
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