

JSN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO.2353 OF 2016
IN
SUIT (L) NO.685 OF 2016

BRS Refineries Private Limited	... Applicant
<i>In the matter between</i>	
Liberty Oil Mills Limited	... Plaintiff
<i>Versus</i>	
BRS Refineries Private Limited and Another	... Defendants

Mr. B. Poojari, *i/b Asian Patent Law for the Plaintiff.*
Ms. Pooja Kshirsagar, *with Dr. B. Saraf, i/b Shikha Goenka for the*
Applicant / Defendants.

CORAM: G.S. PATEL, J
DATED: 11th August 2016

PC:-

1. I passed an ad-interim order on this Notice of Motion on 29th July 2016. The action is in passing off. The Defendants had been served and were represented on that date. One Mr. Sarda, a representative of the 1st Defendant, was present. I noted a statement made by Mr. Sarda that the Defendants' use of the impugned mark "**EVERYDAY**" was from 2001-2002 and that this appeared to be subsequent to the Plaintiffs' adoption of the same mark for similar goods. The fact that the goods are similar was also

noted in paragraph 4. I observed that phonetically and structurally the two marks were the same.

2. Today the Defendants have filed the present Notice of Motion (L) No.2353 of 2016 seeking a recall of the order of 29th July 2016. Ms. Kshirsagar for the Defendants points out that the entire cause of action as pleaded in the Plaint is on the footing that the mark “**EVERYDAY**”, though not registered is “an inherently distinctive word”. This is so stated in paragraph 5, where the Plaintiffs aver that they adopted this “inherently distinctive” mark in 1997. Later in that very paragraph, they say that it has been used in conjunction with their house mark “**LIBERTY**”, but that “**EVERYDAY**” is the leading, essential and prominent feature of that mark. This is the basis on which the Plaint proceeds.

3. Ms. Kshirsagar points out that none of this is true to the Plaintiffs’ own knowledge. Before the Registrar of Trade marks, as far back as in 2010, the Plaintiffs filed an Affidavit of Evidence in support of an application for trade mark registration. That application was signed by a Director of the Plaintiff. In that application, the Plaintiff sought registration of a composite mark “**LIBERTY EVERY DAY**”. This is materially different from what is stated in the Plaint, where, as I have noted, the Plaintiffs claim that “**LIBERTY**” is the registered house mark and “**EVERYDAY**” is used in conjunction with it.

4. What is, however, more telling is the assertion made in paragraph 25 of this Affidavit of Evidence, where the Plaintiffs

unequivocally say that the word “**EVERYDAY**” is a *common dictionary word* and it indicates *daily, common place*. The affidavit does not stop at that. The Plaintiff goes on to say that none can have a monopoly over the word “**EVERYDAY**” for all goods.

5. This Affidavit was filed in the context of an opposition from Nestle India which was using the mark **NESTLE EVERYDAY**. The Plaintiff in paragraph 25 of this very Affidavit stated that the mark of which the Plaintiff sought registration, viz., “**LIBERTY EVERYDAY**”, should be taken as a whole and should not be dissected. Yet this dissection is precisely what the Plaintiff has sought in the present Plaintiff.

6. The question is not today about the use of the mark, or the longevity of that use, but about the Plaintiff’s approach to this adoption and whether, according to the Plaintiff itself, this is an inherently distinctive mark as is now pleaded in the present Suit, or it is a non-distinctive and laudatory word as stated before the Registrar. The two applications are diametrically opposed. It is difficult to see how these two approaches can be reconciled.

7. The more fundamental point, to my mind, is that nowhere in the Plaintiff do I find a reference to this Affidavit. It is not annexed. It is not disclosed. Whatever may have been the Plaintiffs’ stand on this, when approaching a Court and seeking an order of injunction, it was at the very least the duty of the Plaintiff to make a disclosure that it had filed such an Affidavit and then perhaps placed before the Court such explanation as it thought necessary in regard to this

Affidavit. I believe it is now far too well-settled to require reiteration that suppression of a material document amounts to a fraud on the Court and a Court can always deal with such Suit with a strong hand, even dismissing it summarily at any stage.

8. Having regard to the fact that Mr. Poojari has had to operate on instructions, I will at this stage not dismiss the Suit itself. I will, however, immediately vacate the order of 29th July 2016. It is recalled and set aside. The Defendants' Notice of Motion (L) No. 2353 of 2016 is made absolute in these terms.

9. The Plaintiffs' Notice of Motion itself in the present form and in this state of the pleadings cannot be allowed to continue. The Plaintiffs' Notice of Motion No.1908 of 2016 is dismissed. Thanks only to Dr. Saraf's intervention for the the Defendants, there will be no order as to costs.

(G. S. PATEL, J.)