

**FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 248 OF 2017
IN
COMMERCIAL SUIT NO. 369 OF 2017**

Office Notes, Office Memoranda of Coram, Appearances, court's orders or directions and Prothonotary's orders	Court's or Judge's orders
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Mr. Amit Jamsandekar i/by. V. A. Associates for Plaintiff.

Ms. Rupa Bhavé a/w Mr. Harshavardhan G. Khambete i/by. Bhavé and Company for Defendant No.2.

CORAM : K. K. TATED, J.

DATE : NOVEMBER 7, 2017

P.C.:

. Heard learned Counsel Mr. Jamsandekar for Plaintiff and learned Counsel Ms. Bhavé for Defendant No.2.

2. The learned Counsel for Plaintiff submits that they have already served Defendant No.1. He submits that Affidavit of service is already filed on record. The statement is accepted.

3. Though the Defendant No.1 is duly served, no one appeared on behalf of them when the matter was called out.

4. By this Notice of Motion, the Plaintiff is seeking an order of injunction restraining the Defendants from using in any manner/form, directly or indirectly the impugned mark 'KORCAL' by itself or in combination with any prefix/suffix or any other similar/deceptively similar mark thereto or similar/deceptively similar to the trademark 'CORCAL' so as to infringe their registered trade mark 'CORCAL' bearing registration No. 2328770, 2331721, 2331722.

5. It is the case of the Plaintiff that they have learnt from the market that Defendant Nos. 1 and 2 are marketing their product by using deceptively similar registered trade mark of the Plaintiff 'CORCAL'. He submits that it is specifically stated on cover of the said product that Defendant No. 1- Human Life Science is marketing the said product manufactured by Defendant No.2.

6. In support of this contention, learned Counsel for Plaintiff relies on Exhibit "H" (Page 84) of the Plaint. He submits that this Court by considering the facts on record passed ad-interim relief on 24th March, 2017 in terms of prayer clause (a) and (b) of the present Notice of Motion.

7. The learned Counsel for Plaintiff submits that though the Defendant No.1 is duly served, neither have they filed their Affidavit in reply nor have they remained present when the

matter was called out. He submits that this itself shows that Defendant No.1 accepted their contentions as stated in Affidavit in support of Notice of motion as well as the copy of Plaintiff.

8. The learned Counsel Mr. Jamsandekar for Plaintiff submits that Defendant No.2 has filed Affidavit in reply dated 15th September, 2017. He submits that Defendant No.2 in their Affidavit in Reply in paragraph 7 (f) made a statement that neither are they manufacturer of the product as alleged by the Plaintiff in the present proceedings nor are they marketing the same violating the Plaintiff's registered trade mark. paragraph 7 (f) read thus :

“7(f) I say that the Defendant No.1, i.e. HLS is marketing the questioned product is neither manufactured by this Defendant nor there is any business relationship or agreement for marketing any of the products manufactured by this Defendant.”

9. The learned Counsel for Plaintiff submits that Defendant No.2 relied on the complaint lodged by them dated 12th September, 2017 with concerned police station. He submits that even during the course of argument learned Counsel for Defendant No.2 relied on legal notice dated 14th September, 2017 issued by Defendant No.2's Advocate to Defendant No.1. He submits

that in the present proceedings though the Defendant No.2 was duly served with the copy of the proceedings in the month of March, 2017, they have failed and neglected to remain present when the matter appeared before this Court for ad-interim relief on 24th March, 2017.

10. The learned Counsel for Plaintiff submits that Defendant No.2 had filed Affidavit in reply dated 15th September, 2017. But just before that they filed police complaint and also issued legal notice to Defendant No.1 this itself shows that Defendant Nos.1 and 2 are in collusion, violating the Plaintiff's registered trade mark and marketing their product in market. He submits that bare reading of Exhibit "H" (to the Plaintiff) clearly shows that Defendant No.2's name is shown as a Manufacturer. He further submits that even at the time of filing the present suit the plaintiff has specifically made a statement in paragraph 2 of the plaint that Defendant No.2 is manufacturing and marketing pharmaceutical product through the Defendant No.1 and hence, violating the Plaintiff's registered trade mark.

11. The learned Counsel for Plaintiff submits that Defendant No.2 has not placed on record any documentary evidence to show that they are not the manufacturer of the product as alleged by the Plaintiff in the present proceedings.

He further submits that Defendant No.2 has not placed on record any evidence to show that they do not have any business relationship with Defendant No.1. He submits that this Court after considering the evidence placed on record by the Plaintiff granted ad-interim relief by order dated 24th March, 2017. He submits that in the interest of justice this Hon'ble Court be pleased to make this Notice of Motion absolute in terms of prayer clauses (a) and (b). Admittedly Defendant Nos.1 and 2 in collusion with each other, marketing their product by using the plaintiff's registered trade mark. He submits that if the Notice of Motion is not made absolute, irreparable loss will be caused to the Plaintiff.

12. On the other hand learned Counsel Ms. Bhave appearing on behalf of Defendant No.2 vehemently opposed the present Notice of Motion. She submits that as soon as they learnt about the present proceedings and violation of the plaintiff's trade mark showing Defendant No.2's address on the wrapper, they immediately filed police complaint on 12th September, 2017. Not only that, they issued a legal notice to Defendant No.1 to that effect. She submits that in the police complaint dated 12th September, 2017 Defendant No.2 specifically stated in paragraph 2 that Defendant No.1 is using their name for marketing Plaintiff's

trade mark without any authenticity. She further submits that Defendant No.2 has made a specific statement in police complaint that neither they are manufacturing the pharmaceutical product as alleged by the Plaintiff in their complaint nor they are marketing the same through the Defendant No.1. She submits that the said complaint is pending before the concerned authority for taking appropriate action according to law, against Defendant No.1.

13. The learned Counsel for Defendant No.2 further submits that they have specifically made a statement on solemn affirmation before this Court that neither they are manufacturing nor marketing pharmaceutical product similar to the plaintiff's registered trade mark. She submits that Defendant No.2 specifically made a statement on solemn affirmation that they do not have any relationship/transaction with Defendant No.1. She submits that when the Defendant No.2 is not manufacturing and/or marketing their product using the plaintiff's registered trade mark with Defendant No.1, there is no question of granting any relief in the present Notice of Motion against the Defendant No.2. She further submits that the suit itself is not maintainable against Defendant No.2 for want of cause of action.

14. The learned Counsel for Defendant No.2 submits that except Plaintiff's statement in the plaint and particularly in paragraph 2 of the plaint, plaintiff has failed and neglected to place on record any documentary evidence to show that Defendant Nos. 1 and 2 have a business relationship. Not only that, Plaintiff failed to place on record any documentary evidence to show that Defendant No.2 is the manufacturer and marketing their product through Defendant No.1 by using the plaintiff's registered trade mark. She submits that they have absolutely no objection, if any action is taken against the Defendant No.1. She further submits that even they have no objection, if the present Notice of Motion is made absolute against Defendant No.1. She further submits that though the plaintiff filed rejoinder dated 6th November, 2017 they have failed and neglected to place on record any evidence and/or documents to show that Defendant No.2 is manufacturing and trading their product by using the plaintiff's registered trade mark through the Defendant No.1. Hence, there is no substance in the present Notice of Motion and the same is required to be dismissed against Defendant No.2. She submits that if Notice of Motion is not dismissed against Defendant No.2, irreparable loss will be caused to their reputation in the market.

15. I have heard both the Counsel at length.

16. It is to be noted that on bare reading of the Affidavit in reply filed by the Defendant No.2 and particularly paragraph 7, it clearly shows that neither are the Defendant No.2 associated with the Defendant No.1 nor marketing their product by using the plaintiff's registered trade mark as "KORCA MAX". Apart from that, after learning about the present proceedings Defendant No. 2 immediately filed a complaint with the concerned police station for taking action against Defendant No.1. Paragraph Nos. 2, 3 and 4 of the said complaint dated 12th September, 2017 read thus :

"2. M/s Human Life Sciences is marketing a product under the name 'KORCAL MAX' as dietary supplement (A PROPRIETARY FOOD) having Coral, Calcium, Methylcobalamin, Vit.K2-7 & Folic Acid Tablets. this product is being marketed purported with/publicity and information to the public traders and consumers on the label on the said product and or packets/wrappers that the product is manufactured by my concern M/s Bio Genetica. This product is not manufactured by my concern. I have no acquaintance with the individuals carrying on business under the name M/s Human Life Science or any business relations whatsoever with M/s Human Life Sciences. Individuals carrying on business under

Human Life science are using name of my concern with malafide intention of using the goodwill and reputation earned and accrued to me.”

“3. Marketing of this product is fraudulent and deceptive as the product under marketing is not manufactured by my concern. M/s Human Life Sciences (HLS) its agents, stockiest, retailers are playing fraud on the public, traders and the consumers of this product.”

“4. This fact came to my notice from the summons served on the undersigned in respect of a suit filed by M/s Lupin Limited in the Hon'ble High Court of Judicature at Bombay against the said the Human Life Sciences (HLS) and Bio Genetic. A copy of the notice served and plaint is enclosed for your perusal and necessary action.”

17. A bare reading of these three paras shows that the Defendant No.2 is also interested to take action against Defendant No.1 who has committed fraud by using the Defendant No.2's name and address as shown in exhibit “H” in the plaint. Not only that, Defendant No. 2 also issued legal notice to the Defendant No.1 and directed them not to use their address and name as manufacturer in marketing their own product. Though the Plaintiff filed rejoinder, nothing is placed on record to show that Defendant No. 2 is manufacturing the said product and marketing by

using the plaintiff's registered trade mark. Considering these facts, I am of the opinion that Notice of Motion preferred by the Plaintiff is required to be dismissed against Defendant No.2.

18. It is to be noted that though the Defendant No.1 is duly served, no one has appeared on behalf of them when the matter was called out. Hence, the contentions of Affidavit in support of Notice of Motion are deemed to be admitted by the Defendant No.1. Therefore, the Notice of Motion is required to be made absolute against the Defendant No.1 only.

19. At this stage, the learned Counsel appearing on behalf of Plaintiff seeks stay of the order passed by this Court to the extent of dismissal of Notice of Motion against Defendant No.2.

20. It is to be noted that Defendant No.2 has specifically stated in Affidavit in reply in paragraph 7(f) that they are not manufacturer and/or marketing the product which is being marketed by Defendant No.1 under the name of "KORCAL MAX" violating plaintiff's registered trade mark. Further they have already filed police complaint with the concerned police station against Defendant No.1 with regard to the same.

21. Considering these facts, I do not find any reason to grant stay. Hence, prayer made by

the Advocate for Plaintiff is rejected.

22. In view of above mentioned facts, following order is passed.

ORDER

(A) Notice of Motion is made absolute in terms of prayer clauses (a) and (b) against the Defendant No.1 only, which read thus :

“(a) That pending hearing and final disposal of the present suit the Defendants by themselves, its Directors, C & F and other agents, stockists, and/or all other persons claiming through or under them or controlled by them, be restrained by a temporary order and injunction of this Hon'ble Court from using, in any manner/form, directly or indirectly the impugned mark “KORCAL” being Exhibit 'H' by itself or in combination with any prefix/suffix or any other similar/deceptively similar mark thereto or similar/deceptively similar to the said trademarks 'CORCAL', so as to infringe the Plaintiff's registered trademark 'CORCAL' bearing the registration Nos. 2328770,2331721,2331722.

(b) That pending and hearing and final disposal of the present suit, the Defendants by themselves, its Directors, C&F and other agents stockist, and/or all other persons claiming through or under them or under their control, be restrained by a temporary order and injunction of this Hon'ble Court from using, in any manner/form, directly or indirectly the

impugned mark 'KORCAL' being Exhibit 'H' by itself or in combination with any suffix or any other similar/deceptively similar mark thereto or similar/deceptively similar to the trademark 'CORCAL' so as to pass-off or enable others to pass-off the goods of the Defendants as and for the goods of the Plaintiff or as being associated with or emanating from or having any connection with the Plaintiff.”

(B) Notice of Motion stands rejected against Defendant No.2.

(C) Liberty is granted to the Defendant No. 2 to take out appropriate proceedings, if they so desire, to delete their name from the cause title of the Plaint and the same will be decided on its own merits.

(D) Notice of Motion stands partly allowed.

(E) No order as to costs.

(K.K.TATED, J.)