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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO(OS) (COMM) 81/2017 and CM Nos.13700-01/2017

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Date of decision : 12th April, 2017

KENT RO RYSTEMS PVT LTD & ANR Appellants

**Through: Mr. Sandeep Sethi, Sr. Adv.
with Ms. Rajeshwari H.,
Adv.**

versus

**AMAZON SELLER SERVICES
PRIVATE LIMITED**

..... Respondent

**Through: Mr. Saikrishna Rajagopal,
Mr. Sidharth Chopra,
Mr. Nitin Sharma,
Ms. Sneha Jain and
Mr. Arvind Thampy, Advs.**

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE ANIL KUMAR CHAWLA

JUDGMENT (ORAL)

GITA MITTAL, J.

1. Notice.
2. Mr. Sidharth Chopra accepts notice on behalf of the respondent-company.
3. The appellants filed a suit being CS(Comm.) No.1462/2016 seeking a permanent injunction restraining infringement of designs, passing off, damages, rendition of accounts, delivery up and other related reliefs against eight defendants. So far as the present

respondent is concerned, it was arrayed as defendant no.8 in the suit as owning and managing <https://www.amazon.in>, an e-commerce platform whereon sellers of various products are permitted to showcase, sell their products and conduct business through the online portal.

4. The plaintiff had alleged that the defendant no.8 was responsible for addressing the grievances of the seller, including claims of infringement of various products sold on the said website. The plaintiff had complained of infringement of its design by the defendants with regard to products which were hosted on the website by the defendant no.8.

5. Alongwith the plaint, the plaintiff had filed IA No.13448/2016 under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure for grant of *ex-parte ad-interim* injunction. On a *prima facie* consideration of this application, when the suit was first listed before the court on 27th October, 2016, an *ex-parte* interim injunction in the following terms was passed by the court :

“.... Accordingly, till the next date of hearing, defendants, their distributors, dealers, stockists, retailers, servants, agents and all others acting for and on behalf of the defendants are restrained from manufacturing, selling, importing, offering for sale, advertising and directly or indirectly dealing in any products :

i.being water purifiers or parts thereof that infringe the plaintiff's trademarks KENT

PEARL, KENT GRAND+, KENT PRIME, KENT GOLD and KENT SUPREME;

ii. that are deceptively similar to the products of the plaintiffs covered by design nos.219309, 224813, 252225, 262661 and 220727;

Defendant no.8 is also directed to take down/block/remove/delist (i) all the products that infringe the plaintiffs' water purifiers sold under the mark KENT PRIME, KENT GOLD KENT PEARL, KENT GRAND+ and KENT SUPREME. Defendant no.8 is also directed to disclose the details including the name and address of the sellers of water purifiers infringing the plaintiff's registered designs.

Plaintiffs shall comply with the provisions of order XXXIX Rule 3 CPC within seven days from today.

Let a copy of this order be given DASTI under the signatures of the Assistant Registrar."

6. The summons in the suit were returnable on 25th January, 2017. On this date of hearing the respondent had entered appearance, however no proceedings were held as the learned Single Judge was on leave and the case was adjourned to 6th July, 2017.

7. Aggrieved by the ex-parte interim injunction which had been passed against it, the present respondent (defendant no.8 in the suit) filed an application being IA No.1191/2017 under Order XXXIX Rule 4 on 24th January, 2017 seeking vacation/modification of the order of *ex-parte ad-interim* injunction wherein in para 17, it was averred thus :

“17. Therefore, purely as an interim arrangement, the Defendant No.8 undertakes to take down/block/remove/delist any allegedly infringing listing which the Plaintiff specifies and brings to the Defendant’s attention. It is submitted that similar orders have been passed by various Courts including the Apex Court. It is submitted that such an arrangement would balance the rights of the intellectual property holder on the one hand and the rights of the intermediary on the other. It is further submitted that in the event that the ex parte ad interim injunction is allowed to operate against Defendant No.8 in its present overbroad state, it will have an irreparably deleterious impact on its business. Furthermore, in its present state, the order also leaves Defendant No.8 open to claims of disobeying or breaching the injunction by leaving it vulnerable to contempt proceedings despite its bona fides and states willingness to abide by this Hon’ble Court’s order.”

8. Based on the above averments, the following prayers have been sought:

"(a) Modify the ex parte ad interim injunction order dated October 27, 2016 to the extent that the defendant no.8 undertakes to remove any allegedly infringing listing within two working days on being informed by the plaintiff specifying the details of such listing or other data, link or communication.
(b) Pass any such order this Hon'ble Court deems fit in the interest of justice."

9. The respondent, therefore, sought a modification of the order dated 27th October, 2016 to the extent that the defendant no.8

undertook to remove any allegedly infringing listing within two working days on being informed by the plaintiff specifying the details of such listing or other data, link or communication. It is noteworthy that the defendant no.8 filed an undertaking dated 30th January, 2017 in support of the submissions made in IA No.1191/2017 which reads as follows :

“a) That the Defendant No.8 shall remove/delist/take down the listings of the impugned Kent’s Trademarks and Registered Designs as and when identified and communicated by the Plaintiffs’ through specific URLs;

b) That the Defendant No.8 shall remove/delist/take down the listings so identified above in Clause (a) within the period of 48 hours and/or two working days;

c) That the Application under Order XXXIX Rule 1 & 2 and Order XXXIX Rule 4 may be disposed against the Defendant No.8 in accordance and in light of the above undertaking.”

10. IA No.1191/2017 was listed before the court for the first time on 30th January, 2017 when the following order was passed:

"IA No. 1191/2017

Learned counsel for the defendant No.8 has given the undertaking in the following terms and has requested that in terms of this undertaking, the suit against them be vacated.

“Modify the ex parte ad interim injunction order dated October 27, 2016 to the extent that the defendant no.8 undertakes to remove any allegedly infringing listing within two working days on being informed by the

plaintiff specifying the details of such listing or other data, link or communication."

The learned counsel for defendant No.8 also undertakes to disclose the names of the infringing parties, who had been uploading the infringing material on their websites. In view of this undertaking, interim stay order dated 27.10.2016 defendant no.8 i.e. Amazon Seller Services Private Limited, is not extended. However, qua other respondents, the interim stay shall continue. The application stands disposed of."

11. Aggrieved by this order, the appellant (plaintiff in the suit) has filed the present appeal complaining that no notice of the application under Order XXXIX Rule 4 was issued to the plaintiff by the court. No opportunity was given to file a reply or to contest the assertions made in the application. Instead, it is contended that by the impugned order, the learned Single Judge has merely noted the undertaking and the submissions made by the respondent-defendant no.8 in the said application and vacated the interim injunction which had been passed on 27th October, 2016.

12. It is submitted by Mr. Sandeep Sethi, learned senior counsel on behalf of the appellant that grave and irreparable damage enures to the appellant (plaintiff) on account of the vacation of the interim order. The submission is that in the impugned order, the court has not recorded any reasons for vacation of the interim order so far as the respondent is concerned. In fact, the learned Single Judge has not even accepted the limited undertaking which was tendered by the defendant no.8, even if the same was permissible in the facts

and circumstances placed on record by the plaintiff.

13. Learned senior counsel further submits that, in fact, even if the undertaking was accepted and had to be worked, the same would be breached and the rights of the plaintiff infringed. A complaint was made that even if the defendant no.8 (respondent herein) was to remove the infringing listings on a complaint by the appellant in terms of its undertaking, there is no interdiction of the same infringing listings again appearing on a different URL. Learned senior counsel would contend therefore that the vacation of the interim order dated 27th October, 2016 so far as the defendant no.8 is concerned, is contrary to law and cannot be sustained.

14. The fact that IA No.1191/2017 was listed for the first time before the learned Single Judge on 30th January, 2017 is not disputed on behalf of the respondents. So far as issuance of notice and the effect of the order is concerned, the same can also not be disputed in as much as the order does not reflect issuance of notice to the appellant.

15. There is, therefore, substance in the submission on behalf of the plaintiff-appellant that it was deprived an opportunity to contest the detailed assertions of effect made by the respondents in the application on that date. The order does not reflect consideration of any submission on behalf of the appellant.

16. We also find that though an undertaking is extracted in the order, the same has not been accepted by the learned Single Judge. Therefore, there is also strength in the submission of Mr. Sandeep

Sethi, learned senior counsel that by the order dated 30th January, 2017, the interim injunction stands vacated on the basis of a non-binding undertaking purportedly given on behalf of the defendant no.8. In view thereof, certainly the order dated 30th January, 2017 would not be sustainable in law.

17. Mr. Saikrishna, learned counsel for the respondent has submitted that the defendant no.8 could not have been interdicted in the manner in which the order dated 27th October, 2016 purported to do so. Mr. Saikrishna adverts to the provisions of Section 79 of the Information Technology Act, 2000. It is urged that the legal position on the liability of a intermediary under this enactment is well settled. Reliance is placed in support of these contentions on judicial pronouncements of the Supreme Court as well as Division Benches and Single Bench of this court. These submissions do not find consideration in the order dated 30th January, 2017. The appellant has had no opportunity to contest them. Therefore, we are of the view that it is not necessary for us to dwell on these issues in this appeal. It cannot be denied that the appellant was entitled to a fair and reasonable opportunity to contest the assertions made in IA No. 1191/2017 which had been filed by the defendant no.8 under Order XXXIX Rule 4 of the CPC, if necessary, by way of a reply.

18. The order dated 30th January, 2017 has continued to operate till date for over three months. Therefore it may not be appropriate to direct restoration of the injunction made by the court on 27th October, 2016, again without a fair and appropriate hearing on the

rival contentions. The same would certainly be unjust to both the sides. In doing so, we would have to deal with the merits of the assertions made in IA No. 1191/2017, again without the benefit of a response from the plaintiff thereon.

19. It may be noted that IA No. 13448/2016 filed by the plaintiff under Order XXXIX Rules 1 & 2 of the CPC continues to remain pending without any adjudication thereon.

20. Mr. Sandeep Sethi, learned senior counsel appearing for the appellant submits that to obviate any further delay in the matter, the order dated 30th January, 2017 may be treated as having issued notice to the plaintiff of the application and the appellant may be given an opportunity to file a response to the respondent's application. A prayer is made that time- bound directions for combined hearing of IA Nos.13448/2016 and 1191/2017 be made so that the rights of the plaintiff are not prejudiced any further.

21. In view of the above, it is directed as follows :

(i) The order dated 30th January, 2017 to the extent that it directs that IA No.1191/2017 stands disposed of, is hereby set aside and quashed.

(ii) As an interim measure, we accept the undertaking by defendant no.8 at serial nos.A and B of the document dated 30th January, 2017 extracted in para 9 above. The defendant no.8 shall remain bound by the same till final orders in IA Nos.13448/2016 and 1191/2017.

(iii) The appellant is permitted four days time as prayed to file a reply/response to IA No.1191/2017. The defendant no.8 may file

rejoinder thereto within four weeks thereafter.

(iv) IA Nos.13448/2016 and 1191/2017 in CS(Comm.) 1462/2016 shall be listed for fixation of a date of hearing as per schedule of the learned Single Judge on 26th April, 2017.

(v) As requested by learned senior counsel for the appellant as well as counsel for the respondent, the learned Single Judge may ensure that these applications are decided at the earliest, preferably within a period of three months from today.

This appeal and all pending applications are disposed of in the above terms.

Dasti to parties.

GITA MITTAL, J

ANIL KUMAR CHAWLA, J

APRIL 12, 2017/kr