

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 179/2016 & CM 22335/2016**

Date of decision: 6th September, 2017

CENTRAL PARK ESTATES PVT. LTD. & ORS. Petitioners
Through: Mr.Amit Sibbal, Sr. Adv. with
Mr.Satinder Singh, Mr.Abhay Gupta, Mr.Ajay
Kumar, Mr.Sushil Kumar, Advs.

versus

KEYSTONE REALTORS PVT LTD & ANR Respondents
Through: Mr.C.M.Lall, Sr. Adv. with Ms.Nancy
Roy and Mr.Rupin Bahl, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAVIN CHAWLA

SANJIV KHANNA, J. (Oral)

The Central Park Estates Pvt. Ltd. and three associate companies have filed the present intra court appeal under Order XLIII, Rule 1 of the Code of Civil Procedure, 1908 (Code for short) read with Section 10 of the Delhi High Court Act, 1966 impugning order dated 9th May, 2016 disposing of application IA no.14098/2015 of the appellants under Order XXXIX, Rules 1 and 2 of the Code and the application IA no. 22645/2015 of the respondents, who are the defendants, under Order XXXIX Rule 4 of the Code.

2. The appellants are engaged in development and sale of real estate projects under the name 'Central Park'. The appellants assert having adopted the said mark in 2001. They are registered proprietors and have acquired statutory rights under the Trademarks Act, 1999 (Act for short) in respect of the trademark 'Central Park' along with '3 leaves' under class Nos.36 and 37 vide two applications dated 21st March, 2005. Five other registrations with the words "Central Park" in 2011 are referred. The assertion is that the words "Central Park" are the primary and "the most prominent feature" in the registrations, thus they are entitled to protect and enforce their statutory rights.

3. The appellants had prayed for interim injunction restraining the respondents from selling, offering for sale, permitting others to sell or offer for sale, advertise or, directly or indirectly deal in any real estate or allied services under the mark "CENTRAL PARK" or identical or deceptively similar mark.

4. On 17th July, 2015, an ex-parte interim order was passed in favour of the appellants in I.A. No.14098/2015. The respondents upon service had filed I.A. No. 22645/2015 seeking vacation of stay of the said interim order under Order XXXIX Rule 4 of the Code.

5. The impugned order dated 9th May, 2016 partly allows I.A. No.14098/2015 and has modified the interim order directing the respondents to not use the mark or words "CENTRAL PARK" other than as a part of "Rustomjee CENTRAL PARK" for their project at Andheri Kurla Road, Chakala, Andheri East, Mumbai only and not in any other project. The respondents were permitted to undertake the development of

the commercial building within the same project with the name “Rustomjee CENTRAL PARK”. Condition that the word “Rustomjee” shall be in the same font and height as the “CENTRAL PARK” so that the three words, namely, “Rustomjee CENTRAL PARK” get equal prominence, was imposed.

6. The respondents had accepted the said interim order. The appellants, as is clear, have filed the present appeal against the limited interim order. They seek complete restraint or in alternative restraint from using the mark "Central Park" for the commercial building.

7. The respondents, the appellants’ alleged, have violated the common law and statutory rights by using the mark ‘Central Park’ in the real estate projects at Village Chakala, Andheri (East), M.V. Road Mumbai, with the prefix-Rustomjee. Reliance is placed upon Section 29 and clause (a) of Section 34 of the Act. The appellants, it is asserted, were prior user of the trademark ‘Central Park’ as they had adopted and started using in the year 2001. Whereas, the respondents’ first used the mark Central Park for the said project was in 2002. The respondents in the written statement have not pleaded acquiescence which requires knowledge and awareness and, therefore, the defence under Section 33 of the Act would not be available. Drawing our attention to paragraphs 13 to 15 of the impugned order, it is submitted that the impugned order erroneously allows the respondents to use the mark ‘Rustomjee Central Park’ not only as an address but also as a trademark.

8. The appellants plead that the respondents had started construction of a commercial building recently. Order dated 20th January, 2016 passed

by the learned Single Judge records that construction of "another" project 'Rustomjee Central Park', Andheri (East) was started 2 years back.

9. Learned counsel for the respondents have controverted the aforesaid submissions by drawing our attention to various paragraphs in the written statement. The submissions made on behalf of the respondents have been examined in our reasoning.

10. For clarity we would like to reproduce the trademark of the appellants', registered under class No. 36 and 37 vide two applications dated 21st March, 2005.



These registrations are as a device.

The mark of the respondents on the other hand is 'Rustomjee Central Park' :-



11. On the question of prior user, the appellants have relied upon a pamphlet published which refers to the 'Central Park' project at Sector 42, Gurgaon for which enquiry and bookings were to start from 17th October, 2001. The appellants also rely on the documents executed in October, 2001 in the form of booking booklet for the 'Central Park' project in Gurgaon, Haryana. The impugned order observes that the respondents had started using the mark 'Rustomjee Central Park' at Mumbai for their project in the year 2002. Reference is specifically made to the advertisement published by the respondents with the said name and description in the newspaper on 20th January, 2002.

12. However, we find that in the written statement, the respondents have also pleaded that they were using the name and words 'Rustomjee Central Park' since 2001. Reference can be made to paragraphs 24 and 25 of the written statement. The respondents have given details of the advertisement, sale promotion, and sale figures for the financial year 2001-02. The case of the respondents is predicated on bona fide prior use and adoption, which had continued without challenge and objection. The adoption and use of the mark "Rustomjee Central Park" for the Mumbai project was in public knowledge and domain.

13. The total expenditure incurred by the respondents, as claimed, is to the tune of Rs.1,02,61,64,566/-. Expenses, administration and other expenses for the project were Rs.15,02,03,942/-. Advertisement and promotional expenses were to the tune of Rs.28,43,759/-. Sale consideration received was Rs. 63,99,01,457/-. Aforesaid figures would indicate that the respondents had incurred substantial expenditure on account of construction costs, advertisement, and sale promotion and had received payments from third parties for sale of apartments during the period 2001 till 2015.

14. The appellants' assertion that they gained knowledge and learnt about the respondents' adoption of mark 'Rustomjee Central Park' in 2015. This assertion of the appellants is disputed and denied by the respondents who have stated that they were/are well-known developers in Mumbai and the project itself has been in public domain since January, 2002. First phase of the project consisting of two residential buildings comprising of five wings was completed in 2003. Full occupancy certificates were issued by the Municipal Corporation on 1st October, 2003 and 28th November, 2003. With regard to other residential buildings/wings, the full occupancy certificate was received on 30th June, 2009. The construction of the commercial building was in progress when the written statement was filed on 19th November, 2015. With regard to the first phase, a Co-operative Society 'Rustomjee Central Park Co-operative Society' of the residents was formed in the year 2006 and for the second phase, Co-operative Society 'Rustomjee Central Park (G&H) Wings Ltd.' was formed in the year 2010.

15. We have referred to the aforesaid dates and figures to highlight the submission of the respondents that their adoption and use of mark 'Rustomjee Central Park' was well known, well advertised, and in public knowledge. This submission would carry weight when we examine the aspect and question whether the appellants were aware and had knowledge of the adoption and use of the mark "Rustomjee Central Park" by the respondents.

16. The written statement does not use the word "acquiescence", but refers to the facts and assertions noticed above. At this stage we would take a holistic view of the pleading in the written statement, rather than reject the purport and imputation of the assertions made on the ground that the expression "acquiescence" is absent. Acquiescence or absence thereof is an inference to be drawn from facts. The facts which would show and establish knowledge for over five years, have been pleaded and asserted in the written statement. The respondents, in para 19 of the written statement, have stated that the appellants have very cleverly stated in their plaint that they had come to know of the "defendants" only in the first week of July, 2015 through the website. It is also asserted by the respondents that their project was launched in January, 2002 and has been advertised on huge scale since then. Their website has been in existence for long. The assertion is that the appellants had knowledge and were aware of the project and name/mark adopted.

17. From the aforesaid discussion, it is clear that the respondents have taken the plea that the appellants were aware and had knowledge of the respondents' adoption of the mark '*Rustomjee Central Park*', which was

continuously and openly used since the year 2002. The said usage and adoption was in public domain. In these circumstances the appellants would have to establish and show that they did not have knowledge of the respondents' adoption and usage of mark till the year 2015, as asserted in the plaint.

18. Even on the question of prior use, we feel that the matter is debatable and requires evidence before any conclusion can be reached and the dispute decided. Recording a clear prima facie finding in favour of the appellants at this stage would not be right.

19. The impugned order records reference to an advertisement published on 20th January, 2002 by the respondents in which they had used the mark 'Rustomjee Central Park'. The appellants submit that the respondents have placed on record, a photocopy of the said advertisement and the original is not on record. This aspect as whether or not the respondents would be entitled to lead secondary evidence would be decided subsequently in the trial and final judgment. The Court would have to examine and decipher the position in 2001/2002. Documentary evidence at this distinct point of time may be scanty. Oral evidence may carry weight.

20. The respondents have stated that allotment letters to buyers were issued in 2001. Moreover, the figures mentioned in the written statement as well as other documents including the balance sheet of the respondents for the financial year ending March, 2002 refers to the project under construction as Central Park.

21. The submission of the appellants is that the commercial complex know as 'Rustomjee Central Park' is not within the same complex, and is a separate complex. With regard to the commercial complex, contention of the respondents is that, this is the third phase of the same project in which construction had commenced in 2001. The construction of this third phase had commenced prior to the suit. Commercial project has been sold to third parties creating third party obligations and rights.

22. Issue would arise whether the said third phase of the project should be treated as separate or not. On the said aspect, we would not reject the claim and submission of the respondents as unfounded and baseless. We feel the contention that the third phase is in the same complex and part and parcel of one project, would require trial. Pertinently, the respondents assert that the entire complex is known as "Rustomjee Central Park" since 2001 and a judicial interdict would set the clock back by more than 15 years.

23. The impugned order refers to the postal address which would change in case injunction is granted restraining the respondents from using the mark 'Rustomjee Central Park'. Ownership rights and other rights have been acquired by third parties in terms of documents executed by the respondents in favour of residents and purchasers. The residential buildings have been occupied since 2003 and 2006. Any injunction order would necessarily result in change or amendment of the postal address and would also effect rights of the said parties. It is in this context that the impugned order balances out equities and refuses to grant interim injunction. Balance of convenience is in favour of the respondents.

24. The learned Single Judge was right in holding that on examining the question of *prima facie* case, balance of convenience, and irreparable harm and injury, a limited interim injunction order should be passed. Grant of absolute injunction, as prayed for, is not justified and appropriate.

25. To protect the interest of the appellants, the impugned order directs the respondents to use the words 'Rustomjee Central Park' in a way that the font and height of the word 'Rustomjee' is the same as 'Central Park'. In other words, the word 'Rustomjee' should be given as much prominence as Central Park.

26. During the course of arguments, our attention was drawn to Sections 12 and 17 of the Act, which relate to registration in case of concurrent use and effect of registration of parts of a mark. The submission of the respondents was that the appellants had secured registration of the label mark and not the words 'Central Park' which are generic and are common words. The written statement refers to several third persons including real estate developers who are using the words/marks 'Central Park'. Question of delay was raised. Learned counsel for the appellants on the other hand had relied upon the decision of a Division Bench of this Court in *United Biotech Pvt. Ltd. Vs. Orchid Chemicals & Pharmaceuticals Ltd. & Ors.* 2012 (50) PTC 433 (Del.) (DB), wherein reference was made to the decision in *Ramdev Food Products Ltd. Vs. Arvindhbai Rambhai Patel* AIR 2006 SC 3304 to submit that the words 'Central Park' was an essential and central feature of the registered device and hence action for infringement was maintainable.

Reference was also made to *Registrar of Trade Mark v. Ashok Chandra Rakhit Limit* AIR 1955 SC 558 and other cases. In view of our findings recorded, we need not go into the said questions in the present appeal.

27. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is dismissed. In the facts of the present case, there would be no order as to costs. We have deliberately referred to the contentions, submissions, and pleading and avoided making specific conclusive findings as we are deciding on appeal against grant of partial interim order. In fact, in the present case, conclusive findings at this stage are not required and justified. The observations made above, we record, are prima facie and would not be treated as final, binding or conclusive.

SANJIV KHANNA, J

NAVIN CHAWLA, J

SEPTEMBER 06, 2017
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