

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

% **Date of decision: 7th December, 2017**

+ **CS(COMM) 1066/2016**

HIMALYA INTERNATIONAL LTD. Plaintiff

Through: Mr. V. Shankara, Adv.

Versus

HIMALAYA DRUGS COMPANY Defendant

Through: Ms. Prachi Agarwal & Ms. Mrinali
Menon, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for recovery of damages in the sum of Rs.1 crore from the defendant, pleading that the plaintiff has suffered commercial, business and market loss and damage to its brand name and reputation on account of defendant's carelessness and negligence in filing CS(OS) No.1105/2010 of this Court and obtaining an *ex parte* injunction order on absolutely misconceived facts and notions and the defendant has thereby subjected the plaintiff to *mala fide* and vexatious litigation. It is further pleaded that owing to the said *ex parte* injunction obtained by the defendant in CS(OS) No.1105/2010, the plaintiff lost the market share of its product '1DAILY' intended to be launched in 2010 and launch whereof was delayed till 2012.

2. Though the plaint is replete with incomprehensible language and obvious typographical / grammatical errors but a perusal of the order dated 2nd June, 2010 in CS(OS) No.1105/2010, filed along with the documents, shows that thereby summons of the said suit filed by the defendant against the plaintiff were ordered to be issued and vide *ex parte* injunction the

plaintiff was restrained from using the word 'HIMALYA' in relation to its product nutraceuticals or other products of whatsoever nature till the next date of hearing; it was however clarified that the said order will not preclude the plaintiff herein from legitimate use of the mark 'HIMALYA' in respect of food and frozen food products for which the plaintiff had been using the mark 'HIMALYA' till then.

3. This suit was entertained and summons thereof ordered to be issued. The defendant is contesting the suit by filing a written statement *inter alia* pleading i) that CS(OS) No.1105/2010 in which defendant obtained *ex parte* injunction against the plaintiff is still pending consideration; ii) that there can be no claim for damages on the basis of an order of the Court; and, iii) that the *ex parte* order dated 2nd June, 2010 in CS(OS) No.1105/2010 was confirmed on 18th September, 2013.

4. The plaintiff chose not to file the replication.

5. The suit is listed today for framing of issues.

6. Being *prima facie* of the opinion that a suit as the present one does not lie, particularly when CS(OS) No.1105/2010, since re-numbered as CS(COMM) No.535/2017, on account of interim injunction wherein damages are claimed is still pending and is also listed today and in which separate orders have been passed, I have enquired so from the counsels.

7. Neither the counsel for the plaintiff has looked into the said aspect nor has the counsel for the defendant.

8. I have drawn the attention of the counsels to Section 35A and Section 95 of the Code of Civil Procedure, 1908 (CPC) which are as under:

“35A. Compensatory costs in respect of false or vexatious claims or defences.— (1) If in any suit or other proceedings, including an execution proceeding but excluding an appeal or a revision any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if, thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if it so thinks fit may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of cost by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 (9 of 1887), or under a corresponding law in force in any part of India to which the said Act does not extend and not being a Court constituted under such Act or law, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.”

“95. Compensation for obtaining arrest, attachment or injunction on insufficient grounds— (1) Where, in any suit in which an arrest or attachment has been affected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable grounds for instituting the same,

the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding fifty thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury (including injury to reputation) caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.”

and to Article 90 of the Schedule to the Limitation Act, 1963 which, for a suit for recovery of compensation for injury caused by an injunction wrongly obtained, prescribes a limitation of three years commencing from the date when the injunction ceases.

9. There is no averment in the plaint, of the injunction for obtaining which damages are claimed from the defendant, having ceased. As per Article 90 supra, the cause of action for the relief, as claimed in the present suit, accrued only when the injunction wrongly obtained ceases. The plaint, on the averments contained therein, thus does not disclose a cause of action and the suit ought not to have been entertained by the learned District Judge

who, when the suit was pending before him, ordered issuance of summons thereof.

10. The defendant in its written statement has, as aforesaid, however pleaded that the injunction was confirmed.

11. A perusal of the file of CS(OS) No.1105/2010, since re-numbered as CS(COMM) No.535/2017, also listed today, shows that i) the plaintiff preferred FAO(OS) No.481/2010 against the *ex parte* order dated 2nd June, 2010 but on 20th July, 2010 withdrew the appeal with liberty to approach the Suit Court under Order XXXIX Rule 4 of the CPC; ii) the plaintiff having delayed the filing of written statement in CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017 and having sought condonation of delay in filing thereof; iii) the parties in CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017 having on 9th February, 2017 been referred to mediation; iv) the hearing of the application for interim relief in CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017 having been adjourned on innumerable occasions owing to the request of one counsel or the other or on joint request; v) the plaintiff herein, vide order dated 11th July, 2013 in CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017, having been found to be in non-compliance of the interim order dated 2nd June, 2010 in that suit; and, vi) the *ex parte* ad-interim order dated 2nd June, 2010 having been made absolute, during the pendency of CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017, vide order dated 18th September, 2013 therein. It thus transpires that the interim injunction, on account of which the plaintiff herein claims to have suffered damages and for recovery of which the present suit has been filed, has been made absolute and the suit being CS(OS)

No.1105/2010 since re-numbered as CS(COMM) No.535/2017 in which the said interim order was passed is still pending consideration.

12. This suit is thus clearly premature. Though this suit is liable to be dismissed for this reason only but having had occasion to study the subject, I may for the sake of future reference also refer to a few other aspects.

13. The present suit though for recovery of damages in the sum of Rs.1 crore only, inspite of minimum pecuniary jurisdiction of this Court having stood enhanced to in excess of Rs.2 crores, is before this Court for the reason of having been found to be a commercial suit. Though, I entertain doubts whether a suit for recovery of damages on account of obtaining wrongful injunction would qualify as a commercial dispute but if it is so, then as per Clause 3 of Schedule to the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, Section 35A(2) of the CPC which limits the compensatory costs which can be awarded, to Rs.3,000/-, has been deleted insofar as commercial suits are concerned. Though the schedule to the Commercial Courts Act does not make any change to Section 95 of the CPC but following the parity of reasoning as in deletion of Section 35A(2), in commercial suits, the maximum compensation which the Court can award for obtaining injunction on insufficient grounds, cannot be Rs.50,000/- as provided in Section 95(1) of the CPC.

14. Though Section 95(2) of the CPC provides that an order determining an application under Section 95 will bar any suit for compensation in respect of such injunction and which would mean that if such an application is not filed, a suit would lie but I am of the opinion that the Court which is most suited to award compensation for wrongfully obtaining an injunction, is the Court which granted the injunction and to relegate the party, which suffers

such an injunction to a separate suit for recovery of compensation therefor would multiply litigation. I say so because it has been consistently held in ***Abhimanyoo Ram Vs. State of Uttar Pradesh*** (2008) 17 SCC 73, ***Ramesh Chandra Sankla Vs. Vikram Cement*** (2008) 14 SCC 58 followed by me in ***Ruchika Cables Pvt. Ltd. Vs. The Secretary (Labour)*** 2010 (117) DRJ 73 that the Court, at the time of final disposal, must balance the equities flowing from the interim order and a litigant cannot retain the benefit of interim order. Thus, if a Court which has granted an injunction, finds the same to have been obtained on insufficient grounds, while vacating the injunction is required to, while balancing the equities, compensate the party against whom such an injunction was granted. Once that is done and / or is required to be done, in my opinion, the need for a subsequent suit should not arise.

15. In the present case, of course, the injunction has been confirmed and the suit being CS(OS) No.1105/2010 since re-numbered as CS(COMM) No.535/2017 is still pending consideration, it will be open to the plaintiff to, in the said suit, at the time of final disposal thereof, also urge that the interim injunction should be vacated and the Court, if vacating the interim injunction, should compensate the plaintiff for the period for which the injunction remained in force. It is a different matter that the Court may at that stage, instead of balancing the equities itself, relegate the plaintiff to the remedy of a separate suit.

16. Thought has also crossed my mind, whether a mere vacation of the *ex parte* injunction and thereby cessation thereof during the pendency of the suit would furnish a cause of action for a suit for damages. The vacation, even if any of the *ex parte* injunction, is on a *prima facie* view of the matter and the suit for the relief of permanent injunction would still have to be

decided. It is well nigh possible that the Court though has not found the plaintiff entitled to interim injunction may ultimately find the plaintiff entitled to a permanent injunction. Thus, in my opinion, a mere vacation of the *ex parte* injunction on a *prima facie* view of the matter also cannot entitle a defendant against whom the *ex parte* injunction was granted, to institute a suit for recovery of damages. If in the suit in which *ex parte* injunction was granted and vacated, the plaintiff is ultimately found entitled to a permanent injunction, it cannot certainly be said that the plaintiff had sought *ex parte* injunction on insufficient grounds. Once that is so, the question of the defendant being entitled to damages on account of *ex parte* injunction would not arise. Thus the better view appears to be, that even in cases in which *ex parte* injunction is granted and vacated, a suit for damages for obtaining *ex parte* injunction should await the final decision of the suit.

17. Reference in this regard may be made to ***Mahadev I. Todale Vs. Frankfinn Aviation Services Pvt. Ltd.*** 242 (2017) DLT 273, SLP(C) No.28925/2017 preferred whereagainst was dismissed on 10th November, 2017, holding that till the plaintiff obtains an order of acquittal or discharge in his favour, no cause of action to file a suit against the defendant on the tort of malicious prosecution accrues. Reference in this context may also be made to ***Primero Skill & Training Pvt. Ltd. Vs. Selima Publications Pvt. Ltd.*** MANU/DE/0789/2017 and to order dated 20th November, 2017 in CM(M) 1307/2017 titled ***Ashok Kumar Ohri Vs. Ved Prakash Gulati.***

18. Mention may lastly be made of i) ***Bank of India Vs. Lekhimoni Das*** (2000) 3 SCC 640 holding that Section 95 of the CPC provides for a summary remedy to get compensation where a temporary injunction has been granted if such injunction was applied for on insufficient grounds or

there were no reasonable or probable grounds for instituting the claim for injunction; however the said remedy is optional and an injured party can file a regular suit against the applicant for injunction for compensation if he has not already sought relief under the aforesaid provision; thus, Section 95 of the CPC is an alternative remedy in cases of wrongful obtainment of an injunction and it does not in any way interfere with the principles regulating suits for damages for tort of malicious prosecution; however proof of malice and of special damage is necessary; and, ii) to the earlier judgments in *Albert Bonnan Vs. Imperial Tobacco Co. of India Ltd.* AIR 1929 PC 222; *Bhupendra Nath Chatterjee Vs. Srimati Trinayani Debi* AIR 1944 Cal 289; *Inder Singh Vs. The Chief Commissioner, Delhi* AIR 1963 P&H 158; *Basamma Vs. Peerapa* AIR 1982 Kar 9, the need to detail the findings wherein is however not felt.

19. As aforesaid, for dismissal of the present suit, the reasoning given in para no.12 alone is sufficient.

20. There is thus no merit in the suit.

21. Dismissed.

22. Since the counsel for the defendant was also not of any assistance, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 07, 2017

‘gsr’..

(Corrected & released on 4th January, 2018)