

\$~3

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

+ **CS(COMM) 99/2016**

**JATINDER SINGH**

..... Plaintiff

Through: Mr. D.K. Yadav, Advocate.  
(M:9650508945)

versus

**M/S BHAIJI ATTARWALE PERFUMERS(P) LTD** ..... Defendant

Through: Mr. Amit Jain, Advocate for D-1.  
Ms. Kamla, Advocate for D-2.  
(M:9958135209)

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**ORDER**

%

**28.09.2018**

**I.A. 2418/2018 (delay)**

1. This is an application seeking condonation of delay in filing the application under Order IX Rule 13. The delay is condoned.
2. I.A. is disposed of.

**I.A. 2417/2018 (u/O IX Rule 13 CPC)**

3. This is an application under Order IX Rule 13 read with Section 151 CPC seeking setting aside of the order dated 25<sup>th</sup> October, 2017.
4. The case of the Defendant is that the suit was at the stage of amendment of the plaint. It is submitted by learned counsel for the Defendant that the Defendant was under a bona fide impression that the date of hearing was on 6<sup>th</sup> December, 2017 since the notice which was received from the Registry had mentioned the said date and, therefore, no appearance

was put in on 25<sup>th</sup> October, 2017.

5. A perusal of the order of this Court by which decree was passed shows that on the said date i.e. 25<sup>th</sup> October, 2017, the amendment application was considered and the amendment was allowed. The Court had noticed that the Defendant did not appear for several hearings and was thereafter proceeded *ex-parte*. The Court thereafter proceeded to pass a decree of injunction.

6. It may not have been pointed out to the Court that the notice/summons in the case was actually issued by the Registry for 6<sup>th</sup> December, 2017. The notice attached by the Defendants with the application under Order IX Rule 13 clearly shows that the same was returnable on 6<sup>th</sup> December, 2017. It is, therefore, genuinely possible that the Defendants were not aware of the date of 25<sup>th</sup> October, 2017. The Defendants had appeared until 4<sup>th</sup> January, 2017. Under these circumstances, the same is allowed and the *ex-parte* decree dated 25<sup>th</sup> October, 2017 is recalled.

7. I.A. is disposed of.

**CS(COMM) 99/2016**

8. The matter has also been heard on merits on the last date and today. The present suit is filed by the Plaintiff seeking injunction in respect of the trademark 'Bhaiji Attarwale'. The Plaintiff claims that it is engaged in the business of manufacturing and marketing hair oil, perfumery, agarbatti, shampoo, dhoop, etc. The Plaintiff further avers that the mark was coined in the pre-Independence era by the predecessor of the Plaintiff. The area of business was both in India and present day Pakistan. The predecessor of the Plaintiff had moved to India after Independence in 1947. The Plaintiff claims that the father of the Plaintiff had settled in Bareilly during partition

and continued the ancestral business of selling perfumes, scents etc., in 1953. The manner in which the mark has been coined is set out in para 4 of the plaint which reads as under:

*“4. That the father of the plaintiff Late Shri Sardar Santokh Singh moved from Pakistan and settled in Bareilly and continued the ancestral and age old business of manufacturing and selling of Perfumery compound, scent, hair oil in the year 1953. The then firm got registered as a small scale industrial unit in the name and style of BHAI JI ATTERWALEY and commenced the manufacturing of the same in the year 1953 in India. In due course of time the present plaintiff resumed the ancestral and age-old business successfully and is still continued and is extending the business to the remotest area of India as well as has made his business available out of India also. For the sake of convenience, predecessor of the plaintiff and the present plaintiff are hereinafter referred to as the "plaintiff. The certificate of registration of the plaintiff firm as the small scale industrial unit is filed herewith. It is pertinent to mention here that the term ATTAR has been derived from ITRA perfume and the father of the plaintiff Late Shri Santokh Singh was fondly known as BHAI JI. And in such a manner the name of the trade and business of the plaintiff got to be known and popularized as BHAI JI ATTARWALE. The predecessor of the plaintiff was so much so popular that they are known and referred to in public as ATTARWALE and with respect and reverent as BHAI JI ATTARWALE in Pakistan and India both.”*

9. Thus, the Plaintiff claims a goodwill and reputation which is more than 100 years old. The trademark ‘Bhaiji Attarwale’ is also registered under the Trade Marks Act, 1999. In the Plaint, the extensive sales and advertising by the Plaintiff has also been set out.

10. The Plaintiff came to know that the Defendant has adopted the trademark 'Bhaiji Attarwale' and registered a company by the name Bhaiji Attarwale Perfumery Private Limited. The Defendant was using the said mark in relation to identical products, namely, spary, agarbatti, etc. According to the Plaintiff, the Defendant has no rights in the mark.

11. Accordingly, the Plaintiff seeks an injunction in the following terms:

*“(a.). For a decree of permanent injunction restraining the defendant by themselves as also through their directors, proprietors, individual proprietor, partners (if any), agents, servants, assigns, representatives, successors, distributors and all others acting for and on their behalf from using, selling, exporting, offering for sale, advertising or displaying directly or indirectly or dealing in any other manner or mode in hair oil, perfumery, agarbatti, shampoo & dhoop batti and allied/cognate goods under the impugned trade mark and trade name BHAI JI ATTARWALE and/or BHAI JI ATTARWALE PERFUMERS PVT. LTD or any other identical or deceptively similar trade mark and trade name amounting to or resulting in:-*

*(i). Infringement of plaintiffs said trade mark and trade name BHAI JI ATTARWALE;*

*(ii). Passing off and violation of the plaintiffs common law rights in its trade mark and trade name BHAI JI ATTARWALE;*

*(b). For an order for delivery up of all the defendants impugned goods and business bearing the impugned trade mark including packing material, carton boxes, carry bags, finished and unfinished goods, boxes, stickers, or any other incriminating material including display boards and sign boards and trade literature to the plaintiff for the purpose of destructions/erasure.*

*(c). For an order of rendition of account of the defendants by their aforesaid impugned trade activities*

*and a decree to the plaintiff on the amount so ascertained.*

*(d). In alternative to accounts for a decree for grant of damages of Rs. 20,00,500/- (Rupees Twenty Lakh and Five Hundred Only) from the defendant's, jointly and severally to the plaintiff; and*

*(e) For such other and further relief(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case."*

12. The written statement filed by the Defendant shows that the Defendant also claims rights through the same family as that of the Plaintiff. It is claimed by the Defendant that Sh. Gurmukh Singh started the business of 'Bhaiji Attarwale' in pre-independence India now in Pakistan. After Independence, two sons of Sh. Gurmukh Singh and their cousins migrated to India and settled in different places. One cousin settled in Jalandhar and another son settled in Bareilly. The second son of Sh. Gurmukh Singh – Mr. Maninder Pal Singh settled in New Delhi but started his own business. The Defendant claims that the Defendant company was incorporated by Sh. Maninder Pal Singh i.e. the son of Sh. Gurmukh Singh. Thus, the Defendant company has the same origin and is hence entitled to use the trademark 'Bhaiji Attarwale'.

13. On the last date, after perusing the defence of the Defendant, it was deemed appropriate to direct the presence of Sh. Maninder Pal Singh before the Court in order to cut short the dispute and enquire as to whether any permission was given by him for using the mark 'Bhaiji Attarwale' by the Defendant. Today, Sh. Maninder Pal Singh has appeared before this Court and his statement has been recorded. He has categorically submitted that Sh. Atul Jain, the Promoter of the Defendant company had worked with him and

wanted to learn the perfumery trade. Mr. Jain had thus trained under him. His statement is set out herein below:

*“On SA*

*I know Mr. Anuj Jain. He wanted to do work in perfumery. He has learnt perfumery related work from me. I have not given him any permission to use the trademark or trade name ‘Bhaiji Attarwale’. ‘Bhaiji Attarwale’ is our ancestral name and it is more than 100 years old. This mark belongs to my grandfather and the entire family. My brother and my uncle use this mark in Jalandhar and in Bareilly. So I have not given permission to use this mark to anyone outside the family, including the Defendant.*

14. Mr. Maninder Pal Singh has thus stated that he has never give any permission to the Defendant to use the name ‘Bhaiji Attarwale’ which is more than 100 years old and that the mark is only being used by the family members.

15. Under the Commercial Courts Act, the Court is empowered to look into the merits of a particular defence which is being put up by the Defendant and thereafter determine as to the manner in which the suit would proceed. The statement of Mr. Maninder Pal Singh is quite clear that he has not given any permission to the Defendant. The Defendant has no right or connection with the Plaintiff or its family. Under the Commercial Courts Act and the Delhi High Court Rules, 2018, not every case needs to go to trial. If the Court is of the opinion that the trial can be cut short and the adjudication can effectively be done, such a process can be resorted to under Order XIII A and XV A as amended by the Commercial Courts Act, 2015.

16. In the present case, the only defence of the Defendant is that Mr.

Maninder Pal Singh permitted the Defendant to use the mark. Apart from this defence, there can be no other defence as the Defendant himself admits that the mark belongs to the Plaintiff and to its predecessors. Mr. Maninder Pal Singh today has categorically denied giving any permission to the Defendant. The defence of the Defendant is thus false and untenable. Defendant has no rights to use the mark/name 'Bhaiji Attarwale'.

17. Learned counsel for the Defendant submits that Mr. Maninder Pal Singh was in fact one of the promoters of the Defendant company. Learned counsel for Defendant further submits that the logo used by them is different from the logo used by the Plaintiff. The fact that the different logo is used does not take away from the identity of the mark.

18. Mr. Surendra Jain, S/o Mr. Rakesh Jain, R/o A-76, Gali No.9, Chandra Vihar, Mandawali, Delhi-110092 is present in Court. Learned counsel for the Defendant under instructions from Mr. Surendra Jain submits that the Defendant may be permitted to use the BAP logo as shown in the prayer handed over. Learned counsel for the Defendant, at this stage, submits that the Defendant is willing to restrict its rights to only use of the BAP logo without the name 'Bhaiji Attarwale'.



19. The Plaintiff has no objection to the use of the BAP logo. The logo of the Defendant has been handed over to the Court and it is seen that the logo has the letters 'BAP' within a circle. The *BAP* logo which is used by the Defendant is different from the 'Bhaiji Attarwale' logo used by the Plaintiff. The Defendant is accordingly permitted to use the BAP logo but without the name/mark 'Bhaiji Attarwale'. The Defendant shall take steps to apply to the Registrar of Companies for change of name. The Defendant shall adopt a corporate name/trading style which is neither identical nor deceptively similar to 'Bhaiji Attarwale'. The application for change of name shall be made within two weeks. The ROC is directed to process the same and grant approval within a period of three months from the date of the application.

20. Immediately, however, the Defendant shall not use the mark 'Bhaiji Attarwale' on its products. The Defendant is however permitted to use the BAP logo set out above.

21. The suit is decreed in the terms of para 26(a) of the plaint. It is clarified that the decree of this Court which is passed shall not come in the way of the Defendant using the *BAP* logo without the name 'Bhaiji Attarwale'.

22. Decree sheet be drawn. No other argued reliefs are pressed. All pending I.As are disposed of.

23. A copy of this order be sent to the Registrar of Companies, Delhi & Haryana, 4<sup>th</sup> Floor, IFCI Tower, 61, Nehru Place, New Delhi, 110019.

**PRATHIBA M. SINGH, J.**

**SEPTEMBER 28, 2018**

*Rekha/Rahul*