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

+ **FAO(OS) (COMM) 131/2018**

Date of decision : 3rd July, 2018

**GOPAL ENGINEERING & CHEMICAL WORKS PVT LTD
& ORS**

..... Appellants

Through: Mr. Peeyosh Kalra & Ms. Sona
Babbar, Advocates

versus

VIKRANT CHEMICO INDUSTRIES PVT LTD.....Respondent

Through: Mr. Bharat Kumar, Mr.
Siddharth Chopra & Mr.
Dhavish Chitkara, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

CM No.25831/2018

Allowed, subject to all just exceptions.

The application is disposed of

CM Nos.25830/2018 & 25832/2018

These are applications seeking condonation of delay of 48 days in filing of appeal and 9 days in refilling of appeal. Learned counsel for the non-applicant/respondent present on advance notice states that he has no objection if the delay in filing and refilling is condoned. The applications are accordingly allowed.

FAO(OS) No.131/2018

This *intra court* appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Order XLIII Rule (1) of the Code of Civil Procedure, 1908 ('CPC') impugns the order dated 24th January, 2018 passed by the learned Single Judge in CS(OS) No.2584/2015; (i) dismissing IA No.2187/2016 under Order VII Rule 11CPC for rejection of the plaint, observing that the issue of jurisdiction was a mixed question of law and fact, that could not be decided without allowing the parties to lead evidence and (ii) allowing IA No.18038/2018 filed by the respondent for interim injunction under Order XXXIX Rules 1 and 2 CPC and dismissing IA No.23918/2015 filed under Order XXXIX Rule 4 CPC for vacation of *ex parte* interim injunction. Consequently, *ex parte ad interim* injunction, restraining the appellants, partners, officers, directors, employees, representatives, etc. from using the mark 'Doctor Hazel' or any other mark/label that is identical or deceptively similar to the first respondent's registered trademark 'Doctor Brand Phenyle' has been confirmed. The impugned order, however, clarifies that the appellants would be at liberty to use the mark 'chemist brand germ troll.'

2. On the question of territorial jurisdiction and rejection/return of plaint, at this stage, we are primarily concerned with the assertions made in the plaint, as evidence of the parties is to be recorded. Paragraphs 21 and 35 of the plaint

read as under:-

“21. The Defendant No.1 company presently manufactures its products under the CHEMIST brand. The Defendant No.1’s website (www.shrigopal.com) states that its business has been “running successfully in the state of Uttar Pradesh, Madhya Pradesh, Uttaranchal, Chattisgarh, Haryana, Delhi, Punjab, Rajasthan, Bihar & Himachal Pradesh (emphasis supplied). Now CHEMIST brand is poised for major expansion programme to launch the products all across the country(sic).” A print out of the Defendant No.1’s website evidencing the above statements is attached herewith to the instant suit documents.

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35. This Hon'ble Court has the territorial jurisdiction to try and adjudicate the instant suit. It is respectfully submitted that the Defendants are selling the infringing products within Delhi in a surreptitious and clandestine manner, i.e. without issuing invoices against the goods sold, which is within the jurisdiction of this Hon'ble Court. Furthermore, the Defendant No.1's itself admits selling its goods quite successfully in Delhi, on its own website i.e. www.shrigopal.com. Additionally, the Defendant No.1 has recently applied for registration of the impugned DOCTOR HAZEL'S BRAND PHENYLE label in Delhi, to be used on an all India basis, which includes Delhi.”

(emphasis supplied)

3. Impugned order also refers to the report dated 14th September 2017 of the Local Commissioner appointed to visit shops in Khari Baoli, Delhi and was unable to find any products

of the appellants. However, the Local Commissioner has stated that on inquiry shopkeepers had confirmed having sold 2-3 bottles of the said brand about 3 months back, when demand for the product arose. On further inquiry, Local Commissioner was given contact details of the supplier, situated in Kundli, Delhi. The impugned order also refers to the earlier Local Commissioner's report dated 28th September, 2015, wherein it was stated as under:

“..... Mr. Prince (son of the defendant) further claimed that the defendant company manufactures products that are sold in all 29 states of India, including materials impugned by the plaintiff.”

4. Contention of the appellants is that the report of the Local Commissioner (s) cannot be the basis for deciding application filed by the appellants under Order VII Rule 11 CPC. This contention would not matter, for we have noticed and reproduced averments made in the plaint. Assertion on the website of the appellants states that they were/are successfully carrying on business in different parts of the country, including Delhi. Counsel for the appellants states that the aforesaid statement does not relate to 'Doctor Hazel' brand, and was in respect and relating to 'Chemist' brand. This would be a matter of evidence.

5. Issue of territorial jurisdiction, it has been rightly observed by the learned Single Judge, would be examined after

issues are framed and the parties lead evidence. Appeal fails to this extent, by observing and accepting that issue of territorial jurisdiction would be decided subsequently.

6. On the question of interim injunction also, we are not inclined to interfere with the impugned order. The first appellant, a company registered under the Companies Act, 1956, has been manufacturing and selling phenyl under the brand/trademark 'Chemist' since 1st February, 2000. First appellant states and claims that they had acquired rights to use trademark 'Doctor Hazel' from one Mr. M.M. Wadhwa, vide Assignment Deed dated 29th November, 2014.

7. Second appellant, Gopal Krishan Gupta, director of the first appellant, was earlier a partner in the firm- 'M/s Shri Gopal Engineering and Chemical Works', that had coined and adopted the trademarks 'Doctor brand phenyle' and 'Doctor brand germ troll' in the years 1963 and 1983, respectively. Subsequently, pursuant to *inter se* settlement, vide Assignment Deed 18th November, 1996, trademark 'Doctor brand phenyle' was transferred and assigned to M/s. Vikrant Chemico Industries Pvt. Ltd., the plaintiff and first respondent before us.

8. Appellants do not dispute the said position and execution of the assignment deed in favour of the first appellant, to which the second appellant is a signatory.

9. Thereafter, the first appellant has been manufacturing and selling phenyl under the brand name 'Chemist'. First respondent was all along using the brand name 'Doctor Brand

Phenyle’. After nearly 8 or 9 years, the first appellant suddenly started using the word ‘Doctor Hazel’ on the basis of alleged Assignment Deed dated 29th November, 2014 from one M.M. Wadhera, trading as Wester Electronics. Assertion and claim of the appellants based and predicated on purported assignment deed dated 29th November, 2014 itself is debatable and dubious in the factual matrix of this case.

10. We have also examined the coloured photographs of trade mark/labels and containers, as reproduced in the grounds of appeal filed by the appellants. On visual examination, we are in agreement with the findings recorded by the learned Single Judge, confirming the *ex parte ad interim* injunction, *albeit* clarifying that the appellants would be at liberty to use the mark ‘Chemist brand germ troll.’

11. Contention of the appellants that the word ‘doctor’ is a generic word, in our opinion, does not carry weight, once it is accepted and admitted that the second appellant had executed the assignment deed dated 18th November, 1996. The respondent claims *prima facie* with merit, that the mark ‘Doctor Brand Phenyle’ has acquired secondary meaning and is distinctive. The mark is associated in the market and by common man with the phenyl disinfectant manufactured and sold by the respondent. The mark is duly registered. Further, the mark in question consists of number of words, which are then pasted and attached to the good i.e. container containing phenyle, manufactured and sold by the respondent. Together

the words 'Doctor brand phenyle' constitute one mark which mark has acquired distinctiveness. Appellants aware of the trademark 'Doctor brand phenyle', had adopted the mark 'Doctor Hazel' for their phenyl, though earlier they were and statedly continue using the word/mark 'Chemist'.

12. First respondent had filed Contempt Petition, CCP(O) No.57/2016, which was disposed of by the learned Single Judge vide the same order dated 24.1.2018, in view of the statement made by the second appellant that they shall not violate the injunction order in future. Single Judge had recorded the statement made by the second appellant, who was present, observing that if there would be any breach of the interim injunction in future, strict legal action shall be taken. Thus, the appellants had accepted violation of the *ex parte* interim order and stated that they would not violate the interim injunction.

13. The appeal has no merit and the same is accordingly dismissed.

14. We clarify that the observations made in this order are for the disposal of the present appeal and would not be construed as binding and final findings when the suit is heard and decided on merits.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JULY 03, 2018

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