

\$~3

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CS(COMM) 964/2016 & IAs No.8961/2016 (u/O XXXIX R-1&2 CPC), 15114/2016 (of defendant u/O VI R-11 CPC), 15115/2016 (of defendant u/O VII R-10 CPC), 15116/2016 (of defendant u/S 151 CPC)

GLANBIA NURTITIONALS (IRELAND)

LTD & ORS

..... Plaintiffs

Through: Mr. Manish Dhir, Adv.

Versus

HEMANT KUMAR

..... Defendant

Through: Mr. Suhail Sehgal and Mr. Akash, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

08.01.2018

%

1. The three plaintiffs, namely (i) Glanbia Nutritionals (Ireland) Ltd.; (ii) The Isopure Company LLC; and, (iii) Glanbia Performance Nutrition have instituted this suit for permanent injunction to restrain the sole defendant

from infringing the registered trade marks  ,  OPTIMUM NUTRITION,



ISOPURE

SERIOUS MASS, HYDROWHEY, GOLD STANDARD 100% WHEY and GOLD STANDARD 100% CASIEN of the plaintiffs and from passing off his goods as that of the plaintiffs and for ancillary reliefs.

2. The suit was entertained and vide *ex-parte* ad-interim order dated 29th July, 2016, the defendants were restrained from manufacturing, selling, marketing any goods depicting the plaintiffs' registered marks or any other mark deceptively similar thereto and a Commissioner also appointed to seize the infringing goods.
3. The aforesaid interim order has continued and the commission has been executed.
4. The defendant has contested the suit by filing written statement and to which replication has been filed by the plaintiffs.
5. Applications of the defendant under Order VII Rule 10, under Order VII Rule 11 and under Section 151 (for release of the seized good) of the Code of Civil Procedure, 1908 (CPC) as also application of the plaintiffs under Order XXXIX Rules 1&2 of the CPC are for consideration.
6. On the last date of hearing i.e. 21st September, 2017, the application of the plaintiffs under Order VI Rule 17 of CPC was allowed.
7. The plaintiffs, on 21st September, 2017, stated they will be filing another application for amendment of plaint. No such fresh application for amendment of the plaint has been filed.
8. More than four months have lapsed since the last date of hearing and the Court cannot endlessly wait for the plaintiffs to file an application for amendment of the plaint. The suit thus has to proceed on the basis of the plaint as it stands.
9. The counsel for the plaintiffs then states that the defendant in his written statement has pleaded that he is not manufacturing any goods bearing the impugned trade marks and had only purchased the products bearing the

mark from the authorised agents and is engaged in the business of re-sale thereof; that since the defendant is not claiming any rights in the marks with respect to which the suit is filed, the plaintiffs would be satisfied by a decree for permanent injunction being granted in favour of the plaintiffs and against the defendant and the plaintiffs do not claim any other reliefs as claimed in the plaint.

10. The counsel for the defendant, though does not controvert that the defendant does not claim any right in the marks qua which the suit has been filed and that the defendant is not manufacturing any goods with the impugned marks but has contended (i) that the defendant is situated at Faridabad, Haryana and this Court has no territorial jurisdiction; (ii) that the plaintiffs No.1&2 are based outside India and it is only the plaintiff No.3 who has its office at New Delhi; (iii) that the plaintiff No.3 however is not the registered user of the subject trade marks and is thus not entitled to invoke Section 134 of the Trade Marks, Act, 1999; (iv) that the present suit is on the basis of ocular examination only and a outcome of the dispute between the plaintiffs and their stockist from whom the defendant has purchased the goods; and, (v) that the defendant is suffering loss owing to his goods having been seized.

11. Considering that the defendant has made a statement that he does not assert any rights in the marks with respect to which the suit has been filed and does not claim adversely to the plaintiffs with respect thereto, I am of the view that even if a doubt was to be entertained with respect to the territorial jurisdiction of this Court, further litigation should not be encouraged by relegating the parties to litigate on a non-issue in Faridabad Court.

12. As far as the contention of the counsel for the defendant, of its goods having been seized, is concerned, on enquiry, it is informed that the goods in question are food supplements and only 50 jars of food supplements have been seized.

13. Considering the fact that the goods in question are food supplement, if the same are spurious as contended by the plaintiffs, the same cannot be permitted by the Court to be released in the market.

14. The counsel for the plaintiffs has contended that the goods be referred to a Government Laboratory for examination but the said suggestion is not found to be feasible. The counsel for the plaintiffs otherwise agrees that the plaintiffs have not examined the goods, to determine whether the same are spurious or not and has filed the present suit only on the basis of the examination of the cartons in which the goods were being sold by the defendant.

15. In the aforesaid state of affairs, the present suit is disposed of by binding the defendant to its statement that the defendant does not claim any right to the trade marks subject matter of the suit or a right to manufacture or market the goods under the said trade marks, save by purchase thereof from the plaintiffs or their authorised agents and for the purpose of consumption or re-sale and by directing the defendant, to whom the seized goods were given on *superdari*, to in the presence of the representative of the plaintiffs, remove the seal put by the Commissioner and permit the representative of the plaintiffs to take one sample of each variant of the goods and to test the same and to furnish a report thereof to the defendant.

16. However, on enquiry of the expiry date of the products, it is informed that the lifetime of most of the seized goods would have expired.

17. The aforesaid exercise be done with respect to only such of the goods which are within expiry date and be completed by furnishing a report as aforesaid to the counsel for the defendant on or before 19th February, 2018.
18. Needless to state that if the goods are found genuine, the defendant shall be entitled to market the same and if the goods are not found to be genuine, the seized goods shall be destroyed.
19. The counsel for the defendant states that the defendant has also suffered loss on account of seizure got affected.
20. The defendant, in this suit, has not made any counter-claim therefor.
21. Liberty is granted to the defendant to, if wants to pursue the said relief, make a claim therefor against the plaintiffs.

RAJIV SAHAI ENDLAW, J.

JANUARY 08, 2018
'bs'..