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

Date of decision: 29th July, 2019

+ **CS (COMM) 144/2018, CC 23/2016, I.As. 21793/2015, 21794/2015, 24792/2015, 13229/2018 & 10092/2019**

ME N MOMS PRIVATE LIMITED Plaintiff
Through: Ms. Srideepa Bhattacharyya,
Advocate. (M:9981233675)
versus

MR SANDEEP GUPTA Defendant
Through: Mr. Sanjeev Mahajan, Advocate.
(M:9811156437)

CORAM:
JUSTICE PRATHIBA M. SINGH
Prathiba M. Singh, J.(oral)

1. The Plaintiff has filed the present suit seeking an injunction restraining infringement of trademark, passing off, misrepresentation, unfair competition, delivery up etc. The Plaintiff filed the suit on the basis that it is engaged in the manufacture, import, export and retail of a wide variety of infant and mother care products under the trademark “*MEE MEE*” and also operates retail stores/outlets and departmental stores under the name “*Me N Moms*”. The trademark “*MEE MEE*” is a registered trademark, and the Plaintiff had filed the present suit on the basis that the Defendant was involved in selling counterfeit goods under the trademark “*MEE MEE*”.

2. The Plaintiff’s allegation in the suit was that a customer had complained regarding a baby cot bearing the trademark “*MEE MEE*”, which was purchased from the Defendant’s store on 8th April, 2015 and which had some defects. The Defendant had then informed the said customer that the

product was imported from China, and that he would not give any after-sales service in respect of the said product. Paragraph 19 of the plaint claims that the impugned baby cot was not of the Plaintiff's origin and was, in fact, a counterfeit product.

3. On the basis of these pleadings, the Plaintiff sought an *ex parte* injunction against the use of its brand. The Plaintiff also sought appointment of a Local Commissioner. Vide order dated 14th October, 2015, the Court directed as under:

“3. Learned counsel for the plaintiff argues that plaintiff is the owner of the well known trademark “Mee Mee” and various goods for infants, babies and mother care products are sold under this trademark including at the plaintiff’s retail outlets/departmental stores under the name and style of “Me N Moms”. It is argued that the plaintiff has in its portfolio about 600 premium quality baby care products and it has 1200 outlets and 400 stock keeping units in the country. Plaintiff also is said to be selling its products from its website www.meemee.in and the plaintiff’s products are also available on online shopping portals like Babyoye, Ebay, FirstCry, FlipKart Amazon etc.

4. It is argued that the trademark “Mee Mee” was adopted by the plaintiff in the year 2005 and was registered in favour of the plaintiff in terms of 12 different registrations mentioned in para 12 of the plaint. 11 out of 12 registrations are of the year 2006.

5. It is argued that defendant is selling spurious products by using the trademark “Mee Mee” and the same amounts not only to infringement of the trademark of the plaintiff, but the action of the defendant amounts to counterfeiting products by the same under the trademark “Mee Mee” and which actions of the defendant in fact amount to an offence

and for which defendant has to be prosecuted in view of Sections 102 to 105 of the Trademarks Act, 1999.

*6. In view of the arguments urged on behalf of the plaintiff, till further orders unless varied by the Court, defendant is restrained from in any manner using the trademark "**Mee Mee**" or from selling any products using the trademark "**Mee Mee**", especially the products pertaining to infants, babies and mother care products.*

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*8. I also appoint Mr. Subhiksh Vasudev, Advocate (Mob:9810710871 as a Local Commissioner to visit the premises of the defendant as stated in the memo of parties i. e. Deepak Stores, E-23, Kamla Nagar, Near Vaishno Chat Bhandar, New Delhi-110007 and the Local Commissioner is directed to make an inventory of the goods which are being sold by the defendant under the trademark "**Mee Mee**" and seize the same. Local Commissioner after making an inventory and seizing the infringing goods using the trademark "**Mee Mee**" will return the same on superdari to the defendant and defendant will be bound to produce such goods before this Court or deal with the same in terms of the directions which will be hereinafter issued in the present suit. Fees of the Local Commissioner is fixed at Rs. 65,000/- plus out of pocket expenses. Local Commissioner will be entitled to take police help for the purpose of execution of the commission and the concerned SHO of the local police station will give necessary police personnel to the Local Commissioner for executing the commission. It will be the personal responsibility of the concerned SHO to ensure that secrecy of the present order is maintained till the commission is executed otherwise the SHO will be held personally answerable to this Court. Two representatives of the plaintiff will*

accompany the Local Commissioner and representatives of the plaintiff will work under the directions and supervision of the Local Commissioner.”

4. Pursuant to the above order, the Local Commissioner executed the commission and submitted the report. On 3rd December, 2015 the Id. Single Judge, who was dealing with the suit, recorded that all the products, which were seized from the Defendant’s premises, were in fact genuine products of the Plaintiff and this fact was confirmed by the Plaintiff as well. Paragraphs 2 and 3 of the said order are set out herein below:

*“2. During the proceedings before the Local Commissioner the representative of the plaintiff conceded that the goods which are found in the shop of the defendant were not spurious/counterfeiting products but were genuine products of the plaintiff. I have put a specific query accordingly to counsel for the plaintiff, inasmuch as if that is so then this is a very serious issue, because if the defendant is not selling spurious/counterfeiting products and is selling only genuine products of the plaintiff, the injunction order as a whole should be vacated forthwith today. Counsel for the plaintiff, at this stage states that liberty be granted to the plaintiff to file reply to this application, however, for the time being, it is agreed that to the extent the respondent has genuine goods of the plaintiff bearing the trademark "**Mee Mee**", the defendant no longer need to act as superdar of the same, but can sell the genuine products of the plaintiff with the trademark "**Mee Mee**" making it clear that the products to be sold are those which originated from the plaintiff. The defendant will be entitled to open the seal of the products which have been sealed in the proceedings of the Local Commissioner and given on superdari to defendant for being sold in terms of the present order.*

3. Accordingly, defendant is held entitled to sell original products of the plaintiff with the trademark "Mee Mee", making it clear that this is the limited entitlement of the defendant that the defendant can only sell genuine and original products of the plaintiff with the trademark "MeeMee".”

5. Thus, since 3rd December, 2015 the injunction stood modified and the Defendant was permitted to sell the genuine products of the Plaintiff.

6. The Defendant has filed a counter claim on the ground that no cause of action has been made out against him and further that the Plaintiff brought a false case before this Court. Specific case of the Defendant is that the Plaintiff concocted a false story of the Defendant having been sold the counterfeit baby cot. The Defendant had given a categorical assurance that he has never sold counterfeit and fake products, which are not manufactured by the Plaintiff. Paragraph 4 of the counter claim is set out herein below:

“4. That the Defendant in the business of running shop selling children toys and product from Kamla Nagar for the last more than 30 years. Defendant has been running the shop under the name Deepak Store selling variety of children produces with different brand names and is known for selling genuine products. The Defendant has never sold any fake products or products which are not manufactured from the company. The Defendant has never used any counterfeit trade mark or products which are not genuine. However the Plaintiff's authorized dealer Toy Fort has an exclusive counter of MEE MEE products at the shop which is not doing good sales. The Defendant has further been offering various incentives and passing off discount which he get whereas the Plaintiff's authorized dealer is not making any such offer. Probably as a reason thereof, the Plaintiff with

the view to put the Defendant out of business and bring him to disrepute has filed the present suit.”

7. The Defendant has, after denying the allegations of counterfeiting, claimed damages in the following terms.

“(a) Pass a decree of Rs. 10,00,000/- (Rupees ten lakhs only) in favour of the defendant and against the Plaintiff

(b) Award pendelite and future interest @ 18% p.a.”

8. Today, the Plaintiff has moved an application for withdrawal of the suit under Order XXIII Rule 1. Ld. counsel for the Defendant submits that there cannot be unconditional withdrawal and costs should be paid to the Defendant, inasmuch as the Defendant has been put to enormous embarrassment and loss due to the filing of the suit, execution of the commission and seizure of the products as also legal costs.

9. The Court has heard ld. counsels for the parties.

10. It is true that in the present case, the Local Commissioner’s report revealed that the products, which were seized, were in fact genuine. This fact is also admitted in the reply to the application under Order XXXIX Rule 4 CPC in the following terms.

“2. That it is the modus operandi of the Defendant to showcase genuine products on the shop floor to lure customers who want to purchase authentic products and also presents them with catalogues of genuine products to choose from. However, he stocks counterfeit MEE MEE products and delivers the same to the unsuspecting consumers at their residence. Thus no counterfeit MEE MEE products were found by the local commissioner at the time of conducting the court

commission.

3. That vide Order dated October 14, 2015 the Hon'ble Court was pleased to appoint a Local Commissioner and directed the Local Commissioner to visit the premises of the Defendant, make an inventory of the goods being sold under the trade mark MEE MEE and seize the same. The said order also clearly stated that two representatives of the Plaintiff were to accompany the Local Commissioner and who will work under the "directions and supervision" of the Local Commissioner. Thus only the Local Commissioner had the power and authority to interpret the Order dated October 14, 2015, decide as to the actions to be taken in the premises of the Defendant during the execution of the Court Commission and seize the genuine MEE MEE branded products found in the possession of the Defendant."

11. Thus, there is no dispute insofar the seizure having been only of genuine products. However, the stand of the Plaintiff till date continued to be that the Defendant was indulging in clandestine sale of counterfeit products.

12. Whenever an infringement case of this kind is to be filed before this Court, the Plaintiff has the onus of conducting some investigation, as also examination of the products before making an allegation that the products are counterfeit. Ld. counsel for the Plaintiff submits that the Defendant was being suspected of selling counterfeit products, though it was only stocking genuine products in the shop.

13. During submissions, Ld. Counsel relies upon the notarial certificate filed with the plaint to argue that the same is evidence of counterfeiting. A perusal of the notarial certificate filed at the initial stage of the suit shows

that even the said certificate does not mention that the products were not genuine/were counterfeit. The notarial certificate reads as under:

“NOTARIAL REPORT

Under instructions from the client, the undersigned Mr. Sauraj Singh Tawra (Notary Public) along with Mr. Suneel Dhanda S/o Shri R.L. Dhanda representative of Delsai IP, 153 Block-C-1, Janak Puri, New Delhi – 110058 had visited M/s Deepak Stores located at E-23, Kamla Nagar, Near Vaishno Chat Bandhar, Delhi-110007 on September 3, 2015 at about 4:30 PM to purchase samples of baby toys and accessories like milk powder container, musical toys, baby quilts under the brand name MEE MEE.

Mr. Dhanda met at the counter of M/s Deepak Stores one Mr. Sandeep Gupta who claimed to be the owner/proprietor of the said shop. The shop was stocked with a variety of products bearing different brands like Chicco, Fisher Price, Lego, Pigeon, Graco etc. On enquiry various products under the brand name MEE MEE were also shown to Mr. Dhanda.

Mr. Suneel Dhanda purchased a MEE MEE branded baby quilt with printed images of Dora, whose packaging had the trademark MEE MEE printed thereon.

The said MEE MEE quilt was purchased from M/s Deepak Stores' premises, in my presence for a sum of INR 1250.00 in cash. No cash memo for the said purchase was issued by the said store.

The aforesaid sample purchased along with the notarial report were handed over to Mr. Suneel Dhanda.”

14. The above certificate does not say that the products are counterfeit. Obviously, the Notary would have had no idea as to whether the product was genuine or not and hence the Notary merely certified the purchase.

There ought to have been done some kind of examination by the technical department of the Plaintiff, and some reasons given to support the allegation of counterfeiting even at the *prima facie* stage. Without any examination or investigation, it would not be permissible for any party to file a suit, obtain an *ex-parte* injunction and also seek appointment of a Local Commissioner. The pleading of counterfeiting has to have a basis. Execution of a local commission in one's premises can cause enormous embarrassment, especially where shops and outlets are located in busy commercial areas. The reputation of a shopkeeper could be adversely affected to a great extent. Thus, while seeking an *ex-parte* injunction and appointment of a Local Commissioner, the Plaintiff is to bear enormous responsibility by ensuring that the allegation of counterfeiting or fake products is made on the basis of some reports or investigation. A mere allegation could result in a situation, as has been created in the present case, where at the initial stage also, the allegation of counterfeiting was made in the plaint and in the execution of the Commission, however, only genuine products were found. Thus, there was no evidence to show that the product was counterfeit, except the Plaintiff's allegation, which resulted in the injunction being varied. The Local Commissioner, in fact, ended up seizing genuine products, which the Plaintiff admits now to be genuine. Such a situation ought not to have arisen.

15. The Plaintiff is the master of its litigation and the present proceedings and is free to withdraw the suit. However, having obtained an *ex-parte* injunction and having executed the commission at the Defendant's premises, there is no doubt that the Defendant would have incurred enormous legal costs, expenditure of labour and capital as well as embarrassment due to the execution of the Local Commission. Under these circumstances, while

permitting the Plaintiff to withdraw the suit unconditionally, the Defendant's counter claim is decreed for a sum of Rs. 2 lakhs as costs. The costs shall be paid within six weeks. If in the future the Defendant is found selling any counterfeit products or fake products, the Plaintiff is at liberty to file a fresh suit, provided a cause of action is made out in law. No further orders are called for.

16. All pending I.As. are also disposed of.

PRATHIBA M. SINGH
JUDGE

JULY 29, 2019/dk

