

Sr. No. 204

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP-12097 of 2020 (O&M)
DATE OF DECISION : 18.09.2020**

Vikas Jain & Anr.

...Petitioners

Versus

State Drugs Controller Haryana & Ors.

...Respondents

CORAM : HON'BLE MR. JUSTICE ARUN MONGA

Present : Mr. Chander Lall, Sr. Advocate with
Mr. Kapil Wadhwa, Advocate
For petitioners.

Ms. Mamta Singla Talwar, DAG Haryana
For respondent No.1.

Mr. Satyapal Jain, Additional Solicitor General of India with
Mr. Sudhir Nar, Sr. Panel counsel
For respondents No.2 and 3.

Mr. Vikas Bahl, Sr. Advocate with
Mr. Vikram Anand, Advocate
For respondent No.4.
(Presence marked through video conference)

ARUN MONGA, J. (ORAL)

1. *Lis* herein is between father and younger son on the one side (respondent no.4 group) and the elder son on the other (petitioner group), having earlier also had multiple forays of litigation before various fora.

2. Order impugned is dated 29.07.2020, passed by State Drugs Controller, Food and Drugs Administration, Haryana under Rule 143 of the

Drugs and Cosmetics Rules 1945, whereby he has directed the petitioners not to use two cosmetic products, brand named “COSMO SILKY” and “COSMO”. Qua said two trademarks/brands, cross-suits filed by both the parties are pending in Delhi High Court. Trial in both is stated have concluded and now final arguments are to take place. Operative part of the order assailed herein reads as under:-

“Sh. Vikas Jain despite being show cause notice and opportunity of personal hearing failed to produce any ownership proof of brand name “COSMO” and “COSMO SILKY”. Being brothers, family dispute regarding trade mark etc. is pending before the Hon’ble Delhi High Court/ Civil Court Delhi between both of them. As no order has been passed in the pending litigation in favour of Sh. Vikas Jain and as per record submitted by Sh. Gourav Jain along with his letter dated 06.07.2020 the application for registration of trade mark COSMO SILKY in favour of Sh. Vikas Jain has been refused by the Controller General of Patents Design and Trade Marks, so in exercise of power conferred under Rule 143 of the Drugs and Cosmetics Rules, 1945 I hereby direct to Sh. Vikas Jain/ M/s N.G. Beauty Indian LLP not to use trade name COSMO SILKY and COSMO till the final decision of the Hon’ble Courts of Delhi in the pending cases regarding trade mark between Sh. Gourav Jain and Sh. Vikas Jain or till any favourable order regarding use of above mention trade name was passed by the Hon’ble Courts in favour of Sh. Vikas Jain.”

3. Petitioners on the one hand claim the ownership of both the trademarks, being prior user in time since 1987, while on the other hand, respondent No.4 claims ownership thereof on the basis of trademark certificate (Annexure R-4/1).

4. On a query of Court, it transpires that said trademarks/products, until the split in the joint group sometime in the years 2014-15, were

throughout being used by both sides. Both the groups have been manufacturing the said brands in their respective units separately. Prior to their breakup, the entire group as a whole was jointly/collectively using the same. The legality or otherwise, of ownership rights qua manufacture/usage of the said cosmetic products drugs is not the issue before this Court, for that would be adjudicated in the aforesaid two cross civil suits filed in Delhi.

5. Before advertng to merits of the case herein, I had an occasion to go through the orders passed in the cross civil suits. The main issue involved there is, as to who out of two groups is entitled to the usage and ownership of the trademarks/ brands COSMO SILKY and COSMO. Both sides filed cross-suits sometime in the year 2016-17. Suits are clubbed and being tried/heard together. Both parties therein have preferred their respective applications under Order 39 Rules 1 and 2 of CPC seeking injunctions against each other. In this background, it would be apposite to reproduce an order dated 07.12.2017 passed by learned Brother, Rajiv Sahai Endlaw, J. :-

“3. The counsel for the plaintiff in CS(COMM) No. 30.2016 states that CS(COMM) No. 30/2016 was filed a quia timet action and for which reason no ex parte relief was granted and the defendants, taking advantage of the same, have thereafter launched the impugned product and the plaintiffs are suffering losses day by day in the absence of an interim order. Apprehension is also expressed that even if evidence is recorded expeditiously, the suit may not come for final hearing, once listed in the category of ‘Finals’.

4. Needless to state, the senior counsel for the defendants in CS(COMM) No.30/2016 controverts that the defendants’ product was launched subsequently.

5. I have a COFEPOSA hearing in post lunch session and in any case it appears that the hearing on the applications

for interim relief will not be completed today and further hearing will have to be adjourned. I have therefore persuaded the counsel for the plaintiffs in CS(COMM) No.30.2016 to agree to expedited trial with the promise that the suits will not be listed in the category of 'Finals' and will be listed in the category of 'After Notice Miscellaneous Matters' and will not be treated as for hearing of final arguments even though evidence would be completed." (emphasis added)

To be noted, that above order was after hearing the respective arguments on the injunction applications filed by both sides.

6. A perusal of the aforesaid order would show that the learned Judge, instead of passing any interim injunction order, in his wisdom thought it more appropriate to persuade counsel that hearing of the suit be expedited. Though by implication, but the learned Judge, thus declined to pass any interim order, at that stage, despite the insistence of the parties, as is borne out from para 3 of the order, *ibid*. Resultantly, both the injunction applications have ever since remained dormant for the past 3-4 years, since no formal orders were passed to dispose of the same. Status quo, whatever it was, continued.

7. In both the cross suits, sub judice, inter alia, is the ultimate entitlement of the usage/ownership of the aforesaid trademarks/ brands by one group to the exclusion of the other.

8. Issues framed on 07.12.2017 in CS (COMM) 634/2017 filed by Vikas Jain group (petitioner herein) are :-

(1) *Whether the plaintiff is the proprietor and prior user of the trademark COSMO SILKY for cosmetics? OPP*

(2) *Whether the use of the trademark COSMO SILKY by the defendants amounts to passing off of the plaintiff's trademark? OPP*

- (3) Whether the defendants' registration of the trademark COSMO SILKY is invalid?OPP*
- (4) Whether use of mark COSMO SILKY made by M/s Alina Professional Cosmetics Pvt. Ltd. Was a permissive user of the plaintiff?OPP*
- (5) Whether the trademark COSMO is jointly owned by the members of the plaintiff and defendants family as alleged?OPP*
- (6) Whether stand taken by the plaintiff in the present suit is contrary to the stand taken by it in its written statement filed in CS(COMM) 30/2016, if so, the effect thereof?OPD*
- (7) Whether the parties have made any material misrepresentations, concealment and/ or have fabricated any documents, if so, the effect thereof? ONUS ON PARTIES*
- (8) Relief.*

9. Issues framed on 01.08.2017 in CS(COMM) 30/2016 filed by Gaurav Jain (respondent no.4 herein) & others, reads as under:-

- (1) Whether plaintiff NO.1 is the proprietor of trademark "COSMO" and other COSMO formative marks, as alleged in the plaint?*
- (2) Whether adoption and/ or use of trademark "COSMO SILKY" by defendants amounts to infringement of plaintiff's registered trademark COSMO?OPP*
- (3) Whether by use of trademark "COSMO SILKY" defendants are likely to pass-off their goods as goods of plaintiff No.1?OPP*
- (4) Whether plaintiffs have approached this Hon'ble Court with unclean hands, as alleged, if so, to what effect?OPD*
- (5) Whether assignment of trademark COSMO for and in respect of cosmetics by plaintiff No.2 in favour of plaintiff No.1 is invalid? OPD*
- (6) Whether suit filed by plaintiff suffers from delay and laches, as alleged and if so, to what effect?OPD*

(7) Whether defendant No.2 was manufacturing cosmetics under the trade mark COSMO SILKY since 1987, as alleged and if so, to what effect?OPD

(8) Relief.”

10. While the implicit status quo, in terms of non grant of any injunction vide Delhi High Court order dated 07.12.2017, was continuing, respondent No.4 preferred to file a complaint before the Drugs Controller, Haryana, against the petitioners group herein, complaining/ objecting to the license dated 26.06.2018 obtained by the petitioners’ group to manufacture the aforesaid trademarked cosmetics under Drugs and Cosmetics Act, which led to the passing of order dated 29.07.2020, impugned herein.

11. It is relevant to mention here that after the Drug Controller passed the impugned order, on an application moved by the petitioners in CS(COMM) 634 of 2017 before Delhi High Court, following order was passed on 14.09.2020 by Learned Brother V. Kameswar Rao, J.:-

“I have heard the learned counsel for the parties on September 10, 2020.

I have heard them today as well. They state that pending hearing of this suit as well as CS(COMM) 30/2016 titled Gaurav Jain & Anr. Vs. Vikas Agarwal & Anr., Gaurav Jain and Vikas Agarwal shall not approach any statutory authority against each other seeking benefit of the trademark ‘COSMO SILKY’. They also state that one of the parties shall file an application for early hearing of two suits and the other party shall not oppose it. Their statements are taken on record.

It is clarified that this Court has not adjudicated on the legality of the order passed by the State Drugs Controller Haryana dated July 29,2020 as the said issue is pending consideration before High Court at Chandigarh.

Application is disposed of.”

12. In the aforesaid premise, the spirit of the aforesaid order conveys that it was and is expected of both the groups to refrain themselves from approaching any statutory authority against each other until disposal of their suits. Yet, losing sight of the same, respondent No.4 caused the Drug Controller, Haryana to pass the impugned order herein, allegedly, by not even granting any hearing to the petitioner. Though, the said allegation is strongly controverted by Mr. Vikas Bahl, learned Senior counsel appearing for respondent No.4 as well as Mrs. Mamta Singla Talwar, learned State counsel representing respondent No.1, on the ground that appropriate notice, as required, was issued to the petitioners. Pursuant thereto, they also filed reply. While on the other hand, Mr. Chander Lall, learned Senior counsel representing the petitioners, submits that said notice was only with regard to the filing response to the complaint of respondent No.4. When the matter was actually heard, though notice was sent but, it was received by the petitioners on the day of hearing/passing of the impugned order itself. There was thus no occasion with the petitioners to appear and present their case before the Drugs Controller. Petitioners were, therefore, deliberately not given any opportunity of being heard, is the argument of petitioners.

13. Learned Senior counsel representing respondent No.4 as well as learned State counsel have also vehemently opposed the maintainability of the writ petition on the ground of alternative remedy under Rule 143, *ibid*, in as much as the impugned order is appealable. They strongly argue that without filing any appeal, straightway a writ petition has been filed before this Court and, therefore, on that short ground alone, this Court should not interfere.

14. Per contra, learned Senior counsel for the petitioners submits that impugned order being *non est* can be directly challenged before this Court under Constitutional jurisdiction of judicial review. Relying on Apex Court judgment in Whirlpool Corporation v Registrar of Trade Marks, 1998 (8) SCC 1, he argues that the petitioners need not to first approach appellate authority when the order passed is *non est*. According to him, in any case, even if the arguments of learned Senior counsel for respondent No.4 and learned State counsel are accepted that an alternative remedy is available, the same is not equally efficacious and therefore, the petitioners have approached this Court directly.

15. Be that as it may, without entering into controversy of alternative remedy being efficacious or not, I am of the view that once both the sides had preferred to file their injunction applications in their respective suits pending before Delhi High Court, which have remained dormant for all these years, at this stage, to pass the impugned injunction order under the garb of cancellation/ suspension of license already granted to the petitioners to manufacture aforesaid cosmetics was highly improper. Especially, given that, both the sides were and have been manufacturing the same for all these years. They ought to have waited for the outcome of the cross-suits filed by them which are at the final stages. Vide impugned order, a blanket direction has been given to the petitioners not to use the trademarks COSMO SILKY and COSMO, and by necessary implication thereof, it would mean that they cannot manufacture the same. Since the direction clearly says not to use the said trademarks. The said direction seems to have been given by over-reaching the pending proceedings before Delhi High Court which have not been culminated so far. To put it in the words of Mr. Lall, learned Senior

Counsel for petitioners, the Drug Controller assumed the powers of an intra court appellate division bench of Delhi High Court to pass an injunction order, which was implicitly declined by learned single judge in the pending civil suits.

16. As an upshot of the discussion above, the impugned order dated 29.07.2020 passed by State Drugs Controller, Haryana(Annexure P-1) is set aside. The parties are directed to maintain *status quo ante* with regard to their manufacturing rights of the trademarks having brand “COSMO SILKY” and “COSMO”, until the final adjudication of pending suits before Delhi High Court.

17. Disposed of in above terms.

(ARUN MONGA)
JUDGE

September 18, 2020
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Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No