



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

% **Reserved on: 10.12.2021**

Pronounced on: 03.01.2022

+ **CS(COMM) 628/2019**

INTER IKEA SYSTEMS B V Plaintiff
Through: Ms.Tanya Varma & Ms.Archita
Nigam, Advocates

Versus

ITALICA FLOOR TILES PVT. LTD. & ANR. Defendants
Through: Mr. Gaurav Bahl, Advocate

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

ORDER

I.A. 3466/2020 (u/O IX Rule 13 CPC) & I.A.3467/2020 (u/S 151 CPC)
in CS(COMM) 628/2019

1. In the present suit for permanent injunction restraining infringement of trademarks, passing off, rendition of accounts, damages and delivery up, an *ex parte* decree was passed this Court vide judgment and order dated 31.01.2020 against the defendants i.e. the applicants herein, which is subject matter of challenge of the above captioned first applicants.

2. By the above captioned second application, applicants/defendants are seeking stay of order dated 05.12.20219 vide which *ex parte ad interim*



injunction was granted in favour of plaintiffs and against the applicants/defendants as well as order and judgment dated 31.01.2020, vide which suit was *ex parte* decreed against the applicants/defendants.

3. At the hearing, learned counsel appearing on behalf of the applicants/defendants had submitted that defendants are in the business of making Floor tiles and based out of Morbi, Gujrat under the name and style of “Italica”. According to applicants/defendants “Italica” came into existence in the year 2004 for manufacturing and distributing, supreme and genuine top notch quality tiles in India and to the world and has established a large distribution network which consists of more than 300+ dealers all over the world. Learned counsel submitted that defendants strive for creating new, original and distinguished designs for its tiles, with the sole intention of giving its customers strikingly different and attractive upscale decorative tiles, in order to maintain its reputation and goodwill.

4. It is further claimed on behalf of applicants/defendants that the trade mark “Italica” is registered under Clause-19 in favour of defendant No.1/company under the name Italica Floor Tiles Private Limited since the year 2005 and under Clause-11 since the year 2017. It is next submitted that defendant No.2- Ikaa Granito Private Limited was incorporated in the



year 2016 and its first invoice was issued in July, 2017, which bore the trade mark “Italica”, since permitted by defendant No.1 for promotion of defendant No.2 company.

5. During the course of hearing learned counsel for applicants/defendants emphasized that defendant No.2 is not using the mark IKAA but it is a part of corporate name of the company, which had been duly approved by the Registrar of Companies as the name of the company and thereby, there is no deliberate attempt to pass of the plaintiff’s trademark. It was empathically submitted that the Ikaa Granito Private Limited is not the trademark of the defendant No.2 and is not used as the trade mark of defendants. Attention of this Court was also drawn to the spellings and pronouncement of plaintiff’s trade mark and defendants’ trade name and trade mark, which is as under:-

Trademark of Plaintiff	Company name of Defendant No.2
IKEA	IKAA GRANITO PRIVATE LIMITED TRADEMARK used is “ <i>ITALICA</i> ”

6. It was also contended that there cannot be any confusion between the two trade names i.e. “IKEA” and “Italica” and Ikaa Granito Private
I.A. 3466/2020 & I.A.3467/2020 in CS(COMM) 628/2019



Limited is only the corporate name of the defendant No.2 and is limited only to the production and sale of tiles and so, it cannot be said that defendants have deliberately attempted to infringe plaintiff's trade mark or attempted to passing off the same. Also, it was submitted that the name of defendant No.2 company is found only on the packaging in compliance of various laws, rules and regulations requiring the name of the manufacturer/marketeer to be so mentioned and mere affixation of the Company name on the boxes containing tiles, marbles etc does not qualify as a use of trademark and is not covered under provisions of the Section 29 of the Trademarks Act.

7. With regard to defendants being proceeded *ex parte*, learned counsel for the defendants submitted that defendants had received summon of the suit on or about 20.11.2019 and the matter was listed on 05.12.2019 and thereby, they had engaged the services of an Advocate and had also made payment of Rs.25,000/- to the said counsel, which was duly encashed on 07.12.2019. Thereby, defendants were under the *bona fide* impression that the Advocate so engaged by them, was keeping track of the matter. Though it was fairly conceded that the defendants were unable to keep track and follow up the matter but it is only in January, 2020 that



the defendants received copy of the contempt petition and they thereafter engaged services of another counsel and since defendants are based in Gujarat, they took some time to track the matter in Delhi High Court. However, in compliance of order dated 05.12.20219, the defendants have removed the name of Ikaa Granite Private Limited from the LinkedIn Account and also from the Italica Granite Private Limited Website, however, the Facebook account did not promote Ikaa and only promotes the Trademark “ITALICA”.

8. Learned counsel for defendants submitted that the mark in question “IKAA: is the name of the company duly registered by the ROC and “ITALICA” is the Trade mark of the defendants, hence, name of company cannot be changed. It was strenuously submitted that defendants have a good *prima facie* case in their favour and for the negligence and default of the counsel, defendants be not made to suffer. It was thus prayed that order dated 05.12.20219 proceeding defendants *ex parte* as well as decree dated 31.01.2020 be set aside.

9. On the other hand, these applications are sturdily opposed by learned counsel for non-applicant/plaintiff that plaintiff is the owner of the IKEA Concept and the IKEA Retail System, which is franchised to



retailers (IKEA retailers) specifically dealing in products sold under and marked with the IKEA trademark and selling a well-designed, functional and affordable home furnishing products and accessories, bathroom and kitchen fittings, outdoor flooring, home and office furnishing products; stationery including paper and paper articles; tools and implements, and running and managing of retail stores and offering a number of allied goods and services in connection therewith including but not limited to restaurant services, transportation services, e-commerce services, bathroom and kitchen installation services, education and training, development of the franchise business, philanthropic services, all of which



are carried under the trade mark IKEA and d. Learned counsel submitted that defendants are engaged in the business of manufacturing and sale of tiles under the trade mark IKaa, which is used on their brochures as a part of their e-mail ID, face book and LinkedIn page, bill and invoices, hoardings, visiting cards and other packaging material of their products.

10. Learned counsel submitted that defendnats were provided with the papers of the suit on advance service on 20.11.2019, however, they chose



not to appear before the Court and thereby, the order dated 05.12.2019 was passed by this Court. Also submitted that the defendants were served with the injunction order by email on 10.11.2019 and were further served on 28.01.2020 with the injunction application and were also in touch with the plaintiff showing intention to settle the matter, however, did not appear before the Court and the impugned judgment and order dated 30.01.2020 was passed by this Court. It was submitted that defendants cannot take the plea of ignorance and seek setting aside of the decree passed in favour of plaintiff though they themselves chose not to appear before the Court. Next submitted that the plea of negligence of the counsel cannot be permitted as the same has been repeatedly rejected by various judgments of this Court. Learned counsel for non-applicant/ plaintiff also submitted that by seeking stay of order dated 05.12.2019, the defendants are trying to set up a case wherein *ex parte* decree has already been passed against them. Moreover, time for filing written statement under the Commercial Courts Act, 2015 is 30 days, which may not be extended in the absence of any such application having been filed by the defendants. Lastly, it was submitted that defendants are still violating the permanent injunction granted in favour of plaintiff and thus, they are disentitled to any relief by



this Court.

11. In rejoinder, it was averred on behalf applicants/defendants that infringement under Section 29(5) of the Trade Marks Act, is the use of registered trade mark as trade name or part of the trade name and therefore, mere similarity or deceptive similarity with the registered trade mark is not sufficient and has to be exact use of registered trade mark or part of it as a trade name or business. It was emphasized that in the present case there is no infringement and under the Commercial Courts Act and Rules, limitation period of 120 days has been prescribed for filing written statement and from 22.11.2020, the date on which summons of the suit have been said to be served upon defendants, had not lapsed even till passing of the decree by this Court. Finally, learned counsel prayed that these applications be allowed, decree dated 30.01.2020 be set aside and defendants be permitted to file their written statement and contest the suit on merits.

12. The submissions advanced by both the sides were extensively heard.

13. Defendants were proceeded *ex parte* vide order dated 05.12.2019, wherein it has been specifically averred in Para-4 that defendants having been served on 22.11.2019, the time for filing written statement was not



over and therefore, adverse orders were deferred. Vide order and judgment dated 30.01.2020 the present suit stood *ex parte* decreed in favour of the plaintiff and against the defendants. For disposal of these applications, the foremost plea for determination before this Court is as to whether on the date of passing of the decree, defendants had the knowledge of pendency of proceedings or not.

14. Plaintiff has objected to the present application on the plea that defendants were served with the injunction order by email on 10.11.2019 and were in touch with plaintiff to settle the matter. Whereas, defendants have pleaded that they were served on or about 20.11.2019 and came to know that the matter was listed on 05.12.2019 and thereby, they had engaged the services of an Advocate. Defendants also claim to have made payment of Rs.25,000/- to the said counsel, which was duly encashed on 07.12.2019 and details thereof have also been placed before this Court. But the said counsel despite having assured of taking care of the matter, did not pursue it diligently and it is only on 28.01.2020 when defendants received copy of contempt petition, they came to know about *ex parte ad interim injunction* against them. It is further claimed by defendants that since they are based in Gujarat and the present matter has been filed within



the jurisdiction of Delhi, they took time to pursue it and it is only in February, 2020 they came to know about passing of ex parte decree dated 30.01.2020.

15. The Hon'ble Supreme Court in ***G.P.Srivastava Vs. R.K. Raizada*** (2000) 3 SCC 54 has observed as under:-

“7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately



and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits.”

16. In the light of Hon’ble Supreme Court’s decision in **G.P.Srivastava (Supra)**, this case has to be tested to find out whether “sufficient cause” is made out in favour of applicants/defendants or not. Pertinently, defendants had engaged the services of an Advocate to represent their case, however, according to them, due to the callousness and carelessness of the said Advocate, they were proceeded *ex parte*.

17. The Hon’ble Supreme Court in **Rafiq & Anr. Vs. Munshilal and Anr.** 1981 (2) SCC 788 has observed that:-

“3. after engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest..... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative.”

18. Further, this Court is conscious that the Hon’ble Supreme Court in **Salil Dutta v. T.M. & Mc (P) Ltd.** (1993) 1 SCR 794 has also cautioned that the courts may in the interest of justice, set aside dismissal order or *ex parte* decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is



no such absolute rule that a party can disown its advocate anytime and seek relief.

19. Also, the Hon'ble Supreme Court in ***Commissioner, Mysore Urban Development Authority Vs. S.S. Sarvesh*** (2019) 5 SCC 144, while dealing with a question of readmission of an appeal against dismissal in default for non-appearance of counsel, observed and held as under:-

“16. Indeed, this case reminds us of the subtle observations of the learned Judge Vivian Bose, J., which His Lordship made in one of the leading cases of this Court in Sangram Singh v. Election Tribunal [Sangram Singh v. Election Tribunal, AIR 1955 SC 425].

17. Vivian Bose, J., speaking for the Bench, in his distinctive style of writing made the following observations while dealing with the case arising out of Order 9 and reminded the courts of their duty while deciding the case. The observations are apt and read as under: (AIR p. 429, paras 16-17)

“16. ... a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is



done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.

17. ... our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

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*19. In our view, the courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellant Authority was entitled for an opportunity to prosecute their appeal on merits. **If the appellant's advocate did not appear may be for myriad reasons, the Court could have imposed some costs on them for restoration of their appeal to compensate the respondent (plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits.** This is what Vivian Bose, J. has reminded to the courts while dealing with the cases of this nature in Sangram Singh [Sangram*



Singh v. Election Tribunal, AIR 1955 SC 425] to do substantial justice to both the parties to the lis. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.”

20. Applying the ratio of law laid down by the Hon'ble Supreme Court, in various decisions, the instant case has to be seen on its own facts. The defendants have been able to show that a sum of Rs.25,000/- was paid to the counsel while engaging his services, who has since failed to appear before this Court and informing the defendants about the status of their case. Defendants have also claimed to have filed a complaint against the erring Advocate before the Bar Council of Gujarat on 06.03.2020. It cannot also be ignored that defendants are based in Gujarat and it might have taken time to search and follow up their case before this Court in the absence of any material information given by their Advocate. Be that as it may, the applicants/defendants are not poor or illiterate persons but rather into a business acclaimed to be known worldwide. Hence, plea of ignorance does not substantially appeal to the mind of this Court, however, at the same time, this Court finds that a litigant must be given a fair opportunity to present his/her case.



21. Now, this Court is also required to see as to whether the facts put forth by defendants on the merits of the case are such that brings the claims of plaintiffs under clouds, which may result in setting aside the *ex parte* decree dated 30.01.2020.

22. On this aspect, this Court finds that defendants have been uninterruptedly using the trade mark “Italica” since the year 2004, further been registered in the year 2005 by defendant No.1 company i.e., Italica Floor Tiles Limited. Also, defendant No.2 company namely Ikaa Granito Private Limited claims to have been incorporated in the year 2016, which is using the trade mark “Italica” of defendant No.1.

23. Plaintiff claims to be using the trade mark IKEA since the year 1943 and is based in Netherland. Two separate companies belonging to the IKEA Group of Companies have the same registered address since the year 2013 and have been authorized to use the trade mark and trade name IKEA and do business under this trade name in India and it also has an India specific domain www.ikea.in, which was registered on 14.02.2005. In the present suit, plaintiff cease and desist the defendants from using the mark IKA in relation to any product or services, as it is deceptively similar to IKEA.



24. This Court has now been informed that in compliance of order dated 05.12.2021, the defendants have removed the name of Ikaa Granite Private Limited from the LinkedIn Account and also from the Italica Granite Private Limited Website. In the aforesaid facts of the matter, this Court finds that defendants must be given an opportunity to put forth their stand in the present suit, but subject to terms.

25. Accordingly, the above captioned applications are allowed, subject to defendants paying cost of Rs.40,000/- in favour of plaintiff and Rs.15,000/- in favour of Delhi High Court Legal Services Committee. Subject to payment of costs within two weeks, order dated 05.12.2020 setting defendants *ex parte* as well as judgment and decree dated 30.01.2020 are hereby set aside. It is the right of every party to be heard in a suit and thereby, plaintiff and defendants shall both now be able to prove their mettle on merits of the case.

26. The above captioned applications are accordingly disposed of.

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27. In view of orders passed in I.A. 3466/2020 & I.A.3467/2020, the suit is accordingly revived. Defendants are granted 30 days' time to file their written statement, with a copy furnished to the opposite side.



Replication thereto, if any, be filed within four weeks thereafter.

28. Subject to defendants placing on record the receipt of payment of cost, the written statement shall be taken on record.

29. Renotify on 11.03.2022.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 03, 2022

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