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Original Application No.74 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.11.2021

Coram:

THE HONOURABLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

Original Application No.74 of 2021

Bahola Labs,
a partnership firm,
having its registered office at
Homeo House, 30, Bakthapuri Street,
Kumbakonam – 612 001,
and branch Office at 2, Tiger Varadachari Road,
Besant Nagar, Chennai – 600 090.

... Applicant

/versus/

Rajesh Kumar Jaiswal,
Prop.BHL Homeo Labs,
S17/95 A-14B Laxmighat (cantt.)
Nadesher, Varanasi – 221 002,
and at 214 Rudra Apartments, Near Shivpur Thana,
Shivpur, Varanasi – 221 003.

... Respondent

Prayer: Original Application is filed under Order XIV Rule 8 of Original Side Rules read with Section 9 of the Arbitration and Conciliation Act, 1996 to grant an order of interim injunction restraining the respondent, by itself, its partners, men, servants, agents, distributors, stockist, representatives or any one claiming through or under them from in any manner committing acts of copyright infringement by using, in the course of trade, labels/artistic works which are a substantial reproduction of Applicant's copyright in the artistic work or by using any other substantial reproduction of the applicant's labels/artistic works or in any other manner whatsoever pending the arbitration proceedings.



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Original Application No.74 of 2021

For Applicant : Mr.R.Sathish Kumar

For Respondent : Mr.M.V.Swaroop

ORDER

The applicant seeks to restrain the respondent from, directly or indirectly, infringing its copyright in the trade dress, label, or artistic work relating to two of its products, namely, MOTHER TINCTURE and DILUTION.

2. The applicant and the respondent entered into a Distribution Agreement dated 03.08.2015 (the Agreement). In terms thereof, the respondent was appointed as the Distributor for marketing, distributing and selling the products of the applicant in the Territories, as defined therein. The term of the Agreement was for a period of 15 years. By Clause 13 of the Agreement, during the term thereof, the respondent agreed not to directly or indirectly compete with the applicant by marketing, promoting, distributing or selling or dealing with products which are similar to that of the applicant. Clause 14 of the Agreement recorded that all Intellectual Property Rights, as defined therein, relating to or connected with the products are owned exclusively by the applicant. By such Clause, the respondent was restrained from directly or indirectly infringing, impairing, adversely affecting or jeopardizing the Intellectual Property Rights of the applicant either during the term of



the agreement or thereafter. On the allegation that the respondent had contravened its contractual obligations and also infringed the copyright of the applicant, the Agreement was terminated by notice dated 19.01.2021. By such notice, the applicant also invoked the arbitration clause and sought to appoint an Arbitrator. The present application is filed in these facts and circumstances. By an earlier order of this Court dated 12.02.2021, an ad-interim injunction was granted. Such order was extended, thereafter, from time to time.

3. The applicant was represented by Mr.R.Sathish Kumar, learned counsel. He referred to the relevant clauses of the Agreement. He also referred to the labels used on the applicant's products and the respondent's products. On such basis, he contended that the labels used by the respondent in relation to identical products constitutes blatant copying of the applicant's label. Consequently, it is contended that both the contractual rights and the Intellectual Property Rights of the applicant were violated.

4. The respondent was represented by Mr.M.V.Swaroop, learned counsel. He contends that the name, BHL Homeo Labs, was used even in the Agreement and was not adopted for the purposes of infringing the copyright or other Intellectual Property Rights of the applicant. The next contention was that both the



products in question are homeopathic medicines. The trade practice is to use the colour blue in relation to the product DILUTIONS and the colour Green in relation to the product MOTHER TINCTURES. The third contention on behalf of the respondent is that there is no copyright in a label. By advertent to Section 13 read with Section 2(c) of the Copyrights Act, 1957, the respondent contends that the label does not qualify either as a literary, dramatic, musical or artistic work. Even with regard to passing off, he submitted that an action for passing off is in exercise of common law rights. Since it is an action in tort, such rights do not flow from the contract and are, therefore, not arbitrable. By relying upon the judgment of the Division Bench of this Court in *Lifestyle Equitis CV v. Q.D.Seatoman Designs Pvt. Ltd and Ors., 2018 (1) CTC 450* and, in particular, paragraph No.5(t) thereof, it is contended that the validity of an intellectual property is not arbitrable.

5. By way of a brief rejoinder, it is contended on behalf of the applicant that a label qualifies as an artistic work since it involves artistic craftsmanship. In addition, it is contended that the validity of the copyright was not questioned either in response to the applicant's notice or in the counter affidavit.

6. At the outset, it should be noted that the Court is concerned with an interlocutory application pending arbitration proceedings. Consequently, it is neither



necessary nor desirable to record definitive conclusions on the rival contentions especially with regard to the validity of the copyright or other Intellectual Property Rights, as defined in the Agreement. For interlocutory proceedings, it is sufficient to note that the applicant's claim in such regard is not baseless. This is an aspect that should be examined and determined by the duly constituted arbitral tribunal. It is open to both parties to raise all contentions and objections before such arbitral tribunal.

7. On examining the labels relating to the applicant's product and that of the respondent, there is little doubt that the respondent's labels *prima facie* constitutes copying of the labels of the applicant. Not only the colours deployed but also the pattern on the labels of the respondent *prima facie* support an inference of infringement. The fact that the respondent was engaged as a distributor of the applicant and the infringing labels came to be used thereafter, whereas the applicant states that he has used these labels since 2014 are material facts that tilt the balance of convenience in favour of the applicant, and the hardship caused by permitting the respondent to continue using these labels cannot be remedied subsequently. On the other hand, the respondent may continue selling the relevant products by adopting dissimilar labels.



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8. As indicated earlier, the respondent was appointed as a distributor to market, distribute and sell the applicant's products. By the Agreement, the respondent agreed not to compete during the term of the Agreement and also acknowledged that the applicant is the owner of all Intellectual Property Rights, as defined therein, in connection with the products. At least for interlocutory purposes, therefore, in these facts and circumstances, the applicant has made out a case to make the interim order absolute pending arbitration proceedings.

9. For the reasons stated above, Original Application No.74 of 2021 is allowed by making the interim injunction granted on 12.02.2021 absolute but subject to arbitration proceedings. The applicant is directed to take steps to ensure that the arbitral tribunal is constituted and enters upon reference by taking concrete measures in such regard within a period of 30 days from the date of receipt of a copy of this order.

24.11.2021

Index : Yes/No.
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SENTHILKUMAR RAMAMOORTHY J.,

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