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

Date of Decision: 15.04.2021

+ CM(M) 333/2021

MAHESH NAMKEEN PVT LTD Petitioner

Through: Mr.K.G. Bansal & Mr.S.K.
Bansal, Advs.

versus

OM PRAKASH NEBHWANI TRADING AS MAHESH
MATAR NAMKEEN Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

This petition has been heard through video conferencing.

CM APPL. 14406/2021 & 14407/2021 (Exemptions)

Allowed, subject to all just exceptions.

CM(M) 333/2021 & CM APPL. 14405/2021

1. This petition has been filed challenging the order dated 22.03.2021 passed by the learned District Judge (Commercial Court)-02, Central, Tis Hazari Courts, New Delhi in Suit, being CS (Comm) 404/2021 by which the application filed by the petitioner under Sections 148 and 149 of the Code of Civil Procedure, 1908 (CPC), seeking extension of time to make compliance with the Order XXXIX Rule 3 of the CPC, as also seeking appointment of a Local Commissioner to visit and execute the commission at premises A-21,

Khatri Nagar, Near RIICO Pulia, Sanganer, Jaipur-302029, has been rejected by the learned Trial Court.

2. As the Impugned Order has been passed *ex parte* with the defendant/respondent yet to appear before the learned Trial Court, I do not deem it necessary to give a notice of this petition to the respondent/defendant.

3. The above Suit has been filed by the petitioner *inter alia* praying for a decree of injunction claiming itself to be the proprietor of the trademark 'Mahesh'. The learned Trial Court by its order dated 19.02.2021 was pleased to pass an ad interim order of injunction, granting three weeks time to the petitioner to make compliance with the provisions of Order XXXIX Rule 3 CPC. The learned Trail Court was further pleased to appoint a Local Commissioner to visit the premises of the respondent at G-1, 70, Mumal Residency, Shri Kushal Nagar, Near Riico Puliya, Sanganer, Jaipur, Rajasthan.

4. The petitioner thereafter filed an application contending that a large stock of impugned goods are being stored by the respondent at A-21, Khatri Nagar, Near RIICO Pulia, Sanganer, Jaipur-302029 and prayed that the Local Commissioner be also directed to visit the said premises. The said application was dismissed by the learned Trial Court vide its order dated 26.02.2021 finding no merit in the prayer of the petitioner for execution of the Local Commission at the additional address.

5. The petitioner then filed an application seeking modification of the order dated 19.02.2021 praying for incorporation of the facts mentioned in paragraph 26 and 27 of the plaint, in the said order. The said application was also dismissed by the learned Trial Court vide its order dated 05.03.2021.

6. The petitioner then filed an application praying for extension of time for execution of the Local Commission as also for making compliance with Order XXXIX Rule 3 CPC. The petitioner also prayed that instead of G-1, 70, Mumal Residency, Shri Kushal Nagar, Near Riico Puliya, Sanganer, Jaipur, Rajasthan, the Local Commissioner be directed to visit the premises of the defendant/respondent at A-21, Khatri Nagar, Near RIICO Pulia, Sanganer, Jaipur-302029. The said application has now been dismissed by the Impugned Order.

7. The learned counsel for the petitioner submits that only after passing of the *ex parte* ad interim order dated 19.02.2021, the petitioner became aware that the impugned goods are not stored by the respondent at its address given in the Memo of Parties, which was taken from its application of the respondent filed before the Registrar of Trademarks, but instead stored at the subsequently given address. The purpose of appointment of a Local Commissioner would stand defeated if the Commissioner was to visit the premises given in the order dated 19.02.2021.

8. He further submits that the compliance of Order XXXIX Rule 3 CPC was also not made as if the same had been done before the

execution of the Local Commission, the respondent could have shifted the goods thereby defeating the purpose of appointment of the Local Commissioner.

9. I have considered the submissions made by the learned counsel for the petitioner. The order dated 19.02.2021 has been passed *ex parte* in absence of the respondent. The same, as noted hereinabove, apart from granting an ad interim injunction in favour of the petitioner, also appointed a Local Commissioner to visit the address given by the petitioner in the application filed alongwith the plaint. It is the say of the petitioner that the petitioner later learned that the impugned goods are not stored at the said address but are stored at a different address, details whereof were given in the application filed by the petitioner subsequent to the order dated 19.02.2021. As noted hereinabove, the said application was dismissed by the learned Trial Court leading to the filing of the second and thereafter the application which has now been dismissed by the learned Trial Court. In all these proceedings, the respondent has remained *ex parte* as the summons of the Suit are yet to be served on the respondent.

10. The learned Trial Court, in its order dated 19.02.2021, has found a *prima facie* case and the balance of convenience in favour of the petitioner to grant an *ex parte* order of injunction as also direct the appointment of a Local Commissioner. This Court is not considering the merit of the said order as it is not in challenge before this Court by the respondent. Any observation made by this Court in the present order would therefore be without prejudice to the right of the

respondent to challenge the said order/seek its vacation in accordance with law.

11. At the same time, once the plaintiff asserts that it has subsequently come to its knowledge that the goods are not stored at the address given in the application filed alongwith Suit, but are stored at a different address, I see no reason why the learned Trial Court would have rejected the prayer of the petitioner for the Local Commissioner to visit the subsequently given address. No such reason is discernable from the order dated 26.02.2021 of the learned Trial Court. The purpose of the appointment of the Local Commissioner in the Suit of the petitioner was take an inventory of the offending goods lying at the premises of the respondent. This purpose would be served only by sending the Local Commissioner at the address where the Plaintiff asserts that the goods are so lying.

12. I also find merit in the submission made by the learned counsel for the petitioner that in case the petitioner was to make compliance with the provisions of Order XXXIX Rule 3 CPC without execution of the Local Commission, there was a possibility for the respondent to have shifted the goods thereby defeating the purposes of appointment of the Local Commissioner as also of the injunction.

13. Accordingly, the present petition is allowed directing that the Local Commissioner appointed by the learned Trial Court vide its order dated 19.02.2021 shall visit and execute the commission at A-21, Khatri Nagar, Near RIICO Pulia, Sanganer, Jaipur-302029 instead of and in place of G-1, 70, Mumal Residency, Shri Kushal Nagar,

Near Riico Puliya, Sanganer, Jaipur, Rajasthan. The scope of such commission shall be as directed in the order dated 19.02.2021 by the learned Trial Court. The petitioner shall comply with the provisions of Order XXXIX Rule 3 CPC within a period of two weeks of the present order irrespective of whether it is able to execute the Local Commission or not.

14. This order shall be without prejudice to the rights and contentions of the respondent in the suit. It is reiterated that this Court has not expressed any opinion on merit of the claim made by petitioner in the suit pending before the learned Trial Court and/or the order dated 19.02.2021 passed by the learned Trial Court.

15. The petition is allowed in the above terms. There shall be no order as to costs.

16. A copy of this order be supplied to the learned counsel for the petitioner on the e-mail address provided.

NAVIN CHAWLA, J

APRIL 15, 2021/rv/g