

Amol

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL APPELLATE DIVISION
COMMERCIAL APPEAL (L) NO 21303 OF 2022
IN
INTERIM APPLICATION (L) 28220 OF 2021
IN
COMMERCIAL IP SUIT NO 28217 OF 2021
WITH
INTERIM APPLICATION NO 3403 OF 2022
WITH
INTERIM APPLICATION NO 3406 OF 2022
IN
COMMERCIAL APPEAL (L) NO 21303 OF 2022**

Paras Aurvedic Pharma Pvt Ltd	...Appellant
<i>Versus</i>	
Salman Iqbal Ahmed Momin and Anr	...Respondents

Mr Anuj Singh, i/b DP Singh, for the Appellant.
Mr Hiren Kamod , with Gautam Panchal, i/b Gautam & Co, for the
Respondents.
Mr SK Dhekale, Court Receiver present.

**CORAM G.S. Patel &
 Gauri Godse, JJ.**
DATED: 6th September 2022

PC:-

INTERIM APPLICATION NO. 3406 OF 2022:

1. The delay in filing the Appeal is condoned. The Interim Application is disposed of.

COMMERCIAL APPEAL (L) NO 21303 OF 2022

2. The Appeal is directed against two orders of 9th December 2021 and 12th April 2022. The first order of 9th December 2021 (NJ Jamadar J) was an ex parte ad interim order on the Plaintiffs' Interim Application (L) No 28220 of 2021. The second order of 12th April 2022 (RI Chagla J) was an Interim Application (L) No 5960 of 2022 by the Defendant in the Plaintiffs' Interim Application (L) 28220 of 2021. By the second Interim Application, the Defendant sought that the *ex parte* ad interim order of 9th December 2021 be vacated.

3. The suit itself is a commercial intellectual property suit, an action for copyright infringement combined with a cause of action in passing off. The product in question is a medicinal oil or application under the mark *Roghan Sukoon Massage Oil*. It has a unique artistic work that the Plaintiffs claim was created by them, featuring a unique combination of yellow, orange, and red colours and a particular device. The Plaintiffs obtained copyright registration of the artistic work on 22nd April 2014. They say that they have been using this mark contentiously and without interruption ever since.

The Plaintiffs have also filed similar copyright infringement action against other infringers.

4. The plaint states that in early November 2021 the Plaintiffs' representative came across the defendant's impugned goods styled under the name *Rogan Sukoon Massage Oil*. In the name, there is only one missing letter 'h'. The case of the Plaintiffs was that the Defendant's artistic work was a blatant and infringing copy of the Plaintiffs' registered and copyright-protected artwork. The Plaintiffs also said that the Defendant's product was counterfeit. It seems that the Defendant applied for registration of a label mark and a trademark on a proposed-to-be-used basis. One of those applications was resisted in the Trademark Registry. Later, the Defendant made another application No 4786116 with an identical colour combination and artwork, although this artwork was being used by the Plaintiffs since 1989. The plaint said that the Plaintiffs had learned only in the last week of November 2021 launched the impugned goods in the market. The Plaintiffs said that the Defendant had copied its colour combination, get up, essential ingredients placement, layout and other key elements of its copyright-protected artistic work used on *Roghan Sukoon Massage Oil*. On this basis, Jamadar J appointed a Court Receiver and granted an injunction, making an order in the usual form in such cases.

5. The Defendant filed Interim Application (L) No 5960 of 2022 seeking that the ex parte ad interim order made by Jamadar J be vacated and recalled. Mr Singh argued then, as he does before us

now, that the Plaintiff “knew” about the Defendant’s impugned goods much earlier, i.e., from about June 2021. The case pleaded was that the Defendants had disclosed their proposed new label “to the Plaintiffs” by a WhatsApp message to +9192220585595, a copy of which message transmission is at page 491 of the appeal paper book. The submission, therefore, is that the plaint contained a false statement that the Plaintiffs had only learned in late November 2021 of the Defendant’s product with the impugned artistic work. According to the Defendant, the Plaintiffs knew about it much earlier.

6. To begin with, it is difficult to understand what is to be made of this submission. It can hardly be suggested that a few weeks or a few months here or there will justify an infringement of copyright or passing off. There cannot be a case of acquiescence or, for that matter, even of such delay on the part of the Plaintiffs as would disentitle them to relief. More important is the fact that the Defendant is unable to show that there was any communication between it and either of the Plaintiffs themselves. The WhatsApp message referred to above is apparently sent to a person who is or was a distributor, and that too of the Defendant’s product. Mr Singh submits that the same number is also shown on the Plaintiffs’ product. But the fact that the Defendant and the Plaintiffs may have shared a distributor does not substantiate the submission that the Plaintiffs had knowledge of the Defendant’s product since June 2021. The knowledge of a distributor is not knowledge of the Plaintiffs. Nothing is shown by the Defendant to establish that it was the Plaintiffs who were put to notice or informed of the Defendant’s product entering the market.

7. By the second impugned order 12th April 2022, Chagla J considered the rival submissions at some length. In regard to the WhatsApp messages, he concluded that these did not establish the attribution of knowledge to the Plaintiffs of the Defendant's product with the impugned marks. An email also said to have been sent to one Shri Balaji also could not suffice as such attribution of knowledge to the Plaintiffs, since Shri Balaji was only of several distributors of the Plaintiffs' products. No such email was sent to the Plaintiffs' email address.

8. Chagla J found that the Plaintiffs had been using the artistic work since 1999 and had also obtained copyright registration of that artistic work. There was, therefore, no question of false plea or a forged document nor of suppression of vital or important material in the plaint, let alone any question of a deliberately false statement having been made. Chagla J therefore dismissed the Defendant's Interim Application, and, in our view, quite rightly.

9. We have seen the material on record and the impugned orders. We see no reason to interfere with either. There is no infirmity in either of these orders.

10. In any case, no rights have been finally determined. Both learned single Judges exercised their discretion on interlocutory applications. Their orders are not shown to be arbitrary, perverse or capricious, nor to be such that they can fairly be said to take a view that was not reasonably possible. The law in this regard is well-settled for two decades: see: *Wander Ltd & Anr v Antox India Pvt*

Ltd;¹ *Mohd Mehtab Khan v Khushnuma Ibrahim Khan*;² *Shyam Sel & Power Ltd & Anr v Shyam Steel Industries Ltd*.³ Further, as the Supreme Court said in *Monsanto Technology LLC v Nuziveedu Seeds Ltd*,⁴ the appeals court must not ‘usurp the jurisdiction of the Single Judge’; it must confine itself to an adjudication of whether the impugned order was or was not justified in the facts and circumstances of the case.

11. In our view the Appeal is entirely without substance. It is dismissed. Liberty to the Plaintiff to seek the costs of this appeal at any stage in the suit or in any Interim Application therein.

12. For the statistical purposes, the Appeal and the Interim Application are to be finally numbered without the registry insisting on removal of office objections.

(Gauri Godse, J)

(G. S. Patel, J)

1 1990 (Supp) SCC 727.

2 (2013) 9 SCC 221.

3 2022 SCC OnLine SC 313.

4 (2019) 3 SCC 381.