

Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 2049 OF 2023

IN

INTERIM APPLICATION (L) NO. 39762 OF 2023

IN

COMMERCIAL IPR SUIT NO. 28 OF 2023

Maitri Enterprise and Anr.

...Applicants/
Defendant Nos.1 and 2

In the matter between

Uma International

...Plaintiff

Versus

Maitri Enterprise and Ors.

...Defendants

WITH

INTERIM APPLICATION NO. 1605 OF 2023

Mr. Atmaram Patade a/w Ms. Shikha, Mr. Pranav Manjrekar and Mr. Suraj Naik i/by Mr. Atmaram Patade for Defendant Nos.1 and 2.

Mr. Alankar Kirpekar a/w Ms. Jaya Manghwani i/b. Ms. Jaya Manghwani for the Plaintiff.

CORAM : R.I. CHAGLA J

DATE : 22 June 2023

ORDER :

1. Mr. Kirpekar, learned Counsel appearing for the

Respondent herein has tendered Affidavit in Reply in Interim Application (L) No. 8286 of 2022 and Mr. Patade, learned Counsel appearing for the Applicants/Defendant Nos. 1 and 2 has tendered Affidavit in Rejoinder, which are taken on record.

2. By this Interim Application, the Applicants/Defendant Nos. 1 and 2 have sought vacation, setting aside, varying and modification of the *ex parte ad-interim* order dated 7th September 2022 (incorrectly mentioned as 8th December 2022 in the prayer clause of the present Interim Application) and subsequent order dated 9th February 2023 passed by this Court in superdari Application (L) No. 39762 of 2022 under Order XXXIX Rule 4 of the the Code of Civil Procedure, 1908. Further relief is sought for a direction to the Court Receiver appointed by this Court and Defendant No. 3, the Office of the Principal Commissioner of Customs to allow export of the impugned goods in the custody of the Plaintiff or in the alternative for the Court Receiver to sell the impugned goods in the domestic market itself, if required with assistance of the Defendants or the Plaintiff and the GST/draw back duty arising out from the said consignment be refunded to the Defendants and to deposit the sale proceeds thereof in this Court.

3. Mr. Patade, learned Counsel for the Applicants/original Defendant Nos. 1 and 2 has contended that the Defendants were not properly represented in the proceedings, as the Advocate who was representing them was an Advocate on record for the Plaintiff before the Trade Mark Registry. He has stated that the present Application has been taken out in view of the *exparte* order dated 7th September 2022 which had been passed granting *ad-interim* relief and by virtue of which the Court Receiver had sealed the impugned goods in the custody of the Defendants and thereafter by this Court allowing the Superdari Application, the Plaintiff had been handed over the seized goods on an undertaking to protect the same under the seal of the Court Receiver.

4. Mr. Patade has further contended that the *exparte ad-interim* order dated 7th September 2022 was passed on account of this Court being misled by the Plaintiff that one large consignment of the impugned product was being exported by the Defendants from India to Africa where even the Plaintiff's goods are sold in large quantities. He has submitted that the impugned goods were not exported by the Defendants as falsely submitted by the Plaintiff and which can be proved by export data of the Defendants being "NIL"

available on the website www.icegate.gov.in. It is in view of this misstatement of the Plaintiff that the Court Receiver was appointed to seize the impugned goods and thereafter, the Plaintiff has taken custody of the impugned goods of the Defendants.

5. Mr. Patade has further stated that the impugned goods which have been seized by the Court Receiver and thereafter, been placed in the custody of the Plaintiff by allowing the Plaintiff's Superdari Application vide order dated 9th February 2023 has a shelf-life of 12 months from the date of manufacturing and which will expire in the month of July 2023. He has stated on instructions that the sale of the impugned goods may be allowed after removing the impugned goods from the infringing covers containing the CROWN name printed, which will be destroyed and the infringing mark printed on the goods erased under the supervision of the Court Receiver and in the presence of the representative of Respondent. He has relied upon the order of the Division Bench of this Court dated 17th April 2023 in **Khushi Impex Vs. Neha Overseas**¹ in this context.

6. Mr. Kirpekar, learned Counsel appearing for the Plaintiff has submitted that the Application of the Applicants/Defendant Nos.

¹ Commercial Appeal No. 13 of 2023

1 and 2 is entirely frivolous. He has submitted that the said *exparte ad-interim* order was passed by this Court upon being *prima facie* satisfied with the material on record which showed that the impugned product bearing the mark 'OBAMA' are nothing but counterfeit of the Plaintiff's trade mark. Accordingly, *ad-interim* relief in terms of prayer clauses (a), (b), (d) and (e) of the Interim Application was granted and thereafter, the Court Receiver appointed by this Court through the additional Special Receiver has executed the commission.

7. Mr. Kirpekar has submitted that during the execution of commission, it was noted that not only the infringing cover was being used by the Defendants in which the impugned goods were stored, but the impugned goods/Pens stored in the infringing covers were also of identical design to that of the Plaintiff's goods/Pens and was bearing the mark 'OBAMA', on them. He has submitted that the Defendants have subsequently appeared and have at no time contended that the Defendants could not be represented by their Advocates. He has submitted that the objection now raised of the Defendant's having no proper representation is merely an afterthought having no substance.

8. Mr. Kirpekar has submitted that the present Advocates have taken out the Application after several months from passing of the said *ex parte ad-interim* order and the same having been served upon the Defendants. He has further submitted that the present statement made on behalf of the Defendants that the infringing covers may be removed and erasing of the infringing marks printed on the impugned goods/pens and thereafter, the goods/pens may be sold overlooks the fact that the impugned goods/pens are counterfeit products. He has further submitted that another fact, which requires to be taken into consideration, is that the ink in the impugned goods/pens, as per the statement of the Applicants, will run dry in the month of July 2023. Thus, allowing sale of the impugned goods/pens in the market would be detrimental to the Plaintiff as well as customers of the impugned goods.

9. Having considered the rival submission, I am of the view that the Applicants' present claim of not being properly represented has surfaced for the first time in the present Application. There was no such objection raised when the erstwhile advocates represented them. The erstwhile advocates have appeared before this Court on prior dates subsequent to Defendants being served i.e. on 8th

December 2022, 20th December 2022 and 13th January 2023.

10. Thus, there is no substance in the contention on behalf of the Applicants' that there is collusion between the Plaintiff's advocate and the Defendants' erstwhile advocates.

11. Further, it appears that such contentions on behalf of the Applicants is only with a view to give an impression to this Court that the orders had been passed without proper representation of the Defendants after they were served. It is only the Defendants who can be blamed for not properly following up their case and allowing the erstwhile Advocates, presuming they are in any way accountable, to represent them.

12. Having considered the present Interim Application, I am of the view that the *exparte ad-interim* order dated 7th September 2022 has been passed after considering the material on record including that the impugned product of the Defendants was a counterfeit of the Plaintiff's trademark 'OBAMA' and it was in these terms that the *ad-interim* relief is granted in terms of prayer clauses (a), (b), (d) and (e) of the Interim Application. Further, it appears

that the impugned goods seized by the Court Receiver are 40,00,000 in number and therefore, it was correctly represented by the Plaintiff that a large consignment of the impugned goods were ready for export from India to Africa on 1st September 2022.

13. Further, the said order was passed in the Superdari Application taken out by the Applicants in view of this Court being *prima facie* satisfied that the impugned products being nothing but counterfeit products. Accordingly, there is no merit in the present Application for vacation, setting aside, varying and modification of the said order allowing the Superdari Application.

14. I further find no merit in the submission on behalf of the Applicants that in view of the ink in the impugned goods/pens starting to get dry by July 2023, sale of these impugned goods be permitted. Subsequent to the Court Receiver seizing the impugned goods as directed by this Court, it was learnt that the impugned goods/ball pens contained in the infringing cartons were of identical design to that of the Plaintiff's ball pens. It would thus, be detrimental to not only the Plaintiff, but also to its customers, if the impugned goods were allowed to be sold by destroying the impugned

cartons and/or defacing the mark on the impugned goods. The decision of the Division Bench of this Court in **Khushi Impex** (supra) is distinguishable on facts. Thus, the relief sought for in the Interim Application cannot be granted.

15. The Interim Application is accordingly, rejected.
There shall be no order as to costs.

[R.I. CHAGLA J.]