IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.10.2023

Pronounced on : 30.10.2023

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

O.A.Nos.679 and 681 of 2023
and
Application Nos.4813, 4815 and 4816 of 2023
in
C.S.(Comm.Div.)No.194 of 2023

O.A.No.679 of 2023

1.K.Karthik Chandran
and another .. Applicants/plaintiffs

vs.

M/s.Kali Aerated Water Works Private Ltd.,
Teynampet, Chennai-18.
and others .. Respondents/defendants

For Applicants	: Mr.K.Newlin Frederick
For R1, R3 to R8	: Ms.G.Thilagavathi, Sr. Counsel for Mr.R.Gopinath
For R2	: Mr.P.S.Raman, Sr. Counsel for Mr.Thriyambak J.Kannan
For R9	: Mr.Yashod Vardhan, Sr. Counsel for Ms.R.Nandhini
For R10 & R11	: Mr.A.Swaminathan

COMMON ORDER

The plaintiffs are the legal heirs of the deceased Mr.K.P.D.Krishnamurthy, who, along with the defendants 3 to 8, 10 and 11, had entered into a Deed of Mutual Agreement dated 12.03.1993 registered as Document No.301/94 (hereinafter referred to as "DOMA"). The parties to the DOMA are the lineal descendants of Mr.P.V.S.K.Palaniappa Nadar being sons and grandsons, who are entitled to use the brand name "Kali Mark". According to the plaintiffs, the distributor agreement dated 05.04.2023 entered into between the defendants 1 and 2 is in violation of the terms and conditions of DOMA, and it would amount to indirectly assigning the brand name "Kali Mark" and all the brands of Kali Mark in favour of the second defendant in violation of the terms and conditions of DOMA. In such circumstances, the suit has been filed seeking for the following reliefs;

(a) to declare the agreement dated 05.04.2023 entered into between the first defendant and the second defendant as null and void;

(b) to pass an order of permanent injunction restraining the defendants 1 and 2 from acting in furtherance to the agreement between them dated 05.04.2023;

(c) to pass an order of permanent injunction restraining the second defendant from manufacturing, marketing, selling or distributing the products and brands morefully described in the Schedule-B to the plaint owned by the plaintiffs along with the defendants 3 to 10;

(d) to pass an order of permanent injunction restraining the second defendant from manufacturing their brand "Campa" or "Campa Cola" from the factories of the defendants 1, 3 to 9;

(e) to pass an order of permanent injunction restraining the defendants 1 to 9 from manufacturing, marketing, selling or distributing the products and brands morefully described in the schedule B to the plaint, jointly owned by the plaintiffs and the defendants 1, 3 to 11 in the regions described in the schedule-A to the plaint;

(f) to direct the defendants 1 to 9 to pay to the plaintiffs a sum of Rs.75,00,000/- towards damages for the loss suffered between April, 2023 and June, 2023 due to their act of selling, marketing and distributing the brands of Kalimark morefully described in the Schedule-B to the plaint manufactured by the 9th defendant and marketed by the first defendant in the regions described in the Schedule-A to the plaint; and

(g) to direct the defendants 1 to 8 to pay to the plaintiffs a sum of Rs.10,00,000/- per month as damages for the loss to be suffered from the date of the plaint till the defendants 1 to 8 cease to sell, market and distribute the brands of "Kalimark" morefully described in the Schedule-B to the plaint, manufactured by the 9th defendant and marketed by the 1st defendant in the regions described in the Schedule-A to the plaint.

2. The parties are described as per their litigative status in the suit. The plaintiffs, pending the suit, have filed O.A.Nos.679, 680 and 681 of 2023 in C.S.(CD)No.194 of 2023.

(a) O.A.No.679 of 2023 has been filed seeking for an order of ad-interim injunction to restrain the second defendant from manufacturing their brand “Campa” or “Campa Cola” from the factories owned by the defendants 1, 3 to 9, pending disposal of the suit;

(b) O.A.No.680 of 2023 has been filed seeking to pass an order of ad-interim injunction to restrain the defendants 1 to 9 from manufacturing, marketing, selling or distributing the products and brands in the plaintiffs' earmarked area under the DOMA. Exparte interim injunction was granted in the said application on 02.08.2023. Thereafter, based on the undertaking given by the second defendant that they shall not sell the products in the plaintiffs' area, this Court by its order dated 21.09.2023 passed in O.A.No.680 of 2023, made the injunction absolute.

(c) O.A.No.681 of 2023 has been filed seeking for an order of ad-interim injunction to restrain the defendants 1 and 2 from acting in furtherance to the agreement between them dated 05.04.2023, pending disposal of the suit.

3. According to the plaintiffs, the second defendant cannot use the factories of the defendants 1, 3 to 9 for the purpose of manufacturing their brand “Campa Cola” as it would be in violation of the terms and conditions of DOMA. It is also the contention of the plaintiffs that the agreement dated 05.04.2023 entered into between the defendants 1 and 2 is in violation of the terms and conditions of the DOMA as it would amount to indirectly assigning the trademark "Kalimark" to a third party.

4. However, the defendants 1 to 9 have denied the allegations of the plaintiffs and they have categorically stated that they have not violated the terms and conditions of DOMA. It is also their contention

that they have not either directly or indirectly assigned the brand/trademark to the second defendant under the agreement dated 05.04.2023 entered into between the defendants 1 and 2. According to them, the said agreement is only a distributor agreement, which excludes the area earmarked to the plaintiffs' father Late Mr.K.P.D.Krishnamurthy under the DOMA.

5. The defendants 10 and 11 are parties to the DOMA. They have already filed a civil suit in C.S.No.118 of 2022 before this Court questioning the incorporation of the defendants 1 and 9, as, according to them, the incorporation of those companies is in violation of the terms and conditions of DOMA. In these applications, the defendants 10 and 11 sail with the plaintiffs and they are also seeking for making the interim injunction granted by this Court in favour the plaintiffs absolute. By order dated 02.08.2023 passed in O.A.Nos.679 to 681 of 2023, this Court had granted an order of exparte interim injunction as prayed for in those applications in favour of the plaintiffs.

6. Application Nos.4813 and 4815 of 2023 have been filed by the first defendant seeking to vacate the interim injunction granted on 02.08.2023 by this Court's common order in O.A.Nos.679 and 681 of 2023.

7. O.A.Nos.679 and 681 of 2023; and Application Nos.4813, 4815 and 4816 of 2023 are being disposed of by a common order.

8. Heard Mr.K.Newlin Frederick, learned counsel for the plaintiffs; Ms.G.Thilagavathi, learned Senior counsel, assisted by Mr.R.Gopinath, learned counsel for the defendants 1, 3 to 8; Mr.P.S.Raman, learned Senior counsel, assisted by Mr.Thriyambak J.Kannan, learned counsel for the second defendant; Mr.Yashod Vardhan, learned Senior counsel, assisted by Ms.R.Nandhini, learned counsel for the 9th defendant; and Mr.A.Swaminathan, learned counsel for the defendants 10 and 11.

9. The learned counsel for the plaintiffs drew the attention of this Court to the various clauses of DOMA and would submit that the

agreement dated 05.04.2023 entered into between the defendants 1 and 2 is in violation of the terms and conditions of DOMA. According to him, the defendants 1, 3 to 8, by virtue of the agreement dated 05.04.2023 entered into between the defendants 1 and 2, have indirectly assigned the trademark "Kalimark" in favour of the second defendant, though the nomenclature of the agreement dated 05.04.2023 in literal sense may not be worded to mean assignment of trademark "Kalimark" in favour of the second defendant.

10. On the contrary, Ms.G.Thilagavathi, learned Senior counsel for the defendants 1, 3 to 8, Mr.P.S.Raman, learned Senior counsel for the second defendant, as well as Mr.Yashod Vardhan, learned Senior counsel for the 9th defendant, would reiterate that the defendants 1, 3 to 8 have never assigned the trademark "Kalimark" in favour of the second defendant as claimed by the plaintiffs.

11. The learned Senior counsel Ms.G.Thilagavathi would submit that the agreement dated 05.04.2023 entered into between the defendants 1 and 2 is only a distributor agreement and is not an assignment

agreement assigning the trademark “Kalimark” in favour of the second defendant. She would further submit that permitting the second defendant to utilize the factories belonging to the defendants 3 to 8 for the purpose of manufacturing Aerated drinks in the brand name "Campa" and "Campa Cola" belonging to the second defendant is not in violation of the terms and conditions of DOMA. The learned Senior counsel would submit that there is no prohibition for permitting any third party to manufacture Aerated drinks in the factory premises of the defendants 3 to 8 under the DOMA. Therefore, according to her, neither the first defendant nor the defendants 3 to 8 have violated the terms and conditions of DOMA by entering into the distributor agreement dated 05.04.2023 and permitting the second defendant to utilize the factory premises of the defendants 3 to 9 for manufacture of the second defendant's Aerated drinks in the trade name "Campa" and "Campa Cola".

12. Mr.P.S.Raman, learned Senior counsel for the second defendant, would also support the contentions of Ms.G.Thilagavathi, learned Senior counsel for the defendants 1, 3 to 8.

13. Mr.Yashod Vardhan, learned Senior counsel for the 9th defendant would also reiterate that manufacturing of Aerated drinks bearing the trade mark "Campa" by the second defendant by utilizing the factory premises of the defendants 3 to 8 is not in violation of the terms and conditions of DOMA. He would also submit that the incorporation of the 9th defendant is perfectly legal and the supply agreement dated 05.04.2023 entered into between the 9th defendant and 2nd defendant is also perfectly legal.

14. All the counsels who are opposing the grant of interim injunction as prayed for by the plaintiffs have also submitted that since the first defendant company was incorporated in the year 2013 and 9th defendant was incorporated as in the year 2010, the suit filed in the year 2023 by the plaintiffs is barred by limitation. They would also submit that having failed in its attempt to get an order of interim injunction in the connected suit in C.S.(Comm. Div.) No.118 of 2022, which has been filed by the defendants 10 and 11, the present suit filed by these plaintiffs is not maintainable. They would also submit that the plaintiffs have not

made out a prima facie case for the grant of interim injunction and they would also submit that the balance of convenience is in favour of the defendants 1 to 9 for vacating the order of interim injunction as they would be put to irreparable loss/hardship if the interim injunction granted earlier by this Court is continued.

15. Mr.A.Swaminathan, learned counsel for the defendants 10 and 11, supports the arguments of the learned counsel for the plaintiffs and in addition to that, he would submit that the establishment of the 9th defendant by the defendants 3 to 8 is in violation of the terms and conditions of DOMA. According to him, during the pendency of the suit in C.S.(Comm. Div.) No.118 of 2022 filed by the defendants 10 and 11, entering into an agreement dated 05.04.2023 between the defendants 1 and 2 violates the terms and conditions of DOMA. According to him, the brands "Campa" or "Campa Cola" have no reputation in the State of Tamil Nadu and South India and therefore, only in order to conveniently market their brands "Campa" and "Campa Cola", the second defendant has entered into the distributorship agreement dated 05.04.2023 with the first defendant. According to him, the second defendant by entering into

the distributor agreement dated 05.04.2023 with the first defendant has illegally attempted to achieve their object of capturing the market of Aerated drinks, which they could not have achieved directly due to the prohibition of assigning the trademark "Kalimark" under the DOMA.

<u>DISCUSSION:</u>

16. It is settled law that while granting interim injunction, the applicant must satisfy that the three cardinal tests, namely, (a) prima-facie case; (b) balance of convenience; and (c) irreparable hardship, are in their favour. Even if any one of the aforesaid test is not satisfied by the party seeking interim injunction, Courts should desist from granting interim injunction and instead should direct the parties to go for trial and wait for the final outcome in the suit.

17. In the case on hand, the agreement dated 05.04.2023 entered into between the defendants 1 and 2, which is questioned by the plaintiffs, on a prima facie consideration, would reveal that it is only a distributor agreement and not an assignment agreement assigning the trademark "Kalimark" in favour of the second defendant by the first

defendant. In the supply chain management, a manufacturer is involved in producing goods, whereas a distributor is involved in distributing those goods to the end consumers or retailers. Any manufacturer for that matter will employ distributors in the usual course of its business for the purpose of selling its products to the length and breadth of all areas, which, in the ordinary course, may not be possible for the manufacturer to do on its own. It is also probable that the plaintiffs are also engaging distributors within their earmarked area. None of the clauses contained in the DOMA, on a prima facie consideration, reveals that the trademark “Kalimark” has been assigned to the second defendant by the first defendant. The relevant clauses pointed out by the learned counsel for the plaintiffs as well as by the learned counsel for the defendants 10 and 11 do not prima facie reveal that the trademark "Kalimark" has been assigned by the first defendant in favour of the second defendant. The clauses contained in the distributor agreement, on a prima facie consideration, does not amount to assignment of the brand name “Kalimark” in favour of the second defendant. The clauses pointed out by the learned counsel for the plaintiffs during the course of his arguments to substantiate his stand that the agreement dated 05.04.2023 entered into between the defendants 1 and 2 would amount to assignment of trademark "Kalimark' is incorrect. Where there is a clear prohibition in the distributor agreement dated 05.04.2023 that the second defendant shall not make any claim of ownership of the intellectual property rights belonging to the first defendant, there is no question of assigning the trademark in favour of the second defendant. The relevant clauses with regard to the protection of intellectual property rights which is vested with first defendant as found in the distributor agreement dated 05.04.2023 are extracted hereunder:-

"<u>16. INTELLECTUAL PROPERTY RIGHTS:</u>

16.1..................

16.2. The Distributor shall not acquire or claim any right, title, or interest in any of the protected items, by reason of its dealing in the products in the territory or otherwise.

16.3. During the Term of this Agreement, the Distributor shall not make any claims (including ownership claims) on or relating to any protected items or other intellectual property rights permitted to be used by KAPL under this Agreement or otherwise relating to the products.

16.4. Unless otherwise agreed between the parties mutually, the Distributor hereby agrees that upon termination of this agreement, all intellectual property, *including the protected items, that is made available to the distributor will automatically stand transferred/assigned to KAPL."*

18. As seen from the aforesaid clauses, prima facie, it does not disclose any assignment of brand name "Kalimark" in favour of the second defendant, though the learned counsel for the plaintiffs would submit that entering into an agreement dated 05.04.2023, which is questioned in the suit, would indirectly amount to assignment of brand name "Kalimark" in favour of the second defendant. Whether or not the agreement dated 05.04.2023, which is questioned in the suit, would amount to assignment of brand name "Kalimark" indirectly cannot be adjudicated in an interlocutory application, when, on a prima facie consideration, based on the terms and conditions of the DOMA, it is clear that the agreement dated 05.04.2023 is not an assignment agreement, but, it is a mere distributor agreement granting distributorship rights to the second defendant.

19. The rights of the plaintiffs to operate its business of marketing and selling "Kalimark" brands within its earmarked area as per the terms

and conditions of DOMA have also been adequately protected by virtue of the undertaking given by the second defendant before this Court that they shall not encroach upon the plaintiffs' earmarked area under the DOMA as well as by the injunction order, which has been made absolute by this Court on 21.09.2023 in O.A.No.680 of 2023 in C.S.(Comm.Div.)No.194 of 2023.

20. The first defendant was incorporated at the behest of the defendants 3 to 8 in the year 2013 and similarly, 9th defendant was incorporated in the year 2010 at the behest of the defendants 3 to 8 & 10. The defendants 1, 3 to 8 have been selling Aerated drinks in the brand name “Kalimark” within their earmarked areas under the DOMA for a very long period of time. Even though the first defendant was incorporated in the year 2013 and 9th defendant was incorporated in the year 2010, the plaintiffs have chosen to file the suit only in the year 2023 after coming to know that the defendants 10 and 11 had already challenged the incorporation of the companies belonging to the defendants 1 and 9 by filing a separate suit, and they have failed to obtain any interim order in their favour. The suit in

C.S.(Comm.Div.)No.118 of 2022 filed by the defendants 10 and 11 questioning the incorporation of the defendants 1 and 9 is still pending on the file of this Court and it is a prior suit and admittedly, no interim order was granted in favour of the defendants 10 and 11 in the said suit. While that be so, the question of granting interim injunction in favour of the plaintiffs in this suit will not arise, that too, when the agreement dated 05.04.2023 entered into between the defendants 1 and 2, on a prima facie consideration, does not reveal any assignment of brand name "Kalimark" in favour of the second defendant by the first defendant.

21. Further, when the respective companies were incorporated long time back, the question as to whether the consent was obtained for such incorporation from the plaintiffs cannot be adjudicated in interlocutory applications. The plaintiffs having not filed the suit immediately or within a reasonable time questioning the incorporation of the companies, namely, the first and ninth defendant, this Court, in the interlocutory stage, cannot grant any interim relief to the plaintiffs. The parties will have to be necessarily directed to go for trial and only after trial, truth can be unearthed as to whether the terms and conditions of

DOMA were adhered to or not before the incorporation of the first and ninth defendant.

22. It is an admitted fact that pursuant to an undertaking given by the defendants 1, 3 to 8 before this Court that they will not either knowingly or unknowingly encroach upon the plaintiffs' earmarked area as per the DOMA, the defendants 1, 3 to 8 have also stopped encroaching into the area earmarked for the plaintiffs under the DOMA. As stated above, when it is an admitted fact that ever since the incorporation of the defendants 1 and 9, which have been incorporated at the behest of the defendants 3 to 8, they have been carrying on the business and using the brand name “Kalimark”, the question of granting interim injunction in favour of the plaintiffs as an interim measure, pending disposal of the suit, will not arise.

23. As a prudent litigant, any party, if he/she is aggrieved by any violation, will have to approach the Court of law at the earliest instance. Any indifferent/recalcitrant litigant will not enable the Court to grant any interim injunction in his/her favour. In the instance case, there is an inordinate delay on the part of the plaintiffs to approach this Court to

redress their alleged grievance, though they may submit that the recent agreement dated 05.04.2023 gives them cause of action for filing interlocutory applications seeking for an interim injunction, which, according to them, has been filed at the earliest instance. When the plaintiffs have not questioned the incorporation of the defendants 1 and 9, the question of granting interim injunction in favour of the plaintiffs on the pretext that the agreement dated 05.04.2023 is in violation of the terms and conditions of DOMA cannot be granted by this Court. The grant of interim injunction by this Court at this stage will put the defendants 1 to 9 in disarray, which will cause irreparable loss/hardship to them. They would have already invested huge sums of money for the development of the business in respect of sale and marketing of Aerated drinks carrying the brand name "Kalimark" in their earmarked areas. Therefore, granting of interim injunction in favour of the plaintiffs as prayed for in their interlocutory applications would certainly cause heavy loss to the defendants 1 to 9. If injunction is granted, there is every possibility of third party claims being initiated, which includes a claim being made by the second defendant for violating the terms and conditions of the distributor agreement dated 05.04.2023.

24. Having not made out a prima facie case and having not established balance of convenience and irreparable hardship, the interim injunction granted by this Court earlier on 02.08.2023, which has been periodically extended, cannot be extended any longer, but, will have to be vacated forthwith. Whether the defendants 1, 3 to 8 have achieved indirectly what they could not have achieved directly as per the terms and conditions of the DOMA, cannot be adjudicated by this Court in these interlocutory applications and for that purpose, the parties will have to be necessarily directed to go for trial and wait for the final outcome in the suit. Only after letting in oral and documentary evidence, the issue of whether the defendants 1 to 9 have violated the terms and conditions of DOMA or not, can be ascertained based on the available materials on record. At this interlocutory stage, the plaintiffs having not established a prima facie case, balance of convenience and irreparable hardship in their favour, necessarily interim injunction granted by this Court earlier on 02.08.2023 in O.A.Nos.679 and 681 of 2023 has to be vacated.

25. Accordingly, Application Nos.4813 and 4815 of 2023 filed by the first defendant seeking to vacate the interim injunction stands

allowed and O.A.Nos.679 and 681 of 2023 filed by the plaintiffs seeking interim injunction are dismissed.

26. Since all the learned counsels did not make any submissions in A.No.4816 of 2023, which has been filed to reject the plaint for the alleged failure to comply with the mandatory provision of Section 12-A of the Commercial Courts Act, 2015, it can be inferred that the applicant in the said application is not interested in seeking the relief as prayed for in the said application. Accordingly, Application No.4816 of 2023 is closed.

Post the matter for filing written statement by the defendants on 30.11.2023.

30.10.2023

Index: Yes/ No
Speaking order / Non speaking order
Neutral citation : Yes / No
rkm

ABDUL QUDDHOSE, J.

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O.A.Nos.679 and 681 of 2023
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