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O.A.Nos.914 and 915 of 2023 in
C.S. (Comm. Div) No.255 of 2023

Reserved On :	03.06.2024
Pronounced On :	03.07.2024

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in
C.S. (Comm. Div) No.255 of 2023

P.VELMURUGAN,J.

Both the original applications have been filed by the plaintiff. The applicant/plaintiff has filed a common affidavit in both the applications praying as follows;

i. Ad-interim injunction restraining the Respondent, by itself, its directors, servants, agents, dealers, distributors and all persons claiming under or through them from advertisement and marketing activities, especially the impugned Advertisement 1 and 2 by comparing, the Applicant's KALA HIT products and the Respondent's products especially those under the trademark Mortein Mosquito Killer Spray leading to disparagement of The Applicant's trademark "KALA HIT" and the trademarks as filed in plaint document No.8, particularly Trademark Registration No.4367987 and of the Applicant's products and / or business in any



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manner whatsoever; and

ii. Ad-interim injunction restraining the Respondent, by itself, its directors, servants, agents, dealers, distributors and all persons claiming through them from advertisement and marketing activities, especially Impugned Advertisement 1 and 2 by comparing, the Applicant's KALA HIT and the Respondent's products especially those under the trademark Mortein Mosquito Killer Spray, amounting to infringement of the Applicant's registered trademarks as filed in plaint document No.8 particularly Trademark Registration No.4367987, in any manner whatsoever, pending disposal of the suit.

2. The plaintiff has filed the suit for permanent injunction for infringement and disparagement. The cause of action for the suit arose in the month of August 2023 when the plaintiff noticed that the defendant was causing disparagement of the plaintiff's product by asking the consumer to throw away the plaintiff's "KALA SPRAY" vide the impugned advertisements. Since the plaintiff fears and has an apprehension that his activity might cause grave and irreparable loss, harm



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and injury to the plaintiff, the present applications are filed for ad-interim injunction.

3. The respondent has filed counter denying all the allegations made in the affidavits stating that the respondent/defendant has been involving in manufacturing of the famous mosquito repellent and Rat Kill product MORTEIN for over 150 years. The use of MORTEIN dates back to Australia in the 1870s, but the first use in India was in the year 1993, with the launch of MORTEIN India, containing a product range including aerosols, coils, mats, with electric vapourisers and Rat Kill being added at the turn of the century. The respondent has invested enormous sums of money towards the promotion, advertising and protection of its brand and well-known trade mark MORTEIN, with a special emphasis being placed on those elements that are distinctive and unique to it.

3 (a) The respondent, after being satisfied with the performance of its MORTEIN BLUE Aerosol decided, to release the impugned Advertisement 1 & 2 (in short "impugned Advertisement") on 15th August 2023 and 7th September 2023 respectively. The impugned Advertisements



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are not comparing the respondent's product with the applicant's product at all. There is no direct or indirect identification of the applicant's product in the impugned advertisements. The impugned advertisements are informative in nature and only extol the virtues of the respondent's newly launched product in comparison to the respondent's own product which is sold under a black can. In fact, there is no direct or indirect reference to HIT or any of its variants through the impugned advertisements. The reference during the impugned advertisements to 'KALA SPRAY' refers to the respondent's own Mortein Flying Insect Killer with perfume ("MORTEIN BLACK") product which has been in the market since 2018 and was reintroduced in the market in February 2022. The Mortein Flying Insect Killer has been available since 2006 but, was earlier sold under a packaging different from that shown in the impugned advertisement, with changes from time to time. The specific spray can of the respondent shown in the advertisement has been in the market since 2018. This is further fortified by the fact that the product shown in the impugned advertisements is in fact the respondent's own MORTEIN BLACK without the label, which can be identified by the distinctive silver band



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below the cap.

3 (b). The applicant is well aware that it has no statutory right over the alleged mark KALA HIT, or the words "KALA" or BLACK". Despite the same, the applicant has made false claims regarding proprietorship of the alleged mark KALA HIT in paragraph Nos.19, 49, 63, 66, 67 and 72 of the common affidavit and claimed exclusivity over the terms KALA/BLACK/KARUPU. Even otherwise, the applicant cannot claim any rights over the words "KALA" or "BLACK" as the same are common English words used in general parlance and even the respondent's product is referred to as KALA SPRAY in its advertisement and promotional materials. The applicant cannot seek to claim exclusivity over a colour, which is widely used by several third parties. The applicant has failed to show that the word "KALA" has attained a secondary meaning leading to consumers associating them solely with the applicant. Indeed, no such secondary meaning can be achieved by the applicant.

3 (c). With regard to the contents of paragraph 26 of the common affidavit, it is a matter of record that the said suit bearing C.S. (OS) No.660 of 2012 was disposed of vide order dated 30.03.2012 by the Delhi



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High Court on the basis of an amicable settlement between the parties.

However, it is reiterated that the said older proceedings are completely irrelevant to the present proceedings. The word BLACK/KALA/KARUPU are common terms over which no one party can claim exclusivity. It is to be noted that the applicant has no registration for the mark "BLACK HIT" or "KALA HIT" and cannot claim any statutory rights over the same. Even otherwise, the applicant cannot claim rights over the terms BLACK/KALA/SPRAY. Furthermore, the use of the terms "BLACK SPRAY/KALA SPRAY/KARUPU SPRAY" along with the use of respondent's MORTEIN's own black product clearly indicate that the product being shown is the respondent's own product and nobody else's.

3 (d). The product packaging of the applicant's product does not refer to itself as KALA HIT. As per the applicant's own admission in paragraph No.20 of its affidavit, the application for registration of the mark "KALA HIT" is currently pending before the trademark Registry. Furthermore, apart from the generic word "KALA", to which no one party can claim exclusivity and there is absolutely no similarity between "SPRAY" and "HIT". Hence the applicant is not entitled to any relief as



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claimed in the applications. The respondent relied on the the following judgment;

1. Ramjas Foundation v. Union of India reported in (2010) 14 SCC 38 (Paragraphs 21 to 24)
2. S.P. Chengalvaraya Naidu (deed) by LRs Vs. Jagannath (dead) by LRs. & Ors. reported in (1994) 1 SCC 1 (Paragraph 5).
3. Yashoda (Alias Sodhan) Vs. Sukhwinder Singh and Ors. (2022 SCC OnLine SC 1208- Paragraphs 23, 24 and 25.
4. M/s. Seemax Construction (p) Ltd. Vs. State Bank of India and Anr. (1991) SCC OnLine Del 668 - paragraphs 10 and 12.
5. K.Jayaram & Ors. Vs. Bangalore Development Authority & Ors. (2021 SCC Online SC 1194) - Paragraphs 12 to 17.
6. Charanjit Thukral and Anr. Vs. Deepak Thukral and Anr. (2010 SCC Online Del 2517 - Paragraphs 18 to 21.
7. Warner Bros. Entertainment Inc. * Anr. Vs. Harinder Kohli & Ors. - ILR (2009) I Delhi 722 (Paragraphs 20, 24, 29, 30, 31, 32 and 37)



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4. Learned Senior Counsel for the applicant/plaintiff would submit that the applicant/plaintiff is a leading Indian Fast Moving Consumer Goods (FMCG) Company founded in 2001 and based in Mumbai and that the applicant/plaintiff is the leading brand manufacturer in the Aerosol category. Presently, the market share of the applicant's product 'KALA HIT/KARUPU HIT/BLACK HIT' is over 80% to be in the aerosol category. KALA HIT translates to Black Hit (in Hindi). It is presently sold globally and is popularly known as "mosquito killer"/"mosquito repellant" product. The applicant has exclusively used "KALA HIT" in relation to mosquito repellant spray so that it is uniformly perceived as indicative of the source of the applicant. The applicant being the proprietor of all the "HIT" Family trademarks which includes "KALA HIT" enjoys exclusive rights in the said trademarks and is entitled to take action against unauthorized use thereof by third parties, either directly or indirectly.

4 (a). The applicant had previously filed a civil suit bearing C.S.(O.S.) No.660 of 2012 before the Delhi High Court against the respondent herein seeking permanent and mandatory injunction against



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infringement, disparaging, defamatory, and misleading advertisement issued by the respondent/defendant against household insecticide "AEROSOL" which is the registered design of the plaintiff's product under the brand name "HIT". The said suit was disposed of vide order dated 30.03.2012, by the Delhi High Court on the basis of the amicable and expeditious settlement between the parties therein, in which, the respondent/defendant had agreed to replace the "Black Can" with a grey can, in the impugned advertisement therein. The Court also granted 17 days time to the respondent/defendant to discontinue the said advertisement. The respondent/defendant had taken the same plea in the suit proceedings before the Delhi High Court in the interlocutory application filed therein in, as taken in the present suit.

4 (b). The respondent had indeed agreed to replace the "Black can" with "grey can" (and not the design of the can) in the said commercial and sought for 3 weeks to discontinue the said disparaging advertisement therein. This fact is recorded in the order dated 30.03.2012, in the said proceedings. The said order further records that "the suit is accordingly disposed of on the basis of the statement made by the learned counsel for



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the defendant with regard to the change of colour of the can". Therefore, it is amply evident that the design or the shape of a product as alleged by the respondent/defendant does not find any relevance in identifying one's product in a commercial, more particularly in a disparaging commercial. The distinction of the original "black can" as depicted in the original disparaging advertisement forming part of C.S (O.S.) No.660 of 2012 and the "grey can" that was subsequently replaced by the respondent was recorded vide order dated 30.03.2012.

4(c). The impugned advertisement 1, the mother character in the advertisement, directly disparages the product of the applicant/plaintiff by stating that "throw your black spray and buy the new Mortein Odorless Spray" and in the impugned advertisement 2, the mother character in the advertisement, directly disparages the product of the applicant/plaintiff by stating that "throw your black spray and buy the new blue odourless Mortein. The audio portion of "throw away your black can" will be registered more prominently by a common man watching the advertisement than the design of the can which is visible for only few second.

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4 (d). The applicant/plaintiff has got exclusive right to use the KALA HIT. Though the respondent/defendant had agreed to replace the colour of the black can with grey can in the advertisement and to discontinue the disparaging advertisement before the Delhi High Court in the earlier suit filed in the year 2012, once again, now the respondent/defendant is doing the same which amounts to infringement of the trademark rights of the applicant/plaintiff and that the advertisement shows disparagement which affects the business of the applicant/plaintiff. Therefore, the present applications have been filed for ad-interim injunction till the disposal of the suit and that the respondent/defendant may be restrained from infringing and disparaging the plaintiff's product KALA HIT/BLACK HIT/KARUPPU HIT till the disposal of the suit.

5. Heard both the learned Senior Counsel appearing on either side and perused the materials available on record.

6. The respondent appeared through counsel and also has filed counter affidavit. Though these applications are pending from 18.10.2023, the counter affidavit has been filed on 15.12.2023. Earlier the matter was listed on several occasions and at last, this Court had fixed a date for

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hearing of the present original applications on 30.04.2024. Accordingly, on the said date, the learned counsel for the applicant/plaintiff argued the matter and he took about 30 to 45 minutes for making his submission. Thereafter, the learned Senior Counsel for the respondent/defendant argued the matter for more than 4 hours on the said date, even then, he did not conclude his argument on that day. Since it was the last working day before vacation and since the suit itself was filed under emergency category, at the request of both the learned counsel, the matter was adjourned to first week of July i.e.06.06.2024 (immediately after re-opening of the Court after vacation). It is pertinent to state that on 30.04.2024, the learned Senior Counsel for the respondent/defendant had agreed to argue the matter on 06.06.2024 through video conferencing. Accordingly, on 06.06.2024, since the learned Senior Counsel for the respondent/defendant was out of country, he appeared through video conferencing and sufficient opportunity was given and that he took another 3 hours to argue the matter. At last, he concluded his argument at about 6.00 p.m. and submitted that he would submit his written notes with citation through his Junior. In the original applications, the learned Senior



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Counsel for respondent/defendant argued the matter for more than 7 hours.

However, he has made unnecessary comments about the court proceedings in his written submissions. Though the respondent/defendant had filed written submission even on 29.01.2024 itself, thereafter, they have taken time for arguing the matter till April 2024. This Court had given sufficient opportunity and even after availing more than sufficient opportunities for oral submissions, the learned Senior Counsel extensively argued the matter beyond the scope of original application as if, he is arguing the main suit on merits which requires framing of issues and recording of evidence. It is settled proposition of law that the interlocutory application/original application has to be decided by means of affidavit and otherwise and the Court has to consider the affidavit and otherwise filed by the applicant and as to whether the applicant has got *prima facie* case, balance of convenience and irreparable loss for granting ad interim injunction. In this case, the learned Senior Counsel for the respondent/defendant extensively argued the matter not only for interlocutory application but also for the suit and this Court also gave sufficient opportunity and heard the submissions. Despite the same, for the



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reasons best known to him, the learned Senior Counsel for the respondent/defendant has made unnecessary comments in the written submission filed on 11.06.2024.



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7. The specific case of the respondent/defendant is that the applicant/plaintiff does not have a registered trademark KALA HIT/BLACK HIT. Hence, the claim of the applicant that its registered trademark is culled out in the impugned advertisements, is absolutely false. The respondent also uses the terms KALA SPRAY in relation to its MORTEIN BLACK product. Hence, the applicant has no exclusive right to use the mark KALA SPRAY or the words KALA or BLACK. Though the applicant has given brief details of a previous proceedings between the parties, which is of the year 2012 in its plaint, the plaintiff has deliberately suppressed the earlier suit filed by the applicant before the Delhi High Court filed in the year 2006 between the same parties which was dismissed on account of suppression of cause of action. There is no violation of the Judgment of the Delhi High Court passed in C.S. (OS) No.660 of 2012 dated 30.03.2012. The applicant has suppressed the material fact about the suit filed in the year 2006 and also the actual interpretation of the order passed in the suit filed in the year 2012 and hence the persons who suppressed the material facts are not entitled to get an order of interim injunction.



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8. According to the respondent, the applicant has filed two volumes of additional typed set of documents along with its written submission without seeking any leave of this Court under Order XI Rule 5 of CPC (as amended by Commercial Courts Act, 2015). In this regard, the respondent/defendant has filed an application under Order XI Rule 5 of the CPC (as amended by Commercial Courts Act, 2015) seeking the relief of rejection of the additional documents filed with the written submissions, without leave of this Court, placing reliance of the Judgment of the Hon'ble Supreme Court in the case of Sudhir Kumar @ S.Baliyan Vs. Vinay Kumar G.B. (2021 SCC OnLine SC 734) in which the Hon'ble Supreme Court has held that the provisions of Order XI of the CPC are mandatory, the documents filed by the plaintiff with the written submissions cannot be read or relied upon by the plaintiff, as the same were in the power and possession of the plaintiff prior to filing of the above suit and the plaintiff has deliberately not filed the same, with the plaint.

9. Further, with regard to the applicant's contention that the respondent had compared its MORTEIN product with the applicant's HIT



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product in an advertisement launched in the year 2012 which was subject matter of the proceedings before the Delhi High Court in the suit bearing C.S.(OS) No.660 of 2012 and that the respondent had undertaken to change the colour of the can from black to grey, the said suit was for alleged infringement of registered design & disparagement of the applicant's/plaintiff's product and not for trade. Even otherwise, the suit before the Delhi High Court was settled between the parties even before issuance of summons in the suit. Hence, the order dated 30.03.2012 in C.S.No.660 of 2012 is not an adjudication on merits, but a settlement between the parties even before issuance of summons in the suit and that there is no finding of disparagement by the Delhi High Court in the said proceedings. Therefore, the applicant has not *prima facie* proved that they have got exclusive right to use the trade mark KALA/BLACK/KARUPU and also the applicant has suppressed the earlier suit filed by them in the year 2006 before the Delhi High Court. Even otherwise, there is no material to show disparagement. Further, the registration of the trade mark is also pending before the competent authority. Hence, the learned Senior Counsel for the respondent/defendant argued to dismiss both the



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10. Admittedly, in this case, KALA HIT (Black HIT) is applicant's product and the respondent has not denied the same. On earlier occasions, the applicant/plaintiff had filed suits in the year 2006 and in the year 2012. Now in the plaint itself, the applicant/plaintiff has admitted that they had filed a suit before the Delhi High Court in C.S. (OS) 660 of 2012 against the respondent/defendant herein for infringement of registered design of the plaintiff's product, in paragraph No.29, as follows:

29. It is pertinent to note that the plaintiff had previously filed a civil suit bearing C.S. (OS) No.660 of 2012 before the Delhi High Court against the defendant herein seeking permanent and mandatory injunction against infringement, disparaging, defamatory, and misleading advertisements issued by the defendant against Household Insecticide "AEROSOL" which is the registered Design of the plaintiff's under the brand name "HIT".

11. The said suit was settled between the parties and an order was also passed on 30.03.2012 by the Delhi High Court.



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12. But the present suit is filed only for infringement and disparagement. According to the learned Senior Counsel for the respondent, the applicant suppressed the suit filed in the year 2006 before the Delhi High Court for which the learned Senior Counsel for the applicant/plaintiff submitted that the said suit is nothing to do with the present case. Subsequent to the above suit, another suit in C.S. No.660 of 2012 was filed before the very same High Court, in which, the respondent/defendant had made an undertaking to change the colour of the can and based on the undertaking, order was also passed on 30.03.2012 with a direction to the respondent/defendant to discontinue the disparaging advertisement within 17 days by replacing the colour of the can.

13. Admittedly, in the earlier suit, the respondent/defendant had agreed to replace the black can with grey can (not the design of the can) and subsequently, the impugned advertisements have been issued by the respondent/defendant in which, a lady urging the consumers to "throw away the Black Spray and to buy the new Mortein Odorless Spray" and whether the same would amount to disparagement or not can be decided only after trial and not at this stage.



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14. As far as the the contention of the learned Senior Counsel for the respondent/defendant regarding filing of additional typed set of papers by the applicant/plaintiff is concerned, admittedly, the applicant has subsequently filed additional documents regarding the suits which were filed before the Delhi High Court in the year 2012 and 2006 and also the proceedings and the orders. According to the applicant, since the respondent had taken the defence that even though the applicant has mentioned about the suit filed in the year 2012 in the plaint, they have suppressed the suit of the year 2006 and therefore, the applicant has filed the additional documents subsequently, however, the same are not relevant. Now, whether those documents are relevant or irrelevant and whether the applicant has suppressed the material facts or not can be decided only after trial and not at this stage.

15. The present applications are only interlocutory applications. It is settled proposition of law that in the interlocutory/original applications, the applicant has to prove *prima facie* case by means of affidavit or otherwise. Filing of additional documents to prove the averments made in the interlocutory applications will not amount to filing of documents in the



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suit beyond statutory period (as amended by Commercial Court Act) in Order XI Rule 5 CPC. Therefore, the contention of the learned Senior Counsel for the respondent for rejection of the additional documents filed in the interlocutory applications is not sustainable, since the respondent/defendant had taken the defence in their counter affidavit that there is suppression of material fact, in order to avoid the same, the applicant has filed those documents.

16. The applicant also made a complaint dated 23.05.2023 in respect of the disparaging advertisement dated 20.03.2023 before the Advertisement Standard Council of India (ASCI) and the same was registered as complaint and the expert's opinion on behalf of the respondent and the applicant were also submitted before ASCI and ASCI after considering the submissions on both sides, passed an order dated 13.06.2023 and upheld the complaint of the applicant and the respondent was directed to withdraw the claims objected to across all the media by 23.06.2023. Even though the respondent/defendant challenged the said order of the ASCI dated 13.06.2023 before this Court in C.S.No.110 of 2023, the same is still pending. This Court granted interim order dated



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22.06.2023 in favour of the respondent which is ex-parte in nature.

Thereafter, the applicant/plaintiff and ASCI filed their counter and after hearing the matter, this Court has reserved the matter for orders.

17. Admittedly, in the earlier proceedings in C.S. (OS) No.660 of 2012 before the Delhi High Court, the respondent/defendant has made an undertaking to replace the colour of the can, which means the applicant/plaintiff is using the mark KALA HIT and so far, the trademark has not been cancelled by the competent authority. The respondent/defendant has not denied the impugned advertisements and the audio portion as stated by the applicant.

18. As stated above, whether the additional documents are relevant to this case or not, whether the applicant has suppressed material fact or not, whether the applicant/plaintiff is entitled to use the trade mark KALA HIT/BLACK HIT or not; whether, the impugned advertisement by the respondent/defendant is dishonest and amount to infringement of trade practice or not; whether the impugned advertisements made by the respondent/defendant is disparagement, intentional and motivated one or

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not; all these points can be decided only after the trial and not at this stage.

At this stage, the Court has to see is there any *prima facie* case and is there any possibility of confusion in the minds of the public or consumers due to the impugned advertisements.

19. As already stated that for granting of ad-interim injunction, the Court has to see as to whether the applicant has proved that the respondent otherwise causing injury to the applicant in relation to any property in dispute in the suit by means of affidavit or otherwise.

20. A careful reading of the affidavit and the documents and the earlier proceedings before the Delhi High Court of the year 2012, this Court finds that the applicant has got *prima facie* case that the applicant is using the registered trade mark KALA HIT. Therefore the applicant has got *prima facie* case and balance of convenience is in favour of the applicant/plaintiff and this Court is of the view that if the order of interim injunction is not granted, naturally, the applicant would suffer with irreparable loss.



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21. The citations referred to by the learned counsel for the respondent/defendant are not applicable to the present case on hand at this stage and they are distinguishable from the present case on hand at this stage. All the defence taken by the respondent/defendant can be decided only after trial and not at this stage.

22. Therefore the applicant is entitled to get an order of ad-interim injunction of infringement of trade mark and also disparagement against the respondent. Accordingly, both the applications are allowed and interim injunction is granted as prayed for till the disposal of the suit.

List the suit on 09.08.2024.

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Note: Issue order copy on 04.07.2024.



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Pre-Delivery Order in

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