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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 117/2018, I.A. 7954/2024**

DARSHAN SINGH

..... Plaintiff

Through: Mr. Abhishek Malhotra, Mr.
Yashwardhan Singh and Mr. Nageeb
Nawab, Advocates.

versus

BALDEV SINGH

..... Defendant

Through: Mr. Aman Nandrajog and Mr. Ujjwal
Malhotra, Advocates.

CORAM:

HON'BLE MR. JUSTICE ANISH DAYAL

ORDER

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08.04.2024

I.A. 7954/2024 (*Application for production of document alongwith affidavit of evidence of defendant's witness No.2*)

1. This application has been filed under Order XI Rule 14 read with Order XVI Rule 1 and 1A of Code of Civil Procedure Code, 1908 ("CPC") on behalf of defendant for production of document alongwith affidavit of evidence of DW-2, Mr. Satwinder Singh.

2. The said document had been disallowed by the Joint Registrar during the examination of the said witness. Thereafter, O.A. No. 41/2024 was filed by the defendant which resulted in order dated 28th March, 2024 by the Predecessor Bench. Liberty was taken at that stage to move an application to seek leave of the Court to place the documents on record.

3. It is stated by counsel for defendant that the witness DW-2 had been



arrayed as part of the amended list of witnesses filed on 02nd September, 2023, for the said purpose:

To support the case of the Defendant generally and shed light on the use of his own photograph on his packaging

4. This was necessitated since, in the cross-examination of PW-7 (*plaintiff Darshan Singh*), the following questions were asked and responses were given as noted under:

(Witness is confronted with the packaging reading 'REXGOLA' and questioned as under:)

Q2. I put it to you that your brother Shri Satwinder Singh uses these packaging which also show his photograph What do you have to say?

Ans. It is correct. Vol. Customers identify only, 'Sardaar Ji ka Joota' and Satwinder Singh too is using his photograph to enhance his sales and I am going to take action against him too.

(The packaging reading 'REXGOLA' with the photograph of a Sikh gentleman is taken on record and exhibited as Ex. PW7/D1)

Q4. I put it to you that Sh. Satwinder Singh has been using his photograph on his packagings prior to the institution of the present suit. What do you have to say?

Ans. It is incorrect.

(The Witness is confronted with the last page/back cover of a magazine titled 'Footwear Today' purportedly published by 'Redcon' in the month of November 2013)

Q5. I put it to you that the magazine shown to you was published in November 2013, only. What do you have to say?

Ans. The magazine shown to me simply denotes that Sh. Satwinder Singh Madaan is the owner of REX Shoes and does not indicate that his packagings had been bearing his photograph prior to the institution of the present suit.

(The magazine referred to in the preceding question/answer is taken on record and marked as Mark-ZA.)



5. Considering the response of Mr. Darshan Singh, in respect of Question 5 in particular, counsel for defendant states that it was necessitated for them to attempt to prove that Satwinder Singh was using his packaging bearing his own photographs, prior to the institution of the present suit.

6. Accordingly, as part of the list of witnesses, Satwinder Singh Madan was arrayed as DW-2 for the specific purpose as noted above.

7. This, he claims is permitted under Order XVI Rule 1 and 1A of the CPC, as also sanctified by a decision of Hon'ble Supreme Court in *Ashok Sharma v. Ram Adhar Sharma*, (2009) 11 SCC 47.

8. Counsel for plaintiff, however, objects to the same stating that once the document relating to the November, 2013 magazine titled '*Footwear Today*' was placed on record as mark 'ZA', there is no reason why a new document was sought to be introduced through DW-2, which would also naturally have been in possession of defendant, it being an industry magazine and that it ought to have been filed in the initial stages of suit in compliance with strict provisions of the Commercial Court Act, 2015 in particular Order XI of the CPC.

9. However, in conspectus of the facts and circumstances stated above, it is evident that DW-2 was arrayed as part of the list of witnesses not only to support the case of defendant but also specifically to "*shed light on the use of his own photographs on his packaging*".

10. In this light, plaintiff's contention cannot be countenanced, that there ought to be a general presumption that the defendant itself would be in possession of the December 2012 edition of the magazine and was cognizant of the advertisement which was issued by DW-2

11. It is also evident that the issue of proving the presence of DW-2



photographs on DW-2's packaging arose after the cross-examination of PW-7 as noted above.

12. In the opinion of this Court, the document produced by DW-2 of the magazine (of December 2012) may be permitted to be taken on record. The said document may be marked by the Joint Registrar with appropriate number and not exhibited at this stage.

13. Needless to state, the plaintiff will be fully entitled to cross-examine DW-2 in proceedings, which are already continuing for recording of evidence, as also the admissibility of the said documents will be subject to the respective contentions of the parties and final decision by the Court.

14. The application is accordingly allowed in terms of the above.

15. In view of the above, the Chamber Appeal being O.A. 41/2024 is also disposed of.

16. Order be uploaded on the website of this Court.

ANISH DAYAL, J

APRIL 8, 2024/RK

Click here to check corrigendum, if any