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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(COMM) 1130/2016**
AAP KI PASAND & ANR Plaintiff

Through: Ms. Manmeet Kaur, Advocate

versus

HIMALAYAN LEAF PVT LTD Defendant

Through: Ms. Aakanksha Nehra,
Ms. Preeti Singh, Advocates

CORAM:
JOINT REGISTRAR (JUDICIAL) Dr. AJAY
GULATI (DHJS)

ORDER
14.03.2024

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Ld. Counsel for the plaintiffs has objected to the contents of the Affidavit in evidence of DW-1 as being beyond pleadings and has submitted that such of those contents of the Affidavit which are not supported by the defendant's pleadings, should be redacted in view of *Rule 5 of Order 19 of the CPC*, as applicable to the Commercial Courts Act.

Brief factual background would be necessary.

The present suit has been filed *alleging* violation of the plaintiffs copyright in the packaging of its products *i.e.* trade dress, by the defendant as also alleging *passing-off*, and dilution of its product reputation by the defendant. Plaintiffs claim to be engaged in retail sale of premium tea in uniquely designed packages over which it claims a copyright.



Defendant also operates in the same commercial space and markets its tea products under specific brand names – ‘Himalayan Leaf’ or ‘Himalayan Leaf Veda’. The packaging of defendant’s products is somewhat similar to that of the plaintiffs in as much as both market their products in very colorful cloth bags which are fastened at the top by fancy drawstrings. The tea is first packaged in a sealed paper bag and then put in the colorful cloth bags which bags are made up of various clothing material. Plaintiffs claim IPR protection in the entire packaging *i.e.* package in the paper bag followed by packaging of paper bag in colorfully designed cloth bags and fancy draw strings at the top of the bags. Defendant on the other hand has strongly refuted the contention of the plaintiffs. It has been submitted that packaging of tea in a separate paper bag before being packaged further is a functional requirement so as to protect the aroma of the tea which otherwise is spoilt by moisture. It has been further submitted that packaging of the paper bags in colorful cloth bags is a generic commercial practice being followed by a number of tea sellers. Names of few such tea sellers were mentioned in the written statement. It was also contended that defendant is marketing its tea products under 2 distinct brand names which have received trademark registration and even the plaintiffs’ reputation as a premium tea seller is on account of its brand name and not on account of the packaging that it uses. Defendant highlighted that the unique features of its cloth packaging *i.e.* images of elephant, peacock and flower are conspicuously missing in the packaging of the plaintiffs products which leave no scope for any consumer confusion or deception.

In this backdrop, ld. Counsel for the plaintiff has objected



to a number of paragraphs in the affidavit of evidence of DW 1 as being beyond pleadings. The details of the objections raised are as under –

1. In *para* 3 of the Affidavit which starts from pg. 2 and goes on till page. 8, photographs at pgs. 3 to 4 & 6 to 8 (of the affidavit) are not a part of the written statement and neither filed as def.s' documents. Consequently, those are beyond pleadings.
2. *Para* 4 of the Affidavit contains affirmations about products of the defendant being sold on the online platforms like Amazon and 21foods.in. However, no such averment finds a mention in the written statement.
3. *Para* 5 of the Affidavit contains affirmation about registration of def. as a member of the Tea Board of India **i.e.** grant of a Flavour License. However, def.'s prayer for taking on record this document was specifically declined by the Hon'ble Court *vide* its order dt. 30.11.2022 which was passed while taking up IA no. 14350/2022 which was filed by the def. for taking on record 17 additional documents. However, *vide* the above referred order dt. 30.11.2022, the IA was allowed only qua 1 document *i.e.* D-12 which was a copy of a Judgment.
4. *Paras* 6 & 8 of the Affidavit contain an improvement in the form of assertion about defendant selling 'coffee' as well in the same packaging as that of tea, which assertion also does not find a mention in the written statement.



5. *Para 7* contains affirmation to the effect that defendant has been marketing its products through door to door marketing mode which assertion is also beyond pleadings.
6. *Paras 9 & 29* of the Affidavit speaks of defendant having international clientele which affirmation is also beyond pleadings.
7. *Para 12* of the Affidavit contains affirmations of def.s' products being available in any of the 5 star hotels in Jaipur, Udaipur, Goa, Delhi etc., which have no corresponding pleadings in the written statement.
8. *Para 14* of the Affidavit contains affirmations regarding a huge demand and supply base of the def's products and the popularity of the products amongst its clients, which have no corresponding pleadings in the written statement.
9. *Para 15* of the Affidavit contains affirmations regarding revenue generation by the def., which have no corresponding pleadings in the written statement.
10. *Para 17* of the Affidavit contains affirmations concerning removal of def.s' products from the market shelves which were already being marketed in round metal cans and subsequent re-introduction of such metal cans along with other packaging units at the Delhi Airport, which have no corresponding pleadings in the written statement.
11. Last sentence of *para 18* of the Affidavit which pertains to



def. procuring its own packaging material and designing the same with specific instructions to the tailor, also has no corresponding pleadings in the written statement.

12. *Para 30* of the Affidavit contains allegations of reverse passing-off but neither is it supported by relevant pleadings *nor* any counter-claim has been filed.

In response, it has been submitted by Id. Counsel for the defendant that in view of *order 6 rule 2* of the CPC, the pleadings can only contain relevant facts and not the evidence to prove such facts. Affirmations regarding evidence to prove the pleaded facts have to come at the stage of examination-in-chief by way of an affidavit and that is precisely what the defendant witness has tried to do. It has further been argued that the averments in the affidavit are merely an elaboration of the pleaded facts and nothing new is being sought to be pleaded. Responding specifically to the objections to the averments in the affidavit *i.e.* para wise, Id. Counsel raised a common submission that all such averments merely describe as to how is the defendant running its business which, apart from being an extension of the pleaded facts, is also necessary for the witness to depose since not only has it to prove *issue no. 5* onus of which is on the defendant to prove, it also has to effectively discharge the onus which has shifted on the defendants in view of the evidence led by the plaintiff. *Alternatively*, placing reliance on a judgment of the Hon'ble High Court of Delhi *i.e. Brij Prakash Gupta vs. Ashwini Kumar 2020 SCC OnLine Del 1759*, it has also been argued that if some parts of the affidavit in evidence are found to be beyond pleadings, an objection to that effect should be recorded and the



matter can proceed to cross-examination, leaving the objections to be decided by the Court at the final stage. It has also been contended on behalf of the defendant that in case this Court feels that the trial cannot proceed till such time that the objections to the affidavit of the witness are not decided, the matter has to be placed before the Hon'ble Court, in view of Chapter XI Rule 11 (i) and Rule 28, High Court Rules.

I have carefully considered the rival submissions.

So far as *para* nos. 3, 4, 6 to 9, 12, 14, 15, 17, 18 and 29 of the affidavit in evidence of DW 1 are concerned, the averments / affirmations contained therein appear to be patently beyond pleadings. However, in view of the judgment cited by the Id. Counsel for the defendant, instead of directing such averments to be redacted, the objections in regard to those averments can be recorded as being beyond pleadings and such objections, shall be considered and decided at the final stage by the Hon'ble Court, subject to which the evidence led shall be appreciated.

Averments in *para* 17 of the Affidavit can be validly considered to be an extension of the pleadings as contained in *para* 20 of the written statement. So far as averments in *para* 30 of the affidavit are concerned, pleadings to that effect are already a part of *para* 23 of the written statement *i.e.* regarding tarnishing the image and good will of the def.

However, in regard to averments contained in *para* 5 *i.e.* concerning *Flavour License* having been issued by the Tea Board Of India, there is a specific concern since that document has been



expressly prohibited by an order of the Hon'ble Court to be relied upon by the defendant. In the best understanding of the Court, objection to such averment/document cannot be left open to be decided at a later stage. However, since this Court does not have the authority to expunge any part of the evidentiary affidavit, it is appropriate that the matter is placed before the Hon'ble Court in this regard.

Consequently, the matter be put up for the Hon'ble Court's consideration on 02.04.2024, for further directions.

**Dr. AJAY GULATI (DHJS),
JOINT REGISTRAR (JUDICIAL)**

MARCH 14, 2024/sk

Click here to check corrigendum, if any