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

INTERIM APPLICATION (L) NO.8399 OF 2023
IN
SUIT (L) NO.8396 OF 2023

Lallubhai Amichand Limited

...Applicant /
Plaintiff

Versus

Absolink Enterprises Pvt. Ltd. & Ors.

...Defendants

Mr. Zal Andhayarjuina, Senior Advocate, Karl Tamboly, Maithili Parikh, Sumanth Anchan with Vikrant Singh Negi, Pratik Thakkar and Sneha Barange i/b. DSK Legal for the Plaintiff.

Mr. Venkatesh Dhond, Senior Counsel, Mr. Sharan Jagtiani, Senior Counsel, Mr. Rohaan Cama, Mr. Phiroz Mehta, Mr. Prakhar Parekh, Ms. Neha Sonawane, Ms. Anuja Bhansali, Mr. Tejas Popat and Ms. Abhyarthana Singh i/b Rashmikant and Partners for the Defendants.

Mr. Laxman V. Madgundi, Representative of the Court Receiver.

CORAM : R.I. CHAGLA J

DATE : 3 JULY 2023

ORDER :

1. The Defendants by this Interim Application have sought vacation of the ex parte order dated 5th April, 2023 under Order 39 Rule 4 of the Code of Civil Procedure, 1908. Under the said provision

any Order for injunction may be discharged, varied or set aside by an application made by any party dissatisfied with such Order. The proviso to Order 39 Rule 4 of the Code of Civil Procedure, 1908 provides that if in an application for temporary injunction or in any Affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary to do so in the interest of justice.

2. Mr. Dhond, Mr. Jagtiani and Mr. Cama have made submissions on behalf of the respective Defendants in support of the application. They have submitted that there are various suppressions made by the Plaintiff in the pleadings and in the event such disclosures had been made by the Plaintiff, this Court would not have passed the ex parte order without giving notice to the Defendants and / or hearing the Defendants prior to passing of any such order. Reference is made to certain paragraphs in the Plaint, in particular, paragraphs 11.5 to 11.8 of the Plaint.

3. In paragraph 11.5 of the Plaintiff has stated that in the year 2015, the other Directors of the Plaintiff Company learnt of the incorporation of Defendant Company by Defendant Nos.2 and 3. When confronted, Defendant Nos.2 and 3 have informed that the Defendant Company was formed to handle their personal investments. There is mention made of Defendant Nos.2 and 3 being made aware of the fact that they could not operate a business competing with that of the Plaintiff Company. Further, it is stated that owing to the family ties, which bear implicit trust and faith in each other, no further probe was carried out and issue stood rested.

4. Thereafter, in paragraph 11.6 to 11.8 of the Plaintiff, the Plaintiff has mentioned that in December, 2022, there was a software service which had been subscribed to that provided the data pertaining to export import of goods and services from and to India ("Eximpedia"). The software provides export-import data and other details through input of a Harmonized System of Nomenclature Code ("HSN Code"). In paragraph 11.7 of the Plaintiff, there is mention made of a search being carried out using HSN Codes for aluminum products and stainless steel products and upon such search having been carried out, the Plaintiff was shocked to see the name of the

Defendant Company coming up as a search result. This indicated that the Defendant Company was dealing with similar products to that of the Plaintiff Company. Further, the Plaintiff has stated in paragraph 11.8 of the Plaint that, upon conducting an internal search of their server database, to their utter shock and surprise, the Plaintiff found out that the Defendant Nos.2 and 3 through the Defendant No.1 Company, were and continue to engage in competing business to that of the Plaintiff Company. This being contrary to and in violation of the terms in the Articles of Association. Thereafter, in the said paragraph the illegalities have been described.

5. It is submitted on behalf of the Defendant that there are relevant facts suppressed in the aforementioned paragraphs of the Plaint. Although the Plaintiff has stated that it learnt of the Defendant Nos.2 and 3 through the Defendant No.1 Company being engaged in a competing business to that of the Plaintiff Company after the said search in December, 2022, the material was always available on the server of the Plaintiff Company. Further, there were talks between the Plaintiffs and Defendants of separation and a valuer had been appointed for that purpose a few months prior to the search.

6. Further, there has been non-disclosure of the fact that a Memorandum of Understanding dated 3rd September, 2010 had been entered into by which the management and control of the Plaintiff Company vested in the hands of Dhiren R. Shah, Paresh R. Shah and Sanjiv Shah who belong to Rameshchandra Shah group (“the other Directors”) holding 75% of the Company and Defendant No.2 holding approximately 25% shareholding in the Plaintiff Company. Thus, the intent of the parties was at all times that the management and control of the Plaintiff Company would continue with the said four branches.

7. It is further submitted that though the Defendant No.2 was in control of the export business of the Plaintiff Company, the other Directors of the Company who were behind the filing of the Suit against Defendant No.2 and his family members had access to the Plaintiff Company server. Further, the bank accounts, GST Challans and balance sheets of Defendant No.1 had been emailed to and from the external accountants using the registered email address of the Plaintiff Company “lal.accounts@hotmail.com”. This account admittedly was accessible to and had been accessed by all the Directors and employees of the Plaintiff Company. This fact has been

wilfully suppressed by the Plaintiff. Had these relevant facts been made available, the Plaintiffs' case that they learnt of Defendant No.1's business only in December, 2022 would have been entirely belied, as the balance sheets exfacie show that Defendant No.1 was not an investment Company, but was in fact a Company carrying on export trade which is also the business carried on by the Plaintiff Company.

8. There are other suppressions which have been highlighted by the Counsel on behalf of the Defendants which includes various employees of the Plaintiff Company who were actively engaged in the operations of the Plaintiff Company and were reporting to the other Directors of the Plaintiff Company, such as Paresh Shah and Dhiren Shah had assisted in the RoC filings for Defendant No.1 and particularly in amendment of the Memorandum of Association of the Defendant No.1 Company. Thus, they were fully aware of the business carried on by the Defendant No.1 Company. Further, there is no mention made of the warehouse of the Defendant No.1 Company being adjacent to the Plaintiff Company in Gujarat i.e. sharing a compound wall with the factory of the Plaintiff Company.

9. In the event the Defendants had been given notice of the above Suit and Interim Application filed therein, they would have been able to bring to the notice of this Court the aforementioned material facts. Further, had this Court been informed of the aforementioned material, in all likelihood, this Court would not have passed any order restraining the Defendants from accessing their office premises and / or having access to the records of the Plaintiff Company which were necessary to defend the present Suit, particularly considering that the Defendant No.2 had been in control and management of the Plaintiff Company for almost four decades and his right of management has been recognized in a binding legal Memorandum of Understanding dated 3rd September, 2010.

10. The Counsel for the Defendants have submitted that there were numerous disputes between the parties from 2012 onwards and this led to the incorporation of the Defendant No.1 Company as a way of separation. There were exit negotiations ongoing between the parties and as recently as in October, 2022, a valuation had been done mutually for the purpose of the exit. Reliance is placed on WhatsApp messages at pages 13 to 27 of the Affidavit in Reply of the Defendant dated 19th April, 2022 in this

context. Had this fact been known, this Court would have viewed the matter from an entirely different perspective. By seeking such ex-parte order the other Directors of the Plaintiff Company have achieved its purpose of having the Defendants turfed out of the Plaintiff Company premises in order that they may not have access to any Company records and that their share may be bought out at a negligible value. Further, the Defendants would have not been able to be in a position to reveal serious issues, which they had raised as to illicit transactions and illegal write offs on the part of the other Directors. This has now been placed on record in the additional Affidavit of the Defendants at pages 269 read with Pages 352 to 353.

11. The Counsel for the Defendants have further contended that this Court was misled into believing that the Defendant No.1 Company was earning huge profits which fact would have been belied had the Defendants been given notice. It has now been brought on record at paragraph 278 of the additional Affidavit of the Defendants that the Defendant No.1 Company in the last 8 years has made profits of approximately Rs.16 lakhs with a turnover of barely Rs.2.77 Crores as opposed to the turnover of the Plaintiff Company which was in excess of Rs.357 Crores. Thus, the case of the

Plaintiff that it has suddenly discovered that Defendant No.1 Company was carrying on business in competition with the Plaintiff Company and made huge profits at the expenses of the Plaintiff, is ex facie false and a mis-representation warranting recall of the interim order.

12. The Counsel for the Defendants have submitted that there has been inexplicable delay on the part of the Plaintiff in approaching this Court. There is no explanation as to why in December, 2022, there was a sudden discovery of the fact that the Defendant No.1 Company is competing with the Plaintiff Company. This, particularly considering the fact that there were disputes between the other Directors of the Plaintiff Company and Defendant No.2 which went all the wayback from 2012 onwards and there were exit negotiations from 2014 onwards. The Plaintiff has itself admitted that the Defendant No.1 Company was incorporated in 2015. Further, there is no explanation in the Plaint as to why such search had been conducted. The suggestion of the Plaintiff that it happened to see the name of Defendant No.1 Company using HSN Codes for aluminum and stainless steel is ex-facie unbelievable. From the website volga.com, it is evident that there are 9,287 exporters of stainless

steel and 14,00,000 export consignments of stainless steel and likewise 3,010 exporters of aluminum and 46,900 export consignments of aluminum. Thus, the search results of HSN Code for aluminum and stainless steel being fed into the software would have yielded this result.

13. The Counsel for the Defendants have referred to events after the passing of the ex parte order on 5th April, 2023. This includes the termination of the employment of Defendant No.2 on 27th May, 2022 as well as his removal as Director on the same date. Further, there has been removal of all materials, records and possession of the Defendants from the office of the Plaintiffs which have been thrown out in the compound. Thus, there has been misuse of the ex parte order. Accordingly, it is submitted that the ex parte order ought not to continue any further.

14. Mr. Zal Andhyarujina learned Senior Counsel appearing for the Plaintiff has made submissions opposing vacation of the said ex parte order. He has submitted that there is no material suppression on the part of the Plaintiff in the Plaint. He has submitted that it has been correctly stated in the Plaint the fact that

Defendant No.2 and 3 through the Defendant No.1 Company were engaged in a competing business to that of the Plaintiff was learnt of by the Plaintiff only upon conducting search of the HSN Code and thereafter the server database as stated in paragraph 11.7 and 11.8 of the Plaint. Further, from the exercise of perusing the electronic database, the Plaintiff Company learnt of the Defendant No.2 was conducting business of Defendant No.1 Company using email credentials and phone numbers belonging to the Plaintiff Company.

15. Mr. Andhyarujina has further submitted that the Defendants have been misleading and misrepresenting the existing customers, vendors of the Plaintiff Company and banks of the Plaintiff Company into believing that the Defendant No.1 Company is a sister concern of the Plaintiff Company. He has relied upon various material in this context which has been placed on record. He has further referred to the three forensic reports of Pristine Infosolutions appointed by the Plaintiff Company to investigate four suspected employee's computers and one Google workspace account for activities related to Defendant No.1 Company by performing detailed digital forensic investigation. He has submitted that there is sufficient material uncovered which is placed on record by way of the

additional Affidavits filed by the Plaintiff which would show that the Defendant No.1 Company through the Defendant Nos.2 and 3 were clandestinely running competing business and using the Plaintiff's trade mark "QUEEN" thereby infringing the Plaintiffs trade mark.

16. Mr. Andhyarujina made specific reference to the Affidavits which have now been filed by the Plaintiff and in particular the Affidavit in Rejoinder on behalf of the Plaintiff dated 27th April, 2023. He has submitted that the Court Receiver in his report during the execution of the ex parte Order broke open the lock of the premises of the Defendant Company and found that there was no sight of any machinery and equipment. Thus, it can only be inferred that the Defendant No.1 Company is using the factory, manpower, material and financial resources of the Plaintiff Company, thereby causing it tremendous loss. He has further referred to the transcript exchanged between Court Receiver and the Defendant No.2 in order to submit that there have been obstructions on the part of the Defendants in the Court Receiver executing the ex parte Order.

17. Mr. Andhyarujina has thereafter referred to Paragraph 18 and 19 of the said Affidavit in Rejoinder wherein it is

stated that on 23rd April, 2023, Mr. Dharendra Shah, the Director of the Plaintiff who is the deponent of the said Affidavit received a call from the security supervisor informing him of suspicious activities at the labour quarters which is situated in the factory premises. It was thereafter learnt on the next day when the representatives of the Plaintiff Company reached the factory that there was some loose soil which indicated that it had recently been dug up. Further, with the help of some factory labourers and a metal detector the representatives of the Plaintiff Company dug up the soil and found one massive 5 feet deep pit containing articles which are mentioned in Paragraph 18 of the said Affidavit in Rejoinder which were bearing the Queen Brand embossed, all clearly manufactured by the Plaintiff Company as they had the Company's label and packaging. It is further stated in Paragraph 19 of the said Affidavit in Rejoinder that upon inquiring with the supervisor and worker of Company, it was learnt that the daily wage workers had dug up the pit on instructions of another employee of the Plaintiff viz. Mr. Sandip Patel who is stated to be acting on the instructions of Defendant No.2. A police complaint has been filed by the Plaintiff which is annexed to the said Affidavit.

18. Mr. Andhyarujina has submitted that the conduct of the Defendants ought to be taken into consideration and which warrants that the said ex parte order ought not to be vacated. He has further submitted that the material which has been relied upon by the Defendants in the limited additional Affidavit filed on behalf of the Defendants dated 6th June, 2023 is a needle in a haystack, considering that there are only three emails which have been relied upon and which is stated to be on server of the Plaintiff Company, under the general email ID of the Plaintiff Company. He has submitted that the other Directors of the Plaintiff Company had no knowledge of the material on record and by the Defendants merely referring to the knowledge of certain external accountants, cannot infer knowledge on the other Directors of the Plaintiff Company.

19. Mr. Andhyarujina has further submitted that there is enough material on record for the passing of the ex parte order including the siphoning of monies by the Defendant No.2 and his family members into their accounts from the contractors of the Plaintiff Company apart from the fact that the 'QUEEN' trade mark of the Plaintiff Company is being used by the Defendants, thus infringing the mark of the Plaintiff Company. This Court had

considered all this material as well as the fact that the Defendant No.2 was in control of the export business of the Plaintiff Company and that if the Defendants were put to notice the entire cause of action in the present Suit would have become infructuous as the Defendants would have deleted the incriminating data available on their hard disks / laptops / computes etc. He has accordingly submitted that there is no case made out by the Defendants for vacation of the ex parte order.

20. Having considered the submissions, in my view it is necessary to consider whether the ex parte order could have been passed, had the material now produced by the Defendants been on record when the said ex parte order was passed. It is necessary to note that when the said ex parte order was passed, this Court was unaware of the material which is now produced by the Defendants being on the general email address of the Plaintiff Company and accessible from the Company server. This Court was given the impression that the Defendant No.2 had complete control over the “export division” of the Plaintiff Company and thus it would have been to the grave prejudice to the Plaintiff in the event the Defendants were given notice of these proceedings. Further, the

Defendants may remove or destroy certain records at the hands of other employees and other Directors. Thus, this Court had considered that the entire cause of action in the present Suit may become infructuous, if the Defendants erase or divert the entire incriminating data available on their hard disk, laptops, computers / data bases etc., thus making damage calculation impossible. Undoubtedly, this Court had also considered other material on record which led to a prima facie finding that there was use by the Defendant No.1 Company of the Trade Mark of the Plaintiff Company namely “QUEEN”. Further, there was other material to show that the contractors of the Plaintiff Company were directly dealing with the Defendants and that monies have also been received by the Defendants from the contractors of the Plaintiff and shown as salary in the IT Returns.

21. One cannot loose sight of the fact that in passing an ex parte order, the Division Bench of this Court in ***Kewal Ashokbhai Vasoya & Anr Vs. Surabhakti Goods Pvt. Ltd.***¹ has laid down the duties of the Applicant applying for an ex parte order to be passed by the Court. The Division Bench has held that the general

¹ 2022 SCC OnLine Bom 3335.

rule is that both sides must be heard before an interlocutory interim order is made under Order 39 of the Code of Civil Procedure, 1908. Moving without notice is an exception to the rule. The Division Bench has summarized the key principles applicable for every ex parte application. These principles include the paramount duty that every Applicant must make a full, reasonable and accurate disclosure of material facts and must invite the Court's attention to factual, legal and procedural issues. Ex-parte applications are by definition, moved in urgency, this must be demonstrated too.

22. The Division Bench in the said decision has noted the decision of the Supreme Court in *ICICI Ltd. Vs. Grapco Industries Ltd.*², wherein the Supreme Court has held that ad-interim injunction without notice should be for a short duration and also must consider its consequences. Further, the Division Bench has held that when the facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. If material non-disclosure is established, the Court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived. Further,

² (1999) 4 SCC 710.

whether or not the non disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the Court's starting point, at least when the failure is substantial or deliberate. There will be only exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged.

23. There are other decisions which have been relied upon by Counsel on behalf of the Defendants namely *The King Vs. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington*³ and which has been followed in *K. Jayaram and Ors. Vs. Bangalore Development Authority & Ors.*⁴ In the said decisions it has been held that for many years it has been the rule of the Court and one which is of the greatest importance to maintain that when an applicant comes to the Court to obtain relief on an ex parte statement, he should make a full and fair disclosure of all the material facts. In the event the Court finds that the facts have not been fully and fairly stated to it, the Court will set aside any action which it has taken on the faith of the imperfect statement.

³ Kings Division Bench (1917) Pg. 486.

⁴ (2022) 12 SCC 815.

24. In the case of *Morgan Stanley Mutual Fund Vs. Kartick Das*⁵, the Supreme Court in paragraph 36 has held as under:-

36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are---

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the Court will consider whether the Plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application;

(f) even if granted, the ex parte injunction would be for a limited period of time;

⁵ (1994) 4 Supreme Court Cases 225.

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

25. Thus, the aforementioned are the factors the Court must bear in mind in granting ex parte injunction. The Court will consider the time at which the Plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented.

26. In the present case, the Plaintiff has failed to disclose the material fact as to when the Plaintiff first had notice of the act complained of. There were disputes between the Plaintiffs and Defendants from the year 2012 and which resulted in the Defendant No.1 Company being incorporated in 2015, the purpose being that the Defendant Nos.2 and 3 would exit out of the Plaintiff Company and carry on business through the Defendant No.1 Company. This would have given sufficient cause to the Plaintiff Company through its other Directors to make inquiries as well as make a search of its server where requisite material is contained to ascertain the business of Defendant No.1 Company.

27. The Plaintiff has failed to disclose the reason to carry out the search of the HSN Codes in December, 2022. The Plaintiff has only stated that it had subscribed to a software service that provided data pertaining to export – import services from India (“Eximpedia”). The software provided export-import data and other details through input of a Harmonized System of Nomenclature Code (“HSN Code”). The Plaintiff making a random search of the HSN Code is ex-facie unbelievable given that the HSN Code would have revealed vast results as submitted on behalf of the Defendants. Hence, such search could only have been a selective search conducted by the Plaintiff in respect of the Defendant No.1 Company. Further, the Plaintiff Company has stated in paragraph 11.8 of the Complaint that an internal search of its server database was carried out. However, there is no explanation as to why such internal search could not have been carried out earlier when there were admittedly disputes between Plaintiff Company and Defendant Nos.2 and 3.

28. It is apparent from the material now brought on record by the Defendants through their additional limited Affidavit that upon a search of the Plaintiff’s server being conducted, it would have revealed that the Defendant No.1 Company was carrying on the

export business which was also being carried on by the Plaintiff Company. In fact, in Paragraph 11.16 of the Plaint, the Plaintiff has stated that during the exercise of perusing the electronic database, the Plaintiff learnt that Defendant No.2 was conducting business for Defendant Company, while using the email and phone numbers belonging to the Plaintiff Company. However, there is no explanation as to why this exercise could not having been conducted earlier. Presuming that the Plaintiffs' statement in the Plaint of learning of the Defendants competing business only in December, 2022 on carrying out the search is to be accepted, this does not explain the delay of over three months i.e. till 24th March, 2023 for the filing of the present Suit and Interim Application taken out. Thus, the delay in filing these proceedings is a relevant factor for this Court to consider particularly in the context of whether the Plaintiff acquiesced for sometime in the Defendant No.2 conducting a parallel business through Defendant No.1 as that of the Plaintiff Company.

29. There have been submissions made on both sides with regard to the events which took place after the said ex parte order was passed. However, it is not necessary to deal with these submissions considering the purport of the present Application made

under Order 39 Rule 4 of the CPC which is failure to disclose of material facts when the ex parte order was passed.

30. In my view, there has been a failure on the part of the Plaintiff to disclose material facts, which if disclosed, the ex parte order may not have been passed. This is coupled with the fact that there has been an unexplained delay in the Plaintiffs coming to the Court and seeking the ex parte order. It is made clear that this Court has not gone into merits of the application, particularly considering that the Defendants by virtue of the ex parte order have not been able to access relevant material which would offer them an opportunity of putting up a defense to the interlocutory Application of the Plaintiff.

31. In view thereof, the ex parte order dated 5th April, 2023 is vacated. Further, the statement made on behalf of the Defendants that until the hearing of the Interim Application, the Defendant No.1 Company will not use any trade mark including the “QUEEN” mark of the Plaintiff and / or hold itself out as sister concern of the Plaintiff is accepted.

32. With regard to the ad-interim relief granted by this Court in terms of prayer Clause (G) of the Interim Application, the Court Receiver has substantially carried out the exercise contemplated under Clause (G) (i) and (ii) of the Interim Application prior to the vacation of ex parte order and hence this cannot be undone.

33. The Defendants shall file their additional Affidavit in Reply to the Interim Application on merits within a period of three weeks from the date of this Order. The Plaintiff is at liberty to file their Affidavit in Rejoinder within a period of two weeks thereafter.

34. Place the Interim Application for further consideration on 23rd August, 2023.

35. Needless to state that in view of the vacation of the ex parte order, the Court Receiver shall stay its hands other than returning the hardware which belongs to the Defendants within a period of one week from today.

[R.I. CHAGLA J.]