

OCD-2

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
(COMMERCIAL DIVISION)

IA NO. GA 1 OF 2023
IN
CS 154 OF 2023
IN THE MATTER OF:
PANGHAT SAREES PRIVATE LIMITED
VS
ANUP AGARWAL AND ORS.

BEFORE:
The Hon'ble JUSTICE ARINDAM MUKHERJEE
Date : 21st August, 2023.

Appearance:
Mr. Debnath Ghosh, Adv.
Mr. Tinkari Jana, Adv.
Mr. Gautam Kumar Ray, Adv.
Mr. Gopal Das, Adv.
Mr. Sourav Jana, Adv.
Mr. Biswaroop Mukherjee, Adv.
For plaintiff
Mr. Sayantan Basu, Adv.
Mr. Tanmoy Ray, Adv.
For defendant

The Court : Affidavits of service filed in Court today is taken on record.

The defendants appear and oppose the application.

Mr. Basu, learned advocate appearing on behalf of the defendants say that ex parte order of injunction dated 7th August, 2023 is required to be vacated and/or discharged and/or varied for the following reasons:-

- (1) Suppression of material fact by the plaintiffs while it obtained the ex parte ad-interim order.

(2) Forged and fabricated document used in an attempt to make out a case.

(3) No case made out for ex parte order of injunction.

In order to elucidate the grounds it submitted on behalf of the defendants that the defendants' mother was carrying on business ever since 1999 under the name and style of "PANGHAT" at Surat. The defendants place before the Court a professional tax document issued by Surat Municipal Corporation to the mother of the defendant nos.1 and 2 in the year 1999.

The defendants further say that the directors of the plaintiff company, namely, Nirmal Saraf, Hari Kumar Saraf, Sarita Saraf and Nisha Saraf are also the directors of another company Panghat Creation Private Limited. The Panghat Creation Private Limited has its office at 2/2B, Chetan Seth Street, Saraf Tower, Kolkata – 700 007.

The defendants produce tax invoice of the plaintiff company Panghat Sarees Private Limited and Panghat Creation Private Limited to show that the said plaintiff and Panghat Creation Private Limited were supplying the products under the trade name "Panghat" which were being sold by the mother of the defendant nos.1 and 2 from her shop and/or outlets at Surat. The shops/outlets operated by the mother of defendant No.1 and 2 and the board "Panghat" displayed therein to the notice and knowledge of the plaintiff and its directors. The defendants' mother, according to the defendants, was not a manufacturer of either sarees, kurties and other dress materials but only seller of Sarees and other dress materials. In fact, the defendants' mother was mainly selling products of the Panghat Sarees Private Limited. The plaintiff as will appear from

photocopies of the invoices raised by Panghat Sarees Private Limited on Panghat, Surat in 2009 and 2010 and placed before this Court had been selling Sarees and other products of the plaintiff company to the mother of the defendant Nos.1 and 2. The plaintiffs, therefore, according to the defendants know about the existence of outlet with name Panghat as far back as 2009–2010 but suppressed this fact in the plaint and the petition.

After the death of the mother of the defendant nos.1 and 2 in April 2021, the said business is now operated by the defendant nos.1 and 2 and Panghat Creation Private Limited is supplying dress materials to them as will appear from a tax invoice dated 12th April, 2023 placed before the Court. The defendants say that the plaintiff company which functions through its board of directors was, therefor, specifically aware about the operation of the outlets under the name 'Panghat' at Surat since the directors of Panghat Creation Private Limited and Panghat Sarees Private Limited are either common or the same since 2007 as will appear from the documents placed before the Court by the defendants. The defendants say that in the aforesaid background there is neither any passing off nor infringement of the plaintiff's mark. The defendants then refer to paragraphs 3, 5, 13 and 15 of the petition and submit that Panghat Sarees according to the statements made in the plaint and the petition was originally a proprietorship business of Nirmal Saraf which was taken over by the plaintiff company by a deed of assignment dated 10th June, 2003. The said deed of assignment has, however, not been disclosed in the petition or with the plaint. The plaintiff company, therefor, could not allege of either infringement or passing of prior to the date of assignment and at the time of assignment the director of Panghat Sarees Private Limited know about the existence of the Panghat outlet at Surat. The defendants then say that the application for registration of trade mark as will

appear from page 31 of the petition was made on 30th January, 2004 i.e. subsequent to the deed of assignment. Thus the plaintiff cannot claim to be the user of the trade mark since 1999 when admittedly Nirmal Saraf as sole proprietor carried on the business. The defendants also say by referring to the documents at pages 35, 36, 37, 38 and 39 that the same are forged and fabricated and the Court should not rely upon the same. Panghat was not a registered mark in 2002 though “R” is written in the invoices above Panghat to falsely give an impression that the same is a registered mark. The registration, according to the plaintiff, was obtained on 8th November, 2005 and, as such, the plaintiff also could not have used the word “R” in the invoices prior to that date.

The defendants also say that the defendant no.1 had applied for registration of the word mark “Panghat” per se under Class 35 on 24th August, 2011 wherein it has clearly stated to be proprietor of such mark since 11th June, 1999. The defendants, therefore, could have used the alphabets “TM” to indicate that Panghat is a trade mark of at least the defendant no.1 and for the same there was no violation in law.

The defendants then refer to paragraphs 53 and 55 of the petition to submit that no case for ex parte ad interim injunction has been made out by the plaintiff. Ever since 2009 the plaintiff was all along aware about the word Panghat being used by the defendants and/or the mother of the defendant nos. 1 and 2 at the outlet at Surat wherefrom infact products of the plaintiff were being sold. The statement that the plaintiff came to know about the defendants infringing the plaintiff's mark in May 2023 is, therefor, out and out and incorrect statement if not false as will be borne out from the records already placed before the Court by the defendants in the form of invoices for the year 2009-2010. The

defendants also relied upon the judgement reported in **(1994) 4 SCC 225 (Morgan Stanley Mutual Fund Vs. Kartick Das)** to demonstrate that none of the parameters as laid down in the said judgement has been fulfilled by the plaintiff for claiming ex parte ad-interim order. The defendants have also relied upon the judgement reported in **(2011) 8 SCC 249 (Ramrameshwari Devi & Ors. Vs. Nirmala Devi & Ors.)** and that reported in **AIR 2000 Delhi 23 (M/s. Standipack Pvt. Ltd. & Anr. Vs. M/s. Oswal Trading Co. Ltd. & Ors.)** to contend that no infringement action has been made out by the plaintiff against the defendant. The defendants, therefore, submit that the order should be vacated as the whole business of the defendants in view of the ex parte ad interim order dated 7th August, 2023 has come to halt.

On behalf of the plaintiff the factual submissions made by the defendants are denied. It is also submitted that the legal provisions harped upon by the defendants has no manner of application in the facts of the instant case. There has been no suppression for less suppression of material facts for which the order requires to be varied or discharged. The plaintiff had made out a strong prima facie case at the time of passing of the ex parte ad-interim order and the Court on being satisfied with the same to prevent further prejudice to the plaintiff and taking note of the balance of convenience and inconvenience had passed the ex parte ad-interim order. No case has been made out by the defendants for discharge or variance of the order on the returnable date in absence of an affidavit. The documents placed before the Court today by the defendants are unreliable at this stage unless it comes with an affidavit. This Court should, therefore, direct the defendants to file affidavit and continue the order of injunction. The plaintiff at the end submits that in any event when the defendants are saying that they are not manufacturer but are selling the

products of the plaintiff from the outlets at Surat bearing the board “Panghat”, the order may be clarified so that the business of the defendants in selling plaintiff’s products is not hindered in any manner.

The plaintiff says that this Court after being prima facie satisfied with the plaintiff’s case had passed ex parte ad interim order dated 7th August, 2023 by restraining the defendants their men, agents, servants and/or assigns from selling their sarees, kurties, ghagras, dress materials etc. by using the mark or word “PANGHAT”. The order, therefore, does not require interference.

There is, according to the plaintiff, as such no embargo on the defendants selling products bearing mark “PANGHAT” which originates from the plaintiff. Since the defendants claim to be selling products of the plaintiff and/or its sister concern under the name and style “PANGHAT”, there can be no restraint order on the defendants in selling such products as the same will go against the plaintiff. There is as such according to the plaintiff also no restraint order as to any other goods being sold by the defendants from their outlet, which does not bear the mark “PANGHAT”.

After hearing the parties and considering the materials forming part of the application and the documents placed before the Court by the defendants it is clear that the plaintiff has suppressed the fact of its knowledge as to operation of the outlet by the mother of the defendant no. 1 and 2 ever since 2009 when supplies were made by the plaintiff for sale of sarees from such outlets. The plaintiff also cannot deny the knowledge of its directors about the Surat outlet as one of the directors as appears from record is a director since 2007. The plaintiff company functions through its board of directors. The same set of directors are also directors of Panghat Creation Private Ltd. through whom supplies has been made to the present defendants for sale of such product at the defendants outlet

at Surat. Suppression as laid down by the Hon'ble Supreme Court in **2004 (7) SCC 166 [S.J.S Business Enterprises (P) Ltd. vs. State of Bihar and Ors.]** and **2006 (3) SCC 100 [Mayar (H.K) Ltd. & Ors. vs. Owners & Parties Vessel M.V. Fortune Express & Ors.]** shall be such which on being brought to the notice of the Court would have persuaded the Court from passing the order which it had passed. Undoubtedly, if the knowledge of the plaintiff as recorded hereinabove would have been brought to the notice of the Court would have persuaded the Court to hear the matter in the presence of the defendants. This would have allowed the Court to consider all facts which is brought forth by the defendants in course of today's hearing. At the same time infringed of a registered mark warrants passing of ex parte restraint order, if prima facie case is established coupled with balance of convenience and inconvenience and irreparable injury. These ingredients were however, present at the time of passing the orders. The Court is to, therefore, see whether suppression would single handedly liable to have the order varied and/or discharged. The plaintiff in anticipation of the fact that the order may get vacated on the ground of suppression has advanced an argument in favour of clarifying the order so that it does not create an embargo on the defendants selling the plaintiff's products and third party products from the outlet which will neither infringe the plaintiff's mark or allow passing off action.

It appears at this stage that the defendants are more concerned to have its outlets operational since they are not infringing the plaintiff's mark or passing off their goods and services to be that of the plaintiff. At the same time records at this stage reveals that the mark registered in favour of the plaintiff is device or label mark. The word mark i.e. Panghat per se is not registered. The label mark has its own limitations as in Section 2 (m) of the Trade Marks Act, 1999. So the

plaintiff cannot claim anything in excess of its label mark.

At this stage i.e., prior to calling for affidavits, the order dated 7th August, 2023 is clarified to the extent that there is no restraint order in respect of the goods being sold from shops and/or outlets operated by the defendants under the trade name “PANGHAT” without in any manner passing off their product as that of the plaintiff and without infringing the label mark “PANGHAT” in respect of sarees, kurties, ghagras, dress materials etc. registered in the name of the plaintiff.

The order dated 7th August, 2023 is clarified by permitting the defendants from selling any goods and services like sarees, kurtis and dress materials without in any manner infringing the plaintiff’s label mark “Panghat” or from passing off any of its goods and services as that of the defendants.

Let affidavit be filed by 12th September, 2023; reply, if any, by 28th September, 2023. Let this matter appear in the monthly list of October, 2023.

(ARINDAM MUKHERJEE, J.)

sb/nm