

2022 Livelaw (Del) 437

IN THE HIGH COURT OF DELHI AT NEW DELHI

HON'BLE MS. JUSTICE JYOTI SINGH

CS(COMM) 288/2022; 06.05.2022

PEPSICO INC. & ANR. *versus* JAGPIN BREWERIES LIMITED & ANR.

Summary: The Court granted an ex parte injunction in favour of Pepsico against a liquor company allegedly using their mark i.e. Mirinda. Pepsico had successfully made out a prima facie case for an ad-interim injunction since the balance of convenience lies in their favour.

Plaintiffs Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Dheeraj Nair, Mr. Manish K. Jha and Ms. Shruti Dass, Advocates.

Defendants Through: Mr. Shailen Bhatia and Ms. Zeba Tarannum Khan, Advocates.

ORDER

I.A. 6865/2022 (Exemption)

1. Subject to the Plaintiffs filing clearer copies and documents with proper margins, which they may seek to place reliance on, within four weeks from today, exemption is granted.
2. Application is allowed and disposed of.

I.A. 6866/2022 (Section 12(A) of the Commercial Courts Act, 2015 seeking exemption from pre-institution mediation)

3. For the reasons stated in the application, the requirement of preinstitution mediation is dispensed with.
4. Application is allowed and disposed of.

I.A. 6867/2022(exemption from service to Defendants)

5. Since Mr. Bhatia, learned counsel has entered appearance on behalf of the Defendants, application has become infructuous.
6. Application is disposed of accordingly.

I.A. 6864/2022(seeking leave to file additional documents)

7. Present application has been preferred on behalf of the Plaintiffs seeking leave to file additional documents under Order 11 Rule 1(4) CPC.
8. Plaintiffs, if they wish to file additional documents at a later stage, shall do so strictly as per the provisions of the Commercial Courts Act, 2015.
9. Application is allowed and disposed of.

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10. Let plaint be registered as a suit.
11. Issue summons.

12. Mr. Shailen Bhatia, learned counsel enters appearance on behalf of the Defendants and seeks a copy of the paper book.

13. Let a complete set of paper book be supplied to Mr. Bhatia, within three days from today.

14. Written statement be filed by the Defendants within 30 days from today along with affidavit of admission/denial of the documents of the Plaintiffs.

15. Replication thereto be filed by the Plaintiffs within 15 days of the receipt of the written statement along with an affidavit of admission/denial of the documents filed by the Defendants.

16. If any of the parties wish to seek inspection of any documents, the same shall be sought and given within the timelines.

17. List before the Joint Registrar on 29.07.2022.

18. List before the Court on 03.08.2022.

I.A. 6862/2022 (under Order 39 Rules 1 and 2 CPC, by Plaintiffs)

19. Present application has been preferred by the Plaintiffs under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure 1908 for grant of *ex-parte ad-interim* injunction.

20. Issue notice.

21. Mr. Shailen Bhatia, learned counsel accepts notice on behalf of the Defendants.

22. Let reply be filed within a period of four weeks from today. Rejoinder, if any, be filed within two weeks thereafter.

23. It is averred in the plaint that Plaintiff No.1 is a Corporation duly incorporated under the laws of State of North Carolina, USA and is one of the world's premier consumer products Companies engaged in the business of manufacturing and distributing (on its own and through affiliates and subsidiaries) non-alcoholic beverages, packaged and aerated waters and snack foods.

24. It is further averred that Plaintiff No. 2 is a wholly owned subsidiary of Plaintiff No. 1 and is engaged in sale of different kinds of beverages, packaged drinking water and packaged snack foods under (i) its own marks and (ii) various registered marks of Plaintiff No. 1, which it is authorized to use and protect.

25. It is averred that internationally the MIRINDA mark was first adopted in the year 1959 in Spain and has been used by Plaintiff No.1 and/or its predecessors for the last more than 60 years. In India, the earliest registration for the said marks dates back to 1997 in Class 32, though the products under the MIRINDA marks have been available since 1996. Additionally, MIRINDA marks have either been registered or applications have been made for registrations by Plaintiff No.1 or its subsidiaries in about 190 countries of the world. Details of registrations have been given in the plaint and it is stated that the registrations are valid and subsisting.

26. It is stated that the total net revenue earned from the sale of products under MIRINDA marks for the period 2013 till December 2021 in India has been in excess of INR 2500 Crores. Plaintiffs' products under the MIRINDA marks have been widely advertised in India through various media and the advertising and promotional expenses from 2013 to December, 2021 have been in excess of INR 157 Crores. Extensive advertisements and promotion campaigns have been made on dedicated social media platforms such as Facebook, Youtube, Twitter and Instagram. Several celebrities have endorsed the products bearing the MIRINDA marks in India. Plaintiffs have been actively enforcing their rights under the MIRINDA marks in India by instituting legal actions, issuing cease and desist letters, filing oppositions and have received favourable results.

27. It is averred that in December, 2021 Plaintiffs came to know that Defendant No.2 applied for registration of the mark "Continental Mirinda Beer" (bearing No.3465713 in Class 32) in his name, with the user claim from 06.07.2015. On further investigation it was found that Defendant No. 2 who is the Director of Defendant No.1 is currently using the Hindi transliteration of the mark MIRINDA i.e., **मिरिंडा**, in relation to country made liquor and has also filed an application seeking registration of the mark **मिरिंडा** (bearing No. 3471413 in Class 33) before the Trade Marks Registry, which was abandoned subsequently.

28. It is contended by learned Senior Counsel for the Plaintiffs that MIRINDA marks are the registered marks of Plaintiff No.1 and use of the impugned mark or its deceptive variations by the Defendants in relation to their products/business activities amounts to infringement of the statutory rights of Plaintiff No.1 under Section 29 of the Trade Marks Act, 1999. The unauthorized adoption and use is bound to cause confusion and association amongst the public that the products sold under the impugned mark are those of the Plaintiffs. It is clear that Defendants intend to take unfair advantage of the immense goodwill and reputation of Plaintiff No.1's MIRINDA marks. On account of substantial expenditure on promotions; long, continuous and extensive use internationally and in India; significant turnover and diligent enforcement of the intellectual property rights, the MIRINDA marks have become distinctive of and are exclusively associated with the Plaintiffs alone and have become a house-hold name. In fact, it is contended that MIRINDA marks enjoy the status of well-known marks within the meaning of Section 2(1)(zg) of The Trade Marks Act, 1999 and are entitled to the highest degree of protection.

29. It is next contended that the use by Defendants of the impugned mark has inherent in it misrepresentation to the consumers that Defendants' products owe their origin to or are licensed by the Plaintiffs and is calculated to cause damage to the Plaintiffs' common law rights and amounts to passing off.

30. Having heard learned Senior Counsel for the Plaintiffs, this Court is of the view that Plaintiffs have made out a *prima facie* case for grant of *ex parte ad-interim* injunction. Balance of convenience lies in favour of the Plaintiffs and they are likely to suffer irreparable harm in case the injunction, as prayed for, is not granted.

31. Accordingly, Defendants, by themselves, their agents, representatives, servants, men, distributors and all those acting in concert with them or on their behalf or claiming under or through them or otherwise howsoever, are restrained from using transliteration

of the trademark "MIRINDA" in Hindi, i.e., **मिरिन्डा/ मिरिंडा** and/or any other language, and/or any other mark which may be identical and/or deceptively similar to Plaintiff No. 1's registered MIRINDA marks upon or in relation to their products and/or business activities and/or in any other manner amounting to infringement of Plaintiff No. 1's statutory rights in "MIRINDA" marks, till the next date of hearing.

32. Plaintiffs shall comply with the provisions of Order 39 Rule 3 CPC within five days from date of the execution of commission.

I.A. 6863/2022 (for appointment of Local Commissioner)

33. Present application has been preferred by the Plaintiffs under Order 26 Rule 9 and Order 39 Rule 7 read with Section 151 CPC, seeking appointment of a Local Commissioner.

34. Although in the application Plaintiffs have prayed for appointment of one Local Commissioner, Mr. Dayan Krishnan, learned Senior Counsel appearing on behalf of the Plaintiffs, at the outset, submits that another Local Commissioner be appointed to visit the premises of Defendant No.2, which is located at C-115, Ground Floor, Mansarovar Garden, New Delhi 110015.

35. Upon hearing, the application is allowed.

36. Accordingly, Mr. Devendra Kumar, Advocate (Mobile No. 8744880124) and Ms. Sanya Kumar, Advocate (Mobile No. 9818335779) are appointed as Local Commissioners.

(a) Mr. Devendra Kumar, Advocate shall visit the premises at the following address:-
Village Nowgong, Near Sikarpura Bus Stand, District-Chhatarpur, Madhya Pradesh-471201.

(b) Ms. Sanya Kumar, Advocate shall visit the premises at the following address:-
Jagdish Chand Agrawal, C-115, Ground Floor, Mansarovar Garden, New Delhi-110015.

37. Local Commissioners shall visit the aforesaid premises, search and take into custody the infringing products, if any, bearing the Plaintiffs' registered trademarks including but not limited to bottles, labels, packaging materials, stationery, business cards, carry bags, price stickers, visiting cards, bill boards, publicity material, brochures, pamphlets, signages, hard disks, if any, containing infringing material from the computers etc. and make an inventory of the same.

38. Local Commissioners along with the Representatives of the Plaintiffs and/or their counsel shall be permitted to enter the premises of the Defendants, as aforementioned.

39. Local Commissioners shall seize the infringing products and hand over the same to the Defendants on *superdari*, upon the Defendants furnishing an undertaking that they

shall produce the goods, so seized, before the Court, as and when further directions are issued in this regard.

40. Local Commissioners shall make copies and sign books of accounts including ledgers, cash books, bill books, etc. discovered from the premises of the Defendants.

41. Local Commissioners shall be permitted to take photographs/videos of the execution of the Commission. They shall also be entitled to seek police assistance or protection of the Local Police Station, if so required, for the purpose of execution of the order of this Court. The SHOs of the concerned Police Station are directed to provide necessary assistance to the Local Commissioners, if sought for.

42. In case the premises as aforementioned are found locked, the Local Commissioners are at liberty to break open the locks.

43. Fee of Mr. Devendra Kumar, Advocate is fixed as Rs.2,00,000/- in addition to travel, boarding and lodging expenses as well as other miscellaneous out-of-pocket expenses. Fees of Ms. Sanya Kumar, Advocate is fixed at Rs.1,00,000/- in addition to out of pocket and miscellaneous expenses for the execution of the Commission. Fee of the Local Commissioners shall be paid in advance by the Plaintiffs.

44. Report of the Local Commissioners shall be filed within two weeks of the execution of the Commission.

45. Application is disposed of.

46. Copy of this order be given to learned counsel for the Plaintiffs *dasti* under the signatures of the Court Master.

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