



2023:DHC:8717



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(COMM) 869/2023**

HOUSE OF DIAGNOSTICS LLP & ORS. Plaintiffs
Through: Mr. Vaibhav Vutts, Ms. Aamna
Hasan and Ms. Anupriya Shyam, Advs.

versus

**HOUSE OF PATHOLOGY
LABS PRIVATE LIMITED Defendant**
Through:

**CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR**

ORDER (ORAL)

05.12.2023

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CS(COMM) 869/2023, I.A. 24216/2023(Order XXXIX Rules 1 and 2 of the CPC), I.A. 24217/2023 (Section 12A of the Commercial Courts Act, 2015), I.A. 24218/2023 (Order XI Rule 1(4) of the CPC), I.A. 24219/2023 (Order XI Rule 4 of the CPC), I.A. 24220/2023 (Exemption), I.A. 24221/2023 (for urgent listing) and I.A. 24222/2023 (Exemption from advance service)

1. At the very outset, I queried of Mr. Vaibhav Vutts, learned Counsel for the plaintiffs as to the justification for seeking exemption from advance service of notice in the present case. Mr. Vutts, very fairly, agrees to re-listing of the matter after three days, so that he is in a position to serve notice of this suit and the accompanying applications in terms of Rule 22 of the IPD Rules on the defendant.

2. Accordingly, renotify on 12 December 2023 for preliminary hearing.



3. However, as this is a recurring issue, I deem it appropriate to set down my views on this matter. This Court is finding, in case after case, that advance service on the defendant is not being effected and applications for exemption from advance service are being routinely moved. In many cases – as in this – the only ground taken in the application is that an application under Order XXXIX Rules 1 and 2 of the CPC, seeking interim relief, has been moved. If that were to be a sole ground to justify dispensing with advance service, the Court would have to dispense with advance service in every case, as applications for interim relief under Order XXXIX are inevitably filed with every IPD suit. The requirement of advance service would thereby be reduced to a redundancy.

4. Rule 22 of the IPD Rules, which has been framed by this Court, after detailed deliberation by a Committee which is well conversant with all the nuances and intricacies of intellectual property law, reads thus:

“22. Advance Copy

In all matters filed before the IPD, advance copy *shall* be served at the address for service, as also through email, at least two working days in advance, upon the Respondents including the counsels/agents, who may have represented the Respondents before the IPO, or trial court, or authority, as the case may be. *Along with the advance copy so provided, the likely date of listing shall be intimated.* Upon advance copy being served, parties/counsels/agents/authority shall be represented on the first date of hearing before the Court. For the sake of expeditious disposal, if in the opinion of the Court no further notice is required, and if satisfactory proof of service is furnished, no further notice would ordinarily be issued and the matter may be heard and disposed of on the first day of listing.

Provided that, in the facts and circumstances of a given case, and on an application, the Court may dispense with advance service.”



5. The opening words of the Rule read “advance copy *shall* be served at the address for service”. Though “shall” can, at times, be read as “may”, the cardinal principle remains, however, that the word “shall”, when used in a statute, normally denotes its imperative character. Dispensation with advance service is only contemplated by the proviso, and has to be a conscious decision taken in the facts and circumstances of a given case. It cannot be mechanically granted.

6. The public interest pervading Rule 22 is apparent. Contest is always healthy, and an uncontested order passed by a Court is pregnant with the possibility of error, as the Court passes the order after hearing only one side. A contested order does no prejudice to either side and also substantially insulates the Court from making errors, either of facts or of law. Needless to say, no party can seek, as a matter of right, an uncontested order.

7. Rule 22 of the IPD Rules merely requires advance service of the suit papers to be effected on the defendant two working days in advance of filing of the suit. There should ordinarily be no objection, whatsoever, to comply with such an elementary requirement, unless and until there are overarching considerations of justice, equity or public interest which positively require that the opposite party *should not be made aware* that a suit is being instituted against him.

8. The onus to show that such an exceptional case exists would obviously be on the plaintiff. As such, for a case for exemption from advance service under the proviso to Rule 22 of the IPD Rules to be



made out, the plaintiff would have to demonstrate to the Court that, if advance service were made on the defendant in accordance with Rule 22, irreparable injury would result.

9. There are circumstances in which this may happen. For example, in trademark infringement matters, the plaintiff may be alleging that the defendant is a clear infringer who has, in its stock, a large quantity of infringing goods, and may move an application, therefore, to seize the said goods. In such cases, it may legitimately be pleaded that if advance service on the defendant is directed, the defendant may pre-emptively release the entire quantity of infringing goods in the market. Another case in which, hypothetically, exemption from advance service may be justified, is a case in which the defendants, as prior employees or associates of the plaintiff, are alleged to have poached confidential material of the plaintiff with the intent of using it for unlawful means. Where such material is contained on the servers of the defendants, if advance service of the plaint is directed to be served on the defendants, there is a live danger of the defendants compromising the said data or erasing it altogether. In such cases, too, this Court finds applications routinely being moved to appoint local commissioners to obtain copies, from the defendants' servers, of the data concerned so that the Court is aware of the *status quo* as it exists when the plaint is filed and the defendant is not permitted to alter it. In such cases, too, exemption from advance service may legitimately be sought, and granted.

10. The requirement of advance service is in accordance with the *audi alteram partem* requirement. In cases which do not fall within



the aforementioned excepted, or similar categories, the defendant would be within its right in seeking an audience before being faced with an adverse injunctive order.

11. In the present case, however, the only grievance of the plaintiff is that it is the proprietor of the registered trade mark “HOUSE OF DIAGNOSTICS/H.O.D”, under which it provides diagnostic services. The defendant is alleged to be infringing the plaintiff’s registered mark by using “HOUSE OF PATHOLOGY/H.O.P.”, offering similar services. Both have laboratories running. It is obvious that, had the plaintiff complied with Rule 22 and effected advance service on the defendant, no irreparable prejudice or injury would have resulted. Nor has the plaintiff avoided such injury by not effecting advance service. There is absolutely no justification, therefore, in my view, in a case such as this, for the plaintiff instituting the suit without a two-day notice of advance service, in terms of Rule 22 of the IPD Rules being effected on the defendant.

12. Mr. Vutts drew the attention of the Court to the fact that the defendant had been served with a legal notice, putting him on guard regarding the aspect of infringement and that the defendant was recalcitrant and unwilling to mend his ways. It is only thereafter that the plaintiff has come to the Court.

13. In the opinion of this Court, that cannot be a justification for seeking exemption from advance service. Howsoever apparently reprehensible the defendant’s conduct may be, the only situation in which exemption from advance service can be sought is where the



plaintiff demonstrates that if advance service was effected, irreparable injury would result.

14. The conduct of the defendant, or the issuance of the legal notice to the defendant before instituting the suit or the extent of infringement or otherwise that the plaintiff perceives to be taking place, cannot be considerations which immunize the plaintiff against the requirement for effecting a two-day advance service of notice on the defendant before instituting the suit.

15. It is a matter of common knowledge that once interim orders are passed by the Court, they often continue for months on end and the defendant has to strain every sinew in order to have them vacated. On the other hand, if advance notice is served, the worst that can happen is that the defendant would have an opportunity of being present to contest the case before orders are passed.

16. Where no irreparable injury can be shown to exist, in cases where advance notice is to be effected in terms of Rule 22 of the IPD Rules, no case for invoking the proviso to the said Rule can be said to exist. The Court cannot implement the Rule in such a manner that the Rule becomes the proviso and the proviso becomes the Rule.

17. It is made clear, therefore, that, *save and except in cases where the plaintiff is able to demonstrate that compliance with the requirement of advance service, as envisaged by Rule 22 of the IPD Rules, would result in irreparable prejudice, or irreversibly alter the status quo, advance service of the suit papers on the defendant, as*



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contemplated by the said Rule, is mandatory.

18. Having said that, as already noted, Mr. Vutts, very fairly, agrees to renotification of this matter on 12 December 2023.

19. Accordingly, renotify on 12 December 2023 for preliminary hearing. In the meanwhile, let the plaintiff effect advance service of the suit on the defendant and place proof thereof on record.

C.HARI SHANKAR, J

DECEMBER 5, 2023

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[Click here to check corrigendum, if any](#)