

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

F.A.O No. 7892 of 2020

M/s Samsara Couture House (Pvt.) Ltd. and another

versus

Syeda Khadija Batool and 2 others

JUDGMENT

<i>Date of hearing</i>	08.11.2023
<i>Appellants by</i>	<i>Mr. Hasan Irfan Khan, Mr. Saqib Asghar, Mr. Mudassar Hassan and Ms. Mahnoor, learned Advocates.</i>
<i>Respondent No. 1 by</i>	<i>Syed Salman Ali Mohsin, Advocate.</i>

SULTAN TANVIR AHMAD, J:–This appeal, under section 114 of Trade Marks Ordinance, 2001 (the ‘**Ordinance**’), is directed against order dated 28.01.2020 passed under Order XXXIX, Rule 1 & 2 of the Code of Civil Procedure, 1908 (the ‘**Code**’) by learned Presiding Officer, Intellectual Property Tribunal, Lahore (the ‘**Tribunal**’).

2. Respondent No. 1 instituted suit before the learned *Tribunal* with the averments that she is a *bona fide* owner, prior adopter and user of trade mark(s) ‘SAMSARA’ or ‘SAMSARA by Khadija Batool’. She has further claimed in the suit that registration of ‘SAMSARA Couture House (Pvt.) Limited’ with the Securities and Exchange Commission of Pakistan by the appellants and use of mark ‘SAMSARA’ amounts to infringement of her rights. This suit is being contested by the

appellants, raising various objections including that the claim of prior user is false; that respondent No. 1 soon after her graduation in fashion designing entered into partnership agreement dated 03.03.2016 ('the *partnership agreement*') with appellant No. 2 who is having vast experience in textile industry. It is claimed in the written statement that 'SAMSARA' is owned by the partnership as evident from the recital and clauses of the *partnership agreement*. The prior or *bona fide* usage of the 'SAMSARA' by respondent No. 1 is denied in the written statement.

3. On 28.01.2020 the learned *Tribunal* allowed the application instituted under Order XXXIX, Rule 1 & 2 of the *Code* and the appellants have been restrained from using 'SAMSARA' or 'SAMSARA by Khadija Batool' and name 'SAMSARA Couture House (Private) limited'. Aggrieved from the same the present appeal has been filed.

4. It is admitted before me that the mark in question is not yet registered, with the trade mark registry, in the name of any of the parties to the suit. Appellant No. 2 filed application for registration of the disputed mark on 27.09.2017 and soon thereafter i.e. on 10.10.2017 respondent No. 1 also filed an application for registration of the mark in relevant classes. The claim of respondent No. 1 is essentially based on prior use of 'SAMSARA', being its alleged creator and goodwill acquired through prior usage. In the cases of unregistered trademarks, which are filed on the basis of prior use or goodwill acquired through such usage, at the interim stage, it is commonly important for the Courts to tentatively assess sales invoices, advertisements in print and electronic media as well as promotion through other tangible means, receipts, returns showing trade with the given name as well as other relevant documentary evidence filed by the two sides. Reference

can be made to cases titled "Messrs Unique School vs. Messrs Unique Group of Institutions"(**2015 CLD 1297**), "Pioneer Cement Limited through Company Secretary vs. Fecto Cement Limited through Chief Executive Officer and 3 others"(**2013 CLD 201**) and "Qadeer Ahmed vs. The Assistant Registrar of Trade Marks, The Trade Marks Registry and another"(**1999 YLR 96**).

5. It is settled that interim injunction, by its nature is a preventive relief preserving the *status quo* of the subject matter till the final conclusion of the suit. After ascertaining *prima facie* case, by assessing aforesaid documents if available, the Courts must see the existence of the remaining two factors of balance of convenience and irreparable loss or injury. The preventive relief, in such circumstances and in the cases of unregistered marks, should not be granted as a matter of course and it is suitable when existence of right by prior use or its creation as well as its infringement are demonstrated with some clarity. Here it will be beneficial to reproduce paragraph No. 9 of judgment in case titled "Muhammad Kashan vs. Coca Cola Export Corporation through Chief Executive Officer and 3 others"(**2015 CLD 1513**), which reads as under:-

"...Principles relating to the law of interim injunction are more or less well-settled. Interim injunction, by its nature, is a preventive remedy for the purpose of preserving the status quo of the matter of the suit pending the determination of suit. It is a discretionary relief and the Courts while considering the question of grant of such relief, have to see the co-existence of prima facie case, balance of convenience and irreparable loss and injury in favour of a party seeking such relief. Moreover, the existence of a right and its infringement are the first conditions for grant of interim injunction. Therefore, when action is brought before the Court by the plaintiff to prevent infringement of copyright, the Court would grant an interim injunction only when the right claimed by the plaintiff is clear. It cannot be granted as a

*matter of course in those cases where even to establish *prima facie* case evidence has to be produced. In the case in hand, as mentioned in para No.8 supra, the appellant/plaintiff has failed to make out *prima facie* case on the ground of infringement of a "work" under the 1962 Ordinance and for this reason no discretion can be exercised in favor of appellant for grant of interim injunctive relief..."*

6. In the present case respondent No. 1 relied on documents attached with the plaint as Annexures A/1 to A/20. These attachments, besides one document, comprises of invoices reflecting purchase of raw material of fashion apparel for meager amounts and pages from facebook of respondent No. 1 herself. These documents are required to be assessed in trial to see their veracity. On the other hand the *partnership agreement* is not denied by the parties. This admitted document shows that the parties agreed to carry business in the name and style of 'SAMSARA' by Khadija Batool. Respondent No. 1 and appellant No. 2 as per clause 6 of the *partnership agreement* are equal shareholders in profit and loss. This written document, signed by two sides, is totally silent as to prior use of 'SAMSARA' by respondent No. 1 or for that matter even by appellant No. 2.

7. Syed Salman Ali Mohsin, learned counsel for respondent No. 1 has not given any reasonable explanation as to another suit instituted on behalf of respondent No. 1, wherein, the learned Civil Court restrained the parties from violation of the terms of the *partnership agreement* vide order dated 27.11.2018. Reference by Mr. Hasan Irfan Khan, learned ASC to the case titled "Yaqoob vs. Additional Settlement Commissioner, Karachi and 2 others" (**1973 SCMR 116**) and "Kohinoor Soap and Detergents (Private) Ltd through Chief Executive of the Company vs. Basra Soap Factory and 4 others" (**2002 CLD 1223, Karachi**) as well as provisions of

Partnership Act, 1932, is not irrelevant, either. However, addressing these arguments in detail, at this stage, is not required.

8. Keeping in view the peculiar facts of the case, I am of the opinion that three ingredients required for grant of interim injunction are not co-existing in the present case. Consequently, order dated 28.01.2020 passed by the learned *Tribunal* is set-aside and this appeal is *allowed*. The suit is pending for about five years, therefore, the learned *Tribunal* is directed to decide the same at earliest and preferably within five months from the date of receipt of certified copy of this judgment.

9. Before parting with this judgment I would like to clarify that the observations made above are tentative and the learned *Tribunal* shall decide the main case without being prejudiced from any discussion made above.

(*Sultan Tanvir Ahmad*)
Judge

Announced in open Court on _____.

Approved for reporting

Judge