

Himalaya Wellness Company And Ors vs Vlado Sky Enterprise Private Limited on 13 August, 2024

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IN THE HIGH COURT OF DELHI AT NEW DELHI
CS(COMM) 682/2024, I.A. 36274/2024, I.A.
36276/2024, I.A. 36277/2024, I.A. 36278/
HIMALAYA WELLNESS COMPANY AND ORS

VLADO SKY ENTERPRISE PRIVATE LIMITED

CORAM:

HON'BLE MS. JUSTICE MINI PUSHKARNA

% 13.08.2024 I.A. 36279/2024 (Exemption from filing original and clear copies of documents)

1. The present is an application under Section 151 of the Code of Civil Procedure, 1908 ("CPC"), on behalf of the plaintiffs, seeking exemption from filing original documents and filing clear/legible copies of documents with proper margin.

2. Exemption is granted, subject to all just exceptions.

3. Applicant shall file legible, clear, and translated copies of the documents, on which the plaintiffs may seek to place reliance, before the This is a digitally signed order.

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4. Accordingly, the present application is disposed of. I.A. 36275/2024 (Application seeking leave to file additional documents)

5. This is an application under Order XI Rule 1(4) read with 151 CPC as amended by the Commercial Courts Act, 2015, seeking leave to file additional documents.

6. The plaintiffs, if they wish to file additional documents at a later stage, shall do so strictly as per the provisions of Commercial Courts Act, 2015 and the Delhi High Court (Original Side) Rules,

2018.

7. The application is disposed of, with the aforesaid directions I.A. 36276/2024 (Application seeking exemption from undergoing Pre- Institution Mediation)

8. Having regard to the facts of the present case and in the light of the judgment of Supreme Court in the case of Yamini Manohar Versus T.K.D. Keerthi, 2023 SCC OnLine SC 1382, and Division Bench of this Court in Chandra Kishore Chaurasia Versus RA Perfumery Works Private Ltd., 2022 SCC OnLine Del 3529, exemption from attempting Pre-Institution Mediation, is granted.

9. Accordingly, the application stands disposed of. I.A. 36277/2024 (Application seeking extension of time to file Court fees)

10. The present is an application filed by the plaintiffs under Section 149 read with Section 151 CPC seeking extension of time to file Court Fees.

11. It is submitted that the requisite court fees shall be filed within a period of ten days from today.

12. Liberty is so granted.

13. Let the needful be done by the plaintiffs within the time granted.

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14. With the aforesaid liberty, the present application is disposed of. I.A. 36278/2024 (Application for filing Certificate under Section 63(4) of Bharatiya Sakshya Adhiniyam, 2023)

15. The present is an application under Section 151 CPC seeking four weeks for filing the Certificate under Section 63(4) of Bharatiya Sakshya Adhiniyam, 2023 ("BSA").

16. Let the needful be done accordingly.

17. With the aforesaid directions, the application is disposed of. CS(COMM) 682/2024

18. None appears for the defendant despite advance service.

19. Learned counsel appearing for the plaintiffs has drawn attention of this Court to the affidavit of service to submit that a proper service has been done on the defendant.

20. Attention of this Court has been drawn to a document, which is the screenshot from the website of the Ministry of Corporate Affairs, which shows the Email Id of the defendant.

21. Accordingly, this Court is satisfied that a valid service has been done upon the defendant.

22. Thus, it is noted that none appears for the defendant despite valid service.

23. Let the plaint be registered as suit.

24. Upon filing of the process fee, issue summons to the defendant by all permissible modes. Summons shall state that the written statement be filed by the defendant within thirty days from the date of receipt of summons. Along with the written statement, the defendant shall also file affidavit of admission/denial of the plaintiffs' documents, without which, the written This is a digitally signed order.

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25. Liberty is given to the plaintiffs to file replication within thirty days from the date of receipt of the written statement. Further, along with the replication, if any, filed by the plaintiffs, an affidavit of admission/denial of documents of the defendant, be filed by the plaintiffs, without which, the replication shall not be taken on record. If any of the parties wish to seek inspection of the documents, the same shall be sought and given within the timelines.

26. List before the Joint Registrar (Judicial) for marking of exhibits, on 3rd October, 2024.

27. List before the Court on 12th December, 2024.

I.A. 36274/2024 (Application under Order XXXIX Rules 1 & 2)

28. The present suit has been filed for permanent injunction against the defendant and restraining any infringement of trademark, copyright, dilution, tarnishment, passing off, rendition of accounts, damages, etc. by the defendant.

29. Learned counsel appearing for the plaintiffs submit that the plaintiffs have been continuously and extensively using the trademark "HIMALAYA" since 1930. The plaintiffs are one of the largest and the world's most popular manufacturers of herbal healthcare products, with presence in over 100 countries worldwide. By virtue of continuous and extensive use, the trademark 'HIMALAYA' has carved a niche for itself and commands high reputation and goodwill.

30. It is submitted that under the aegis of the house mark 'HIMALAYA', the plaintiffs are offering multiple products under the category of nutrition, pharmaceutical, baby care, animal health, personal care, beauty, wellness, This is a digitally signed order.

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organic range etc., and have also spread their operations to different parts of the country.

31. It is submitted that the 'HIMALAYA' products are sold in the iconic green and orange colour packaging associated with the brand, 'HIMALAYA'. Even the 'HIMALAYA' logo is depicted in green and orange colour and depicts an orange leaf. It is submitted that the products of the plaintiffs' under the umbrella brand 'HIMALAYA' are sold across the world in over 100 countries under various trademarks using the mark 'HIMALAYA' and several 'HIMALAYA' logos such as etc.

32. Attention of this Court has been drawn to the table showing the gross sales turnover of the plaintiffs' products under the trademark/logo 'HIMALAYA'. Further, attention of the Court has also been drawn to the table showing the expenses incurred on advertisement for promotion of the products under the trademark/logo 'HIMALAYA'.

33. It is submitted that the trademark 'HIMALAYA' and its formative marks are unique to the plaintiffs and have acquired a secondary meaning to denote the plaintiffs' products by virtue of their long-standing use thereof.

34. It is submitted that the products of the plaintiffs under the 'HIMALAYA' trademark/ logos, are available over the counter at various neighborhood drugstores/chemists, general stores, modern trade centers etc. The plaintiffs also retail the same under HIMALAYA exclusive stores across India. These stores are presently 670 in number, spread over 108 cities.

35. It is submitted that the plaintiffs are the prior adopters, users and This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/08/2024 at 23:16:37 registered proprietor of the mark 'HIMALAYA', as well as their associate and formative marks and logos and have been using the same extensively and continuously. The plaintiffs have around 150 registrations of 'HIMALAYA', and its associate and formative marks and logos across multiple Classes in India.

36. It is submitted that the word mark 'HIMALAYA' has been registered in India in the name of plaintiff no. 2, bearing Registration No. 1004753 on 20th April, 2001, with use being claimed of their associated mark since 1930. The table showing the registrations in favour of the plaintiffs, as given in the plaint, are reproduced as under:

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37. It is submitted that the trademark in favour of the plaintiffs have time and again been renewed and are subsisting on the register of the Registrar of Trade Marks.

38. It is submitted that the plaintiffs' 'HIMALAYA' trademarks/logos are instantly identifiable and recognizable by both the members of trade and public, as being exclusively associated with the goods and business of the plaintiffs and act as a source identifier, in as much as, they stand for the high standard and superior quality of products manufactured by the plaintiffs and sold over the world. Further, the plaintiffs' products under 'HIMALAYA' trademarks/logos have been widely written about and published in several mediums across the country and worldwide.

39. It is submitted that in October 2023, the plaintiffs first became aware that the defendant has applied for registration of trademark 'HIMALAYAN This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/08/2024 at 23:16:38 ORGANICS' word mark as well as the logo and the trade dress in classes 3, 5, 29, 30, 31, 32 and 35. The details of the various registrations in favour of the defendant, as given in the plaint, are as follows:

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40. It is submitted that in order to resolve the matter amicably, the plaintiffs issued a cease and desist notice to the defendant on 29th November, 2023 informing them of the plaintiffs' rights in the 'HIMALAYA' trademarks and calling upon the defendant to cease using the mark 'HIMALAYAN ORGANICS', which is identical to the marks of the This is a digitally signed order.

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41. It is submitted that despite the legal notice, the defendant continues to manufacture, offer for sale, advertise and market products, identical to that of the plaintiffs', under the mark 'HIMALAYAN ORGANICS' with a deceptively similar trade dress on their website <https://www.thehimalayanorganics.in/> and e-commerce websites - www.amazon.in, www.lmg.com, www.pharmeasy.in, www.nykaa.com, www.fitbynet.com. Some of the products sold by the defendant are as below:

42. Attention to this Court has been drawn to the emails received from various people to show that there is actual confusion which is happening in the market. The Email dated 05th June, 2024 as received from one Mr. Sanket Pawar, is reproduced as under:

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43. Attention of this Court has also been drawn to an Email from one Pradeep Tailor dated 05th June, 2024, which is reproduced as under:

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44. Learned counsel appearing for the plaintiffs submits that when the products of the plaintiffs are searched for on the Amazon website, the products of the defendant also appear on the web page. The screenshot from This is a digitally signed order.

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45. Attention of this Court has also been drawn to the webpage of This is a digitally signed order.

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46. Learned counsel for the plaintiffs further submits that even if a Google search is done, the products of the plaintiffs as well as the defendant are shown. The screenshot from Google.com, as filed along with the present plaint, is reproduced as under:

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47. Attention of this Court has also been drawn to judgment dated 05th December, 2005 passed in CS (OS) 1719/2000, wherein, an ex-parte decree was passed in favor of the plaintiffs, in a suit for infringement.

48. Attention of this Court has also been drawn to the comparison between the plaintiffs and the defendant's products. The table, as given in the plaint, is reproduced as under:

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49. Thus, it is submitted that the defendant has malafide intention to create an identical brand as that of the plaintiffs. It is submitted that malice is also borne from the fact that multiple elements have been copied, which could not have been a coincidence. The defendant has blatantly imitated the fundamental identity of the brand under which products are sold under the mark 'HIMALAYA' and are attempting to ride on the coattails of the This is a digitally signed order.

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plaintiffs' goodwill and reputation established by virtue of continuous and extensive use of the 'HIMALAYA' trademarks/logos.

50. It is submitted that the plaintiffs' distinct packaging in the orange and green colour is a hallmark of their brand identity and is exclusively associated with the plaintiffs' products by virtue of its extensive and continuous use and the defendant has slavishly imitated the same.

51. Learned Counsel appearing for the plaintiffs also relies upon the judgment in the case of Raj Kumar Prasad and Another Versus Abbott Healthcare (P) Ltd., 2014 SCC OnLine Del 7708, in particular to Paras 11 and 21, which are reproduced as under:

"xxx xxx xxx

11. The view taken by the learned Single Judge is based upon a reading of Section 124 of the Trademarks Act, 1999. The learned Single Judge has held that a registered proprietor of a trademark is entitled to sue a registered proprietor of a trademark if the latter is identical with or nearly resembles the other. Holding that the suit would be maintainable, the learned Single Judge has held that the trademark used by the defendants 'AMAFORTEN' is ex-facie phonetically and visually deceptively similar to that of Abbott: 'ANAFORTAN'. The learned Single Judge has noted that through its predecessors Abbott had been using the trademark 'ANAFORTAN' extensively since the year 1988 and thus has injuncted the defendants from selling its product under the trademark 'AMAFORTEN' or any other mark deceptively similar to that of Abbott.

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21. Tested on the legal principles laid down by the Supreme Court in the decision reported as 1990 Supp SCC 727 : (1991) 11 PTC 1 (SC) Wander Ltd. v. Antox India P. Ltd. we find no infirmity in the view taken by the learned Single Judge and thus would dismiss the appeal challenging the order dated April 25, 2014 allowing IA No. 23086/2012 filed by Abbott.

XXX XXX XXX"

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52. By referring to the aforesaid judgment, it is submitted that a suit for infringement will be maintainable even against a registered proprietor of a trademark, if the competing mark is identical with or nearly resembles the other.

53. It is further submitted that in view of the fact that the word 'HIMALAYA' and 'HIMALAYAN' are similar, there is high likelihood of passing off.

54. Considering the submission made before this Court, this Court is of the view that the plaintiffs have established a prima facie case in their favour. Balance of convenience also lies in favour of the plaintiffs and against the defendant. Irreparable loss shall be caused to the plaintiffs, if interim orders are not passed in their favour.

55. This Court also further notes that in the present matter, there is a valid service of advance copy of the present plaint to the defendant. Despite the same, the defendant has chosen not to appear at their own accord.

56. Accordingly, it is directed that the defendant, their partners, proprietors, affiliates, franchisees, officers, distributors, servants, agents, assigns, representatives, and anyone acting for and on their behalf, directly or indirectly, as the case may be, are restrained from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with regard to products, under the mark 'HIMALAYAN ORGANICS', or any other trademark/trade name, which is deceptively similar to the plaintiffs' registered 'HIMALAYA' trademark/logo.

57. Considering the fact that defendant is stated to have been pursuing its business since the year 2018 and has registered trademarks in its favour, though, rectification petition against the same have been filed by the This is a digitally signed order.

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58. The defendant is directed to file its affidavit with respect to its existing stock, along with the date of manufacture and batch numbers.

59. Let the aforesaid affidavit be filed by the defendant within a period of two weeks from today.

60. Issue notice to the defendant by all permissible modes, upon filing of process fees, returnable on the next date of hearing.

61. Reply be filed within a period of four weeks from the date of service.

62. Rejoinder thereto, if any, be filed within a period of two weeks, thereafter.

63. Compliance of Order XXXIX Rule 3 CPC, be done, within a period of ten days, from today.

64. List before the Court on 12th December, 2024.

MINI PUSHKARNA, J AUGUST 13, 2024 da This is a digitally signed order.

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