

# **Pleadings/Notarised Affidavits) ... vs Radiant Indus Chem. Pvt. Ltd on 16 September, 2020**

**Author: Mukta Gupta**

**Bench: Mukta Gupta**

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IN THE HIGH COURT OF DELHI AT NEW DELHI  
CS(COMM) 379/2020

I.A. 8147/2020 (under Order XXXIX Rule 1 and  
I.A. 8148/2020 (exemption)  
I.A. 8149/2020 (exemption from filing original  
pleadings/notarised affidavits)

CAPITAL FOOD PVT. LTD.

Represented by: Mr.C.M.Lall, Sr.Adv  
Mr.Abhishek Kotnala

versus

RADIANT INDUS CHEM. PVT. LTD.

Represented by: Mr.Hemant Singh,  
Mr.J.P.Sengh, Ms.Ma  
Jha, Mr.Waseem Ahme  
Ms.A.Sharma and Mr.  
Rastogi, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA  
ORDER

% 16.09.2020 The hearing has been conducted through Video Conferencing. I.A. 8148/2020 (exemption)

1. Exemption allowed subject to just exceptions. Original documents, if any, be filed within two weeks of the normal Court functioning.

2. Application is disposed of.

I.A. 8149/2020 (exemption from filing original signed pleadings/notarised affidavits)

1. By this application, the plaintiff seeks exemption from filing the Signing Date:16.09.2020 20:16:28 This file is digitally signed by PS to HMJ Mukta Gupta attested affidavits in support of the plaint, statement of truth, applications and certificate under Section 65-B of the Indian Evidence Act. The necessary affidavits be filed within two weeks.

2. Application is disposed of.

CS(COMM) 379/2020 I.A. 8147/2020 (under Order XXXIX Rule 1 and 2 CPC)

1. Complaint be registered as suit.

2. Issue summons in the suit and notice in the application.

3. Mr. Waseem Ahmed, learned counsel for the defendant accepts summons in the suit and notice in the application.

4. Written statement to the suit and reply affidavit to the application along with affidavit of admission-denial be filed within 30 days. Replication and rejoinder affidavit along with affidavit of admission-denial be filed within three weeks thereafter.

5. List the suit and application on 15th January, 2021.

6. Case of the plaintiff is that the plaintiff is a company engaged in manufacturing and marketing of wide variety of dips, spreads, condiments, sauces, ready to eat food products etc. for more than 25 years. Plaintiff has presence not only in India but in other countries also. The plaintiff is the proprietor of trademarks such as SCHEZWAN CHUTNEY, CHING'S, CHING'S SECRET and according to the plaintiff, these names have become synonymous with Desi Chinese cuisine in the country today. According to the plaintiff, the plaintiff coined and adopted SCHEZWAN CHUTNEY, SCHEZWAN CHUTNEY (stylised) and SCHEZWAN CHUTNEY (label) as trademarks and obtained registrations of the word mark SCHEZWAN CHUTNEY in class 30 on June 1, 2017 for its application dated November Signing Date:16.09.2020 20:16:28 This file is digitally signed by PS to HMJ Mukta Gupta 22, 2012. Further, the plaintiff has placed on record the sales figures of its products and claims that it is promoting its products with the famous stars and spending substantial amount on promotion.

7. Grievance of the plaintiff against the defendant is with respect to the adoption of the trademark SCHEZWAN CHUTNEY, the trade dress/packaging and its copyright in its marketing and advertising contents. According to the plaintiff, in the first week of September, 2020, the plaintiff came across the impugned product of the defendant i.e. Mrs. Foodrite SCHEZWAN CHUTNEY being sold and offered for sale on E-commerce platform www.amazon.in. On further investigation, it was found that the defendant is, inter alia, manufacturing, selling and offering for sale, advertising and promoting the impugned product SCHEZWAN CHUTNEY, of which the plaintiff placed an order and the same was duly delivered at the Delhi address. Further, the plaintiff also came across the defendant's listing on www.facebook.com and on perusing the said facebook page, the plaintiff found that the defendant has copied the plaintiff's marketing and advertising contents for its brand SCHEZWAN CHUTNEY. It was also revealed that the defendant has participated in food exhibitions held at Pragati Maidan, New Delhi and has advertised its products.

8. As per the plaintiff, a comparison of the products of the plaintiff and the defendant noted at page 63 of the plaint and reproduced as under, shows that not only has the defendant copied the trademark of the plaintiff i.e. SCHEZWAN CHUTNEY but also the manner in which it is written in the trade dress and packaging.

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Plaintiff's product  
SCHEZWAN CHUTNEY

Mark  
SCHEZWAN CHUTNEY

Defendant's im  
product  
SCHEZWAN CHUTNEY  
Impugned Mark  
SCHEZWAN CHUTNEY

Stylisation of SCHEZWAN Stylisation of SCHEZWAN CHUTNEY CHUTNEY Label Impugned Label  
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9. As regards the comparison of the advertising material on the facebook page, the comparison of the two marks is depicted on pages 66 and 68 of the plaint, which is as under:-

Defendant's mark Source:

<https://www.facebook.com/foodrite/photos/a.280755708633559/3171557936219974/?type=3&theater> Signing Date:16.09.2020 20:16:28 This file is digitally signed by PS to HMJ Mukta Gupta The screenshot obtained from the Plaintiff's website:-

10. Learned counsel for the defendant who enters appearance on advance notice claims that SCHEZWAN CHUTNEY is not a coined word. Chutney is common word used in Hindi and as far as SCHEZWAN CHUTNEY is concerned, it is commonly used for spicy, oily and specially peppery mixture. It is a generic word and hence, the plaintiff cannot claim any proprietorship therein. Learned counsel for the defendant also relies upon Sections 9, 29 and 30(2)(b) of the Trademarks Act claiming that, even if the plaintiff is the registered owner of the mark, the plaintiff cannot claim infringement qua the defendant as the impugned name relates to the identity of the product and hence, is covered by Section 30(2)(a) of the Trademarks Act. Learned counsel for the defendant also relies upon McCarthy on Trademark and Unfair Competition, Third Edition to contend that a generic term can never be a trademark and descriptive terms are not inherently distinctive and suggestive, arbitrary and fanciful terms are regarded as being inherently distinctive. He further contends that the defendant is using Signing Date:16.09.2020 20:16:28 This file is digitally signed by PS to HMJ Mukta Gupta SCHEZWAN CHUTNEY as a descriptive word and its trademark is

'Mrs.Foodrite', which is prominently displayed on its products.

11. Rebutting the contentions of the learned counsel for the plaintiff, relying on the decision of this Court in Marico Limited Vs. Agro Tech Foods Limited [2010 SCC Online Del 3806], it is stated that the case of the defendant is clearly distinguishable as therein, the defendant was using the term LOW ABSORB technology, hence, the findings by the Division Bench are not applicable to the facts of the present case. Learned counsel for the defendant relies upon the decision of the learned Single Judge of this Court in 2007 (35) PTC 15 (Del.) Rich Products Corporation and Anr. Vs. Indo Nippon Foods Ltd. and the decision of Division Bench in 2008 (38) PTC 617 (Del.) (DB) Cadila Healthcare Limited Vs. Dabur India Ltd.

12. By IA 8147/2020 under Order XXXIX Rule 1 and 2 CPC, the plaintiff seeks ad-interim injunction not only against the mark SCHEZWAN CHUTNEY but also the trade dress/packaging and the reproduction, imitation, copying, adopting of the original work of the plaintiff used as its marketing and advertising content. Based on the documents placed on record and the arguments of the parties, this Court is of the considered opinion that the SCHEZWAN CHUTNEY is a descriptive term and the same has been used by the defendant along with its trademark Mrs.Foodrite whereas the plaintiff is also using the mark SCHEZWAN CHUTNEY along with CHING'S i.e. CHING'S SCHEZWAN CHUTNEY. The defendant has placed on record material to show that even prior to the plaintiff adopting the descriptive term SCHEZWAN CHUTNEY, there were others who had adopted the said mark and is thus not a coined mark. Defendant has also placed on record documents to show that number of other entities are also Signing Date:16.09.2020 20:16:28 This file is digitally signed by PS to HMJ Mukta Gupta selling Schezwan Chutney with their marks. Thus, this Court is of the prima facie opinion that no case is made out for grant of an ad-interim injunction in respect of the mark 'SCHEZWAN CHUTNEY' . However, since the plea of the plaintiff is that there is a similarity of the trade dress, get up and SCHEZWAN CHUTNEY has been written in a highlighted manner so as to form a prominent label mark in red colour and that the defendant has also reproduced and copied its original works for marketing and advertising contents, this Court deems it fit to grant an ad-interim injunction in terms of prayer (ii) and (iii) of para 67(A) of the application in respect of the trade dress/packaging as also reproduction, adoption and imitation of the original works of the plaintiff in respect of its marketing and advertising contents.

13. It is clarified that the observations made by this Court hereinabove are prima facie in nature and are not an expression of final opinion on the matter.

14. Order be uploaded on the website of this Court.

MUKTA GUPTA, J.

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