

The Himalaya Drug Company & Ors vs Ashok Kumar & Ors on 24 February, 2021

Author: C.Hari Shankar

Bench: C.Hari Shankar

\$~12

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(COMM) 95/2021

THE HIMALAYA DRUG COMPANY & ORS. Plaintiffs

Through Mr. Pravin Anand, Ms. Prachi
Agarwal, Ms. Ridhie Bajaj and Ms. Mishthi
Dubey, Advs.

versus

ASHOK KUMAR & ORS.

Through Mr. Vakul
Defendant No. 16

..
Sharm

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER

%

24.02.2021

(Video-Conferencing)

I.A. 2900/2021 (Section 151 CPC)

1. For the reasons stated in the application, requirement of service of advance notice on the defendants is waived.

2. The application stands allowed and disposed of.

I.A. 2899/2021 (Section 151 CPC)

1. Subject to the plaintiffs filing legible copies of any dim documents, on which they seek to place reliance within a period of four weeks from today, exemption is granted for the present.

2. The application stands disposed of.

I.A. 2898/2021 (Order XI Rule 1 (4) CPC)

1. Subject to the right of the defendants to admit or deny the same, the plaintiffs are permitted to file additional documents, as they may so choose under a cover of an appropriate affidavit within a

period of four weeks from today.

2. The application stands disposed of.

CS(COMM) 95/2021

1. Issue summons in the suit to the defendants, returnable on 29th April, 2021 before the Joint Registrar for completion of pleadings, admission and denial of documents and marking of exhibits.

2. The Defendant No. 1 has been accorded a fictitious name "Ashok Kumar", being the normally used Indian equivalent of "John Doe".

3. Service on Defendant No. 1 would be effected at the 13 email IDs reflected in the memo of parties being i. info@himalayapharmacy.in, ii. support@himalayapharmacy.in, iii. info@himalayawellness.in, iv. support@himalayawellness.in, v. help@himalayawellness.in, vi. distributor@himalayawellness.in, vii. info@himalayafranchise.org.in, viii. support@himalayafranchise.org.in, ix. contact@himalayafranchise.org.in, x. support@himalayadistributor.in, xi. info@himalayadistributor.in, xii.

support@masterfranchise.org.in and xiii. info@masterfranchise.org.in as well as by whatsapp at the telephone numbers provided in the memo of parties where whatsapp accounts are available. Service would additionally be effected at two postal addresses of Defendant No. 1, which though the plaintiffs state that they are fraudulent and have been represented by Defendant No. 1 at which he may be contacted. Notice be also additionally served on Defendant Nos. 2 to 15 at the email IDs as well as by whatsapp at the telephone numbers provided in the memo of parties.

4. Notice be served on the remaining defendants by ordinary process as well as by email at the email IDs provided in the memo of parties.

5. Report of service along with proof thereof be placed on record before the next date of hearing.

6. Mr. Vakul Sharma, learned counsel for Defendant No. 16, accepts notice.

7. Written statement, if any, be filed within a period of four weeks accompanied by affidavit of admission and denial of the documents filed by the plaintiffs with advance copy to learned counsel for the plaintiffs, who may file replication thereto, if any, within a period of two weeks thereof accompanied by affidavit of admission and denial of the documents filed by the defendants.

I.A. 2897/2021 (Order XI Rule 2 CPC)

1. Issue notice to the defendants, returnable on 29th April, 2021 before the Joint Registrar.

2. Mr. Vakul Sharma, learned counsel for Defendant No. 16, accepts notice.

3. Response to this application, if any, be filed within a period of four weeks from today with advance copy to learned counsel for the plaintiffs, who may file rejoinder thereto, if any, within a period of two weeks thereof.

I.A. 2896/2021 (Order XXXIX Rules 1 and 2 CPC)

1. Issue notice to the defendants, returnable on 18th May, 2021 before the Court.

2. Mr. Vakul Sharma, learned counsel for Defendant No. 16, accepts notice.

3. Response to this application, if any, be filed within a period of four weeks from today with advance copy to learned counsel for the plaintiffs, who may file rejoinder thereto, if any, within a period of two weeks thereof.

4. Mr. Pravin Anand, learned counsel for the plaintiffs, prays for ex- parte ad interim reliefs, in terms of the prayer contained in this application.

The prayer clause, in this application, reads thus:

"49. It is, therefore, prayed that this Hon'ble Court may be pleased to grant the following reliefs, during the pendency of the proceedings, in favour of the Plaintiffs and against the Defendant Nos. 1 to 15.

i. An order of ad interim injunction restraining the Defendant Nos. 1 to 15, 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, from using the Plaintiffs' registered trademarks, including HIMALAYA, or any other mark identical and/ or deceptively similar thereto in any manner, including their use as part of the impugned domain names <himalayapharmacy.in>, <himalayawellness.in>, <himalayadistributor.in> and <himalayafranchise.org.in>, the impugned website www.himalayapharmacy.in, www.himalayawellness.in, www.himalayadistributor.in and www.himalayafranchise.org.in; or email IDS info@himalayapharmacy.in, support@himalayapharmacy.in, info@himalayawellness.in, support@himalayawellness.in, distributor@himalayawellness.in, help@himalayawellness.in, info@himalayafranchise.org.in, support@himalayafranchise.org.in, info@himalayadistributor.in, contact@himalayafranchise.org.in and support@himalayadistributor.in or any other domain names, websites, email IDs similar thereto, including but not limited to, on their WhatsApp profiles, on their own or third-party websites, on business papers, commercial documents, social media platforms including but not limited to Twitter, Facebook, youtube etc., brochures, registration forms etc.; as well as restraining them from using, advertising, or directly or indirectly dealing in any manner with the trademarks/ logos of the Plaintiffs and from reproducing or communicating to the

public, the Plaintiffs' artistic works comprised in the distinctive logo/ label/device and all variations thereof, the Plaintiffs' artistic works comprised in the unique, original and distinctive packaging of the Plaintiffs' products that are displayed on the impugned websites, the Plaintiffs' literary and artistic works contained in its brochure, registration form and the content as well as visual presentation of the Plaintiffs' websites, including www.himalayapharmacy.in, www.himalayawellness.in, www.himalayadistributor.in and www.himalayafranchise.org.in, amounting to infringement of the Plaintiffs' registered trademarks; passing off; misrepresentation; unfair competition; unjust enrichment; and dilution and tarnishment of the Plaintiffs' trademarks infringement of the Plaintiffs' copyright on the said works;

ii. An order of interim injunction direction the Defendant Nos. 1 to 15 to transfer the domain names <himalayapharmacy.in>, <himalayawellness.in>, <himalayafranchise.org.in> and <himalayadistributor.in> to the Plaintiffs and suspend/block the said websites, and all email addresses bearing the above domain names.

iii. An order of interim injunction directing the Defendant Nos. 16 to 18 to provide all information like name, phone number and address etc. pertaining to the person(s)/ entity holding the impugned domain names <himalayapharmacy.in>, <himalayawellness.in>, <himalayadistributor.in> and <himalayafranchise.org.in> and cancel, suspend and/or transfer the said domain names to the Plaintiffs.

iv. An order directing Defendant No. 19 to provide information like phone numbers, address etc of the person/ entity holding the email IDs info@himalayapharmacy.in, support@himalayapharmacy.in, info@himalayawellness.in, support@himalayawellness.in, info@himalayafranchise.org.in, support@himalayafranchise.org.in, info@himalayadistributor.in, support@himalayadistributor.in, info@masterfranchise.org.in and support@masterfranchise.org.in, till the disposal of the present suit or till further orders of this Hon'ble Court.

v. An interim order directing the Defendant Nos. 20 to 25 to provide all information pertaining to the person(s) holding the following accounts:

Sr. No.	Bank Name	Account Number	IFSC
1	Canara Bank	3225101012026	CNRB0001181
2	Canara Bank	3529101007532	CNRB0003529
3	UCO Bank	30040110054765	UCBA0001062
4	Allahabad Bank	50532853871	ALLA0210579
5	Ujjivan Small Finance	3319110010051588	UJVN0001133

6	Bank Kotak Mahindra Bank	4345473192	KKBK0008306
7	Central Bank of India	3867517216	CBIN0283488

as well as details of all other accounts held by the same person(s) with Defendant Nos. 20 to 25, and freeze all amounts held in the said account(s) till the disposal of the suit or as per the directions of this Hon'ble Court.

vi. Pass ex-parte ad-interim orders in terms of prayer (i)- (v) above, pending the hearing and disposal of the present application;

vii. Pass an order granting the reliefs mentioned in paragraphs 49

(i)-(vi) in favour of the Plaintiffs and against the aforesaid Ashok Kumars as and when they are identified and such further information/ details are obtained.

AND Any further orders which this Hon'ble Court deems fit and proper in the facts and circumstances of the proceedings."

5. According to the plaintiffs, Defendant Nos. 1 to 15 indulged in fraudulent misrepresentation, duping customers to believe that they represent the plaintiffs and are authorised to induct franchisees for the plaintiffs' business. They are also using plaintiffs' trademark and trade name without due authorization, thereby resulting in infringement thereof. They are also passing off their activities as those of the plaintiffs.

6. Plaintiff No. 1 is a well-known entity, engaged in manufacture and distribution of Ayurvedic medicaments and preparations, under the name "HIMALAYA". Several of the plaintiffs' products, such as Liv. 52, Cystone, Bonnisian and Rumalaya Forte, have become well-known household names, and are used by cognoscenti and laity alike, to admirable therapeutic effect.

7. It is claimed that, in 2001, the entire range of the plaintiffs' products were unified under the "HIMALAYA" brand and that in 2014, the plaintiffs established the Himalaya Global Research Centre at Dubai. The plaintiffs' logo, which is implied by the plaintiffs in several variations, is essentially as under:

8. The plaintiffs points out that its logo has the following distinctive features:

"i. Closeness to nature and the pledge to care for people and the earth, ii. The green color represents passion to explore the wonderful world of herbs, iii. The orange color is evocative of warmth, vibrancy and commitment to caring, and iv. The leaf forming

the crossbar of the letter H evokes the company's focus on herbal solutions for healthcare."

9. The aforesaid logo, it is submitted, has, over a period of time, attained a status of a visual definition of the plaintiffs' brand identity, and has also attained a secondary meaning, being identified with the products of the plaintiffs, by the public.

10. The plaintiffs further avers that they have a well established process for appointing business partners and that they do not solicit and collect any fee, and have not authorized any agency to collect any fee from persons, who seek to become franchisees of the plaintiffs.

11. Paras 14 to 17 of the plaint set out the various achievements and testimonials to the plaintiffs' credit, on the basis of which, it is averred, in para 18, that the "HIMALAYA" brand acquired, as already noted hereinabove, a secondary meaning, by long standing and uninterrupted usage, and is indelibly identified with the products of the plaintiffs.

12. Paras 20 and 21 of the plaint set out the gross sales figures of the plaintiffs from 1997-1998 (124.99 crores) to 2018-2019 (2840 crores). The advertising and promotional expenses of the plaintiffs are also tabulated, in para 21 of the plaint, from the year 1997-1998 (8.90 crores) to 2016-2017 (267.88 crores).

13. The plaintiffs claim to be distributing their products, not only at retail outlets and chemists shops all over the country, but also through 226 exclusive "Himalaya" stores, located over 108 cities. The plaintiffs also claim to be holding 82 domain names, in all of which "Himalaya" features as a prominent part. The plaintiffs' products, it is pointed out, are also available on all e-commerce websites, as a result of which the plaintiffs have, over a period of time, attained global reputation and goodwill. The plaintiffs claim to have approximately 150 registrations of "HIMALAYA" and associate marks and logos, across multiple classes and that, since 1930, the word-mark "HIMALAYA" is registered in the name of Plaintiff No. 2 for medicinal, Ayurvedic and pharmaceutical preparations. A tabular statement of the registrations held by the plaintiffs is also provided in para 28 of the plaint, which reads thus:

14. The plaintiffs also claim that the artwork in the "HIMALAYA" logo constitutes an "original artistic work" within the meaning of Section 2(c) of the Copyright Act, 1957 (hereinafter referred to as "the Act"), and that the plaintiffs are the first owner of the said artistic work within the meaning of Section 17 of the Act. It also claims to have several copyright registrations in the works .

15. By dint of long extensive and uninterrupted use, it is claimed that the plaintiffs' trademark and logo has become a well-known trademark within the meaning of Section 11(6) of the Trademarks Act, 1999, and is a source identifier for the products of the plaintiffs.

16. The plaint also annexes several articles written about the plaintiffs, testifying to its global reputation.

17. The defendants, it is claimed, are conducting fraudulent activities under the name "Himalaya Global Holdings Ltd." (Defendant No. 2) as well as other names such as "Himalaya Pharmacy Pvt. Ltd." The defendants are alleged to be impersonating the plaintiffs and communicating with the public via emails, pamphlets, whatsapp, application forms, social media etc., under the aforesaid names, making it appear that said messages originated from the plaintiffs. Using these, it is claimed that the defendants are offering distributorship of the plaintiffs' products, as well as offers to gullible members of the public to enrol as franchisees of the plaintiffs without any authorisation from the plaintiffs whatsoever. Inter alia, it is claimed, the defendants are operating through rogue websites as such www.himalayapharmacy.in, www.himalayawellness.in, www.himalayafranchise.org.in, www.himalyadistributor.in and www.masterfranchise.org.in, all of which conspicuously display as the logo of the defendants.

18. It is also claimed that content, from the plaintiffs' website, was found on the defendants' websites www.himalayaglobalholding.com and photographs of the plaintiffs' products taken from its website www.himalayawellness.com were also misappropriated by the defendants.

19. It is also alleged that the defendants are using the plaintiffs' "HIMALAYA" word mark as part of their domain name as well as in their various email IDs, with which the defendants communicate with the public, such as info@himalayapharmacy.in, info@himalayawellness.in, help@himalayawellness.in, support@himalayapharmacy.in, support@himalayawellness.in, distributor@himalayawellness.in, info@himalayafranchise.org.in, support@himalayafranchise.org.in, contact@himalayafranchise.org.in, support@himalayadistributor.in, info@himalayadistributor.in, info@masterfranchise.org.in and support@masterfranchise.org.in.

20. Despite this, it is stated that as Defendant No. 1's exact identity could not be ascertained, the plaintiffs have been constrained to implead Defendant No. 1 by the omnibus "Ashok Kumar" moniker.

21. Defendant Nos. 2 to 15 are stated to be employees of Defendant No.

1. Their exact identities and addresses are unknown.

22. Mr. Pravin Anand, learned counsel for the plaintiffs, has, moreover, invited my attention to-

(i) The following franchisee application form, issued by Defendant No. 2, containing the plaintiffs' logo at the head of the form:

(ii) The following screenshots of the websites of Defendant No. 2, representing false association with the plaintiffs:

(iii) E-mails, addressed by Defendant No. 2 to various gullible customers, inviting persons to distribute the plaintiffs' products or offering franchisees for the plaintiffs, using the plaintiffs' logo.

(iv) Complaints, received from various customers, of which the following is one example:

"1 ----- Original Message ----- From : nikhil kumar [nikhil3029@gmail.com] Sent: 11/2/2021 8:57 pm To: contactus@himalayawellness.com Subject: Fwd: HIMALAYA GLOBAL HOLDINGS LTD.

(CONFIRMATION LETTER) Dear sir, I have applied for distributorship for ranchi location online and received this confirmation. Please validate to proceed further.

Regards Nikhil kumar

----- Forwarded message -----

From : <info@himalayadistributor.in> Date: Thu, 11 Feb, 2021, 11:31 am Subject: HIMALAYA GLOBAL HOLDINGS LTD.

(CONFIRMATION LETTER) To: <nikhil3029@gmail.com> Dear Mr Nikhil kumar, This is to inform you that your Himalaya Distributor Confirmed and your Registration Process is going on today so you make the payment and contact your Relationship manager for further information.

Himalaya Global Holdings limited does not accept any type of cash. You can use these methods of payment such as NEFT, RTGS, Net banking and UPI.

Bank Details:

Beneficiary Name: - HIMALAYA GLOBAL HOLDINGS LTD.

Account No: 3319110010051588 IFSC Code: UJVN0001133 Branch : TUMKUR BENGALURU Bank Name : UJJIVAN SMALL FINANCE BANK You may meanwhile visit and login <https://himalayadistributor.in/login.php> (franchise and partners section) for more details about Himalaya Global Holdings Ltd and Offerings.

USER 1D:-nikhi13029@gmail.com password;-123456"

23. Mr. Pravin Anand submits that various emails addressed by the Defendant no. 2 to the various customers, inviting the customers to enroll as franchisees of the plaintiffs and to distribute plaintiffs' products, also reflect the bank accounts, in which deposits have been directed to be made for the said purpose. A tabular statement of these bank accounts, as contained in the prayer of the application is as under:

Sr. No.	Bank Name	Account Number	IFSC	Branch
1	Canara Bank	3225101012026	CNRB0001181	Ban
2	Canara Bank	3529101007532	CNRB0003529	Hyd
3	UCO Bank	30040110054765	UCBA0001062	Cha
4	Allahabad Bank	50532853871	ALLA0210579	Har
5	Ujjivan Small Finance Bank	3319110010051588	UJVN0001133	Tum
6	Kotak Mahindra Bank	4345473192	KKBK0008306	Tum
7	Central Bank of India	3867517216	CBIN0283488	Tum

24. Defendant Nos. 16 to 18 are the domain name Registrars for the website of Defendant No. 1.

25. The plaint also annexes emails, pamphlets, franchisee application forms, fraudulent franchisee agreements, products lists, etc. of the defendants, using the plaintiffs' logo. Additionally, the following screenshots have been provided from www.himalayapharmacy.in and www.himalayawellness.in websites, reflecting the defendants' holding themselves out as associated with the plaintiffs:

By:SUNIL SINGH NEGI Signing Date:01.03.2021 21:34:38

26. All these frauds, it is submitted, are being perpetrated in the name of Himalaya Global Holdings Ltd. The following statements, as reflected in the above website, have also been extracted in para 44 of the plaint:

"i. As per the email shared with the public, Himalaya is an innovative market place for pharmacy and health care store.

ii. As per the pamphlets shared with the public, Himalaya Herbal Healthcare is a digital platform of healthcare supported by a physical network of service centres called health buddies. The ambit includes Supply Chain of Pharma and Wellness Products & Services, Diagnostics, Diet Clinic, Doctor Appointment & Consultation, Counseling & Health Information and Food made with good natural ingredients.

iii. A Health buddy is an independent retailer, registered on the digital platform Himalaya and is holding a valid trade license and a retail license under the Drugs and Cosmetics Act, 1940.

iv. As per the impugned websites of the Plaintiffs, Himalaya Global holdings, founded in 1998, pioneered the concept of internet portals to generate quality leads for franchisors and is now the largest franchisee lead referral service in the world. The Himalaya Global Holdings Ltd. network consists of global site targeting all over India! Himalaya Global Holdings Ltd. was started in 2013 with the aim of servicing the region with an expanding network of franchising portals. Our portal was launched in India in December, 2013.

v. The Himalaya Company has created 4 Franchise models with investments between 5-25 lacs. Himalaya will select eligible and deserving candidates and handhold them through the whole process of registration and marketing, and supply them with proper guidance to succeed and get up on their own.

vi. The Himalaya Pharmaceutical company is an Indian company established by Muhammad Manal in 1930 and based in Bengaluru, Karnataka. India. It makes health care products under the name Himalaya Herbal Healthcare whose products include ayurvedic ingredients.

vii. Start up business has been launched by our himalya company to support entrepreneurship among women and SC/ST citizens of India. Under this initiative, the banks are committed to providing 75% of the entire requirement. The remaining 25% contribution are often reduced further to 10% using various subsidies. The entrepreneur must put in 20% of the entire requirement. the govt has also established workplace -- NCGTC -- to assist entrepreneurs secure the loan with none collateral."

27. It is further alleged, in the plaint, that the emails shares by Defendant No. 1 and Defendant Nos. 3 to 6 indicate that the total investment amount for the purported franchisee of the plaintiffs' products is 10 lacs to 20 lacs, of which 50% has to be paid in advance after entering into an agreement. The registration fee, which is being directed to be deposited by such prospective franchisee applicants by Defendant No. 1 is 29,800/- + 18% GST apart from refundable security deposit (without interest). In total, a payment of 35,614/- had to be made in favour of Defendant No. 2 through NEFT or online.

28. The plaint further alleges that it was found, by the plaintiffs, to their shock, that the distributorship agreement, on which applications were invited by Defendant No. 2, was signed by Mr. Philippe Haydon, who was the retired Chief Executive Officer (CEO) of Plaintiff No. 1.

29. In these circumstances, the plaintiffs state that they initiated an investigation through a private investigator into the affairs of the defendants.

The investigator, on contacting one of the representatives of Defendant No. 2, was invited to his office, where he received a call from one Mr. Kartik Kumar Mishra, from another number, who informed him that he was the person looking after the franchisee process of M/s. Himalaya Global Holding Ltd. and that the charge for a franchisee was 35,164/-. The investigator also claimed that he had done a domain name search for the websites, www.himalayapharmacy.in and www.himalayawellness.in, but that the name of the registrants, the contact details etc. were completely redacted from the said websites. Investigations, at the addresses of Defendant no. 1, were also attempted, but no company was found at the said addresses nor were any employees present there.

30. After the investigations were concluded, it is alleged that the defendants changed their phone numbers reflected on their websites.

31. Inter alia, on these grounds, to Mr. Pravin Anand, learned counsel for the plaintiffs, submits that a fraud, solely aimed at reaping benefits and illegal gains, was being perpetrated by Defendant Nos. 1 to 15, capitalizing, in the process, on the reputation and goodwill of the plaintiffs.

32. The facts as noted hereinabove, led, prima facie, credence to the submissions advanced by Mr. Pravin Anand. It does appear that the defendants illegally sought to capitalize the goodwill of the plaintiffs and without any due authorization, are earning huge amounts from the public, representing themselves as authorised franchisee agents of the plaintiffs and distributors of the plaintiffs' products.

33. In view thereof, I deem it appropriate to pass the following ad interim directions:

(i) Till the next date of hearing, there shall be ad interim injunction in terms of prayer (i) in the application extracted in para 4 (supra).

(ii) Defendant Nos. 16 to 18 are directed, forthwith, to freeze the websites and domain names of Defendant Nos. 1 to 15, including the domain names <himalayapharmacy.in>, <himalayawellness.in>, <himalayafranchise.org.in> and <himalayadistributor.in>,

(iii) Directions are issued to Defendant Nos. 20 to 25 not to allow any withdrawals from the accounts indicated in the table in prayer (v) in this application, save and except with leave of this Court. The said banks are also directed to file affidavits in these proceedings within a period of three weeks from today, setting out the

particulars of the aforesaid accounts including the accounts holders as well as those who have introduced the accounts for the purposes of being opened in the said banks. In the interest of confidentiality, the banks are, if they deem it appropriate, permitted to file the said details in sealed cover.

34. The aforesaid directions shall continue to remain in force, till the next date of hearing.

35. However, as they have been passed ex parte, the defendants would be at liberty to approach this Court for modification/vacation thereof, if they so deem appropriate.

36. The plaintiffs are also directed to comply with the requirement of Order XXXIX Rule 3 of the CPC within a period of one week from today, for which purpose communications may be made at the email IDs provided in the memo of parties.

37. The Registry is directed to email a copy of this order to learned counsel for the plaintiffs as soon as it becomes available.

C.HARI SHANKAR, J FEBRUARY 24, 2021 r.bararia