

K L F Nirmal Industries Pvt Ltd vs Marico Limited on 20 December, 2023

Author: R.I. Chagla

Bench: R.I. Chagla

2023:BHC-OS:15064

IA(L) 26759.2023

Kavita S. J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

INTERIM APPLICATION (L) NO.26759 OF 2023
IN
COMMERCIAL IP (L) SUIT NO.22293 OF 2023

K.L.F. Nirmal Industries Pvt. Ltd.,

In the matter between :

Marico Limited

Versus

K.L.F. Nirmal Industries Pvt. Ltd.,

Mr. Venkatesh Dhond, Senior Counsel a/w Mr. Shriraj Dhruv,
Aastha Mehta and Mr. Ronak Shah i/b Dhru & Co., Advocates for
Applicant/Original Defendant.

Mr. Ravi Kadam, Senior Counsel a/w Mr. Hiren Kamod, Mr. Nis
Nadkarni, Mr. Aasif Navodia, Ms. Khushboo Jhunhunwala, Ms.
Jaanvi Chopra i/b Khaitan & Co., Advocates for Plaintiff.
Mrs. Naina Poojary, S.O., Court Receiver present.

CORAM : R.I. CHAGLA, J.

KAVITA

JUDGMENT RESERVED ON : 2ND NOVEMBER, 2023.

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IA(L) 26759.2023 in COMIP(L) 22293.2023

JUDGMENT :

1. By this Interim Application the Applicant/Defendant has sought vacation and setting aside of the impugned order dated 18 th August, 2023 passed in the Interim Application (L) No.22359 of 2023 in Commercial IP Suit (L) No.22293 of 2023.

2. Mr. Venkatesh Dhond, learned Senior Counsel appearing for the Applicant/Defendant has submitted that the Plaintiff being aware of the law as laid down by this Court in Kewal Ashokbhai Vasoya and Anr., Vs. Suarbhakti Goods Pvt. Ltd. 1 and Lallubhai Amichand Limited Vs. Absolink Enterprises Pvt. Ltd. & Ors. 2 that "giving notice" is the "Rule" and "not giving notice" is the exception had pleaded a false case to fall within the exception viz. the object of granting injunction would be defeated by the delay in giving notice. This was done by a skillful combination of (i) intentional mis- statement; and (ii) active concealment.

3. Mr. Dhond has submitted that a reading of the Plaint and in particular Paragraphs 2, 26, 28, 30, 34 and 39 thereof makes it 1 (2022 SCC OnLine Bom 3335) 2 (IA(L) No.8399/2023 in Suit (L) No.8396/2023 - decision dtd. 3rd July, 2023 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc clear that the Court believed that the Defendant was an entity which was suspect; it had blatantly copied the Plaintiff's distinctive blue bottle and all its protectable features; it already had a yellow bottle, with a very different appearance; it had only "very recently" sought to switch to the impugned blue bottle; the Plaintiff had discovered this impugned blue bottle only in July, 2023; since the violation was extremely recent, the Plaintiff had immediately rushed to the Court in early August 2023; a clear case of extreme urgency existed; and a case of secrecy also existed. He has submitted that the ground for seeking ex-parte ad-interim relief without notice was apart from the aforementioned, was that the Plaintiff would "destroy/conceal all evidence"; dump the goods in the market; "goods may be concealed and thereafter re-appear in the market in other outlets".

4. Mr. Dhond has submitted that the Plaintiff has deliberately pleaded the aforementioned false case in order to misrepresent to this Court that the Defendant was a doubtful entity with suspect antecedents who had recently switched to the impugned bottle and who would have little qualms about 'concealing evidence'; 'dumping goods'; 'secreting away the impugned goods only to clandestinely sell them elsewhere later'. In other words, if notice was IA(L) 26759.2023 in COMIP(L) 22293.2023.doc given, the offending goods would disappear overnight. This is typically the case with persons who are described as "fly by night operators / pirates".

5. Mr. Dhond has submitted that the Plaintiff has suppressed from this Court that the Applicant/Defendant is a well- established business entity with an established presence for decades and a bouquet of products and hence, would not usually function in the manner suggested by the Plaintiff. The Plaintiff has concealed the entire contents of the Defendant's website although referring to the same in Paragraph 28 of the Plaint. This reference was in support of the Plaintiff's contention that impugned product has being sold On- line, through the website. He has submitted that from a mere perusal of the website, it is apparent that the Defendant has a history and tradition going back to 1948, when Mr. K.L. Francis introduced Oil Milling in Kerala (the KLF in the Defendant's name comes from this). The Defendant is a well-known and established market entity with substantial sales and having wide range of products with presence not only in India but in the Gulf. The Defendant is in fact the largest manufacturer of cold pressed virgin coconut oil in India. The Defendant has won a slew of awards, including from the Government IA(L) 26759.2023 in COMIP(L) 22293.2023.doc of India.

6. Mr. Dhond has submitted that the least that the Plaintiff should have done was whilst making the ex-parte application was to indicate that the other party was a well-established enterprise with a legacy and reputation who was openly selling the impugned goods on its website.

7. Mr. Dhond has submitted that the Plaintiff has misrepresented to this Court that the impugned goods had been very recently introduced in the market, by changing over from a yellow- coloured product and this was detected by the Plaintiff only in July, 2023. He has referred to the sales of the impugned product which have set out in Paragraph 10 of the present Interim Application and which sales figures have been corroborated by the Certificate of the Chartered Accountant and actual Purchase Orders; Delivery Challans; Invoices etc. issued in relation to sales to the Canteen Stores Department ("CSD"). He has referred to and relied upon the compilation of documents which have been filed on behalf of the Defendants as well as Additional Affidavit dated 6 th October 2023, wherein the aforementioned documents have been disclosed. He has IA(L) 26759.2023 in COMIP(L) 22293.2023.doc submitted that the invoices/records specifically mention "Blue Bottle"

and show sales from 2017 in blue bottles. He has further submitted that the factum of CSD Sales is established by independent third-

party records. The CSD Sales is critical because admittedly the fact that the Plaintiff is the largest supplier of coconut oil to the CSD has not been denied. In that context reference can be made to Paragraph 16 at Page 18 of the present Interim Application for the assertion that the Plaintiff is the largest supplier to this CSD and the

Defendant is the second largest. Further reference can be made to Paragraph 21 at Page 178 of the Affidavit in Reply filed by the Plaintiff to the present Interim Application. This clearly establishes 'de facto' knowledge.

This fact was not placed before this Court and instead, a wholly dishonest plea of "very recently" having introduced these goods by switching over from yellow was made - which the Court believed.

8. Mr. Dhond has submitted that despite the Defendant having specifically asserted that the impugned blue bottle was launched in 2017, the Plaintiff denied it in the Reply. The Plaintiff even denied that the Defendant is a CSD supplier. This aggravated the wrongdoing of the Plaintiff. To make matters worse, during the course of arguments, it was submitted on behalf of the Plaintiff that IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the Defendant had not indicated "which blue bottle was being supplied to the CSD?" and the Defendant ought to have shown the Court, the actual image of the bottle which had been uploaded on the CSD Portal. Therefore, from a case of "No sales to the CSD" in the Reply, the argued case turned to/changed to "which blue bottle was sold to the CSD".

9. Mr. Dhond has placed reliance upon the Affidavit dated 2nd November 2023 where the Defendant placed on record the e-mails exchanged with the CSD showing the CSD being provided High Resolution Image files of the blue bottles being supplied. This was in response to the CSD's request for High Resolution Images so that they could be uploaded on the CSD website. This correspondence is of December 2021 and destroys the dishonest case of the Plaintiff that the Impugned goods have been "very recently" launched and discovered by the Plaintiff in July 2023. He has submitted that the Defendant has also annexed the CSD website which shows the rival products being sold side by side.

10. Mr. Dhond has submitted that the almost cavalier approach of the Plaintiff to being truthful and/or fair and/or candid IA(L) 26759.2023 in COMIP(L) 22293.2023.doc to this Court is exemplified by the defence to the Applicant's plea about the withholding of any reference to the Non-Disclosure Agreement dated 5th March 2021 and the Information Memorandum circulated. He has referred to the relevant pleading at Pages 16 to 18 of the present Interim Application and the documents are at Pages 52 and 93 thereof. He has submitted that it is undisputed that the Plaintiff signed the N.D.A. as it bears the signature of a High Functionary of the Plaintiff, namely the Head, Mergers and Acquisitions and Investor Relations. Therefore, the Plaintiff is a party to the NDA. The NDA itself states its purpose, viz. "the Parties intend to engage in discussions and negotiations concerning acquisition of the Disclosing Party by the Receiving Party". In this context he has referred to the first Recital of the NDA. Thus, the purpose of executing the NDA was that the information could be disclosed.

11. Mr. Dhond has submitted that the Information Memorandum contains a disclosure of the Applicant/Defendant and its bouquet of products. It is entitled "Project Kepler". It states that it is being made available/delivered to parties "who have expressed interest in investing in KLF Nirmal Industries Pvt. Ltd." and "who have signed and returned a confidentiality agreement". Therefore, IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the Plaintiff was given the Information

Memorandum giving details of the Defendant's products with photographs and which includes the impugned blue bottle.

12. Mr. Dhond has submitted that from the NDA and the Information Memorandum it is clear that the impugned products/bottles were being sold as they find mention in the document of 2021. The Plaintiff, de facto, had knowledge of this fact from the document delivered to it. This is apart from the CSD sales.

13. Mr. Dhond has submitted that the Plaintiff has in response to the reliance placed by the Applicant/Defendant from the NDA and Information Memorandum made a deliberate ambivalent oral submission that it "may have or may not have got the Information Memorandum - "we do not know", "we can't really say"

which hardly inspires any confidence. This is because admittedly, by its E-mail dated 23rd April, 2021, the Plaintiff communicated that "PROJECT KEPLER" (emphasis supplied) was not of strategic relevance to them and that they would not be participating any further. This E-mail is more than a month after the NDA and at two places (subject and body) it makes a reference to "Project Kepler"

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc which is the title of the Information Memorandum. Clearly therefore the Plaintiff demonstrably had the Information Memorandum.

14. Mr. Dhond has submitted that in the Plaintiff's Reply to the present Interim Application, the case put forth is nothing but fantasy. He has submitted that to expect that a takeover or acquisition of a large player and/or competitor was examined by two persons who regarded it as such a top secret that they kept this information to themselves (who incidentally are said to have left the organization and are not available to give any affidavit/statement) without the involvement or even knowledge of anyone else in the organization is to stretch credibility.

15. Mr. Dhond has submitted that in any event, as a matter of law, it is contrary to settled principles of corporate law which impart/attribute knowledge to a corporation. He has placed reliance upon the decision of the Supreme Court in Indian Bank Vs. Godhara Nagrik Co-op. Credit Society 3 at Paragraphs 19, 20 and 21 in this context.

16. Mr. Dhond has submitted that the injunction was 3 (2008) 12 SCC 541 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc improperly sought by the Plaintiff contrary to the settled law. He has submitted that though the Court is not examining the merits of the case, considering the arguments of the Plaintiff that even if injunction is wrongly obtained, this Court should continue the same; and this Court had concluded that the two products are deceptively similar, and this assessment cannot now change, he has made counter submissions.

17. Mr. Dhond has submitted that the Plaintiff cannot claim any monopoly over their blue colour. The coconut oil segment has an abundance of several manufacturers, having the same blue coloured bottles. These include Bajaj, Reliance, Dabur, who are well entrenched in the market. These are

extensively sold and the Plaintiff took no steps whatsoever to stop them. The tall claims made by the Plaintiff that "we objected to Bajaj, Reliance and Dabur as well" are entirely misleading. These objections were Oppositions to Trademark Applications filed. There has been no objection to sales in the market.

18. Mr. Dhond has further submitted that the finding of this Court about similarity in the two products was because this Court believed the case of the Plaintiff, that they were the only entity selling IA(L) 26759.2023 in COMIP(L) 22293.2023.doc coconut oil in what the Plaintiff described as "their distinctive blue colour". There is no such colour/shade monopoly. He has submitted that had this Court been aware of this, the finding would have been different. He has submitted that in any event, in a contested hearing (as opposed to one moved ex-parte) the attention of the Court is invited to dis-similarities, which is often not done when an application is moved ex-parte.

19. Mr. Dhond has submitted that the Defendants have not adopted any of the three features highlighted in the Plaint. Since the Defendant was anxious that they would not default in their obligations to the CSD, qua purchase orders, they filed an Affidavit dated 6th October, 2023 suggesting a product with even further points of distinction qua the split coconut device, as a pro-tem arrangement. Even this suggestion was declined by the Plaintiff.

20. Mr. Dhond has accordingly submitted that the Plaintiff is determined to misuse an order obtained by misleading a Court, as an instrument of oppression. In these circumstances, the ex-parte injunction be vacated forthwith.

21. Mr. Ravi Kadam, learned Senior Counsel appearing for IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the Plaintiff has submitted that the scope of an application under Order 39 Rule 4 is very narrow, accordingly the burden is very high. An application under Order 39 Rule 4 cannot be proceeded merely on the basis of surmises and conjectures. He has submitted that the present Interim Application has failed to make out a clear case of knowledge on the part of the Plaintiff of the Information Memorandum or the sale of the products in the CSD canteen; that these were material particulars that required consideration in the context of the order sought to be vacated; and that the Plaintiff has knowingly, deliberately and willfully made a false or misleading statement in respect of such material particulars.

22. Mr. Kadam has submitted that that the Defendant has not been able to cross the first threshold and the application filed lacks any material particulars with respect to the very first ingredient to demonstrate knowledge of the Plaintiff of the alleged facts. He has submitted that the application does not provide any particulars whatsoever as to who, to whom, how or when the Information Memorandum was provided to the Plaintiff. These particulars are not even provided in the Rejoinder inspite of a specific issue being raised by the Plaintiff. Further, the Defendant proceeds only on a IA(L) 26759.2023 in COMIP(L) 22293.2023.doc presumption that the Plaintiff ought to have noticed the products of the Defendant on the shelves of the CSD canteen without providing any material which demonstrates the particulars of the actual packaging used by the Defendants in the CSD Canteen.

23. Mr. Kadam has submitted that the Defendant has missed the point that often infringing products are not noticed by brand owners in the market and merely because some shop owners are selling infringing products on the same shelf (which the brand owners may neither have knowledge or nor are responsible for) cannot attribute / presume knowledge of the Defendant. On the contrary, the fact that the Defendant was aware of the products of the Plaintiff and its rights given that it was being sold on the same shelf is in fact evidence of dishonesty on the part of the Defendant in the adoption of the infringing marks. He has placed reliance upon decision of this Court in Royal Canin SA vs Venky's India Limited ⁴ This is more so when this Court on a perusal of the conflicting marks has already observed albeit at a prima facie stage that they are deceptively similar and that it is apparent that the Defendant has dishonestly adopted the infringing marks.

4 LNIN 2003 Bom 831 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

24. Mr. Kadam has submitted that assumed or presumed knowledge of the Plaintiff without any material particulars and without any material that conclusively demonstrates such knowledge cannot form the basis of an application under Order 39 Rule 4 and consequently cannot lead to any conclusion that the Plaintiff has knowingly made a false or misleading statement. He has submitted that the present Application is thus devoid of merit, frivolous, misconceived, not maintainable, and a gross abuse of the process of law. The Application ought to be dismissed in limine and the ad-interim order be continued including in view of the fact that the Defendant has miserably failed to make out any case for vacating or setting aside of the said order and has indisputably failed to discharge the burden which the Defendant approaching a Court under Order 39 Rule 4 of the CPC is obliged to discharge. He has submitted that the Defendant's Application and the alleged documents produced by it do not even prima facie satisfy the requirements of Order 39 Rule 4 before an order of the Court can be vacated or set aside. No plausible reason has been made out for vacating or setting aside the ex-parte Order and in any event, the alleged reasons sought to be urged by the Defendant are unsubstantiated, lack material particulars, are not material to the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Order and would not affect the passing or operation or continuation of the ex-parte Order given the settled law in regard to delay not affecting the grant of urgent ad-interim reliefs in intellectual property matters of this nature.

25. Mr. Kadam has submitted that in any event and without prejudice to the aforesaid, given the blatant dishonesty and the deliberate copying by the Defendant and the attempt of the Defendant to come as close as possible to the Plaintiff's well known packaging/trade dress of its Parachute coconut oil products, this Court ought to continue the ad-interim injunction keeping in mind the interest of justice and public interest including since the products in question are edible coconut oil products which are consumed by millions of people.

26. Mr. Kadam has submitted that assuming whilst denying that there is any suppression or false or misleading statement, the allegedly suppressed facts would have merely indicated some delay on the part of the Plaintiff and would not be a material fact in the overall circumstances given that it is settled law that mere delay could not defeat an injunction and where dishonesty is apparent IA(L) 26759.2023 in COMIP(L) 22293.2023.doc prompt ex-parte injunctions are to be granted, as in the present case.

27. Mr. Kadam has submitted that the burden on the Defendant seeking vacation or setting aside or variation of an ex- parte order is very high and that it is settled law that the Defendant has to make out an absolute case and irrefutably establish that the Plaintiff has "knowingly made a false or misleading statement in relation to a material particular". He has submitted that the Defendant has failed to discharge this burden. The Defendant has consequently failed to demonstrate that the Plaintiff has knowingly made a false or misleading statement in respect of the Information Memorandum when the Defendant itself has failed to prove that the Plaintiff is even in receipt of the Information Memorandum which the Defendant claims the Plaintiff has suppressed. The Plaintiff's bona fides are also evident from the fact that the Plaintiff has disclosed all reasonably ascertainable facts including those relating to trademark registration obtained by the Defendant.

28. Mr. Kadam has submitted that an ex-parte order cannot be vacated on the basis of conjectures or surmises. The bare minimum requirement for the Defendant's Application to succeed in IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the facts of the present case is that the Defendant is required to produce absolute material to demonstrate that i) the Plaintiff had knowledge of the alleged Information Memorandum or ii) of the Defendant's impugned products prior to the date of knowledge claimed in the plaint; and iii) that the Plaintiff has knowingly/deliberately suppressed the same. Further, iv) the Defendant is also required to demonstrate that the alleged Information Memorandum is a material particular or v) that the alleged date of knowledge (as per the Defendant) of the Plaintiff about the Defendant's impugned product (which alleged date of knowledge has not even been identified by the Defendant either in its Application or the Rejoinder filed by it) is a material particular that would affect the passing or continuance of the ex-parte Order.

29. Mr. Kadam has submitted that the Defendant has failed to produce any material whatsoever and there is nothing on record to demonstrate any of the aforementioned. The entire Application of the Defendant proceeds on a conjecture or a surmise that the alleged Information Memorandum was received by the Plaintiff and/or that the Plaintiff had knowledge of the Defendant's impugned product prior to July 2023.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

30. Mr. Kadam has submitted that the Defendant's case of alleged intent of the Plaintiff for allegedly suppressing the Information Memorandum or NDA was not to obtain an ex-parte injunction but to avoid mediation. Thus, it is not the case of the Defendant that no injunction would have been granted had the alleged Information Memorandum or the NDA been brought to the notice of the Court and it is evident that it does not constitute material information which would have or could have in any manner altered the findings of this Court or the circumstances in which such findings were arrived at by this Court in the said Order. In any event it is well settled that there is no requirement of mediation where urgent reliefs are sought by the Plaintiff and for this reason also the Application is baseless, and no grounds for vacating the injunction have been made out and the same deserves to be dismissed.

31. Mr. Kadam has submitted that neither the contents of the alleged Information Memorandum nor the Defendant's contention in respect thereof are verifiable, since material particulars are missing in the application. The assumption with respect to handing over of the Information Memorandum on behalf of the Defendant to the Plaintiff is derived only on the basis of a Non-disclosure Agreement (NDA) IA(L) 26759.2023 in COMIP(L) 22293.2023.doc executed between the Defendant and the Plaintiff which neither identifies any confidential information nor makes any reference whatsoever to the Information Memorandum. Merely because the NDA was signed by the erstwhile Head-Mergers & Acquisitions of the Plaintiff company who led the 2-member M&A team of the Plaintiff company, this does not demonstrate and it cannot be assumed that the alleged Information Memorandum, which the Defendant is rely upon, has been shared with the Plaintiff. The signing of the NDA does not in any manner demonstrate that the alleged Information Memorandum was received by the Plaintiff or that the Plaintiff was aware of or ought to have noticed the Defendant's impugned products prior to July 2023. It is not even the case of the Defendant that the Information Memorandum was handed over by the Defendant to the Plaintiff. It is the case of the Defendant that some consultant handed it over to the Plaintiff.

32. Mr. Kadam has submitted that an attempt has been made by the Defendant to draw a link between the NDA and the Information Memorandum by placing reliance on the project name 'Project Kepler' which has been mentioned on the alleged Information Memorandum and in an E-mail dated 23rd April, 2021. This is IA(L) 26759.2023 in COMIP(L) 22293.2023.doc despite the Plaintiff at the very outset showed its disinterest in participating in the acquisition opportunity shared by one Equirus (financial advisor to the Defendant) in respect of the Defendant Company. The mere reference to 'Project Kepler', does not constitute any evidence whatsoever of the receipt by the Plaintiff of the Information Memorandum or any other document containing images of the impugned product.

33. Mr. Kadam has thereafter referred to the alleged Information Memorandum which contains images of the range of products of the Defendant and in this context, he has submitted that the images of this products shown in the Information Memorandum, assuming whilst admitting that it contained images of the impugned product, the focus of the Plaintiff's representatives (of the M&A team) engaged in the initial/preliminary screening would be to view any such document from the perspective of a business as a whole and not scrutinize it brand by brand / product by product in the context of infringement. Therefore, no false, much less deliberate or knowingly false statement has been made by the Plaintiff. Further, the issue of infringement is not only about the blue bottle but the entire packaging being the consolidated effect of several distinctive IA(L) 26759.2023 in COMIP(L) 22293.2023.doc features / marks coupled with the blue color scheme.

34. Mr. Kadam has submitted that it is incorrect on the part of the Defendant to assume that the alleged information, if any provided to one person within the Plaintiff's organization would necessarily imply that the entire organization had active knowledge as contemplated under Order 39 Rule 4, was aware of it or was deemed to have been aware of it or had access to the same with a view to knowingly make a false or misleading statement with respect to the same. He has submitted that the Plaintiff being a listed company and therefore any information involving any potential merger or acquisition constitutes price sensitive information and is not permitted to be shared by anyone else

other than recipients of such information. The price sensitive information is highly confidential and stringently governed under the relevant SEBI regulations including the Insider Trading Regulations. He has submitted that the reliance placed by the Defendant on the doctrine of indoor management cannot be put into force to impute knowledge to the entire Plaintiff company and therefore the Defendant's reliance on the case of Indian Bank Vs. Godhara Nagrik Coop Credit Society Ltd (supra) is misplaced.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

35. Mr. Kadam has submitted that the internal enquiries with regard to the alleged Information Memorandum revealed that the proposal of the Defendant did not even cross the preliminary evaluation process and therefore no material or information, if any, provided to the Plaintiff was ever shared by the 2 member team of merger or acquisition (M&A) with any other teams of the Plaintiff company at the relevant time or any time thereafter. The M&A team decided that the deal was not to be pursued since the same was not of strategic relevance to the Plaintiff and hence was not progressed at the very initial stage and no information with respect to the proposal trickled down or was disclosed further.

36. Mr. Kadam has submitted that it is essential in cases of trademark infringement to consider public interest whilst deciding an application made under Order 39 Rule 4, especially given the fact that the product in question is edible in nature and where the dishonesty in adoption of the infringing mark is apparent and evident. He has submitted that without prejudice to the submission that no false statement has been made on the part of the Plaintiff, assuming whilst not admitting that the information was shared with a member of the Plaintiff, there is at best an incorrect/inadvertent IA(L) 26759.2023 in COMIP(L) 22293.2023.doc statement made by the deponent of the Plaintiff who had no knowledge of the alleged Information Memorandum or its contents. Such incorrect/inadvertent statement is not made knowingly by the deponent on behalf of the Plaintiff and does not / cannot constitute a ground for vacating the ad-interim order since the parameters set out in Order 39 Rule 4 of the CPC do not exist, have not been met, nor made out. No false statement is made and no material fact has been deliberately suppressed which affects the merits of the Plaintiff on the basis of which the ad-interim order came to be granted. Thus, there arises no ground for the Court to vacate or modify its injunction and it is in the interest of justice as well as public interest, to ensure that the ad-interim Order continues to remain in force.

37. Mr. Kadam has placed reliance upon the decision of this Court in Shaw Wallace & Company Vs. Mohan Rocky Spring Water 5 at Paragraphs 10, 11 and 14 wherein this Court has, despite an incorrect statement being made by the Plaintiff therein, held that as the purpose of granting temporary injunction in a suit for infringement of trade mark is not only to protect the interest of the Plaintiffs but also to protect the interest of the general public. 5 MIPR 2007 (o) 185 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Accordingly, denial of temporary injunction to the Plaintiffs merely because the Plaintiffs have made an incorrect statement in the plaint, would not be in the interest of justice. He has also placed reliance upon the decision of this Court in Hindustan Unilever Limited Vs. Farooq Usman Batliwala & Ors.,⁶ at Paragraphs 13 and 14 in this context. Further, reliance has been placed on decision of the Delhi High Court in the case of Apollo Tyres Ltd

Vs. Pioneer Trading Corporation & Anr.,⁷ at Paragraphs 2, 23, 24 and 118, wherein the Delhi High Court had found merit in the submission that the aspect of public interest would also have to be considered by the Court while considering whether, or not, to continue the injunction granted against the defendant.

38. Mr. Kadam has submitted that the Defendant has placed reliance on selected paragraphs of the decisions of this Court in Kewal Ashokbhai Vasoya (supra) and Lallubhai Amichand Limited (supra) which is misplaced and misleading. He has submitted that the Plaintiff has in fact satisfied all requirements set out in the judgment in Kewal Vasoya (supra) in respect of grant of ex-parte 6 [(IA (L) NO.37027 / 2022 in COMIP Suit (L) NO.26527/2022] 7 2017 SCC OnLine Del 9825 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc reliefs as the Plaintiff has made full and reasonably accurate disclosure of material facts and has invited the Court's attention to factual, legal and procedural issues, as required.

39. Mr. Kadam has submitted that under Order 39 Rule 4 the Court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. This has been held by this Court in Kewal Vasoya (supra).

40. Mr. Kadam has submitted that the mere fact that the Plaintiff 'ought to have been aware' or 'may have been aware' can never be the basis for vacation or setting aside of the Court's Order. The Defendant is required to produce irrefutable and positive evidence of the Plaintiff having undeniable knowledge of the Defendant's impugned product, prior to the date claimed by the Plaintiff, and such knowledge having been deliberately suppressed by the Plaintiff for it to discharge its burden under Order 39 Rule 4 of the CPC. In the present case, the Defendant failed to even identify the date from which according to it, the Plaintiff had knowledge about IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the impugned products. The Defendant has also miserably failed to demonstrate that the Plaintiff had any knowledge about the Defendant's impugned products prior to July 2023.

41. Mr. Kadam has submitted that the mere alleged presence of the infringing product in the market is of no consequence and the Defendant is required to demonstrate positive evidence of the Plaintiff's knowledge of the presence of Defendant's impugned products instead of merely making assumptions or allegations about the Plaintiff's possibility or probability of knowledge of the impugned products. The Defendant's reliance on alleged CSD documents (stray purchase orders/invoices etc.) do not assist the Defendant in any manner inter alia since they do not correlate to the impugned product in the impugned packaging which has been enjoined. The only publicly accessible document or third-party document sought to be produced by the Defendant are certain regional newspaper clippings of April and May 2023. However, the impugned products have been left out of and are conspicuously missing from the said newspaper clippings and no inference of knowledge of the Plaintiff can be derived or even assumed from the same.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

42. Mr. Kadam has submitted that the other documents produced by the Defendant which are at Pages 115 to 117 of the Defendant's Compilation are the Defendant's own documents which are undated and do not in any manner prove use of the bottle either from 2013 or 2017 or anytime thereafter prior to the date of knowledge pleaded by the Plaintiff. Not a single third-party invoice demonstrating even a single sale of the impugned bottle bearing the impugned packaging to any third party has been produced by the Defendant.

43. Mr. Kadam has submitted that even assuming whilst denying that the Defendant's impugned product was available in the market prior to July 2023, the same is of no significance in establishing that the Plaintiff had knowledge of the said products prior thereto or that it has deliberately suppressed such knowledge or made any misleading or false statement before this Court. In any event, according to the Defendant, the Plaintiff's intention behind suppressing such knowledge is to allegedly to avoid mediation and not to secure the ad-interim order and thus cannot be the subject matter of an application under Order 39 Rule 4.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

44. Mr. Kadam has thereafter referred to alleged sales figures produced by the Defendant from which it is evident that the sales figures are from year 2019 onwards and not from 2013 or 2017 and even for the years 2021-22 and 2022-23, the same are unaudited figures. Further, the sales figures are meagre and not substantial, and at best run into a few crores only. The sales figures for 2019-2020 is shown as Rs.7.69 crore and for the subsequent years i.e. 2020-2021 is Rs.3.7 crores; for the year 2021-2022 is Rs.5.99 crores and for the year 2022-2023 is Rs.7.12 crores only. This does not in any manner evince that the Plaintiff had knowledge of the impugned products prior to July 2023. The two recent CSD purchase orders produced by the Defendant in respect of the month of October, 2023 are approximately INR 45 Lakhs and INR 61 Lakhs respectively, which would amount to a total of approximately INR 1 Crore. Therefore, it is reasonable to conclude that at best, the Defendant would have a total of approximately only 5-6 purchase orders in a year that too from an institutional seller such as CSD. He has further submitted that the Defendant has not produced any material to co-relate the sale figures with the impugned label / packaging, whether from the year 2013 or 2017 or 2019 or anytime thereafter.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

45. Mr. Kadam has submitted that assuming whilst denying that the products of the Defendant and the Plaintiff are both sold through the canteen Stores Department (CSD), the Plaintiff cannot be expected to have knowledge of the Defendant's products merely because one channel of sale for the rival products is the same. Merely because the Plaintiff's quantum of sales to the CSD can be said to be high, it can never be assumed that the Plaintiff is aware of every infringing product made available through the CSD. Further, it cannot be assumed that the Plaintiff was aware about the Defendant's infringing product allegedly sold through CSD. An identical plea of suppression and presence of products in the same trade channel has been considered by this Court in the case of Royal Canin SA Vs. Venky's India Ltd. (supra), wherein the contentions of the Defendant regarding suppression were rejected and the dishonesty on the part of the Defendant was taken judicial note of

by this Court. The dishonesty on the part of the Defendant being that it has tried to come as close as possible to the Plaintiff to draw an association with the Plaintiff or ride upon its goodwill and reputation. The difference between the sales figures of the Plaintiff and the alleged sales figures of the Defendant is significant which is indicative of the fact that the presence of the Defendants products as compared to that of the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Plaintiffs is miniscule and that too only in one trade channel which is the CSD. Thus, there can be no attribution or assumption of knowledge on this basis alone.

46. Mr. Kadam has submitted that the alleged documents relied upon by the Defendant in respect of its alleged sales to CSD conspicuously lack any image or any identification of the product being ordered/supplied under the invoices. The documents do not have any reference to the impugned product and have nothing therein to co-relate them with the impugned product. This has been expressly averred by the Plaintiff in its Reply, to which the Defendant has failed to produce any material to co-relate the said documents to the impugned product. The Defendant's feeble attempt to rely on the word "blue bottle" mentioned in these documents, but its deliberate failure to produce any documents to support its contentions (despite being called upon to do so) is a telling fact and is a giveaway of the Defendant's dishonesty and falsity of its claims.

47. Mr. Kadam has submitted that the Defendants have during the arguments filed an additional Affidavit dated 2nd November, 2023 i.e. after the pleadings in the Application had been IA(L) 26759.2023 in COMIP(L) 22293.2023.doc completed and in fact even after the Plaintiff had made its arguments in the matter. The Defendant's additional Affidavit was neither served on the Plaintiff prior to the hearing nor was the Plaintiff permitted any opportunity to deal with the same since the same was tendered across the bar during oral arguments in rejoinder by the Defendant's counsel on 2nd November, 2023. The Plaintiff has strongly objected to the said Additional Affidavit being taken on record in a belated manner and the Plaintiff having no opportunity to deal with the same. He has submitted that in any event and without prejudice to the aforementioned submission, the contents of the additional Affidavit are denied. A mere perusal of the additional Affidavit makes it evident that the Defendant has even now, failed to produce the images of the product required to be annexed to the alleged CSD purchase orders which are at Pages 131 and 132 of the Defendant's compilation of documents as well as CSD Invoices/Delivery Challans dated 17th June, 2017 and 21st June, 2017 at Pages 28 to 55 of Defendant's Compilation of Documents. The Defendant has instead sought to rely upon an alleged E-mail of 3rd December, 2021 which allegedly attaches the images of the impugned products in their correspondence with the CSD.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

48. Mr. Kadam has submitted that the correspondence relied upon in additional Affidavit appears to be as recent as December 2021 and thus there is still nothing on record to demonstrate that the alleged CSD Orders / Invoices of 2017 as sought to be relied upon by the Defendant were in respect of the impugned bottle.

49. Mr. Kadam has submitted that without prejudice to the above submission, a perusal of the CSD purchase order dated 27th September, 2022 at Page 46 of the Defendant's compilation of

documents would demonstrate that the same pertains to certain "introduction circular of new items in the CSD range". It therefore appears that the Defendant's products or allegedly the impugned products were never a part of the CSD range prior to September 2022 and at best (assuming whilst denying), were only approved for listing with the CSD in September 2022. Even as regards the alleged CSD purchase order of September 2022, there is no material on record to demonstrate that the same pertains to the Defendant's impugned products.

50. Mr. Kadam has submitted that the Defendant's own document (alleged screenshot of the CSD website) at Page 759 of the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Additional Affidavit dated 2nd November 2023, demonstrates that the Defendant is depicting and selling a yellow packaging on its website though it is described as 'KLF Nirmal Brand Pure Coconut Oil 50 ml BLUE HDPE BOTTLE' and is not selling the impugned product in the blue impugned packaging/label.

51. Mr. Kadam has submitted that the Defendant is in contempt of this Court's Order if the CSD website listings depict the impugned product as on present date or even on 2nd November, 2023 or any time after the order was passed and in force. It is settled law that the Defendant is required to purge contempt before it can request the Court to even consider its application under Order 39 Rule 4 of the CPC.

52. Mr. Kadam has submitted that the Defendant has through its website, sought to demonstrate that it is not a 'fly by night operator' and that its reputation has been captured on its website and the Plaintiff has suppressed the same from this Court. He has submitted that it is apparent from the Plaint that the words 'fly by night operator' has not been used and the same also does not find place in the impugned order and the said order was not granted on IA(L) 26759.2023 in COMIP(L) 22293.2023.doc any assumption or submission that the Defendant is a fly by night operator.

53. Mr. Kadam has referred to the relevant Paragraphs 39 and 40 of the Plaint which provides reasons for moving ex-parte and which predominantly on the apprehension of the impugned products being dumped in the market and/or the apprehension that the goods may be concealed and thereafter re-appear in the market in other outlets. He has submitted that in any event and without prejudice to the aforementioned submission, the law does not contemplate that ex-parte reliefs can only be granted against small entities or entities who are fly by night operators.

54. Mr. Kadam has submitted the reliance placed by the Defendant on its website cannot be construed as evidence in support of the Defendant's claims and cannot discharge the Defendant's burden of proving the truth of its tall claims that otherwise have no basis.

55. Mr. Kadam has submitted that there is no delay or acquiescence on the part of the Plaintiff in approaching this Court or taking steps to protect its rights in its marks/labels/packages. The IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Plaintiff in its Reply to the application at Paragraphs C(ii) set out an indicative, and not exhaustive list of the actions which Plaintiff has taken against several entities which have attempted to / have infringed the Plaintiff's rights in its Parachute coconut oil product packaging marks/labels and the Plaintiff has taken action against them to protect its rights as also the interest of general public. The present suit is not a one off action

initiated by the Plaintiff and the Plaintiff has not sought to suppress any relevant facts to snatch an order.

56. Mr. Kadam has submitted that assuming whilst denying that the alleged Information Memorandum was shared with the Plaintiff, at best, an allegation of delay can be attributed to the Plaintiff, which in any event, is not sufficient to defeat a prompt ex- parte injunction. He placed reliance upon the judgment of the Supreme Court in Midas Hygiene Industries (P) Ltd. Vs. Sudhir Bhatia and Ors.,⁸ at Paragraphs 4 and 5 which has held that "In cases of infringement either of Trade Mark or of Copyright normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction 8 (2004) 3 SCC 90, IA(L) 26759.2023 in COMIP(L) 22293.2023.doc also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest." In this context he has also relied upon the decision of Supreme Court in Laxmikant V. Patel Vs. Chetanbhai Shah & Anr.,⁹ at Paragraphs 13 and 14. This decision is also for the principle that where initial adoption by the Defendant itself is vitiated by fraud and/or is dishonest, once a case of passing off is made out the practice is generally to grant a prompt ex-parte injunction followed by appointment of local Commissioner, if necessary.

57. Mr. Kadam has submitted that the infringing nature of the Defendants' impugned label/package and trade dress and the dishonesty in adoption is writ large and the ad-interim order has been granted after a careful comparison of the rival marks/labels/package pursuant to this Court arriving at a finding that the same are prima facie in violation of the rights of the Plaintiff.

58. Mr. Kadam has submitted that it is settled law that it is no defence to state that others are also infringing the marks/labels of the Plaintiff and the Defendant cannot seek shelter behind other infringers or potential infringers.

9 (2002) 3 SCC 65 IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

59. Mr. Kadam has submitted that reliance upon the other entities use of blue bottle in support of the Defendant's contention that the colour scheme of the Parachute coconut oil products of the Plaintiff are common to trade is a mere afterthought and is an unsustainable argument in view of the settled law in this regard. He has submitted that no other entity including the Defendant, as per the Defendant's own admission, was using the aforementioned features or colour scheme in respect of coconut oils prior to the Plaintiff. Further, the Defendant has not led any documentary evidence whatsoever to show the actual use or extent of sales of the alleged third party products sought to be relied upon by it. He has placed reliance upon the decision of this Court in Pidilite Industries Limited Vs. Riya Chemy (Supra) and in particular Paragraph 52 of the said decision in this context.

60. Mr. Kadam has submitted that it is evident the colour blue has no connection with the characteristic of the product coconut oil and cannot be a defense to the Defendant's unauthorized use of the impugned packaging/label.

61. Mr. Kadam has submitted that the revisions now sought IA(L) 26759.2023 in COMIP(L) 22293.2023.doc to be proposed by the Defendant to the impugned packaging (as a stop gap measure

to fulfill certain CSD purchase orders) are inconsequential, insignificant and do not make the impugned packaging/label non-infringing. The Defendant cannot seek a seal of approval from this Court to use a packaging which continues to be in violation of the rights of the Plaintiff. This is apparent from a mere perusal of the allegedly revised packaging. This Court in R.R. Oomerbhoy Vs. Court Receiver, High Court 10 at Paragraph 26 observed that "It has been said many times that it is no part of the function of this Court to examine imaginary cases of what the defendant could or could not do under this form of injunction. The best guide, if he is an honest man, is his own conscience; and it is certainly not the business of this Court to give him instructions or hints as to how near the wind he can sail. Honest men do not attempt to sail near the wind". He has submitted that it is settled law that under the 'Safe Distance Rule', once a party infringes on another's trademark or trade dress, the confusion sowed 'is not magically remedied' by de minimis fixes.

62. Mr. Kadam has distinguished the decision relied upon by 10 (2004 (1) BomCR 436) IA(L) 26759.2023 in COMIP(L) 22293.2023.doc the Defendant viz. Procter & Gamble Hygiene and Health Care Limited & Anr., (Supra) in which only the prayer for appointment of a Court Receiver for making an inventory of goods was granted ex- parte (as opposed to an injunction and seizure of goods), only in view of the extensive and chartered history of prior/ongoing disputes/litigation between the parties, which is evidently missing in the present case. He has further distinguished the decision relied upon by the Defendant viz. Indian Bank Vs. Godhara Nagrik Co-op. Credit Society Ltd. (supra) which is on the doctrine of indoor management which cannot be put into force to impute knowledge to the entire company of the Plaintiff and therefore reliance on this decision is misplaced and of no assistance to the Defendant.

63. Mr. Kadam has submitted that the Defendant has miserably failed to make out any case for vacating or setting aside of the said order and has failed to discharge the heavy burden on a Defendant who has approached this Court under Order 39 Rule 4 of the CPC. In any event and without prejudice to the above submission, given the blatant dishonesty and the deliberate copying by the Defendant and the attempt of the Defendant to come as close as possible to the Plaintiff's well known packaging/trade dress of its IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Parachute coconut oil products, this Court ought to continue the ad- interim injunction in the interest of justice and public welfare since the products in question are edible coconut oil products which are consumed by millions of people across the world.

64. Having considered the rival submissions, in my view it is necessary to refer to Order 39 Rule 4 of CPC, under which the present Interim Application has been made. Order 39 rule 4 of CPC is reproduced below for reference:

ORDER XXXIX TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

(4) Order for injunction may be discharged, varied or set aside -- Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

2[Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading

statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has IA(L) 26759.2023 in COMIP(L) 22293.2023.doc been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.]

65. The essential requirement for vacation of an ex-parte order i.e. where a party has knowingly made a false or misleading statement in relation to a material particular is required to be established in an application for vacation of the ex-parte order under Order 39 Rule 4. Presuming that this has been established, even then under the first proviso to Order 39 Rule 4 this Court may not vacate the injunction if it considers that it is not necessary to do so in the interest of justice.

66. Having considered Order 39 Rule 4, in my view the Defendant has in the present case failed to establish / discharge the burden of proving that the Plaintiff has knowingly made a false or misleading statement in relation to a material particular in either the Plaint or in the Interim Application for temporary injunction. In the present case, the Defendant has sought vacation of the ex-parte order IA(L) 26759.2023 in COMIP(L) 22293.2023.doc on the basis of conjectures or surmises. The contention on behalf of the Defendant that the Plaintiffs had received the Information Memorandum and / or had knowledge of the Defendant's impugned product prior to July 2023 is without producing a single document to demonstrate the same.

67. I further find that the document which has been relied upon by the Defendant viz. the Non-Disclosure Agreement (NDA) has no reference to the Information Memorandum. There is an attempt made by the Defendant to draw a link between NDA and the Information Memorandum by relying upon the project named "Project Kepler" mentioned in the alleged Information Memorandum and by further placing reliance upon the E-mail dated 23 rd April, 2021 which refers to "Project Kepler". However, a perusal of the said E-mail shows that the Plaintiff at the very outset expressed its disinterest in participating in the acquisition opportunity shared by one Equirus (financial advisor to the Defendant) in respect of the Defendant Company. The mere reference to 'Project Kepler', in my view cannot constitute evidence that the Plaintiff Company had received the Information Memorandum and/or any other document containing the images of the impugned product.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

68. I am of the view that the Information Memorandum is not a material and / or relevant document, presuming that the Plaintiff had knowledge of the Information Memorandum and had not disclosed the same, as the Information Memorandum was not capable of being scrutinized in the

context of infringement given the fact that the issue is not only about the blue bottle but the entire packaging being the consolidated effect of several distinctive features / marks coupled with the blue color scheme. Further, the Information Memorandum contained images of the several products of the Defendant and the focus of the Plaintiff's representatives i.e. of the M&A team engaged in the initial/preliminary screening was to view any such document from the perspective of a business as a whole and not scrutinize it brand by brand / product by product in the context of infringement. Thus, presuming that the knowledge of the M&A team can be attributed to the Plaintiff as contended by the Defendant, there is no knowingly false or misleading statement made by the Plaintiff in the Plaintiff or in the Interim Application for temporary injunction.

69. I find much merit in the submission of Mr. Kadam that assuming that the Information Memorandum was shared with a IA(L) 26759.2023 in COMIP(L) 22293.2023.doc member of the Plaintiff, at best an incorrect/inadvertent statement has been made by the deponent of the Plaintiff who had no knowledge of the alleged Information Memorandum or its contents and such incorrect/inadvertent statement is not made knowingly by the deponent on behalf of the Plaintiff and does not / cannot constitute a ground for vacating the ad-interim order since the parameters set out in Order 39 Rule 4 of the CPC do not exist, have not been met, nor made out. The decision relied upon by the Plaintiff viz. Shaw Wallace & Company (Supra), in support of this submission is apposite in this context. This Court was of the view that the purpose of granting temporary injunction in a Suit for infringement of trademark is not only to protect the interest of the Plaintiffs but also to protect the interest of the general public and that denial of temporary injunction to the Plaintiffs merely because the Plaintiff has made an incorrect statement in the Plaintiff, would not be in the interest of justice. This has also being held by the Delhi High Court in Apollo Tyres Ltd. (Supra) which decision had been relied upon by the Plaintiff. The Delhi High Court has held that the aspect of public interest would have to be considered by the Court whilst considering whether, or not, to continue the injunction granted against the Defendant.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

70. In Kewal Ashokbhai Vasoya (Supra), this Court has laid down the general principles and tests for a Plaintiff moving without notice and seeking temporary injunction. In my view, the Plaintiff has been able to satisfy the requirements laid down in the above decision in respect of grant of ex-parte relief by making full and reasonable accurate disclosure of material facts and has invited the Court's attention to the factual, legal and procedural issues as required.

71. It is relevant to refer to the finding of this Court in Paragraph 16 of the ex-parte order dated 18 th August, 2023 which reads thus:

"Prima facie, there is no manner of doubt that the Defendant's respective impugned labels/packaging and the impugned products as aforementioned, are deceptively similar to or rather almost identical with the PARACHUTE Registered Marks of the Plaintiff, the Parachute Packaging/Labels, the Flag Device, the Parachute Tree Device, the Broken Coconut Device as well the Distinctive Parachute Bottles/Containers. The Defendant's respective labels/packaging used on the

respective impugned products, is a reproduction / substantial reproduction of the Plaintiff's original artistic works comprised in the Plaintiff's Parachute IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Packaging/Labels and/or the including the Flag Device, Parachute Tree Device and the Broken Coconut Device.

The similarities between the marks/labels/packages cannot be a matter

coincidence. Undoubtedly, the Defendant must have placed the Plaintiff's marks/labels/packages before them when adopting the impugned marks/labels/packages. It appears that the Defendant is in fact trying to come as close as possible to the Plaintiff's range of products. In the aforesaid circumstances, I am satisfied that the Plaintiff has made out a strong prima facie case for the grant of ex-parte ad- interim reliefs. The balance of convenience is in favour of the Plaintiff. Unless reliefs as prayed for are granted, the Plaintiff will suffer irreparable harm / injury which cannot be compensated in terms of money."

72. In Paragraph 17 of the said order, this Court was satisfied that giving notice to the Defendants before passing the said order would defeat the purpose of granting ad-interim relief. Thus, this Court had upon comparison of the rival products arrived at a prima facie finding that the Defendant has dishonestly adopted its marks / labels / packaging and that the respective labels / packaging used on the impugned products are a reproduction / substantial reproduction of the Plaintiff's original artistic works comprised in the Plaintiff's IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Parachute packaging / labels and / or including the Flag Device, the Parachute Tree Device, the Broken Coconut Device. This finding was arrived at after this Court was prima facie satisfied that the Plaintiff has been able to establish its goodwill and reputation in its products bearing the PARACHUTE Registered Marks, Parachute Packaging/Labels, the Flag Device, the Parachute Tree Device, the Broken Coconut Device as well as distinctive Parachute Bottle / Container.

73. In the decisions of this Court in Kewal Ashokbhai Vasoya (supra), this Court has held that "the Court nevertheless has discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice." Although, in my view, there has been no suppression of any material particular, presuming that there was a suppression, this is a fit case for this Court to exercise its discretion to continue the injunction (or impose a fresh injunction), in view of the overriding consideration which is always the interest of justice.

74. Further, I do not find any merit in the submission of the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Defendant that the Plaintiff had knowledge of the Defendant's impugned product prior to the date claimed by the Plaintiff and such knowledge has been suppressed by the Plaintiff. The Defendant has failed to produce any positive evidence of the Plaintiff having knowledge of the Defendant's impugned product prior to the date claimed by the Plaintiff and / or since when the Plaintiff had knowledge of the Defendant's impugned product and / or demonstrated that the Plaintiff had knowledge about Defendant's impugned product prior to July, 2023. Thus, the mere reference to the alleged Purchase Orders and / or alleged Invoices / Delivery Challan relating to

sales to CSD is insufficient to establish the Plaintiff's knowledge prior to the date claimed by the Plaintiff. These documents only mentioned the words "blue bottle" but there is no image or identification of the product being ordered / supplied under these documents. Thus, it is unable to ascertain as to whether the impugned products were the subject matter of these documents. There is nothing on record to connect the CSD purchase orders / Invoices / Delivery Challan with impugned product bearing impugned packaging / label, much less any proof of their having been sold from 2013 or 2017 or any time thereafter, as contended by the Defendant.

IA(L) 26759.2023 in COMIP(L) 22293.2023.doc

75. The documents which had been produced by the Defendants during the arguments and particularly after the arguments of the Plaintiff had been concluded do not in any manner demonstrate that the alleged CSD orders / Invoices of 2017 sought to be relied upon by the Defendant were in respect of the impugned bottle. At best, the documents being images of impugned products which have been attached to the E-mail dated 3rd December, 2021 sent by the Defendant to CSD would only show that the Defendant supplied the impugned product to CSD in December, 2021 and not in year 2017. This is contrasted with the CSD Purchase Order dated 27th September, 2022 which pertains to "Introduction Circular of new items in CSD range" from which it appears that the Defendant's impugned products were never part of the CSD range prior to September, 2022 and were only approved for listing with the CSD in September, 2022.

76. The reliance placed by the Defendant on its website in order to show that the Defendant's reputation has been captured and that the Defendant was not a fly by night operators is in my view irrelevant, particularly considering that the said ex-parte order had not been passed on the premise that the Defendant was a fly by night IA(L) 26759.2023 in COMIP(L) 22293.2023.doc operator but upon being satisfied that a prima facie case has been made out upon perusal of the rival products and given the immense goodwill and reputation which has been gained by the Plaintiff in respect of its products. In any event, the mere writing on the Website of the Defendant cannot be construed as evidence to support the claim of the Defendant.

77. With regard to Defendant's contention of delay or acquiescence on the part of the Plaintiff, I do not find much substance in its contention, particularly considering the settled law as laid down in the decision relied upon by the Plaintiff viz. Midas Hygiene Industries (P) Ltd. (supra) and Laxmikant Patel (Supra). In the former case it has been held that mere delay in an action for infringement of Trademark or Copyright is not sufficient to defeat the grant of injunction and in the later case it has been held, once a case of passing off is made out the practice is generally to grant a prompt ex-parte injunction followed by appointment of local Commissioner, if necessary.

78. In the present case, I am of the prima facie view that there has been no delay in the Plaintiff approaching this Court and / IA(L) 26759.2023 in COMIP(L) 22293.2023.doc or that there is any suppression of delay, considering that the Defendant is not able to establish as to when the Plaintiff had knowledge of the Defendant's product contrasted with the Plaintiff's case of being aware of the Defendant's impugned products in July, 2023. The Plaintiff upon being aware has acted with utmost dispatch and proceeded to take action against the Defendant. In the ex-parte order, this Court had

considered the prior proceedings which have been initiated by the Plaintiff against several entities who have attempted to / have infringed the Plaintiff's right in the Parachute Coconut Oil Product packaging marks / labels in order to protect the Plaintiff's right as also in the interest of general public.

79. The decisions relied upon by the Defendant on knowledge of the Plaintiff are clearly distinguishable on facts and are thus inapplicable in the present case.

80. It is settled law that it is no defence to state that others have also infringing the marks/labels of the Plaintiff as the Defendant cannot seek shelter behind other infringers or potential infringers. Further, the Defendant's reliance upon third party entities using the same colour scheme in respect of coconut oil product as that of the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Plaintiff is insufficient without the Defendant leading documentary evidence to show the actual use or extent of sales of the alleged third party products sought to be relied upon by it. This has been held by this Court in Pidilite Industries Limited Vs. Riya Chemy (Supra).

81. I find much merit in the submission of Plaintiff that the Defendant cannot seek a seal of approval from this Court to use a revised packaging which continues to be in violation of the Plaintiff. This Court in R.R. Oomerbhoy Vs. Court Receiver, High Court (Supra) has held that "it has been said that many times that it is not part of the function of this Court to examine imaginary cases of what the defendant could or could not do under this form of injunction. The best guide, if he is an honest man, is his own conscience; and it is certainly not the business of this Court to give him instructions or hints as to how near the wind he can sail. Honest men do not attempt to sail near the wind". Further, I find merit in the submission of the Plaintiff that under the 'Safe Distance Rule', once a party infringes on another's trademark or trade dress, the confusion sowed 'is not magically remedied' by de minimis fixes.

82. In view thereof, I do not find any merit in the IA(L) 26759.2023 in COMIP(L) 22293.2023.doc Defendant's application under Order 39 Rule 4 of the CPC, as the Defendant in my view has failed to make out any case for vacating and / or setting aside the said order by discharging its burden and / or meeting the essential requirements for vacating an ex-parte order under Order 39 Rule 4 of CPC. In that view of the matter, the ex- parte ad-interim order dated 18th August, 2023 shall continue to operate till further orders.

83. The Interim Application (L) No.26759 of 2023 is accordingly disposed of.

84. The Interim Application (L) No.33259 of 2023 shall be placed for hearing on 11th January, 2024.

[R.I. CHAGLA, J.]