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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : 30.08.2024

+ **FAO(OS) (COMM) 193/2024 & CAV 426/2024 CM APPL. 50091-50093/2024**

M/S DEEN DAYAL ANAND KUMAR SARAFAppellant

Through: Mr Avishkar Singhvi, Ms Kangan Roda, Mr Nitesh Jain, Mr Yash A Arora, Mr Tanishq Sharma, Mr Sbhuham Kumar and Mr Naved Ahmed, Advocates.

versus

PARAS AGARWAL T/A M/S PURUSHOTTAM
AGARWAL CO & ANR.

.....Respondents

Through: Mr Sandeep Arya, Mr Vikram Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE SACHIN DATTA

VIBHU BAKHRU, J. (ORAL)

1. Issue notice.
2. The learned counsel for the respondents accepts notice.
3. The appellant has filed the present appeal impugning an order dated 06.08.2024 (hereafter *the impugned order*) passed by the learned Single Judge in IA No.13660/2023 filed by the respondents in CS (COMM) No.161/2023 captioned *M/s Deen Dayal Anand Kumar Saraf v. Paras Agarwal T/A M/s Purushottam Agarwal and Co. & Another*. The



respondents had filed the said application under Order XXXIX Rule 4 of the Code of Civil Procedure, 1908 (hereafter *the CPC*) seeking vacation/discharge of the *ex parte* ad-interim order dated 28.03.2023 passed by the learned Single Judge in IA No.5513/2023 moved by the appellant under Order XXXIX Rules 1 & 2 of the CPC.

4. The appellant had filed the above captioned suit [CS (COMM) No.161/2023], *inter alia*, seeking a decree of permanent injunction restraining the respondents from using the trademark MD Payal/ MD Star Fancy Payal & Chains/ MD STAR, which it alleges are deceptively similar to the appellant's registered trademarks. The appellant alleges infringement of its trademarks, infringement of its copyright, as well as passing off. In addition, the appellant has also sought a decree for damages.

5. It is the appellant is the registered proprietor of the following trademarks: -

Trade Mark	Registration No.	Registration Date	User claim	Class
MD	2598843	19.09.2013	25.11.1997	Class 14: Payal, Chains, Silver Ornaments, Silver Coins & Article Made by Gold Silver and Other Precious Material
MD- 70	2598848	19.09.2013	25.11.1997	Class 14: Payal, Chains, Silver Ornaments, Silver Coins & Article Made by Gold Silver and



				Other Precious Material
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6. It is the appellant claim that it has been using the trademark in stylised manner and the respondents copied its label, trade dress, and packaging. It also claims that the respondents' product is an imitation of the appellant's product, which has garnered a significant goodwill in the market.

7. The appellant claims that it became aware of the respondents' use of the trademark around November 2022, when it came across their product, which allegedly infringes the appellant's trademark/copyright. The appellant claims that the respondents had openly displayed and advertised their products at the exhibition of All India Jewellery Expo held between 13th and 15th November, 2022 at SNJ Gold Convention Centre, Fatehbad Road, Agra, Uttar Pradesh. The appellant also claims that it had found that the respondents had applied for registration of the trademarks MD PAYAL and MD STAR, which infringe the appellant's mark and therefore has been opposed.

8. Based on the aforesaid pleadings, the learned Single Judge had granted an *ex parte* ad interim order restraining the respondents, *inter alia*, from using the appellant's trademark or any other deceptively similar marks.

9. The respondents have filed their written statement raising several defences including that it was a prior user. The respondents also filed reply to the appellant's application (IA No.5513/2023) under Order XXXIX Rules 1 & 2 of the CPC. Additionally, the respondents also filed application (IA No.13660/2023) under Order XXXIX Rule 4 of the CPC seeking vacation of



the *ex parte* ad interim order dated 28.03.2023 on the ground that the appellant had suppressed the material facts. The respondents allege that the appellant had not disclosed that it had issued cease and desist notice dated 12.11.2022 (hereafter *the C&D notice*) calling upon the respondents to cease and desist from using any mark which is deceptively similar to the appellant's registered trademarks. The respondents responded to the C&D notice by a letter dated 30.11.2022, *inter alia*, calling upon the appellant to disclose its registered trademarks for a comparative examination.

10. Concededly, the appellant's pleadings in the suit neither refers to the C&D notice nor the respondents' reply to the same. The respondents allege that issuance of the C&D notice and the respondents' reply to the said notice are relevant to the disputes and the appellant had willfully suppressed the same. It is contended that since the appellant had suppressed the material facts, it was not entitled to any discretionary relief. Accordingly, the respondents prayed that the *ex parte* ad interim order be vacated. It is evident from the impugned order that the respondent had also relied upon the decision of the Supreme Court in *S.P. Chengalvaraya Naidu (Dead) by LRs v. Jagannath (Dead) by LRs & Ors.: (1994) 1 SCC 1* and the decision of this Court in *Canon Kabushiki Kaisha v. B. Mahajan and Ors.: Neutral Citation: 2007: DHC: 745* in support of their contention that the party concealing the material facts would not be entitled to any discretionary relief.

11. The learned Single Judge found merit in the contentions advanced on behalf the respondents and held that the C&D notice issued by the appellant to the respondents and their reply to the same are relevant documents. The



said documents were thus, necessary to be disclosed in the pleadings and ought to be filed along with the plaint particularly as the appellant was seeking *ex parte* ad interim injunction. The learned Single Judge has held that non-disclosure of such documents was a fatal act to the appellant's claim for *ex parte* ad interim relief. The relevant extract of the impugned order, setting out the aforesaid reasoning, is reproduced below: -

“13. Since all connected and relevant documents arising out of the cause of action involved having consequential effect(s) are necessarily to be a part of the pleadings and/ or filed along with the pleadings by a party, therefore, in the opinion of this Court, the plaintiff ought to have mandatorily pleaded about both C&D notice and the C&D reply thereto in the plaint and also filed them along with the plaint at the very inception of the suit for consideration of this Court. Not doing so, even though the plaintiff was well aware of both of them, is a fatal act of non-disclosure by the plaintiff when it was seeking grant of an *ex-parte ad-interim* injunction from this Court and vacation thereof embodied in Order XXXIX rule 4 CPC, relevant extract whereof is reproduced as under:-

‘(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:

[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:’

14. Also, though the plaintiff has tried to take shelter for not doing so by simply saying that the present suit was filed in haste, however, admittedly despite becoming aware of its lapse, way back on 10.07.2023 when present application was filed by the defendants, even after the passage of more than a year, the plaintiff has chosen to sit quietly to enjoy the fruits of the *ex-parte ad-interim* injunction order dated 28.03.2023 granted by this Court in its favour without taking any steps to amend its plaint.

15. Interestingly, in paragraph (f) of the C&D notice dated 12.11.2023 though the plaintiff stated that it “... ..*recently come across... ..*” the identically similar impugned marks



of the defendants as those involved in the present suit but in the present suit the very same plaintiff in paragraph 61 of the plaint has pleaded that “*The cause of action first accrued in favour of the Plaintiff in or around November 2022... ..exhibition All India Jewellery Expo held on 13th to 15th November... ..*”. At first



blush, it seems, there is no contradiction, however, though the aforesaid are not the same.

16. Cumulatively taken, in the opinion of this Court, the aforesaid reflect that the plaintiff has misled this Court as it has been guilty of deliberately concealing, suppressing and withholding material, relevant and necessary facts being the C&D notice and the C&D reply thereto without any satisfactory and/ or plausible reasoning and/ or explanation to do so, even though they had a direct nexus to the facts involved herein to somehow obtain an *ex-parte ad-interim* injunction order against the defendants by over-reaching and/ or misleading this Court behind their back.”

12. In view of the above, the learned Single Judge allowed the application filed by the respondents under Order XXXIX Rule 4 of the CPC, and vacated the *ex parte* ad interim order dated 28.03.2023. Additionally, the learned Single Judge also dismissed the appellant’s application under Order XXXIX Rules 1 & 2 of the CPC.

13. We have heard the learned counsel for the parties.

14. The principal question to be addressed is whether non-disclosure of the C&D notice is fatal to the appellant’s claim for discretionary relief.

15. Undisputedly, the C&D notice and the respondents’ reply to the C&D notice are relevant documents and ought to have been disclosed. It is the appellant’s case that it derived no benefit from not disclosing the said documents and the appellant had inadvertently overlooked to refer to them in the pleadings and to place them on record. The appellant has explained that this was because of the change of the counsel prior to the filing of the



suit.

16. There is no cavil that the party approaching the Court must fully disclose all the material facts and any party approaching the Court with unclean hands would not be entitled to any discretionary relief. The decision whether a party should be denied discretionary relief solely on account of non-disclosure of any fact(s) must be informed by addressing the following questions: (a) whether the fact(s) suppressed are vital and material to the relief sought for by the party; and (b) whether the fact has been suppressed deliberately.

17. The question whether the fact(s) suppressed are material to the relief sought, must be determined by examining whether the disclosure of such fact(s) could possibly lead to an adverse decision. It is only the non-disclosure those facts, which are adverse to the case of the party, that warrant denial of discretionary relief. It is necessary for the Court to consider whether disclosure of the facts, which a party has failed to disclose, could possibly result in an unfavourable decision for the party. Clearly, non-disclosure of facts that are favourable to the case of the party, would not warrant denial of discretionary relief to that party.

18. The substratal principle of denying equitable relief to a party, which approaches the Court with unclean hands rests on the principle that a person whose conduct is inequitable is not entitled to any equity. The said principle has been explained in Halsbury's Laws of England¹ as under:

"1305. He who comes into equity must come with clean

¹ Halsbury's Laws of England, 4th Edition, Vol. 16, Pages 874-876



hands.—A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim ‘he who has committed iniquity shall not have equity’, and relief was refused where a transaction was based on the plaintiff’s fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.

The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff’s demerits.”

19. The above passage was also referred to by the Supreme Court in *Arunima Baruah v. Union of India: (2007) 6 SCC 120*.

20. In *Spry on Equitable Remedies*, the author had referred to the decisions in *Moody v. Cox: [(1917) 2 Ch 71: (1916-17) All ER Rep 548 (CA)]* and *Meyers v. Casey: [(1913) 17 CLR 90]* and had explained “... that the absence of clean hands is of no account ‘unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity



sued for”.

21. In the present case, neither the C&D notice nor the respondents’ reply to the C&D Notice provides a cause for denying the interim relief to the appellant. Viewed in this perspective, non-disclosure of the said documents does not present any reason for denying interim relief to the appellant.

22. We are unable to accept that the appellant had derived any benefit or could derive any benefit, from non-disclosure of the C&D notice or the respondents’ reply to the same.

23. The appellant had stated in the plaint that it had become aware of the respondents using the allegedly infringing trademarks in or around November, 2022. The C&D notice was also issued on 12.11.2022. The fact that such notice has been issued is neither in conflict with any averment made by the appellant in the plaint, nor militates against the case set up by the appellant.

24. Non-disclosure of the fact, which if disclosed, would not be unfavourable to the case of the party that has failed to disclose the same, does not warrant denial of any discretionary relief.

25. In view of above, we are unable to concur with the decision of the learned Single Judge that disclosure of the C&D notice and the respondents’ reply was vital to its claim for ad interim injunction. The impugned order does not indicate as to how the appellant had derived any benefit from non-disclosure of the said documents.

26. The learned counsel appearing on behalf of the respondents is also



unable to point out any prejudice that would have been caused to the appellant if the said documents were disclosed in the plaint. He fairly states that the respondents had other grounds to contest the appellant's application for interim relief, and the learned Single Judge may be directed to consider the same.

27. In the given facts, we consider it apposite to set aside the impugned order and restore the appellant's application (IA No.5513/2023) under Order XXXIX Rules 1 & 2 of the CPC before the learned Single Judge to the same position as obtaining on 06.08.2024, for consideration on merits.

28. The respondents are also not precluded from filing a fresh application under Order XXXIX Rule 4 of the CPC for seeking vacation of the ad interim order on other grounds, if so advised.

29. It is clarified that this Court has not examined the appellant's claim on merits and nothing stated in this order should not be considered as such.

30. The present appeal is disposed of in the aforesaid terms. The caveat is discharged and the pending applications are also disposed of.

31. The parties are left to bear their own costs.

VIBHU BAKHRU, J

SACHIN DATTA, J

AUGUST 30, 2024

M/gsr

[Click here to check corrigendum, if any](#)