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

+ CS(COMM) 274/2023 & I.A. 8594/2023, I.A. 8595/2023, I.A. 8596/2023, I.A. 8597/2023, I.A. 8598/2023

SUN PHARMA LABORATORIES LTD. Plaintiff
Through: Mr. Sachin Gupta, Ms. Swati
Meena and Ms. Yashi Agrawal, Advs.

versus

M/S NUTRA SALES AND TRADERS & ANR ... Defendants
Through: None

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **ORDER**
03.05.2023

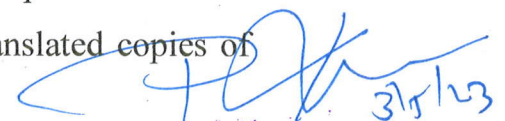
I.A. 8596/2023 (Under Section 12A of the Commercial Courts Act, 2015)

1. In view of the judgment of the Division Bench of this Court in *Chandra Kishore Chaurasia v. R.A. Perfumery Works Pvt Ltd*¹, exemption is granted from the requirement of pre-institution mediation under Section 12A of the Commercial Courts Act, 2015.

2. The application stands allowed accordingly.

I.A. 8597/2023 (under Section 151 of the CPC)

3. By this application, the plaintiff seeks exemption from the requirement of filing original/certified as well as translated copies of the documents.


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¹ 2022 SCC OnLine Del 3529

4. Subject to the plaintiff filing original documents at the stage of filing of documents during the course of the proceedings, exemption is granted for the present.

5. The application stands disposed of accordingly.

I.A. 8598 /2023 (under Section 151 of the CPC)

6. For the reasons stated in the application, the plaintiff is exempted from serving advance service of the suit paper book on the defendants.

7. This application stands allowed accordingly.

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8. The plaintiff is aggrieved by the manufacture and export, by Defendant 2, M/s United Laboratories, Mohali, Punjab, of pharmaceutical products used for treating infertility in males and females, under the brand names "FERTISURE M" and "FERTISURE F". Defendant 2 is stated to be manufacturing the said goods at units situated at Khasra No. 502/2 and 503, Village Bhagwanpura Derabassi, Mohali, Punjab -140507. It is also alleged that Defendant 2 is exporting the infringing product to Nepal, where it is being sold by Defendant 1.

9. The plaintiff claims to be the leading pharmaceutical company in India in as many as 11 specialities and to be the fourth largest generic pharmaceutical company in the world. It is further averred, in the plaint, that the plaintiff is ranked one of the three foremost pharmaceutical companies in branded dermatology in US and is

ranked as one of the top five speciality generic pharmaceutical companies globally.

10. The plaintiff is stated to have commenced marketing pharmaceutical products as a proprietary firm in 1978. Paras 7 to 9 of the plaint detail the circumstances in which the plaintiff became the proprietor and owner of all intellectual property rights of its predecessor-in-interest Sun Pharmaceutical Industries Ltd. The Trade Mark "FERTISURE", for pharmaceutical products for treating infertility, is claimed to have been coined and adopted by Sun Pharmaceutical Industries Limited in 2010. Para 11 of the plaint sets out the composition of FERTISURE M and FERTISURE F. The plaintiff also holds registrations for the word mark FERTISURE in Class 5 w.e.f. 3rd September 2010 and 18th May 2018. The said registrations are stated to be renewed, valid and subsisting as on date. It is further averred that, though the registrations were obtained in the name of Sun Pharmaceutical Industries Ltd., the plaintiff stands recorded in the register of Trademarks as the subsequent proprietor of the marks.

11. The plaint further asserts that, by dint of continuous user, the marks FERTISURE M and FERTISURE F have acquired distinctiveness and enviable goodwill and reputation and have become source identifiers of the plaintiff's product.

12. To vouchsafe its reputation and reach in the market, the plaint also provides the sales turnover from sales of the product FERTISURE M and FERTISURE F which, during the years 2022-


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2023 itself is to the tune of ₹ 24.1 crores and ₹ 27.1 crores respectively.

13. Defendant 2 is alleged to be manufacturing identical products with similar composition, also intended to treat infertility in males and females, using marks which are identical to those registered in favour of the plaintiff, i.e., FERTISURE M and FERTISURE F. These products are stated to be manufactured at the address at Mohali, Punjab noted earlier in this order. It is alleged that Defendant 2 is exporting the said products to Defendant 1 who is located in Nepal, where the products are sold.

14. It is in these circumstances that the plaintiff has approached this Court by means of the present suit, seeking permanent injunction against the defendants from manufacturing, selling, importing or exporting, or otherwise using in any manner the marks FERTISURE, or FERTISURE M and FERTISURE F, for any medicinal or pharmaceutical preparations, as would infringe the plaintiff's registered trade mark FERTISURE.

15. Attendant reliefs by way of delivery-up, rendition of accounts, costs and damages have also been sought.

16. This Court has its reservations regarding whether any injunctive orders can be passed against Defendant 1, who is situated in Nepal. However, Section 29(6) of the Trade Marks Act 1999 includes, within the ambit of "use of a registered trade mark", import and export of the mark. As such, by manufacturing and exporting the goods bearing the registered trade marks of the plaintiff, Defendant 2 is, *prima facie*,

infringing the plaintiff's registered marks and also seeking to pass off its product as that of the plaintiff.

17. The Supreme Court has, in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*² clearly held that, where infringement or passing off is found to exist in respect of pharmaceutical products, the court, keeping in mind the public interest involved, is required to be more rigid in its approach. In such cases, immediate injunctive orders are justified.

18. In the circumstances, keeping the issue of jurisdiction of this Court, *vis-à-vis* Defendant 1 alive, let the plaint be registered as a suit.

19. Issue summons in the suit.

20. Written statement, accompanied by affidavit of admission/denial of the documents filed by the plaintiff be filed within 30 days with advance copy to learned Counsel for the plaintiff who may file replication thereto, accompanied by affidavit of admission/denial of the documents filed by the defendant within 30 days thereof.

21. List before the learned Joint Registrar (Judicial) for completion of pleadings, admission and denial of the documents and marking of exhibits on 11th July 2023.

I.A. 8594/2023 (under Order XXXIX Rules 1 and 2 of the CPC)

22. This is an application under Order XXXIX Rules 1 and 2 of the


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Code of Civil Procedure, 1908 (CPC), seeking interlocutory injunctive relief.

23. For the reasons stated above, a clear case for grant of such relief even at this stage is made out.

24. As such, issue notice, returnable before the Court on 3rd August 2023.

25. Reply, if any, be filed within four weeks with advance copy to learned Counsel for the plaintiff who may file rejoinder thereto, if any, within four weeks thereof.

26. Till the next date of hearing, the Defendant 2, as well as all others acting on its behalf, shall stand restrained from manufacturing, selling, advertising, promoting, exporting or in any other way dealing with pharmaceutical products bearing the impugned marks FERTISURE, FERTISURE M and FERTISURE F or any other mark of which FERTISURE constitutes a part, or any other mark which is confusingly or deceptively similar to the registered trade marks of the plaintiff.

27. Compliance with order XXXIX Rule 3 of the CPC be effected in the terms specified hereinafter.

I.A. 8595/2023 (under Order XXVI Rule 9 of the CPC)

28. This is an application under Order XXVI Rule 9 of the CPC

² (2001) 5 SCC 73

which seeks appointment of two Local Commissioners, to visit the following premises of Defendant 2:

(i) Khasra No. 502/2 & 503
Village Bhagwanpura
Derabassi, Mohali
Punjab -140507

(ii) Hansa Industrial Park
Barwala Road
Derabassi, Mohali
Punjab--140507

29. In the circumstances of the case, the request is justified.

30. Accordingly, this Court appoints Mr. Amit Sinha, Advocate (Mob: 9810673337) and Mr. Chiranjiv Kumar, Advocate (Mob: 9810657124) as the Local Commissioners to visit the aforesaid premises of Defendant 2.

31. Mr. Amit Sinha shall visit the premises situated at Khasra No. 502/2 & 503, Village Bhagwanpura, Derabassi, Mohali, Punjab - 140507 and Mr. Chiranjiv Kumar shall visit the premises situated at Hansa Industrial Park, Barwala Road, Derabassi, Mohali, Punjab-140507.

32. The terms and conditions of the commission and the manner in which it shall be executed, shall be as follows:

(i) The learned Local Commissioners shall visit the aforesaid premises on 6th May 2023 at 11 a.m. in order to execute the commission.


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(ii) The learned local Commissioners are directed to take into custody any product or label bearing the impugned marks FERTISURE, FERTISURE M and FERTISURE F. The said products and labels, after being taken into custody, shall be inventorized and handed over to the representative of Defendant 2 under *superdari* for retention in safe custody pending further orders.

(iii) The learned local Commissioners shall also take into custody any material, equipment, machinery, labels, stickers, printing or packing material or any other equipment which may be used in connection with, or for the purposes of manufacturing of the products bearing the impugned marks FERTISURE, FERTISURE M and FERTISURE F. All such equipment and material, after being taken into custody, shall be inventorised and, thereafter, handed over to the representative of Defendant 2 under *superdari* for retention in safe custody pending further orders.

(iv) The learned local Commissioners shall also obtain copies of the books of accounts of defendants, insofar as they relate to products bearing the brand name FERTISURE, FERTISURE M and FERTISURE F. In case the defendants maintain the accounts electronically or on any Cloud platform, the defendants shall provide the necessary password(s) or other details so as to enable access to the accounts, by the learned Local Commissioners.

(v) During the course of executing the commission, the

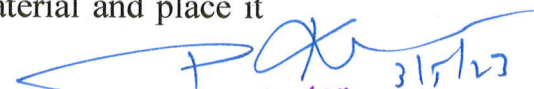
learned local Commissioners shall be entitled to take all steps necessary to do so, including effecting forced entrance into any premises, should the need arise.

(vi) Needless to say, the commission shall be executed peacefully without unnecessarily disrupting the legitimate business activities of the defendants. The defendants, as well as any other person, who may be in possession or occupation of the premises at which the commission is to be executed, are directed to extend all due cooperation in execution of the commission.

(vii) The jurisdictional police authorities are also directed to provide necessary assistance for execution of the aforesaid commission by the learned Local Commissioner, should need arise. In such an event, the police authorities shall also file a report before this Court, within a week of execution of the commission, certifying that the commission has been executed peacefully and without hindrance.

(viii) During the course of execution of the commission, should it become known to the learned local Commissioners that similar infringing products or material are present at any other premises, the learned Local Commissioner would execute the commission similarly at such other premises.

(ix) The learned local Commissioners are directed to take photographs of the infringing products or material and place it on record along with their report.


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(x) The execution of the commission shall be video-graphed, at the expense of the plaintiff, so as to assure this Court that the execution has not been hindered in any manner.

(xi) Each of the learned Local Commissioners shall be entitled to a consolidated fee of ₹ 1 lakh, apart from travel to and fro as well as boarding, if necessary, and other incidental expenses at actuals. The fees of the learned Local Commissioners shall be payable in advance of the execution of the commission.

(xii) The learned Local Commissioners shall file reports of the execution of the commission within a week thereof before the Registrar General of this Court. The reports shall be accompanied, with photographs of the infringing products as well as all other products, goods or materials which have been taken into custody.

33. The Registry is directed not to upload this order on the website of this Court till the commission is executed and reports in that regard are filed.

34. Compliance with order XXXIX Rule 3 of the CPC may be effected within a week of filing of reports by the learned Local Commissioners.

35. This application stands allowed accordingly.

36. Let a copy of this order be given *dasti* to learned Counsel for

the plaintiff under the signature of the Court Master.

MAY 3, 2023
dsn

sd/-
C. HARI SHANKAR, J.

Attached
P. K. 3/5/23
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