

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (L)NO. 269 OF 2014

IN

SUIT NO. (L) 92 OF 2014

Rasiklal Manikchand Dhariwal and Another

..... Plaintiffs

Versus

M/s. Maule Aqua Industries and others

..... Defendants

Dr. Birendra Saraf along with Ms. Pooja Kshirsagar and Mr. B. N. Poojari, instructed by M/s. Asia Patent Law, for the Plaintiffs.

None for Defendants

**Coram: S. J. Kathawalla, J**

**Date : 18<sup>th</sup> February 2014**

**PC.**

1. The Plaintiffs have filed the present Suit to restrain the Defendants from infringing their registered trademark "OXYRICH" and also to restrain the Defendants from passing off their products as those of the Plaintiffs by using a deceptively similar trademark "OXYRITZ". The Plaintiffs have also prayed for relief of an injunction against the Defendants from infringing their copyright in the artistic label of OXYRICH. At this stage, the Plaintiffs have pressed for relief on the basis of infringement of their trademark and copyright.

2. Plaintiff No.1 is the Karta of a Hindu Undivided Family carrying on business under the name and style of R. M. DHARIWAL (HUF). Plaintiff No.2 is a company

which is owned 99.99% by Plaintiff No.1. The Plaintiffs are engaged inter alia in the business of manufacturing and/or processing and/or bottling and/or marketing, *inter-alia*, packaged drinking water under the trademark “OXYRICH”.

3. It is averred in the Plaint that , in the year 2002 Plaintiff No.1 originally conceived and invented a distinctive and innovative word “OXYRICH” to use as trademark in respect of the oxygen enriched packaged drinking water. On 15<sup>th</sup> March, 2001, Plaintiff No.1 also sought patent in respect of the oxygen enriched packaged drinking water process which was granted by the Patent Office, Government of India on 26<sup>th</sup> December, 2006. The copy of the certificate has been produced by the Plaintiffs and has been annexed as Exhibit A to the Plaint. This fact is emphasized by the Plaintiffs to establish that the Plaintiffs maintain high quality and standards of drinking water marketed by them.

4. On 23<sup>rd</sup> May 2002, Plaintiff No.1 applied for and obtained registration of trademark “OXYRICH” in class 32. The copy of the certificate evidencing registration of the Plaintiffs’ mark is at Exhibit B to the Plaint. The said trademark is valid and subsisting on the Register of Trademarks which can be seen from the renewal certificate issued by Registrar , which is annexed at Exhibit C to the Plaint.

5. Sometime in 2002, the Plaintiffs engaged services of one Mr. Pantul Kothari, the proprietor of M/s. Integra Advertising for designing and development of an artistic trademark label. The said Mr. Pantul Kothari designed the artistic label under a contract for service. The said artistic Label is at Exhibit-D to the Plaint. Under a subsequent Deed of Assignment dated 7<sup>th</sup> April, 2005, the said Mr. Pantul Kothari has assigned the copyright in the said artistic “OXYRICH” trademark label in favour

of Plaintiff No.1 for valuable consideration as set out in the Deed of Assignment.

Plaintiff No.1 thus is the owner of the copyright in the said artistic label.

6. Plaintiff No.2 is in continuous and extensive use of the trademark “OXYRICH”, both the word mark as well as the label. The Plaintiffs have produced a copy of Registered User Agreement dated 18<sup>th</sup> October, 2005, entered into between the Plaintiffs which is at Exhibit – L to the Plaint. It has been mentioned in the said Agreement that prior to the Registered User Agreement, Plaintiff No.2 was using the said trademark under a Memorandum of Understanding dated 24<sup>th</sup> June, 2006. Plaintiff No.2 has also made an Application to the Learned Registrar of Trade Marks to register Plaintiff No.2 as the user of the trademark “OXYRICH” word and/or label.

7. In or about the year 2003, since the Plaintiffs were sponsoring the Filmfare Awards, a “Manikchand Filmfare” logo was inserted into the label at Exhibit-D to Plaint. The said label with “Manikchand Filmfare” logo is at Exhibit-F-1 to the Plaint. By an application bearing No.1231929 in class 32, *inter-alia*, Plaintiff No.1 has also applied for registration of the label at Exhibit – F-1 which is pending.

8. The Plaintiffs state that they discontinued sponsoring the Filmfare Awards. The Plaintiffs therefore, through the said Mr. Pantul Kothari, replaced “Manikchand Filmfare” logo with picture of a women holding “OXYRICH” packaged drinking water bottle and added a slopping golden strip at the bottom on the label. The changed label is annexed at Exhibit G-1 to the Plaint. It is the Plaintiffs’ case that there is no change made in the essential and distinctive characteristics including the trademark, layout and colour-scheme of the trademark label at Exhibit-D to the Plaint. By a letter dated 10<sup>th</sup> December, 2007, the said Mr. Pantul Kothari assigned

the copyright in respect of the label at Exhibit G-1 in favour of Plaintiff No.1. The copy of the letter dated 10<sup>th</sup> December, 2007 is produced at Exhibit G-2 to the Plaintiff.

9. It is averred in the Plaintiff that the Plaintiffs have extensively advertised the product in the following manner:-

(a) At the “Manikchand Filmfare” event site, as also its relays made on T.V. Channels, in the year 2003, the packaged drinking water bottle bearing artistic “OXYRICH” trademark label was prominently displayed. The copies of some of the relevant pages of the Filmfare magazine published in the month of April, 2003, showing “OXYRICH” packaged drinking water bottle prominently are annexed at Exhibit – H (colly) to the Plaintiff.

(b) The Plaintiffs have also advertised the said product in news papers and on hoardings. The copies of the newspapers and copies of photographs of hoardings bearing the trademark “OXYRICH” are at Exhibit I-1 to I-23 to the Plaintiff.

The Plaintiffs have also produced at Exhibit – K, the statement of advertisement and sales promotion expenses incurred by the Plaintiffs for “OXYRICH” Packaged Drinking Water duly certified by their Chartered Accountant for the period from 2002 – 2012.

10. The Plaintiffs state that they are continuously and extensively using the trademark “OXYRICH”, wordmark and label, by bottling and marketing the packaged drinking water. They have produced the copies of few invoices for sale of packaged drinking water by the Plaintiffs bearing the “OXYRICH” trademark label.

The said invoices are at Exhibits N-1 to N-10 to the Plaint. The statement of year wise sales figures of the said packaged drinking water bearing the artistic “OXYRICH” trademark label for the period from 2002 to 2013 duly certified by the Plaintiffs’ Chartered Accountant is also annexed at Exhibit – M to the Plaint.

11. It is stated in the Plaint that in January, 2014, for the first time the Plaintiffs’ noticed that the Defendants have commenced bottling and marketing packaged drinking water by adopting and/or using word “OXYRITZ” depicted on a label having colour-scheme, getup, design and layout identical with and/or deceptively similar to the Plaintiffs’ “OXYRICH” trademark label at Exhibits- D, F-1 and G-1 hereto. The Defendants’ label is annexed at Exhibit – O to the Plaint.

12. The Plaintiffs caused a search in the records of the Registrar of Trade Marks through website “ipindia.nic.in” and found that the Defendant No.3 has made an application under No.2425757 for registration of the impugned mark “OXYRITZ” with the impugned label in respect of the packaged drinking water. The Application is at Exhibit Q to the Plaint. The Application shows that Defendant No.3 has claimed user since 01<sup>st</sup> January, 2012 which is much subsequent to Plaintiffs’ registration and use. Pertinently , The Learned Registrar of Trade Marks has raised objection to the trademark application of the Defendant No.3 under Section 11(1) that the mark under the impugned application of the Defendant No.3 is identical with and/or deceptively similar to the Plaintiffs’ trademark “OXYRICH”. The examination report is at Exhibit – R (colly) to the Plaint.

13. It is submitted on behalf of the Plaintiffs that trademark “OXYRITZ” is identical to and/or deceptively similar to the Plaintiffs’ trademark “OXYRICH”. The

same is orally, visually and structurally similar to the Plaintiffs' mark. It is submitted that the most prominent, essential and striking characteristic feature in the Plaintiffs' artistic trademark labels at Exhibits- D, F-1 and G-1 is the word "OXYRICH" depicted in white fonts on a sky blue background which has also been copied by the Defendants. The Defendants have made an imitation of the Plaintiffs' label which highlights malafide intention of the Defendants to pass off their inferior products as those of the Plaintiffs' high quality products.

14. It is submitted on behalf of the Plaintiffs that the adoption and/or use of the trademark "OXYRITZ" by the Defendants is subsequent to the Plaintiffs' said registration of trademark 'OXYRICH' and also the Plaintiffs' use and thus amounts to infringement of the Plaintiffs' registered trademark "OXYRICH". The Plaintiffs contend that subsequent adoption and/or unauthorized use of its trademark 'OXYRICH' and/or any mark identical with and/or deceptively similar thereto or its colourable imitation in respect of packaged drinking water is an infringement of the Plaintiffs' trademark thereby violating the Plaintiffs' statutory rights to proprietorship and exclusive use of the trademark in respect of the said goods. It is submitted that the products in the present case are packaged drinking water. The Plaintiffs maintain high standards to ensure that safe water is provided to public at large. The public at large have developed faith in the Plaintiffs' products. The Plaintiff states that such subsequent and unauthorized use of trademark 'OXYRITZ' or any mark identical trademark is likely to deceive and/or cause confusion among the trade and the general public, leading to them to believe that the Defendants' goods are the Plaintiffs' goods and/or they emanate from the Plaintiffs. The Defendants are trying

to pass of their goods as those of the Plaintiffs which may be a danger to public health.

15. In view of the above facts and circumstances the Plaintiff have filed the present Suit. The Plaintiffs have also made an application for ex – parte ad interim relief. The Plaintiffs state that if the notice of application for *ad-interim* relief is given to the Defendants, then the Defendants will remove the stock /goods bearing the offending trademark ‘OXYRITZ’ or flood the market with the impugned products and the objective of filing the present Suit will stand defeated. The products being packaged drinking water, the interests of the public at large is also at stake. It was submitted that the balance of convenience is in favour of the Plaintiffs.

16. I have considered the Plaint and the documents produced by the Plaintiffs therewith and considered the submissions of the learned Counsel for the Plaintiffs. The Plaintiffs are the registered proprietors of the trademark “OXYRICH” with effect from 23<sup>rd</sup> May, 2002. The material produced by the Plaintiffs discloses extensive sales since 2002 and also substantial expenditure on publicity and promotion including sponsoring well known events. The Defendant is using “OXYRITZ” trademark for the similar product. I have considered the rival marks and the rival labels. I have also compared the rival products bearing the marks which were placed for my consideration in the course of submissions. In my prima facie view, the Defendants’ trademark is deceptively similar to the Plaintiffs’ trademark “OXYRICH” and the Defendants’ label is also a colourable imitation of the Plaintiffs’ label. The mark “OXYRICH” is phonetically, visually and structurally similar to the Plaintiffs’ registered trade mark. When pronounced, more so in India, there is all likelihood of

confusion between the two marks. Even the get up and colour scheme of the two labels are quite similar. When the marks and the labels are considered in conjunction, *prima facie*, I find merit in the submission of the Plaintiffs that the intention of the Defendants is to infringe the Plaintiffs' mark and to trade upon their goodwill. The Defendants have claimed user in the application for registration from 1<sup>st</sup> January, 2012, which is much after the registration of the Plaintiffs' mark and their use. The Plaintiffs have made out a strong *prima facie* case for grant of *ex parte ad interim* injunction restraining the Defendants from infringing their registered trademark and their copyright in label of "OXYRICH at Exhibits-D, F-1 and G-1.

17. There is also merit in the apprehension expressed by the Plaintiffs that if notice of the application is given to the Defendants, the Defendants or their agents and/or distributors will offload the infringing products bearing the offending mark in the market and the object of filing the purpose of the present proceeding and the order that may be passed will be defeated. The products being drinking water, the health of the public at large is also at stake. It is therefore necessary to pass an order without notice to the Defendants. The balance of convenience is in favour of the Plaintiffs. A *prima facie* case for grant of *ad-interim* injunction is made out.

18. In light of the aforesaid, the *ad interim* reliefs are granted to the Plaintiffs in terms of prayers ( a) and (b) of the Notice of Motion. In addition, the Court Receiver is also appointed Receiver to take inventory of all the infringing products. Till the Receiver takes inventory, the compliance of Order XXXIX Rule 3 is dispensed with.



19. The Notice of Motion is listed for directions of 27<sup>th</sup> February, 2014.

(S.J. KATHAWALLA, J.)