

(2014) 04 DEL CK 0049

In the Delhi High Court

Case No : I.A. No. 12459/2013 in CS (OS) 1472/2013

Industria DE Diseno Textil SA

APPELLANT

Vs

Oriental Cuisines Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 4

Citation : (2014) 209 DLT 729 : (2014) 59 PTC 162

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Rajiv Nayar, Senior Advocate, Mr. Akhil Sibal, Mr. Sushant Singh, Mr. Nikhil Chawla, Ms. Geetika Kapur, Mr. P.C. Arya, Mr. Rupesh Pandey and Mr. V.K. Shukla, Advocate for the Appellant; N.K. Kaul, Senior Advocate, Mr. M.S. Bharath and Ms. Prachi Agarwal, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J.

I.A. No. 12459/2013 (u/O XXXIX R 4 CPC)

1. The above application under Order XXXIX Rule 4 CPC has been filed by the defendant for vacation of the ex parte ad interim injunction dated 29.07.2013.
2. On 29.07.2013 this court in IA No. 11760/2013 had passed an injunction order restraining the defendants, their employees, agents, etc. from offering any type of services, manufacturing, marketing, selling and offering for sale, products and/or restaurant or hospitality services bearing the mark ZARA as a trade mark, trade name, corporate name, domain name or in any other manner.
3. The plaint is filed seeking a decree of permanent injunction to restrain the defendants, their employees, agents, etc. from offering any type of services, manufacturing, marketing, selling and offering for sale, etc. any products and/or restaurant services or any allied or cognate products bearing the mark ZARA, ZARA TAPAS BAR and from using the mark ZARA as a mark, trade mark,

corporate mark, etc. in any manner so as to cause infringement to the plaintiffs registered trade mark ZARA. Other connected reliefs are also sought.

4. It is averred in the plaint that the word ZARA is coined, conceived and adopted as a trade mark in 1975. The plaintiffs first ZARA shop is said to have opened 38 years ago in Spain. The mark ZARA was first registered in Spain on 05.06.1979 in class 25. The domain name was registered on 29.05.1997. It is stated that the plaintiff has as in the year 2013, 1763 ZARA stores and other connected stores in over 86 countries. It is averred that in India, garments and other articles bearing the plaintiffs ZARA marks have been specially manufactured since 1986-87 by plaintiffs Indian manufactures. In February 2009, the plaintiff is stated to have signed an agreement with Trent Limited, an enterprise of the Tata Group to develop its ZARA Stores in India. Pursuant to the said partnership the plaintiff is said to have opened 12 stores in major cities in India. In 2012, the value of the ZARA products sold in India are said to be Rs. 3,841,107,582/-. In India, the earliest registration of the trade mark is of 07.04.1993.

5. It is further averred that in or around April 2005, the plaintiff came across defendant No. 1's trade mark application for ZARA TAPAS BAR in Class 16, advertised in Trade Mark Journal dated 17.01.2005. The plaintiff is said to have filed an opposition and the same is said to be pending before the Trade Marks Registry, Chennai. It is stated that in 2012 the plaintiff also came across with other trade mark applications filed by defendant No. 1 for registration of ZARA TAPAS BAR. The plaintiff is said to have opposed all trade mark applications comprising of ZARA filed by defendant No. 1 which have been advertised till date. A list of five such applications is given in the plaint. Reference is also made to the communication dated 24.02.2011 which the plaintiffs attorneys received on 25.02.2011 from defendant No. 1's trade mark attorneys proposing a settlement and co-existence. It is stated that this was the first time when the defendant admitted to be offering products and services in the restaurant and hospitality sector using the mark ZARA TAPAS BAR. It is further averred that in March 2013, the trade mark attorneys of the plaintiff received evidence in support of applications in opposition proceedings No. MAS-787475 and MAS-788957 filed on behalf of defendant No. 1. It is averred that on study of these documents filed by defendant No. 1, the plaintiff was shocked to find materials which show that defendant No. 1 has been and still is using the expression ZARA per se, and not as part of ZARA TAPAS BAR or in the form of a composite label mark. It is averred that such use of the disputed mark in commerce by the defendant is totally contrary to its claims till date in the past proceedings and settlement negotiations. On the said averments, the present suit is filed.

6. IA No. 12459/2013 has been filed by the defendant stating that the plaintiff has obtained ex parte injunction order dated 29.07.2013 by suppressing material facts and making false and misleading statements in relation to material particulars. Number of other averments have been made. It is urged that there is

suppression as to date of knowledge of the defendant's presence and its growth. It is stated that the defendants have been using the trademark ZARA TAPAS BAR without interruption since 2003. It is also urged that the plaintiff has opened its first outlet in India in 2010. It is averred that though the plaintiff's trade mark registration is obtained in 1993, but it suffers from gross non-use until 2010, whereas the defendants have been using the mark ZARA TAPAS BAR in relation to its restaurant business since 2002. It is urged that prior to 2010, the use by the plaintiff was confined to sporadic manufacture purely by outsourcing the goods. Hence there is a delay of eight and a half years in filing the present proceedings. It is also urged that there are multiple parties in India or abroad co-existing with the use of the mark ZARA. Hence it is urged that prima facie case is made out by the defendant. The ex parte order is also said to be causing irreparable loss and injury to the business of the defendants. In the light of the above, it is urged that the ex parte ad interim order be vacated.

7. At the outset learned senior counsel appearing for the defendants strongly urged that the arguments and submissions for the time being are being confined only to the fact that there is gross suppression of material facts on the part of the plaintiff in approaching this court and on this ground of suppression itself the interim order passed by this court is liable to be vacated. He submits that for the moment the arguments are not being made on the merits of the case or prima facie merits of the case of the parties.

8. It has been submitted by the learned senior counsel for the defendant that material facts which had a major bearing on the grant of ex parte injunction by this court have been suppressed by the plaintiff and a fraud has been played on this Court. It is stated that the plaintiff have disclosed two set of oppositions to the proceedings before the Trade Mark Registry but they have suppressed the details of opposition and the various connected relevant documents and their admitted knowledge of the defendants' restaurant business under the mark ZARA since the year 2008. It is urged that the affidavit in evidence filed by the plaintiff deposed by Mr. Antonio Abril Abadin dated 14.01.2008 clearly and unequivocally demonstrates a clear admission on the part of the plaintiff about their knowledge that the defendants are in the restaurant business using the brand ZARA TAPAS BAR. This affidavit has been suppressed. Hence it is stated that the plaintiff knew as per their own admission as early as in 2008 that the defendants were in the business of Bar and Restaurant. Heavy reliance is also placed on para 28 of the plaint where the plaintiff has averred that the cause of action for filing of the present trade mark infringement and passing of suit first arose in 2011 when defendant No. 1's trade mark attorney addressed a letter to the plaintiff's attorney claiming for the first time use of the mark ZARA TAPAS BAR in the composite label form in relation to restaurant and hospitality services. The said para further submits that the cause of action further arose in March 2013 when the plaintiff's trade mark attorney received some evidence in support of an application in the opposition proceedings pending before the Trade Mark Registry where the plaintiff discovered that the defendants have been using and

promoting their products and services as ZARA per se and not as a composite mark comprising the three words or the label as applied for. It is urged that these averments are contrary to the statement made by Mr. Antonio Abril Abadin in his affidavit dated 14.01.2008 filed on behalf of the plaintiff where the plaintiff states that the composite mark ZARA TAPAS BAR is being used by the defendant for restaurant and hospitality services and that the defendant is also using the mark ZARA per se. These averments were made on 14.01.2008. On the basis of the above suppression and fraud, it is urged that the plaintiff has misled this court into granting an ex parte ad interim injunction against the defendants. Learned senior counsel has relied upon the following judgments:-

- (i) S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,
- (ii) Satish Khosla Vs. M/s Eli Lilly Ranbaxy Ltd. and another,
- (iii) Kishore Samrite Vs. State of U.P. and Others,
- (iv) Khoday Distilleries Limited (Now known as Khoday India Limited) Vs. The Scotch Whisky Association and Others,
- (v) Warner Bros. Entertainment Inc. and Another Vs. Harinder Kohli and Others,

Based on the above judgments he contends that a litigant who approaches the court is bound to produce all the documents which are relevant to the litigation and if he withholds vital documents in order to get advantage on the other side then he would be guilty of playing a fraud on the court as well as on the opposite party. On the basis of this submission and judgments relied upon it is averred that the plaintiff has fraudulently suppressed vital material facts about its knowledge of the defendants operating the restaurant and bar by the name ZARA TAPAS BAR since 2008 and hence the interim order passed by this court is liable to be vacated forthwith without going into the merits of the case.

Learned counsel appearing for the plaintiff has also confined his arguments on the contention as to whether the ex-parte stay order dated 29.07.2013 is liable to be vacated in view of proviso to Order XXXIX Rule 4 CPC. He has denied the submissions of the defendants. It is urged that assuming against the plaintiff for arguments sake, every false statement does not attract the proviso to Order XXXIX Rule 4 CPC as is sought to be pleaded by the defendants. It is urged that full disclosure of material facts have been made and nothing material has been suppressed from this Court. It is urged that at best if the arguments of the learned senior counsel for the defendants are accepted, it is a case of wrong narration of such facts which imply delay on the part of the plaintiff in approaching this court. There is obviously no acquiescence by the plaintiff to the continuing use of the trade mark ZARA by the defendants in view of the opposition proceedings which have been filed before the Trade Marks Registry as far back as in 2005. Reliance is placed on various judgments which hold that delay is not fatal to stay in a case relating to infringement of trade mark.

Reference is made to the judgments of the Hon"ble Supreme Court in the case of Midas Hygiene Industries P. Ltd. and Another Vs. Sudhir Bhatia and Others, , where it was held that in case of infringement of trade mark or copyright normally an injunction must follow. For the proposition that mere delay in bringing action is not sufficient to defeat grant of injunction in cases of infringement of trade mark, reliance is placed on the judgment of this High Court in M/s. Hindustan Pencils Pvt. Ltd. vs. M/s. India Stationery Products Co. & Anr., AIR 1990 Del 19 and on the judgment of the Gauhati High Court in the case of Saha and Nath Biri Factory and Others Vs. Sankar Biri Factory, . Learned counsel for the defendants has also strenuously urged that in none of the pleadings filed by the defendants i.e. reply to I.A. no. 11760/2013 which application is filed by the plaintiff or in I.A. No. 12459/2013 which is filed by the defendants, any averments have been made as argued in court pertaining to alleged suppression of material facts.

9. The controversy to be considered is as to whether there is such suppression of material facts and documents as would warrant vacation of the ex parte injunction order passed by this court on 29.07.2013 without going into the merits of the rival contentions. Parties have argued extensively for over several hearings spread over considerable period of time.

10. However, first I would like to deal with the contention of the plaintiff of lack of material pleadings on behalf of the defendant on the above controversy. The said contention is without merit. A perusal of IA No. 12459/2013 would show that in para 3 it is clearly stated that the plaintiff has made false statements in relation to the date of knowledge of the defendants' activities. In addition to that the defendants have also placed on record the documents including the evidence of the witness by way of affidavit of Mr. Antonio Abril Abadin filed before the Trade Mark Registry. Hence, the said contention is without merit.

11. Reference may be had to the proviso to Order 39 Rule 4 CPC which reads as follows:-

[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:

12. Hence the issue for purpose of disposing off I.A. No. 12459/2013 would be as to whether the plaintiff has knowingly made a false or misleading statement in relation to a material particular.

13. The stress of learned senior counsel for the defendants has been on the averments made in the affidavit filed by Mr. Antonio Abril Abadin dated 14.01.2008 which has been filed in support of the opposition made by the plaintiff before the Registrar of Trade Marks which are said to be at variance with

the averments made in the plaint. Relevant portion of the affidavit reads as follows:-

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? Although the applicant repeatedly asserts that its mark is ZARA TAPAS BAR (and not ZARA per se), a number of documents in the Applicant's evidence refers to the applicant's mark only as ZARA. Therefore, the applicant's contention that the applied mark shall be sufficiently distanced from my company's well known mark ZARA is false.

xxx

6. With regard to the statements in paragraphs 2 of the Applicant's Affidavit, I deny that the applicant is carrying on a leading business of all packaging materials, hoarding, boards, news magazines, paper and paper articles, cardboard and cardboard articles, printed matter, newspapers and periodicals, photographs, stationery, visiting cards, letterheads, bills books, sign boards, invoices, newspapers advertisements and stationery used in computers and software boards since many years as contended or at all. From the evidence supplied by the applicant it is clear that the applicant is in the business of running a restaurant and bar and not in the business of manufacturing and/or marketing any product covered by Class 16 specifications. The applicant clearly does not manufacture or sell any packaging materials, hoardings, boards, news magazines, paper and paper articles, cardboard and cardboard articles, printed matter, newspaper and periodicals, photographs, stationery, visiting cards, letterheads, bills books, sign boards, invoices, newspapers advertisements and stationery used in computers and software boards under the brand name/ trademark ZARA TAPAS BAR or under any other brand name as contended or at all.

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15. xxx

? Moreover, the applicant has depicted the expression ZARA (without the expression TAPAS BAR) in a number of hoardings. Therefore, its contention that the impugned mark shall be sufficiently distanced from my company's well known mark ZARA, is false.

xxx

? The Menu Card containing the expression ZARA is admittedly with respect to restaurant services and therefore fails to substantiate any use of the applied mark with respect to the goods applied for. Since the applicant has depicted the expression ZARA (without the expression TAPAS BAR), its contention that the impugned mark shall be sufficiently distanced from my company's well known mark ZARA, is false.

? The write-up exhibited by the applicant on ZARA is admittedly with respect to

restaurant services and therefore fails to substantiate any use of the applied mark with respect to the goods applied for. Since the applicant has against used the expression ZARA (without the expression TAPAS BAR), its contention that the impugned mark shall be sufficiently distanced from my company's well known mark ZARA, is false.

14. Hence as per this affidavit as on 14.01.2008, as per the plaintiff the defendant is using the composite mark ZARA TAPAS BAR in connection with restaurant and hospitality business. The defendant is also using the mark ZARA per se. These averments indicate knowledge of both these aspects as on 14.01.2008.

15. Let us now come to the averments made in the plaint.

16. Reference may be had to para 16 of the plaint. Relevant portion of para 16 reads as follows:-

16. On 25 February 2011, Plaintiffs Indian trademark attorneys received a letter dated 24 February 2011, from Defendant No. 1's trademark attorneys, proposing settlement and co-existence of the marks ZARA and ZARA TAPAS BAR. That was the first time Defendant admitted to be offering products and services in the restaurant and hospitality sector using the ZARA sign.....

17. The same averment is repeated in para 27 of the plaint relevant portion of which reads as follows:-

27. ...

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(c) ...The cause of action for filing the present trademark infringement and passing off suit first arose in 2011 when Defendant No. 1's trademark attorneys addressed a letter to Plaintiff's Indian trademark attorneys, where Defendants claimed to be using "ZARA TAPAS BAR" in the composite label form in relation to restaurant and hospitality services. However, Defendant's claim was not supported by any documentary evidence. ...

18. In para 21 of the plaint it is averred as follows:-

21. In March 2013, the trademark attorney of Plaintiff received the evidence in support of applications in opposition proceedings No. MAS-787475 and MAS-788957 filed on behalf of defendant No. 1, beyond the stipulated time, together with an application for condonation of delay. On a study of the documents filed by the Applicant/Defendant No. 1 as evidence, plaintiff was shocked to find materials which show that defendant No. 1 has been and is still using the expression "Zara" per se, and not as part of ZARA TAPAS BAR or in the form of a composite label mark. Such use of the disputed mark in commerce by Defendants is totally contrary to its claims till date in the opposition proceedings and settlement negotiation. Plaintiff immediately conducted a search of the Internet and located several promotional materials and write-ups/articles etc.,

which refer to Defendants' business, outlet and services as "Zara", "Zara Spain", etc. The manner of use and promotion of the "Zara" name by Defendant No. 1 in respect of its business, products and services is completely and flagrantly violative of the rights and interests of Plaintiff in its ZARA trade mark/name. In the absence of any other available option to protect its invaluable rights in the ZARA brand/name, Plaintiff was compelled to file the instant suit before this Hon'ble Court.

19. Similarly, relevant portion of para 28 reads as follows:-

28..... The cause of action further arose in March 2013, when Plaintiffs trade mark attorneys received the evidence in support of application under Rule 51 of the Trade Mark Rules, 2002 in the opposition proceedings No. MAS-787475 and MAS-788957. As part of the evidence in support of applications, Defendant No. 1 filed two affidavits of Mr. Ramanarayan, the Chief Financial Officer of Defendant No. 1. In the affidavit, Mr. Ramanarayan deposed on oath the following "Moreover it is important to note that the instant mark is always used as a composite mark comprising of three words referring to the kind of cuisine that it serves so that customers are aware of what would be available for them in this restaurant" On study of the documentary evidence filed by defendant No. 1, plaintiff discovered that Defendants have been using and promoting their products and services as "ZARA" or "Zara's" and not as composite mark comprising the three words or the label as applied, as claimed by defendant No. 1.

20. Hence as per the plaint, the plaintiff was aware about the defendant using the composite mark ZARA TAPAS BAR as far back in 2005 when it filed opposition proceedings before the Trade Mark Registry, but it is sought to be stated that the whole controversy in 2005 pertained to use of the said composite mark in relation to Class 16 of the international classification and it had nothing to do with the hospitality/restaurant services. It is further sought to be implied that the plaintiffs knowledge about the use of the said composite mark ZARA TAPAS BAR in connection with restaurant/hospitality industry only came on 25.02.2011 when the plaintiffs trade mark attorneys received a communication to the said effect from the defendant's trade mark attorneys. Knowledge about use of the mark ZARA per se by the defendant is stated to be with effect from March 2013 when the plaintiff's trade mark attorneys received communication in support of an application in opposition proceedings No. MAS-787475 and MAS-788957.

Clearly these averments made in the plaint are wholly contradictory to the affidavit of Mr. Antonio Abril Abadin dated 14.01.2008 where clear admission of their knowledge of the use as of 2008 by the defendant of the composite mark ZARA TAPAS BAR and of the mark ZARA per se in connection with restaurant/hospitality business is made. Hence, prima face the plaintiff has made incorrect statements in the plaint regarding date of knowledge of the use of the composite mark ZARA TAPAS BAR and of the mark ZARA per se in connection with hospitality and restaurant services by the defendant.

21. The question now would be as to whether in the light of this above prima facie finding the interim order passed by this Court on 29.07.2013 is to be vacated.

22. Learned senior counsel for the defendants has strongly relied upon various judgments to state that a fraud has been committed by the plaintiff and all consequences must follow.

23. In the case of S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by Lrs. And Ors. (supra) in para 6 the court held as follows:-

6. ...A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar.

24. Similarly in Satish Khosla vs. M/s. Eli Lilly Ranbaxy Ltd. & Ors. (supra) the court in para 14 held as follows:-

14. Was it not obligatory on the part of the respondent to disclose to the Court that in all earlier suit filed by it, the Court had not granted any stay in its favour and if on such a disclosure having been made the Court still granted stay in favour of the respondent, it could be said that the respondent had not concealed any material fact from the Court? But not mentioning anything about the Court having not granted any stay in similar circumstances in favour of the respondent in the earlier suit, it appears to us that the respondent had not only concealed material facts from the Court but had also tried to over-reach the Court. Being unsuccessful in obtaining stay in Suit No. 3064/96, it was not permissible to the respondent to file the subsequent suit and seek the same relief which had not been granted to it in the earlier suit.

25. In the case of Kishore Samrite vs. State of U.P. & Ors. (supra) the court held has follows:-3

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with "unclean hands". Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3 The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and

suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

26. Similarly in *Khoday Distilleries Ltd. vs. Scotch Whisky Association and Ors.* (supra) in para 46 the court held as follows:-

This Court also in *Power Control Appliances and Others Vs. Sumeet Machines Pvt. Ltd.*, held: 26. Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In *Harcourt v. White Sr. John Romilly* said: It is important to distinguish mere negligence and acquiescence. Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in *Mouson (J.G.) & Co. v. Boehm*. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in *Rodgers v. Nowill*.

27. Learned senior counsel for the plaintiff has apart from refuting the contentions of the defendant, submitted that admittedly in the present case there is no acquiescence on the part of the plaintiff to use of the trademark ZARA or ZARA TAPAS BAR by the defendant as objections before the Trade Mark Registry have been diligently filed. He further submitted that at the best what is being argued is that facts which have been allegedly suppressed are about the delay of the plaintiff in approaching this Court. This delay would not affect the merits of the case of the plaintiff inasmuch as delay in filing of a suit would not be a ground to deny grant of injunction or interim injunction in a suit relating to infringement, of trademark or passing off.

28. Learned senior counsel for the plaintiff has relied upon *Midas Hygiene Industries P. Ltd. and Anr. vs. Sudhir Bhatia and Ors.* (supra) wherein in para 5 the court held as follows:-

5. The law on the subject is well settled. 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 also becomes necessary if it prima facie appears that the adoption of

the Mark was itself dishonest.

29. Similarly the learned senior counsel for the plaintiff relies on M/s. Hindustan Pencils Pvt. Ltd. vs. M/s. India Stationery Products Co. & Anr. (supra) where this court held as follows:-

31. Even though there may be some doubt as to whether laches or acquiescence can deny the relief of a permanent injunction, judicial opinion has been consistent in holding that if the defendant acts fraudulently with the knowledge that he is violating the plaintiffs rights then in that case, even if there is an inordinate delay on the part of the plaintiff in taking action against the defendant, the relief of injunction is not denied. The defense of laches or inordinate delay is a defense in equity. In equity both the parties must come to the Court with clean hands. An equitable defense can be put up by a party who has acted fairly and honestly. A person who is guilty of violating the law or infringing or usurping somebody else's right cannot clarify the continued misuse of the usurped right.

30. In my view the plaintiff has prima facie by jugglery and twisting of words given an impression in the plaint that the plaintiff gained knowledge about use by the defendant of the composite mark ZARA TAPAS BAR in 2011 and use of the mark ZARA per se in 2013. These submissions are contradictory to the affidavit filed by Mr. Antonio Abril Abadin on behalf of the plaintiff. However, keeping in view the legal position that delay per se may not defeat the right of a plaintiff for grant of injunction in a suit for infringement of trademark and passing off, I am not inclined to accept the contention of the learned senior counsel for the defendant that there is a fraud played upon the Court by the plaintiffs. Fraud would normally be inferred where a party to the suit deliberately and mischievously makes a false representation without belief in its truth recklessly to cause deliberate loss to the other side. As delay in filing a suit for infringement of a trademark and passing off would normally not defeat the right of a party in seeking the said relief, the question of causing irreparable loss to the defendant and gaining an unfair advantage does not arise. There is also no evidence to show that the act was deliberate. However, it is implicit in the plaint that incorrect averments have been made which lead to incorrect inference which is contrary to the affidavit of Mr. Antonio Abril Abadin dated 14.01.2008.

31. It would also be proper to look at the ex parte injunction granted to the plaintiff on 29.07.2013 without any prior notice to the defendants. The relevant portion of the said order reads as follows:-

...It is urged that initially the defendants have started using the mark ZARA TAPAS BAR and have also made an application for the trade mark for the same which is being opposed by the plaintiff. It is further submitted that the plaintiff has recently come across the fact that the defendants have started using the trade mark "Zara per se" as elaborated in paras 21 and 22 of the plaint. Hence, it is alleged that the defendants by adopting the trade mark ZARA as trade mark

are infringing the plaintiff's well known trade mark. It is further alleged that by using the mark ZARA as a trade mark, defendants are passing off their services as that of the plaintiff and hence are guilty of the infringement of trade mark.

The plaintiff has made out a prima facie case in his favour. Balance of convenience is also in favour of the plaintiff and against the defendants. In case an ex parte ad interim injunction is not granted, irreparable loss is likely to cause to the plaintiff.

32. Hence, the ex parte order was passed keeping in view the averments made by the plaintiff as elaborated in paras 21 and 22 of the plaint, namely that it was only in March 2013 that the plaintiff received evidence which show that defendant No. 1 has started using the expression ZARA per se and not as part of ZARA TAPAS BAR i.e. in the form of composite label. Same is the thrust of the averment in para 22 of the plaint. Factually this appears incorrect inasmuch as in its affidavit filed on 14.01.2008 before the Trade Mark Registry of Mr. Antonio Abril Abadin there are categorical averments made by the plaintiff that the defendants are using the mark ZARA per se. As this averment was made in 2008 knowledge of use of this mark could not be attributed to be March 2013 as averred in para 21 of the plaint.

33. In view of the incorrect facts stated in the plaint based on which ex-parte order dated 29.07.2013 was passed in IA No. 11760/2013, it would be in the fitness of things and in the interest of justice that the ex parte interim orders passed by this Court on 29.07.2013 is modified and the defendants are permitted to use the composite trade mark ZARA TAPAS BAR only till further orders in IA No. 11760/2013. Keeping in view the facts of this case, the defendants will not use the mark ZARA per se. The defendants will continue to be bound by the order dated 29.07.2013 pertaining to the use of the mark "ZARA" per se.

34. It is however clarified that the present modification of order dated 29.7.2013 is being made in view of the facts as narrated above and not on the merits of the matter. Nothing said herein would in any way affect the contentions of the parties on the merits of the matter while arguing IA No. 11760/2013 which application the plaintiff is free to press and seek all orders and relief as permissible in law.

35. With above modification IA No. 12459/2013 stands disposed of. No costs.

CS(OS) 1472/2013

List on 9th July, 2014 before Joint Registrar.