
(2010) 01 DEL CK 0095

In the Delhi High Court

Case No : I.A. No. 10586 of 2009 in C.S. (OS) No. 1528 of 2009

Ozone Spa Pvt. Ltd.

APPELLANT

Vs

Ozone Club

RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:

Citation : (2010) 42 PTC 469

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Pratibha M. Singh and Archana Sachdeva, for the Appellant; Mohan Vidhani and Rahul Vidhani, for the Respondent

Judgement

Manmohan Singh, J.—The plaintiff has filed the suit for permanent injunction restraining passing off the registered trade mark, unfair competition, dilution and damages and rendition of accounts etc. The brief facts are that on 7th June, 1994 the company i.e. M/s. Taj Resorts Pvt. Ltd. was incorporated. Subsequently on 6th January, 2003 its name was changed to "Ozone Spa Pvt. Ltd.". The plaintiff company is a premier boutique health Spa and it adopted the mark "Ozone" in relation to health services in May 2001. It launched its first Health Centre and Spa under the brand name "Ozone" on 26th October, 2002 and changed its name in 2003. The trade mark "Ozone" which also forms a dominant part of the corporate name has been in use continuously since its adoption in 2001. It has already established itself as a one of its kind fitness centre, the members of which include eminent personalities like Ms. Sania Mirza, Ms. Ekta Chaudhary, Ms. India Universe 2009, well known model Mr. Inder Mohan Sudan etc. The plaintiff has already established branches in Haryana, Gurgaon, Chandigarh and Bangalore and it has planned to commence operations in Ludhiana, Indore and Ahmadabad. The plaintiff has established four branches of "Ozone" in Delhi i.e. at Defence Colony, Palm Country Club, Gurgaon, Delhi Lawn Tennis Association and at Deepak Plaza Building, Rohini.

2. The services and facilities enumerated by the plaintiff

company are as under:

- (i) Cardio equipment ...
- (ii) Strength equipment to tone and strengthen the body.
- (iii) Steam, sauna, massages, showers, changing cubicles and a vanity arc for women.
- (iv) Aerobics, yoga, body sculpting and specific strength workouts.
- (v) Luxurious spa suites which offer advanced relaxation therapies....
- (vi) Body composition analysis.
- (vii) Scientific nutritional evaluation and diet counseling.
- (viii) In house care and guidance by physiotherapist, along with medical counseling by doctors.
- (ix) Wi-Fi-Wireless Internet access available free for all members.

3. The plaintiff has stated the turnover of the company from 2002 to 2009 in Para 10 of the plaint. The plaintiff has submitted to have spent approximately Rs. 74 lakhs on account of advertising and business promotion under the mark "Ozone" in various newspapers and journals during the said period. The details of the expenses are given in Para 11 of the plaint. It is submitted that the plaintiff, since the time it commenced operations, has been a pioneer in the health industry. The plaintiff in fact boasts of top-notch designs with studiosque appeal where each member is assigned a personalized workout schedule, closely monitored by trained staff. The USP of the gym is the state of the art equipment, sauna, Swedish massage and group activities that include spinning, pilates, kick-boxing and yoga.

4. The plaintiff is the registered proprietor of the trade mark "Ozone" in Classes 16, 30, 32, 33 and 42. The plaintiff also has registration of copyright in the said mark, the details of which are given in Para 15 of the plaint. The plaintiffs application for registration of the trade mark "Ozone" in class 41 in relation to health club related services is pending before the trade mark registry as it is opposed by the defendant.

5. According to the plaintiff, in March 2007 the plaintiff became aware of the defendants mark when the same was advertised in the trade mark journal. Immediately on 22nd March, 2007 an opposition to the same was filed by the plaintiff. The plaintiff via correspondence was informed of the opposition filed by the defendant against the plaintiffs mark. However, the plaintiff has as of now not been served with a copy of the said notice of opposition. The opposition proceedings are pending before the trade mark registry. In order to protect its rights in the mark "Ozone" the plaintiff has issued a legal notice dated 26th March, 2009.

The defendant sent its reply dated 13th April, 2009 to the legal notice of the plaintiff.

6. It is submitted that the mala fide intentions of the defendant are evident from the fact that it has adopted an identical name for health services and/or cognate and allied services that it provides. It is stated by the plaintiff that the services provided by the defendant under the impugned mark are health related, the details of which are given in the plaint i.e. swimming pool, Talwalkers fitness centre, lawn tennis, badminton, skating, restaurant and banquet facilities, Billiards and archery centre.

7. The plaintiff has also opposed the application for registration of the trade mark filed by the defendant before the filing of the suit. The plaintiff also issued legal notice dated 26th March, 2009 to the defendant asking it to cease and desist from using the impugned name. However, in the reply the defendant has stated that since the services provided by the defendant are different, therefore, the request was not acceded to.

8. The defendant has claimed the prior adoption of the said name since 1st January, 2004. The plaintiff has stated that in view of the conduct of the defendant, the defendant is guilty of infringement of exclusive and statutory rights of the trade mark as well as dilution and act of unfair competition and the rights of the plaintiff are protected u/s 29 of the Trade Mark Act, 1999 in view of the registration already granted in favour of the plaintiff under class 16, 32, 33 and 42 of the Act being a well known trade mark.

9. It is also stated that the present case is a case of triple identity where the mark is identical, the business/services are also identical i.e. health Spa and fitness and related services and class of customers are also the same and, therefore, the defendant cannot be allowed to ride piggy back on the goodwill and reputation earned by the plaintiff.

10. Along with the suit the plaintiff filed the application under Order XXXIX Rules 1 & 2 being I.A. No. 10586/2009 and an ex parte ad interim order was granted on 21st August, 2009 against the defendant restraining it from using the mark/name "Ozone" in relation to the services of the fitness center, spa health club and gymnasium except the services of swimming pool provided by the defendant under the trade mark "Ozone".

11. In another application being I.A. No. 10587/2009 a Local Commissioner was appointed by this Court to make the inventory and take into custody all the infringing material, newspapers, letters, brochures, pamphlets, advertising material, publicity material, sign boards, invoices etc bearing the trade mark "Ozone" and hand over the same on superdari to the defendants or its representatives who shall give an undertaking that the seized material would be produced as and when directed by the court. The Local commissioner was also authorised to sign the accounts books, ledgers, cash books, purchase and sale of services provided by the defendant and to take photographs, if necessary. In

compliance with the orders of the court the Local commissioner filed his report on 16th September, 2009 along with the documents.

12. The defendant filed an appeal being FAO (OS) No. 476/09 against the ex parte order dated 21st August, 2009 along with the interim application which was disposed of with a direction to hear the interim application on 21st October, 2009. The matter was listed on 21st October, 2009. The interim application was listed for arguments on 12th November, 2009 as the pleadings filed by the parties were not on record. On 12th November, 2009 the matter was adjourned at the request of the defendant to 17th December, 2009 and due to a similar position even on that date, the matter was adjourned to 22nd December, 2009 when it was finally heard on 22nd and 23rd December 2009 on the interim injunction.

13. The defendant filed the written statement and reply to the interim application. The main defense raised by the defendant is that the defendant is a Charitable Trust registered under the Charitable Trust Act and is managed by "Prabodhan" which was started in 1972. The defendant applied for registration of the service mark on 9th August, 2004 and the said trade mark was accepted and advertised in the Trade Mark Journal dated 1st September, 2006 which is under Opposition No. 255171. It is contended by the defendant that the defendant is providing sport promotion and blood bank services under the trade mark "Prabodhan" and swimming services under the name "Ozone". The defendant has installed "Ozone" Generation Plant at site for water treatment of swimming pool. It is contended by the defendant that the defendant was never in the field of health club as the premises are given by "Talwalkar" for running their fitness club and "Talwalkar" is a separate entity which is running its business under the name/mark "Talwalkar". Various preliminary objections have been raised by the defendant which are given as under:

a) That this Court has no jurisdiction to entertain and try the present suit and the provisions of Section 134 are not attracted as the defendant is not registered under Clause 41 of the classification which is pending for registration in respect of the said services.

b) That the suit is liable to be stayed as the right of the parties concerning the subject matter, namely, service mark "Ozone" are pending before the trade mark office.

c) That the present suit suffers from the defects of delay, laches and acquiescence and the plaintiff is not entitled for any relief.

d) That the word "Ozone" has not acquired secondary meaning in favour of the plaintiff and the plaintiff is not the proprietor. It is a generic name and no one can have exclusive right over the same.

e) That the word "Ozone" is common and various other companies, traders and societies are using the word "Ozone" for various goods and services.

f) That the suit has not been properly valued for purposes of court fees and jurisdiction and no proper court fee has been paid and the suit has also not been signed and verified by a duly authorised person. The suit has also not been filed in accordance with High Court Rules.

14. In the replication it is contended by the plaintiff that the defendant runs the Activity Center under the mark "Ozone" and the defendant is providing health related services under the impugned mark. The plaintiff is the prior user of the mark in question as the defendant as per alleged admission is using the impugned mark since the year 2004.

15. As regards the objection raised by the defendant with respect to delay and laches, the case of the plaintiff is that it was in March 2007 that the plaintiff became aware of the defendants mark when the same was advertised in the trade mark journal. Immediately, the plaintiff filed the notice of opposition to the said mark so that it could not be registered in favour of the defendant as per the case of the plaintiff.

16. I have heard learned Counsel for both the parties and have also gone through the pleadings and documents filed by the parties and the report submitted by the Local commissioner. From the documents it appears that the plaintiff company adopted the mark "Ozone" in relation to health services from the year 2001. The registration for the mark "Ozone" with the suffix has been issued in favour of the plaintiff with effect from 13th May, 2002 claiming user as of 1st April, 2002. The record further shows that the health center and spa was launched under the brand name "Ozone" in October 2002 and the name of the plaintiff company earlier was Taj Resorts Pvt. Ltd. which was changed to "Ozone" Spa Pvt. Ltd. on 6th April, 2003. Various registrations have been issued in class 30, 32, 33 and 42 claiming user as of 1st May, 2001 as from the date of registration i.e. 11th June, 2003. The copyright registration was also granted in favour of the plaintiff on 3rd December, 2003. The plaintiffs application in Clause 41 bearing No. 1254797 as on 11th December, 2003 claiming user from 1st May, 2001 is under opposition filed by the defendant.

17. Before taking any legal action the plaintiff also issued a legal notice dated 26th March, 2009 to which the defendant sent its reply vide letter dated 13th April, 2009. It is denied by the plaintiff that the defendants activities are sports related activities under the name "Prabodhan". In fact, according to the plaintiff, all the health related activities such as Gym, Aerobics, Yoga, Spa etc. are being run under the name "Ozone" Club and the said fact is evident from the documents filed by the defendant. It is also denied by the plaintiff that the mark "Ozone" is a generic word and it is used by various parties. According to the plaintiff it is an arbitrary mark in relation to the services for which it is being used and the mark adopted and used by the plaintiff is reputed and popular on account of residual goodwill and promotion of the said mark in India. The learned Counsel for the plaintiff has also referred various documents filed by the plaintiff as well as defendant and relied upon various decisions.

18. Similarly, the defendant's application claiming user as of 1st January, 2004 as from the date of application in class 41 bearing application No. 1301322 is also under opposition filed by the plaintiff. It is not in dispute that before filing of the present suit the legal notice dated 26th March, 2009 was issued by the plaintiff to the defendant which was duly replied by the defendant on 13th April, 2009. 19.

19. Now I shall deal with the contentions raised by the defendant. The first objection of the defendant is that the suit for infringement of the trade mark is not maintainable as the plaintiff has no registration in its favour in class 41 of the Schedule IV of the classification, thus, the plaintiff cannot invoke the jurisdiction u/s 134 of the Act. From the documents filed by the plaintiff it appears, prima facie, that the trade mark "Ozone" adopted and used by the plaintiff has acquired secondary meaning by virtue of long and continuous user. In support of the claim of goodwill and reputation, the plaintiff has furnished the statement of sale and promotional expenses as well as the documents to show that the mark "Ozone" has been continuously used and advertised in various modern media and the mark was adopted to distinguish with the services of the plaintiff. The plaintiff has filed the ample evidence on record to show their business activities and extensive advertisement and in view of that, there is no hesitation to come to the conclusion that the said name "Ozone" is known mark in relation to the services provided by the plaintiff despite of the fact that the plaintiff's application for registration in class 41 of Schedule IV of the Classification in relation to health club and related services is pending for registration but at the same time it is an admitted fact that the plaintiff has got the registration in class 42 in relation to services such as medical, hygiene and beauty care etc.

20. As regards the suit for infringement is concerned, undisputedly the plaintiff's trade mark "Ozone" is registered in respect of the various goods in classes 16, 30, 32, 33 and particularly in class 42 in respect of goods including hygiene and beauty care services. Although, these are not same services but somehow they are connected with the services provided by the plaintiff under the mark "Ozone" the mark which has already acquired a residual goodwill and reputation, therefore, this Court is of the considered opinion that the present matter covers under the dicta of Section 29(4) of the Act where the protection of the mark is given to the dissimilar goods as use of the mark by the defendant would be unfair advantage of or is detrimental to the mark of the plaintiff, therefore, it is a well known trade mark within the meaning of Section 2(1)(zg) of the Act and have the present case covered u/s 29(4) of the Act.

21. The plaintiff under the said circumstances is also entitled to invoke the territorial jurisdiction u/s 134(2) of the Act, as the plaintiff is actually and voluntarily carries on business and working for gain in Delhi.

22. The learned Counsel for the defendant has referred various judgments in support of his contention. The first judgment he has referred to is Rhizome Distilleries P. Ltd. and Others Vs. Pernod Ricard S.A. France and Others, on the

point that the mark "Ozone" is not protectable under the law being a common name. I am of the view that this judgment does not help the case of the defendant on the reasons that the defendant in the referred judgment was the registered proprietor of the trademark. Secondly, it was held by the Division Bench of this Court that the defendant applied for registration of the trademark in 2002 and plaintiff had withdrawn its objections before the Excise Department and the said fact has been disclosed by the plaintiff in the matter. Thirdly, the Court held that the mark/label Imperial Blue and Rhizome Imperial Gold are dissimilar and in view of these reasons no interim protection was issued. But the facts in the present case are different, as the two rival marks are identical.

23. The second judgment referred by the learned Counsel for the defendant is D. Adinarayana Setty v. Brooke Bond Tea of India AIR 1960 Mys 142 (V 47 C 37) in order to stress his submission on the point of stay of the present proceedings due to pendency of its application wherein it has claimed concurrent registration. The said judgment is also not applicable to the facts and circumstances of the present case as the present case is not a case of concurrent and honest user. In the present case the application for registration was filed in 2004 with the user of 2004. The question of concurrent and honest user in the circumstances does not arise. Therefore, the suit proceedings cannot be stayed.

24. The next objection raised by the defendant is that the suit suffers from the defect of delay, laches and acquiescence and the plaintiff is not entitled to any relief due to the same. The present suit is a suit for infringement of trade mark and exclusive and statutory rights of infringement of trade mark cannot be defeated in case there is any delay on the part of the plaintiff for bringing the action before the court as per well established law. In Swaran Singh Vs. Usha Industries (India) and Another, , it was held as under:

(7) There is then the question of delay. Learned Counsel for the respondents had urged that the delay is fatal to the grant of an injunction. We are not so satisfied. A delay in the matter of seeking an injunction may be a ground for refusing an injunction in certain circumstances. In the present case, we are dealing with a statutory right based on the provisions of the trade and Merchandise Marks Act, 1958. An exclusive right is granted by the registration to the holder of a registered trade mark. We do not think statutory rights can be lost by delay. The effect of a registered mark is so clearly defined in the statute as to be not capable of being misunderstood. Even if there is some delay, the exclusive right cannot be lost. The registered mark cannot be reduced to a nullity. The principles governing other types of injunctions are not to be readily applied to a case like the present.

25. In Hindustan Pencils (P) Ltd. Vs. India Stationery Products Co. and Another, it was observed as under:

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 plaintiff's 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 claim the continued misuse of the usurped right. It was observed by Romer, J. in the matter of an application brought by J.R. Parkington and Coy. Ltd. 63 R.P.C. 171 that "in my judgment, the circumstances which attend the adoption of a trade mark in the first instance are of considerable importance when one comes to consider whether the use of that mark has or has not been a honest user. If the user in its inception was tainted it would be difficult in most cases to purify it subsequently". It was further noted by the learned Judge in that case that he could not regard the discreditable origin of the user as cleansed by the subsequent history. In other words, the equitable relief will be afforded only to that party who is not guilty of a fraud and whose conduct shows that there had been, on its part, an honest concurrent user of the mark in question. If a party, for no apparent or a valid reason, adopts, with or without modifications, a mark belonging to another, whether registered or not, it will be difficult for that party to avoid an order of injunction because the Court may rightly assume that such adoption of the mark by the party was not an honest one. The Court would be justified in concluding that the defendant, in such an action, wanted to cash in on the plaintiff's name and reputation and that was the sole, primary or the real motive of the defendant adopting such a mark. Even if in such a case, there may be an inordinate delay on the part of the plaintiff in bringing a suit for injunction, the application of the plaintiff for an interim injunction cannot be dismissed on the ground that the defendant has been using the mark for a number of years. Dealing with this aspect Harry D. Nims in his "The Law of Unfair Competition and Trade Marks". Fourth Edition, Volume Two at page 1282 noted as follows:

Where infringement is deliberate and wilful and the defendant acts fraudulently with knowledge that he is violating plaintiff's rights, essential elements of estoppel are lacking and in such a case the protection of plaintiff's rights by injunctive relief never is properly denied. The doctrine of estoppel can only be invoked to promote fair dealings.

26. On the question of balance of convenience the learned Counsel for the defendant has also referred to *Wander Ltd. and Anr. v. Aptox India (P) Ltd.* 1991 PTC 1 and *Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd.*, wherein it is observed that the Court must weigh one party's need against another and determine where the "balance of convenience lies" in order to consider the matter on balance of convenience and prima facie case. In the present case, it is the defendant's case itself that the defendant was never in the field of health club. Further, the two rival marks of the parties are same. Therefore, the finding

of this referred decision does not help the case of the defendant.

27. The next judgment referred by the learned Counsel for the defendant is B.L. and Co. and Ors. v. Pfizer Products Incl. 2001 PTC 797 (Del)(DB). In this case an ex-parte ad-interim order was vacated by the Division Bench on various reasons, one of the reasons was that the plaintiff's products were not available in India and even user of the plaintiffs was very recent in overseas mark and on the other hand the defendant had launched its business on large scale in India. By considering the irreparable loss and injury to the defendant, an ex-parte order was vacated and the matter was referred to the learned Single Judge for disposal of the application under Order XXXIX Rules 1 & 2 CPC on merit. The situation in the present case is different in the defendants appeal, the Division Bench did not interfere with the ex-parte order and disposed of the appeal with the directions to expedite the hearing of the interim application and the same has been heard.

28. The other objection raised by the defendant is that "Ozone" is a generic name and no one can have exclusive rights over the same and the plaintiff is also not the proprietor of the mark "Ozone". The said argument is a self defeating argument. Firstly, the mark "Ozone" is a registered trade mark in favour of the plaintiff and secondly the defendant himself has applied for registration of the trade mark "Ozone" in class 41 in relation to the services as that of the plaintiff. It does not lie in the mouth of the defendant to contend now that the mark is a generic mark, in fact the defendant is debarred from raising such a plea in view of his own conduct. The said contention is totally misconceived. In the case of Automatic Electric Limited v. R.K. Dhawan and Anr. 1999 (19) PTC 81 in para 16, the learned Single Judge of this Court has observed that the defendant had got their trade mark "DIMMER DOT" registered in Australia. The fact that the defendant itself has sought to claim trade proprietary right and monopoly in "DIMMER DOT", it does not lie in their mouth to say that the word "DIMMER" is a generic expression. User of the word "DIMMER" by others cannot be a defence available to the defendants, if it could be shown that the same is being used in violation of the statutory right of the plaintiff.

29. The next objection of the defendant is that there are various other companies, traders, societies and associations which are using the word "Ozone". The said submission is also without any substance as the defendant has failed to produce any cogent evidence before this Court to show that any third party is using the name/mark "Ozone" in relation to health related services. The said submission is also rejected.

30. The other submission of the defendant is that the plaintiff has not filed the certificate for use in legal proceedings and has merely filed the copies of the registration certificate. The admission/denial in the present matter is yet to be carried out by the parties. The plaintiff still has an opportunity to file the certificates of registration or to summon the relevant record of the Trade Mark office in order to prove the registration granted in favour of the plaintiff, therefore, the objection at this stage cannot be decided in favour of the

defendant as the plaintiff has filed the photocopies of registration certificates in its favour. Further, there is no denial by the defendant that the plaintiff has not obtained the registration. Therefore, the objection is not sustainable. 31. The next submission of the defendant is that the suit is not properly valued for purposes of court fees and jurisdiction and no proper court fee has been paid and the suit has not been signed, verified and filed by a proper and authorised person. Further, the suit has not been filed in accordance with the Delhi High Court Rules, 1966. No reason whatsoever has been assigned by the defendant for raising the preliminary objections in Paras 15 to 17 in the written statement and reply to the interim application. The plaintiff has valued the suit for purposes of court fees and jurisdiction at Rs. 25,00,200/- and proper court fee of Rs. 26,764/- has been paid. Further, the plaint has been signed by Mr. V.K. Pahwa who is the authorised signatory of the plaintiff. The resolution in his favour dated 6th May, 2009 is already placed on record. The plaintiff has also filed the original Memorandum and articles of Association of the plaintiff company. No reason whatsoever has been assigned by the defendant that how the suit was not filed in accordance with the Delhi High Court Rules. It appears that these preliminary objections have been raised by the defendant only for the purpose of raising objections, otherwise prima facie the same are baseless and cannot be considered at this stage of the matter.

32. As far as merit of the case is concerned, it is pertinent to mention that the defendant itself has admitted in the written statement that it is using the name "Ozone" in respect of the activities of swimming pool only as the defendant has installed "Ozone" generation plant on side for water treatment of swimming pool. Admittedly, there is no ex parte interim order passed by this Court in this regard as the learned Counsel for the plaintiff did not press the ex parte ad interim order in relation to the said services, still the defendant is pressing for vacation of the orders in respect of other services. It appears that the statement made by the defendant in the written statement is not candid and is incorrect in the face of the documents produced by the defendant as well as from the report of the Local Commissioner.

33. The explanation given by the defendant is in Para 6 of the preliminary objection and it is that the defendant was never in the field of health club and the premises have been given to Talwalkar for running their fitness club which is a separate entity and they are running their business under the name Talwalkar and not "Ozone". The defendant has also placed copy of the agreement dated 7th September, 2006 in this regard in order to satisfy its stand.

34. After going through the clauses of the agreement dated 7th September, 2006, it appears that the averment made by the defendant in written statement is not correct. A few relevant clauses of the said agreement are given as under:

1. The Principal:

a. ---.

b. Shall provide necessary security to the premises, from out sides of the structure. The Caretaker is responsible for security of their equipment and belongings fixed or stored in the premises under their control and the principal shall not be hold responsible for loss or damages to the equipment/belonging to the Caretaker.

c. ---.

d. Shall allow the Caretakers to take outsiders as fitness centre members other than "Ozone" Club"s members.

e. ---.

f. ---.

35. The report of the Local Commissioner further demolishes the case of the defendant as it is mentioned in the report of the Local Commissioner that at the reception there was a sign board stating "Ozone" Activity Centre. A photograph depicting the same has also been filed. The Local commissioner has also seen the placards with the mark "Ozone" at the defendants premises. The question was also raised to the defendant as to whether that the mark "Ozone" Activity Centre for health club, gym facility was being used and the Local Commissioner was informed by the defendant by one Mr. Tribhuvani that the health club etc. is being used with Talwalkar mark on it. He also informed the Local commissioner that 500 members are using "Ozone" Activity Centre/Fitness center. The documents filed by the Local commissioner establish that in fact the defendant is in the service of health club centre/fitness centre as alleged by the plaintiff. The plaintiff has also dealt with the objection in Para 4 of the preliminary objection in the replication which negates the case of the defendant.

36. After thoughtful consideration of the entire matter and having gone through the pleadings, documents of the parties and report of the Local Commissioner, it appears to me that a strong prima facie case for confirmation of the ex parte ad interim order has been made out by the plaintiff. The balance of convenience also lies in favour of the plaintiff and against the defendant. In case the interim order is not issued the plaintiff will suffer irreparable loss and injury.

37. Therefore, till the disposal of the suit the defendant is restrained from using the mark/name "Ozone" in relation to the services of Fitness Centre, Spa, Health Club and Gymnastic except the services of swimming pool provided by the defendant under the name "Ozone". The application of the plaintiff is disposed of accordingly.

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38. The parties shall appear before the Joint Registrar on 8th March, 2009.