



2025:DHC:2987-DB



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

+ **FAO (COMM) 100/2025**

**KHILENDER GUPTA TRADING AS M/S BOBBY  
ENTERPRISES**

.....Appellant

Through: Mr. Ankit Jain, Sr. Adv. with  
Mr. Shantnu Aggarwal and Ms. Sakshi  
Garg, Advs.

versus

**M/S HIND FOOD PRODUCT & ORS.** .....Respondents

Through: Ms. Swathi Sukumar, Sr. Adv.  
with Ms. Prakriti Varshney and Mr.  
Prashant, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**HON'BLE MR. JUSTICE AJAY DIGPAUL**

**JUDGMENT (ORAL)**

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**25.04.2025**

**C.HARI SHANKAR, J.**

1. Khilender Gupta, trading in the name and style of M/s Bobby Enterprises, assails, in this appeal, order dated 7 April 2025 passed by the learned District Judge (Commercial)<sup>1</sup>, in applications filed by the appellant under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the Code of Civil Procedure, 1908<sup>2</sup>, in CS (Comm) 26/2025<sup>3</sup>.

2. CS (Comm) 26/2025 was instituted by Khilender Gupta before

<sup>1</sup> "the learned Commercial Court", hereinafter

<sup>2</sup> "CPC", hereinafter

<sup>3</sup> **Khilender Gupta v Hind Food Product**



2025:DHC:2987-DB



the learned Commercial Court under Sections 51 and 55 of the Copyright Act, 1957 read with Section 134 of the Trademarks Act, 1999. The appellant claimed to be the registered owner of the trademark BOOM BOOM and also that the trade dress/label/packaging under which the appellant sold its products constituted an “artistic work” within the meaning of Section 2 (c) of the Copyright Act. The appellant alleged that the respondent Hind Food Product was selling Aampapad under the marks DHOOM WOOM and DHOOM BOOM on its packing pouch/material along with its other mark STAR MOON. The said acts of the respondents, it was alleged, tantamounted to infringement of the appellant’s registered trademark and copyright as well as an attempt to pass-off its products as the products of the appellant. The appellant, therefore, sought, in its suit, a decree of permanent injunction, restraining the respondents from continuing the alleged infringing activities as well as costs and damages.

**3.** In the said suit, the appellant also filed applications under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC. By the application under Order XXXIX Rules 1 and 2 of the CPC, the appellant sought an interlocutory injunction restraining the respondents from using the impugned mark and trade dress either directly or indirectly, on its products or in any other manner. The application under Order XXVI Rule 9 of the CPC sought the appointment of a Local Commissioner to visit the premises of the respondent and seize and inventorize the allegedly infringing goods.



2025:DHC:2987-DB



4. One Rakesh Kumar, claiming to trade as M/s Sai Birbal Das Foods, had instituted a separate suit against the appellant, being CS (Comm) 498/2020, in which he claimed ownership of the trademark BOOM BOOM, asserted by the appellant in CS (Comm) 26/2025. In the said suit, Rakesh Kumar sought interim injunctive reliefs, by way of an application under Order XXXIX Rules 1 and 2 of the CPC. The application was dismissed by the Court *vide* order dated 14 October 2023. That order was challenged by Rakesh Kumar before this Court by way of FAO (Comm) 226/2023, which is presently pending.

5. The afore-noted Rakesh Kumar also filed an application in CS (Comm) 26/2025, in which the impugned order has come to be passed, under Order I Rule 8A of the CPC, seeking to intervene in the proceedings. For the said reason, as also because of the cognate proceedings instituted by the Rakesh Kumar against the appellant by way of CS (Comm) 498/2020, the learned Commercial Court, *vide* order dated 17 March 2025, issued notice to Rakesh Kumar. The said order was challenged by the appellant before this Court by way of CM(M)-IPD 8/2025<sup>4</sup>, which was disposed of, by a learned Single Judge of this Court by order dated 25 March 2025, with the clear finding that there was no occasion for the learned Commercial Court to issue notice to Rakesh Kumar, who was a third party and against whom no relief have been sought in the plaint. The learned Single Judge also noticed that the suit had been listed on six dates before the learned Commercial Court and no effective orders had been passed on the applications filed by the appellant under Order XXXIX Rules 1

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<sup>4</sup> **Khilender Gupta v Hind Food Product & Ors.**



and 2 and Order XXVI Rule 9 of the CPC. In these circumstances, the learned Single Judge directed the learned Commercial Court to consider and pass an order on the applications pending before it under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC. Paras 14 to 17 of the judgment of the learned Single Judge in CM(M)-IPD 8/2025 may be reproduced thus:

“14. I am in agreement with the submissions of the petitioner that there was no occasion for the Commercial Court to issue a court notice to a third party i.e. Mr. Rakesh Kumar, at this stage. In the suit before the Commercial Court, admittedly, no cause of action has been pleaded against Mr. Rakesh Kumar, nor has any relief been claimed against him by the petitioner.

15. The cause of action for filing the present suit was only against the respondents, who are the defendants in the suit and who are allegedly infringing the registered trademark of the petitioner.

16. In view of the above, the impugned order is unsustainable and is set aside.

17. Considerable time has elapsed since the present suit along with applications for seeking ex-parte ad interim injunction and appointment of a Local Commissioner were filed, in which urgent reliefs are sought. Accordingly, the Commercial Court shall consider and pass an order in the aforesaid two applications filed on behalf of the petitioner/plaintiff on the next date of hearing.”

6. The learned Commercial Court, however, has, in a somewhat peculiar fashion, declined to consider the applications of the appellant under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC even for grant of *ex parte* relief, once again on the ground that an application under Order I Rule 8A of the CPC, filed by Rakesh Kumar, was pending. The pendency of the said application, somewhat strangely, has been cited as a ground to hold that no case for grant of *ex parte ad interim* injunction in favour of the appellant, was made out



at that stage. Para 12 of the impugned order, which contains the entirety of the decision of the learned Commercial Court, reads thus:

“12. Since the ownership of the registered trade-mark and copy rights, as alleged by the plaintiff in the present suit, and the aforesaid miscellaneous application, is under challenge by the intervenor Sh.Rakesh Kumar, and the intervenor has already moved an application under Section 151 r/w Order I Rule 8A CPC, and the same is pending disposal before this court, this court is of the considered opinion that no case for grant of ex parte at-interim injunction, in favour of the plaintiff is made out, at this stage. Therefore, the request of the Ld. Counsel for the plaintiff for grant of ‘exparte’ ad-interim injunction and for appointment of local commissioner, at this stage, is hereby declined.”

**7.** Aggrieved by the said order, the appellant Khilender Gupta has approached this Court by means of the present appeal.

**8.** We have heard Mr. Ankit Jain, learned Senior Counsel for the appellant and Ms. Swathi Sukumar, learned Senior Counsel for Rakesh Kumar.

**9.** We may note that the respondent Hind Food Products never entered appearance.

**10.** The respondent has not appeared before this Court either. However, Ms. Swathi Sukumar, learned Senior Counsel appears on behalf of Rakesh Kumar, though Rakesh Kumar is not a formal party in this appeal. Nonetheless, we have heard her as well.

**11.** In our considered opinion, the learned Commercial Court could not have declined to consider the appellant’s applications under Order



XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC on merits, insofar as the prayer for *ex parte ad interim* relief was concerned, merely because an intervention application by Rakesh Kumar was pending. There is no order by any court, holding that Rakesh Kumar was the proprietor of the trade mark BOOM BOOM, asserted by the appellant in the appeal. Even in CS (Comm) 498/2020, instituted by Rakesh Kumar against the appellant, no interim injunction was obtained by Rakesh Kumar, against which Rakesh Kumar is presently in appeal before this Court.

**12.** Besides, once this Court in its order dated 25 March 2025 in CM(M)-IPD 8/2025, critically noted the fact that the applications of the appellant under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC had been pending over a considerable period of time and, therefore, directed the learned Commercial Court to pass an order on the applications, qua the prayer for *ex parte ad interim* relief, without waiting for any appearance by Rakesh Kumar, the learned Commercial Court was duty bound to pass an order on the applications. The impugned order, though, it purports to decline the prayer for *ex parte ad interim* relief, is completely unsatisfactory, as it does not consider the prayer on merits.

**13.** That said, it is also a fact that a trademark can be asserted by its registered proprietor or by a person to whom the mark has been lawfully assigned. The ownership of the trademark BOOM BOOM cannot, therefore, be regarded as an irrelevant consideration, while examining the appellant's applications under Order XXXIX Rules 1



and 2 and Order XXVI Rule 9 of the CPC. We cannot, therefore, foreclose the learned Commercial Court from examining the entitlement of the appellant to assert proprietary rights over the asserted trademark BOOM BOOM, while examining its applications Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC.

**14.** We are, however, clear in our mind that the learned Commercial Court could not have declined to grant the prayer for *ex parte ad interim* relief, in terms of the prayers contained in the applications filed by the appellant under Order XXXIX Rules 1 and 2 and Order XXVI Rule 9 of the CPC, merely because an intervention application by Rakesh Kumar was pending.

**15.** For the aforesaid reasons, we set aside the impugned order and remand the applications of the appellant under Order XXXIX Rules 1 and 2 of the CPC and under Order XXVI Rule 9 of the CPC for *de novo* decision by the learned Commercial Court, on the prayer for *ex parte ad interim* relief. We, however, clarify that the decision taken would be without prejudice to the rights of Rakesh Kumar, who has moved an application under Order I Rule 8A of the CPC before the learned Commercial Court. Needless to say, Rakesh Kumar would be entitled to press the said application and, if it is pressed, the learned Commercial Court would take a view thereon.

**16.** We may note, incidentally, that an aspect of the maintainability of this appeal was raised but learned Counsel for the parties are *ad idem* that, in view of the order passed today no decision needs to be



2025:DHC:2987-DB



returned by the Court on that aspect. We leave that aspect open for a decision in an appropriate case.

17. The present appeal stands disposed of accordingly.

**C.HARI SHANKAR, J.**

**AJAY DIGPAUL, J.**

**APRIL 25, 2025/aky**

*Click here to check corrigendum, if any*