

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORIGINAL SIDE CIVIL JURISDICTION****NOTICE OF MOTION (L) NO. 1167 OF 2018****IN****SUIT (L) NO. 656 OF 2018**

Puro Wellness Private Limited ... Plaintiff

Versus

The Advertising Standards Council of India ... Defendant

Dr. Birendra Saraf a/w Mr. Hiren Kamod, Mr Nishad Nadkarni and Mr Vaibhav Keni i/b Khaitan & Co., Advocates for the Plaintiff.
None for the Defendant.

CORAM : S.J. KATHAWALLA, J.**DATED : 4th MAY, 2018****P.C.:**

1. The Plaintiff, has filed the present suit against the Defendant i.e. The Advertising Standards Council of India, challenging certain decisions which have been passed by the Consumer Complaints Council (CCC) of the Defendant in respect of three television commercials, the latest decision being one that was communicated to the plaintiff on 26 April 2018. At this stage, the Plaintiff seeks ad-interim reliefs in terms of prayers (b) and (c) of the Notice of Motion.
2. It is submitted that the notice of this application along with the papers have been served upon the Defendants by hand as well as through e-mail on 3 May 2018. A notice of the listing of the matter (with the serial number on today's board) has also

been issued through an email dated 3 May 2018. These notices have been delivered and received by the Defendant. An affidavit of service dated 4 May 2018 proving service of documents by hand and through e-mail and issuance of notice has been tendered in Court and taken on record. Despite the notice, none appear today on behalf of the Defendant.

3. It is submitted that the Plaintiff was incorporated in the year 2016 and is a recognized start up under the StartUp India initiative of the Government of India and the DIPP has accredited the Plaintiff as a 'startup' under the startup India initiative after being recommended by the Science and Technology Park promoted by the department of Science and Technology, Government of India. It is further submitted that the Plaintiff is the first clean label company in India in respect of food and focusses on delivery of completely natural products which are not subjected to any synthetic or chemical processing and free from preservatives or additives or artificial ingredients.

4. The present suit relates to three television commercials which have been issued by the Plaintiff in respect of their product sold as PURO Healthy Salt, which according to the Plaintiff is an unrefined Himalayan pink rock salt i.e. an edible mineral salt known since ancient times as the Saindhava Lavana. The story boards of the original television commercials are produced at Exhibit C, D and E which have been published since about December 2017. It is submitted that the television commercials were modified in January 2018 and March 2018 and the relevant story

boards are also annexed at Exhibit H and Exhibit O respectively.

5. It is submitted that the Defendant has since December 2017 sought to entertain complaints against the Plaintiff's three television commercials and sought to pass decisions against the Plaintiff (a) without regard to the preliminary objection that the Plaintiff is not a member of the Defendant and (b) without considering the material placed on record by the Plaintiff. As per the Plaintiff, the decisions of the Defendant are passed in an arbitrary fashion and without application of mind. The Plaintiff whilst dealing with complaints filed with the Defendant, has challenged the overall manner of functioning of the Defendant including issues related to conflict of interest. It is submitted that the first three complaints were from the competitors of the Plaintiff claiming disparagement and challenging the product claims. A letter from FSSAI seeking assistance from the Defendant has been converted into two complaints and the final complaint which has led to the filing of the suit was a suo moto complaint which was then sought to be merged with an alleged complaint filed by CERC. It is submitted that the Plaintiff has consistently raised a preliminary objection with regard to the ability of the Defendant to try entertain and dispose off any complaint against the Plaintiff since it is not a member of the Defendant. It is submitted that, without prejudice to the objection, the Plaintiff has co-operated with the Defendant and given substantial responses to the Complaints.

6. I am not presently dealing with merits of the allegations in the complaints received by the Defendant from the competitors of the Plaintiff and the responses

submitted by the Plaintiff with regard to the claims of disparagement as well as product claims. This is so because I am informed that to the extent that there may be any allegations of disparagement and challenges to product claims by competitors being salt manufacturers, the same are already the subject matter of a suit instituted in the Ahmedabad City Civil Court by the Indian Salt Manufacturers Association (ISMA) which seeks to represent all salt manufacturers including the competitor who had filed complaints before the Defendant. In this regard, my attention is drawn to Exhibit Q being an ex-parte order dated 15 March 2018 obtained by ISMA from the Ahmedabad City Civil Court against the Plaintiff and Exhibit R being an order dated 26 March 2018 passed by the Gujarat High Court quashing and setting aside the ex-parte order and relegating the interim application back for being heard afresh after hearing the parties. My attention is also drawn to “The Code for Self-Regulation of Advertising content in India” of the Defendant being Exhibit V which *inter alia* states that the “*The CCC does not look into claims which are already the subject-matter of proceedings before any Court in India and the disclosure of this information to ASCI is required from the parties involved in the complaint process*”. It is submitted that therefore, prima facie, the Defendant would no longer be entitled to entertain any claim that may be made before the Defendant which overlaps with the claims made by ISMA in its suit instituted before the Ahmedabad City Civil Court. I tend to agree with this submission, especially since it was submitted before me that the plaint in the suit before the Ahmedabad City Civil Court makes a specific allegation that the television

commercial of the Plaintiff's brand PURO salt '*is also dehors to the Advertisement Code as specified by the Advertising Standard Council of India (ASCI)*' and the Plaintiff has brought the legal proceedings to the notice of the Defendant by their email dated 30 March 2018 being Exhibit S to the Plaintiff.

7. It is submitted that the Plaintiff did not wish to initially engage in any legal proceedings in respect of the complaints being entertained by the Defendant, considering it is a start up and wanted to focus on marketing. However, the Defendant seems to have thereafter initiated a suo moto complaint which was transmitted to the Plaintiff on 28 February 2018 (Exhibit N to the plaintiff) and the sequence of events that are related to this complaint seem to have triggered the filing of the present suit. It is submitted that the Plaintiff had all along raised an objection with regard to Defendant's ability to exercise jurisdiction over the Plaintiff and the said objection had not been dealt with in any of the previous complaints. The Defendant for the first time sought to respond to the objection as to jurisdiction by an email of 13 March 2018 (Exhibit N-2) and claimed jurisdiction on the basis of an MOU with FSSAI placing reliance on a facebook post by FSSAI that it had entered into an MOU with FSSAI. It is submitted that no particulars of MOU, the date of the MOU, the contents of the same or a copy thereof was provided. The Plaintiff once again strongly opposed the Defendant's claim about jurisdiction on the basis of the FSSAI MOU by its email dated 19 March 2018. Since in the meantime the proceedings in Ahmedabad City Civil Court had commenced and the Gujarat High Court had passed the order in the appeal

preferred by the Plaintiff, the Plaintiff also called upon the defendant to stop exercising jurisdiction in respect of its television commercials and claims. It is submitted that, however, the defendant has on 26 April 2018, without regard to the requests by the Plaintiff and without regard to all the material that has been placed before the defendant, once again passed a decision against the Plaintiff whereby it is seeking to prevent the Plaintiff from communicating to the public that its product is 100% natural and that it is a “clean label company”. My attention is drawn to observations made in respect of the claims and it is submitted that these are completely arbitrary and without regard to the established principles of law including those with regard to burden of proof. The communication is addressed not only to the Plaintiff but has been forwarded to the advertising channels of the Plaintiff being Zee Entertainment Enterprises Ltd and Star India Pvt Ltd and also to the endorser Mr. Anil Kapoor and compliance is sought by 14 May 2018. It is submitted that there is a possibility that the advertiser may refuse to run the television commercials of the Plaintiff in view of the communication of the Defendant.

8. It is submitted that the product which is Saindhava Lavanam or rock salt is known to have several benefits which have been placed before the Defendant from time to time and that no material to the contrary has been relied upon by the Defendant or the complainants before the Defendant. It is submitted therefore that the consumers shall remain completely unaffected in the event that the reliefs as sought are granted. It is submitted that the Defendant shall undergo no harm loss or injury

whatsoever.

9. I have heard the submissions in detail and perused the plaint and the documents produced therewith and the urgency as pleaded. I have also considered the following submissions advanced on behalf of the Plaintiff which are also made out in the plaint.

(i) The Defendant is a private body and is not a statutory body or 'State' or an instrumentality or an agency of the State within the meaning of Article 12 of the Constitution of India. The decisions made and directions issued by the Defendant to its members in respect of the television commercials and claims of the Plaintiff have the effect of adversely affecting and restricting the rights of the Plaintiff to carry out its trade, business and occupation and to that extent the directions are against law, without regard to the material on record and beyond the realm of the Defendant powers. The similar conduct of the Defendant has been assailed by other entities in the past before various courts within India.

(ii) The members of the Defendant may be bound to follow the decisions of the CCC of the Defendant. However, the Defendant being a private Company is governed by its MOA and AOA and the same is a contract enforceable only between the Defendant and its members. Considering that the Plaintiff is not a member of the Defendant, there exists no legal relationship between the Plaintiff and the Defendant and the Defendant cannot exercise its jurisdiction over the Plaintiff in any manner, whether directly or indirectly in the garb of regulating its own members. The Defendant is in a monopolistic position and since the decisions of the Defendant have the effect of a mandatory injunction on the members of the Defendant, any decisions taken by the CCC of the Defendant against the television commercials or decisions of the Plaintiff is likely to have the effect of causing substantial prejudice, harm and damage to the marketing, promotion, publicity, advertisement and sale of the Plaintiff

products inspite of the fact that the Plaintiff itself is not a member of the Defendant. The Defendant cannot in any manner obstruct the carrying on of the business by the Plaintiff or the exercise of its right to commercial speech.

(iii) This Court has passed repeated orders in respect of the decisions passed by the Defendant of the nature complained in the present case and held that the same are without jurisdiction and against the principles of natural justice and yet the Defendant has continued to pass such orders.

10. I am of the view that the Defendant ought to have stayed its hands in view of its own code of conduct and once the legal proceedings pending adjudication before the Ahmedabad City Civil Court was brought to its notice. Further, this Court has repeatedly observed that the Defendant in the garb of acting as a voluntary self regulatory Council cannot act as a statutory regulator and cannot arrogate to itself the powers of restricting/restraining or causing the restriction/restraint of any commercial advertisements belonging to a party who is not a member of the Defendant. Prima facie, I agree with the submissions made on behalf of the Plaintiff that since the Plaintiff is not a member of the Defendant, there exists no legal relationship between the Plaintiff and the Defendant and the Defendant cannot exercise its jurisdiction over the Plaintiff whether directly or indirectly in the garb of regulating its own members. The Plaintiff has made out a strong prima facie case in its favour. The inability of the Plaintiff to telecast and communicate the television commercials and continue with its claims with regard to the product of the Plaintiff in light of the Impugned Decisions is likely to cause irreparable harm, injury and damage to the Plaintiff. This is more so since the television commercials are now being

examined by the Ahmedabad City Civil Court after the ex-parte ad-interim injunction in respect thereof has been vacated by the order of the Gujarat High Court. The balance of convenience is also in favour of the Plaintiff since the grant of ad-interim reliefs as prayed shall neither affect any right of the Defendant nor cause him any loss or damage. Moreover, the Defendant has failed to remain present today, despite service. I do not believe that that the grant of ad-interim protection as prayed for today and in the manner that they are being granted today, would cause any harm loss or damage to the Defendant which would be more than the harm loss or damage that is likely to be caused to the Plaintiffs if such reliefs are not granted.

11. In the circumstances, I am of the view that it is necessary to grant protection to the Plaintiff by way of an ad-interim order and there shall accordingly be an ad-interim order till the next date of hearing in terms of prayer clauses (b) and (c) of the Notice of Motion, which are reproduced below:

"(b) That pending the hearing and final disposal of the suit, the Defendant, their board, CCC, management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner seeking to (i) implement or act upon or in furtherance of or cause the implementation or acting upon or in furtherance of the Impugned Decisions or any other decisions in respect of any advertisements and / or claims of the Plaintiff comprised on their packaging, website or advertisements of any nature of the Plaintiff (including in particular the television commercials depicted at Exhibit C, D, E, H and O to the Plaint) (ii) publish or cause to be published or communicated to the public in any manner whatsoever the Impugned Decisions or any other decisions in respect of any advertisements and / or claims of the Plaintiffs comprised on their packaging, website or

advertisements of any nature of the Plaintiff (including in particular the television commercials depicted at Exhibit C, D, E, H and O to the Plaintiff);
(c) *That pending the hearing and final disposal of the suit, the Defendant, their board, CCC, management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions be restrained by a perpetual order and injunction of this Hon'ble Court from in any manner entertaining, trying or disposing off or passing any decisions in respect of any advertisements and / or claims of the Plaintiff comprised on their packaging, website or advertisements of any nature of the Plaintiff (including in particular the television commercials depicted at Exhibit C, D, E, H and O to the Plaintiff);*

12. Considering the fact that the present ad-interim order is being passed today in the absence of the Defendant (though served) and with a view of not causing any prejudice to the parties due to the upcoming summer vacation, I am placing the matter for further ad-interim reliefs on 16 May 2018.
13. List the Notice of Motion for further ad-interim reliefs on 16 May 2018.

(S.J.KATHAWALLA, J.)