

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

% Date of decision: 14.09.2010

+ RFA(OS) No.29/2010

SHELL BRANDS INTERNATIONAL AG. & ANR. ...APPELLANTS

Through: Mr.Anil Sapra, Sr.Adv. with
Mr.Sushant Singh, Ms.Urvi
Kuthiala, Mr.Gautam Panjawani
and Mr.Prakash Arya,
Advocates

Versus

MR.PRADEEP JAIN ...RESPONDENT

Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The appellants (original plaintiffs) filed a suit against the respondent (original defendant) for permanent injunction restraining infringement of trade mark, passing off, damages, delivery up, etc. in respect of their trademark 'SHELL'. Summons were issued in the suit and notice on the

interim application for injunction under Order 39 Rules 1 and 2 of Code of Civil Procedure ('the said Code' for short) giving limited ad interim ex parte relief to the appellants. The notices in both the suit and the application were made returnable before the Joint Registrar. The respondent entered appearance and pleadings were completed both in the suit and the application. None of the parties filed any original documents for purposes of admission/denial and thus the Joint Registrar placed the suit and the applications before the Court on 12.05.2009. We may note that the respondent had also filed an application under Order 39 Rule 4 of the said Code.

2. On 12.05.2009, issues were framed in the suit and parties were directed to file their list of witnesses within fifteen days and for the appellants to file their affidavits of examination in chief within six weeks. The evidence was to be recorded before the Joint Registrar. Insofar as the interlocutory applications are concerned, at request of learned counsel for the respondent, the same were adjourned to 28.08.2009 with a direction for continuation of the interim orders.
3. The suit was listed before the Joint Registrar on 31.07.2009 when it was found that neither list of witnesses had been filed by either of the parties nor affidavits of evidence were filed by the appellants. Further time was granted and the suit was re-notified for cross-examination of the appellants'

witnesses on 18.12.2009. In the meantime, the interim applications were listed before the Court on 28.08.2009, as already fixed, but once again at the request of the learned counsel for the respondent, the same were adjourned to 12.10.2009. On 12.10.2009, none appeared for the appellants before the learned Single Judge and thus those applications were re-notified on 07.01.2010. We may note at this stage that though these orders were passed actually on the applications, inadvertently the applications numbers were not mentioned and only suit was mentioned which was already listed before the Joint Registrar. The appellants filed their affidavits by way of evidence. On 18.12.2009, the Joint Registrar was not holding the Court and thus the matter was re-notified for 22.12.2009. The counsel for the appellants on that date stated before the Joint Registrar that their witnesses had not come. The Joint Registrar placed the matter before the Court on 07.01.2010 as the date was already fixed before the learned Single Judge, albeit for hearing of the interlocutory applications. This order of the Joint Registrar appears to have been passed inadvertently ignoring the fact that what was before the Court were only the interlocutory applications and not the suit for which trial was going on and yet to be completed by the Joint Registrar. On 07.01.2010, when the interlocutory applications were listed, arguments were heard by the Court and orders reserved on the suit itself. The judgment came to be

pronounced on 01.02.2010 dismissing the suit, which order is assailed in this appeal.

4. Learned senior counsel for the appellants has drawn our attention to all these proceedings to contend that apart from the legality of the impugned order on merits, the trial in the suit was not even complete. What were actually placed before learned Single Judge were only interlocutory applications and the suit had been posted before the Court by the Joint Registrar at that stage only because of non-appearance of the witness of the appellants/plaintiffs for cross examination though affidavits of evidence of the appellant had been filed. The respondent naturally had not led its evidence. The issues framed show that onus of some of the issues was on the appellants while onus of the other issues was placed on the respondent. In the absence of cross-examination of the witness of the appellants and no evidence on behalf of the respondent, there could have been no question of discharge of onus by either of the parties for determination of the issues. We also note that there are not even findings on some of these issues in the impugned judgment though such a finding is liable to be recorded for each issue.
5. We thus find merit in the grievance made by the learned senior counsel for the appellants that the suit has been decided even without complete trial. It is not a case where the appellants' evidence has been closed on account of any

default. At least there is no order passed to that effect. The suit was erroneously placed before the Court by the Joint Registrar who was still in the process of recording of evidence and it appears that learned Single Judge also proceeded with the suit inadvertently in the absence of evidence though actually the interlocutory applications were required to be considered by him on the relevant date to either confirm or vacate the injunction. The issues could not have been decided as framed without evidence being led by the respective parties on whom onus had been put, especially as most of these issues are issues of fact.

6. At the stage of admission of the appeal, interim orders were granted on the application for stay accompanying the appeal on 26.03.2010 in the following terms:

“ CM No.5673/2010 (Stay)

Notice.

Learned counsel accepts notice on behalf of the respondent.

The learned Single Judge had passed the following injunction order in CS(OS) No.639/2008 on 8th April, 2008:-

“Accordingly, till further orders, the defendant, its constituents, offices, servants and agents etc. are restrained from using, manufacturing, marketing or exporting their products or any other goods under the trademark/trade name SHELL or any other name/mark deceptively similar to that of the plaintiffs. The defendant is also restrained from using the word SHELL as their website or domain name, till further orders.”

The injunction will continue till the disposal of the appeal.

CM stands disposed of.”

7. The aforesaid is actually the injunction which had been granted in terms of orders of the learned Single Judge on 08.04.2008 and operating since then.
8. We may note that the respondent aggrieved by the order dated 26.03.2010 passed on the interim application had preferred an SLP(C) No.21252/2010, which was dismissed on 09.08.2010 when the Supreme Court also made a request to the Division Bench to dispose of the first appeal as expeditiously as possible. In view of that order, the appeal was listed before this Court for directions on 07.09.2010, but we found that no directions were required as the appeal was already on our Regular Board as Item No.24. The appeal reached for hearing on 09.09.2010 when we heard learned counsel for the appellant, but none appeared for the respondent. The position was the same on 13.09.2010 as also today when none appeared for the respondent.
9. We are thus of the considered view that on the basis of the submissions advanced before us and the records of the case, the impugned judgment and decree is unsustainable and is liable to be set aside with a direction to remand both the suit and interim applications for consideration before the learned Single Judge. The suit is required to be decided

post trial while interim applications can be decided considering *inter alia* the pleadings on the same.

10. We thus issue the following directions:

- i) The impugned judgment and decree dated 01.02.2010 is set aside.
- ii) IA Nos.4302/2008 (of the plaintiffs under Order 39 Rules 1 and 2 of CPC) and 14314/2008 (of the defendant under Order 39 Rule 4 of CPC) be placed before the learned Single Judge on 08.11.2010 for directions.
- iii) CS(OS) No.639/2008 be placed before the Joint Registrar for directions on 27.09.2010 to fix a date for cross examination of the witnesses of the appellants whereafter the respondent can file their affidavits of evidence and the appellants will get the right to cross examine those witnesses. The suit will be placed before the Court after conclusion of trial.
- iv) Since the impugned judgment and decree have been set aside and the respondent has chosen not to appear, notice would have to be issued by the learned Single Judge and the Joint Registrar, to the respondent, to ensure his presence.
- v) Till the interim applications are finally decided by the learned Single Judge, the order passed in the suit on 08.04.2008, which was continued by the Division Bench of this Court vide order dated 26.03.2010, would continue to enure for the benefit of the appellants.

11. The appeal is accordingly allowed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

SEPTEMBER 14, 2010
dm

VALMIKI J. MEHTA, J.