

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

+ **CS(OS) NO.13/2005**

Date of Decision : 08.10.2010

AMRIT BANASPATI CO. LTD. **Plaintiff**
Through: Mr.Dhruv Bhagat, Advocate

Versus

M/S GOINDWAL SAHIB VANASPATI MILLS
..... **Defendant**
Through: Mr. Shailen Bhatia,
Advocate.

**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

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

V.K. SHALI, J. (oral)

IA No.15053/2008(u/O VII Rule 10 CPC)

1. This order shall dispose of the suit as well as an application of the plaintiff under Oder 7 Rule 10 CPC for return of the plaint so as to enable the plaintiff to file the same in appropriate Court and also extending the interim order dated 7.1.2005 so as to enable the plaintiff to draw the benefit of the restraint order.
2. Briefly stated the facts of the case are that the plaintiff filed a suit for infringement of trademark, Copyright and passing off

against the defendant. It was alleged that the plaintiff was a company incorporated in the year 1940 and was manufacturing for selling Vegetable oils, milk and milk products. It is alleged that the business of Vanaspati and dairy milk was being conducted in poly packs with the trademark GAGAN.

3. The registration in respect of the aforesaid edible items were obtained in 1974 and 1992 pertaining to Vanaspati oil and various types of milk and milk products respectively. It is alleged that the defendant is using the mark GANGA which is deceptively similar to that of the plaintiff apart from adopting somewhat similar color scheme with different shades.
4. On the basis of these allegations, the matter came up for the first time on 7.1.2005 when this Court had issued summons to the defendant and also passed an ex parte ad interim injunction against the defendant restraining them from using the mark GANGA in any manner whatsoever in respect of its products of Vanaspati etc. This ex parte ad interim injunction order has continued till date.
5. The defendant had put in appearance and filed its written statement contesting the claim of the plaintiff.
6. On 21.2.2006, issues were framed and the plaintiff was given two weeks' time to file the list of witnesses and four weeks' time for the purpose of filing the affidavits by way of evidence. More than five years have elapsed and not even a single affidavit has been filed during all these years. On the contrary, the plaintiff continued to file applications, one after

other, which showed that it wanted to delay the disposal of the main suit itself.

7. On 12.11.2007, the plaintiff's application for amendment was allowed. Thereafter, no affidavit by way of evidence has been filed and the present application under Order 7 Rule 10 CPC has now been filed in the year 2008 contending that this Court does not have the jurisdiction on account of arrangement of various businesses of the sister concern under which the branch office of the erstwhile plaintiff company has been closed in Delhi.
8. An application under Order 7 Rule 10 CPC was filed on 24.11.2008 wherein it was stated that Amrit Corporation Ltd. and its sister concern have undergone a scheme of arrangement under which the name of the plaintiff company has been firstly changed to M/s Amrit Corporation Ltd. and fresh certificate of incorporation dated 26.6.2007 was issued by the Registrar of Companies. Photocopy of the said certificate is purported to have been attached along with the application. It has also been stated that M/s Amrit Corporation Ltd. which has taken over the trademark GAGAN in respect of edible oils and against Vanaspati has stopped its office in Delhi and therefore, the only existing office of the Corporation is either at Ghaziabad or registered office at Chandigarh Road, Rajpura-140401. It is alleged that since the present suit for infringement was filed by invoking Section 134(2) of the Trademarks Act and Section 62 (2) of the Copy Right Act, 1957 on account of the plaintiff having been

carrying on business in Delhi which has ceased to exist, therefore, the plaintiff be permitted to withdraw this suit with liberty to file a fresh suit in Patiala where the registered office is situated. It was also urged that in the meantime the interim order dated 7.01.2005 be continued to ensure the benefit of the interim order to the plaintiff which he has enjoyed for almost 5½ years.

9. The defendant has filed its reply to the application and contested the claim of the plaintiff for return of plaint so as to enable it to file the same at Patiala. It has been contended by the learned counsel for the defendant that this is only a ploy to overreach the Court. The plaintiff after having been given undue indulgence of filing the affidavits by way of evidence which he has failed to avail despite a lapse of 5½ years cannot contend that there has been scheme of arrangement between the plaintiff company and its sister concern and consequently stoppage of its branch office in Delhi, therefore, this Court does not have the jurisdiction. It has been contended by the learned counsel for the defendant that the rights of the parties in a pending suit is decided on the basis of the date of institution of the suit and not on the basis of subsequent developments which has taken place during the pendency of the suit. The learned counsel has also relied upon the case titled **Harshad Chiman Lal Modi Vs. D.L.F Universal Ltd. & Anr.** AIR 2006 SC 646.
10. I have heard the learned counsel for the parties and gone through the record.

11. Before the application of the plaintiff under Order 7 Rule 10 CPC is dealt with, the question which arises for consideration is whether the said application of the plaintiff is required to be considered at all. There is no dispute about the fact that the plaintiff had come to Court in the month of January, 2005 making certain allegations with regard to the infringement of its trademark GAGAN in respect of Vanaspati articles of the plaintiff by alleging that the defendant was using the mark GANGA which was somewhat similar to the mark of the plaintiff and therefore, violating the statutory right of the plaintiff company. The allegations of violation of statutory right and the Copyright in respect of design, get up, color scheme, etc. were also made. Therefore, a definite case had been set up by the plaintiff when it had approached the Court and the Court had issued an ex parte ad interim order restraining the defendant from using the word GANGA in respect of edible oils/vanaspati unless and until the interim order is vacated or modified. The benefit of the said interim order though extended originally only for 15 days but thereafter it has been continued till date.
12. In the meantime, it is not in dispute that on 21.2.2006, issues were framed and a definite time was given to the plaintiff to file the list of witnesses within two weeks and affidavits by way of evidence within four weeks. On 20.4.2006, it was observed that although the list of evidence was filed but no affidavit was filed. Thereafter, both the sides continued to file the application for various

peripheral things. The plaintiff was derelict in not producing any evidence or making any effort in this regard.

13. The plaintiff despite expiry of nearly 5½ years has curiously chosen not to place even a single affidavit of its witness on record. Order 17 Rule 3 CPC reads as under:-

“3. Court may proceed notwithstanding either party fails to produce evidence, etc.--

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, [the Court may, notwithstanding such default,--

(a) if the parties are present, proceed to decide the suit forthwith, or

(b) if the parties are, or any of them is, absent, proceed under Rule 2.”

14. A perusal of the aforesaid order would clearly show that on a date when the case is fixed if a party does not adduce any evidence, the Court has no other option but to close the evidence and dismiss the suit on account of lack of evidence in support of the issues in respect of which onus is on the plaintiff.
15. In the instant case also, the application of the plaintiff under Order 7 Rule 10 CPC which has been filed in the month of November, 2008 is only a ploy to defer the passing of the order under Order 17 Rule 3 CPC.
16. The plaintiff was aware of the fact that issues were framed in the year 2006 and a definite time schedule had been fixed for

the purpose of filling evidence and it could not be scuttled or permitted to be scuttled by him by filing the present application and contending that since there has been a scheme of rearrangement between the plaintiff and the other sister concern and therefore, in the light of these subsequent developments, the office of the company which it had got under that said scheme the trademark GAGAN cannot maintain the suit. The rights and liabilities of the parties in respect of pending suit have to be decided on the basis of pre-existing rights which were available to them at the time of filing of the suit although the subsequent developments during the course of evidence, if produced may have some bearing with regard to the same. It is very unreasonable that a suit has been permitted to linger on for 5½ years after framing of issues and without producing any evidence, if it was permitted to be withdrawn on the ground that the Court has ceased to have jurisdiction.

17. Another unreasonable prayer is made in the application that while returning the plaint, the benefit of the interim order may be extended so that the same enure to the benefit of the plaintiff till the time a fresh suit is filed. The practice of grant of interim order or extending the same in cases where either the plaint is rejected on account of lack of jurisdiction or where the plaint is returned so as to enable the parties to approach the appropriate forum has been deprecated by Courts of record.

18. In the instant case, although the plaint has been sought to be rejected, which request is not been granted by this Court but the prayers which have been made by the plaintiff clearly show that the entire exercise on the part of the plaintiff is actuated with a view to subject the defendant to unreasonable harassment of taking him to another forum so as to settle scores with him.
19. Under these circumstances, I feel that not only the application of the plaintiff under Order 7 Rule 10 CPC deserves to be rejected but the evidence of the plaintiff is also closed under Order 17 Rule 3 CPC. In my opinion, all the requisite conditions of Order 17 Rule 3 CPC are satisfied that is despite time having been granted, no evidence has been produced or filed by the plaintiff till date, the suit must fail, accordingly, the same is dismissed.
20. File be consigned to the Record Room.

V.K. SHALI, J.

OCTOBER 08, 2010
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