

HIGH COURT OF DELHI AT NEW DELHI

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F.A.O. No.36/2013

Decided on : 8th April, 2015

SAGAR RATNA RESTAURANTS PVT. LTD. Appellant

**Through: Mr. Sushant Singh & Mr. Jagjit Singh,
Advocates.**

Versus

SRI BIHARI JI'S AND ORS Respondents

**Through: Mr. Sudhir Chandra Agarwala, Senior
Advocate with Mr. Yogender Nath
Bhardwaj, Advocate.**

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

C.M. No.13114/2013 (for recall of order dated 28.1.2013)

1. By virtue of the present application, the appellant is seeking recall of the order dated 28.1.2013 vide which the appeal of the appellant against the order dated 15.9.2012 was permitted to be withdrawn with liberty to file the same at an appropriate stage. Recall is sought on the ground that by virtue of the order dated 15.9.2012, the application of the appellant/plaintiff under Order 39 Rule 1 & 2 CPC for ad interim

injunction was partly allowed **at this stage** (at the stage of disposal of the application) restraining the respondents from using the trade name ‘Sagar Ratna’. So far as the other ad interim relief, which were claimed in the application are concerned, they were not granted.

2. Before dealing with the rival contentions of the parties, it may be pertinent to give briefly the background in which the present application has been filed. The appellant/plaintiff, M/s. Sagar Ratna Restaurants Private Limited filed a suit claiming itself to be a registered company having entered into a franchisee agreement and a supplementary agreement with respondent No.1, M/s Sri Bihariji’s and others allowing them to open a South Indian restaurant in the name of ‘Sagar Ratna’ at Vrindavan. It was alleged that vide e-mail dated 12.7.2013, the said agreement was illegally terminated by respondent No.1 which was in derogation of the terms and conditions and they continued to misuse the intellectual property of the appellant/plaintiff by using the trade names ‘Sagar Ratnam’ and ‘Ratnam’. Further, the respondent/defendant had taken steps to get the said marks registered. It was also alleged that so far as respondent Nos.2 and 3 were concerned, they were the employees of

the plaintiff and they were in the knowledge of the aforesaid trade names, who had taken undue advantage of their knowledge in the capacity of employees of the appellant/plaintiff and thereafter tendered resignation from the services of the appellant/plaintiff on 16.4.2012 and 14.4.2012 respectively and joined hands with respondent No.1, who had usurped publically the aforesaid two trade names 'Sagar Ratnam' and 'Ratnam' and started business of selling South Indian preparations. It was also alleged that search from the Registry of the trademark has revealed that respondent No.1 had applied for registration of the aforesaid trade names as trade mark. Apart from the main relief of permanent injunction against the respondents, the appellant/plaintiff had also sought an ex parte ad interim injunction in the suit by filing an application under Order 39 Rule 1 and 2 CPC.

3. The respondents were served. On the very first date, the appellant/plaintiff is purported to have insisted on addressing arguments on the grant of ad interim injunction without permitting the respondent/defendants to file their reply in writing which lead to the passing of an order dated 15.9.2012. So far as the respondent/defendant

is concerned, though it admitted the trade name 'Sagar Ratna' being owned by the appellant but it denied that the said name is deceptively similar to 'Sagar Ratnam' or 'Ratnam' which was claimed by them to be their own names. As regards the condition of a restraint of not carrying any business of selling South Indian preparations in terms of the franchisee agreement with the appellant, the respondent took the plea that the said agreement having been terminated and, therefore, the condition does not foreclose their right to sell the preparation and in any case any condition which restraint them from selling any South Indian dishes was void *ab initio* as it was in violation of Section 27 of the Indian Contract Act, 1872. They also took the plea that the appellant/plaintiff had not filed Schedule I, II and III of the agreement and thus, they had tried to give selective information about the franchisee agreement between the parties.

4. The learned trial court, after hearing the learned counsel for the parties and on the basis of the admission purported to have been made by respondent No.1 granted an *ex parte* ad interim injunction in favour of the appellant/plaintiff and against the respondent from using the trade name

‘Sagar Ratna’ **at this stage**. The court had consciously used the word **at this stage** at the time of disposal of the application perhaps on the ground that the written reply of the respondents to the application or the written statement was not on record.

5. The appellant feeling aggrieved by the aforesaid grant of partial relief had preferred an appeal which came up before this court on 28.1.2013.

6. After hearing the learned counsel for the appellant, the court was of the view that as the application under Order 39 Rule 1 and 2 has been not finally disposed of by the impugned order, therefore, the appeal at that point of time may not be an appropriate remedy and accordingly, the learned counsel representing the appellant/plaintiff before this court sought the permission to withdraw the appeal with liberty to approach at an appropriate stage. Meaning thereby, as and when their application under Order 39 Rule 1 and 2 CPC is decided on merits by the trial court, they would be entitled to prefer an appeal against the said order.

7. Later on they have filed the present application in the month of August, 2013 seeking recall of this order on the ground that the trial court

while granting the relief partially to the appellant and rejecting the other part of the relief has already expressed its view on the merits of the matter and, therefore, even though the reply on behalf of the respondent is filed, it will only result in an empty formality to go back to the same court for the decision on the application under Order 39 Rule 1 and 2 CPC on merits and, therefore, they would like this court to only consider the appeal on merits and decide the appeal. This, in essence, is the background and contention of the learned counsel for the appellant.

8. Mr. Chandra, the learned senior counsel for the respondent/defendant has contested the maintainability of the application seeking recall of the order dated 28.1.2013 primarily on three grounds.

- (i) Firstly, it has been contended by the learned senior counsel that the order dated 28.1.2013 clearly was an order invited by the appellant themselves with liberty to file an appeal at an appropriate stage. Filing of an appeal at an appropriate stage would mean that they had to file an appeal against the order dated 15.9.2012 within the period of limitation and since the period of limitation to file the appeal itself has expired, they innovated this novel method to seek

recall of the order to overcome the question of limitation. In any case, it has been contended that the situation before the court as was available on 28.1.2013 and as on today has not resulted in any change of circumstances which may warrant the entertaining of the present application. As a matter of fact, it has been contended by him that by filing the aforesaid application, the appellant/plaintiff is not only in gross abuse of the processes of law but is also trying to overreach the court inasmuch as otherwise the period of limitation would come in the way of the appellants and, therefore, the application deserves to be dismissed on this third ground itself.

- (ii) The second submission made by the learned senior counsel Mr. Chandra is that the application filed by the appellant seeking recall of that order dated 28.1.2013 cannot be entertained because the court has become *functus officio* and once the court becomes *functus officio*, no application can be entertained for the purpose of revival of the appeal itself. The learned senior counsel in support of his submission has placed reliance on *Ajay Mohan and Others*

vs. *H.N. Rai and Others*; 2008 (2) SCC 507 para 24 which reads as under:-

“24. The order of the City Civil Court dated 13.10.2006 may be bad but then it was required to be set aside by the court of appeal. An appeal had been preferred by the appellants there against but the same had been withdrawn. The said order dated 13.10.2006, therefore, attained finality. The High Court, while allowing the appellant to withdraw the appeal, no doubt, passed an order of status quo for a period of two weeks in terms of its order dated 23.11.2006 but no reason therefor had been assigned. It ex facie had no jurisdiction to pass such an interim order. Once the appeal was permitted to be withdrawn, the Court became functus officio. It did not hear the parties on merit. It had not assigned any reason in support thereof. Ordinarily, a court, while allowing a party to withdraw an appeal, could not have granted a further relief.”

- (iii) The third submission made by the learned senior counsel Mr. Chandra is that the application under Section 151 CPC as has been filed by the appellant/plaintiff seeking recall of the order dated 28.1.2013 is concerned, that does not warrant to be entertained for the simple reason that the exercise of inherent powers sought to be invoked by the appellant is actuated by *malafides*. For this purpose, the learned senior counsel has referred to the conduct of the appellant. It has been contended by Mr. Chandra when the

respondent/defendant appeared for the first time, they sought time to file their written statement and reply to the application which was opposed by the appellant tooth and nail and thereby the appellant/plaintiff himself only invited the order by addressing arguments, without their being any formal reply on the part of the respondent on record. It has been further contended when the court expressed its view on certain points and reserved the orders on 4.9.2012, which were not to the liking of the appellant/plaintiff, he filed an application in the court of district judge on 12.9.2013 for transfer of the suit from the court of the trial judge knowingly fully well that the trial judge has reserved the orders on the application. This application of the appellant for transfer was dismissed by the learned district judge for the reason that there was no ground for transfer made out by the appellant and more particularly when the order had been reserved by the learned trial judge. It has been further contended that on 15.9.2012, the trial court passed the order against the appellant and they instead of waiting for the adjudication of the application on merits in the light of the reply and the written statement filed by the appellant chose to rush to the

High Court by filing the appeal which was also withdrawn by them and now they want to wriggle out of that withdrawal on a spacious ground that the learned trial judge has already expressed the view on certain aspects on the merits of the matter and therefore, they may be permitted to address the arguments on the merits of the appeal. This clearly shows that the appellants are doing forum shopping and a flip flop only in order to get the complete relief as was sought by them in the application. It has been contended that the tendencies on the part of such like litigants deserve to be curbed and rejected with a heavy hand.

9. It has also been contended by the learned senior counsel after the withdrawal of the appeal, the appellant/plaintiff has voluntarily consented to the framing of the issues and gone into arena of adducing evidence and thus tacitly given up the challenge to the impugned order. Further after the filing of the appeal, the appellant has got the record summoned to the high court and the said record remained here for a period of almost two years as a result of which, the trial court could not proceed.

10. Mr. Sushant Singh, the learned counsel for the appellant has contested the submission of Mr. Chandra on all the three aspects. It has been contended by Mr. Singh that there is no abuse of the process of law. All that the appellant prays is that their appeal may be heard by this court on merits or alternatively the matter may be remanded to the trial court for the purpose of consideration of their remaining prayers in the light of the stand having been taken by the respondents.

11. So far as the non-maintainability of the application filed by the appellant on the ground of court having become *functus officio* is concerned, it is contended by Mr. Singh that this question of having become *functus officio* would not apply to an application where modification, recall, etc. of an order is sought or where an order which has been obtained by fraud or which is passed under a mistake by the court itself or under a mistaken belief on the statement having been made by the counsel or a party in such a case the court having become *functus officio* will not be a bar from entertaining an application. In this regard, the learned counsel for the appellant has relied upon the judgment of the Apex Court in *Indian Bank vs Satyam Fibres (India) Pvt. Ltd.*; (1996) 5

SCC 550 wherein it has been specifically observed that where a court is mislead by a party or the court itself commits a mistake which prejudices a party, the court has an inherent power to recall its own order. It has been contended that in the instant case, the appellant had withdrawn the appeal under a mistaken belief that the appeal can be argued before the trial judge on the merits and, therefore, the same was withdrawn.

12. With regard to the third submission made by the learned senior counsel that the application under Section 151 CPC is not maintainable on the ground of the fact that the appellant has not come with clean hands. It is contended by Mr. Singh that no doubt an application for transfer was filed by the appellant before the learned district judge which stood rejected but there was no attempt made by the appellant either to overreach the court or to do forum shopping or to do anything which may be actuated with *mala fide* reasons. It has been contended that the appellant was ill advised by the counsel which resulted in filing of an application for transfer which of course stood rejected by the district judge on the judicial side and mere filing of an application which has ultimately been rejected this should not hold against the appellant and

thereby causing serious prejudice to him to get justice. It has been denied that there has been any *mala fide* attributed to the appellant in filing the application. It has also been disputed that he has tacitly given the challenge to the impugned order by permitting the court to frame issues. So far as the summoning of the record by the high court is concerned, it has been contended that the respondent could have got record sent back. It was disputed that the appellant has got the record summoned.

13. Accordingly, it is prayed that the application of the appellant may be allowed.

14. I have carefully considered the submissions made by the learned counsel for the appellant as well as the respondent. There is no dispute about the fact that the order of 28.1.2013 was passed on the statement made by the learned counsel for the appellant and the statement of the learned counsel was at this stage actuated by the words which were used by the learned trial judge in the operative portion of the order where a restraint order was given in favour of the appellant and against the respondent from prohibiting them from using the word ‘Sagar Ratna’ at this stage. Meaning thereby that at that point of time when the reply and

the written statement of the respondent was not available on record, the court on the basis of the oral submissions of the respondent considered it fit to grant only partial relief and get the application pending to be decided on merits after the reply and the written statement was filed. That is the reason why the court permitted withdrawal of the appeal with liberty to the appellant to file an appeal at an appropriate stage meaning the right to file an appeal was reserved to the appellants after getting their application adjudicated on merits.

15. The appellant has not taken any steps before the trial court by filing an application and inviting the attention of the trial court to the language used in the impugned judgment dated 15.9.2012 that the application has still remained pending and therefore, that application be decided. The contention of the learned senior counsel for the respondent that the appellant has appeared thereafter before the court and permitted the court to frame issues and enter into the arena of evidence does not preclude the court or for that matter, the appellant to request the court from deciding the application. Therefore, in my considered opinion, the proper course of remedy open to the appellant was to go back to the trial court and file

an application before the said court for deciding the application on merits. The appellant instead of doing so, has filed the present application before this court seeking recall of the order dated 28.1.2013 on the ground that the appeal itself may be heard on merits because the trial court has already expressed its opinion on the merits of the case in regard to certain aspects and therefore, it may be an empty formality. This submission on the part of the learned counsel for the appellant does not have any merit as that observation which may have been passed by the trial court while granting them an injunction partially is only to be treated as tentative in nature and that too in the absence of any formal reply on behalf of the respondent and it cannot bind the court while deciding the application on merits. Therefore, I feel that this ground will not be a valid ground for recall of the order dated 28.1.2013.

16. So far as the submission made by the learned senior counsel Mr. Chandra with regard to this court having become *functus officio* and consequently the application filed by the appellant as being not maintainable is concerned, that also, in my view, does not hold any water. The reason for this is that what is sought to be recalled is only an order

which has permitted the appellant to withdraw the appeal with liberty to file the same at an appropriate stage. The learned counsel for the appellant has relied upon the judgment of the Apex Court which has taken note of the fact that no act of the court will prejudice any party and if any order has been passed by the court on the statement purported to have been made by the counsel under a mistaken belief or an order has been obtained by a fraud or for that matter, the review of an order is sought that can never preclude the entertaining of an application on the ground that the court has become *functus officio*. If such a proposition is held, it is practical that the same court will never be able to correct its own mistake either under review, recall, modification, clarification and it will only result in opening of the floodgate of appeals being filed for something which is inconsequential and deserves to be corrected by the court which has passed the order. Therefore, this submission of the learned senior counsel, in my view, does not preclude the court from entertaining the application and in any case what is the relief which is sought by the appellant. The appellant is only seeking recall of the order and adjudication of the appeal on merits. The appellant cannot be made to suffer for an order which will not be the subject matter of judicial

scrutiny by the appellate court. In case, the argument of the appellant is rejected and the arguments of the learned counsel for the respondent is accepted then practically it would mean that though the law envisages that there must be an appeal permissible against the rejection or allowing of an application under Order 39 Rule 1 and 2 CPC by at least one speaking order of the court but that right in the instant case would stand denied to the appellant. The reason for this is that the trial court has not passed the order on merits. The appellate court has divested itself of the very consideration of the appeal on the ground that the party will go back to the trial court and have the matter adjudicated where the party has never gone and it has sought recall of the order to be considered on merits which the court will not entertain by rejecting their application meaning thereby effectively the first and the last judicial review by an appellate court would be denied by the High Court. This is not the purport of law. *Actus Curiae Neminem Gravabit*, that is, an act of court shall prejudice no one. Therefore, I feel on this reasoning also, the submission of the learned counsel for the respondent that the court has become *functus officio* does not have any merit.

17. The third submission of the learned counsel Mr. Chandra that the court should not entertain an application under Section 151 CPC and exercise inherent powers because the conduct of the appellant has been such that he has not come to the court with clean hands or that it is actuated by *mala fides* or that he has tried to do forum shopping also does not convince the court to secure the larger interest of justice. The reason for this is that no doubt the appellant may have acted foolishly on the advice of the counsel by filing an application for transfer notwithstanding the fact that the order was reserved but he has already made his waterloo by obtaining an order of rejection. It was also inappropriate on the part of the appellant to have necessitated in passing the order *ex parte* without the court being permitted to grant a reasonable amount of time to the respondent to file their written statement and the reply to the application as heavens would not have fallen. But merely because of these submissions on the part of the appellant, the judgment of the court should not get clouded and deprive a party in obtaining justice and decision on merits of his application. Therefore, this ground also does not convince the court. Accordingly, the application of the appellant is being entertained by the present court.

18. Now, the only question which arises for consideration is as whether the order dated 28.1.2013 should be permitted to be withdrawn and decide the appeal on merits or whether this court in exercise of its inherent power should direct the trial court to decide the application under Order 39 Rule 1 and 2 CPC on merits taking into consideration the written statement and the reply of the respondent without being in any manner influenced by the observations passed by this court and the observations which it may have passed earlier in the order dated 15.9.2012. Since the trial court has specifically and consciously used the word **at this stage** meaning thereby that the application was being considered in the absence of any formal written statement and reply on record, therefore, the stay application deserves to be decided on merits by the trial court. This would also give an advantage to this court to have the view of the trial court on the merits of the matter while deciding the application. Accordingly, though I reject the application of the appellant for recall of the order dated 28.1.2013 in terms of the prayer of the appellant and hear the appeal on merits; however, in exercise of the powers under Section 151 CPC, this court gives a direction to the parties to appear before the trial court on 20.4.2015 and direct the trial court to

decide the application of the appellant under Order 39 Rule 1 & 2 CPC as is available on the record on merits after taking into consideration the written statement and the reply to the application and after giving both the learned counsel for the parties an opportunity of being heard and without getting influenced by any of the observations passed by this court in the present order or by itself in the order dated 15.9.2012. Needless to say that if any party feels aggrieved by the order so passed, he is free to take such recourse as may be available in law.

19. With these observations the application stands disposed of.

V.K. SHALI, J.

APRIL 08, 2015
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