

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

% *Judgment Reserved on : August 11, 2014*
Judgment Pronounced on : September 09, 2014

+ **FAO (OS) 591/2013**

LT FOODS LTD. Appellant

Represented by: Mr.Neel Mason, Advocate with
Mr.Ankit Relan, Advocate

versus

SACHDEVA & SONS RICE
MILLS LTD. & ORS.

..... Respondents

Represented by: Mr.Rakesh Tiku, Sr.Advocate
instructed by Mr.Rikky Gupta,
Mr.Manish Vashisth and
Mr.Sameer Vashisth, Advocates
for R-1 and R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The backdrop facts leading to filing of the above captioned appeal are that on April 08, 2009 the appellant filed a suit being CS (OS) No.653/2009 on the original side of this Court inter-alia praying for a decree of permanent injunction restraining the respondent No.1 or any other person acting under its authority from using the trade mark “HERITAGE” as part of its trade name “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” in relating to its goods (Basmati rice). Along with the suit, the appellant filed an application under Order XXXIX Rule 1 and 2 CPC being I.A.

No.4748/2009 praying for an interim injunction till the disposal of the suit.

2. It was pleaded by the appellant that it is the registered proprietor of trade mark “HERITAGE” in India in relation to Basmati rice. The respondent No.1 is engaged in the business of manufacture, sale and export of Basmati rice. The respondent No.1 is using the trade name “INDIA HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” in respect of Basmati rice. The use of trade mark “HERITAGE” as part of its trade name “INDIA HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” by the respondent No.1 is illegal and unlawful and constitutes the acts of infringement and passing off; as it attempting to ride on the goodwill and reputation created by the appellant by manufacturing/selling Basmati rice in India. Prior to the filing of suit by the appellant, the respondent No.1 had filed a suit being CS (OS) No.639/2009 on the original side of this Court seeking to restrain the appellant from using the trade mark “HERITAGE” on the ground that it is continuously using the trade mark(s) “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” since the year 1985 and is also the registered proprietor of said trade mark since the year 2002. The appellant cannot be permitted to use trade mark “HERITAGE” for the reasons the respondent No.1 has the exclusive right to use the trade mark(s) “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” being the prior user and registered proprietor of the same and word “HERITAGE” (used by the appellant) is an essential feature of trade mark of respondent No.1. In addition thereto, the respondent No.1 had also filed a rectification petition before the Intellectual Property

Appellate Board seeking the cancellation of the registration of trade mark “HERITAGE” in favor of appellant.

3. On November 10, 2009 the respondent No.1 filed its written statement essentially stating therein that it is continuously using the trade mark(s) “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” since the year 1985 much before trade mark “HERITAGE” was adopted/use by the appellant and is also the registered proprietor of said trade mark. The suit filed by the appellant is not maintainable inasmuch as the respondent No.1 has the exclusive right to use the trade mark(s) “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” being the prior user and registered proprietor of the same. In this view of the matter, the appellant cannot be permitted to use trade mark “HERITAGE” for the reason word “HERITAGE” is an essential feature of the trade mark of respondent No.1.

4. After the pleadings were completed, the admission/denial of documents filed by the parties was conducted in the year 2011.

5. Vide order dated March 30, 2012 the learned Single Judge allowed I.A. No. 4748/2009 filed by the appellant and restrained the respondent No.1 and its franchisees/licensees from using the trade mark(s) “INDIAN HERITAGE SELECT/HERITAGE SELECT” or any other trade mark which is deceptively similar to the trade mark “HERITAGE” of the appellant till the disposal of the suit filed by the appellant.

6. In the month of August, 2012 the respondent No.1 filed an application under Order VI Rule 17 CPC being I.A. No.14779 of 2012 seeking amendment of the written statement filed by it. The amendment

sought by the respondent No.1 was insertion of paragraphs 9A to 9E in its written statement, which paragraphs read as under:-

“9A. That the Plaintiff has not approached this Hon’ble Court with clean hands and has deliberately concealed material facts before this Hon’ble Court and has based its case on falsity solely with a view to gain undue advantage and to deprive the Defendant No. 1 of its rights to do business under its Trademark “INDIAN HERITAGE SELECT”. It is submitted that the Plaintiff in its application before the United States Trademark and Patents Office, United States of America, has made a categorical statement and disclaimed as follows:

“No claim is made to the exclusive right to use “HERITAGE” and “BASMATI RICE” or “SELECT” apart from the mark as shown.”

The Plaintiff has further explained its mark as follows:

“The mark consists of green oval with a yellow trim around it. On top it has the word “HERITAGE” in bold white capital letters. On the bottom of the oval it has “BASMATI RICE” also written in white capital letters. There are two gold diamond figures on the left and right side of green oval. In the middle there is a blue oval with a white trim around it. In the middle there are three wheat figures. The first wheat figure is in gold, the second is off-white, and third is in white.”

It is submitted that despite making the aforementioned categorical disclaimer and explanation, the application filed by the Plaintiff before the aforementioned Statutory Authority has been refused and no registration has been granted to the Plaintiff in respect of the aforementioned Trademark despite the aforestated disclaimer.

9B. That further the Plaintiff has filed a written explanation before the United States Trademark and Patents Office, United States of America, has given a categorical explanation that the Trade Mark “HERITAGE SELECT”, as already registered in the name of importer of the Defendant No.1, and the Trade Mark “HERITAGE BASMATI RICE” Device with Logo, of which the user is claimed by the subsidiary of the Plaintiff herein, are two different marks.

9C. *That the Plaintiff has no right to seek exclusive usage of the mark "HERITAGE" or "SELECT". It is submitted that as the Plaintiff is debarred from suing or claiming the reliefs sought by its own conduct in making categorical disclaimer as aforementioned as also a categorical admission that "the said trademark is not likely to cause confusion" and the said statement amounts to abandonment and waiver of its rights, if any, and further the Plaintiff is now stopped to claim exclusive use of the Trademark "HERITAGE" moreso in view of the disclaimer and explanation given by the subsidiary of the Plaintiff in USA that their Trade Mark "HERITAGE BASMATI RICE" Device with Logo is not likely to cause any confusion with the Trade Mark "INDIAN HERITAGE SELECT" as already registered with the United States Trademark and Patents Office, United States of America.*

9D. *That the Plaintiff is also precluded from claiming an exclusive usage on the trademark "HERITAGE" as the said marks are infact words which are used in common language and the said words are generic nature and hence no monopoly can be claimed by the Plaintiff or any other person.*

9E. *That further the word HERITAGE and SELECT are in common use and registration have been granted by the various Trade Mark Registries of the world to various proprietors for the same category and goods as well as for different categories of goods. It is submitted that many if such registration are prior in time to the Plaintiff and/or the Defendant No.1. Thus the claim of the Plaintiff that the Defendant No.1 cannot use the Trademark HERITAGE and SELECT in any manner whatsoever is liable to be rejected and the suit deserves to be dismissed."*

7. The appellant filed reply to the IA No. No.14779 of 2012 inter-alia contending therein that :- (i) by way of amendment of written statement, the respondent No.1 has attempted to take an entirely new defence that the mark "HERITAGE" is a generic word and thus no person/company including the appellant can claim exclusive use of the same; (ii) the aforesaid new defence sought to be taken by the respondent No.1 is

mutually destructive to the defence taken by it in its unamended written statement that it has exclusive right to use the mark(s) “INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT” by virtue of being prior user and registered proprietor of said mark(s), which is impermissible; (iii) by way of amendment of written statement, the respondent No.1 has attempted to withdraw certain admissions made by it in its unamended written statement regarding similarity between its trademark(s) (“INDIAN HERITAGE SELECT/INDIAN HERITAGE/HERITAGE SELECT”) and that of the appellant (HERITAGE); and (iv) the application seeking amendment of written statement filed by the respondent No.1 three years after filing of the suit by the appellant is mala-fide which is clearly evident from the fact that no details whatsoever have been given in the application for amendment regarding the acquisition of the knowledge by the respondent No.1 of the (new) facts pleaded in the said application.

8. Vide order dated October 29, 2013 the learned Single Judge allowed IA No. 14779 of 2012 and permitted the respondent No.1 to amend its written statement. In so concluding, the learned Single Judge placed reliance upon the law laid down by the Supreme Court in the decision reported as (2007) 5 SCC 602 Usha Balasaheb Swami v. Kiran Appaso Swami that the Courts should adopt a liberal approach in the matter of amendment of the written statement than that of amendment of plaint and even such amendment of written statement which has the effect of addition of a new ground of defence or substitution or alteration of defence or taking inconsistent pleas in the written statement can also be allowed and the fact that the admission/denial of documents and issues are yet to be concluded/framed in the suit.

9. Aggrieved by the order dated October 29, 2013 the appellant has filed the above captioned appeal under Section 104 CPC read with Order XLIII Rule 1 of CPC.

10. During the hearing of the present appeal, the appellant reiterated the contentions advanced by it in the reply to the IA No. 14779 of 2012. In addition thereto, the appellant highlighted that the parties had completed the exercise of admission/denial of documents in the suit before passing of the impugned order dated October 29, 2013. In support of its contentions, the appellant placed reliance upon the decisions of the Supreme Court reported as (2008) 7 SCC 85 Gautam Sarup v. Leela Jetly & Ors, 2000 (1) SCC 712 B.K. Narayana Pillai v. Pararaneswaran Pillai and (2009) 10 SCC 84 Revajeetu Builders and Developers v. Narayanaswamy and Sons and decision of this Court reported as 1999 (48) DRJ 589 Kedar Nath v. Ram Prakash.

11. Order VI Rule 17 of the Code of Civil Procedure, 1908 as it originally stood enacted reads as under:-

“17. Amendment of pleadings:- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

12. It was felt that the provision for amendment of pleadings was one of the significant sources of delay in the judicial process. In the year 1999, as per the recommendations of Law Commission, the provision for amendment of pleadings was altogether deleted by Amendment Act No.46 of 1999. The deletion of the provision led to widespread protests by different legal bodies and as a result in the year 2002 the provision

was once again introduced, albeit with a rider, by Amendment Act No.22 of 2002. By virtue of said amendment, a proviso was appended to Rule 17, which reads as under:-

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

13. The legal position regarding amendment of written statement is well settled. The principles culled out from various judicial decisions regarding amendment of written statement are being enumerated herein under:-

I The object of Order VI Rule 17 CPC is that the court should try the merits of the case that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to either side.

II The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in larger interest of doing full and complete justice to the parties before the court. Thus, the court should always give leave to amend pleadings of a party unless it is satisfied that the party applying was acting malafide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice.

III Amendment sought after substantial delay could be allowed even if barred by limitation if that sub-serves the cause of justice and avoids further litigation.

IV While dealing with amendment applications the Courts should not adopt a hyper technical approach. Liberal approach should be general rule particularly in cases where the other party can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties.

V Amendments should be refused only where the other party cannot be placed in the same position before the amendment but the amendment would cause him an injury which could not be compensated in costs.

VI A prayer for amendment of the plaint and a prayer of written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. The aforesaid principle does not apply to the amendment of the written statement.

VII In case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice is far less in the former than in the latter. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

VIII Inconsistent and alternative pleas can be allowed to be taken in a written statement provided they are not destructive of each other.

IX Mere delay in making an amendment application itself is not enough to refuse amendment particularly when the delay does not cause

serious prejudice to the other party and can be compensated in terms of money.

X It would not be open to a party to wriggle out of an admission made by him by seeking amendment of the written statement as admission is a material piece of evidence which would be in favor of a person who would be entitled to take advantage of that admission. However, the admission can be explained and it would be permissible to add rider and/or proviso thereto while keeping the admission intact.

(The afore-noted principles have been culled out by us from the decisions of the Supreme Court reported as AIR 2006 SC 1646 Rajesh Kumar Aggarwal & Ors v. K.K. Modi, AIR 2004 SC 4102 Pankaja & Anr. v. Yellapa (D) by LRs & Ors, 2000 (1) SCC 712 B.K. Narayana Pillai v. Pararaneswaran Pillai, AIR 1957 SC 363 Piragonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors, (1976) 4 SCC 320 Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co and (2007) 5 SCC 602 Usha Balasaheb Swami v. Kiran Appaso Swami).

14. Keeping afore-noted legal principles in mind, we proceed to determine whether the impugned order dated October 29, 2013 passed by the learned Single Judge permitting the respondent No.1 to amend its written statement is just and proper.

15. A careful look at the paragraphs 9A to 9E sought to be inserted by the respondent No.1 in its written statement (which have been reproduced by us herein above) brings out that amendment(s) sought by the respondent No.1 were as follows:-

(a) The appellant had made a categorical statement before the United States Trademark and Patents Office, United States of America that it

does not claim the exclusive right to use marks “HERITAGE/BASMATI RICE/SELECT and marks “HERITAGE SELECT” (trademark of respondent No.1) and “HERITAGE BASMATI RICE” are two different marks. (Paragraphs 9A to 9C)

(b) Mark “HERITAGE” is a generic word and thus no person/company including the appellant can claim exclusive use of the same. (Paragraphs 9D and 9E)

16. A perusal of the written submissions filed by the appellant in the present appeal shows that the appellant has no objection to the amendment (a) allowed by the learned Single Judge. The objection of the appellant is to the amendment (b) allowed by the learned Single Judge on four counts which have already noted in paragraph seven above.

17. We need not delve into the question that whether it was open to the respondent No.1 to take a new ground of defence by way of amendment of its written statement for we have already noted herein above that it is settled legal position that it is open to a defendant to take a new ground of defence by amending its written statement.

18. It is true that it is open to a defendant to take alternative pleas in his written statement but the same should not be destructive of each other.

19. The difference between the ‘*alternative*’ and ‘*destructive*’ pleas was succinctly stated by a Single Judge of Bombay High Court in the decision reported as 2014 (2) BomCR 456 Hausu Dhonba Uike & Ganba Dhondba Uike v. Sahebrao Chintaman Salam & Ashok Chintaman Salam in the following terms:-

“The said issue, one must say, is in the nature of an alternative plea, pure and simple, not really destructive of the first plea

taken by the respondents that they have become owners of the suit filed by virtue of document of sale deed dated 02/01/1991. It is well settled law that even mutually inconsistent pleas could be raised in defence by the defendants. (See Arundhati Mishra (Smt.) vs. Sri Ram Charitra Pandey (1994) 2 SCC 29). The only prohibition, as held in the case of Vimal Chand Ghevarchand Jain vs. Ramakant Eknath Jadoo (2009) 5 SCC 713, is that alternative pleas should not be destructive of each other. They should be capable to co-exist with each other and should not be so inconsistent as to make it impossible to prove one plea unless the other is given up. Such a situation, as for example, could be found when plea of adverse possession is taken and simultaneously plea of transfer of title by virtue of sale or exchange is taken. The plea of adverse possession is based upon the assertion of one's possession with an intention to occupy it adversely to the true owner and whereas, the plea of ownership based upon sale or exchange essentially admits title of another. In such a scenario, period of prescription required for perfecting of title by adverse possession would not begin till the time the plea of transfer of title, by sale or exchange is given up."

20. Referring to the provision of Order XIX Rule 4 of the Rules of Supreme Court (England) corresponding to Order VI Rule 2 of the Code of Civil Procedure in the decision reported as (1887) 35 Ch D 492 Owen Vs. Morgan Lindley L.J. observed as under:-

"A person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them; and it is appears to me to be far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark."

21. Reference may also be made to the decision of the Full Bench of Calcutta High Court reported as (1907) ILR 34 Cal 51 Narender Nath Barari Vs. Abhoy Charan Chattopadhyaya. In said case, the plaintiff prayed for a declaration that the property in dispute belonged to him or in the

alternative he had a right of easement over it. The Full Bench approved the following observations passed by the learned Single Judge while making the reference:-

“While there is an undoubted inconsistency in claiming a right of ownership and right of easement jointly in the same land, there is no real or necessary inconsistency in claiming either of these rights in the alternative. In a case like the present a plaintiff may very well allege ‘bona fide’. I believe the land to be mine, but I may be unable to prove it; if I should fail to prove it I can at any rate prove that I have been using the right of way as an easement uninterruptedly and as of right for over 20 years.

There appears to me no reason in principle and why a claim like this in alternative should not be tried, or why the plaintiff should be forced first to bring a suit to establish his right of ownership, and if that fails, then to bring a suit to establish his right of easement.”

22. The Full Bench took the view that the trial of the claim in the alternative in one suit would tend to avoid a multiplicity of suits, in compliance with Section 42 of the Code of Civil Procedure, which provides that “Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute”, and so to prevent further litigation concerning them.

23. In the decision reported as AIR 1951 SC 177 Firm Srinivas Ram Kumar v. Mahabir Prasad the Supreme Court observed as under:-

“A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative.”

24. Reference may also be made to the decision of Supreme Court reported as 1995 Supp (3) SCC 179 Basavan Jaggu Dhobi v. Sukhnandan

Ramdas Chaudhary. In said case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, the defendant sought to amend his written statement by taking the stand that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15-A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Supreme Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement the Supreme Court observed as follows:-

*“As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his written statement under Order 6 Rule 17 CPC by taking a contrary stand than what was stated originally in the written statement. This is opposed to the settled law. It is open to a defendant to take even contrary stands or contradictory stands, thereby the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action.” **(Emphasis Supplied)***

25. In view of legal position enunciated above, particularly that in Basavan’s case (supra), it is open to the respondent No.1 to plead that mark “HERITAGE” is a generic word and thus no person/company including the appellant can claim exclusive use of the same and in the alternative plead that it i.e. respondent No.1 and not appellant can exclusively use mark “HERITAGE” as it is the prior user and registered proprietor of said mark.

26. As regards the submission relating to withdrawal of admission(s) contained in the unamended written statement, suffice would it be to state that after going through the (unamended) written statement and application for amendment of the written statement in depth, we do not

find that the respondent No.1 had sought to withdraw any admission made by it by way of amending its written statement.

27. Lastly, mere delay in filing the application for amendment of written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the appellant by allowing the amendment. We note here that the trial is yet to commence in the present suit.

28. In view of above discussion, we find no merit in the present appeal. The same is accordingly dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 09, 2014
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