

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.210 of 2015**

1. M/s UTV Motion Pictures
Corporate Office :
UTV Software Communications ltd.,
Previous Address :
Building No.11,
8th Floor, Solitaire Corporate Park,
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093

New Address :
Building No.14,
1st Floor, Solitaire Corporate Park,
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093
2. M/s UTV Software Communications Ltd.,
Previous Address :
Building No.11,
8th Floor, Solitaire Corporate Park,
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093

New Address :
Building No.14,
1st Floor, Solitaire Corporate Park,
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093
3. Mr. Ronnie Screwala,
Major of Age,CEO and Chairman,
UTV Group,
Previous Address :
Building No.11,
8th Floor, Solitaire Corporate Park,
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093
4. Mr. Siddharth Roy Kapur,
Major in age, CEO,
UTV Motion Pictures,

Corporate Office :-
 UTV Software Communications Ltd.,
 Previous Address :
 Building No.11,
 8th Floor, Solitaire Corporate Park,
 Guru Hargovindji Marg,
 Chakala, Andheri (East)
 Mumbai 400 093

New Address :
 Building No.14,
 1st Floor, Solitaire Corporate Park,
 Guru Hargovindji Marg,
 Chakala, Andheri (East)
 Mumbai 400 093

5. M/s Ishan Films,
 B/701, Harcules Vasant Galaxy,
 Off Link road, Bangur Nagar,
 Goregaon (West), Mumbai 400 062

Correct Name and Address :
 Ishana Movies Private Limited
 302, Mars-E, Vasant Galaxy,
 Bagur Nagar, Off Link Road,
 Goregaon (West), Mumbai 400 104

6. Mr. Anurag Basu,
 Major in age,
 Director Movie "Barfi"
 B/701, Harcules Vasant Galaxy,
 Off Link road, Bangur Nagar,
 Goregaon (West), Mumbai 400 062

.. Petitioners

Versus

M/s Murphy Enterprises
 Having office at Sotiamol (Savargall)
 Vazem, Shiroda, Goa and herein
 Represented by its Sole Proprietor
 Miss Smita Dilip Shirodkar,
 daughter of Shri Dilip N. Shirodkar,
 aged 29 years, Business, Resident
 of House No.889, Satiamol
 (Savargall), Vazem, Shiroda,
 Ponda Goa.

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Respondent

Shri S. G. Dessai, Senior Advocate with Mr. Raunaq Rao,
 Advocate for the petitioners.

Mr. Sudin Usgaonkar, Senior Advocate with Mr. K. Padgaonkar, Advocate for the respondent.

CORAM :- C. V. BHADANG, J.

Reserved on : 29th September, 2015

Pronounced on : 7th December, 2015.

JUDGMENT :

Rule. Rule, made returnable forthwith. The learned Counsel for the respondent waives service. Heard finally with the consent of the learned Counsel for the parties.

2. The challenge in this petition, at the instance of the original defendants, is to an order dated 01/10/2014 allowing the application (Exhibit 31) filed by the respondent/ plaintiff, for amendment of the plaint.

3. The precise challenge is on the ground that the impugned order amounts to allowing the respondent no.5 to retract their admission namely "Murphy Munna Baby " is an artistic work", which is popular since the year 1948.

4. The brief facts are that the respondent filed Civil Suit No.49/2012 before the learned Principal District and Sessions

Judge, North Goa, for permanent injunction, compensation and damages for infringement of trademark and copyright and certain consequential reliefs.

5. It appears that the application for Temporary Injunction filed by the respondent was rejected by an order dated 27/02/2013, which was challenged by the respondent before this Court in A.O. No.37/13. The respondent chose to withdraw the appeal, with liberty to file additional/ fresh application. Subsequently, the respondent filed an application Exh.31 for amendment of the plaint, seeking amendments as set out in the schedule annexed to the application. By the proposed amendment, the respondent, *inter alia*, sought addition of paragraphs 2a to 2q in the plaint.

6. The application was opposed on behalf of the petitioners, *inter alia* on the ground that the amendment sought is malafide and not genuine. The respondent is trying to fill lacuna in its case and that the amendment has the effect of retracting an admission, which is not permissible. It was also contended that the proposed amendment has the effect of changing the nature of the suit. It was also contended that the documents on the basis of which, the amendment is sought, were in the possession and knowledge of the plaintiff and thus, the respondent cannot be allowed to improve their case or fill up

lacuna by way of an amendment.

7. The learned Principal District Judge, by the impugned order dated 01/10/2014, allowed the application for amendment. Feeling aggrieved, the petitioners are before this Court.

8. I have heard Shri Dessai, the learned Senior Counsel for the petitioners and Shri Usgaonkar, the learned Senior Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the record and the impugned order.

9. It is submitted by the learned Senior Counsel for the petitioners that in paragraph 8 of the rejoinder, the respondent claimed that "Murphy Munna" is an artistic work and is a drawing/ photograph of the baby, which has been extremely popular since the year 1948. The learned Senior Counsel would submit that the petitioners had not filed a separate reply to the application for Temporary Injunction and for the purposes of opposing the said application, the contents of the written statement were adopted. It is, thus, submitted that the rejoinder containing the said admission, cannot be reckoned as in pursuance of any reply filed to the application for Temporary Injunction and as such, would partake of the nature of pleadings. It is submitted that the petitioners cannot now

wriggle out of the admission by claiming that the artistic work, which was made by Murphy India Limited, was first published in the year 1962, so as to get out of the period as mentioned in Section 25 of the Copyright Act. It is contended that although the trademark might be relatable to the year 1962, the copyright started in the year 1948. It is contended that the amendments cannot be claimed as a matter of right and no amendment, which would act to the prejudice of the other side can be allowed, so as to disturb vested rights or change the nature of the suit or which has the effect of resiling from the earlier admission. It is submitted that under Order VIII, Rule 9 of C.P.C., the Court can permit filing of additional pleadings and the ordersheet dated 06/10/2012 would show that the Court had fixed the suit for filing rejoinder. It is thus, submitted that the proposed amendment would take away an admission in the pleadings.

10. The learned Senior Counsel has placed reliance on the following decisions, in support of the various submissions :

(i) ***M/s Sham Hotels Pvt. Ltd., Through its representative Mr. Chinmay Vishwas Patil Vs. Mr. John Francis De Souza and 10 Ors;***
(W.P.No.30/2015, dated 13/04/2015.)

(ii) ***Gautam Sarup Vs. Leela Jetly and Others,***
reported in (2008)7 SCC 85.

(iii) ***M/s. Modi Spinning and Weaving Mills Co.Ltd and another Vs. M/s. Ladha Ram & Co.,***

reported in (1976)4 SCC 320.

(iv) ***K. Laxmanan Vs. Thekkayil Padmini and others,*** reported in (2009)1 SCC 354.

(v) ***Rasiklal Manikchand Dhariwal Karta Vs. Kishore Washwani,*** reported in 2005 SCC Online Bom 100.

11. On the contrary, it is submitted by Shri Usgaonkar, the learned Senior Counsel for the respondent that a rejoinder filed for the purpose of an application for Temporary Injunction, cannot be construed as part of the pleadings. It is further submitted that apart from this, the proposed amendment cannot have the effect of resiling from an admission. It is submitted that although "Murphy" came in the year 1948, the baby face came much later. It is submitted that production of the documents is already allowed. It is submitted that the learned Trial Court has rightly found that the proposed amendment is only explanatory in nature and no prejudice would be caused to the petitioners as the Trial is yet to commence. It is submitted that amendments have to be liberally allowed, subject to well established exceptions, which are not to be found in this case and thus, the normal rule that a prayer for amendment has to be liberally considered, would apply. The learned Senior Counsel

further submitted that the order sheet dated 06/10/2012 cannot be read to mean that any leave was sought or granted in as much as the Presiding Officer is shown to be on Casual Leave on that date. The learned Senior Counsel has placed reliance on the following decisions :

(i) ***The Regional Manager and another Vs. Pawan Kumar Dubey***, reported in (1976)3 SCC 334.

(ii) ***Procter and Gamble India Ltd & another Vs. Endolabs Limited & Others***, 2000(3) Bom. C.R. 136.

(iii) ***Union of India and others Vs. Dhanwanti Devi and others***, reported in (1996)6 SCC 44.

(iv) ***Ambica Quarry Works etc. Vs. State of Gujrat and others***, reported in AIR 1987 SC 1073.

(v) ***State of Maharashtra and others Vs. Prakash Pandharinath Patil and others***, reported in 2005(4)Mh.L.J. 930.

12. I have given my anxious consideration to the rival circumstances and the submissions made.

13. At the outset, it is necessary to mention that the petitioners are not taking exception for production of the documents on the ground that they relate to a claim under the Trademarks Act. The learned Senior Counsel for the petitioners

also fairly submitted that the petitioners do not object to the part of the amendments, which pertain to a claim based on Trademarks Act. Thus, the objection is only confined to a claim about the artistic work of the "Murphy Munna Baby" and the same being introduced in the year 1962. In particular, the objection is only confined to the amendments as proposed in paras 2(b),(c),(e),(f) and (p), which arise out of a copyright under the Copyrights Act.

14. The reason for objection to the introduction of the year 1962, is obvious and is based on Section 25 of the Copyrights Act, 1957, which provides that in the case of a photograph, a copyright shall subsist until 60 years from the beginning of the calendar year, next following the year, in which, the photograph is published. The contention is that going by the contents of para 8 of the rejoinder, filed by the respondent, the Murphy Munna Artistic Work was said to be popular since the year 1948 and thus, under Section 25 of the Copyrights Act, copyright in the said artistic work would expire in the year 2008 and thus, would not be available in the year 2012, when the suit came to be filed. It may be mentioned that amendment is mainly challenged on the ground that it takes away the aforesaid admission in the pleadings.

15. Before proceeding to consider the submissions, certain

facts, which are not disputed and are in fact, matters of record, may be noticed as under :

That the application for Temporary Injunction filed by the respondent was rejected by the Trial Court, which was challenged before this Court in A.O. No.37/2013. That appeal was allowed to be withdrawn on 02/09/2013, with a liberty to the respondent to file fresh application for Temporary Injunction. A perusal of the order would further show that on behalf of the respondent, leave was sought to withdraw the appeal, with liberty to file a fresh application for Temporary Injunction, after seeking leave of the Court to amend the plaint and add necessary particulars to substantiate their allegations in the plaint. The order also records a submission on behalf of the petitioners herein (respondents in A.O. No.37/2013) that the respondents would be at liberty to file any fresh application, if so advised, based on any subsequent pleadings and stating that in case any such application is filed, the learned Trial Court will consider the same on hearing the parties in accordance with law. In consequence thereof, the respondent filed the application for amendment, which has been allowed.

16. The learned Trial Court has found as under :

- (i) The so called admission about the Murphy Munna Baby being popular since the year 1948 is not contained

in the plaint, but only in the rejoinder and it would not form part of the pleadings under Order VI, Rule 1 of Civil Procedure Code (C.P.C.).

(ii) That the amendment is only explanatory in nature and does not amount to taking away an admission.

(iii) That no prejudice would be caused thereby to the petitioners as amendment is not belated and the parties would get an opportunity to challenge the same as the trial is yet to commence.

(iv) That the amendment does not change the nature of the suit and the documents in support of the amendment, have already been allowed to be produced.

17. Thus, the material question is whether the contents of the rejoinder would form part of the pleadings and if yes, whether the proposed amendment would have the effect of taking away any admission as such and whether the impugned order would need interference in exercise of the extra-ordinary jurisdiction of this Court.

18. Order VI, Rule 14 of C.P.C. clearly provides that pleadings shall mean plaint or written statement. Thus, the contents of an affidavit-in-reply or rejoinder, cannot partake of the nature of the pleadings, within the meaning of Order VI, Rule 1 of C.P.C. Indisputably, the plaint does not contain any

recital that Murphy Munna Baby was popular from the year 1948. This for the first time came to be stated in para 8 of the rejoinder. On behalf of the petitioners, reliance is placed on Order VIII, Rule 9 of C.P.C., which provides for subsequent pleadings. It, *inter alia*, provides that no pleadings, subsequent to the written statement of a defendant, other than by way of defence to set off or counterclaim, shall be presented, except by the leave of the Court and upon such terms as the Court thinks fit. However, the Court may at any time require the written statement or additional written statement from any of the parties and fix a time of not more than 30 days for presenting the same. As noticed earlier, on behalf of the petitioner, reliance is placed on the order sheet dated 06/10/2012. A perusal of the order sheet would show that the written statement was filed on that day on behalf of the petitioner nos.2, 3, 5 and 6 along with list of certain documents and application Exh.D-15 was filed under Order XI, Rule 16 of C.P.C. by way of notice to produce documents. The order sheet further records that as the Presiding Judge was on Casual Leave and "as per her instructions", matter was adjourned. Stand over for rejoinder on 10/10/2012.

19. On the basis of this order sheet, it is not possible to accept that any leave to file a supplication within the meaning of Order VIII, Rule 9 of C.P.C. was either sought or could have

been granted, in as much as, the Presiding Officer was on leave. In fact, once the Presiding Officer was on leave, it is inconceivable that there would be any judicial order, which can be passed or can be read into the order sheet. In my considered view, the submission, based on the order sheet dated 06/10/2012, will have to be refuted.

20. In the case of **Gautam Sarup** (supra), the respondent no.6 had accepted the case of the appellant in its entirety, to the extent of accepting that the appellant's case in the suit, claiming half share in the suit property left by his father be decreed. In that case, each and every contention of the appellant/ plaintiff was accepted by the respondent no.6 and the Hon'ble Apex Court had found in para 31 of the judgment that the only explanation which could be offered by her was that the purported admission had been taken from her by playing fraud on her and, therefore, she was not bound thereby.

21. The Hon'ble Apex Court, in the context of such a factual background held that a categorical admission cannot be resiled from, but in a given case, it may be explained or clarified. It is further held that offering explanation in regard to an admission or explaining away the same, would depend upon the nature and character thereof.

22. In the case of **M/s. Modi Spinning and Weaving Mills Co. Ltd.** (supra), it was found that the defendants cannot be allowed to change completely the case made in paras 25 and 26 of the written statement and substitute an entirely different case. It was found that although inconsistent pleas can be taken, on facts it was found that the effect of substitution of paras 25 and 26 has the effect of displacing the plaintiff completely from the admissions made by the defendants in the written statement.

23. Reliance is placed on the decision in the case of **K. Laxmanan** (supra) and in particular, para 29 thereof, which reads thus :

“29. Pleadings as we understand under the Code of Civil Procedure (for short “the Code”) and as is defined under the provision of Rule 1, Order 6 of the Code consist only of a plaint and a written statement. The respondent-plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have become the part of the pleadings, but mere non-filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement. The specific objection in the form of denial was raised in the affidavits filed in respect of the injunction applications which were accepted on record by the trial court and moreover the acceptance on record

of the said affidavit was neither challenged nor questioned by the present appellant.”

(Emphasis supplied)

It can, thus, be seen that what has been held is that a replication, if filed, as allowed by the Court, would become the part of the pleadings, which is not the case in hand.

24. In the case of **Rasiklal Dhariwal** (supra), the plaint was sought to be amended, *inter alia*, to include a plea that the plaintiffs have conceived and adopted the trademark in relation to tobacco products, consisting of bidi and commenced using the same on a commercial scale in or about 1958 and that the plaint erroneously indicates that the mark was conceived and adopted in the year 1961. It is, thus, clear that the amendment as to the substitution of the year from 1961 to 1958 was contained in the plaint, unlike in the present case. Thus, in my humbly opinion, the facts are clearly distinguishable. In this regard, it would be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of **Pavan Kumar Dubey** (supra). In that case, it was held that a rule deducible from the application of law to the facts and circumstances of a case constitutes its ratio decidendi and not some conclusion, based upon facts, which may appear to be similar. It has been held that one additional or different fact can make a world of a difference, between the conclusions in two cases, even when the same principles are

applied in each case to similar facts.

It is not necessary to multiply authorities on the point as the legal position, as to what constitutes ratio decidendi of the case, is too well settled to be restated.

25. In the case of ***Sham Hotels Pvt. Ltd. Vs. Mr. John Francis De Souza***, (Writ Petition No.30/2015, dated 13/04/2015), the challenge was to an order, rejecting an application for amendment filed by the plaintiff. Amendment sought was to substitute the words “with an existing structure” in the place of words “without any structure”, to substitute the words “enclosed property” in the place of “enclave property” and seeking an additional relief to have a consent decree being declared as null and void. It is difficult to envisage as to how the decision can take the case of the petitioner any further, the facts being clearly distinguishable.

26. In the case of ***Prakash Patil*** (supra), a Division Bench of this Court was concerned with a challenge to the transfer of certain employees on the ground that the transfers were effected in contravention of the guidelines and were arbitrary. In para 11 of the judgment, it was found with reference to retention of three employees that number of persons have been retained in the same place, without being transferred, while the original applicants were said to be transferred without even

completion of one year at the place where they were posted last. This Court found that although the original application mentioned the names of three such employees, it was only in the rejoinder that some more names were said to be added in that regard. This Court had observed that the rejoinder does not form part of the pleadings and it forms part of the evidence in support of the pleadings. It has been found that the basic facts have necessarily to be pleaded in the original application.

27. In the case of ***Reva Jitu Builders and Developers Vs. Narayan Swami and sons and another***, reported in 2009(10) SCC 84, the Hon'ble Apex Court, after taking a survey of the decisions on the scope and extent of the powers, has culled out the principles, which have to be kept in mind, while dealing with a prayer, for amendment. It would be apposite to reproduce para 63 of the judgment as under:

“63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case;*
- (2) Whether the application for amendment is bona fide or mala fide;*
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;*

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

28. Applying the principles and having found that the recital about the Murphy Munna Baby being popular since the year 1948, is not contained in the plaint and the recital, in that regard, was only contained in the rejoinder filed by the petitioner for the purpose of the application for Temporary Injunction, would not form part of the pleadings. It is not necessary to dilate further on this aspect. The fact that there was no separate reply filed to the application for Temporary Injunction and the petitioner adopted the contents of the written statement, would not make any difference, in as much as, the rejoinder was filed for the purposes of disposal of the application for Temporary Injunction and it is also not shown that it would form part of a supplication/ additional pleadings, within the meaning of Order VIII, Rule 9 of C.P.C. as there was no leave

sought or can be said to have been granted as per the order sheet dated 06/10/2012.

29. Indisputably, the trial is yet to commence and as has been rightly held by the learned Trial Court, the petitioners would get an opportunity to contest the suit on all the grounds as may be available in law. The same would not cause any prejudice much less of irretrievable nature to the petitioners.

30. The scope of interference available under Article 227 of the Constitution of India is limited. Unless and until, it is shown that the jurisdiction exercised by the Court is beyond the bounds of its authority or demonstrates a patent perversity, leading to manifest injustice, no interference is called for. Thrust is more on the manner in which the jurisdiction is exercised. On perusal of the impugned order, I do not find that on the available principles, any case for interference is made out.

31. In the result, the writ petition is hereby dismissed.

32. Rule is discharged, with no order as to costs.

C. V. BHADANG, J.

SMA