

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 16th DAY OF DECEMBER 2015

THE HON'BLE MR. JUSTICE K.K.SASIDHARAN

A.No.7585 of 2015

in

C.S.No.829 of 2015

1.Dart Industries Inc.
(A Corporation founded under the Laws of Delaware, U.S.A.)
14901, South Orange Blossom Trail,
Orlando, Florida 32837, U.S.A.,
rep.by its constituted attorney
Ms.Kimberly Weate

2. Tupperware India Pvt. Ltd
204-206 Tolstoy House,
15, Tolstoy Marg,
New Delhi, 110001
rep.by its Authorized Signatory
Ms.Vandita Batta ...Plaintiffs

Versus

1. Cello Plastotech
Surv.No.597/2A,
Somnath Road, Dabhel, सत्यमेव जयते
Daman - 396210,
Also at:
Cello House, Corporate Avenue 1st Floor,
'B' Wing, Sonawala Lane Goregaon (E),
Mumbai - 400 063, India.

2. Cello Household Products
Building A, Plot No.710, 711, 714 to 717
Somnath Road,
Dabhel, Daman - 396210 ...Defendants

A.No.7585 of 2015:

1. Cello Plastotech
Survey.No.597/2A,
Somnath Road, Dabhel,
Daman - 396210,

Also at:

Cello House, Corporate Avenue 1st Floor,
'B' Wing, Sonawala Lane Goregaon (E),
Mumbai - 400 063, India.

2. Cello Household Products

Building A, Plot No.710, 711, 714 to 717
Somnath Road,
Dabhel, Daman - 396210

...Applicants

-Versus-

1.Dart Industries Inc.

(A Corporation founded under the Laws of Delaware, U.S.A.)
14901, South Orange Blossom Trail,
Orlando, Florida 32837, U.S.A.,
rep.by its constituted attorney
Ms.Kimberly Weate

2. Tupperware India Pvt. Ltd

204-206 Tolstoy House,
15, Tolstoy Marg,
New Delhi, 110001
Represented by its Authorised singatory
Ms.Vandita Batta

...Respondents

Application praying that this Hon'ble Court be pleased
to revoke the leave dated 06.10.2015 granted in A.No.6709
of 2015.

This application coming on this day before this court
for hearing the WEB made the following order:

The defendants in C.S.No.829 of 2015 have come up with
this interlocutory application to revoke the leave granted
by this Court by order dated 6 October 2015 in A.No.6709 of
2015.

2. The respondents filed a suit, complaining of
<https://hcservices.ecourts.gov.in/hcservices/>
infringement and passing off and praying for a decree of

permanent injunction, restraining the applicants from manufacturing or selling the product AQUASAFE bottle, by imitation of their get up, design and trade dress. Since the applicants are situated beyond the jurisdiction of this Court, the respondents obtained leave to sue.

3. The applicants in the affidavit filed in support of the application contended that initiation of suit before this Court is nothing but gross abuse of judicial process. According to the applicants, both the parties are situated outside and the cause of action has not arisen within the jurisdiction of this Court. It is their further contention that in order to obtain an *exparte* order of injunction and coerce the applicants, the respondents have filed the suit, where no cause of action or even minuscule part of cause of action has arisen. The applicants allege that the respondents made a false statement before this Court to the effect that they are not in possession of any registration for their design and obtained *exparte* injunction, by misleading the Court. In short, the applicants wanted to revoke the leave on the ground of jurisdiction and gross abuse of judicial process.

4. The respondents in the counter affidavit justified the initiation of suit before this Court and supported the order granting leave. According to the respondents, the product in question was sold by a dealer at Chennai. The respondents purchased the product with the offending

trademark from a retail store at Pondy Bazaar, and as such, the suit is maintainable before this Court. The respondents specifically denied the allegation regarding misleading with respect to the registration of design.

5. The learned counsel for the applicants contended that the applicants have lodged a caveat at Delhi, in view of the location of the second respondent. Similarly, caveat was lodged at Bombay, taking into account the Corporate office of the first applicant. According to the learned counsel, the respondents, with a view to obtain exparte injunction, purchased a bottle from a dealer at Chennai and filed the suit before this Court. The learned counsel contended that such a stray sale would not give jurisdiction to this Court where, not even a part of the cause of action has arisen. The learned counsel contended that the Doctrine of Forum Conveniens would apply to a matter like this and as such, the suit filed before this Court, where the applicants are not carrying on business, is not maintainable.

6. The learned Senior Counsel for the respondents contended that the respondents have already initiated similar suits against others before this Court. Even before the Delhi High Court, there are suits filed by the respondent with respect to infringement and passing off.

According to the learned counsel, the applicants are selling their products resembling that of the product of

the respondents through Rathna Stores, which is a leading retail chain in Chennai. In view of Section 134 of the Trademarks Act, the suit is maintainable before this Court and the leave is not liable to be revoked.

7. The first respondent is a company incorporated under the laws of Delaware, USA. The second respondent is a company incorporated under the Companies Act and having its registered office at New Delhi. The respondents are in the business of manufacturing Tupperware products. The Tupperware products manufactured by the respondents are stated to be identified by their distinctive designs, innovative and high quality. The products are made from safe, non-toxic, non-carcinogenic materials. The products are sold in more than hundred countries, including India. Marketing and sale of Tupperware products is carried out by way of direct selling method, apart from print and electronic media advertisements. The present suit is in respect of ACQUASAFE BOTTLE and CAP, which is said to be a novel design. The respondents have registered BOTTLE and CAP separately, both being independent articles, manufactured and sold together as well as separately.

8. The feature of novelty in the AQUASAFE BOTTLE resides in its overall shape and configuration as well as its ornamental surface pattern rendering it a unique, novel and aesthetically attractive original design created by

expert designers engaged by the 1st respondent for valuable consideration.

9. Since AQUASAFE BOTTLES are new and original, the same became extremely popular in Indian market, keeping with the trend in the other countries worldwide and have acquired tremendous goodwill and reputation. It is the case of the respondents that the applicants are collectively involved in manufacturing, supplying and selling bottles which are blatant imitation of design No.221424 (for Bottle) and 221425 (for cap), registered in the name of the first respondent. The imitation is so fraudulent that it is impossible to distinguish between the propriety bottle of the respondents and the applicants.

10. The respondents purchased the infringing product from Rathna Stores, Pondy Bazaar, Chennai. Since the products are readily available at Chennai, respondents have laid the suit before this Court.

11. This Court taking into account the submission of the plaintiffs that the defendants are marketing the infringing goods on a retail basis to various shops at Chennai, granted leave.

12. The applicants have come up with a contention that the respondents are guilty of forum shopping and filed the suit before a Court having no jurisdiction. The applicants have lodged caveat at Delhi and Bombay, expecting initiation of suits before the jurisdictional Courts. It is

the contention of the applicants that the first respondent with a view to obtain *ex parte* interim injunction, laid the suit before this Court. According to the applicants, appropriateness or suitability of the forum are valid grounds while deciding the jurisdiction of the Court. Since the applicants and the respondents are doing business at Bombay and Delhi respectively, and in view of the principle of *forum conveniens*, the suit has to be filed before the Courts either at Delhi or Bombay. The respondents therefore, wanted to revoke the leave.

13. The respondents obtained leave from this Court by contending that the product in question was sold by a dealer at Chennai and as such, the suit being one for infringement of trademark is maintainable before this Court.

14. Section 134 of the Trademarks Act, deals with the suit for infringement. Sub clause (2) of Section 134 provides for filing a suit before the District Court where the person instituting a suit or proceeding or where there are more than one such persons, any of them, actually and voluntarily residing or carrying on business or personally working for gain.

15. The argument of the learned counsel of the applicant was based on the principle of *forum conveniens*.

According to the learned counsel, even if the Court is having jurisdiction, still it is open to the Court to

decline leave to sue on the ground of availability of a more convenient forum.

16. The question therefore is while considering an application for revocation of leave to sue, whether the principle of forum conveniens is a relevant factor.

17. This Court, long before the development of law relating to forum conveniens, in **Seshadri Rao vs. Nawab Askar Jung Aftal Dowlath Mushraf Mulk**, L.L.R. 30 MAS 438, held that notwithstanding the fact that the cause of action has arisen within the jurisdiction, still the Court would decline to grant leave, taking into account the convenience factor, in view of the wordings of Clause 12 of the Letters Patent.

18. In **Kusum Ingots and Alloys Ltd. vs. Union of India** (2004 (6) SCC 254), the Hon'ble Supreme Court has taken a similar view, based on the principle of forum conveniens.

19. It is not necessary to deal with the various judicial pronouncements on the question raised by the learned counsel for the applicant, in view of the Full Bench judgment of this Court in **M/s.Duro Flex Pvt. Ltd. vs. M/s.Duroflex Sitzings System Duro Flex Pvt.** (2014 (6) CTC 577). The Full Bench scanned the earlier decisions on the point and summarised the legal position in the following words:

58. We are, thus, of the view that in considering an Application for grant of

leave or revocation thereof, the appropriateness or suitability of the forum would be material and to that extent, principle akin to *forum conveniens* would apply.

20. The case pleaded by the respondent to grant leave and that of the applicant to revoke the leave to sue requires to be decided taking into account the accrual of cause of action and the test of "*forum conveniens*".

21. The sale of infringed goods by a dealer at Pondy Bazar was shown as the reason for filing the suit before this Court. Even though it was a stray sale, in view of Section 134 of the Trade Marks Act, this Court granted leave, as part of the cause of action has arisen within the jurisdiction of this Court.

22. While granting leave, this Court has no occasion to consider the test of *forum conveniens*. There is an indication even in the application filed by the respondents in A.No.6799 of 2015 for appointment of Commissioner to visit the premises of the applicants at Bombay and Daman and to seize the products, moulds, books of accounts, etc. with the assistance of local police that the proper forum is the Court at Mumbai. In case the cause of action has arisen at Chennai, as alleged, the respondent ought to have

taken out a commission to seize the materials from the local retail dealer. No such application was filed by the respondent. This Court at the instance of respondents, issued a Commission and the Commissioner has seized the products, moulds and records from Mumbai and Dabhel. This clearly shows that the respondents were fully aware that the substantial part of the cause of action has arisen at Mumbai. The respondents have filed suits against the other manufacturers at Delhi. Those suits are pending. The appellants have lodged caveat at Delhi and Bombay. But the suit was filed before this Court on the basis of a local purchase of the infringed product.

23. The applicants have demonstrated that the alleged infringed products are available in Bombay and Delhi. However, the respondents have chosen to file the suit before this Court, so as to drag the applicant to Chennai. When it is the case of seizure of infringed products and moulds, the respondents have gone to Mumbai. The applicants are therefore correct in their contention that notwithstanding the availability of a convenient forum, the respondents have chosen a Court to cause them inconvenience.

24. The applicant is based at Mumbai. The second respondent is situated at Delhi. The suit is filed at Chennai. The balance of convenience is therefore not in

favour of the respondents. In such circumstances, the Court has to apply the test of "*forum convenience*" to determine the jurisdiction. Even though part of the cause of action has arisen within the jurisdiction of this Court, I am of the view that the leave to sue is liable to be revoked by invoking the principle akin to "*forum conveniens*".

25. The leave granted by this Court by order dated 6 October 2015 in A.No.6709 of 2015 is revoked.

26. In the upshot, I allow the application to revoke the leave to sue. No costs.

sd/.K.K.S.J
16.12.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/18.12.2015

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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