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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 2168 OF 2016
IN
SUIT NO. 112 OF 2014

Pidilite Industries Limited ...Plaintiff
Versus
Jubilant Agri and Consumer Products Limited ...Defendant

Mr. Venkatesh Dhond, Senior Advocate *with Hiren Kamod, Sumeet Rane, i/b Legasis Partners for the Plaintiff.*
Mr. Ravi Kadam, Senior Advocate *with Mr. Alankar Kirpekar i/b MAG Legal for Defendant / Applicant in both Notices of Motion.*

CORAM: G.S. PATEL, J
DATED: 6th October 2016

PC:-

1. Heard Mr. Kadam for the Defendants in support and Mr. Dhond in opposition.

2. This is the Defendant's Notice of Motion is under Order 39 Rule 4 of the Code of Civil Procedure, 1908 ("CPC") seeking that an order dated 13th January 2014 passed by S.J. Kathawalla J allowing the Plaintiff's Notice Motion (L) No. 1717 of 2013 be discharged, varied and set aside.

3. The Suit is an action in trade mark infringement and passing off. The mark in question is **MARINE**, one that the Plaintiff uses in regard to waterproof or water resistant products. Mr. Justice Kathawalla allowed the Notice of Motion in terms of prayer clauses (a), (b) and (c) with costs. It appears that the Defendant filed an Appeal No. 35 of 2016. This Appeal was dismissed as withdrawn on 21st April 2016.

4. It is in these circumstances that Mr. Kadam presses his present application. He submits that he has now got additional material in the form of technical literature and industry-related documentation to demonstrate that Mr. Justice Kathawalla's order was incorrect or requires to be revisited.

5. Of course, I cannot speculate why the Defendants withdrew the Appeal. Those reasons are best known to themselves. The consequence, however, is undeniable.

6. I do not think that the present application properly falls within the frame of Order 39 Rule 4 which reads as under:-

4. Order for injunction may be discharged, varied or set aside

Any order for an injunction may be, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

Provided that if in an application for temporary injunction or in any affidavit supporting such application a

party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party.

(Emphasis added)

7. I understood Mr. Kadam to place this case under the second proviso to Rule 4. Again, I do not accept his proposition that there is any “change in circumstances” within the meaning of the second proviso. The mere fact that one or the other side has lost or has not succeeded in a litigation is not a change in circumstances within the meaning of this Section. That can never be. The question of undue hardship also does not arise in situation like this.

8. The submission by the Defendant is not that the Defendant *could* not with due diligence have found this material at an earlier point of time before Mr. Justice Kathawalla decided his case, or, at any rate, before the Defendant withdrew its Appeal from that order,

but that the Defendant *did* not find this material despite efforts made at the time. This is not the same thing in law. In order to be able to sustain such an application a Defendant must be shown to have been prevented from the discovery of critical material which has resulted in an order that causes undue hardship. The general wording of Order 39 Rule 4 has to be read subject to the proviso. Otherwise it would mean that every order in every Court would always be without finality and would be constantly revisited at the instance of a losing party. This cannot be the purpose of Order 39 Rule 4 and that is why the two provisos were added by the 1976 amendment. The statement of objects and reasons¹ of the amending Act makes it clear that where an injunction is granted after a party has been heard, the injunction is not to be discharged, varied or set aside *except* where that discharge, variation or cancellation is necessitated by a change of circumstances or by reason of undue hardships.

9. There has to be a finality to litigation. That is a fundamental premise of our judicial system. This is why we have provisions for Appeals and restricted rights in review or for recall. Accepting Mr. Kadam's argument amounts to upending the basics of our judicial process. Should I be tempted — I am not — to hold for him, nothing would prevent Mr. Dhond, by the same token, in moving an application seeking that I reconsider what I reconsidered; and then Mr. Kadam would file yet another similar application, and so on, “creeping in this petty way from day to day to the last syllable of recorded time”.

1. Gazette of India extraordinary dated 8th April 1974, Part II Section 2 p. 336.

10. Then there is this other dimension to this application: in essence, the present application asks me to sit in an Appeal over Mr. Justice Kathawalla's order. It does so despite the fact that the Defendants did move the Appeal Court, which they were always entitled to do, and which Appeal they then withdrew. In other words, I am now being asked — and there is really no other way of seeing this — to review the order of withdrawal by the Appeal Court and to take up an appeal from Mr. Justice Kathawalla's order. To say that this is slightly beyond the merely impossible is a very considerable understatement.

11. The Notice of Motion is dismissed. Only because of Mr. Kadam's thoughtfulness in approach, no costs.

(G. S. PATEL, J.)