

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.500 OF 2014
IN
CHAMBER SUMMONS NO.170 OF 2013
WITH
NOTICE OF MOTION NO.782 OF 2015
IN
APPEAL NO.500 OF 2014

Khoday India Limited	Appellant
versus	
The Scotch Whisky Association & others	Respondents

Mr.I.M.Chagla, Senior Advocate, with Mr.Gaurav Joshi, Senior Advocate with Mr.S.V.Doijode, R.H.Dawlat and R.H.Parbhoo i/by Doijode & Associates for Appellant.

Dr.Vieendra Tulzapurkar, Senior Advocate, with Mr.Kirti Munshi, Amit Jamsandekar, Ms.Gaurangi Pijara, Ms.Andrey Cardoz, Mr.M.Sampat i/by Little & Co. for Respondent no.1.

CORAM : A.S.OKA AND P.D.NAIK, JJ.

DATE : 21st March 2016

PC :

1. Heard learned Senior Advocate appearing for the Appellant and learned Senior Advocate appearing for the Respondent no.1. The Appellant is the original defendant and the Respondents are original plaintiffs. What is impugned in this Letters Patent Appeal is an order dated 1st April 2014

passed by the learned Single Judge on chamber Summons No.170 of 2013 taken out by the Appellant for rejection of the plaint under Rule 11 of Order VII of Code of Civil Procedure, 1908 ('Code' for short).

2. The suit is filed by Respondents as an action for passing off by the Appellant, inter alia, seeking a declaration that by using in respect of whisky not distilled and matured in Scotland, the label and carton containing the word "SCOT" and/or the crest of a lion rampant and/or the description "Distilled from the Finest Malt and Blended with Choiceste Whiskies by Scotch Experts under Government Supervision", the Appellant is passing off its whisky as "Scotch Whisky".

3. In the suit of the year 1987 after the written statement was filed, on 15th June 2006, issues were framed by learned Single Judge. A Chamber Summons being Chamber Summons No.1783 of 2008 was taken out by the Appellant on 12th February, 2013 for rejection of the plaint by invoking Rule 11 of Order VII of the code. The rejection was sought on the ground that the issue involved in the suit was already decided by the Apex Court on 27th May, 2011. Learned Single Judge by judgment and order dated 7th October 2009 dismissed the Chamber Summons for rejection of the plaint. The order was subjected to a challenge by present Appellant by preferring Appeal No.150 of 2010, which was dismissed by order dated

12th September 2011. The Division Bench while dismissing the Appeal No.150 of 2010, by order dated 12th September 2011, held that the suit could not have been dismissed at that stage because amongst other reasons, the issue of res-judicata was not raised by the Appellant in their written statement. A Special Leave Petition (Civil) No.1106 of 2012 was preferred by present Appellant. By order dated 27th January 2012, the SLP was disposed of by directing the learned Single Judge to decide old suit of 1987 as expeditiously as possible and in any event within three months from the date of communication of the said order. After the aforesaid order of Apex Court dated 27th January 2012, a Chamber Summons was taken out by the Appellant for amendment of the written statement for incorporating the plea of bar of res-judicata. The said Chamber Summons No.424 of 2012 was made absolute by order dated 16th July 2012.

4. On the basis of the registration granted on 27th January, 2011 to "Scotch Whisky" as a geographical indication under the provisions of the Geographical Indications of Goods (Regulation and Protection) Act, 1999, the Respondents took out Chamber Summons No.488 of 2012 for amendment of the plaint. While allowing the said Chamber Summons on 16th July 2012, the learned Single Judge observed that the question whether the Geographical Indications of Goods (Registration and Protection) Act, 1999 could be applicable to the facts of the present case or not will have to be decided after evidence is led

by the parties and the parties are heard. We must note here that the order dated 16th July 2012 passed by the learned Single Judge in chamber Summons No.488 of 2012 for amendment of the plaint was challenged before the Apex Court by filing a Special Leave Petition which was disposed of by order dated 5th November 2012. Though special leave petition was not entertained, all contentions of the parties were kept open and the learned Single Judge was directed to dispose of the matter within a period of three months.

5. It is after this order that on 12th February 2013, Chamber Summons No.170 of 2013 was taken out by present Appellant invoking Rule 11, Order VII of Code for rejection of the plaint. By the impugned order, the learned Single Judge dismissed the Chamber Summons.

6. Learned Senior Advocate appearing for the Appellant submitted that the prayer for rejection of plaint under rule 11 Order VII of the Code could have been considered at any stage of the proceedings and the suit could have been disposed of in terms of the directions of Apex Court even by the rejection of the plaint. Learned Senior Advocate invited our attention to the findings recorded in the impugned order and in particular observations made by learned Single Judge in paragraph 10 of the impugned order that the issues which were settled earlier by the Division Bench by judgment and order dated 12th

September, 2011 cannot be reagitated. Assailing the said finding of learned Single Judge, the submission is that the learned Single Judge ought to have decided the Chamber Summons on its own merits. he urged that the bar of res-judicata was attracted on reading of the plaint. Learned senior counsel for the original plaintiffs supported the impugned order.

7. We have carefully considered the submissions. In the first Chamber Summons being Chamber Summons No.1783 of 2008 taken out by the Appellant, the contention was that the plaint be rejected on the ground that the issue involved in the suit is decided by the judgment of Apex Court dated 27th May 2011 reported in (2008)10-SCC-723. By the order dated 7th October 2009, said Chamber Summons was rejected by learned Single Judge. Appeal No.150 of 2010 was carried by the Appellant before the Division Bench for challenging the said order. The Division Bench dismissed the appeal by judgment and order dated 12th September 2011. In paragraph no.1 of the said order, the Division Bench observed that in the earlier Chamber Summons, it was not the case of the Appellant that the suit was barred by res-judicata. The Division Bench noted the submission made by the Appellant that in that case, Section 151 of the Code could have been invoked for dismissing the suit as barred by res-judicata. Ultimately, the Division Bench observed that in the written statement filed by the Appellant, the plea of res-judicata was not raised and, therefore, the suit could not

have been dismissed on the basis of Chamber Summons taken out by the Appellant. Therefore, the order of learned Single Judge was confirmed by the Division Bench for different reasons. The Division Bench while dismissing the Appeal, granted liberty to the Appellant to raise a plea of res-judicata in the written statement. It is this order of the Division Bench which was challenged by the Appellant in Special Leave Petition No.1106 of 2012, which was disposed of by the Apex Court by order dated 27th January 2012. The order of the Apex Court reads thus :

"We have heard the learned counsel for the parties at some length. We are not inclined to interfere in the matter. However, in the peculiar facts and circumstances of this case, we deem it appropriate to request the High court of Judicature at Bombay to decide the old suit of 1987, being Civil Suit No.1729/1987, as expeditiously as possible, in any event, within three months from the date of communication of this order. With these observations this special leave petition is disposed of."

(Underline supplied)

8. Thereafter, as stated earlier, Chamber Summons No.424 of 2012 was taken out by the Appellant for amendment of the written statement for incorporating the plea of res-judicata. The said Chamber Summons was made absolute. Chamber Summons No.484 of 2012 filed by the Respondents-Plaintiffs for amendment of the plaint was also made absolute. Both the orders were passed by learned Single Judge on 16th July 2012. As pointed out earlier, the order dated 16th July

2012 passed in Chamber Summons taken out by the Respondents-Plaintiffs was confirmed by the Apex Court by the order dated 5th November 2012. The said order reads thus :

" We notice that the Suit is of the year 1987 and on that simple ground we are not entertaining this special leave petition. However, all the contentions available to the parties are kept open to be urged by the parties before the court below.

Considering the fact that the Suit is of the year 1987, the learned Single Judge of the Bombay High court is requested to dispose of the matter within a period of three months.

The special leave petition is, accordingly, disposed of."
(Underline supplied)

9. On 12th February 2013, Chamber Summons No.170 of 2013 was taken out by present Appellant for the rejection of the plaint. We have perused the affidavit-in-support of the said Chamber Summons in particular. Paragraph 15 which refers to the subsequent amendment made to the plaint. In paragraph 14 it is contended that the suit is barred by provisions of Section 11 of the Code and therefore, the Court ought to have rejected it on that ground. Paragraph 15 of the affidavit-in-support of the Chamber Summons raises a contention that amended suit is not maintainable. In paragraph 14, there is a contention that the suit be dismissed in exercise of the power under section 151 of the Code.

10. From the prayers made in the Chamber Summons No.170 of 2013 it is crystal clear that what was invoked was Rule 11 of Order VII of the code. While considering the prayer for rejection of the plaint, only the averments made in the plaint and the annexures to the plaint can be considered and nothing else. Therefore, at highest, under Rule 11 Order VII of the Code, the learned Single Judge could have considered the prayer for rejection of plaint on the ground of res-judicata on the basis that the averments made in the plaint show that the suit is barred by, res-judicata. It is in that context that the learned Single Judge in paragraph 10 has observed that the issue which was admittedly canvassed by taking out earlier Chamber Summons for rejection of the plaint, could not be reagitated. The fact remains that the earlier order of the learned Single Judge by which the prayer for rejection of the suit on the ground of res-judicata was rejected has become final. The same prayer could not have been again considered by the learned Single Judge because there was an amendment made to the written statement. In paragraph 16 of the impugned order, the learned Single Judge has observed thus :

"16. With regard to the Defendants' contention that the question posed for the Court's consideration by the present Chamber Summons should be decided as a preliminary issue, and their reliance on the judgments in Abdul Rahman Vs. Prasony Bai (supra) and Shipping Corporation of India Ltd. V/s. Machado Brothers and Ors. (supra) for the said purpose, the Plaintiffs are correct in submitting that the observations and conclusions in these two judgments were made by the Hon'ble Supreme Court on the basis of the facts in those two

matters. In the present case, especially in view of the order dated 16th July 2012, it is now not open for the Defendants to contend that the question raised by the present Chamber Summons should be decided as a preliminary issue."

Therefore, the learned Single Judge has observed that in the light of the order dated 16th July 2012 passed by the Apex Court, it is not open for the Appellant to contend that the question raised by the present Chamber Summons should be decided as a preliminary issue.

11. On special leave petition filed by the Appellant bearing No.32062 of 2012, by order dated 5th November 2012, the Apex Court expected the learned Single Judge to decide the suit within a period of three months. In fact, under the earlier order dated 27th January 2012 passed by the Apex Court in Special Leave Petition No.1106 of 2012 filed by the Appellant, a direction was already issued to decide the suit within three months from the communication of the said order.

12. Issues have been framed on the basis of amended pleadings. On the face of order dated 5 November 2012 of the Apex Court, which expected the learned Single Judge to take up the suit for final hearing and decide the same in three months, the learned Single Judge was justified in not deciding the Chamber Summons for rejection of plaint taken out by the Appellant on merits. However, notwithstanding the impugned order, the additional issue framed on the basis of the plea of res-

judicata will be decided on its own merits as the said issue has not been decided on merits.

13. Therefore, we do not see any reason to interfere with the impugned order passed by learned Single Judge. Subject to what is observed above, the appeal is dismissed with no order as to costs. Notice of Motion No.782 of 2015 does not survive and stands disposed of as such.

(PD.NAIK, J.)

(A.S.OKA, J.)

MST