

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

% Order delivered on: 10th November, 2014

+ **I.A. No.300/2013 and I.A. No.3756/2014 in**
CS(OS) No.2172/2007

BANYAN TREE HOLDING (P) LIMITED. Plaintiff
Through Mr. Pravin Anand, Adv.
versus

JAMSHYAD SETHNA AND ANR Defendants
Through Mrs.Prathiba M. Singh, Sr. Adv.
with Mr.Vaibhav Vutts, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. By this order I propose to decide two applications of the plaintiff being I.A. No.300/2013 and I.A. No.3756/2014 under Order VI Rule 17 read with Section 151 CPC for amendment of the plaint.
2. The plaintiff had filed the present suit for passing off, unfair competition, dilution of trademark, rendition of accounts of profit, delivery up, damages, etc against the defendant in the year 2007.
3. Plaintiff filed an application being I.A. No.15722/2009 for amendment of plaint on 2nd December, 2009 to bring on record the factum of registration of trademark No.1254023 in favour of the plaintiff and incorporate the prayer for infringement of trademark. This application was withdrawn by the plaintiff with the liberty to file

fresh application along with deed of assignment executed on 22nd May, 2006, which was allegedly placed on record under the list of documents dated 1st November, 2009 but could not be located in Court at the time of hearing when the said application was withdrawn.

4. Thereafter plaintiff moved a fresh application for amendment being I.A. No. 300/2013 to bring on record the factum of registration of trademark No. 1254023 in favour of the plaintiff and incorporate the prayer for infringement of trademark. Reply to the said application was also filed.

5. It is the case of the plaintiff that during the pendency of proceedings, plaintiff became aware of certain new trademark registrations under Nos. 1513432, 1513433 and 1513434 which were not in plaintiff's knowledge, power or possession at the time of filing the earlier amendment application being I.A. No. 300/2013. This is because certificate of registration of trademark No. 1513432 though was issued on 16th March, 2011, it was received by the plaintiff only in May, 2011 containing certain errors which are yet to be corrected by the Trade Marks Registry. Similarly, certificate of registration of trademark No. 1513433 though was issued on 27th December, 2011, it was received by the plaintiff only in June, 2011 containing certain errors and these errors were corrected by the Trade Marks Registry only in July, 2013. However, said certificate in the corrected form has not yet been made available to the plaintiff by the Trade Marks Registry and could not be placed on record despite due diligence.

Whereas certificate of registration of trademark No. 1513434 was not in plaintiff's knowledge, power or possession at the time of filing the earlier amendment application and the plaintiff became aware of the existence of the said certificate only subsequently.

6. It is the case of the plaintiff that these trademark registrations issued in favour of the plaintiff confer valuable statutory rights and omission to sue upon infringement of the said statutory right was entirely inadvertent. Plaintiff despite exercise of due care and caution did not come into possession of the corrected certificates of registration until very recently.

7. It is averred that it is imperative for the plaintiff to consequently amend its pleadings to reflect its statutory rights and to seek relief for infringement of its trademark against the defendants. Accordingly, the plaintiff seeks to amend the plaint as detailed in Para 9 of the application being I.A. No.300/2013 and in Para 7 of the application being I.A. No.3756/2014.

8. I have heard learned counsel for the parties and have also considered the present application as well as the decisions given by various Courts on this aspect of the matter. No doubt an amendment cannot be allowed if it would have the effect of substituting one cause of action for another or changing the subject matter of the suit. An amendment sought would also not be allowed if it would deprive the other party of a legal right accrued by lapse of time. However, it is the duty of the Court to allow amendment of the pleadings when it is necessary for the purpose of determining the real question of

controversy in the suit. It is the duty which has been cast upon the Courts so that substantial justice may be done for which purpose the Courts exist.

9. In the present case, it is an undisputed fact that the plaintiff has filed the suit for permanent injunction, passing off etc. seeking the injunction from using the mark BANYAN against the defendants. The trade mark BANYAN on the date of filing of the suit was not registered/assigned in favour of the plaintiff. The said trade mark was registered in favour of the plaintiff during the pendency of the suit. It is also a matter of fact that the evidence in the matter is yet to commence and it is also well established law that while considering the amendment, the merit of the case is immaterial.

10. There are various decisions given by this Court in similar situation wherein the trademark was registered during the pendency of the suit for passing off and amendment was allowed by the Courts, the parties were permitted to incorporate the claim of infringement of trademark in the plaint.

11. In the case of ***Anglo Dutch Color & Varnishing Works Ltd. vs. Indian Trading House***, 1984 PTC 54, the amendment of the plaint was sought by the plaintiff raising an additional ground as to infringement of trademark registered during the pendency of suit was allowed even when the original suit was based on infringement of copyright and passing off action. It was held that as the amendment sought is necessary for a decision of real dispute between the parties particularly when it will not prejudice the defendants in any manner

even though it introduced to a new cause of action in the strict and technical sense.

12. In the case of ***Savitri Minda vs. Minda Industries***, 1997 PTC 257, this Court allowed the amendment of the plaint under Order VI Rule 17 CPC observing that the courts should be liberal in the matter of allowing amendment unless serious injustice or irreparable loss is caused to the other side. It was also observed that the Courts exist to decide the rights of the parties and not to punish them for the mistake they make in the conduct of their cases.

13. In ***Sinhal Metal Industries Pvt. Ltd. vs. Royal Enterprises***, 1998 PTC 128 amendment of plaint under Order VI Rule 17 was allowed in a suit for passing off, when the registration of mark was obtained during pendency of the suit. It was held that refusal of amendment is likely to lead to multiplicity of proceedings.

14. In the case of ***Laxmi & Co. Vs. Dr. Anant R. Deshpande and Anr.*** AIR 1973 SC 171 it was held as under :

“Where, subsequent to the institution of the suit events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief he will, as a general rule, be allowed to amend the plaint by moulding it in an appropriate manner.”

15. Ordinarily under Order VI Rule 17 CPC, all amendments ought to be allowed which satisfy two conditions (a) of not causing injustice to the other side and (b) of being necessary for the purpose of determining the real question in controversy between the parties.

16. While considering an application under Order VI Rule 17 CPC, the Court cannot decide about the falsity or correctness of the amendment sought to be made. The main consideration which must weigh with the Court is whether such amendment is necessary for just and final determination of the controversy between the parties or not.

17. In the case of **Rajesh Kumar Aggarwal and Ors. Vs. K.K. Modi and Ors.** AIR 2006 SC 1647, it was held as under:

“19.While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment.....”

18. In the case of **State of A.P. v. Pioneer Builders**, (2006) 12 SCC 119, at page 127, it was observed as under :

“21. Principles governing amendment of pleadings are well settled. Order 6 Rule 17 CPC deals with the amendment of pleadings and provides that the court may at any stage of the proceedings allow either party to alter or amend pleadings in such a 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 questions in controversy between the parties. It is trite that though an amendment cannot be claimed as a matter of right under all circumstances, yet the power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice. It is equally well settled that unless serious injustice or irreparable loss is likely to be caused to

the other side, the court should adopt liberal approach and not a hypertechnical approach, particularly in a case where the other side can be compensated with costs. Dominant object to allow the amendment in the pleadings liberally is to avoid multiplicity of proceedings. (See L.J. Leach & Co. Ltd. v. Jardine Skinner & Co. AIR 1957 SC 357, Ganga Bai v. Vijay Kumar (1974) 2 SCC 393 and B.K. Narayana Pillai v. Parameswaran Pillai (2000) 1 SCC 712) Nevertheless, one distinct cause of action cannot be substituted for another nor the subject-matter of the suit can be changed by means of an amendment. The following passage from the decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung AIR 1922 PC 249 succinctly summarises the principle which may be kept in mind while dealing with the prayer for amendment of the pleadings:

All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.”

19. In the case of ***Usha International vs. Usha Television Limited***, 2002 (25) PTC 184 (Del) (DB), it was held that the rule of amendment of pleadings has to be governed on the basic rule of justice, equity and good conscience. When this principle is applied, the amendment as prayed has to be allowed. It was further observed that the main consideration for allowing the application is to avoid multiplicity of proceedings which means saving of previous judicial time and saving of avoidable expenses for the litigants.

20. In view of my above discussion, amendments sought by the plaintiff is allowed as no prejudice is caused to the defendants in any manner. I am of the considered view that the proposed amendments are necessary for the purpose of determining the real matter in controversy between the parties. Amended plaint be filed within two weeks from today. The defendant is granted four weeks thereafter to file the written statement.

21. Both the applications being I.A. No.300/2013 and I.A. No.3756/2014 filed by the plaintiff under Order VI Rule 17 CPC stand disposed of in the above terms.

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List the matter before Joint Registrar on 5th February, 2015 for completion of pleadings.

**(MANMOHAN SINGH)
JUDGE**

NOVEMBER 10, 2014