* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 6th December, 2017

+ **CS(COMM) 757/2016 & IA No.7613/2016 (under Order XXXIX Rules 1&2 CPC).**

MAJA COSMETICS & ANR. ..... **Plaintiffs**
Through: Mr. Neeraj Grover, Ms. Kanika Bajaj, Mr. Aditya Singh, Ms. Mehak and Ms. Ragini Anand, Advs.

versus

OASIS COMMERCIAL PVT. LTD. ..... **Defendant**
Through: Mr. Shailen Bhatia, Mr. Amit Jain, Ms. Priyanka Anand and Mr. Nikhil Mittal, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

OA No.34/2017 (of the plaintiffs against order dated 9th January, 2017) and IA No.2695/2017 (for condonation of two days delay in preferring the appeal).

1. The plaintiffs have preferred this Chamber Appeal against the order dated 9th January, 2017 of the Joint Registrar, allowing the application of the defendant for condonation of delay in filing the written statement subject to payment of costs of Rs.5,000/- by the defendant to the plaintiffs / appellants.

2. The counsel for the plaintiffs / appellants has argued that it is not in dispute that the defendant did not file the written statement within 120 days of service and the learned Joint Registrar has notwithstanding the dicta of this Court in order dated 11th August, 2016 in CS(OS) No.3390/2015 titled ***Oku Tech Private Limited Vs. Sangeet Agarwal,*** holding that owing to the

amendments in Order VIII of the Code of Civil Procedure, 1908 (CPC) as applicable to Commercial Courts constituted under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, (Commercial Courts Act) the Court is not empowered to condone the delay in filing the written statement beyond 120 days from the date of service, condoned the delay beyond the said 120 days.

3. The Chamber Appeal is accompanied with an application for condonation of two days delay in filing thereto. The delay is attributed to the unexpected travel by the clerk of the counsel for the plaintiffs / appellants to his native place without handing over the receipt of the application for the certified copy of the order to anyone else.

4. The counsel for the defendant appears on advance notice.

5. I have enquired from the counsel for the defendant, whether ***Oku Tech Private Limited*** supra was taken in appeal.

6. The counsel for the defendant states that he has heard so but has no particulars thereof.

7. The counsel for the defendant has at the outset contended that no cause is shown for condonation of delay of two days in preferring the Chamber Appeal.

8. The application for condonation of delay is accompanied with the affidavit of the counsel for the plaintiffs / appellants as well as of the clerk of the counsel for the plaintiffs / appellants and I have no reason to disbelieve the same.

9. For the reasons stated, the delay in preferring the Chamber Appeal is condoned.

10. The counsel for the defendant has next contended that the plaintiffs /

appellants have accepted the costs subject to payment of which the delay in filing the written statement was condoned vide the impugned order and is now not entitled to challenge the order. In support thereof, a photocopy of the letter addressed by the counsel for the defendant to the counsel for the plaintiffs / appellants along with a photocopy of a Bank Draft for Rs.5,000/- stated to be enclosed therewith and the courier receipt vide which it was dispatched and the report of delivery is handed over and which are taken on record.

11. I have enquired from the counsel for the defendant, whether the Demand Draft has been encashed.

12. The counsel for the defendant states that he has not checked the same.

13. The counsel for the plaintiffs / appellants, on enquiry, states that no Demand Draft has been received.

14. The counsel for the plaintiffs / appellants at this stage also states that the defendant has filed a reply to the application for condonation of delay and in which the defendant took the same plea and the plaintiffs / appellants have in rejoinder filed controverted that any Bank Draft towards cost of Rs.5,000/- has been encashed.

15. The counsel for the defendant states that the plaintiff, in rejoinder has only made a bare denial.

16. Be that as it may, since there is a denial, if the counsel for the defendant wants to press the said aspect, he ought to have obtained a certified copy from the Bank of the encashment of the Demand Draft and without the same, the said plea cannot be accepted.

17. The counsel for the defendant has then contended that Section 13 of the Commercial Courts Act prohibits an appeal and this appeal itself is thus

not maintainable. Reliance is placed on the judgment dated 14th February, 2017 in FAO(OS) (COMM) No.12/2017 titled ***HPL (India) Limited Vs. QRG Enterprises***, where the Division Bench of this Court has held that against orders of Commercial Divisions of the High Court other than the orders mentioned in Order XLIII Rule 1 of the CPC no appeal lies.

18. Section 13 is as under:-

> *"**13. Appeals from decrees of Commercial Courts and Commercial Divisions.**–(1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be:*
>
> *Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996.*
>
> *(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act."*

and needs no elucidation.

19. The same nowhere refers to a Chamber Appeal which is a creation of the Delhi High Court (Original Side) Rules, 1967 framed in exercise of powers under Section 7 of the Delhi High Court Act, 1966 and under Sections 122 and 129 of the CPC.

20. The High Court, vested with ordinary original civil jurisdiction in suits, value of which exceeds Rupees Two Crores, for the sake of expeditious disposal of such suits, in exercise of powers under Section 7 of

the Delhi High Court Act, enabling it to make rules and orders with respect to practise and procedure for the exercise of its ordinary original civil jurisdiction, has devised a practice/procedure of certain powers of the Court to be exercised by Joint Registrars (Judicial) and which post is occupied by the Additional District Judges on deputation and of an Appeal against the orders of the Joint Registrar to the 'Judge in Chambers'. One such power which the Joint Registrar (Judicial) is empowered to exercise, is to decide applications for enlargement of time.

21. There is nothing in the Commercial Courts Act, to make the said practise/procedure inapplicable to disposal of commercial suits and there is no bar to such a Chamber Appeal. Section13(2) of the Commercial Courts Act supra, commencing with a *non obstante* clause only bars appeals, otherwise than as provided therein, against the order or decree of Commercial Court/Commercial Division and not the Chamber Appeal under the Delhi High Court Act and the Delhi High Court Rules.

22. In the absence of any bar, it cannot be said that the Chamber Appeal does not lie.

23. It is not the contention that the Joint Registrar (Judicial) has no such powers in relation to commercial suits. It is not even open to the defendant to contend so, the defendant being beneficiary of the order of the learned Joint Registrar (Judicial).

24. The counsel for the defendant then contends that had the order been passed by a Commercial Division instead of by the learned Joint Registrar (Judicial) as its delegatee, there would have been no occasion for the plaintiffs / appellants to appeal to the Division Bench of this Court inasmuch as the order of the nature impugned in this Chamber Appeal is not appealable

under Order XLIII Rule 1 of the CPC.

25. Not only can no such hypothetical argument be raised but even otherwise, merely because an appeal is not maintainable would not alter the character of the order and the remedy of approaching the Supreme Court against the order would always have been available. On such arguments, decisions cannot be rendered.

26. I thus hold this Chamber Appeal to be maintainable.

27. Once the appeal is found to be maintainable, there is no iota of doubt that the view taken by the learned Joint Registrar (Judicial) is contrary to ***Oku Tech Private Limited*** supra which has been followed by other single Judges and reference may be made to ***Saregama India Limited Vs. Jai Manjit Singh*** 2017 SCC OnLine Del 12169 and ***AIS Glass Solutions Limited Vs. Moser Baer Solar Limited*** **2017** SCC OnLine Del 11467.

28. I have enquired from Mr. Sandeep Sethi, Sr. Advocate present in Court in another matter whether the judgments aforesaid have been considered by the Division Bench of this Court and he informs that the Division Bench is seized of appeal against order dated 30th August, 2016 in CS(OS) No.3355/2015 titled ***Gulf DTH LLC Vs. Dishtv India Limited***.

29. The Chamber Appeal is allowed.

30. The order dated 9th January, 2017 of the Joint Registrar allowing the application of the defendant for condonation of delay in filing the written statement is set aside. Resultantly, IA no.15044/2016 of the defendant is dismissed.

31. The Chamber Appeal is disposed of.

<u>CS(COMM) 757/2016 & IA No.7613/2016 (under Order XXXIX Rules 1&2 CPC).</u>

32. The defendant, in accordance with the provisions of Order VIII Rule 10 of the CPC as applicable to Commercial Suits, having forfeited the right to file written statement, I have considered whether the plaintiffs are entitled to decree forthwith as sought or are to be relegated to proving their case.

33. The plaintiffs, besides the relief of injunction restraining infringement of trade mark, have also sought relief of delivery and recovery of damages. The counsel for the plaintiffs however on enquiry states, that for the purposes of decree forthwith under Order VIII Rule 10 of the CPC, the plaintiffs are willing to forsake the relief of delivery and damages and confine the relief in this suit to that of injunction alone.

34. The plaintiffs being the registered proprietor of the trade mark 'VI-JOHN' have instituted this suit to restrain the defendant from using the trade mark 'V-JOHN'.

35. The plaintiffs have registration of the mark *inter alia* in Class-3 of the 4th Schedule to the Trade Mark Rules, 2017 i.e. in relation to shaving creams, cosmetics, etc. and also hold the registration in Class-33 i.e. relating to alcoholic beverages except beer.

36. The defendant is using the mark in relation to alcoholic beverages except beer and the counsel for the defendant on enquiry states that the defendant is using the mark in relation to whisky.

37. The mark of the defendant is not registered.

38. The only argument of the counsel for the defendant is that the plaintiffs have not filed any manufacturing license to show the manufacture and marketing of alcoholic beverages for which registration has been sought and since alcoholic beverages cannot be manufactured or marketed without such license, the inference that has to be drawn is that the plaintiffs are not

manufacturing or marketing alcoholic beverages under the mark 'VI-JOHN'.

39. The counsel for the plaintiffs has argued that it is also his case that the plaintiffs, though had initially set up the business for manufacturing and marketing shaving creams, cosmetics etc. but have since expanded into diverse businesses including of alcoholic beverages and it is the plea of the plaintiffs that the plaintiffs are carrying on business in alcoholic beverages. The plaintiffs have however not filed any carton/label or other document, showing use of the mark 'VI-JOHN' in relation of alcoholic beverages.

40. I have considered the aforesaid contention of the counsel for the defendant and whether the same disentitles the plaintiffs to the relief of permanent injunction restraining infringement.

41. The counsel for the plaintiffs has argued that the plaintiffs are entitled to protection under Section 29(4) of the Act.

42. Having given thought to the matter, I am of the view that if it is the case of the defendant that the plaintiffs are not using the trade mark in relation to the goods for which the plaintiffs have obtained registration under Class 33, the remedy of the defendant is to apply under Section 47 of the Act for having the trade mark struck off from the Register and without the said procedure having been followed, and the right to file written statement having been forfeited, the defendant cannot be permitted to resist the decree under Order VIII Rule 10 of the CPC on such ground.

43. Otherwise, on perusal of the two marks, there is no iota of doubt that the use by the defendant of the mark 'V-JOHN' in relation to alcoholic beverages is deceptive of the registered mark 'VI-JOHN' of the plaintiffs for the same class of goods. The need to relegate the plaintiffs to lead evidence on this aspect is not felt.

44. A decree is accordingly passed, in favour of the plaintiffs and against the defendant in terms of prayer paragraphs 40 (a), (b), (c) & (d) of the plaint. The plaintiffs shall also be entitled to costs of the suit from the defendant.

45. Counsel fee assessed at Rs.50,000/-.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

DECEMBER 06, 2017
'pp'..

(Corrected and released on 19th January, 2018).