

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.10.2018

Date of Decision : 20.11.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.6025 of 2018
in
C.S.No.632 of 2017

QDSeatamon Designs Private Limited,
5th Floor, Status Quo,
38 Sterling Road
Nungambakkam,
Chennai-600 034

rep by its Director Ms.Aarthi Mudalaiyar .. Applicant in A.No.6025 of 2018
and
Defendant in C.S.No.632 of 2017

Vs.

P.Suresh

.. Respondent in
A.No.6025 of 2018
and
Plaintiff in C.S.No.632 of 2017

A.No.6025 of 2018 is filed under Order XIV Rule 8 of the Madras High Court Original Side Rules read with Section 151 of the Civil Procedure Code seeking to dismiss the suit in C.S.No.632 of 2017 on the file of this Court.

C.S.No.632 of 2017 is preferred under Order IV Rule 1 of OS Rules read with Order VII Rule 1 of the Code of Civil Procedure, 1908 read with Section 60 of the Copyright Act, 1957 seeking to grant a judgment and decree by (a) directing the defendant to pay a sum of Rs.25,01,000/- as damages to the plaintiff along with future interest at 18% per annum from the date of filing of the suit till the actual payment thereof; (b) granting a permanent injunction restraining the defendant, their assigns, affiliates, directors, servants, agents,

employees or any other persons acting on their behalf from making groundless and illegal threats of institution of legal proceedings for infringement of copyright or any other like proceeding against the plaintiff; (c) by granting an order of declaration declaring the threats issued by the defendant pursuant to emails, dated 6.7.2017, 13.7.2017 and 04.08.2017 are illegal, groundless and unjustifiable; (d) by granting an order of declaration declaring that the plaintiff has neither infringed nor is in possession of any material or information or confidential information relating to the defendant's business, including copyrights and any other intellectual property right as claimed by the defendant ; (e) by granting an order of declaration declaring that the defendant is not the owner of copyright in the prototype samples or the 2D illustrations of designs/ garment styles developed for the Fall 17 collection or any of the past collections as claimed by the defendant; (f) an order of costs in these proceedings; and (g) any further orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the present case may be passed in favour of the plaintiff and against the defendant.

For Applicant : Mr.Parthasarathy
for Mr.Arun Karthikmohan

For Respondent : Mr.Anirudh Krishnan

सतर्पणेन जयते
ORDER

This application raises a very interesting legal situation. It may be necessary to set out the factual matrix in a nutshell, sans unnecessary details and particulars, for better understanding and appreciation of this order.

2 Factual Matrix in a Nutshell :

(a) One P.Suresh (son of A.Perumal) (hereinafter referred to as 'PSR' for brevity and clarity) was engaged as a Product Developer by a

private limited company which goes by the name QDSeatamon Designs Private Limited (hereinafter referred to as 'QDS Company' for brevity and clarity). According to PSR, he rendered services as product developer for QDS company for more than four years after which he chose to terminate his engagement with QDS company on 27.6.2017 citing family reasons. Ironically and incidentally, this termination or this terminating point is the originating point of this entire lis.

(b) PSR would go on to say that as a matter of good faith and goodwill gesture, he continued to attend the office of QDS company till 15.7.2017. It is PSR's allegation that QDS company compelled him to sign a job offer letter post aforesaid termination. QDS company would deny this allegation. It may not be necessary to delve further into these factual controversies in the light of the limited and narrow scope of the instant application.

(c) It is PSR's case that QDS company sent mails / communications inter-alia alleging that PSR's termination had not been accepted as he was handling sensitive and valuable information relating to copyright and other intellectual properties owned by QDS company.

(d) To be noted, copyright and intellectual property rights which are subject matter of this lis are inter-alia constituted by original prototype samples pertaining to either Fall 17 collection, other past season collections and hard copies of the colour print outs for Fall 17 collection, all pertaining to apparel (this shall hereinafter be collectively referred to as 'suit copyright' for the sake of convenience and clarity). Further to be noted, while

PSR disputes that QDS company has any copyright qua suit copyright, QDS company is asserting the contrary.

(e) It is also PSR's case that a barrage of mails and communications sent by QDS company in this regard are illegal, baseless and groundless qua suit copyright. On this basis, PSR filed a suit in this Court being C.S.No.632 of 2017. This suit was presented on 09.08.2017 and this suit is primarily under Section 60 of 'The Copyright Act, 1957' (hereinafter referred to as 'CR Act' for brevity).

(f) Prayers in this suit included injunctive relief against QDS company qua groundless and illegal threats pertaining to suit copyright, damages for Rs.25,01,000/-, declaratory relief that communications sent by QDS company (which constitutes the fulcrum of the suit) are illegal / groundless, for a declaration that PSR has not infringed suit copyright or any other confidential information. Another declaration prayer that QDS company is not the owner of the suit copyright, for costs and a usual residuary limb form part of the suit prayer. To be noted, communications which constitute the fulcrum of this suit have been set out as three emails, dated 6.7.2017, 13.7.2017 and 4.8.2017 sent by QDS company to PSR. This suit, i.e., C.S.No.632 of 2017 filed under Section 60 of CR Act and presented in this Court on 9.8.2017 shall hereinafter be referred to as 'senior suit'.

(g) Suit summons in senior suit was duly served on the sole defendant, i.e., QDS company. Thereafter, QDS company filed / presented a suit being C.S.No.742 of 2017 on the file of this court on 15.9.2017. This suit is inter-alia under Sections 51 and 55 of CR Act. PSR is the sole defendant in

this suit. Prayers in this suit are for injunctive relief qua suit copyright, damages for alleged mental agony owing to alleged infringement of suit copyright, for delivery of offending material and costs. This infringement suit shall hereinafter be referred to as 'junior suit' for the sake of convenience and clarity. To be noted, aforesaid two suits, i.e., first suit for groundless threat primarily under Section 60 of CR Act and the latter suit for infringement primarily under Section 55 of CR Act are referred to as 'senior suit' and 'junior suit' respectively based on the dates of presentation / filing of the respective suits.

(h) In the aforesaid scenario, QDS company has now taken out the instant application in the senior suit with a prayer for dismissal of the senior suit. To be noted, as per judges summons, this application has been filed under Section 151 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity), but at the hearing, it is submitted that dismissal of the senior suit is being sought under proviso to Section 60 of CR Act. In other words, it is the case of QDS company in the instant application that junior suit has been filed with due diligence which in effect is commencement and prosecution of action qua suit copyright and therefore, by operation of proviso to Section 60 of CR Act, the senior suit deserves to be dismissed. According to QDS company, in the instant case, in the light of proviso to Section 60 of CR Act, on presentation and prosecution of junior suit, Section 60 of CR Act is not available for PSR.

(i) This submission is resisted by PSR by saying that junior suit has been filed much later in time, senior suit includes a claim for

damages and that a mere filing of junior suit, i.e., a suit for alleged infringement will not entitle dismissal of the prior suit for groundless threat. I shall refer to the submissions in greater detail infra under a suitable caption as this is narration of factual matrix in a nutshell.

3 Rival Submissions :

The rival submissions of the counsel on either side can be summarised as follows:

4 Submissions of Mr.R.Parthasarathy, learned Counsel for defendant in the Senior Suit (applicant herein) are as follows:

(a) The language in which proviso to section 60 of the CR Act is couched is clear and does not need any further interpretation. The language indicates that once a suit for infringement is filed, the previous pending suit with respect to groundless threat under section 60 of the CR Act will become infructuous.

(b) The application and interpretation with respect to proviso to section 60 has been well settled by the Delhi High Court in ***Super Cassette Industries Ltd. Vs. Bathla Cassettes India (P) Ltd. [AIR 1994 Del 237]***, the Supreme Court has affirmed this ratio in ***M/s.MAC Charles (I) Ltd. Vs. M/s.Indian Performing Rights Society Ltd. [SLP (C)No.39994 of 2012***, decided on 30.9.2013]. There is no reason for resurrection of a debate on the same.

(c) The Bombay High Court in ***Music***

India Ltd. Vs. M/s. Super Cassetts Industrial Pvt. Ltd.
[1987 PTC 83] interpreted proviso to section 60 even before the Delhi High Court in **Super Cassette Industries Ltd** case. The Bombay High Court also held that once a suit for infringement has been filed, the previous pending suit with respect to groundless threat under section 60 of the Copyright Act will become infructuous.

(d) Even though the Supreme Court judgment is pre-leave, it is binding on the Madras High Court under Article 141 as interpreted in conclusion para, more particularly sub paragraph (v) of paragraph 44 of the **Kunhayammed and others Vs. State of Kerala** reported in (2000) 6 SCC 359. **Suganthi Suresh Kumar Vs. Jagdeeshan** reported in (2002) 2 SCC 420 was also pressed into service in this regard to emphasise the Rule of precedents.

(e) The word 'due diligence' occurring in proviso to section 60 only refers to a point in time, meaning that the plaintiff in the suit for infringement must institute the infringement suit, without any delay. The suit for infringement must be instituted within reasonable time. The word 'due diligence' has also been interpreted to be a point in time by the Madras High Court in **Mehta Unani Pharmacy & Co., Rajkot and another Vs. Amrutanjan**

Limited, Madras reported in **2002 (25) PTC 475**.

(f) Two learned Judges of the Madras High Court in two separate judgments have followed the ratio in **Super Cassette Industries. (Polaris Financial Technology Limited Vs. Adobe Systems Incorporated in C.S.No.735 of 2013 and O.A.No.842/2013 and M/s.Zari Vs. M/s. Zari Silk India Pvt. Ltd. in C.S.No.665 of 2013 and O.A.No.744 of 2013)**.

(g) Pendency of the senior suit will prejudice this defendant as laid down by the Supreme Court in **Shipping Corporation of India Ltd Vs. Machado Brothers and Others** reported in **(2004) 11 SCC 168- ex debito justitiae**.

(h) Ratio in **M/s.Purbanchal Cables and Conductors Private Limited Vs. Assam State Electricity Board** reported in **AIR 2012 SC 3167** has been referred to a Larger Bench owing to divergent views taken by two Judges of the Supreme Court in **Shanti Conductors Private Limited Vs. Assam State Electricity Board** reported in **(2016) 15 SCC 13**. Therefore, **Purbanchal Cables** cannot be relied on for sub silentio principle.

(i) The senior suit will not become infructuous by the mere filing of the junior suit as proviso to section 60 of the CR Act has many sub issues, which have not been dealt with in the judgments of the Delhi High Court, Supreme Court and the Madras High Court referred to supra.

(ii) As the Delhi High Court judgment and the Supreme Court judgment did not interpret certain important sub- issues in the proviso to section 60, both those judgments are *sub silentio*, hence not binding on this Commercial Division.

(iii) The sub issues under proviso to section 60 which have not been dealt with, by the Delhi High Court, Supreme Court and subsequently the Madras High Court are :

(a) It should prima facie be established that plaintiff in copyright infringement suit has filed the same with due diligence and this is a question of fact. Likewise meaning of expression 'due diligence' as occurring in proviso to Section 60 of CR Act not examined.

(b) The expression 'copyright claimed by him' occurring in proviso to Section 60 of CR Act has not been interpreted.

(c) Whether a suit under section 55 of CR Act for infringement should be prior to or post the suit under section 60 of the CR Act.

(d) Whether the relief for damages under section 60(b) of the CR Act can be taken away merely because a suit for infringement has been filed under section 55. This is an important sub issue as the main provision recognises the plaintiff's right to claim damages and the proviso cannot take away a right which is recognised by the main provision.

(iv) The Supreme Court judgment does not fall within the purview of doctrine of binding precedent under Article 141 of Constitution of India, as this principle/doctrine has certain exceptions. There are two exceptions to Article 141 of Constitution of India-(i) when a judgment has been declared as *per incuriam* or (ii) when the judgment is *sub-silentio*.

(v) *Sub silentio* has been interpreted by the Supreme Court in ***Municipal Corporation of Delhi Vs. Gurnam Kaur [AIR 1989 SC 38]***, ***State of U.P. Vs. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139]*** and ***Purbanchal Cables and Conductors Private Limited Vs. Assam State Electricity Board [AIR 2012 SC 3167]***

in a identical manner. Hence it does not matter that the judgment in ***Purbanchal Cables and Conductors Private Limited*** has been referred to a Larger Bench owing to divergence in ***Shanti Conductors Private Limited Vs. Assam State Electricity Board [(2016) 15 SCC 13]***. All these judgments apply the principle of *sub silentio* by referring to Professor P.J. Fitzgerald, editor of Salmond on Jurisprudence, 12th edn. which explains the concept of *sub silentio* (at page 153) in the following words:

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind."

(vi) The legal maxim *stare decisis* is only applicable when the decision/judgment contains concrete reasons and interpretation, hence as a sequitur it will follow that judgments without reasons and interpretation of sub-issues are *sub silentio* and not binding under Article 141 of the Constitution of India (***Municipal Corporation of Delhi Vs. Gurnam Kaur [AIR 1989 SC 38]***, ***State of U.P. Vs. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139]*** and ***Purbanchal Cables and***

Conductors Private Limited Vs. Assam State Electricity Board [AIR 2012 SC 3167]- all these judgments are for the interpretation of sub silentio).

(vii) The Judgment in **Super Cassette Industries Ltd Vs. Bathla Cassettes India (P) Ltd. [AIR 1994 Del 237]** which was subsequently affirmed by the Supreme Court in **M/s.MAC Charles (I) Ltd v. M/s.Indian Performing Rights Society Ltd. in SLP (C)No.39994 of 2012** decided on 30.9.2013 is not binding on this Commercial Division as both are *sub silentio* because the four sub-issues indicated supra have not been brought to the notice of the Delhi High Court and the Supreme Court.

(viii) Casual observations made by the Supreme Court in **MAC Charles** will not bind the lower courts; an *obiter dictum* is not binding. Only judgments, which are pronounced after being fully argued and after consideration of all issues and sub-issues with respect to the case, will be binding under Article 141 or in other words, it should be a *Ex Cathedra statement*. In **Municipal Corporation of Delhi** case, it was held that when a point of law is not pressed in court, then it shall not bind the lower court. Hence it will follow that as the 4 sub-issues referred to supra, were not articulated before

the Delhi High Court and the Supreme Court, those judgments will not bind this Commercial Division.

(ix) Moreover the judgment in **MAC Charles** case is pre-leave, therefore the Doctrine of merger will not apply and Article 141 will not come into operation.

(x) Judgments which are *per incuriam* are not binding on court [**Synthetics and Chemicals Ltd.(1991) 4 SCC 139**].

(xi) A Division Bench of the Madras High Court in **P.Bhaskaran Vs. S.K.M.Sivakumaran and others [MANU/TN/1178/2015]** has held some court case laws to be *sub silentio* qua a particular Rule.

6 Deliberation and Discussion :

(a) Though several rival submissions have been made, on a careful analysis of the entire factual matrix and legal pleas that have been raised in the instant case, the debate necessary for this deliberation and discussion stands considerably narrowed down.

(b) The nerve centre of this application or in other words, the provision of law which commands the ticking of this application is proviso to Section 60 of CR Act. If an action of infringement of copyright is filed, defendant in such an action at law cannot thereafter take recourse to Section 60 of CR Act and file a case of groundless threat of legal proceedings. There

can be no two ways about this. The aforesaid proviso to section 60 is clinching and clear in this regard. There can be no two ways about this.

(c) However, the moot question is when an action of infringement of copyright is commenced against an entity / person after such entity / person files a case of groundless threat of legal proceedings, will such commencement of action for infringement of copyright render the groundless threat suit infructuous? In other words, when infringement suit is post groundless threat suit, will it render the prior groundless threat suit infructuous is the question.

(d) This moot question was answered by Delhi High Court in ***Super Cassette Industries Ltd. Vs. Bathla Cassettes India (P) Ltd.*** reported in ***50 (1993) DLT 7***. In ***Super Cassette case***, Delhi High Court answered this moot question by holding that once a suit is filed for infringement of the copyright by the person who has given the threat, the suit under Section 60 becomes infructuous as the section 60 ceases to apply in such a situation. In other words, Delhi High Court made it clear that a suit for infringement of copyright will render prior suit for groundless threat infructuous. To be noted, the judgment of Delhi High Court in ***Super Cassette case*** was dated 04.02.1993.

(e) Subsequently, two decades later on 30.09.2013, Hon'ble Supreme Court in ***M/s.MAC Charles (I) Ltd. Vs. M/s.Indian Performing Rights Society Ltd. (Special Leave Petition (C) No.39994 of 2012)*** referred to the aforesaid ***Super Cassette*** case of Delhi High Court and held that once a suit is filed for infringement of copyright by the person who has given the

threat, the suit under Section 60 becomes infructuous as the section ceases to apply in such a situation. To be noted, **Super Cassette** case of Delhi High Court besides **50 (1993) DLT 7** has been reported in **AIR 1994 Del 237** also. Supreme Court in **MAC Charles** case held that Delhi High Court has clarified in **Super Cassette** the proviso to Section 60 which makes the position clear that this Section will have no application if a person who has made such threats commences and prosecutes with due diligence an action for infringement of the copyright claimed by him.

(f) It has to be borne in mind that **MAC Charles** is an order made by Supreme Court at pre leave stage or in other words, what is understood as the first part of Article 136 of the Constitution of India. If **MAC Charles** is post leave, there is no difficulty as doctrine of merger will apply. As it is pre leave and as it is at SLP stage, one will have to necessarily look at the binding nature of what Supreme Court has said in **MAC Charles** case. For this, we have to look at the often cited case law of precedent being **Kunhayammed Vs. State of Kerala** reported in **(2000) 6 SCC 359**. Conclusions arrived at by Supreme Court in **Kunhayammed** have been summed up and set out as seven bullet points in seven sub paragraphs of paragraph 44 of **Kunhayammed** case. What is of relevance to us is sub paragraphs (iv) and (v). A careful reading of sub paragraphs (iv) and (v) of paragraph 44 of **Kunhayammed** case reveals that Supreme Court has held that an order refusing special leave to appeal may either be by a speaking order or non speaking order. But, irrespective of whether it is speaking order or non speaking order, it means that Supreme Court was not inclined to exercise its

discretion to allow the appeal being filed. Therefore, an order refusing special leave does not stand substituted in place of the order challenged. This means that the doctrine of merger does not operate and apply when Supreme Court refuses to grant leave. After saying so, Supreme Court has clearly referred to two kinds of orders refusing leave to appeal as mentioned supra. One is, speaking order and the other is non speaking order. Though the order is only the one not granting leave to appeal, it is nonetheless a statement of law contained in the order and therefore, it becomes a declaration of law by Supreme Court within the meaning of Article 141. Flowing from this is the position laid down by Supreme Court that such declaration of law by Supreme Court is binding not just the parties thereto, but all Courts, Tribunals or authorities in any proceedings subsequent thereto by way of judicial discipline as the Supreme Court is the Apex Court of the Country.

(g) My understanding to **Kunhayammed** case flows from sub paragraphs (iv) and (v) of paragraph 44 as mentioned supra. I deem it appropriate to extract sub paragraphs (iv) and (v) of paragraph 44 of **Kunhayammed** case and the same reads as follows :

“44. To sum up, our conclusions are:

x x x x x x

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a

speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties. “

(h) This takes us to the question as to whether what Supreme Court has said in **MAC Charles** is statement of law. For this purpose, it may be necessary to have a careful look at the relevant paragraph in **MAC Charles** order which reads as follows :

“The judgment and order in the matter of “Super Cassette Industries Ltd. Vs. Bathla Cassettes India (P) Ltd... AIR 1994 Del 237, has further clarified the proviso which makes the position clear that this Section will have no application if a person who has made such threats commences and prosecutes with due diligence an action for infringement of the copyright claimed by him. Once a suit is filed for infringement of the copyright by the person who has given the threat, the suit under Section 60 becomes infructuous as the Section ceases to apply in such a situation. “

(i) A careful reading of the aforesaid paragraph makes it clear that Supreme Court has clearly made a statement of law with regard to proviso to Section 60 of CR Act and impact on subsequent action for infringement of copyright of a prior suit for groundless threat. Therefore, though **MAC Charles** is pre leave, in my considered understanding it is a statement of law made by Supreme Court on proviso to Section 60 of CR Act and its impact on prior groundless threat suits when infringement action is instituted subsequent to / pending groundless threat suits.

(j) To be noted, there is no dispute or disagreement before me that **Super Cassette case** of Delhi High Court reported in **AIR 1994 Del 237** or the aforesaid **MAC Charles** order of Supreme Court in SLP(C) No.39994 of 2012 are not distinguishable on facts qua the case on hand. When they are not distinguishable on facts, the question is whether **MAC Charles** operates as binding precedent. In the light of the **Kunhayammed** case principle, **MAC Charles** certainly operates as binding precedent is my considerable view.

(k) However, Mr.Anirudh Krishnan, learned counsel submitted that issues pertaining to damages, due diligence and whether the subsequent action for infringement is frivolous have not been examined in **MAC Charles** or for that matter, in **Super Cassette** and therefore, these issues along with issues (enumeration of which have been made supra under 'Rival Submissions') passes sub silentio in **MAC Charles**. According to him, as it passes sub silentio, **MAC Charles** is not binding precedent under Article 141 of Constitution of India.

(l) Learned counsel also made an emphatic submission that sub silentio is an exception to Article 141. There is no dispute or disagreement before me that there is no case law for answering the question as to whether sub silentio is an exception to Article 141. At least, there is no dispute or disagreement that there is no direct Indian case law answering the question as to whether sub silentio is an exception to Article 141.

(m) In the absence of Indian case law, learned counsel laid emphasis on some passages in Salmond on Jurisprudence and submitted that sub silentio is in fact an exception to Article 141.

(n) Mr. Anirudh Krishnan, learned counsel, referred to three judgments of Hon'ble Supreme Court, namely, ***Municipal Corpn. of Delhi Vs. Gurnam Kaur*** reported in ***AIR 1989 SC 38 : (1989) 1 SCC 101***, ***State of U.P. Vs. Synthetics and Chemicals Ltd.***, reported in ***(1991) 4 SCC 139*** and ***Arnit Das (1) Vs. State of Bihar*** reported in ***(2000) 5 SCC 488*** and submitted that Professor P.J. Fitzgerald, Editor of the *Salmond on Jurisprudence*, 12th Edn. explained the concept of sub silentio and this explanation of Professor P.J. Fitzgerald has been quoted in the aforesaid ***Gurnam Kaur*** and ***Synthetics and Chemicals Ltd.*** cases and the said ***Synthetics and Chemicals Ltd.*** case has been referred to in ***Arnit Das*** case. Relevant paragraph of what Prof. P.J. Fitzgerald said is as follows :

“A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the

court should not have decided in favour of the particular party unless it also decided point *B* in his favour; but point *B* was not argued or considered by the court. In such circumstances, although point *B* was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point *B*. Point *B* is said to pass sub silentio. For example, In *Gerard v. Worth of Paris Ltd.*[(1936) 2 All ER 905 (CA).] , the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.*[(1941) 1 KB 675 : (1941) 2 All ER 11 (CA).] , the Court held itself not bound by its previous decision. Sir Wilfrid Greene, M.R., said that he could not help thinking that the point now raised had been deliberately passed sub silentio by the counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "*without argument, without reference to the crucial words of the rule, and without any citation of authority*", it was not binding and would not be followed. *Precedents sub silentio and without argument are of no moment.* This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority. "

(o) A careful analysis of aforesaid three judgments of Supreme Court will clearly reveal that it has not been laid down that sub silentio is an exception to Article 141. As already alluded to supra, there is no direct Indian case law answering the question whether sub silentio is an exception to Article 141.

(p) As answer to the aforesaid question is not blessed with authorities and case laws, I have to necessarily examine whether the aforesaid issue pertaining to groundless threat suit has passed sub silentio in **MAC Charles** case. To be noted, it is not disputed before me by defendant's counsel Mr.R.Parthasarathy that aforesaid points raised by Mr.Anirudh Krishnan, i.e., damages, prima facie (not frivolous suit for infringement) and due diligence have not been examined in **Super Cassette** case and **MAC Charles** case. Therefore, the submission of Mr.Anirudh Krishnan is that these three points and others enumerated in rival submissions supra passes sub silentio in **Super Cassette** case and **MAC Charles** case.

(q) Therefore, the issue is further narrowed down as to whether sub silentio is an exception to Article 141.

(r) In search of an answer to this question, learned counsel for applicant placed reliance on two judgments of Supreme Court and one judgment of Full Bench of our High Court. Two judgments of Supreme Court are **Suganthi Suresh Kumar Vs. Jagdeeshan** reported in (2002) 2 SCC 420 and **State of Gujarat Vs. R.A.Mehta** reported in (2013) 3 SCC 1. Full Bench judgment of this Court is **Philip Jeyasingh Vs. The Joint Registrar of Co-operative Societies and others** reported in 1992 (1) LW 216. In all these

cases, it has been held that it is impermissible for the High Court to not to follow any decision of the Apex Court on the ground that the Supreme Court laid down a legal position / made determination of law without considering a particular point when the case law is otherwise not distinguishable either on facts or other aspects. This has been articulated in paragraph 9 of ***Suganthi Suresh Kumar Vs. Jagdeeshan*** reported in (2002) 2 SCC 420. Paragraph 9 of the said judgment authored by Hon'ble Mr. Justice K.T. Thomas reads as follows :

“9. It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that the Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in *Anil Kumar Neotia v. Union of India* [(1988) 2 SCC 587 : AIR 1988 SC 1353] that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.”

(s) In ***State of Gujarat Vs. R.A.Mehta*** case reported in (2013) 3 SCC 1, Hon'ble Dr. Justice B.S. Chauhan writes in paragraph 61 as follows :

“61. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, particularly when the same is that of a coordinate Bench or of a larger Bench. It is also correct to state that even if a particular issue has not been agitated earlier or a particular argument was

advanced but was not considered the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced has actually been decided. The decision therefore, would not lose its authority “merely because it was badly argued, inadequately considered or fallaciously reasoned”. The case must be considered taking note of the ratio decidendi of the same i.e. the general reasons or the general grounds upon which the decision of the court is based, or on the test or abstract from the specific peculiarities of the particular case which finally gives rise to the decision. (Vide *Somawanti v. State of Punjab* [AIR 1963 SC 151] , *Ballabhadas Mathurdas Lakhani v. Municipal Committee, Malkapur* [(1970) 2 SCC 267 : AIR 1970 SC 1002] , *Ambika Prasad Mishra v. State of U.P.* [(1980) 3 SCC 719 : AIR 1980 SC 1762] , SCC p. 723, para 6 and *Director of Settlements v. M.R. Apparao* [(2002) 4 SCC 638 : AIR 2002 SC 1598] .) “

(t) With regard to Full Bench judgment of Madras High Court, relying on ***Pritam Kaur Vs. Surjit Singh*** reported in ***MANU/PH/0180/1984***, Full Bench of our High Court traced the law of precedents in detail by referring to English Courts and Supreme Court of India. It was held that if ratios of Larger Benches and judgments of Superior Courts were to be merely rested upon the quicksands of the ingenuity of the counsel to raise some fresh or novel argument which had not been earlier raised or considered and if such orders are dislodged on this basis, then the finality of binding precedent would become a mirage. It was specifically held that the hallowed rule of the finality of binding precedent would become merely a teasing mirage.

(u) As a last submission, reference was made to Division Bench judgment of Madras High Court in **P.Bhaskaran** (supra) and it was pointed out that some case laws pressed into service by appellants in **P.Bhaskaran** supra were held to be not helping the appellants therein as the said case laws passed sub silentio qua Rule 35(aa) of the Tamil Nadu State and Subordinate Service Rules. **P.Bhaskaran** does not help the plaintiff in the senior suit in the instant case for more than one reason. To mention few reasons, **P.Bhaskaran** is certainly not an authority for the principle that sub silentio is an exception to Article 141 of Constitution. Secondly, a careful perusal of **P.Bhaskaran** reveals that appellants therein have pressed into service 5 case laws and only 2 of them are Supreme Court case laws. Others are Madras High Court judgments. From paragraph 27 of **P.Bhaskaran**, it is not clear if the sub silentio reference is to the Supreme Court case laws. Another most important reason is, a careful reading of paragraph 27 of **P.Bhaskaran** reveals that case laws cited by appellants therein have been distinguished on facts and thereafter sub silentio qua Rule 35(aa) has been mentioned only as an additional feature, which is not the situation in the case on hand.

(v) One more aspect of the matter qua **P.Bhaskaran** case is, in **P.Bhaskaran** case, one entire rule, namely Rule 35(aa) had not been brought to the notice of the Court in the case laws cited. That is not the obtaining position in the instant case. It is nobody's case before me that Section 60 of CR Act had not been brought to the notice of Delhi High Court in **Super Cassette** case or Hon'ble Supreme Court in **MAC Charles** case.

Unlike **P.Bhaskaran** case, relevant provision, i.e., section 60 of CR Act was brought to the notice of the Court, but all arguments pertaining to the relevant provision were not projected before the Court in **Super Cassette** and **MAC Charles** is learned counsel Mr.Anirudh's say. When an entire provision of law, i.e., one entire rule is not brought to the notice of the Court, it will be an issue by itself, whereas when the provision is brought to the notice of the Court, but all arguments on the same were not placed before the Court, dynamics and dimensions of sub silentio argument changes vastly. In other words, Section 60 has been considered by Delhi High Court in **Super Cassette** and by Hon'ble Supreme Court in **MAC Charles**, but in **P.Bhaskaran** supra, a bare perusal of paragraph 27 of said judgment reveals that the provision concerned in that case, i.e., Rule 35(aa) had not been brought to the notice of the Court at all. In this view of the matter also, **P.Bhaskaran** case is clearly distinguishable. As mentioned supra, **P.Bhaskaran** is certainly not an authority for the principle that sub silentio is an exception to Article 141 of the Constitution of India. Besides not being an exception to Article 141 of the Constitution of India, **P.Bhaskaran**, on facts stands on a different footing even with regard to sub silentio principle as what has passed sub silentio is one entire rule and not some arguments on the Rule which was otherwise not only brought to the notice of the Court but arguments were also advanced on the same.

(w) Therefore, I have no hesitation in my mind that statement of law made by Supreme Court is declaration of law within the meaning of Article 141. As of today, this principle alone can be followed. In

other words, it is not for the High Court to hold that a judgment of Supreme Court is per incuriam or to overlook the statement of law made therein on the ground that some issues pass sub silentio. It is a matter of judicial discipline that this Commercial Division follows the statement of law contained in **MAC Charles** case as declaration of law within the meaning of Article 141. That the aforesaid point passes sub silentio in **MAC Charles** cannot be a ground to say that the statement of law made in **MAC Charles** ceases to be a declaration of law made by Supreme Court within the meaning of Article 141.

7 Parting observation : (Parting but pertinent – Scenario in England):

(i) Before parting with this case, this Commercial Division deems it appropriate to look at a very interesting sequence of some judgments of Courts of Appeal and House of Lords in England. It all started with **Broome Vs. Cassell Co. Ltd. {[1971] 2 QB 354}**, in which the Court of Appeal was presided over by Lord Denning, Lords Justices Salmon and Phillimore. In this **Cassell** case, the question arose was whether the Court of Appeal has to follow a previous decision of the House of Lords in **Rookes Vs. Barnard {[1964] AC 1129}**. The issue pertains to circumstances in which exemplary damages could be awarded. Lord Denning writing for the Court of Appeal in **Cassell** case, held that **Rookes Vs. Barnard** rendered by House of Lords is per incuriam as two relevant judgments of House of Lords had been overlooked. Saying that **Barnard** case is per incuriam, Lord Denning held that it was not binding. To be noted, this **Cassell** judgment of Court of Appeal was

a unanimous judgment made by all the three Judges. **Cassell** case was carried in appeal to House of Lords . House of Lords held that Court of Appeal cannot avoid an otherwise binding precedent of House of Lords by merely declaring it as per incuriam. To be noted, this Commercial Division has held that High Court cannot declare a judgment of Supreme Court per incuriam.

(ii) Be that as it may, Court of Appeal in **Cassell** case referred to unwavering hierarchial loyalty, considered the same to be more important than judicial individuality. In **Cassell** case, House of Lords held that it is necessary for each lower tier including the Court of Appeal to accept loyally the decisions of the higher tiers. As mentioned supra, **Cassell's** case in Court of Appeal was in 1971 and the judgment of House of Lords in **Cassell** case was in 1972.

(iii) Interestingly, three years later, i.e., in 1975, Lord Denning in **Schorsch Meier G.m.b.H Vs. Henning** reported in **[1975] 1 QB 416**, presiding the Court of Appeal along with Justices Foster and Lawton examined the question as to whether an English Court can award a judgment in foreign currency. Though House of Lords in **Re United Railways of the Havana and Regla Warehouses [1961] AC 1001** held that an English Court cannot award a judgment in foreign currency, Lord Denning applied *cessante ratione* principle (to be noted, *cessante ratione* principle means changed condition rule) and held that the rule laid down by House of Lords in **United Railways** case was obsolete as the reason that existed in 1961 during **United Railways** case is no longer existing owing to changed economic

conditions. In other words, it was Lord Denning's considered view that economic conditions that existed in 1961 which impelled House of Lords to hold that a English Court cannot award a judgment in foreign currency ceases to exist in 1974 when he penned ***Henning judgment***. To be noted, in ***Henning*** judgment, Justice Lawton dissented and it was not a unanimous judgment. Further to be noted, ***Henning*** judgment was not carried in appeal, i.e., it was not carried to House of Lords.

(iv) However, a similar issue arose before House of Lords a year later in 1976 in ***Miliangos Vs. George Frank (Textiles) Ltd. [1976] AC 443***. This House of Lords was presided over by Five Lords, namely, Lords Wilberforce, Simon, Cross, Edmund-Davies and Fraser. Very interestingly, all the five Lords in the House of Lords agreed that their old rule, i.e., rule of House of Lords regarding currency of judgment should be changed. In other words, the view taken by Lord Denning presiding over the Court of Appeal in aforesaid ***Henning*** case was approved and they did say that it required a change or in other words, the ***United Railways*** principle required a change. Though the House of Lords concurred with the view taken by Lord Denning, it was held by House of Lords in no uncertain terms that such a change should be made by House of Lords themselves and not by the Court of Appeal. House of Lords held that *cessante ratione* principle had been wrongly applied. It was held that Courts of law which are bound by the rule of precedents are not free to disregard an established rule of law because it was conceived that another devising made by Court of Law in the hierarchy to be more reasonable.

(v) Therefore, I have no hesitation in holding that if **MAC Charles** upholding **Super Cassette** principle of Delhi High Court is to be revisited and reexamined, the same should be done by Hon'ble Supreme Court and not by High Court. In the light of the narrowed down discussion and deliberations, it is deemed unnecessary to embark upon the exercise of dealing with all and every point raised by both parties. Such an exercise will serve no useful purpose and it would only result in making this order verbose. However, rival submissions have been summarised and set out supra with the intention of capturing the trajectory of hearing before this Commercial Division with clarity and with the intention of comprehensively capturing the hearing scenario, for better appreciation of this order.

8 Conclusion :

(a) Inevitable conclusion that follows and flows from the discussion and deliberations qua debate supra is that the prayer in the instant application should be acceded to by applying **MAC Charles** principle and holding that the senior suit has become infructuous owing to filing of the junior suit.

(b) As part of his concluding submissions, learned counsel for plaintiff Mr. Anirudh Krishnan submitted that if this court is not inclined to accept his submissions regarding sub silentio, it may be left open for plaintiff to seek damages by way of counter claim in the junior suit. If the law permits a counter claim of this nature to be made in the junior suit, this order will not come in the way and this order will not become an impediment. To be noted,

it is not for this Court to grant leave to make counter claim. It is only clarified that if law permits counter claim to be made in the junior suit, this order will not impede the same and therefore, these observations shall not be construed as leave to make counter claim.

9 Decision :

Application No.6025 of 2018 is allowed and C.S.No.632 of 2017 (senior suit) is dismissed as infructuous in the light of C.S.No.742 of 2017 (junior suit) being filed. Considering the nature of hearing, parties are left to bear their respective costs.

20.11.2018

Speaking order

Index : Yes

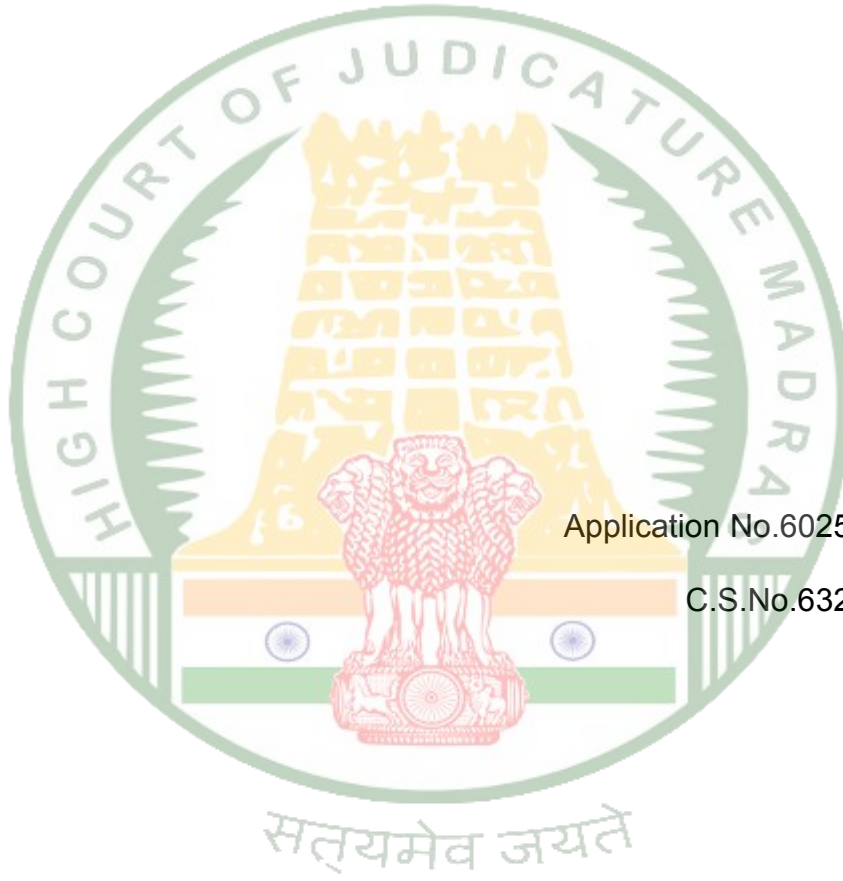
vvk



WEB COPY

M.SUNDAR, J.

vvk



order in
Application No.6025 of 2018
in
C.S.No.632 of 2017

WEB COPY

20.11.2018