

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 13TH DAY OF AUGUST 2018

THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

A.Nos.4700 & 4701 of 2018

in

C.S.No.832 of 2009

*M/s.Matrimony.Com Limited,
No.94,TVH Bellicia a Towers,
Towers-2, 10th Floor,
MRC Nagar, Mandaveli,
Chennai- 600 028
rep.by its Director*
Mr.Janakiraman Murugavel

(*Amended as per order dated 12.09.16 in A.No.4614/16)

..Plaintiff

vs

1.Google India Pvt.Ltd.
No.3, RMZ Infinity - Tower E,
3rd, 4th and 5th Floors,
Old Madras Road,
Bangalore - 560 016

2.People Interactive Pvt.Ltd.
**Shop No.33-36,
Door Nos.96&104
Ground Floor, Kaveri Complex,
Nungambakkam High Road,
Nungambakkam,
Chennai- 600 034

(**Amended as per order dated 21.01.2010 in A.No.6379/09)

3.Jeevansathi Internet Services P.Ltd.,
1-H, Gee Gee Emerald,
151, Village Road,
Nungambakkam,
Chennai- 600 034

4.(*) Bennett, Coleman and Co.Limited
Times of India Building.
Dr.D.N.Road, Mumbai 400001.

(*) 5.Google LLC
 (*) (Amended as per order dated 25.01.201 in A.No.642/18)
 (***) 1600, Amphitheatre Parkway,
 Mountain View, CA 94043
 (***) 5th defendant is impleaded as per order dated 30.09.2010
 in A.No.247/10) ..Defendants

A.Nos.4700 & 4701 of 2018:

M/s.Matrimony.Com Limited,
 No.94,TVH Bellicia a Towers,
 Towers-2, 10th Floor,
 MRC Nagar, Mandaveli,
 Chennai- 600 028
 rep.by its Director*
 Mr.Janakiraman Murugavel ..Plaintiff
 vs

1.Google India Pvt.Ltd.
 No.3, RMZ Infinity - Tower E,
 3rd, 4th and 5th Floors,
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 1-H, Gee Gee Emerald,
 151, Village Road,
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 Chennai- 600 034

4.Bennett, Coleman and Co.Limited
 Times of India Building.
 Dr.D.N.Road, Mumbai 400001.

5.Google LLC
 1600, Amphitheatre Parkway,
 Mountain View, CA 94043

..Defendants

A.No.4700 of 2018:

Application praying that this Hon'ble Court be pleased
 to take the separately docketed documents nos.43-75
 mentioned in the Affidavit of Documents 1 to 33 filed by
 the Defendant dated 5th May, 2017 on record.

A.No.4701 of 2018:

Application praying that this Hon'ble Court be pleased to permit the applicant to let in secondary evidence in respect of the newspaper reports by marking photocopies of the documents 26,27,28, 29 and 71 as mentioned in the affidavit of documents and referred to in the Schedule to the Judges Summons.

This Application coming on this day before this court for hearing the court made the following order:

These two Applications have been filed by the plaintiff in the suit.

2.C.S.No.832 of 2009 had been filed by the plaintiff M/s.Matrimony.com Limited., against Google India Pvt. Ltd., People Interactive Pvt. Ltd., Jeevansathi Internet Services Pvt. Ltd., Bennett Coleman and Co. Limited and Google LLC under Sections 27, 28, 29, 134 and 135 of the Trade Marks Act, 1999, seeking a judgment and decree of permanent injunction restraining the defendants from infringing the plaintiff's registered Trade Mark Bharath Matrimony, Tamil Matrimony, Telugu Matrimony and similar Trade Marks and for permanent injunction from diverting the plaintiff's business to its competitors by using the first and fifth defendant's search engines and for consequential reliefs and also for damages of Rs.10,05,000/- and also for cost of the suit.

3.The suit had been presented on 14.09.2009. Various Applications seeking interim injunctions were filed. The matters were taken upto the Honourable Supreme Court on orders passed in the Applications. The stage has finally reached when evidence has to be recorded. Issues have also been framed on 19.04.2017. Thereafter, Honourable Mr. Justice K.Venkatraman was appointed as Judge Commissioner to record evidence. In view of his inability,

by order, dated 28.04.2018, this Court had appointed Honourable Mr. Justice P. Jothimani as Judge Commissioner. A time line was fixed for commencement of recording evidence. The time line was not adhered to. Now, the plaintiff had filed the present Applications.

4. In Application No. 4700 of 2018, the plaintiff seeks permission to take document Nos. 43 - 75 on record and in Application No. 4701 of 2018, he seeks permission to let in secondary evidence in respect of newspaper reports by marking xerox copies of document Nos. 26, 27, 28, 29 and 71 as mentioned in the affidavit of documents. In the affidavit filed in support of the said Applications, the Managing Director of the plaintiff company had stated that the documents now mentioned had already been filed in the affidavit of documents dated 05.05.2017 which was filed on 30.06.2017. It has also been stated that these documents were also part of the Court records since they had already been filed in typed sets on 06.01.2010, 08.03.2010, October 2016 and December 2017 in Applications which were under consideration of this Court. It has been stated that though they had not been filed along with the plaint, the documents were always under consideration by the Court and consequently permission was sought to produce the documents during trial. It has been further stated that document No. 1 was a Board Resolution authorising the witness to tender evidence. Document Nos. 2-42 have already been filed along with the plaint. Document Nos. 43-75 had been filed as documents along with typed set of papers on 08.03.2010. Document No. 74 is a Chartered Accountant Certificate showing sales Turn-over and advertisement expenses of the plaintiff. It had been stated that if these documents are not permitted to be marked, then the plaintiff would be put to serious prejudice. It had been stated that no prejudice would be caused to the respondents by marking of the above documents.

5. In Application No.4701 of 2018, it had been stated that among the documents produced, the document Nos.26, 27, 28, 29 and 71 are photocopies of newspaper articles dated 02.11.2005, 10.11.2006, 19.02.2017, May 2007 and 26.09.2009. It had been stated that the plaintiff had taken steps calling upon the newspaper entities to produce original issues of each one of the newspapers. However, they declined to do so. Consequently, the photocopies are being produced and permission is sought to mark them as documents.

6. A counter had been filed on behalf of the contesting respondents. In the counter affidavit with respect to Application No.4700 of 2018, the first respondent had stated that the plaintiff had suppressed the fact that the additional documents were in their possession. They have not given reasons as to why the documents were not produced at the time of filing the suit. It had been stated that the document at serial No.43 which is dated 26.10.2009 could have been obtained by the plaintiff from the Trade Mark Registrar Office before the filing of the suit. Again the document No.44 is dated prior to the filing of the suit. Similarly document Nos.45-70 should have been produced at the time of filing of the suit. It had also been stated that document No.74, certificate from Chartered Accountant should have been produced before filing of the suit. It had been stated that no reasons had been given for filing secondary evidence. It had been stated that the Application must be dismissed.

7. In the counter affidavit of the second respondent, it had been stated that the plaintiff had failed to satisfy the requirements under Order 11 Rule 1(5) of C.P.C, as amended by Commercial Courts Act, 2015. It had been stated that the plaintiff had not explained the delay in filing

the documents. It had been stated that the plaintiff had not filed all the documents which they seek to produce during evidence. It had also been stated that the plaintiff had admitted that they had the documents in their possession, but have not given any reason for not filing the same along with the suit. It was prayed that the Application must be dismissed.

8. In the counter affidavit filed by the first defendant in Application No.4701 of 2018, it had been stated that under Section 66 of the Indian Evidence Act, notice must be given to the party who has the original document. It had been stated that the plaintiff had failed to issue such notice. It had also been stated that it would be difficult to ensure the accuracy of the contents of the documents. It had also been stated that document No.4 is a electronic record and consequently, it cannot be taken on file without certificate under Section 65 B of the Indian Evidence Act. It had been stated that the Application must be dismissed.

9. In the counter affidavit filed by the second defendant in Application No.4701 of 2018, it had been stated that the documents should have been filed along with plaint as required under Order 9 Rule 11(5) of C.P.C. It had also been stated that the plaintiff had not given the date of publication with respect to the document relating to award granted by P.C. World to the plaintiff. It had been stated that the plaintiff had not satisfied the requirements of Section 65 of the Indian Evidence Act 1872. It had been stated that the originals of the newspaper article should be produced. It had also been stated that the Application must be dismissed.

10. Heard the arguments advanced by Mr.Arun C.Mohan,

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learned counsel for the Applicant/plaintiff and Mr.G.Bala Subramaniam, learned counsel of M/s Poovayya and Co. for

the first respondent/defendant and Mr.Vineet Subramani, learned counsel for the second respondent/second defendant and Mr.R.Partha Sarathy, learned counsel for the third respondent/third defendant.

11.The suit is of the year 2009. The plaintiff had also filed Application Nos.5860 of 2016 and 5861 of 2016 under Order 39 Rule 2(a) of C.P.C and this Court had directed that evidence must be let in with respect of both the issues raised in the suit and the issues raised in these Applications. A time schedule was also fixed for commencement of recording of evidence. Honourable Mr. Justice P.Jothimani, Judge Commissioner was appointed by this Court for recording the evidence. However, recording of evidence has not yet commenced. The plaintiff has now filed these applications seeking permission to mark documents during the course of trial. Application No.4700 of 2018 has been filed seeking permission to mark additional documents during trial. Application No.4701 of 2018 has been filed seeking permission to mark documents No.26, 27, 28, 29 and 71 since they are photocopies of the newspaper articles.

12.The suit has been meandering to nowhere right from the date of its presentation. Arguments had been advanced in the injunction Applications. Orders were passed. Orders were appealed against. The appeals were disposed with the directions. But the trial did not commence. In the meanwhile, Applications under Order 39 Rule 2(a) of C.P.C. were filed. Again arguments were advanced. Finally parties were directed to let in evidence in both the suit and in the Applications. Still trial has not commenced. The plaintiff has now come forward with these Applications.

13.The Applications are opposed by the contesting defendants, primarily on the ground that the documents were

already available with the plaintiff even before the institution of the suit and no reason had been given as to why they were not produced at the time of filing of the suit. It is the contention of the plaintiff that these documents were relied on from the year 2010 onwards when arguments were advanced in various Applications before this Court. It had been stated that the documents were already filed in the form of the typed set of papers. Now, the plaintiff seeks permission to rely on each and every documents. The plaintiff has also sought permission to rely on photocopies of newspaper reports which have been produced as document Nos.26, 27, 28 and 29 and 71. With respect to production of the documents, during the course of arguments in the Applications, the plaintiff had stated that they have filed the documents as typed set of papers filed on 06.01.2010, 08.03.2010, October 2016 and December 2017. The documents filed in October 2016 and December 2017 were filed along with Application Nos.5860 of 2016 and 5861 of 2016 which were filed under Order 39 Rule 2(a) C.P.C. It had been stated that the documents are required to establish the case of the plaintiff. With respect to the photocopies of document Nos.26, 27, 28 and 29 and 71, it had been stated that letters have been addressed to the newspaper establishments. But they have refused to give the primary documents.

14.The plaintiff has to prove his case and the evidence let in should be of such nature to substantiate the pleadings. Evidence would include both oral and documentary evidence. The primary reasons given to object the filing of these documents are that the documents were not produced at the time of filing of the suit. However, it must be noted that the documents were actually filed and as is the practice in the original side of the Madras High Court, they were filed in the form of typed set and this Court had relied on those documents when arguments were

heard in the injunction Applications. For a document to be called as evidence, it has to cross the stage of admissibility, relevancy and proof. When a witness produces a document, he must be prepared to submit himself for cross examination. However, when arguments are advanced in Applications, the documents are taken on their face value and analysed and also sometimes form the basis of orders passed. The plaintiff cannot be shut out at the threshold only for the reason that though he had filed the documents in Court in the form of typed set of papers, he had not filed the documents separately. It would be denial of opportunity to the plaintiff when he seeks to re-enforce his case during trial. The defendants can always cross examine the witness with respect to all the contentions raised by them. They can raise their objections at the time of marking of the documents and the Judge Commissioner will have to necessarily record the objections. They can raise the questions with respect to the reason as to why the documents were not produced at the time of filing of the plaint, though the plaintiff had them in possession. At the time of arguments, again, if admissions are extracted during cross examination, the defendants can urge the Court not to consider those documents for which sufficient and proper explanation has not been given. These observations would provide sufficient safeguards for the defendants. However, they must be effective during cross examination of the plaintiff's witnesses.

15. With respect to the newspaper articles mentioned in Application No.4701 of 2018, it must be mentioned that the plaintiff had stated in the affidavit that he had addressed letters to the respective newspaper establishments, but, they had not responded it and consequently the plaintiff was handicapped in producing the originals. Again, on this aspect also, the witness can be cross examined on the alleged letter sent, on the contents of the newspaper

articles and arguments can be advanced challenging their veracity, admissibility and relevance. The documents which are electronic records, can be admissible only when Certificate under Section 65 (B) of the Indian Evidence Act is produced.

16. In view of the above discussions, I hold that the plaintiff must be given an opportunity to produce and mark the documents as exhibits. If the documents are found to be irrelevant or are not proved in manner known to law or sufficient explanation had not to be given by the witness for not producing the primary documents, then it would always be available for the counsels for the defendants to raise those issues at the time of arguments in the main suit and seek the Court to reject the documents from consideration.

17. Consequently, Application Nos. 4700 of 2018 and 4701 of 2018 are allowed. No costs.

Sd/.C.V.K.J

13.08.2018

//Certified to be a true copy//

Dated this the th day of 2018.

KY/20.08.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.