IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.09.2018

Date of Decision : 27.09.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

A.No.3965 of 2017
in
C.S.No.338 of 2017

M/s.Amilal Ramkishan Dass
A partnership firm having the following Partners
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Faridabad
Haryana-121 002. .. Applicant

Vs.
Ashok Kumar Sethi,
Trading as M/s.Abhinav Export Corporation,
residing at C-2, No.1 & 3,
Swarup Heritage II Street,
Kasthuri Estate,
Poes Garden,
Chennai-600 086. .. Respondent

This application is filed under Order XIV Rule 8 of Original Side Rules read with Order VII Rule 11 of CPC seeking to reject the plaint in C.S.No.338 of 2017.

For Applicant : Mr.P.V.Balasubramanian

For Respondent : Ms.Gladys Daniel

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ORDER

There is a sole plaintiff and a sole defendant in the main suit. Sole defendant in the main suit is the applicant herein and the sole plaintiff in the main suit is the sole respondent herein. Parties in this application, i.e., A.No.3965 of 2017 shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

2 Sole defendant has taken out the instant application with a prayer for rejection of plaint under Order VII Rule 11 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity).
3 Before we look into this application for rejection of plaint, it may be necessary to have a panoramic birds eye view of the main suit as it unfurls from the plaint averments.
4 According to plaint averments, plaintiff is a renowned manufacturer and exporter of hair dyes and other products made of Henna. Plaintiff commenced business in 1998 and has grown into one of the leading manufacturer and marketer of Dye based products in India with turnover running into several lakhs of rupees. It has also been averred in the plaint that plaintiff is the owner of copyright in the artistic work in the pouch and carton in which plaintiff's products inter-alia bearing the mark 'AMIN'S' is marketed. According to plaint averments, plaintiff's first date of publication is 1998. The copyright was created by employees of plaintiff during the course of their employment and no contract to the contrary exists is plaintiff's say. In other words, plaintiff is the sole and absolute owner of the copyright 'AMIN'S' (hereinafter referred to as 'suit CR' for brevity) as depicted in the pouch and cartons in which plaintiff's products are marketed is plaintiff's specific say.
5 It has also been averred in the plaint that around April 2007, plaintiff discovered that defendant was manufacturing and selling black Hennas exploiting plaintiff's suit CR 'AMIN'S'. Plaintiff's suit CR and alleged offending copyright of defendant as set out in the plaint are as follows :

6 Alleging that the above is a clear case of infringement of copyright and passing off qua suit CR, the instant suit has been filed by plaintiff (presented on 21.4.2017) with prayers for injunctive reliefs qua infringement of suit CR and passing off qua suit CR. Usual prayers for direction to surrender offending materials and for accounts, costs and residuary relief also form part of the plaint.

7 Considering the nature of submissions made in the reject the plaint application, I deem it appropriate to extract the entire prayer paragraph which is paragraph 48 of the plaint and the same reads as follows:

'48.The Plaintiff, therefore, prays for Judgment and Decree for :-
(a)granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors, or anyone claiming through them from reproducing by selling, advertising and or offering for sale both domestic and exports by using the impugned Copyright AMIL'S as shown in Document No.2 upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way substantially reproduce the Plaintiff's Copyright AMIN'S the picture mark as shown in Document No.1 or in any manner infringing the Plaintiff's Copyright as shown in Document No.1.
(b)granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors, or anyone claiming through them from manufacturing, distributing, advertising and or offering for sale by using the impugned Copyright AMIL'S as shown in Document No.2 in the course of their business both domestic and exports upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way visually, phonetically or deceptively similar to the Plaintiff's Copyright the picture mark as shown in Document No.1 or in any manner passing off the Plaintiff's Copyright as AMIN'S shown in Document No.1.
(c)Directing the Defendant to surrender to the Plaintiff all the black hennas, packing materials, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials containing/bearing the impugned copyright AMIL'S in respect of black hennas.
(d)For a preliminary decree in favour of the Plaintiff, directing the Defendant to render an account of profits made by them by the use of the Trade Mark AMIL'S on the goods referred and for a final decree in favour of the Plaintiff for the amount of the profits found to have been made by the Defendant, after the Defendant have rendered accounts.

(e)directing the Defendant to pay to the Plaintiff the costs to the suit, and
(f)pass such further or other order, as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.'

8 Sole defendant has filed a written statement on 29.1.2018 and completed the pleadings. Prior to sole defendant filing written statement in the aforesaid manner and completing pleadings, the application for rejection of plaint was filed on 03.07.2017. Plaintiff (in his capacity as sole respondent in the reject the plaint application) has filed a counter affidavit (dated 21.07.2017) on 24.07.2017. As pleadings are complete in the instant reject the plaint application, the same was taken up for hearing. To be noted, it is a matter of first principle that a reject the plaint application has to be first decided before proceeding with the suit. The instant reject the plaint application was taken up on such first principle.
9 Mr.P.V.Balasubramanian of BFS Legal (Law firm) on behalf of sole defendant (applicant in reject the plaint application) and Ms.Gladys Daniel, learned counsel on record for sole plaintiff (lone respondent in reject the plaint application) were before this Commercial Division. I heard both sides.
10 A perusal of the affidavit filed in support of the instant reject the plaint application will reveal that several grounds including the plea that suit CR is not copyright at all have been raised. Such a plea and other pleas have been denied in the aforesaid counter affidavit.
11 In the aforesaid backdrop, learned counsel for sole defendant submitted that though such aforesaid pleas have been raised in the instant reject the plaint application, the entire application turns on one issue. It was submitted that this reject the plaint application will be argued on that one issue. According to learned counsel for sole defendant that one issue on which instant reject the plaint application turns is, plaintiff should have obtained leave to sue (prior to institution of the main suit) under Clause 12 of Letters Patent as sole defendant is not residing or carrying on business within the territorial jurisdiction of this Court.
12 Elaborating on the aforesaid sole issue on which instant reject the plaint application turns, learned counsel for defendant submitted that limb (a) of plaint prayer pertains to copyright infringement and therefore, the benefit of Section 62(2) of the Copyright Act, 1957 (hereinafter referred to as 'CR Act' for brevity) is available for the plaintiff. In other words, it is specifically submitted that plaintiff can institute this suit in this Court by saying plaintiff is carrying on business within the territorial jurisdiction of this Court, though defendant is not within the territorial jurisdiction of this Court by taking advantage of Section 62(2) of CR Act as far as the injunctive relief qua copyright infringement is concerned, as the same is a statutory remedy. However, limb (b) of plaint prayer is passing off qua suit CR, which is not statutory remedy and only a common law remedy for which the benefit of Section 62(2) of CR Act is not available is his say. On this basis, it was submitted that CR Act does not recognise passing off action and therefore, in the light of limb (b) of plaint prayer pertaining to passing off qua suit CR, plaintiff ought to have obtained leave under Clause 12 of Letters Patent prior to institution of this suit, is his further say.
13 Exemplifying this submission, learned counsel for sole defendant submitted that while plaintiff has territorial jurisdiction to institute the suit in this Court with regard to one part of cause of action for the suit, i.e., infringement, the other part of cause of action being passing off qua copyright is one for which such benefit is not available and therefore, plaintiff ought to have obtained leave under Clause 12 of Letters Patent.

14 Responding to the aforesaid lone issue on which reject the plaint application turns, learned counsel for sole plaintiff submitted that plaintiff, no doubt, has not obtained leave under Clause 12 of Letters Patent, but has taken out an application in A.No.2632 of 2017 under Clause 14 of Letters Patent and the said application has been ordered as prayed for on 27.04.2017.
15 In the light of the aforesaid application under Clause 14 of Letters Patent and in the light of the same being ordered as prayed for, the plea that plaintiff has not obtained prior leave to sue under Clause 12 of Letters Patent is not tenable. This is plaintiff counsel's say.

16 I have given my careful consideration and I have closely scrutinised the rival submissions made by both learned counsel.
17 I now embark upon an exercise of analysing the rival submissions. While analysing the rival submissions, I find that defendant is predicating his argument primarily on the ground that a part of cause of action, i.e., that part of cause of action pertaining to passing off qua suit CR is one for which leave is sine qua non for institution of this suit, whereas plaintiff's response to this is by way of projecting the application under Clause 14 of Letters Patent in A.No.2632 of 2017 (for combining cause of action) being allowed on 27.04.2017, the same admittedly being given legal quietus and saying that this neutralises the sole plea on which defendant is pursuing this application.

18 Before I continue my exercise of analysing the rival submissions, it may be necessary to set out two standard parameters which shall operate as litmus test for testing this application. One standard parameter is, this Court will look at plaint averments and at best uncontroverted plaint averments with a hood and admitted documents alone, as this is an application for rejection of plaint. This principle has been well settled in a long line of authorities.
19 The second standard parameter pertains to 'cause of action'. No elaboration or explanation is required to say that 'cause of action' is not a term of art. In other words, it is not an expression / term, which has been defined in any statute or Code. As 'cause of action' is not a term of art, one has to necessarily look at judicial pronouncements to understand what is 'cause of action'.
20 There are some expressions, terms and words which are difficult to define, but are capable of description. To my mind, 'cause of action' is one such term / expression and that, to my mind appears to be the reason as to why 'cause of action' has not been defined in any statute or Code. In other words, it is my considered opinion that 'cause of action' as an expression and term, can be described, but difficult to define. Be that as it may, for clarity on what is 'cause of action', I deem it appropriate to refer to a judgment of Hon'ble Supreme Court in Nawal Kishore Sharma v. Union of India reported in (2014) 9 SCC 329. Relevant paragraph in Nawal Kishore Sharma case is paragraph 10 and the same reads as follows :
□10.In State of Rajasthan v. Swaika Properties [(1985) 3 SCC 217] , the fact was that the respondent Company having its registered office in Calcutta owned certain land on the outskirts of Jaipur City, was served with notice for acquisition of land under the Rajasthan Urban Improvement Act, 1959. Notice was duly served on the Company at its registered office in Calcutta. The Company, first appeared before the Special Court and finally the Calcutta High Court by filing a writ petition challenging the notification of acquisition. The matter ultimately came before this Court to answer a question as to whether the service of notice under Section 52(2) of the Act at the registered office of the respondent in Calcutta was an integral part of cause of action and was it sufficient to invest the Calcutta High Court with a jurisdiction to entertain the petition challenging the impugned notification. Answering the question this Court held: (Swaika Properties case [(1985) 3 SCC 217] , SCC pp. 222-23, paras 7-8)
□7. Upon these facts, we are satisfied that the cause of action neither wholly nor in part arose within the territorial limits of the Calcutta High Court and therefore the learned Single Judge had no jurisdiction to issue a rule nisi on the petition filed by the respondents under Article 226 of the Constitution or to make the ad interim ex parte prohibitory order restraining the appellants from taking any steps to take possession of the land acquired. Under sub-section (5) of Section 52 of the Act the appellants were entitled to require the respondents to surrender or deliver possession of the lands acquired forthwith and upon their failure to do so, take immediate steps to secure such possession under sub-section (6) thereof.
8. The expression □cause of action□ is tersely defined in Mulla's Code of Civil Procedure:
□The □cause of action□ means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.□
In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2) of the Act on

the respondents at their registered office at 18-B, Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1) of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. The Notification dated 8-2-1984 issued by the State Government under Section 52(1) of the Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. It was not necessary for the respondents to plead the service of notice on them by the Special Officer, Town Planning Department, Jaipur under Section 52(2) for the grant of an appropriate writ, direction or order under Article 226 of the Constitution for quashing the notification issued by the State Government under Section 52(1) of the Act. If the respondents felt aggrieved by the acquisition of their lands situate at Jaipur and wanted to challenge the validity of the notification issued by the State Government of Rajasthan under Section 52(1) of the Act by a petition under Article 226 of the Constitution, the remedy of the respondents for the grant of such relief had to be sought by filing such a petition before the Rajasthan High Court, Jaipur Bench, where the cause of action wholly or in part arose.

21 From the description of 'cause of action' supra, it can be gathered that cause of action is a bundle of facts and all and every fact in the bundle which constitutes a lis may not qualify as cause of action. However, those facts which in a long chain of facts which are imperative to be proved for the plaintiff to be entitled to a decree, go to constitute a cause of action.

22 On the basis of the aforesaid two parameters, it emerges clearly that in the instant case, there is a very simple and straight forward answer to the issue that is being debated and analysed. Plaint prayers in limbs (a) and (b), i.e., copyright infringement qua suit CR and passing off qua suit CR are not two parts of one cause of action, but are two causes of action. The bundle of facts and chain of events which need to be proved for the plaintiff to be entitled to a decree qua injunctive reliefs against infringement of suit CR is different and distinct qua bundle of facts which the plaintiff will have to prove (though arising out of same factual matrix with vast overlaps) to be entitled to a decree with regard to passing off prayer. I hasten to add that there are vast overlaps with regard to chain of facts which require to be proved qua the two causes of action. Mere overlap will not make the two different parts of one cause of action. In other words, it is quite possible that plaintiff may succeed in getting injunctive relief with regard to infringement of suit CR and may fail with regard to injunctive relief with regard to passing off.

23 Further to be noted, as rightly pointed out by learned counsel for defendant, prayer limb (a) pertaining to copyright infringement of suit CR is a statutory remedy under CR Act, whereas prayer limb (b) pertaining to passing off qua suit CR is a common law remedy and it does not fall within the ambit of CR Act. The degrees of proof required are also different and this position is well settled in a long line of authorities and no elaboration is required in this regard. It emerges very clearly that there are two causes of action in the main suit. In other words, the main suit is a composite suit seeking injunctive reliefs with regard to two causes of action. Therefore, there is no difficulty in accepting the submission that this Court has jurisdiction to entertain one cause of action, i.e., cause of action regarding infringement in the light of Section 62(2) of CR Act. Equally, there is no difficulty in accepting the submission that if it is a suit for passing off qua suit CR alone, the benefit of Section 62(2) of CR Act may not be available. Also to be noted, if it had been filed in this Court, Section 20 of CPC also will not be available in the light of Section 120 CPC. That would leave the plaintiff with a situation where it would have been imperative for the plaintiff to obtain leave under Clause 12 of Letters Patent. That is not a case here. This is a composite suit for two causes of action, wherein this

Court has jurisdiction with regard to one cause of action and jurisdiction may not be readily available with regard to other cause of action. Clause 14 of Letters Patent provides a complete solution for such composite suits. Therefore, I deem it appropriate to extract Clause 14 of Letters Patent, which reads as follows :

"14.Joinder of several causes of action.--And We do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immovable property, and the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as the High Court shall seem fit."

24 In the light of Clause 14 of Letters Patent supra, as rightly pointed out by learned counsel for plaintiff, an application in A.No.2632 of 2017 has been taken out and the same has been ordered as prayed for on 27.04.2017. The said order reads as follows :

"Pending suit, the applicant has filed the present application, seeking leave to combine the cause of action and passing off with infringement of copyright and try the suit.

2.Considering the averments made in the affidavit filed in support of the application and considering the fact that combining the causes of action will avoid multiplicity of proceedings, this application is ordered as prayed for."

25 There is no dispute or disagreement before me that the aforesaid order has been given complete legal quietus and has attained finality. As the aforesaid order is a judicial order and the same has admittedly been given complete legal quietus by sole defendant, the sole defendant cannot now be heard to contend that leave under Clause 12 of Letters Patent is sine qua non for this suit. This Court having acceded to the prayer in the aforesaid application under Clause 14 of Letters Patent, saves the composite suit and the suit is not liable for rejection. However, for capturing the hearing as accurately as possible, it may be necessary to point out that learned counsel for plaintiff pressed into service a Division Bench judgment of this Court in Wipro Limited & Anr. Vs. Oushadha Chandrika Ayurvedic India (P) Limited & others reported in 2008 (37) PTC 269 (Mad.)(DB) : (2008) 2 LW 430. Relevant paragraph in the Wipro Limited case is paragraph 10 and the same reads as follows :

'10.In order to appreciate the rival contentions raised by the learned counsel for the parties, it will be necessary to analyse the provisions of Clause 12 of the Letters Patent, Section 62 of the Copyright Act, 1957 and Section 134 of the Trade Marks Act, 1999. Clause 12 of the Letters Patent reads as hereunder:

"12. Original Jurisdiction as to suits. And We do further ordain that the said High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court: or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause at Madras, in which the debt or damage, or value of the property sued for does not exceed hundred rupees."

Section 62 of the Copyright Act, 1957 reads as hereunder:

"62. Jurisdiction of Court over matters arising under this Chapter. (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the direct Court having jurisdiction.

(2) For the purpose of sub-section (1), a "district Court having jurisdiction" shall, notwithstanding

anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.
Section 134 of the Trade Marks Act, 1999 reads as hereunder:
134. Suit for infringement, etc., to be instituted before District Court:
(1) No suit
(a) for the infringement of a registered trade mark; or
(b) relating to any right in a registered trade mark; or
(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.
(2) For the purpose of clauses (a) and (b) of sub-section (1), a District Court having jurisdiction shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.
Explanation. For the purposes of sub-section (2), person includes the registered proprietor and the registered user.

26 In my considered opinion, Wipro Limited case may not directly apply to the facts of this court. Wipro Limited is a case where the Division Bench of this Court speaking through Hon'ble Mr.Justice A.P.Shah (Chief Justice of this Court as His Lordship then was), analysed Clause 12 of Letters Patent its interplay with Sections 134(1) of The Trade Marks Act, 1999 and 62(2) of CR Act. However, this judgment very elucidatively has laid down the scope of Clause 12. To that extent, it can be gainsaid that this composite plaint for injunctive reliefs with regard to two causes of action does not deserve to be rejected for want of leave under Clause 12 as an application under Clause 14 has been taken out and the same has been allowed.
27 Also for capturing the hearing as accurately as possible, it is to be recorded that learned counsel for defendant pointed out that in the cause of action paragraph, plaintiff has averred that a part of cause of action has arisen within the territorial jurisdiction of this Court and the relevant portion is paragraph 46 which is the cause of action paragraph and the same reads as follows :
46.That the cause of action arose in or around April 2017 when the Plaintiff discovered that Defendant was marketing the impugned products and manufacturing the goods with the Copyright AMIL'S and the pictorial mark and logo as well as the Copyright color scheme and get up of the Plaintiff and passing off their goods by using labels and packaging as those of the Plaintiff. For the relief on account of infringement of Copyright the Plaintiff is entitled to file the suit under Sec.54 read with 62 of the Copyright Act 1957 within the jurisdiction of this Hon'ble Court because the Plaintiff, is residing at Poes Garden, Chennai within the jurisdiction of this Hon'ble Court. The defendant is also circulating their goods with the impugned mark in the city of Chennai through their stockist and dealers. Hence the cause of action for passing off also has arisen within the jurisdiction of this Hon'ble Court through the Port of Chennai by way of exports to Sri Lanka which will be proved at the time of Trial. The cause of action for the present suit is a continuing one and arises each day the Defendant manufacture, offers for sale or sells the said black hennas which are in violation of the Plaintiff's aforesaid intellectual property rights. Therefore the suit is filed within the period of limitation. It is just and proper that the cause of action with respect to passing off is combined with the cause of action with respect to infringement of copyright. No prejudice will be caused to the Defendant and it will avoid multiplicity of proceedings. For seeking the relief of passing off an application under clause 14 of the Letters Patent is taken out in this suit.

Be that as it may, in the affidavit filed in support of the application being A.No.2632 of 2017, the plaintiff has averred that defendant is carrying on business outside the jurisdiction of this Court and the cause of action with respect to passing off arises outside the jurisdiction of this Court. To my mind, this does not appear to be a self defeating contradiction which requires to be looked into in the reject the plaint application.

28 As alluded to supra, all pleadings are complete in the main suit and parties would do well to have the trial expedited by resorting to swift and strict time lines that have been provided in the amended CPC as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity). After completion of pleadings, next procedural steps under amended CPC as amended by said Act are inspection of documents followed by admission and denial under Rules 3 and 4 of Order XI of said Act. Parties will do well to complete this exercise within four weeks from the date of pronouncement of this order in the open Court. The procedural step under amended CPC post completion of such exercise is 'CASE MANAGEMENT HEARING' ('CMH' for brevity) under Order XV-A of CPC.

29 Registry to list the main suit under the caption for CMH after four weeks from the date of pronouncement of this order in the open Court.

30 In the light of the narrative supra, A.No.3965 of 2017 is dismissed. Considering the nature of application and the nature of lis, parties are left to bear their respective costs in this application.

27.09.2018
Speaking order

Index : Yes

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M.Sundar, J.

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order in
A.No.3965 of 2017
in
C.S.No.338 of 2017

27.09.2018