

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 8TH DAY OF OCTOBER 2018

THE HON'BLE MR. JUSTICE M.SUNDAR

A.No.7277 of 2017

in

C.S.No.341 of 2010

1.Mr.A.D.Padmasingh Isaac
Trading as Aachi Spices and Foods
Old No.4, New No.181/1
6th Avenue, Thangam Colony
Anna Nagar
Chennai 600 040

2.M/s.Aachi Masala Foods (P) Ltd.,
No.6, Ground Floor
15th Street, Anna Nagar, 'G' Block
Chennai 600 040
Rep.by its Director
Mr.Ashwin Pandian

..Plaintiffs/Respondents

Vs.

Aachi Cargo Channels Private Ltd.,
Door No.9, III Floor, VGP Murphy Squire
No:19, GST Road, St.Thomas Mount
Chennai 600 016
Tamil Nadu.

..Defendant/Applicant

Application praying that this Hon'ble Court be
pleased to the original Plaintiffs Mr.A.D.Padma Singh
Isaac and Mr.Ashwin Pandian to depose before this Hon'ble
Court regarding the material aspects.

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

There are two plaintiffs and a sole defendant in the main suit.

2. Sole defendant in the main suit is the lone applicant in the instant application. Plaintiffs 1 and 2 in the main suit are Respondents 1 and 2 respectively, in the instant application.

3. For the sake of convenience and clarity, parties in the instant application are referred to by their respective ranks in the main suit.

4. Plaintiff No.1 is an individual and a natural person. Plaintiff No.2 is a juristic person i.e., a Private Limited Company incorporated under the Companies Act in India.

5. Plaintiffs have filed the main suit *inter alia* complaining of infringement of their registered trademarks. Usual prayers for delivery of alleged offending material, accounts and costs also are other limbs of the prayer. The usual residuary limb of prayer is also contained in the prayer paragraph.

6. In short, this is a suit for alleged infringement of plaintiffs' registered trademarks.

7. Though plaintiffs claim registration in several trademarks, a perusal of the plaint reveals that central to the lis is the mark 'AACHI'.

8. The principal face of the plaintiffs' label as depicted in the plaint is as follows:



9. Instant application has been taken out by the defendant with a prayer to summon plaintiff No.1 Mr.A.D.Padmasingh Isaac and Mr.Ashwin Pandian, Director in plaintiff No.2 company.

10. Instant application has been filed *inter alia* under Order XXIX, Rule 3 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as well as Order XVI, Rule (1) Sub-rule (iv) and Order XVI Rule 14 of the Original Side Rules of the Madras High Court ('OS Rules' for brevity).

11. To be noted, there is no dispute or disagreement between the two counsel before me i.e., Ms.Revathi G Mohan for sole defendant and Ms.Gladys Daniel, counsel on record for both the plaintiffs that interim prayers sought for by the plaintiffs in the interlocutory applications were not acceded to, and the same were carried in appeal by way of an intra-court appeal. The Division Bench also did not accede to the interim prayers. The matter was carried upto the Hon'ble Supreme

Court which held that all issues are to be decided in the main suit.

12. Now, trial in the main suit has commenced and one B.Gnanasambandam, has been examined as P.W.1. It is submitted that aforesaid P.W.1 is Senior Manager -L & S. I am informed that abbreviation 'L & S', for which there is no expansion in the deposition, stands for 'Legal and Secretarial'.

13. It is not in dispute that cross examination of P.W.1 was completed on 10.10.2017.

14. It comes to light that instant application has been filed on 05.10.2017, when the cross-examination was in progress.

15. The instant application is supported by a one page six paragraphs affidavit and the same reads as follows:-

'1. I submit that I am the Director of the petitioner /Defendant Company and I am well acquainted with the facts of the case herein.

2.I submit that I have filed my detailed "Written Statement along with Counter Claim" in the main suit and the same may be read as part and parcel of this Affidavit.

3.I submit that Mr.B.Gnanasambandam s/o, Balasubramaniam, Senior Manager, L &

S of the Respondents / Plaintiffs company has filed his proof affidavit along with some documents before this Hon'ble Court and the matter is pending trial.

4.I submit that, the said Mr.B.Gnanasambandam is neither the Director Principal Officer, Proprietor or the competent person to depose on the material aspects, facts or circumstances in the plaintiffs "adopting" the word mark "AACHI".

5.I submit that there will not be any prejudice caused to the original plaintiffs to depose before this Hon'ble court about the material aspects on the other hand I will be severely prejudiced if this Hon'ble court rejects this application.

6.I submit that filed this interlocutory application is neither wilful but due to the reasons state above.'

16. Though not articulated in the affidavit filed in support of the instant application, it was argued today by learned counsel for defendant that P.W.1 has refused to answer several questions, which has necessitated the filing of the instant application.

17. I have perused the deposition of P.W.1.

18. To my mind, it does not appear that P.W.1 has refused to answer any question.

19. It is pointed out that P.W.1 does not have personal knowledge about adoption of the above mark.

20. Faced with the above situation, plaintiffs, who have filed a short seven paragraph counter affidavit dated 30.11.2017 submitted that, it is open to the sole defendant to canvas that adverse inference should be drawn against the plaintiffs in this regard i.e., with regard to P.W.1 pleading ignorance about what according to the plaintiffs are certain vital aspects of the lis.

21. I deem it appropriate to extract seven paragraphs of the counter affidavit dated 30.11.2017 filed by the plaintiffs and the same reads as follows:-

'1.I am the Senior Manager - Legal & Secretarial of the 2nd Respondent in the above application and as such I am well acquainted with the facts and circumstances of the case. I am swearing to this Affidavit on behalf of both Respondents.

2.Before dealing with the parawise reply, I state that the above application is being filed under Order 29 Rule 3 of CPC. The application is not maintainable under the said provision.

3.I have perused the affidavit of S.Saravanan and I deny all the

allegations therein expect those that are admitted herein.

4.I deny the allegation that the written statement along with counter claim filed in the main suit may be read as part and parcel of this affidavit.

5.Paragraph 3 of the application requires no response.

6.I state that with respect to paragraph 4, PW1 is the authorized person to depose and give evidence on our behalf of the respondents and the required authorization has already been marked as EX P1. PW1 is the Senior Manager - Legal & Secretarial and he is competent to give evidence on behalf of the Respondents. PW1 has also deposed specifically during his cross examination dated 10.10.2017 that he had knowledge from papers, records and documents of the plaintiffs. I submit that the above suit is filed by the Respondents and it is the Respondent's prerogative to authorize any person who is well versed with the facts of the case to give evidence on their behalf.

7.The allegations contained in paragraph 5 and 6 are denied as incorrect. The suit is at the stage of trial. PW 1's evidence has been completed. At this juncture the Applicant/Defendant has come out with

this application only to delay the proceeding. This application is vexatious and will put the Respondents to unnecessary difficulty. There is no sufficient cause shown by the Applicant to summon the Respondent and it's Directors to depose regarding material aspects. It is also submitted that the Applicants are the prior users and proprietors of the Trade Mark AACHI since 1995. Despite the same no interim injunction was granted in our favour and we are put to severe hardship injunction was granted in our favour and we are put to severe hardship and damage. Now the Respondent has come out with this application only with the view to drag on the proceedings and delay the trial from seeing its positive end in our favour.'

22. I now turn to provisions of law under which the instant application has been filed.

23. As alluded to supra, the instant application has been filed under Order XXIX, Rule 3 of CPC and Order XVI, Rule 1 Sub Rule (iv) and Order 16, Rule 14 of the O.S Rules.

24. A perusal of the aforesaid pleadings of the sole defendant (To be noted, I have extracted the pleadings of the plaintiffs also) reveals that no compelling case has been made out for this Court to require the personal appearance of the Secretary or Director or the Principal Officer of the Corporation i.e., Plaintiff No.2 or for that matter Plaintiff No.1 who is a natural person. This puts an end to the prayer under Order 29 Rule 3 of CPC.

25. With regard to the aforesaid provisions of O.S. Rules, the same pertain to subpoena. A perusal of the pleadings supra will reveal that no case has been made out, much less a compelling case for issue of subpoena. However, I have also considered the argument that P.W.1 has refused to answer some questions. To be noted, I have perused the deposition and found that he has not refused to answer questions, but has pleaded ignorance about certain aspects.

26. Orders passed in interlocutory applications do not weigh in the final disposal of the suit. Making a departure from this position, learned counsel for plaintiffs makes a submission that it is open to the sole defendant to canvass that adverse inference should be drawn against the plaintiffs with regard to any shortcomings in the deposition of P.W.1. This is recorded.

27. Learned counsel for plaintiffs also submits that it is open to the sole defendant to press into service the instant order and what has been recorded supra while canvassing that adverse inference should be drawn, when the main suit is taken up for hearing.

28. At this juncture, learned counsel for sole defendant brings to my notice that counter claims have been made in the suit and that the counter claims pertain to validity of trademark registration in favour of the plaintiffs.

29. If the sole defendant chuses to take out suitable applications with regard to validity of plaintiffs' registered trade marks, this order will not be an impediment and it is open to the sole defendant to do so. If the sole defendant chuses to adopt such a course, such applications will be dealt with and disposed of on their own merits.

30. In my considered opinion, recording the aforesaid submissions made on behalf of plaintiffs that it is open to the sole defendant to canvass that adverse inference should be drawn against the plaintiffs and that the said plea shall be heard and disposed of on its own merits douses the anxiety, if any, on the part of the sole defendant qua the instant application.

This application is disposed of as closed recording

the aforesaid submissions. Considering the nature of the application and the trajectory of the hearing, there shall be no order as to costs.

Sd./- M.S.J.

08.10.2018

//Certified to be a true copy//

Dated this the day of 2018.

DL/14.11.2018

COURT OFFICER

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



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