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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 257/2017 & CM Nos.34422-23/2017**

% **Date of Decision: 9th January, 2018**

M/S ZIHWA FOODS PVT LTD Appellant
Through: Mr. Ashutosh Dubey, Adv.

versus

M/S G D FOODS MANUFACTURING
(INDIA) PVT LTD Respondent
Through: Nemo.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

GITA MITTAL, ACTING CHIEF JUSTICE

1. Despite our last order dated 25th September, 2017, there is no appearance on behalf of the respondent. We have, therefore, proceeded with hearing of the ld. counsel for the appellant.

2. The appellant assails the order dated 17th May, 2017 whereby the ld. Single Judge dismissed the I.A. No.18308/2013 (*under Order VII Rule II CPC*) filed in CS(OS) No.813/2013. By this application, the appellant (defendant in suit) had sought rejection of the plaint on the ground that the said suit for permanent injunction premised on the complaint that the appellant was guilty of infringement of trademark was not maintainable. It was submitted that the plaintiff/respondent herein did not have any registered trademark in Class 30 of the Trade Marks Act, 1999

(*hereinafter referred to as 'the Act'*), even as per the tabulation set out in the plaint and consequently, the suit for infringement of such trademark at the instance of the plaintiff was not maintainable.

3. The second limb of the arguments before us is that the appellant had no business in Delhi and its office as well as business is located only in Chennai, India. It is, therefore, submitted that Section 134(2) of the Act has no application and that premised on the submissions in the plaint, the respondent/plaintiff could institute the suit for passing off by the appellant/defendant of its goods as having connection to those of the respondent's/plaintiff's only in the territorial jurisdiction of the courts in Chennai.

4. We find that the Id. Single Judge has relied upon the assertions on the plaint.

5. Mr. Ashutosh Dubey, Id. counsel for the appellant has also taken us through the copy of the plaint which has been placed on record. We find that in para 11 of the plaint, the respondent/plaintiff has tabulated the status of the trademark possessed by it in different Classes which includes Class 29 and Class 30 in respect of trademark 'TOPPS'. In para 25 of the plaint, the respondent/plaintiff has alleged that the appellant was infringing the "*registered trade marks of the plaintiff as detailed here above by using the identical/similar trade mark TOPPS*". The prayer for injunction in respect of the alleged infringement of trademark has been based by the appellant *inter alia* on this averment.

6. So far as the territorial jurisdiction is concerned, in para 31 of

the plaint, the respondent has relied on the provisions of Section 134(2) of the Act submitting that as the registered office of the respondent/plaintiff is at Delhi, this Court has territorial jurisdiction to entertain and adjudicate upon the subject matter of the suit. On these assertions, the plaintiff has joined the cause of action for infringement of the trademark as well as passing off action against the appellant in the same suit.

7. It is trite that while adjudicating upon an application under Order VII Rule II of the Code of Civil Procedure, the Court can examine only the averments made in the plaint and the consideration on such application has to proceed on demurrer.

8. In this background, given the assertions of the plaintiff/respondent in the plaint as noted above, the impugned order dated 17th May, 2017 cannot be faulted with on any illegally tenable ground.

9. It is submitted by the ld. counsel for the appellant that the bald averments in plaint are not supported with even any firm averments in the plaint, let alone any documentary proof. It is submitted that such assertions cannot be relied upon. This is an aspect which would be open to the appellant to place before the ld. Single Judge by seeking vacation of any orders which may have been passed in favour of the respondent/plaintiff. Such prayer would also enable the ld. Single Judge to test the material placed by the appellant on record and to examine the sustainability of any interim prohibition which may have been granted against the appellant/defendant. The ld. Single Judge shall proceed in the

matter uninfluenced by any observations made in the previous interim orders.

10. It may be noted that the suit was filed in the year 2013. We are informed by the ld. counsel for the appellant that the suit has barely reached the stage of admission/denial of documents. This is the second time that the matter of rejection of plaint has been brought to the Division Bench. The matter has even been taken to the Supreme Court of India for the same purpose.

It is directed that the proceedings in the suit shall not be adjourned except for reasons to be recorded.

In view of the above, we find no merit in this appeal. The appeal as well as pending applications are hereby dismissed. No order as to costs.

ACTING CHIEF JUSTICE

C.HARI SHANKAR, J

JANUARY 09, 2018/pmc