IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4818 OF 2018

Aplab Limited, a Public limited Company incorporated under the Provision of Indian Companies Act, 1956 and now governed under provision of Indian Companies Act, 2013, having address at Aplab House A-5, Wagle Estate, Thane 400 604, through Shri Rajesh Kesrinath Deherkar, Company Secretary and Constituted Attorney **...Petitioner (Ori.Plaintiff)**

Versus

Applabs Technologies Private Limited Company incorporated under the Provision of Indian Companies Act, 1956 and now governed under the provisions of Indian Companies Act, 2013, having office address at Plot Nos.83 & 84, Road No.2, Banjara Hills, Hyderabad 500 034 **...Respondent (Ori.Defendant)**

Mr. Surin Usgaonkar, for the Petitioner.
Mr. Shriniwas Deshmukh, a/w Ms. Aarti Shah, i/b M/s. Mulla & Mulla & Craigle Blunt & Caroe, for the Respondent.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 10th OCTOBER,, 2019
PRONOUNCED ON: 17th OCTOBER, 2019

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India takes exception to an order dated 8th December, 2017, passed by the learned District Judge, Thane, on an application (Exhibit-50) in Civil Suit No.6 of 2008, whereby the learned Judge rejected an application for amendment of the plaint so as to incorporate, *inter alia,* claim for enhanced damages to the tune of Rs.100 crores, for the deceptive use of the Trade Mark.

3. The Aplab Limited, the petitioner – plaintiff company has instituted a suit against the Applabs Technologies Private Limited, the respondent – defendant company with the assertion that the defendant has infringed the Trade Mark "Aplab" in the year 2008 by using a deceptively similar and phonetically identical mark, "Applabs". The plaintiff is an established company. It deals in the business of manufacturing and marketing of various electrical and electronic devices. The plaintiff company has invented, adopted and registered the trade mark "Aplab". The defendant company adopted the name "Applabs" deceptively similarly to plaintiff's corporate name and trade mark. The plaintiff, thus, sought the reliefs of injunction and also damages quantified at Rs.50,53,00,000/-.

4. The defendant resisted the claim by filing the written statement. Issues were framed on 10th February, 2015. The plaintiff filed an application for amendment and sought to incorporate the averments as proposed in paragraph 18(a), 18(b), 18(c) and 18(d), and further sought to add the name of the authorised officer of the plaintiff – company in the cause-title of the plaint. The plaintiff also sought to amend the relief in Clause 23(f) of the plaint and claim enhanced damages to the tune of Rs.1,90,53,00,000/-.

5. The defendant resisted the application for amendment. It was contended that the alleged loss of Rs.100 crores was suffered in the year 2007. The suit was instituted on 19th December, 2008. Issues have been framed. Affidavit of examination-in-chief has also been filed. Thus, the interdict contained in the proviso to Order VI Rule 17 came into play. The plaintiff has not assigned any justifiable reason to indicate that despite due diligence the application for amendment could not have been preferred before commencement of trial.

6. The learned Judge, after considering the averments in the application and reply thereto and the submissions of the parties, was persuaded to reject the application, on the premise that the plaintiff had full knowledge of the facts, which were sought to be incorporated by way of amendment, as they occurred in the year 2005 and 2009. Thus, there was no due diligence on the part of the plaintiff. Since the trial has commenced and the suit was posted for cross-examination of the plaintiff, in the view of the learned Judge, the plaintiff was not entitled to seek amendment at that stage of the suit.

7. Being aggrieved by and dissatisfied with the impugned order, the petitioner has invoked the writ jurisdiction of this Court.

8. Mr. Usgaonkar, the learned Counsel for the petitioner mounted two-fold challenge to the impugned order. Firstly, the trial court lost sight of the fact that the enhancement of the claim for damages was on account of the fact that the plaintiff continued to suffer damages during the pendency of the suit as there was no interim relief. Secondly, the trial court took a very hyper-technical view of the matter and fell in error in rejecting the application for amendment which was imperative for determination of the real question in controversy between the parties.

9. As against this, Mr. Deshmukh, the learned Counsel for the respondent urged that the impugned order does not suffer from any perversity or arbitrariness warranting interference in exercise of the writ jurisdiction. The learned Judge was justified in disallowing the plaintiff to amend the plaint as the bar incorporated by the proviso to Rule 17 of Order VI squarely applied, with full force, and there was no whisper about the due diligence on the part of the plaintiff in the application. Banking upon the judgment of this Court in the case of ***Jayashree Subhash Kalbande and another vs. Bhaurao Nagorao Derkar and others*[1]*,*** it was urged that the rejection of the application for amendment was in consonance with the principles of law. It was further submitted that the claim for the enhanced damages was for the loss which the plaintiff allegedly suffered in the year 2007, and thus barred by limitation. Hence, the learned Judge was well within her rights in placing reliance upon the judgment in the case of ***South Konkan Distilleries and another vs. Prabhakar Gajanan Naik & others***[2] and decline the prayer for amendment as the said claim was hopelessly barred by limitation.

10. Mr. Usgaonkar, the learned Counsel for the petitioner joined the issue by putting-forth a submission that the learned District Judge committed an error in delving into the merits of the matter at the stage of consideration of the application for amendment and, thus, misdirected herself in rejecting the application.

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1 2014(4) Mh.L.J.

2 (2008) 14 Supreme Court Cases 632.

11. Evidently, the suit was instituted on 19th December, 2008. The issues were framed on 10th February, 2015. The plaintiff tendered Affidavit of examination-in-chief on 20th June, 2015. The instant application came to be preferred when the mater was posted for the cross-examination of the plaintiff's witness. Evidently, the interdict contained in the proviso to Order VI Rule 17 had clear application. It was incumbent upon the plaintiff to establish to the satisfaction to the Court that in spite of due diligence the plaintiff could not have sought amendment before the commencement of trial.

12. If the application for amendment is scrutinized, on the aforesaid touchstone, it becomes evident that the plaintiff has made no endeavour whatsoever to bring the case within the exception carved out by the proviso to Order VI Rule 17. The criticism on behalf of the defendant that there is no whisper about due diligence, is well merited. No reason, much less satisfactory and justifiable one, has been assigned to seek amendment at that stage. The only assertion in the opening paragraph of the application is that the facts were revealed after filing of the affidavit of evidence and the amendment was necessitated to rectify the legal lacuna in the cause-title of the plaint. If the schedule of the amendment, which is incorporated in the application itself, as paragraphs 18(a) to 18(d), is perused, it becomes abundantly clear that the circumstances referred to therein and the claims sought to be brought on record thereby, had transpired even before the institution of the suit, namely, the e-mail communication dated 27th July, 2007; the communications from Bank of Maharashtra dated 25th September, 2007 and 26th September, 2007 and certificate of incorporation dated 16th August, 2005.

13. In the backdrop of the aforesaid facts, reliance placed on behalf of the defendant on the judgment of this Court in the case of ***Jayashree Kalbande*** (supra) appears to be impeccable. In the said case, this Court had extracted the law of due diligence which was summarized in the judgment in Writ Petition No.722 of 2012 and connected matters, decided on 25th September, 2013, as under:

> "**9**. In the judgment delivered in W.P No. 722/2012 and connected matters on 25-9-2013, after taking into consideration the various decisions of the Apex Court and of this Court, the law on due diligence has been summarized in paragraph 87 as under;
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> 87. The law on "due diligence" developed till this date is summarized as under:
>
> (a) "Due diligence" means careful and persistent application and effort. It means the diligence as a prudent man would exercise in the conduct of his own affairs. Unless the party takes prompt steps, mere action cannot be accepted after the commencement of the trial. The due diligence determines the scope of party's constructive knowledge of the claim. It is a kind of reasonable investigation, which is necessary before claiming the relief.
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> (b) The due diligence is distinct from ignorance. In spite

> of knowledge, ignorance by a party or an Advocate cannot be a matter of due diligence. The neglect to perform an action, which one has an obligation to do, cannot be called as a mistake.
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> (c) The degree of prejudice to the other side by an amendment after the commencement of the trial is greater than one at pretrial stage.
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> (d) Without recording finding on the question of due diligence, the Court shall not get jurisdiction either to allow or disallow an amendment in the pleadings after the commencement of the trial.
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> (e) The Court while allowing an amendment must record a finding that in spite of due diligence, the party could not have raised the matter before the commencement of the trial or that the events sought to be brought on record by way of an amendment have occurred subsequent to the commencement of trial.
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> (f) The facts and grounds in the application for amendment must be clearly stated to bring out a case that the delay caused was beyond the control and diligence of the party proposing amendment.
>
> (g) Where a party had acted with due diligence or not, would depend upon the facts and circumstances of the case and no hard and fast rule or straitjacket Formula can be laid down."

14. In view of the aforesaid enunciation of the legal position, the fact that the application for amendment even did not contain averments as regards the cause of delay, the circumstances in which it occurred and the justification for moving the application for amendment at that stage, is plainly fatal to the tenability of the application for amendment.

15. Faced with the aforesaid facts, the learned Counsel for the petitioner attempted to wriggle out of the situation by canvassing a submission that the application was necessitated on account of the damages, which the plaintiff sustained during the pendency of the suit, as there was no injunctive relief in favour of the plaintiff. This submission also suffers from the same infirmity as the application for amendment is conspicuously silent about the ground now sought to be forcefully urged by the learned Counsel for the petitioner.

16. In the aforesaid view of the matter, no interference is warranted in the impugned order in exercise of the extra-ordinary jurisdiction. Hence, the petition deserves to be dismissed.

17. The petition stands dismissed. No order as to costs.

18. Rule discharged.

[N. J. JAMADAR, J.]