

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

REVIEW PETITION NO. 29 OF 2016

IN

NOTICE OF MOTION NO. 1608 OF 2011

AND

NOTICE OF MOTION (L) NO. 1964 OF 2014

IN

SUIT NO. 1184 OF 2011

WITH

CHAMBER SUMMONS NO. 851 OF 2018

Dilip Kumar Jain & Anr

...Petitioners

Versus

Sumeet Appliances Pvt Ltd

...Respondents

WITH

COMMERCIAL SUIT NO. 310 OF 2017

Sumeet Research and Holdings Pvt Ltd

...Plaintiff

Versus

Dilip Kumar Jain & Ors

...Defendants

**Dr Birendra Saraf, with Meghana Chandru & HJ Engineer, i/b
Gordhandas & Fozdar, for the Petitioners.**

**Mr Akash Rebello, with Aditi Phatak & Parag Sharma, i/b Udwadia
& Co., for the Respondents.**

**Mrs Tanmayi Rajadhyaksha, with A Nair & Shrikant Pillai, i/b
Mustafa Motiwala, for the Plaintiff in COMS/310/2017.**

CORAM: G.S. PATEL, J
DATED: 12th February 2019

PC:-

1. The Review Petition is directed against my order dated 28th October 2015. I admitted the Review Petition on 7th October 2016 and granted an ad-interim order in terms of prayer clause (b) staying the effect, operation and implementation of that order. The next order of consequence is the one of 16th March 2018 by which I directed the parties to obtain an administrative order on the basis that should I allow the Review Petition the principal Notice of Motion No. 1608 of 2011, as also the companion Notice of Motion (L) No. 1964 of 2014 would be taken up for hearing by this Court. I am informed that all these matters have since been assigned to this Court. This means that not only am I hearing the Review Petition but I will also be hearing the Notices of Motion for interim relief in the suit, i.e., the Notices of Motion by Sumeet Appliances Pvt Ltd (**"SAPL; "Sumeet Appliances"**) being Notice of Motion No. 1608 of 2011 and Notice of Motion (L) No. 1964 of 2014, as also the Notice of Motion No. 2752 of 2017 in the Commercial Suit No. 310 of 2017 filed by one Sumeet Research and Holding Pvt Ltd (**"Sumeet Research"**).

2. This is actually now a three-cornered dispute in relation to the mark in question: **"Sumeet"**. This is used, amongst other things, in relation to kitchen appliances. A very brief outline of the facts may be necessary. SAPL filed Suit No. 1184 of 2011 against Dilip Kumar Jain and his proprietorship (colly, **"Jain"**), both of

whom operate out of Goa. SAPL said two things. First, that it was the registered proprietor of various marks containing the word and label “**Sumeet**” rendered distinctively. Second, that Jain was infringing this mark by using the word “**Sumeet**”. The fact that this was used in conjunction with a prefix “**MI**” made no difference. Broadly speaking the defence from Jain was that “**Sumeet**” was a name that he adopted because it was his son’s name.

3. SAPL claimed ownership of the “**Sumeet**” mark on a certain historical basis. One Power Control and Appliances Company (“**Power Control**”) was the original proprietor of the mark “**Sumeet**”. This was a proprietary concern of one Mrs Madhuri Mathur, the wife of the gentleman who first designed these appliances and coined the mark in the 1950s. In early 1981, Power Control assigned its rights in the mark “**Sumeet**” to Sumeet Research. There is a deed of assignment. Then on 21st December 2002 Sumeet Research assigned its rights to one Sumeet Machines Pvt Ltd, (“**Sumeet Machines**”). There were then different deeds of assignment by which apparently the rights in “**Sumeet**” were allegedly assigned by Sumeet Machines to the SAPL.

4. Even while SAPL’s Notice of Motion No. 1608 of 2011 for a restraint against Jain was pending before me, it seems that Jain found out that there was some doubt about SAPL’s title to the proprietorship of the mark. It seems that Power Control in 1992 brought a suit for trademark and copyright infringement against Sumeet Machines, SAPL’s predecessor-in-title in the Madras High Court. The matter was carried higher. The Supreme Court granted

an injunction against SAPL from using this mark in the celebrated decision in *Power Control Appliances v Sumeet Machines Pvt Ltd.*¹

5. Dr Saraf for the Review Petitioners, Jain, says that during the proceedings in the Notice of Motion, his clients repeatedly asked the Advocates for SAPL for copies of the Madras High Court proceedings but these were always denied. There were several such letters. The Affidavit in Reply filed by Jain on 24th June 2011 contains a specific and categorical assertion that these Madras High Court litigation documents were necessary for a decision in the matter. SAPL filed a rejoinder on 30th June 2011 denying that it was hiding or suppressing any proceedings or any facts in relation to the ownership of the mark. It maintained that it was the “rightful subsequent registered proprietor of the mark Sumeet on a devolution of that mark from its predecessor”.

6. This is precisely the problem today. The judgment under review did not and could not on the material that was then available have addressed satisfactorily this issue. The reason is plain. SAPL is not an original adopter of the mark but claims a derived title or right. There is today also as part of these proceedings — and I do not see how I can disentangle it from the Review Petition — a substantive claim made by Sumeet Research saying that it, and not SAPL, is, and even at the time of institution of SAPL’s suit, was the only rightful and registered proprietor of the mark.

1(1994) 2 SCC 448.

7. Ms Rajadhyaksha for Sumeet Research says that there should in fact be an injunction against Jain and his company, but that injunction cannot be granted to SAPL. It must be granted, in her submission, on merits, but only to Sumeet Research. This directly puts into question the issue of proprietorship and ownership of the mark as between SAPL and Sumeet Research. For it is one of the contentions by Dr Saraf for Jain that if these two Sumeet entities are at loggerheads as to which of them owns the mark, then all to the good so far as he is concerned, and no injunction can be granted to an unknown or uncertain proprietor. The one thing that any infringement action demands is absolute certainty as to proprietorship. Infringement injunctions cannot hang in the air untethered to known, established, certain and unambiguous proprietorship of the mark in question. It may well be his submission that if there exists such confusion between the two Sumeet entities, then that is sufficient for his purposes. He is, therefore, careful to say in this Review Petition that the ground for review is not the findings returned against Jain, but simply that no such findings could have been returned at the instance of SAPL. There was, in his submission, nothing to show that the claim to proprietorship was good, or that the mark vested in SAPL. The review is on this limited basis that it was unclear at the time of SAPL's suit and, therefore, at the time of the order under review as to who the true proprietor was. If SAPL could not have been the proprietor of the mark, then it could not maintain its suit at all, and no injunction could have been granted. There was no question of passing on to an examination of the merits of the infringement claim without first establishing proprietorship.

8. In the proceedings before me at the Motion, SAPL's Director Ajay Mathur filed an Affidavit saying in essence that he denied that Power Control had ever disputed the rights of SAPL. He said there was some family bickering about the mark and claimed that the litigation was restricted to one specific Sumeet mixer model. He claimed that there was a memo of compromise and then asserted that the original proprietor Mrs Madhuri Mathur had ratified and confirmed the assignment in favour of SAPL's predecessor, Sumeet Machines.

9. While all this was going on, Jain adopted another mark "**Sumeet Sassaki**", and on 20th October 2015 I granted an injunction against the use of both the marks "**MI Sumeet**" and "**Sumeet Sassaki**". Jain appealed. After those Appeals were admitted, Jain withdrew them and it is now the case of Jain in this Review Petition that he learnt some time in late June 2016 from the market that Sumeet Machines was under an injunction of the Madras High Court in a compromise decree. It was thereafter in the first week of July 2016 that Jain obtained a copy of this consent decree dated 29th January 1997. It is a consent decree in the suit filed by Power Control and Sumeet Research against Sumeet Machines. The parties to this consent decree were Sumeet Research, Power Control & Appliances Company, Power Control & Appliances (Bombay) Ltd and another two companies on the one hand, and Sumeet Machines and a second limited company on the other. Sumeet Machines submitted to a decree of permanent injunction undertaking not to manufacture, sale, advertise for sale, using the mark or name "**Sumeet**" and not to pass off goods

referred to in certain specified trade mark applications by using any name similar to “**Sumeet**”.

10. I note this because while this is set out in the Review Petition and there are replies and rejoinders, it is not disputed that this compromise decree was not in the papers that were before me at the time of the order under review. I am not concerned with SAPL’s explanation to the background of the compromise decree and the statements that this was a temporary or transitory arrangement and other arguments. Those will be available at the correct time. The point is that these were never considered at the time of the order dated 28th October 2015. It is entirely possible that had these factors been considered, the resultant judgment might have been significantly different. It is not easy to say at this stage that it *would* have been different but only that it may well might have been so, and that for the purposes of a review must surely be enough.

11. As Dr Saraf points out it is unclear how a Court decree, albeit by consent, could be modified by any subsequent family internal arrangement. There is also no answer from SAPL as to how in 2017 in its suit Sumeet Research alleges infringement by Jain and this is on the basis that Sumeet Research claims rights in the mark “**Sumeet**”. This does not reconcile with SAPL’s claim that there was a family compromise or settlement. This will need to be explained.

12. There is also mention that Mrs Madhuri Mathur has in another suit filed against one Aishwarya Industries said that she is a

director of Sumeet Research and that she has not signed the letters purporting to assign or transfer the mark to SAPL. Now there is in light of this some material of a handwriting analysis presented by SAPL.

13. This, broadly stated, is the conspectus of the Review Petition. I have considerably foreshortened some of the details because I do not think that these are necessary beyond the remit of the provisions of the Code of Civil Procedure 1908 (“CPC”) and specifically the review provisions which are well known Order XLVII Rule 1 of the CPC reads thus:

“ORDER XLVII

Review

1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made

against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

14. This will of course for completeness have to be read with Section 114 of the CPC which reads thus:

"114.Review.—Subject as aforesaid, any person considering himself aggrieved—

(a)by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b)by a decree or order from which no appeal is allowed by this Code, or

(c)by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

15. Now this dispute as to proprietorship seems to me to go to the root of the matter. It squarely affects SAPL's entitlement in the first place to maintain the infringement action against anybody at all, whether it be Jain or any other user of the mark. Was SAPL on the date of the suit even a registered proprietor of the mark? If it was not, then no amount of demonstration of alleged infringement or similarity could have helped its cause. If there was even the slightest uncertainty about the title, the same result would probably follow. The Review Petition is, I hasten to make clear, is not being allowed on the basis of what Sumeet Research today claims or does not claim. After all it has a substantive suit and a Notice of Motion of its own and these will be considered. Undoubtedly SAPL will also be heard in Sumeet Research's claim for an injunction, as will Jain. Therefore, even excluding from present consideration whatever Sumeet Research may have to say, on Jain's own showing there is adequate material to indicate that SAPL's standing to maintain the suit itself was never adequately or fully addressed. This, in my view, is not only within the frame of Order XLVII but is also something that a Court is beholden and obliged to address. It is an error apparent on the face of the record. It may even be a mistake, and as to the question of due diligence I think it is sufficient to say that when Jain repeatedly sought this disclosure but did not get it — and there is no doubt that the compromise decree was never disclosed — but got it only much later, then that is sufficient to meet the due diligence test as well.

16. Mr Rebello for SAPL insists that the relevant facts were all before me. I disagree. The relevant facts were not before me. And neither was Mr Rebello.

17. Dr Saraf relies on the decision of the Supreme Court in *United India Insurance Co Ltd v Rajendra Singh & Ors*² where the Supreme Court in paragraph 16 said in the context of an Insurance Court that no Court or Tribunal is powerless to recall its own order if it is convinced that (and now I am using the words of the Supreme Court) “the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim”.³ Whether or not SAPL is guilty of such “wangling” is something I will decide in the Notice of Motion, which I will restore by allowing this Review Petition and recalling the order of 28th October 2015.

18. The Review Petition is allowed.

19. The order dated 28th October 2015 is recalled and set aside.

20. I will hear SAPL’s principal Notice of Motion No. 1608 of 2011 and Notice of Motion (L) No. 1964 of 2014 as also Sumeet Research’s Notice of Motion No. 275 of 2017 tomorrow.

(G. S. PATEL, J)

²(2000) 3 SCC 581 : AIR 2000 SC 1165.

³Also see *Indian Bank v Satyam Fibres (India) Pvt Ltd.*, (1996) 5 SCC 550.