

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Application No.1486 of 2019

in

Application No.6926 of 2018

in

C.S.(Comm. Division) No.645 of 2018

1. S.Balaji Das
 2. Ultra Business Consultants LLP
No.88B, Karpagam Nagar,
3rd Street, Selaiyur,
Chennai 600 073. ... Applicants/Respondents 1
and 2/ Defendants 1 & 2
- vs.
1. FLSmidth Private Limited,
FLSmidth House, 34 Egatoor,
Rajiv Gandhi Salai,
Kelambakkam, Chennai 600 103,
rep. By its constituted Attorney,
Thomas Kunjummen
 2. FLSmidth A/S
Vigerslevalle 772500
Valby, Denmark,
rep. By its constituted Attorney,
Thomas Kunjummen ... Respondents 1 & 2 /
Applicants/Plaintiffs
 3. LafargeHolcim Bangladesh Ltd.,
Suvaslu Iman Square,
65, Gulshan Avenue,
Gulshan -1, Dhaka,
Bangladesh - 1212.
 4. Chettinad Cement
Rani Seethai Hall Building,
603, Anna Salai, Chennai 600 006. ... Respondents/
Respondents/Defendants 3 & 4

Application filed under Order XIV Rule 8 of the
Original Side Rules read with Clause 12 of the Letters
Patent seeking to revoke the leave granted by this Court in
Application No.6926 of 2018 vide order dated 11.09.2018.

ORDER

In the main suit, i.e. C.S. (Comm. Div) No.645 of 2018, there are two Plaintiffs and four Defendants. Parties in the instant Application (A.No.1486 of 2019) shall be referred to by their respective ranks in the main Suit in this order for the sake of convenience and clarity.

2. Instant application (i.e. A.No.1486 of 2019) has been taken out by Defendants 1 and 2 with a prayer to revoke the leave granted in Application No.6926 of 2018 vide order dated 11.09.2018.

3. The present Suit has been filed seeking for an injunctive relief against the Defendants for infringement of copyright in the artistic work in the Engineering Drawings in respect of Separators and passing off in respect of use of the mark O-Separator and for other consequential reliefs.

4. Ms.S.Suba Shiny, learned counsel for Defendants 1 and 2 submitted that Defendants 1 and 2 are carrying on business at Selaiyur, Chennai 600 073, which is outside the jurisdiction of this Court. The 3rd Defendant is at Bangladesh and that leave has been sought based on the presence of the 4th Defendant at Chennai, which is within the jurisdiction of this Court.

5. According to the learned counsel for Defendants 1 and 2, the 1st Defendant was an employee under the Plaintiffs' Company and that after leaving the services of their Company, he started his own business. She drew the attention of this Court to the averment made in the Leave to Sue Application and in the Plaint that the 1st Defendant had covertly sent emails to the employees of the 4th Defendant, thereby attempting to solicit loyal customers of the Plaintiffs, during the tenure of his employment. In this regard, she contended that but for the said sweeping statement, no material is placed on record as to the nature of the email correspondence.

6. It is further stated by the learned counsel for Defendants 1 and 2 that the email correspondence dated 22.12.2006 found at page 220 of the Typed Set of papers would make it very clear that the 1st Defendant had served in the Plaintiffs' Institution and had parted with the said Institution and that the said email correspondence nowhere states that the 1st Defendant had requested cancelling/passing off business. Learned counsel further stated that in terms of Section 62 of the Copyright Act, 1957 and in terms of Section 134 of the Trade Marks Act, 1999, the Plaintiffs may be entitled to sue before the

District Court.

7. Learned counsel for the Defendants 1 and 2 went on to contend that though the subject matter involves a commercial dispute, it will certainly not come under the purview of the jurisdiction of this Court, in view of two provisions mentioned supra.

8. For better appreciation, Section 62 of the Copyright Act, 1957 and Section 134 of the Trademark Act, 1999 are extracted below:

Section 62 of the Copyright Act, 1957:

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 District 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 Trademark Act, 1999:

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 trademark 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 proceedings, 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.

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9. It is the further contention of the learned counsel for Defendants 1 and 2, that Defendants 1 and 2 are not selling their products in Chennai, when there are no cement industries in Chennai and that till date, Defendants 1 and 2 have not sold any products in Chennai. Hence, according to the learned counsel, when there is no nexus between the 1st, 2nd, 3rd and 4th Defendants, the 4th Defendant

has been made a party to the Suit only with a view to invoke the jurisdiction of this Court. She pointed out

that no relief has been sought by the Plaintiffs against the 4th Defendant in the Suit and that it is incorrect to state that the conduct of the 1st Defendant is in violation of the employment contract and that he has stolen proprietary information from the Plaintiffs' Company. According to her, it is also incorrect to state that Defendants 1 and 2 have made substantial reproduction of the Plaintiffs' copyright and the averments in paragraph 15 of the Plaint would make it very clear that Defendants 1 and 2 are running business with the mark "O-Separator" and not the mark "O-Sepa" as that of the Plaintiffs.

10. Drawing the attention of this Court to page No.220 of the typed set of papers, which pertains to the email sent by the 1st Defendant to the 4th Defendant, learned counsel for Defendants 1 and 2 stated that the 1st Defendant had personally thanked the 4th Defendant for their wonderful support and that the said email cannot be construed that the 1st Defendant had acted against the terms of the contract, when actually, there was severance of the employee-employer trade relationship between the 1st Defendant and the Plaintiffs. In view of the foregoing reasons, learned counsel for the Applicants submitted that this Court has no jurisdiction to try this Suit and she prayed that the leave granted by this Court has to be revoked.

11. On the other hand, learned counsel appearing for the Plaintiffs submitted that the 1st Defendant was an employee of the Plaintiffs' Organization and categorical averments have been made in the Plaint that the Defendants have made substantial re-production of the Plaintiffs' copyright, and that the products of Defendants 1 and 2 are sold with the mark "O-Separator", as could be seen in paragraph 15 of the plaint.

12. He further submitted that this Court will have to take into account the jurisdictional limit as mentioned under Clause 12 of the Letters Patent of the High Court of Madras to institute a Suit and that if the Defendants, at the time of commencement of the suit carries on business, this Court is empowered to take up the matter and decide the same on merits. He also submitted that in terms of Section 29(6)(c) of the Trademarks Act, 1999, this Court has got territorial jurisdiction to entertain a Suit, if a person, who uses the registered trademark, if in particular, imports or exports the goods under the mark.

13. According to the learned counsel appearing for the Plaintiffs, since the goods are exported through Chennai Port Trust, it would imply that this Court has got jurisdiction, and the contention that Defendants 1 and 2 have not carried on any business in Chennai, cannot be accepted. In any event, the issue of jurisdiction is still

open and it is for the parties to let in evidence. He went on to state that in paragraph 9 of the Leave to Sue Application, it is categorically stated that the 1st and 2nd Defendants are also responsible for the manufacture and distribution of goods all over the country, including Chennai. He further submitted that the order dated 11.09.2018 granted in Application No.6926 of 2018 is based on paragraph 9 of the Affidavit filed in support of the Leave to Sue Application. He pointed out that there is no denial of the contentions made in paragraph 9 of the Leave to Sue Application. Hence, it is his contention that this Court has jurisdiction to try the Suit, as Defendants 1 and 2 are carrying on business and selling their products in Chennai.

14. It is further contended by the learned counsel appearing for Plaintiffs that since there was no denial with regard to production, manufacture and distribution of products at Chennai and that the products of the 1st and 2nd Defendants are available at Chennai, this Court has jurisdiction to try the Suit. With reference to paragraph 15 of the Plaint, learned counsel categorically stated that the Suit is a commercial dispute falling within the territorial jurisdiction of this Court and that by way of abundant caution, an Application of Leave to Sue has been filed and that the Petition seeking to revoke the leave granted by this Court, cannot be filed and the same may not

be maintainable once the Suit is numbered. He pointed out that in paragraph 15 of the plaint, there has been a typographical error and the sentence "The Plaintiffs' products under the mark O-Separator" should read as "The Defendants 1 and 2 products under the mark O-Separator".

15. Learned counsel also drew the attention of this Court to the meaning of "clerical error" as given in Black's Law Dictionary, which reads thus:

"clerical error : An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination. Among the boundless examples of clerical errors are omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call. A Court can correct a clerical error at any time, even after judgment has been entered."

16. In reply, learned counsel for the Defendants 1 and 2 submitted that export of goods had taken place outside Chennai and there is no evidence produced by the Plaintiffs to show that there was any export in Chennai. The Plaintiffs will have to substantiate their stand based on the pleadings made, and it cannot be improved by means of verbal statements. In support of her stand, learned counsel relied on an order dated 01.11.2018 passed by this Court in Application No.6799 of 2018 in C.S. (Comm. Division) No.468 of 2018, wherein, it is held as under:

"6(q). In cases of this nature, where leave has been granted on the proposed plaint, leave is always granted only on the basis of proposed plaint that has been placed before the Court. One has to necessarily look at only the plaint and plaint averments only. In the considered view of this Commercial Division, not only should plaint averments alone be looked into, but it should be looked into with a hood. After obtaining leave by placing the proposed plaint before this Court, plaintiff who is faced with leave revocation application, should not be allowed to improve or improvise its case. After making this position clear, I deem it appropriate to extract two portions of the counter affidavit in the instant leave revocation application. One is contained in sub paragraph (1) of paragraph 4 of the counter affidavit and the other is contained in paragraph 10 of the counter affidavit. ..."

17. Learned counsel for the Defendants 1 and 2 went on to submit that in the Plaint, there is no plea to the effect that commercial transaction has taken place and that goods are imported through Chennai Port Trust. According to her, the Plaintiffs have got alternative forum and that no relief has been sought for against the 4th Defendant, who has been made a party in the present Suit only to invoke the jurisdiction of this Court. Hence, she pleaded that Leave to Sue granted by this Court is not maintainable.

18. Heard the learned counsel on either side and

perused the material documents available on record.

19. The issue on hand is with regard to the trade mark "O-Sepa" and "O-Separator". Barring the 4th Defendant, none of the other Defendants and the Plaintiffs are residing within the territorial jurisdiction of this Court.

20. It is no doubt true that the term "Plaintiffs" mentioned in the second line of paragraph 15 of the Plaint is only a typographical error and the Defendants cannot harp on the same and take a finding against the Plaintiffs on that score. However, when there is no pleading by the Plaintiffs with regard to carrying on business and sale on commercial basis, and when there is no nexus between Defendants 1 to 3 and the 4th Defendant with regard to business that is being carried on in the industry, taking note of the provisions under Section 62 of the Copyright Act, 1957 and Section 134 of the Trade Marks Act, 1999, which entitles the Plaintiffs to approach the alternative forum, this Court is of the view that the plea taken by the Defendants 1 and 2 in Application 1486 of 2019 is sustained, as leave was granted only based on paragraph 15 of the Plaint.

21. Thus, having been convinced with the contention of the learned counsel for Defendants 1 and 2, the leave granted by this Court has to be revoked. **Accordingly,**

Application No.1486 of 2019 is allowed and leave granted in Application No.6926 of 2018 vide order dated 11.09.2018,

stands revoked. Parties are left to bear their respective costs. **Consequently, main suit in C.S.No.(Comm.Div.) No.645 of 2018 is dismissed.** Plaint and connected papers shall be returned to the counsel for the Plaintiffs.

22. However, it is needless to mention that the present order does not bar the Plaintiffs to maintain the Suit before the appropriate alternative forum.

Sd./-S.V.N.J

05/04/2019

//Certified to be a true copy//

Dated at Madras this the day of 2019.

COURT OFFICER(O.S.)

JJ 27/04/2019

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