

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.01.2019

Date of Decision : 01.02.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.1948 of 2018
and
C.S.No.726 of 2017

M/s.Meenakshi Overseas LLC
2500 B Hamilton Blvd,
South Plainfield,
NJ – 07080
USA

.. Applicant

Vs.

M/s.V.V.V & Sons Edible Oils Limited,
represented by its Director,
M.Rajiv Vignesh,
No.443, Bazaar,
Virudhunagar-626 001

.. Respondent

Application is filed under Order XIV Rule 8 of Original Side Rules read with Order VII Rule 11 of Civil Procedure Code, 1908, seeking to reject the plaint in C.S.No.726 of 2017.

For Applicant : Mr.M.S.Krishnan, Senior Counsel
for Mr.A.E.Ravichandran

For Respondent : Mr.R.L.Ramani, Senior Counsel
for Mr.V.Anand,
Mr.P.V.Sudakar and
Ms.Pavithra Ramani

ORDER

In the main suit, there is one plaintiff and there are three defendants. Plaintiff is a public limited company incorporated in India and is, therefore, a juristic person. First defendant is a 'Limited Liability Corporation' ('LLC' for brevity) and this Commercial Division is informed that it is an entity formed in 'United States of America' ('USA' for brevity). Defendants 2 and 3 (M/s.Shivaraja Impex Company and M/s.Damodar Foods respectively) are entities in Virudhunagar and Coimbatore Districts respectively.

2 Instant application, i.e., A.No.1948 of 2018 has been taken out by the first defendant in the main suit with a prayer for rejection of plaint inter-alia under Order VII Rule 11 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity). In the instant application, the sole plaintiff has been arrayed as lone respondent. From hereon, parties shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

3 The plaint has been presented in this Court on 14.09.2017. The caption to the plaint says that it has been filed under Sections 26, 134 and 135 of 'The Trade Marks Act, 1999' (47 of 1999) (hereinafter referred to as 'TM Act' for brevity). These are substantive provisions under which the plaint has been presented, besides procedural provisions under Madras High Court Original Side Rules and CPC. Reference to Section 26 of TM Act is an obvious error and the reference is to Section 29 of TM Act captioned 'Infringement of registered trade marks'.

4 The crux and gravamen of plaintiff's case is that it is engaged in the business of selling sesame oil under brand name 'Idhayam', which is

registered as a trade mark in India. It is plaintiff's further case that it exports sesame oil in its regular form as well as refined form to USA, Middle East and other countries. This is besides selling these products in India. This product shall henceforth be referred to as 'suit product' and the registered trade mark 'Idhayam' shall henceforth be referred to as 'suit TM' for the sake of brevity, clarity and convenience. Registration certificates for suit TM qua suit products have been filed as plaint documents along with plaint, but it is submitted that the most important registration certificates which are most relevant for the instant lis are plaint document Nos.1 and 3 being trademark registration certificates dated 24.12.1986 and 06.05.1997, both for the mark 'Idhayam' and both in class 29 for Gingelly oil. While trade mark certificate dated 24.12.1986 is for trade mark No.465063, trade mark registration certificate dated 06.05.1997 is for trade mark No.746974. To be noted, these two trademarks are collectively referred to as 'suit TMs'.

Trademark No.465063 is as follows :



Trademark No.746974 is as follows :



5 Of the two registrations which constitute suit TMs, Legal Use Certificates ('LUC' for brevity) were not filed along with the plaint. After this was pointed out by this Commercial Division and after it was pointed out that Form O-2, Trade Mark Registration Certificate comes with a rider that it is not for use in legal proceedings, LUC for trademark No.465063 alone has been filed by way of a lone document in what has been styled as additional typed set of papers-I dated 18.01.2019. A perusal of this LUC reveals that the registration is for word mark 'IDHAYAM' and trade mark type is 'Device'. It is in class 29 and the goods and description as in LUC is Gingelly Oil.

6 The pivotal complaint in the plaint is that first defendant is using marks deceptively similar to suit TMs for selling suit products in USA. Learned senior counsel for plaintiff very fairly submitted that first defendant is not selling suit products or any other products for that matter with marks deceptively similar to suit TMs in India. In other words, it is the specific and categorical complaint of plaintiff in the plaint that suit products and other products using marks deceptively similar to suit TMs are being sold by first

defendant in USA only and not in India.

7 It is submitted that the service of second defendant is being engaged by plaintiff for packaging and exporting sesame oil to USA and the service of third defendant is being used by plaintiff for packaging and exporting of snacks both with marks deceptively similar to suit TMs to USA.

8 A typical alleged offending sachet in which one of the suit products, namely Gingelly oil is being sold in USA by first defendant is filed as plaint document No.22 and the same is as follows :



9 As mentioned supra, the suit has been filed alleging / complaining of infringement of suit TMs, but the primary prayer reads as follows :

“(a)a permanent injunction restraining the 1st defendant from in anyway entering into any arrangement with anybody for the supply of sesame oil or any other product with the brand name and trade mark of the plaintiff “Idhayam” affixed on it or in business papers for the purpose of export from India into USA or anywhere else in the world;”

10 As mentioned supra, the suit is primarily one complaining of infringement of suit TMs, i.e., under Section 29 of TM Act. In the light of the stated position of plaintiff that the first defendant is not selling suit products or any other products for that matter with marks deceptively similar to suit TMs in India, the entire plaint turns on Section 56 of TM Act. There shall be further discussion in this regard elsewhere infra and the fact that the entire suit turns on Section 56 of TM Act has been mentioned here only for the purpose of effective completion of setting out the crux and gravamen of this case.

11 First defendant had entered appearance and presented a written statement on 22.03.2018 along with four documents. However, even prior to 22.03.2018, the instant application being A.No.1948 of 2018, seeking rejection of plaint inter-alia under Order VII Rule 11 of CPC had been filed, arraying sole plaintiff as lone respondent, sole plaintiff has filed counter affidavit in A.No.1948 of 2018 and this counter affidavit is dated 20.3.2018.

12 The sum and substance of first defendant's plea is that the first

defendant has obtained registration of trade mark 'Idhayam' in USA. Therefore, first defendant is entitled to use the trade mark 'Idhayam' in USA. However, plaintiff assailed the registration of first defendant's mark 'Idhayam', sought cancellation of the same in the Patent and Trade Mark office in USA, but such petition by plaintiff for cancellation was dismissed by order dated 15.07.2015. Plaintiff carried it further to the United States District Court, Eastern District of California in USA, which did not accede to the prayer for cancellation vide order dated 13.02.2017. After all these proceedings in USA, plaintiff suppressing these proceedings has presented the instant suit in this Court on 14.09.2017, as plaintiff was unsuccessful in the proceedings in USA and instant suit therefore is a case of relitigation.

13 It is the sheet anchor submission of first defendant that this is nothing but blatant relitigation. It is the specific case of first defendant that plaintiff after unsuccessfully assailing the registration of trade mark 'Idhayam' by first defendant in USA, has suppressed the proceedings in the trade mark Registry in USA as well as in the Eastern District Court, California and filed this suit in this Court and therefore, besides relitigation, the plaint is also liable to be rejected on the ground of suppression.

14 It was pointed at the hearing that a reject the plaint application has to be decided by testing the plaint on a demurrer. To put it differently, it was pointed out that an application seeking rejection of plaint should be tested on the basis of uncontroverted averments in the plaint without adding or subtracting to the same. It was also highlighted that Hon'ble Supreme Court in **Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I**

reported in **(2004) 9 SCC 512** held that the plaint and plaint documents should be looked into for deciding an application seeking rejection of plaint, besides pointing out that this principle has been followed repeatedly by this Commercial Division by adding to it and holding that in an application for rejection of plaint, plaint should not only be tested on a demurrer, but plaint averments should be looked at with a hood.

15 In response to this, learned Senior Counsel for first defendant submitted that besides Order VII Rule 11 CPC, the application shall also be treated as one under Order VI Rule 16 of CPC, as relitigation has been held to be a serious ground, for striking out such pleadings by Hon'ble Supreme Court in **K.K.Modi** case, being **K.K.Modi Vs. K.N.Modi and others** reported in **(1998) 3 SCC 573**. Besides this, it was also highlighted that this Commercial Division has powers under Order XIII-A of CPC to pass summary judgment before recording oral evidence if a party to the lis is able to demonstrate that it's adversary has no real chance of succeeding in its claim or defending the claim when there are no other compelling reasons as to why such summary judgment (before recording oral evidence) should not be passed. It is in the aforesaid backdrop that this matter was heard.

16 There is no dispute or disagreement before me that first defendant has in fact obtained trade mark registration for the mark 'Ihdayam' in USA for Sesame oil. The fact that this was assailed in the trade mark registry and carried to the jurisdictional District Court is also not in dispute. However, there is no explanation whatsoever as to why this has not been disclosed in the plaint. On the contrary, the response in this regard was by

way of counter allegations which are twofold. One is that first defendant has obtained registration for word mark 'Idhayam' in USA by falsely representing that the word 'Idhayam' has no meaning in any foreign language. It was submitted that foreign language in USA necessarily means any language other than English. As 'Idhayam' is a word which has meaning in Tamil language for sure, it is a false representation and first defendant has obtained registration in USA by making false representation is learned plaintiff's counsel say. The second submission in this regard is that first defendant has registration in USA for several popular marks in India, such as Bournvita, Thumbs up, Limca, Gold Spot and therefore, first defendant is clearly deceitful in its actions. It was also submitted that objection to the trade mark registration by first defendant in USA ought to have been made within 63 days and it is only a case of delay on the part of plaintiff.

17 A careful consideration of aforementioned submissions reveals that there is no explanation whatsoever as to why plaintiff has not disclosed the legal proceedings in USA seeking cancellation of trade mark registration. In this regard, a chronicle, i.e., chronology of dates also assumes significance. While registration in USA was granted to first defendant on 02.08.2011, cancellation application by plaintiff was negated by trade mark registry on 15.7.2015 and order of Eastern District Court of California was passed on 13.02.2017, the plaint has been presented in the instant court close on the heels of the order of the Court in California, i.e., in six months, on 14.9.2017. In other words, registration was obtained by first defendant on 02.08.2011 itself and proceedings for cancellation of the mark were initiated

by plaintiff thereafter and the same was unsuccessful on 15.7.2015 itself, but the plaintiff waited till the order of Eastern District Court on 13.02.2017 and has filed the instant plaint suppressing these proceedings. Therefore, the submission of learned Senior counsel for first defendant that it is a clear case of relitigation qua **K.K.Modi** principle laid down by Hon'ble Supreme Court cannot be brushed aside lightly. On the contrary, it has to be viewed with all seriousness.

18 Besides requesting this application to be treated as one under Order VI Rule 16 of CPC also (in addition to Order VII Rule 11 of CPC), learned Senior Counsel for first defendant submitted that the law laid down by Supreme Court will also come within the purview of 'law' occurring in sub-clause (d) of Order VII Rule 11 of CPC. According to learned Senior Counsel, the ratio of Supreme Court in **K.K.Modi** case can be referred to as 'K.K.Modi principle'. To put it differently, 'K.K.Modi principle' will also qualify as law within the meaning of sub-clause (d) of Order VII Rule 11 of CPC is his say. This proposition also cannot be lost sight of and brushed aside. To be noted, K.K. Modi principle in very simple terms is 'relitigation is barred'.

19 Be that as it may, notwithstanding the aforesaid position with regard to relitigation and suppression, this Commercial Division deems it appropriate to examine the crux and gravamen of plaintiff's case and also test whether plaintiff has any real chance of succeeding in its claim. As already mentioned supra, it is clear that the entire plaint and complaint therein turns on Section 56 of TM Act. Therefore, it is necessary to extract Section 56 of TM Act which reads as follows :

“56. Use of trade mark for export trade and use when form of trade connection changes.--(1) The application in India of trade mark to goods to be exported from India or in relation to services for use outside India and any other act done in India in relation to goods to be so exported or services so rendered outside India which, if done in relation to goods to be sold or services provided or otherwise traded in within India would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods or services for any purpose for which such use is material under this Act or any other law.

(2) The use of a registered trade mark in relation to goods or services between which and the person using the mark any form of connection in the course of trade subsists shall not be deemed to be likely to cause deception or confusion on the ground only that the mark has been or is used in relation to goods or services between which and the said person or a predecessor in title of that person a different form of connection in the course of trade subsisted or subsists.”

20 A perusal of Section 56 of TM Act reveals that the expression 'use of trade mark' occurs therein. The expression 'use of trade mark' has been explained in clause (c) of sub-section (2) of section 2 of TM Act. In other words, it is explained in Section 2(2)(c) of TM Act. Section 2(2)(c) of TM Act contains two sub-clauses, namely (i) and (ii), while (i) deals with construing the expression 'use of the mark in relation to goods, (ii) deals with construing the expression 'use of the mark in relation to services'. Therefore what is of relevance in the instant case is section 2(2)(c)(i) of TM Act and the same reads as follows :

“2.Definitions and interpretation.--(1) x x x x x

x x x x x x x x x

(2)In this Act, unless the context otherwise requires, any reference--

(a) x x x x x

(b) x x x x x

(c)to the use of a mark,---

(i)in relation to goods, shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods;”

21 Learned senior counsel for first defendant submitted that interpretation of section 56 of TM Act was made by a learned Single Judge in a reported judgment being **Crompton Greaves Limited Vs. Salzer Electronics Limited** reported in **2011 (3) CTC 453**. It was pointed out that in this **Crompton Greaves** case, learned Single Judge has interpreted Section 56 in a case with similar factual matrix by specific reference to section 2(2)(c) of TM Act and section 29 of TM Act. It was submitted that this **Crompton Greaves** judgment was upheld wholly by a Division Bench of this Court which is also a reported judgment reported in **2011 (6) CTC 157**. Therefore, as far as the law of precedents is concerned, **Crompton Greaves** judgment is a judgment of Division Bench of our High Court, is learned senior counsel's say. In this regard, learned senior counsel for plaintiff submitted that **Crompton Greaves** case is distinguishable on facts and I shall discuss this in the later part of this order / judgment.

22 A reference was made to two orders made by two learned Judges of this Court in O.A.No.585 of 2017 in C.S.No.434 of 2017 (dated

24.10.2017) and O.A.No.1282 of 2017 in C.S.No.987 of 2017 (dated 05.07.2018). It was submitted by learned senior counsel for plaintiff that both these suits, namely C.S.Nos.434 and 987 of 2017, were filed by the same plaintiff. While the former was filed against third defendant herein, namely M/s.Damodar Foods, latter was filed against third defendant herein, namely, M/s.Damodar Foods as well as one M/s.RR Global Enterprises, USA arraying them as defendants 1 and 2. Paragraph 22 of the order dated 24.10.2017 made in O.A.No.585 of 2017 in C.S.No.434 of 2017 is relevant and the same reads as follows :

“22.Mr.Mylswamy, for his part relies on a decision of the Madras High Court in the case of *Crompton Greaves Limited Vs. Salzar Electronics Limited* (MANU/TN/2862/2011). This case does not deal with the provisions of section 56 of the Act but considers the repurcussion of infringement by a job worker who was manufacturing products under contract. The conclusion of the Bench that there was no infringement was rendered in the specific facts of that case.”

23 Referring to this, it was submitted by learned senior counsel for plaintiff that MANU/TN/2862/2011 referred to in paragraph 22 is a reference to a Division Bench judgment in ***Crompton Greaves*** case reported in **2011 (6) CTC 157** and on this basis, it was submitted that there is no discussion regarding Section 56 of TM Act in the Division Bench judgment. I am unable to agree with learned senior counsel as there is no dispute or disagreement before me that as far as ***Crompton Greaves*** case is concerned, Division Bench judgment dated 14.7.2011 made in O.S.A. Nos.90, 91 and 92 of 2011 reported in **2011 (6) CTC 157** wholly and completely upholds the judgment of

learned Single Judge dated 08.02.2011 made in O.A.Nos.925 to 927 of 2010 reported in **2011 (3) CTC 453**. In the concluding paragraph of Division Bench judgment being paragraph 29, it has been categorically held by Division Bench of our High Court that reasons assigned by learned Single Judge herein dismissing the application are well founded and that Hon'ble Division Bench does not find any material to interfere with such decision. On this basis, the intra court appeals were dismissed. Relevant portion of paragraph 29 of judgment of Hon'ble Division Bench reads as follows :

“29..... The reasons assigned by the learned Judge for dismissing the applications are well founded and we do not find any material to interfere with such decision. Accordingly, the Original Side Appeals are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.”

24 Therefore, the Division Bench has considered all reasonings made / given by learned Single Judge and has upheld the same. A perusal of the order of learned Single Judge reported in **2011 (3) CTC 453** reveals that it turns heavily on interpretation of Section 56 of TM Act and impact of the same. It has not only dealt with Section 56 of TM Act, but it has clearly elucidated and interpreted Section 56 of TM Act in the light of section 29 and Section 2(2)(c) of TM Act. Therefore, as a matter of judicial discipline, I deem it appropriate to follow the Division Bench order of our High Court as that is the precedential value as far as **Crompton Greaves** case is concerned. In other words, I am of the considered view that interpretation of Section 56 of TM Act in the light of Sections 2(2)(c) and 29 of TM Act in **Crompton**

Bench of our High Court.

25 On an extreme demurer, even if it is assumed for a moment that the ratio is that of a learned Single Judge, **Crompton Greaves** judgment was rendered by learned Single Judge on 08.02.2011 and therefore, it cannot be subsequently said in 2017 by another learned Single Judge that Crompton Greaves does not deal with Section 56. Therefore, I respectfully follow the Division Bench judgment.

26 As mentioned supra, it was submitted on behalf of plaintiff that **Crompton Greaves** case is distinguishable on facts. According to learned senior counsel for plaintiff, it is distinguishable on three aspects. One is, in Crompton Greaves, the mark was not visible. The second aspect is that it was held to be a case of trade rivalry and the third aspect, according to learned senior counsel for plaintiff, is that in Crompton Greaves case, all three marks are registered in United Kingdom. A perusal of **Crompton Greaves** judgment reveals that interpretation in **Crompton Greaves** case does not turn on the basis that the mark is not visible. In **Crompton Greaves** case, the Court addressed itself to two questions and the same is articulated in paragraph 25 of learned Single Judge's order which reads as follows :

“25. In the light of the above pleadings and the documents, the questions that arise for consideration are (i) whether the use of the mark MCG by the First Defendant in the products intended for export to the Second Defendant would constitute an infringement in terms of the Act, and (ii) whether the use of the mark in the inner casing of the switchgear, in a manner not

visible to the end users, but visible only after the opening of the outer casing by removing the screws, would constitute an infringement."

27 With regard to paragraph 25, to get clarity on what is mark MCG, it is necessary to extract paragraph 23, which reads as follows :

"23. In response to the above, it is contended by the Respondents that the mark "MCG" is the registered trademark of a Company by name Motor Control and Industrial Switchgear, which is part of a group of companies called City Electrical Factors Ltd. (CEF). The trademark is registered in UK under TM No.2428465. The word "MCG" is an acronym for "Motor Control and industrial switch Gear". The said company CEF purchases switch gears from the Second Respondent in UK. The switch gears sold by the Second Respondent to their customer CEF, are obliged to carry the trademark MCG of the company CEF. The same cannot constitute an infringement. "

28 Thereafter, the answer to question No.1 is contained in paragraph 34 which reads as follows :

"34. But today, the Second Defendant has started engaging the First Defendant directly, for the supply of switchgears, for eventual sale and supply to another company in UK by name CEF. Therefore, the First Defendant is applying the trademark "MCG" of the said company CEF, on the goods exported to the Second Defendant. The application of the trademark "MCG" on the goods supplied by the First Defendant to the Second Defendant, is not intended either to cause confusion in the minds of the public or to create an impression that the goods are that of the plaintiff. Even if the First Defendant makes exports without affixing any trademark on the goods, the supplier for whom they are intended, viz., CEF, would affix and would be entitled to affix their registered trademark

MCG before tapping the market. At that stage, the Plaintiff would have no cause to complain, since the use of a registered trademark by the proprietor, would not tantamount to infringement of the registered trademark of another. This is clear from Section 30(2)(e) of the Act."

29 The other paragraphs which are of relevance are paragraphs 30, 31 and 36 which read as follows :

"30. Section 2(2)(c) of the Act, prescribes as to what constitutes "the use of a mark", for the purposes of the Act, unless the context otherwise requires. It reads as follows:-

"(2) In this Act, unless the context otherwise requires, any reference --

(c) to the use of a mark, --

(i) in relation to goods, shall be construed as a reference to the use of the mark upon, or in any physical or in any other relation whatsoever, to such goods;

(ii) in relation to services, shall be construed as a reference to the use of the mark as or as part of any statement about the availability, provision or performance of such services."

31. The expression "use of the mark" in the Act, is intended to serve two purposes, viz., (i) to see if such use by third parties, constitutes infringement and (ii) to see if there is bona fide usage of the mark by the proprietor of the mark himself, to enable him either to obtain registration or to continue to have the benefit of registration under Chapter VI. To put it differently, the expression "use of the mark" is used in the Act, (i) in some places with reference to the use by the proprietor of the mark himself and (ii) in other places with reference to the use by

persons other than the proprietor of the mark. Therefore, the meaning to be assigned to the expression, depends solely upon the context. This is why, a distinction is maintained between the use of the same expression in Chapter IV including Section 29(6)(c) and the use of the same expression in Chapter VI including Section 56(1). In Chapter IV, the expression "use of the mark" is used predominantly in connection with the use by third parties, tantamounting to infringement and the limitations upon the registered proprietor for prohibiting the others from using his mark. On the other hand, in Chapter VI, the same expression is used in connection with the use of the mark by the proprietor himself, either for the purpose of entitling him to the registration of the mark or for the purpose of retention of the already registered mark in the Register.

36. Therefore, I am of the view that the application by the first Defendant, of the registered trademark of the ultimate importer in UK, on the goods intended for export to such importer in UK, would not constitute an infringing use of the registered trademark of the Plaintiff, either under Section 29(6)(c) or under Section 56(1) of the Act."

30 As already mentioned supra, these reasons have been upheld and have been held to be well founded by Division Bench of this Court. There is no dispute or disagreement before me that this has attained finality. With regard to second aspect, namely trade rivalry, in **Crompton Greaves** case, plaintiff had been engaging the services of first defendant Salzer Electronics Limited for manufacturing electrical products, after which first defendant started supplying it to the United Kingdom directly to end users. It is in this

trade mark rivalry, but a trade rivalry also. It hardly makes any difference to the principle that has been laid down. As far as the third aspect is concerned, namely, all three marks registered in United Kingdom and not in India point, a perusal of the factual matrix in **Crompton Greaves** case reveals that it is incorrect. This is set out in paragraph 7(i), which reads as follows :

“7. The case of the Plaintiff in brief, is as follows:-

(i) The Plaintiff is the market leader in the electrical engineering sector and also exports its products to more than 60 countries worldwide. It is using and is the exclusive proprietor of the corporate name Crompton Greaves and a distinctive CG logo since the year 1966. By virtue of such long, continuous and extensive use, the trademark and the logo have been distinctive of and are exclusively identified with the plaintiff. The plaintiff's business extended beyond boundaries and has been identified as a global business company in the light of which they unveiled a new brand identity by adopting a new CG logo since 15th October, 2009. The new logo is artistically created and thereby enjoys copyright protection.”

31 In any event, it does not make any difference to the principle laid down in **Crompton Greaves** case law with regard to interpretation of Section 56 of TM Act.

32 Besides all the above said submissions, it was also argued on behalf of first defendant that there is no cause of action for the suit and therefore, the plaint is liable to be rejected on this ground also inter-alia under Clause (a) of Order VII Rule 11 of CPC. There is no doubt that cause of

action has not been defined in any statute much less in CPC. Therefore, one has to turn to judicial decisions and that in the considered view of this Commercial Division is for description of the term 'cause of action' and not for definition of the term 'cause of action'. Therefore, judicial decisions, in my considered view, provide a description of the expression 'cause of action'. The term 'cause of action', in my considered view, has not been defined in any statute for the purpose of avoiding scope of the expression getting limited.

33 Be that as it may, leading case with regard to description of the term / expression 'cause of action' is ***Nawal Kishore Sharma v. Union of India*** reported in **(2014) 9 SCC 329**. Relevant paragraph in ***Nawal Kishore Sharma*** case is paragraph 10 and the same reads as follows :

“10. In *State of Rajasthan v. Swaika Properties* [(1985) 3 SCC 217] , the fact was that the respondent Company having its registered office in Calcutta owned certain land on the outskirts of Jaipur City, was served with notice for acquisition of land under the Rajasthan Urban Improvement Act, 1959. Notice was duly served on the Company at its registered office in Calcutta. The Company, first appeared before the Special Court and finally the Calcutta High Court by filing a writ petition challenging the notification of acquisition. The matter ultimately came before this Court to answer a question as to whether the service of notice under Section 52(2) of the Act at the registered office of the respondent in Calcutta was an integral part of cause of action and was it sufficient to invest the Calcutta High Court with a jurisdiction to entertain the petition challenging the impugned notification. Answering the question this Court

held: (*Swaika Properties case* [(1985) 3 SCC 217] , SCC pp. 222-23, paras 7-8)

“7. Upon these facts, we are satisfied that the cause of action neither wholly nor in part arose within the territorial limits of the Calcutta High Court and therefore the learned Single Judge had no jurisdiction to issue a rule nisi on the petition filed by the respondents under Article 226 of the Constitution or to make the ad interim ex parte prohibitory order restraining the appellants from taking any steps to take possession of the land acquired. Under sub-section (5) of Section 52 of the Act the appellants were entitled to require the respondents to surrender or deliver possession of the lands acquired forthwith and upon their failure to do so, take immediate steps to secure such possession under sub-section (6) thereof.

8. The expression ‘cause of action’ is tersely defined in *Mulla’s Code of Civil Procedure*:

‘The “cause of action” means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.’

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. The mere service of notice under Section 52(2) of the Act on the respondents at their registered office at 18-B, Brabourne Road, Calcutta i.e. within the territorial limits of the State of West Bengal, could not give rise to a cause of action within that territory unless the service of such notice was an integral part of the cause of action. The entire cause of action culminating in the acquisition of the land under Section 52(1) of the Act arose within the State of Rajasthan i.e. within the territorial jurisdiction of the Rajasthan High Court at the Jaipur Bench. The answer to the question whether service of notice is an integral part of the cause of action within the meaning of Article 226(2) of the Constitution must depend upon the nature of the impugned order giving rise to a cause of action. The Notification dated 8-2-1984 issued by the State Government under Section 52(1) of the Act became effective the moment it was published in the Official Gazette as thereupon the notified land became vested in the State Government free from all encumbrances. It was not necessary for the respondents to plead the service of notice on them by the Special Officer, Town Planning Department, Jaipur under Section 52(2) for the grant of an appropriate writ, direction or order under Article 226 of the Constitution for quashing the notification issued by the State Government under Section 52(1) of the Act. If the respondents felt aggrieved by the acquisition of their lands situate at Jaipur and wanted to challenge the validity of the notification issued by the State Government of Rajasthan under Section 52(1)

of the Act by a petition under Article 226 of the Constitution, the remedy of the respondents for the grant of such relief had to be sought by filing such a petition before the Rajasthan High Court, Jaipur Bench, where the cause of action wholly or in part arose.”

34 Besides this, learned senior counsel for first defendant also pressed into service a decision of learned Single Judge of this High Court in ***Mytrah Energy (India) Limited Vs. Gamesa Renewable Private Limited*** reported in **2016-4-L.W. 86**. This judgment was pressed into service for the principle that for plaint to be sustained, cause of action should not just be a mere ground of title, but it should be fact which entitles the plaintiff to get relief. In other words, it is for the principle that cause of action should be material cause of action.

35 Besides this, a judgment of a Division Bench in ***Syed Mohamed Salahuddin Vs. Ahmed Abdulla Ahmed Al Ghurair*** reported in **(2018) 6 MLJ 257** was pressed into service to say that once the reliefs cannot be granted owing to a statutory bar, a suit filed claiming the same also would be barred. It was submitted that relief cannot be granted in the light of interpretation of Section 56 of TM Act as in *Crompton Greaves* and therefore, suit is clearly barred.

36 To be noted, Division Bench judgment in ***Syed Mohamed Salahuddin*** reported in **(2018) 6 MLJ 257** was carried to Supreme Court in ***Ahmed Abdulla Ahmed Al Ghurair Vs. Star Health and Allied Insurance Company Limited*** and Supreme Court vide judgment dated 26.11.2018 in

Bench of our High Court.

37 In the above scenario, as a last submission, learned senior counsel for plaintiff attempted to say that first defendant has obtained registration in USA by falsely representing that 'Idhayam' is a word which does not have any meaning in a foreign language. According to learned senior counsel, this constitutes fraud. For this purpose, the celebrated judgments of Hon'ble Supreme Court being **S.P.Chengalvaraya Naidu Vs. Jagannath** reported in **1994-1-L.W. 21** and **A.V.Papayya Sastry Vs. Government of A.P.** reported in **2007-4-L.W. 139** were pressed into service. In the light of the legal proceedings which have been alluded to supra, this submission of fraud and registration in USA obtained by first defendant being vitiated by fraud does not save the plaint. In other words, it does not save the plaint as plaintiff has already unsuccessfully assailed the trade mark registration in USA in that country.

38 Learned senior counsel for plaintiff relied on decisions of Bombay High Court and Delhi High Court being **Cadila Pharmaceuticals Limited Vs. Sami Khatib of Mumbai and another** reported in **(2011) 3 Bom CR 587** and **M/s.Friends Overseas Vs. Swadi Product U.K. Ltd. and others [I.A.No.6094 of 2010 and I.A.No.8683 of 2010 in CS(OS)No.889 of 2010 dated 02.07.2012]**, respectively. However, the aforesaid two decisions do not help the plaintiff in the instant case because of the decision of the Division Bench of our High Court in **Crompton Greaves**. In any event, in

terms of law of precedents, they at best have only persuasive value.

39 In the light of the narrative supra and owing to all that have been set out above, this Commercial Division is of the considered view that plaint is not only liable to be rejected as lacking cause of action, but is also liable to be struck out on the ground of relitigation on **K.K.Modi** principle, besides suppression of proceedings in USA. Therefore, the prayer in A.No.1948 of 2018 deserves to be acceded to. To be noted, as alluded to supra, instant application being A.No.1948 of 2018 is being treated as one under Order VI Rule 16 of CPC also on the ground that quoting a different provision or not quoting a particular provision will not denude the Court of its discretion to exercise its powers if the Court otherwise has powers to do so.

40 In the light of the dispositive reasoning supra, A.No.1948 of 2018 is allowed. Consequently, the plaint in the suit in C.S.No.726 of 2017 is rejected. Resultantly, the suit is dismissed. Considering the unique nature of the matter, this Commercial Division refrains from imposing costs and leaves both parties to bear their respective costs.

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Speaking order

Index : Yes

vvk

M.SUNDAR, J.

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order in
Application No.1948 of 2018
and
C.S.No.726 of 2017

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