

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :14.11.2019

Coram

The Honourable Mr.Justice N.SATHISH KUMAR

C.S.No.181 of 2019
and
A.Nos.4613 & 4614 of 2019
& O.A.No. 224 of 2019

GRB Dairy Foods Private Limited
No. C-47, Thiru. Vi. K. Industrial Estate,
Guindy, Chennai – 600 032,
Tamil Nadu, India,
rep.by its Executive Director
Mr.B.Dhanraj

...Plaintiff

Versus

M/s.KKR Products and Marketing Pvt.Ltd.,
Okkal P.O. Kalady,ddf
Ernakulam,
Kerala – 683 550.
...Defendant

Prayer: This Civil Suit is filed under Order IV Rule 1 of the Original Side Rules and Order VII, Rule 1 of the Code of Civil Procedure, Sections 27, 28, 29, 134 & 135 of the Trade Marks Act, 1999 and Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No.4 of 2016, prayed to grant a judgment and decree on the following terms:

(a) A permanent injunction restrainig the defendant, its proprietor

/ partners, men, servants, agents, distributors, stockists, successors in business, retailers, legal representatives, heirs, assigns or any other person claiming through or under them, from in any manner passing off and enabling others to pass off the defendant's products as and for plaintiff's products by use of deceptively similar tagline / trademark "Thari thari Polulla Ney" or any tagline/mark similar to the plaintiff's tagline/trademark "Thari Thariyayi Amma Undakkuna Ney Pole" or in any other manner for promoting its products whatsoever;

(b) The defendant be ordered to surrender to the plaintiff for destruction, wrappers, labels, prints, dies, blocks, moulds and plates, screen prints, cylinders, packing and advertising material and any other material in the defendant's possession, having the deceptively similar tagline/trademark "Thari Thari Polulla Ney" or any mark/tagline similar to plaintiff's tagline/trademark "Thari Thariyayi Amma Undakkunna Ney Pole";

(c) damages to the tune of Rs.10,00,000/- for the loss of sale and revenue or such higher amount as may be claimed by the plaintiff at a later date and as may be determined by this Court upon enquiry.

(d) for costs; and

(e) pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstance of the case and thus render justice.

For Defendant : M/s.Suba Shiny
for M/s.B.Karthick Raman Kartha Bijimol Jose

For Plaintiff : M/s.Satish Parasaren
for M/s.Arun C.Mohan

JUDGMENT

This is an application filed for rejection of plaint on the ground that no cause of action has arisen within the jurisdiction of this Court. The plaintiff had instituted the suit on the ground of passing off by the applicant. The documents annexed along with plaint do not contain the trademark nor any proof of use of their trademark from the year 2006. According to the applicant, this Court does not possess jurisdiction in this issue. The applicants have been trading solely in the State of Kerala and it is stated that a single advertisement copy filed as document along with the plaint which is alleged as proof of applicants presence in the jurisdiction of the Court does not carry any reference about the paper or journal in which the advertisement originated. Further the applicant does not reside within the jurisdiction of this Court and no cause of action arose within the jurisdiction of the Court. Hence prayed for rejection of the plaint.

2. On the other hand, according to the respondent, it is denied that no part of cause of action has arisen within the jurisdiction of this Court and it is submitted that the respondent is carrying on business within the jurisdiction of this Court and the applicant is marketing and advertising the products using similar trademark / tagline "THARI

THARI POLULLA NEY” through television channels that is being broadcasted throughout India including the city of Chennai within the jurisdiction of this Court has not been denied. It is denied that the impugned product is not sold within the jurisdiction of this Court and the applicant is trading solely in the State of kerala. The applicant's products are widely available in interactive websites whereby the products are readily available and delivered in the city of Chennai within the jurisdiction of this Court. Hence the respondent prays for dismissal of the application.

3. The learned counsel appearing for the applicant submitted that the plaint is abrupt of the details and the plaintiff has only approached the office at Chennai while the registered office in Kerala. The suit itself is filed for restraining the applicant / defendant from passing off their products as that of the plaintiff. Though, it is stated in the plaint that advertisement was issued for plaint documents indicate that advertisement issued in Malayalam via all channels, including radio, TV, print etc. Further, none of the ingredients whatsoever obtained under Clause 12. Hence, submitted that there is no cause of action and this

Court has no jurisdiction to entertain the suit. In support of the submissions, he relied upon the judgments in the case of Dhodha House and Ors. Vs S.K.Maingi and Ors in Civil Appeal Nos.6248 of 1997 and 16 of 199 by the Hon'ble Supreme Court of India and in the case of F.L.Smith Private Limited & Anr Vs. S.Balaj Das & Ors., reported in 2019(79) PTC 142 [Mad][DB] by the Division Bench of this Court.

4. The learned senior counsel appearing for the respondent submitted that the applicant is engaged in sale of goods in Chennai and the advertisement is carried on in Chennai and the sale is also made in Chennai and the entire cause of action is within Chennai City for passing off the goods. Hence, it is submitted that the application to reject the plaint is liable to be dismissed. Along with the counter affidavit, invoices are filed to show the sale of goods in Chennai. Therefore, it cannot be said that there is no sale in Chennai.

5. The suit has been mainly for the relief of permanent injunction restraining and for passing off the defendants product as plaintiff's product by using similar trade mark / tagline. The main averments in the plaint indicate that the plaintiff is involved in selling Ghee. They also

obtained Agmark Certificates, APEDA Certificate and all other relevant certificates in the course of the business and they honestly adopted “THARI THARI POLULLA NEY”, its variations in different languages. By virtue of continuous and uninterrupted use, the said taglines/trademarks have acquired distinctiveness in respect of the goods and trading in public at large. The plaintiff's trademark i.e., GRB and its variants have acquired an immensely high reputation and earned goodwill for the GRB Ghee.

6. While so, in or about November 2018 the plaintiff came across the defendant's advertisements in various media including television, print media, etc., to promote their Ghee products. The defendant has ultimately adopted the similar tagline/trademark with the intention to mislead and confuse the public. It is also pleaded in the plaint that cause of action in respect of passing off has arisen at Chennai within the jurisdiction of this Court as the defendant's advertisements are broadcasted in various media including television to the general public on a day-to-day basis, all over India including the city of Chennai.

7. It is well settled that whether or not there is any cause of action

only the plaint averments are taken for consideration. It is now well settled that documents filed along with plaint also can be read in conjunction with averments of the plaint to find out whether there is any cause of action to file the suit before this Court. Admittedly, the defendant is not residing within the jurisdiction of this Court. The plaintiff stated that they are carrying on business in Guindy in their Branch Office. The above averments make it very clear that the head office of the plaintiff is also not within the jurisdiction of this Court. The plaintiff's trade mark/ tagline "THARI THARIYAYI AMMA UNDAKKUNNA NEI POLE" is also adopted in Malayalam and the same clearly indicate that the plaintiff has mainly started business in Kerala. Though it is pleaded in the plaint that defendant has given advertisement in the Month of November 2018 in various Media including television, print media etc., to promote their Ghee products and using the trademark/tagline "THARI THARI POLULLA NEY". The plaint pleadings do not denote any particulars as to the date, name of the TV Channels in which such an advertisement was given. Besides there are no details in the plaint as to the nature of advertisement given by the defendants except stating that the defendant has issued advertisement in the name of plaintiff trade mark. The plaint is silent as to the manner and whether

the publications or advertisements had taken place within the jurisdiction of this Court. The plaint documents indicate that the registration of trade mark in the name of GRB Ghee registered in the name of plaintiff is at Hosur address under class 29.

8. All the trade mark certificates filed in the plaint indicate that the address of the plaintiff in the suit is Hosur. In the so called advertisement given by the defendants filed along with plaint documents, it is seen that one advertisement was given in Malayalam and is not indicated where it was given and whether it was circulated in Tamil Nadu particularly within the jurisdiction of this Court.

9. Further, if the entire plaint pleadings are carefully seen, there is no whisper what so ever with regard to the sale of products by defendants within the jurisdiction of this Court. The entire plaint proceeds as if the defendants are trying to issue the advertisement using the name of the plaintiff. Except the above facts, there are no pleadings as to the nature of sale made within the jurisdiction of this Court. It is to be noted that the suit is for passing of goods. To maintain a suit in a particular jurisdiction, it is essential to establish that defendant is

passing off goods under the pretence of the plaintiff's mark. In this regard, it is useful to note that Section 134 of the Trademark Act, 1999 clearly says that only in respect of the infringement action, where the plaintiff actually and voluntarily resides and carries on their business, the suit can be maintained within the jurisdiction. As far as passing off is concerned Section 134 does not give any right to the plaintiff to file a suit within the jurisdiction where he actually and voluntarily resides and carries on business personally.

10. The main allegation pleaded in the plaint is with regard to the jurisdiction of this Court. The defendant advertised their product in the name of the plaintiff mark in various channels and newspapers. But as already indicated there is no averment as to the journal or the newspaper etc., relating to the same.

11. In the judgment of Hon'ble Apex Court of India reported in **(2006) 9 SCC 41**, in the case of **Dhodha House and Ors. Vs S.K.Maingi and Ors** in Civil Appeal Nos.6248 of 1997 and 16 of 1999 and the relevant paragraph is extracted hereunder:

“43.In Patel Field Marshal (supra) again the thrust was on the sale of products and/or advertisement by the Appellant

for registration of trade marks in the Trade Marks Journal and other local papers. The Division Bench of the High Court, as has been noticed herein before, did not advert to the issue as to whether the defendant had been selling its product in Delhi on commercial scale or not. It is, therefore, not necessary for us also to dilate further on the said question. We have furthermore noticed herein before that the advertisement appearing in a journal or newspapers by itself would not confer any jurisdiction on the Court, if it otherwise did not have any.

12. The Division Bench of this Court in the case of F.L.Smith Private Limited & Anr Vs. S.Balaj Das & Ors., reported in 2019(79) PTC 142 [Mad][DB] as held that:

“18. What is relevant would be the pleadings in the plaint/affidavit to establish that the suit is maintainable before a Court. In other words pleadings are germane, the pleadings should explicitly state the factual situation and there can be no assumption or presumption. In this regard, it would be relevant to take note of the decision of the Division Bench of this Court in Tuticorin Alkali Chemicals and Fertilizers Limited v. Cochi in Silicate and Glass Industries reported in 1992(1)LW 308. In the said decision, it was held that in deciding whether to refuse leave or not, it would be necessary to see on facts and not on assumptions, as to who shall suffer – the appellant/plaintiff or defendant, if the leave is granted or

refused as the case may be. The decision in Parle Products Private Limited (supra), in our considered view does not advance the case of the appellant/plaintiff. On facts, we have found that there is no specific pleading either in the affidavit filed in support of leave to sue application or in the plaint averments as to how the defendants 1 to 3 are amenable to the jurisdiction of this Court. Unless and until, the Court is satisfied that there are pleadings and materials to show that infringement of the appellant's/plaintiff's mark has been done by the respondents 1 to 3 within the jurisdiction of this Court, the question of contending that the matter has to be adjudicated at the time of trial by adducing oral and documentary evidence does not arise. Therefore, we cannot be called upon to decide as to whether leave to be granted or not, based on assumptions and we are required to go by the facts. On perusal of the facts as set out by the appellant/plaintiff in their pleadings, we are fully convinced that the learned single Bench was justified in revoking the leave granted to the appellant/plaintiff."

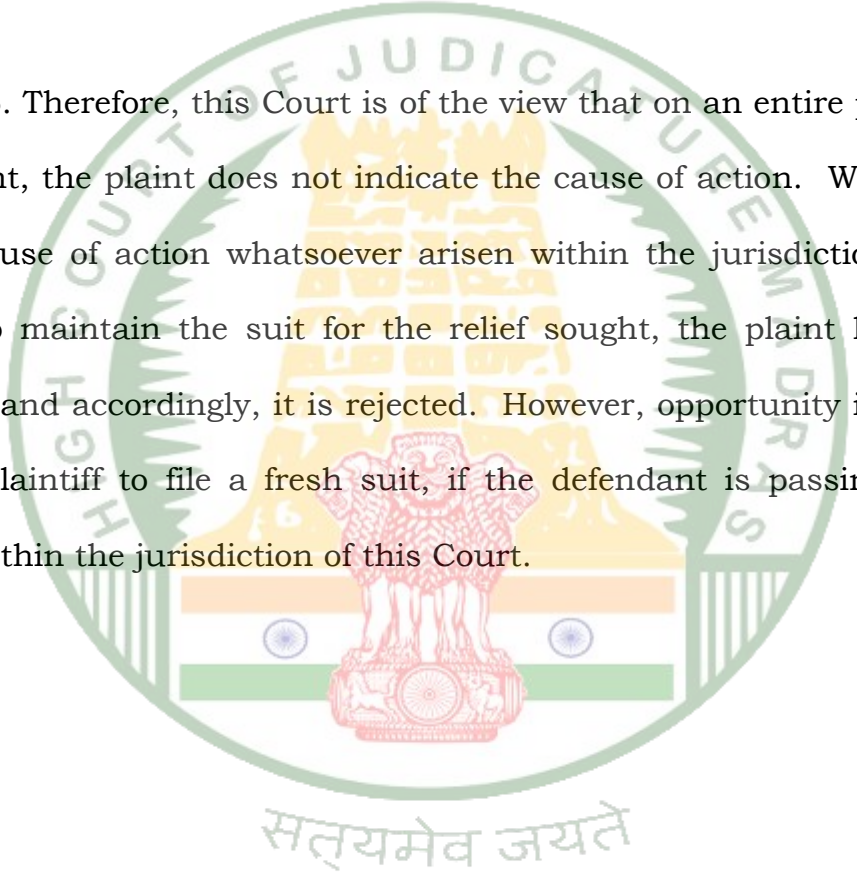
13. It is to be noted that any subsequent documents or pleadings to get over the defects in the earlier pleadings will not cure the defects. What is relevant at this stage to see whether there is a cause of action or this Court has jurisdiction which has to be culled out only from the allegations and the plaint documents. But, from the entire pleadings,

there is no details in respect for passing off the goods before the jurisdiction of this Court. The cause of action has not arisen within the jurisdiction of this Court and the pleadings also indicate that the trade mark is adopted in Malayalam. The same clearly indicates that the plaintiff is predominantly doing the business in the State of Kerala. In a judgment of M/s.Duroflex Private Limited vs. M/s. Duroflex Sitzings System, the full bench of this Court held that while granting leave or revoking leave under Clause 12 of Letters Patent, the principle of forum convenience would be applicable. In this case the defendant is also from Kerala. The plaintiff business is predominantly in Kerala. The trade mark registration indicate that their address at Hosur. Further no documents along with plaint or pleadings available to the effect that the goods are sold by the defendant in Chennai.

14. Therefore, this Court has to necessarily hold that there is no cause of action. Yet another aspect to be seen is that even assuming that advertisements said to have been issued by the defendants constitute cause of action, it is to be noted that it is only a part of cause of action. Even for such a cause, before instituting the suit, the leave had to be obtained from this Court. But, no leave has been obtained in

this regard. Though such a ground is not raised in the application, the facts remains that it is purely a question of law. Therefore, merely on the ground that it is not raised in the application, it cannot be said that the suit is maintainable before this Court.

15. Therefore, this Court is of the view that on an entire perusal of the plaint, the plaint does not indicate the cause of action. When there is no cause of action whatsoever arisen within the jurisdiction of this Court to maintain the suit for the relief sought, the plaint has to be rejected and accordingly, it is rejected. However, opportunity is granted to the plaintiff to file a fresh suit, if the defendant is passing off the goods within the jurisdiction of this Court.



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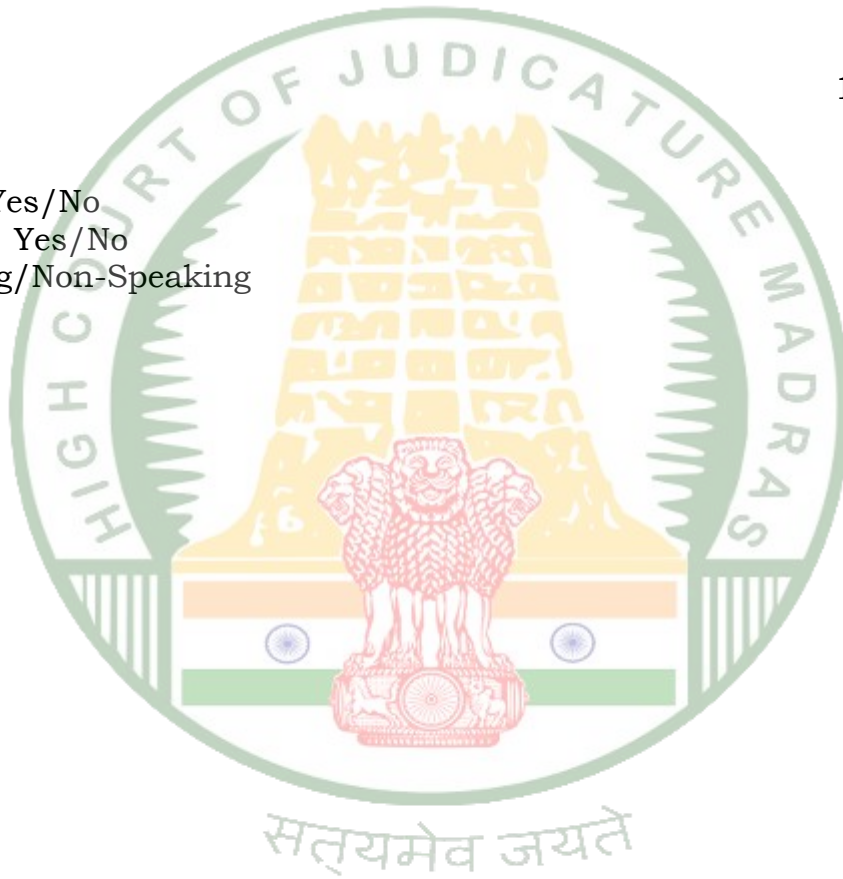
16. With the above observations, the Application No.4613 of 2019

is allowed and plaint is rejected. Accordingly, interim injunction granted in favour of the Applicant/Plaintiff in O.A.No.224 of 2019 dated 08.03.2019 is vacated and Application No.4614 of 2019 stands allowed. No costs.

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Index : Yes/No
Internet: Yes/No
Speaking/Non-Speaking

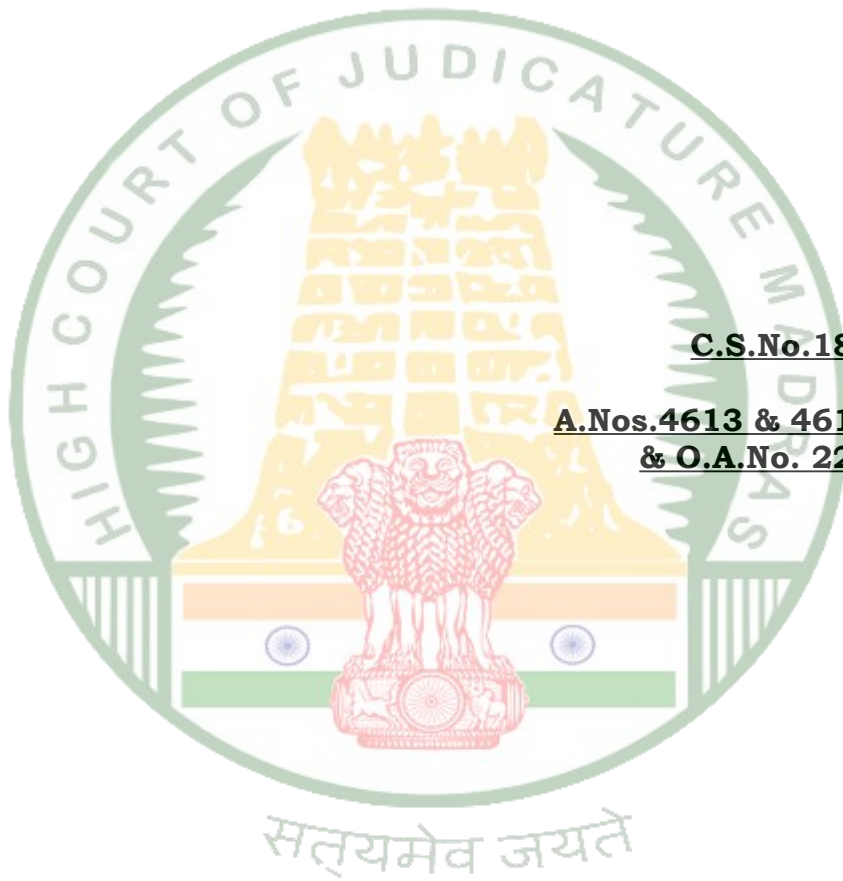
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N.SATHISH KUMAR, J.,
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