

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 18.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Date of Reserving the Judgment	Date of Pronouncing the Judgment
30.04.2019	18.06.2019

O.S.A. Nos.120 & 121 of 2019
C.M.P.Nos.10928, 10932, 10938 of 2019

1.FLSmidth Private Limited,
FLSmidth House, 34 Egatoor,
Rajiv Gandhi Salai, Kelambakkam,
Chennai - 603103
Rep., by its constituted attorney
Mr.Thomas Kunjummen

2.FLSmidth A/S
Vigerslev Alle 77, 2500
Valby. Denmark.
Rep., by its constituted attorney
Mr.Thomas Kunjummen

.. Appellant/Petitioner
in both Appeals

-vs-

1.Mr.S.Balaj Das

2.Ultra Business Consultants LLP
88B, Karpagam Nagar, 3rd Street,
Selaiyur, Chennai - 600073.

3. LagargeHolcim Bangladesh Limited
Suvaslu Iman Square,
65 Gulshan Avenue, Gulshan-1,
Dhaka, Bangladesh-1212.

4. Chettinad Cement
Rani Seethai Hall Building,
603, Anna Salai,
Chennai - 600006.

.. Respondents in both Appeals

COMMON PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of O.S. Rules r/w. Section 15 of the Letters Patent to set aside the common orders dated 05.04.2019 in C.S.No.645 of 2018 made in A.No.1486 of 2019 in A.No.6926 of 2018 in C.S.No.645 of 2018 on the file of the Original Side.

For Appellant : Mr.Arun C.Mohan

For Respondents: Mrs.Suba Shiny

COMMON JUDGMENT

T.S.Sivagnanam, J.

These appeals are directed against the common judgment and order dated 05.04.2019 in C.S.No.645 of 2018, A.No.1486 of 2019, in Application No.6926 of 2018.

2. The appellants were plaintiffs in the said Suit which was filed for the following relief:-

a. To grant a judgment and decree of permanent injunction restraining the first and second respondents herein and their agents etc., from contacting the customers of the appellants for providing products, parts and fittings in any manner infringing the appellant's/plaintiff's copyright in the artistic work in the engineering drawings for its separator and/or any products/parts by substantially reproducing the artistic work by manufacturing, selling, offering for sale or dealing with parts based on or derived from the appellant's/plaintiff's copyrighted engineering drawings;

b. for granting judgment and decree of permanent injunction restraining, the respondents 1 & 2 from in any manner passing off or enabling others to pass off their products as and for the appellant's/plaintiff's products by use of the similar name O-SEPARATOR or any other trademark, which is identical or deceptively similar to the appellant's/plaintiff's mark O-SEPA;

c. For a judgment and decree to direct the respondents 1 and 2 to pay the appellant/plaintiff a sum of Rs.25,00,000/- as damages for committing acts of infringement of copyright and passing off;

d. For a preliminary decree in favour of the appellant/plaintiff to direct the respondents 1 and 2 to render true and faithful accounts of all profits earned by them, using appellant's/plaintiff's drawings and a final decree be passed in favour of the appellants for the amount of profits thus found to have been made by the respondents 1 & 2 after they have rendered accounts;

e. For a judgment and decree directing the respondents 1 & 2 to surrender to the appellants for destruction, the name boards, invoices, etc., which bears deceptively similar trade mark/ trade name 'O-Separator'.

3. The appellants/plaintiffs filed two applications, namely, O.A.Nos.869 & 870 of 2018, praying for orders of interim injunction. The learned Single Bench by common order, dated 17.09.2018, granted an order of ex parte injunction as prayed for, and ordered notice to the respondents 1 & 2 returnable by 01.10.2018. Subsequently, the orders of interim injunction were extended vide order dated 01.10.2019. Prior to the suit being listed for admission along with interim applications, the appellant/plaintiff filed Application No.6926/2018, under clause 12 of Letters Patent seeking leave to sue the defendants. This application was filed as the first and third defendants were not residing or carrying on business within jurisdiction of this Court. The appellant/plaintiff's submission was that the part of cause of action has arisen within the territorial jurisdiction of this Court. The Court noted the averments in paragraph 9 of the affidavit filed in support of the Application No.6926 of 2018, in which the appellant/plaintiff is purported to have set out as to how the part of the cause of action has arisen within the territorial jurisdiction of the commercial division of this Court. The relevant portion of the paragraph 9 as noted by the Commercial division is as follows:-

"9.I submit that the Appellant's products are available for sale on a huge commercial basis in Chennai, within the jurisdiction of this Hon'ble Court. I also submit that the 1st and 2nd respondents are also responsible for the manufacture and distribution of goods all over the country, including in Chennai, which is within the jurisdiction of this Hon'ble Court..."

4. Taking into consideration the averments set out in the above referred paragraph and the plaintiff averments, leave to sue was granted by order dated 11.09.2018. Thus, the applications for grant of interim injunction were numbered subsequently and listed for hearing and the Court granted an ex parte order of interim injunctions by order dated 17.09.2018, which was subsequently extended on 01.10.2018. Upon notice, the first and second respondents/defendants 1 & 2 filed Application No.1486 of 2019, to revoke the leave granted in Application No.6926 of 2018, dated 11.09.2018. This Application was resisted by the appellant/plaintiff by filing a counter affidavit. Upon hearing the applications, the learned Single Bench by judgment and order dated 05.04.2019, allowed the Application No.1486 of 2019 and revoked the leave granted in Application No.6926 of 2018, consequently, the main Suit in C.S. Commercial Division 640 of

2019 was dismissed and the plaint along with connected papers were directed to be returned to the counsel for the appellant/plaintiff, making it clear that the judgment and order does not bar the appellant/plaintiff, to maintain the suit before the appropriate alternate forum.

5. Mr.Arun C.Mohan, learned counsel appearing for the appellant/plaintiff, submitted that the impugned judgment and order is liable to be set aside on account of the erroneous application of law apart from being contrary to the pleadings, evidence produced on record by the parties. It is submitted that the suit was filed at Chennai against the respondents 1 & 2, who are selling infringed goods and carrying on business within the jurisdiction of this Court and against the fourth respondent who is situated within the jurisdiction of this Court and this fact was not denied or disputed by the respondents/defendants. It is submitted that the learned Single Bench ought to have noted that the suit being an action in common law for passing off, jurisdiction applicable is where, the infringing goods are made available for sale and in the present suit, the infringing products are available in Chennai. It is submitted that the learned Single Bench was right in granting leave to sue by order dated 11.09.2018, in Application No.6926 of 2018, by taking note of the averment made by the appellants that the respondents 1 and 2 are also responsible for the manufacture and distribution of goods all over the country including Chennai, which is within the jurisdiction of this Court as pleaded in paragraph 9 of the affidavit filed in support of the application for leave to sue. Further, it is submitted that the learned Single Bench rightly granted the leave to sue by placing reliance on the averments made in the plaint, which is most germane in matters relating to territorial jurisdiction. Therefore, it is submitted that the Court while revoking the leave granted erroneously held that there is no pleading by the appellant/plaintiff with regard to carrying on business and sale on commercial basis by the respondents 1 and 2 in Chennai. It is further submitted that the Court should have taken into consideration the pleadings set out in the plaint, which are utmost germane. The Court failed to note that there is a specific averment in the plaint that the products of the respondents 1 and 2 are available in Chennai and this plaint averment read with paragraph 9 of the averments set out in the affidavit filed in support of the application for leave to sue clearly shows that this Court has territorial jurisdiction to entertain the Suit. In support of his contention, the learned counsel placed reliance on the decision of the Division Bench of this Court in Parle Products Private Limited vs. Surya Food and Agro Limited reported in MANU/TN/2109/2008.

6. Countering the above submissions, Mrs.Suba Shiny, learned counsel appearing for the respondents submitted that the

respondents 1 & 2 are not selling their products in Chennai, when there are no cement industries in Chennai and till date, the respondents 1 & 2 have not sold any products in Chennai and furthermore, there is no nexus between 1, 2, 3 & 4th respondents and the fourth respondent has been made a party to the suit only with a view to invoke the jurisdiction of this Court, more particularly, no relief has been sought for by the appellants/plaintiffs against the fourth respondent/fourth defendant. Further, it is submitted that it is incorrect to state that the conduct of the first respondent is in violation of the employment contract and that he has stolen proprietary information from the appellant/plaintiff's company. Further, the allegation that the respondents 1 & 2 have made substantial reproduction of appellant's/plaintiff's copyright is incorrect and going by the averments in paragraph 15 of the plaint, it would make it clear that the respondents 1 & 2 are running business with the mark O-SEPARATOR and not the mark O-SEPA, as that of the appellant/plaintiff. Further, by referring to the e-mail correspondence, which was heavily relied on by the appellants/plaintiffs, it is submitted that the same cannot be construed that the first respondent had acted against the terms of the contract when actually, there was severance of the employee-employer trade relationship between the first respondent and the appellant/plaintiff. In support of her contention, the learned counsel placed reliance on the decision of the Division Bench of this Court in Jagdale Industries Limited vs. Halewood Laboratories Pvt., Ltd., & Ors., reported in MANU/TN/1444/2013 and decision of the Commercial Division in Captain Tractors Pvt., Ltd., vs. Ashok Leyland Ltd., in Application No.6799 of 2018, in CS Commercial Division No.468 of 2018, dated 01.11.2018.

7. We have elaborately heard the learned counsels appearing for the parties and carefully perused the materials placed on record.

8. Clause 12 of the Letters Patent of the Madras High Court provides for two categories of Suits, namely (i) Suits pertaining to immovable properties i.e., suit for land or property and (ii) all other suits i.e., Suits other than those for lands or properties. Three situations arise for maintaining a Suit under clause 12 of Letters Patent in respect of the second category of the Suits i.e., Suits other than those for land or property. Three situations being a) where cause of action has wholly arisen within the territorial jurisdiction of this Court b) Where cause of action has arisen in part, leave of this court should have been first obtained and c) Where defendant at the time commencement of the Suit dwells/carries on business or personally works for gain within the territorial jurisdiction of this Court. Thus, we are required to examine as to whether part of the cause of action has arisen within the

territorial jurisdiction of this court to enable the Commercial Division to maintain the Suit.

9. The settled legal position is that a cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the Suit.

10. In Parle Products Private Limited (supra), it has been held that for deciding the issue as to whether leave granted should be revoked, one has to look only to the averments in the plaint and documents filed by the applicant and if the appellant/plaintiff had shown that the defendant have made sale of an infringing product within the territorial jurisdiction of this Court, leave to sue prayed for ought to be granted as part of cause of action has arisen within the territorial jurisdiction of this court as per clause 12 of the Letters Patent.

11. To decide the controversy, we may straightaway refer to the cause of action as pleaded in paragraphs 14 & 15 of the plaint, which are quoted as hereunder:-

14. The cause of action first arose in March 2016, when the 1st Defendant incorporated the 2nd Defendant herein in violation of his employment contract; in the last few months of 2016, when the 1st Defendant herein stole proprietary information from the Plaintiff's; In December 2016, when the 1st Defendant herein sent convert emails to the 4th Defendant; in August 2017, when the 2nd Defendant gave its proposal to the 3rd Defendant; in October 2017, when the 3rd Defendant gave the 2nd Defendant its purchase order; in July 2018, when the Plaintiff's became aware of the infringing activities of the Defendants herein. The cause of action continues to arise each and every day until the Defendants are restrained by this Hon'ble Court from infringing the Plaintiffs' copyright in the artistic work in the 2-dimensional drawings and the separator, which are 3-dimensional reproductions of the same.

15. The 1st and 2nd Defendants have made a substantial reproduction of Plaintiff's copyright. The Plaintiff's products under the mark O-SEPARATOR is sold throughout India including Chennai. The 4th Defendant carries on business at Chennai within the jurisdiction of this Hon'ble Court. Hence, this Hon'ble Court has jurisdiction to entertain and try the suit at Chennai in respect of copyright infringement within the meaning of Section 62

of the Copyright Act, 1957. However, as a matter of abundant caution, the plaintiffs have applied for leave to sue the Defendants. The plaintiff has filed an application seeking leave of the court vide A. No._____ of 2018 and the same has been allowed by this Hon'ble Court vide order dated __.08.2018. the subject matter of the present commercial Suit is a "commercial dispute" as defined in section 2(1) (c)(xvii) and falls under the first proviso of section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (Act 4/2016).

12. In paragraph 15 of the plaint, there is a typographical error in the second sentence, wherein it was mentioned as the appellant/plaintiff's products under the mark "O-SEPARATOR", is sold throughout India including Chennai. It should be read as the 'defendant's product'. Going by the plaint averment, it has to be seen as to whether, the appellant/plaintiff was able to establish before the Commercial Division that the defendant's products under the mark O-SEPARATOR is sold throughout India including Chennai. On a bare reading of the averments, it is seen that the first allegation made against the defendants 1 & 2, by the appellant/plaintiff is that they have made substantial reproduction of the appellant/plaintiff's copyright. The second allegation is the defendant's products under the mark O-SEPARATOR is sold throughout India including Chennai. Third averment is that the fourth defendant carries on business at Chennai within the jurisdiction of this Court. With these three statements, the appellant/plaintiff states that this Court has jurisdiction to entertain and try the suit at Chennai in respect of copyright infringement within the meaning of Section 62 of the Copyright Act, 1957.

13. The appellant/plaintiff would further go to state that as a matter of abundant caution, they have applied for leave to sue the defendants. To be noted that though there is a specific averment in paragraph 15 that the fourth defendant carries on business at Chennai, no relief has been sought for in the Suit against the fourth defendant. It cannot be disputed that except the fourth defendant, none of the other defendants namely 1 to 3 nor the appellant/plaintiff are within the territorial jurisdiction of this Court. Furthermore, there is no pleading by the appellant/plaintiff with regard to carrying on business and sale on commercial basis and there is no nexus between the defendants 1 to 3 and the fourth defendant with regard to business that is being carried on in the industry and therefore, in our considered view the learned Single Bench was right in holding that the plaintiffs have to approach the

alternate forum and leave to sue could not have been granted based on the averments made in the paragraph 15 of the plaint.

14. The appellant/plaintiff had miserably failed even to establish a casual link between the defendants 1 to 3 and the fourth defendant. No records were filed along with the plaint to show that the fourth respondent/defendant was carrying on business and that the infringing product was dealt with by them.

15. To be noted that the first and second respondents/defendants are carrying on business at Selaiyur, Chennai-600073, which is outside the jurisdiction of the Commercial Division of this Court. Thus, the plaintiffs sought leave to sue solely based on the presence of the fourth respondent/defendant at Chennai, who is within the jurisdiction of this Court. There is absolutely no averment in the plaint or in the affidavit filed in support of the application for leave to sue as to how the presence of the fourth respondent/defendant at Chennai has given rise to cause of action to file a suit before this Court. As already noted, no relief has been claimed against fourth respondent/defendant nor against the third respondent/defendant.

16. Furthermore, the e-mail correspondence referred by the learned counsel appearing for the appellant/plaintiff, can in no manner advance the case of the appellant/plaintiff, as there is no material to establish that the first respondent ever attempted to solicit the customers of the appellant/plaintiff 1 & 2. That apart, those e-mail correspondences which have been referred to are of the year 2016. Thus, it is clear that the fourth respondents/defendant has been arrayed as party to the Suit only for the purpose of invoking the jurisdiction of the Commercial Division of this Court.

17. We have perused the affidavit filed in support of the application No.6926 of 2018, wherein the prayer was made to grant permission to sue the defendants before this Court. Paragraph 9 was noted by the Court while passing the order dated 11.09.2018, granting leave to sue. The averment in the said paragraph is that the appellant/plaintiff's products are available for sale on huge commercial basis in Chennai within the jurisdiction of this Court. Further averment is that the respondents 1 & 2/defendants 1 & 2 are responsible for the manufacture and distribution of goods all over the country including Chennai, which is within the jurisdiction of this Court. The third sentence states that the fourth respondent/fourth defendant is carrying on business within the jurisdiction of this Court. All these three sentences are independent of each other mutually exclusive to the statement made therein and there can be no conjoint reading of those three sentences to confer jurisdiction on the commercial division of

this Court to say the least it is the case of a clever drafting, which cannot be a ground to hold that the Suit is maintainable before the Commercial Division of this Court.

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 Fertilisers Ltd., vs. 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.

19. For all the above reasons, we hold that the appellant/plaintiff has not made out any case for interference with the order impugned. In the result, the appeals fail and are dismissed. No costs. Consequently connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

pbn

To:

The Sub Assistant Registrar,
(Original Side),
High Court, Madras.

+2ccs to Mr.Suba Shiny, Advocate, S.R.No.49234

O.S.A. Nos.120 & 121 of 2019
C.M.P.Nos.10928, 10932, 10938 of 2019

VSN-II (CO)

RRS (25/07/2019)



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