



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2019

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH
and
The Hon'ble Mr. Justice KRISHNAN RAMASAMY

O.S.A.No.320 of 2019
and
C.M.P.No.26258 of 2019

Hindustan Unilever Limited,
No.101, Santhome High Road,
R.A. Puram, Chennai - 28.

..Appellant

Vs

1.Sree Annapoorna Foods
rep. by its Managing Partner
R.Velumani

2.R.Velumani

..Respondents

Appeal preferred under Order XXXVI Rule 9 of O.S. Rules r/w
Clause 15 of Letters Patent against the order dated 03.10.2019
made in A.No.5881 of 2019 in C.S.No.674 of 2010.

For Appellants .. Mr.Madhan Babu

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

Appellant is the defendant in the suit. The suit has been
filed by the respondents along with two others seeking the
following reliefs:

(a) a permanent injunction restraining the
defendant by themselves, their
proprietor/partners/directors as the case may be,
heirs, legal representatives, successors in business,
assigns, servants, agents, distributors, retailers,
stockists or any one claiming through them from in any
manner infringing the plaintiffs' registered trademark
'ANNAPOORNA' per se or in conjunction with other marks
as part of trade name/trading style or any other
mark/name identical or deceptively similar thereto or
in any other manner whatsoever;



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(b) a permanent injunction restraining the defendant by themselves, their proprietor/partners/directors as the case may be, heirs, legal representatives, successors in business, assigns, servants, agents, distributors, retailers, stockists or any one claiming through them from in any manner passing off or enabling others to pass off their food products as and for the plaintiffs' products by use of the offending mark Annapoorna/Annapurna as a trademark, trading style or in any other manner whatsoever;

(c) The defendant be ordered to surrender to plaintiff for the purpose of destruction all goods including containers, cartons, packs, labels, prints, blocks, dyes, plates, moulds and other material bearing the mark/name ANNAPURNA which is deceptively similar to the plaintiffs' registered trademark ANNAPOORNA;

(d) The defendant be directed to pay to the plaintiffs as compensatory and punitive damages a sum of Rs.1,00,000/- for the infringement activities and acts of passing off committed by them;

2. Pending the suit, the respondents filed an application for amendment seeking rendition of account, which was allowed by the learned single Judge. Challenging the same, the present appeal has been filed.

3. Learned counsel appearing for the appellant submitted that the amendment application ought not to have been allowed. It is contrary to Section 135 of the Trade Marks Act, 1999. The principle of Doctrine of Election would certainly come into play. The amendment changes the character of the suit. The pendency of the earlier suit was not taken note of. Though the respondents sought for amendment of valuation, it has been fixed only at Rs.1,000/-. In support of his contention, learned counsel has relied upon the following decisions:

(i) Meenakshisundaram Chettiar Vs. Venkatachalam Chettiar ((1980) 1 SCC 626

(ii) Tamil Nadu Electricity Board etc., Vs. Tamil Nadu Alloy Foundry Co. Ltd., (2001-3-L.W.280)

(iii) Sopan Sukhsho Sable and Carriers Vs. Assistant Charity Commissioner and Others ((2004) 3 SCC 137)

(iv) National Insurance Company Limited Vs. Mastan and Another ((2006) 2 SCC 641)

(v) Transcore Vs. Union of India and Another



((2008) 1 SCC 125)

(vi) Revajeethu Builders and Developers Vs. Narayanaswamy and Sons and Others ((2009) 10 SCC 84)

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4. The suit has been filed for infringement, passing off and other consequential reliefs. Originally, relief has been sought for, for damages. Thereafter, in the amendment application, a further relief has been sought for rendition of accounts.

5. Learned single Judge allowed the application inter alia holding that the issue sought to be raised both on facts and law will have to be decided in the suit and the character of the suit has not been changed by the proposed amendment.

6. We are also in agreement with the aforesaid conclusion of the learned single Judge. Section 135 of the Trade Marks Act, 1999 speaks about the relief in suits for infringement or passing off as the case may be. Therefore, there is a distinction between the relief and the prayer. Probably, at the time of granting relief, it is open to the plaintiff to choose either one of the options. Therefore, the plaintiff can choose either damages or accounts of profits as the case may be. This does not mean that even at the time of filing suit, the plaintiff has to choose either one of the two reliefs. The contention raised by the learned counsel appearing for the appellant in this regard stands rejected.

7. The object of Order 6 Rule 17 CPC is to avoid multiplicity of proceedings. In the case on hand, the suit has been laid on the ground of both prior user and also infringement. This issue was decided by the Court after framing issues and allowing the parties to go through the trial. On the other issue with respect to valuation, the same cannot be countenanced since it is for the Court to find out correct valuation. Now, what has been sought for is only by way of amendment. It is always open to the appellant to raise the plea that such relief sought for in the suit has been undervalued. This is a triable issue to be decided at the time of hearing the appeal.

8. Since the learned counsel appearing for the appellant has made reliance upon number of judgments we would like to go into the same.

9. The Apex Court in *Sopan Sukhsho Sable and Carriers Vs. Assistant Charity Commissioner and Others* ((2004) 3 SCC 137) was pleased to consider the scope and applicability of Order 2 Rule 1 CPC. We are of the view that the ratio laid down in the said judgment does not have any application to the case on hand. We are not on the question of applicability of Order 2 Rule 1 or



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Order 2 Rule 2 CPC as the case may be. In fact, we may note that the application filed by the appellant under Order 7 Rule 11 CPC has already been rejected. Therefore, we are not on the question of maintainability of the present suit. We may note that Order 2 Rule 1 CPC or Order 2 Rule 2 CPC operate in their respective fields. This has to be decided based upon the pleadings and taking note of the earlier suit along with the relief sought for. What has been sought for by the respondents by way of application is only amendment of the plaint. If the contention of the appellant is rejected then the very plaint itself will have to be struck down. On an application filed by the respondents seeking amendment, it cannot be done by us. Hence we also find that the said judgment has got no application to the case.

10. In *Transcore Vs. Union of India and Another* ((2008) 1 SCC 125), the issue was with respect to the doctrine of election. As discussed by us earlier, the said situation has not arisen at this point of time. Thus, the said judgment also will not help the case of the appellant.

11. Reliance has been made on the decision of the Apex Court in *National Insurance Company Limited Vs. Mastan and Another* ((2006) 2 SCC 641) wherein the issue that came up for consideration was under the Workmen Compensation Act, 1923. Even here, the Apex Court was dealing with the principle enshrined on doctrine of election. As we do not have any quibble over the law enunciated by the Apex Court in this regard, we only reiterate the fact that the said judgment has got no application.

12. Learned counsel has also placed reliance upon the decision rendered in *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others* ((2009) 10 SCC 84) wherein the Apex Court reiterated the principle governing amendment. It is apposite to refer the following paragraph:

"Factors to be taken into consideration while dealing with applications for amendments

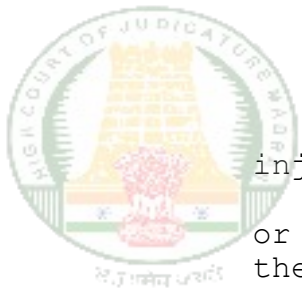
63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) Whether the application for amendment is bona fide or mala fide;

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to



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injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

13. The aforesaid principles are borne in mind by the learned single Judge, in our considered view. As stated by us, the character of the suit does not undergo any change. The suit itself has been filed on the premise that there is both infringement and passing off involved. Thus, what has been sought for by way of amendment is accepted by way of consequential relief as follow-up to the alleged infringement or passing off.

14. On the question of valuation, learned counsel made reliance upon the decision rendered in Meenakshisundaram Chettiar Vs. Venkatachalam Chettiar ((1980) 1 SCC 626. In the said case, application was filed under Order 7 Rule 11 CPC. We are not dealing with the said application which was already filed and rejected by this Court. However, we make it clear that the payment of adequate court fee is certainly an issue to be framed by the learned single Judge while framing the other issues.

15. Thus, in the light of the above discussion, we do not find any reason to interfere with the order passed by the learned single Judge. Accordingly, the Original Side Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed. However, inasmuch as the suit has been filed way back in the month of July 2010 and the issues are not framed till now, we request the learned single Judge to frame the issues within a period of eight weeks and thereafter proceed further. The question of effect of the amendment either relating back to the date of the plaint or after can also be an issue that can be framed.

-s/d-

Assistant Registrar (CCC)

True Copy

Sub-Assistant Registrar



To

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

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+1 CC to Mr.R. Parthasarathy, Advocate sr 102183.

O.S.A.No.320 of 2019

GMR (CO)
SP (09/01/2020)