HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

AND

HONOURABLE SRI JUSTICE K. LAKSHMAN

CIVIL REVISION PETITION NOS.1805 AND 1806 OF 2019

COMMON ORDER:
(Per Sri Justice M.S.Ramachandra Rao)

1. These two Revisions arise out of the same suit between the same parties and so they are being disposed of by this common order.

2. The petitioner in both these Revisions is the defendant in COS No.52 of 2018 on the file of the Commercial Court-cum-XXIV Additional Chief Judge, City Civil Court, Hyderabad.

3. The respondents/plaintiffs filed the said suit against the petitioner for a permanent injunction restraining the petitioner from in any manner using, selling, offering for sale or stocking, advertising, directly or indirectly dealing in any goods or service under the trade mark logo or word 'KRITUNGA' or along with any prefix or suffix which amounts to infringement of the respondents' registered trade mark/logo 'KRITUNGA' or any other mark which is identical or deceptively similar thereto or in any other manner whatsoever; for a mandatory injunction directing the petitioner to deliver up all printed matters/materials, stationery, advertising material or any other material that similarly infringes the plaintiffs' registered trade mark 'KRITUNGA' or to destroy them; and for an order of rendition of accounts by the petitioner to the plaintiffs and also damages of Rs.1.00 crore and costs.

4. Written statement was filed by the petitioner opposing the suit claim. In the written statement, a specific contention is raised by the petitioner that the respondents cannot maintain an infringement action against the petitioner which is the registered Proprietor of the mark 'KRITUNGA'. It is also contended that the respondents herein who are plaintiffs in COS No.52 of 2018 had taken such a stand before the XV Additional District Judge, Ranga Reddy District at Miyapur in O.S.No.954 of 2017 filed by the petitioner against them and therefore, the respondents should not be granted any relief in COS No.52 of 2018.

5. Before the trial commenced, the respondents filed I.A.No.4 of 2019 in COS No.52 of 2018 to amend the plaint by taking a plea therein contending that there was a bonafide mistake on the part of the respondents in basing their claim in the suit on the basis of infringement of a registered trade mark and they are entitled to amend the plaint by basing their claim on 'passing off'. They contended that this was an inadvertent error in drafting, and the words 'passing off' were not mentioned in certain paragraphs and in which place the word 'infringement' was mentioned and this necessitated consequential amendments.

6. The respondents had also filed I.A.No.602 of 2018 under Order XXXIX Rules 1 and 2 CPC for a temporary injunction restraining the petitioner from using the name 'KRITUNGA' pending suit.

7. In the said application also, the respondents filed I.A.No.5 of 2019 to substitute 'passing off' in the place of 'infringement' pleaded therein

and base their claim for interim injunction on the basis of 'passing off' instead of 'infringement'.

8. Counter affidavit was filed by the petitioner opposing not only I.A.No.4 of 2019 seeking amendment of the plaint but also I.A.No.5 of 2019 seeking amendment of I.A.No.602 of 2018 contending that there is no inadvertent error in drafting as is being contended by the respondents; that the word 'infringement' was deliberately used in the pleadings; that in O.S.No.954 of 2017 filed by the petitioner against the respondents, the respondents had filed an application under Order VII Rule 11 CPC stating that the said suit was barred by law; that the plaint was rejected on 07.11.2017 and it was also confirmed in CRP No.6288 of 2017; and the respondents, having argued the proposition that a suit for infringement cannot lie against another registered Proprietor in O.So.954 of 2017, cannot now turn around and seek the amendments of the plaint and the I.A. by now basing the relief on 'passing off' instead of 'infringement'.

9. By separate orders dated 12.04.2019, the Court below allowed both I.A.No.4 of 2019 in COS No.52 of 2018 and I.A.No.5 of 2019 in I.A.No.602 of 2018 in COS No.52 of 2018 and permitted the amendments of both the plaint and the pleadings in the I.A. of the respondents. It took note of the legal position that a suit for infringement cannot lie against any other registered Proprietor; that the petitioner is having a registered trade mark and both parties are claiming that they are prior users and under Section 28(3) of the Trade Marks Act, 1999,

neither the respondents nor the petitioner is deemed to have acquired such a trade mark; it then referred to certain decisions of the Supreme Court, High Court of Delhi, etc., and held that the decisions cited by the parties emphasize that a suit can be filed for injunction based on 'passing off' or 'infringement' but a suit for passing off should be filed where the defendant resides; that the defendant is residing in the jurisdiction of the Commercial Court at Hyderabad; and therefore, the respondents/ plaintiffs can file a suit on the basis of the principle of 'passing off'. It held that there was a bonafide mistake committed by the respondents which can be permitted to be rectified. It also observed that normally suits are not to be rejected if they can be rectified.

10. Assailing the same, these Revisions are filed.

11. Learned counsel for the petitioner contended that the Court below erred in permitting the amendments of both pleading in the plaint and pleadings in I.A.No.602 of 2018 and that permitting such amendments creates serious prejudice to the petitioner.

12. Learned counsel for the respondents supported the orders passed by the Court below.

13. Order VI Rule 17 CPC states:

> "***17. Amendment of pleadings:-*** *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*

> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

14. This provision has been considered by the Supreme Court in **Rajkumar Gurawara (Dead) through L.Rs. Vs. S.K.Sarwagi and Co. Pvt. Ltd. and others**[1] and the Supreme Court held that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy; however, this rule is subject to the proviso appended therein which makes it clear that after commencement of the trial, no application for amendment shall be allowed, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. It declared that pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial because in the former case, the opposite party is not prejudiced and he will have an opportunity of meeting the amendment sought to be made, but in the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise; and in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso. The Supreme Court also observed that application for amendment should not be allowed if it changes the nature of the suit or it results in introducing new cause of

[1] (2008) 14 SCC 364

action and intends to prejudice the other party or when allowing amendment application would defeat the law of limitation.

15. These principles were reiterated again in **Abdul Rehman and another Vs. Mohd. Ruldu and others**[2]. The Supreme Court reiterated that parties to the suit are permitted to bring forward amendment of their pleadings at any stage of the proceedings for the purpose of determining the real question in controversy between them and the Courts have to be liberal in accepting the same, if the same is made prior to the commencement of the trial. It also held that if such application is made after commencement of the trial, the Court would have to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. It also declared that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the suit and in fact, if amendments were allowed, they would avoid multiplicity of litigation.

16. It is not in dispute that in the instant case, the trial in the suit has not commenced. Therefore, the proviso to Order VI Rule 17 CPC does not apply.

17. Also, the respondents/plaintiffs had already laid the necessary factual basis for amendment in the plaint and they are not seeking to alter the relief sought in the suit of perpetual injunction or in I.A.No.602 of 2018, wherein relief of temporary injunction was sought pending suit.

[2] (2012) 11 SCC 341

Therefore, by merely substituting the basis of the claim as 'passing off' instead of 'infringement' mentioned at various paragraphs in the original plaint, it cannot be said that the nature of the suit has been changed or that the cause of action has changed.

18. In our opinion, no prejudice is caused to the petitioner because it would have the opportunity to file amended written statement in the suit and amended counter affidavit in I.A.No.602 of 2018 taking appropriate pleas to defend itself.

19. Therefore, we do not find any error of jurisdiction in the orders passed by the Court below warranting interference by us in exercise of Revisional jurisdiction of this Court under Article 227 of the Constitution of India.

20. Accordingly, the Civil Revision Petitions are dismissed. No costs. Pending miscellaneous petitions, if any, shall also stand dismissed.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date:16-12-2019
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