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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CR-7675-2017 (O&M)

Date of decision : 18.03.2019

M/s Om Shivam Utpadan

... Petitioner

Versus

M/s Saraswati Utpadan Private Ltd.

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Harsh Bunker, Advocate
for the petitioner.

Mr. Vivek Salathia, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The present revision petition is directed against the impugned order, whereby the application of the respondent-plaintiff for leading additional evidence i.e. affidavit dated 03.09.2015 of the petitioner-defendant giving an undertaking not to use the trade-mark of the plaintiff, when the defendant put in cross-examination, denied the existence of affidavit, has been allowed.

Mr. Harsh Bunker, learned counsel appearing on behalf of the petitioner-defendant submitted that the respondent-plaintiff instituted the suit for injunction for violation of trademark 'Bahadur' with an emblem of 'flying Horse' as an illegal act of "Passing Off" their inferior goods as that of the plaintiff. There was no averment with regard to the alleged undertaking,

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reflected in the affidavit, sought to be placed on record, by way of additional evidence, and it was, for the first time, put in cross-examination to the defendant, which was denied, in such circumstances, the respondent-plaintiff, in the absence of any issue of rebuttal, submitted an application for additional evidence, which has erroneously been allowed. The *ratio decidendi* rendered in **CR No.3905 of 2017** titled as **“Jasdeep Singh Makkar V/s Brilliant Brainz Educational Society (Regd.) and others”**, decided on 11.01.2019, relied upon by Mr. Salathia, on the last date of hearing, is pertaining to a case, where the fact was pleaded, therefore, the same would not be applicable. It would be an evidence beyond the pleadings. Had it been pleaded in evidence, would have been denied it and onus would have shifted upon the plaintiff to lead evidence in affirmative, thus, urges this Court for setting aside the impugned order.

Mr. Vivek Salathia, learned counsel appearing on behalf of the respondent-plaintiff submitted that there is a passing reference in para No.8 of the plaint, that on basis of dissolution of partnership firm, the defendant had severed all the relations and connections with the firm including trademark and copy right. In fact that would take care of the part of the alleged wanting of pleadings and during the pendency of the revision petition, the order allowing additional evidence has been complied in part and the report of the expert has been placed on record and exhibited, but the cross-examination is yet to be done. It would help the Court for adjudication of the *lis* and the defendant-petitioner would also given a chance to rebut the same.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submissions of

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Mr. Bunger.

It would be apt to reproduce the para 8 of the plaint, which reads as under:-

"8. That on the dissolution of the Firm vide resolution deed dated 20.08.2015, Manohar Lal retired from the partnership and as per Clause-2 of the Dissolution Deed, all the assets and liabilities of the Firm had been taken over by the continuing partner i.e. S. Dilbagh Singh Whereas, the retired partner namely Manohar Lal had completely severed all his connections with the Firm including the Trademark, copy rights, patent designs and all other intellectual property right. Therefore, with the execution of the said Dissolution Deed, Manohar Lal was left with no right or interest in the Trademark "Bahadur" and as such, he could not use the said Trademark "Bahadur" in relation to the business that he was to set up after retiring from the partnership concern."

No doubt, there was no reference of the affidavit and its dates, but the tenor and mode of the provisions, leads to an irresistible conclusion that the defendant had severed the relations with regard to the copy right and trademark. Time and again, the objection qua admissibility of the documents, in the absence of pleadings, is being raised, but the trial Court as well as this Court, some time, remains oblivious of the provisions of Article 145 of the Indian Evidence Act, which reads as under:-

"Section 145 of the Indian Evidence Act:-

Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved,

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be called to those parts of it which are to be used for the purpose of contradicting him."

The cross-examination is a device, where the opposite party is competent to reveal the truth, much less, to the previous statement in writing. The expression of previous statement would not be a pleading, since the affidavit is a deposition and can always be taken into consideration, subject to its mode of proof and admissibility. The defendant/petitioner would have a right to rebut the same by rebutting the evidence led by the plaintiff, if any. Since the report of the expert has already been submitted and accepted, the petitioner-defendant shall be at liberty to cross-examine Expert and lead evidence, if they desire.

Keeping in view the aforementioned facts, the impugned order, under challenge, cannot be said to be suffering from illegality and infirmity. No ground is made out for interference.

However, allowing of the application of the respondent-plaintiff for additional evidence, shall be subject to the payment of costs of ₹10,000/-.

18.03.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**