

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

7.

+

RFA (OS)(COMM) 13/2018 & CM 29064/2018

CHRISTIAN LOUBOUTIN SAS

..... Appellant

Through: Mr Sudhir Chandra, Senior Advocate
with Mr Pravin Anand, Mr Dhruv
Anand, Ms Udit Patro and Mr
Nischay Mall, Advocates.

versus

ABUBAKER & ORS.

.... Respondents

Through: Mr Sunil Fernandes and Ms Nupur
Kumar, Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

11.04.2019

%

Dr. S. Muralidhar, J.:

1. The present appeal is directed against the judgment dated 25th May, 2018 passed by the learned Single Judge, dismissing the Appellant's suit being CS (Comm) No. 890 of 2018 at the very first hearing of the suit without there being any summons issued to the Respondents/Defendants.

2. Admit. With the consent of counsel for the parties, the appeal is heard finally.

Background

3. The aforementioned commercial suit was filed by the Appellant (Plaintiff), a company duly incorporated under the existing laws of France, having its registered office at Paris against the Defendants who are located in Mumbai. The suit was filed for a permanent injunction to restrain the Defendants from infringing the Plaintiff's trademark, passing off, unfair competition, dilution and tarnishment, apart from damages, rendition of accounts of profits and delivery up etc.

4. According to the Plaintiff, when it conducted a market survey in early April, 2018 it learnt of the Defendants' use of the Plaintiff's 'RED SOLE' trademark on ladies shoes being sold by the Defendants. Relying on the report of a private investigator who visited the premises of the Defendants, the Plaintiff claimed that the Defendants were engaged in counterfeiting activities by selling shoes that bore the Plaintiff's well-known trademark 'RED SOLE'.

5. In the plaint, it was explained that the Plaintiff's 'RED SOLE' trademark has been registered in Clause 25 with No. 1922048 (with an illustration of an outsole of a shoe, which is not reproduced here) in respect of the shoes, except orthopaedic footwear, with the sole condition and disclaimer that "the mark shall be limited to the colour Red as shown in the representation on the Form of the application (Pantone No. 18.1663TP)". The Plaintiff has explained that the aforementioned 'RED SOLE' trademark is in fact a device mark wherein a specific tone of red colour (Pantone No. 18.1663TP) is applied to the outsole of a shoe and "is unique in its own accord and

became known in the world of fashion only after being introduced by the Plaintiff”. It is further averred that “the trademark, being an innovation of the Plaintiff, is used and known only in relation to the Plaintiff and goods of the Plaintiff only”. The claim of the Plaintiff is that “due to its uniqueness and since the said trademark is the central and quintessential element of the goods of the Plaintiff, the Plaintiff considers this intellectual property is incredibly valuable and has expended a significant amount of resources on securing registrations and protecting the 'RED SOLE' trademark”. The further claim is that the ‘RED SOLE’ trademark is internationally recognizable and has extensive usage in India; the 'RED SOLE' trademark enjoys trans-border reputation in India; the goodwill and renown of the 'RED SOLE' trademark has spilled over into India from various countries and that the consumers are well aware of this goodwill and reputation even before the Plaintiffs trademark was first formally launched in India.

6. The Plaintiff, along with the above suit, had filed IA No.6898/2018 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (‘CPC’), seeking an interim injunction to restrain the Defendants *inter alia* from manufacturing, selling or offering for sale, footwear including ladies shoes bearing the 'RED SOLE' trademark. A separate application was filed for the appointment of a Local Commissioner to visit the shops of the Defendants and seize the infringing goods.

Impugned order of the Single Judge

7. The suit, along with the aforementioned applications, was first listed for hearing before the learned Single Judge in the Commercial Division of this

Court on 18th May, 2018. After hearing the submissions of Mr. Sudhir Chandra, learned Senior counsel for the Plaintiff, the learned Single Judge reserved orders. Thereafter on 25th May 2018, the learned Single Judge, by a 47 page judgment, dismissed the suit *in limine*. Among the grounds on which the suit has been dismissed are:

(i) In view of the ‘admissions’ in the plaint, the suit ought to be dismissed in terms of Order XII Rule 6 CPC.

(ii) Even taking all the averments in the plaint to be ‘completely correct’, the Plaintiff would not be entitled to the reliefs of infringement or passing off or claim “existence of dilution, unfair competition etc”.

(iii) Use of a single colour of the Plaintiff does not qualify the single colour to be a trademark in view of provisions of Sections 2(m) and 2(zb) of the Trade Marks Act, 1999 (‘Act’).

(iv) “Also Section 30 (2) (a) of the Trade Marks Act, in the facts of the present case, is a complete disentitlement to the reliefs claimed by the Plaintiff on the basis of causes of action pleaded in the plaint”.

(v) The Plaintiff was also not entitled to the relief of injunction against passing off because (a) a single colour cannot become a trademark and the Plaintiff cannot claim rights in one colour as a trademark for exclusive use of the Plaintiff (b) The issue of passing off would arise only if there was disentitlement in the defendants to not use the red colour shade in the soles

of the ladies footwear being manufactured and sold by the Defendants, but there is no such disentitlement for the Defendants because the user by the defendants of the red colour shade on the footwear is pursuant to the legal rights conferred upon the defendants under Section 30(2)(a) of the Trade Marks Act as already discussed above. (c) There would be no deception since the word mark under which the Plaintiff were selling their goods was "CHRISTIAN LOUBOUTIN", which was completely different from the Defendants' word mark/trademark 'Veronica'.

(vi) Although the learned Single Judge did not base his conclusions on Order VII Rule 11 CPC, he nevertheless observed that "the suit does not contain any legal cause of action because even if whatever are the causes of action in the plaint are taken as correct, even then such causes of action taken as true, will not entitle the plaintiff for the reliefs as claimed in the present suit".

8. Before the learned Single Judge, Mr. Sudhir Chandra, the learned Senior counsel for the Plaintiff, placed reliance on two judgments of learned Single Judges of this Court holding that a single colour was entitled to protection as a trademark. The first was a decision dated 23rd April 2018 in CS (COMM) 738 of 2018 (*Deere & Company v. Mr. Malkit Singh*). The other was a final judgment dated 12th December 2017 by another learned Single Judge in CS (COMM) 714 of 2016 (*Christian Louboutin Sas v. Mr. Pawan Kumar*) in which the Plaintiff's entitlement to exclusive ownership of the trademark "RED SOLE" in relation to its use on the soles of ladies' footwear was upheld. The learned Single Judge has in the impugned judgment held the

said judgments to have been incorrectly decided and, therefore not binding or applicable since they did not consider the definition of ‘trademark’ under Section 2 (m) of the Act and also did not notice Section 30 (2) of the Act. In support of this conclusion the learned Single Judge referred to the decisions in *Padma Sundara Rao (Dead) v. State of Tamil Nadu (2002) 3 SCC 533* and *N. Bhargavan Pillai (Dead) by Lrs. v. State of Kerala (2004) 13 SCC 217*.

9. The learned Single Judge also distinguished the judgment of the Division Bench of this Court in *Bright Enterprises Private Ltd. v MJ Bizcraft LLP 2017(69) PTC 596 [Del][DB]* on the ground that the suit was not being dismissed under Order XIII-A CPC but with reference to Order XII Rule 6 CPC.

10. This Court has heard the submissions of Mr Sudhir Chandra, learned Senior Counsel appearing for the Appellant/Plaintiff and Ms Nupur Kumar, learned counsel appearing for the Respondents/Defendants.

Questions of law

11. The substantial questions of law that arise for determination are as follows:

(i) Can a commercial suit seeking a permanent injunction against infringement of a registered trademark be dismissed at the very first hearing of the suit invoking Order XII Rule 6 CPC? On the facts of the present case, can it be said that the plaint disclosed ‘admissions’ of the Plaintiff that would disentitle it to the reliefs prayed for in the suit?

(ii) Was the learned Single Judge, in the facts and circumstances of the present case, without the Defendants entering appearance and raising any plea, justified in holding that “a single colour cannot under any circumstances be given the benefit for being used as an exclusively owned trademark of a manufacturer/seller etc.” and that the device mark of the Plaintiff “could legally not have been got registered as a trademark.”?

(iii) Was the learned Single Judge justified in proceeding to dismiss the suit disagreeing with the correctness of the judgments of two co-ordinate benches of the High Court on the very issue, without referring the matter to a larger Bench?

Question (i)

12. The learned Single Judge has in the impugned judgment explained that he was dismissing the suit *in limine* “by applying the provisions of Order XII Rule 6 CPC”. Order XII Rule 6 CPC comes into play when there is an ‘admission’ by the Plaintiff of “the truth of the whole or any part of the case of any other party”.

13. Since the suit was being heard for the first time, and with there being no appearance on behalf of the Defendants, the learned Single Judge was in no position to know what the case of the ‘other party’ i.e. the Defendants, was. Even otherwise By reading the plaint as a whole, this Court is unable to agree with the learned Single Judge that there is any ‘admission’ by the Plaintiff of any case that may have been put up by the Defendants.

14. The learned Single Judge took note of the submission of the Senior counsel for the Plaintiff, based on the decision of the Division Bench of this Court in *Bright Enterprises Private Ltd. v MJ Bizcraft LLP* (*supra*) that:

“this Court should not act as an adversary and the present commercial suit cannot be dismissed at this stage by holding that there is no real prospect for the plaintiff to succeed inasmuch as this plea under Order XIII A CPC as applicable to commercial suits can only be taken by the defendants after they are served in the suit, and the defendants move such an application under Order XIII A CPC for dismissing the suit on the ground that plaintiff has no real prospect to succeed, with a 30 days notice being given in terms of the application under Order XIII A CPC to the Plaintiff to contest this issue.”

15. However, the learned Single Judge rejected this submission by holding that:

“The provision of Order XIII A CPC is an additional provision applicable to commercial suits filed in commercial courts thereby entitling dismissal of a suit in spite of existence of disputed questions of fact on the ground that plaintiff has no real prospect of succeeding, but existence and applicability of Order XIII A CPC does not take away the existence and application of Order XII Rule 6 CPC. This Court is not hearing the lack of maintainability of the suit on the ground that the plaintiff has no "real prospect" of succeeding as stated under Order XIII A CPC as applicable to commercial cases and that trial will be required on disputed questions of fact, **but the lack of maintainability of the suit on the ground of lack of merits in the suit and for it to be dismissed on the ground that the suit plaint even if is taken as completely correct with respect to its averments of the causes of action pleaded i.e. even if the contents of the plaint are deemed to be correct, yet a legal cause of action is not made out and consequently this Court by applying Order XII Rule 6 CPC is entitled to dismiss the suit at this stage itself without issuing of**

summons in the suit. A decree is defined under Section 2(2) CPC to include a dismissal of a suit and therefore Order XII Rule 6 CPC can be invoked, by the Court for dismissal of the suit even without issuing of summons to the defendants.” (emphasis supplied)

16. There appears to be, in the above reasoning, a conceptual confusion as to what Order XII Rule 6 CPC requires a Court to do. The said provision reads thus:

“Order XII Rule 6 CPC

Judgment on admissions.

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the court may at any stage of the suit, either on the application of an party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.

(2) Whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced.”

17. The word ‘admissions’ in Order XII Rule 6 CPC has to be understood with reference to Order XII Rule 1 CPC which is titled ‘Notice of Admission of case’ and states that “any party to a suit” may give notice in pleading or writing “that he admits the truth of the whole or any part of the case of any other party.” For invoking Order XII Rule 6 CPC the *sine qua non* is a party to a suit admitting “the truth of whole or any part of the case or any other party”. There can be no occasion to invoke Order XII Rule 6 CPC at the first hearing without the ‘other party’ appearing in the suit and

putting forth its case. This basic requirement appears to have been completely lost sight of by the learned Single Judge. His reasoning is relatable to Order VII Rule 11 CPC, particularly when he observes: “suit plaint even if is taken as completely correct with respect to its averments of the causes of action pleaded i.e. even if the contents of the plaint are deemed to be correct, yet a legal cause of action is not made”.

18. This is further reflected in the manner in which the learned Single Judge dealt with the objection that the Court could not position itself as the ‘adversary’ in the absence of the Defendants as is evident from the following passage in the impugned judgment:

“I really fail to understand that when the Court put a proposition to the plaintiff that the suit is not maintainable and the same is liable to be dismissed inasmuch as even if the contents of the plaint are taken to be correct still no legal cause of action is made out for granting of the reliefs claimed in the suit, then how by putting such a proposition would the Court become an "adversary". This argument of the plaintiff in my opinion is a completely misconceived one, and in fact is raised only as an attempt to get summons issued in the suit, although the suit plaint does not make out a legal cause of action for grant of the reliefs prayed. This argument is therefore rejected that the suit cannot be dismissed without issuing of summons; because, the Court can do so by invoking and applying Order XII Rule 6 CPC.”

19. In *S. M. Asif v. Virendra Kumar Bajaj 2015 (9) SCALE 729*, the Supreme Court explained that:

“The words in Order XII Rule 6 CPC “may” and “make such order...” show that the power under Order XII Rule 6 CPC is discretionary and cannot be claimed as a matter of right.

Judgment on admission is not a matter of right and rather is a matter of discretion of the Court. Where the defendants have raised objections which go to the root of the case, it would not be appropriate to exercise the discretion under Order XII Rule 6 CPC. The said rule is an enabling provision which confers discretion on the Court in delivering a quick judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim."

20. Therefore, in the present case, in the absence of the Defendants entering appearance and filing their written statement, and/or reply to the application for interim injunction, the question of the Court determining if there was any 'admission' on the part of the Plaintiff of the case of the Defendants on any aspect, did not arise.

21. Order VII Rule 11 CPC permits a Court even at the first hearing to reject the plaint for failing to disclose a cause of action. Order XII Rule 6 CPC, on the other hand, does not refer to the failure of the Plaintiff to make out a 'legal cause of action'. It refers to 'admissions' made by one party of the case of the other. It could be an admission by the Defendant of the Plaintiff's case or vice versa. Therefore, the stage at which Order XII Rule 6 CPC is invoked is different. By its very nature, it envisages the 'other party' making known its case. In the present case, the learned Single Judge did not invoke Order VII Rule 11 CPC. He repeatedly states that he is invoking Order XII Rule 6 CPC. The reasoning of the learned Single Judge that because a Civil Court can under Order VII Rule 11 CPC reject a plaint for failure to disclose a cause of action, it could do so at the first hearing even under Order XII Rule 6 CPC is misconceived. This Court specifically is unable to accept the

reasoning of the learned Single Judge as under:

“Also, it is not necessary that a Court can only apply Order VII Rule 11 CPC and reject the plaint when it discloses no cause of action, because, there would be many situations which may though fall under Order VII Rule 11 CPC may yet also fall under Order XII Rule 6 CPC, and once that is so, the Courts are surely not prohibited from dismissing the suit at the threshold by calling in aid Order XII Rule 6 CPC. No provision of law has been shown to this Court, contrary to Order XII Rule 6 CPC, that where the suit plaint does not disclose any legal cause of action for granting the reliefs claimed in the suit, then why the suit cannot be dismissed by applying Order XII Rule 6 CPC.”

22. The learned Single Judge erred in overlooking the legal position explained by the Division Bench of this Court in ***Bright Enterprises Private Ltd. v MJ Bizcraft LLP*** (*supra*) where it reversed a judgment of a learned Single Judge of this Court which again had dismissed a suit seeking permanent injunction against infringement of a registered trade mark at the initial stage without issuing summons to the Defendant. Just as in the present case, there too it was nobody’s case “that the suit had not been duly instituted in the sense that it did not comply with the requirements of Order VI and VII CPC.” It was “neither a case of return of a plaint under Order VII Rule 10 nor a case of rejection of a plaint under Order VII Rule 11 CPC.” It was a “dismissal of the suit itself on merits”. After referring to Order V Rule 1 (1) CPC read with Section 27 thereof, this Court observed:

“18. In the present case, the learned Single Judge has neither returned the plaint under Order VII Rule 10 nor rejected the plaint under Order VII Rule 11 CPC. Therefore, it was incumbent upon the learned Single Judge to have issued summons to the respondents /defendants, particularly because

the respondents/defendants had not appeared at the time of presentation of the plaint and did not admit the claim of the appellants/plaintiffs. The Rule of audi alteram partem is embedded in Order V Rule 1 sub-rule (1) read with Section 27 CPC.”

23. The DB further explained the different consequences that would entail where the suit is dismissed summarily as opposed to the plaint being rejected under Order VII Rule 11 CPC or returned under Order VII Rule 10 CPC. It held:

“We may also point out that there is a clear distinction between ‘return of a plaint’, ‘rejection of a plaint’ and ‘dismissal of a suit’. These three concepts have different consequences. A dismissal of a suit would necessarily result in a subsequent suit being barred by the principles of res judicata, whereas this would not be the case involving ‘return of a plaint’ or ‘rejection of a plaint’. What the learned Single Judge has done is to have dismissed the suit of the appellants/plaintiffs at the admission stage itself without issuance of summons and this, we are afraid, is contrary to the provisions of the statute.”

24. The learned Single Judge has in the impugned judgment referred to only one aspect of the decision of the DB in **Bright Enterprises Private Ltd. v. MJ Bizcraft LLP** (*supra*) which dealt with Order XIII A CPC, and overlooked the above passages which were squarely applicable to the case on hand and binding on the learned Single Judge.

25. The result of the above discussion is that Question (i) is answered in negative. In the facts of the present case, and considering the averments in the plaint, it cannot be said that it discloses any ‘admission’ by the Plaintiff of the case of the Defendants that would disentitle it to the reliefs prayed for

in the suit.

Question (ii)

26. The learned Single Judge has in the impugned judgment examined in great detail whether the registration granted to the Plaintiff in respect of the device mark ‘RED SOLE’ was valid. The reasoning given for this exercise was as follows:

“Registration of a trademark is only prima facie evidence of its validity vide Section 31(1) of the Trade Marks Act and therefore once what has been got registered as a trademark, could legally not have been got registered as a trademark results in an illegality because what is registered as a trademark could legally not have been got registered as a trademark, then when that matter comes up before the court then the courts are surely entitled to reject the claim of ownership and entitlement to a trademark which is not capable of being a trademark under the Trade Marks Act.”

27. The learned Single Judge has on an analysis of Section 10 read with Section 30 (2) (a) of the Act come to the conclusion that a “single colour not being a mark, the single colour cannot be claimed as a trademark”. The Plaintiff assails this to be based on an incorrect understanding of the Plaintiff’s mark. From the averments in the plaint, it is evident that the Plaintiff is claiming distinctiveness over the use of ‘pantone red’, which is a particular shade of the colour red and used at a specific part of a shoe. As pointed out by the Plaintiff, “this placement is illustrated in the trademark registration certificate as being the outsole of a shoe, which is limited to the colour Red.” The Plaintiff further claims that

“The placement of the colour is completely arbitrary and of a whimsical character. That further that this in-dissociable combination constituting the mark does not result from the shape imposed by the nature or function of the product. That if the RED SOLE trademark is emblematic, it is due to the promotional efforts of the Appellant.”

28. It is further contended that “a ‘device’ by definition is a feature or a thing which appears on a product and serves the purpose of source identification.” While the above claims have to be tested further by a Court on the basis of the pleadings and evidence, it perhaps explains why the Plaintiff has sought and obtained registration for ‘RED SOLE as a device mark. The specific case of the Plaintiff is that the said trademark was a "device trademark" consisting of a combination of a colour red and the placement of the said colour at a specific position on the outsole of a shoe and that it would be wrong to assume that it consists only of an individual single colour. It is pointed out that the determination of the nature of the trademark was a ‘mixed question’ of law and fact.

29. In any event, this being a critical aspect of the case of the Plaintiff, any determination whether the Plaintiff was entitled to seek the protection of its registered trademark would require deliberation on the basis of the case put forth by the Defendants. Section 30 (2) (a) is a defence available to a Defendant in an infringement suit. It is doubtful that a Court could *suo motu* confront the Plaintiff in a case like the present with that ‘defence’ without the Defendant raising it. Further, for the purposes of that provision whether the device mark is ‘functional feature’ that is utilitarian or aesthetic or whether as claimed by the Plaintiff it “is an arbitrary placement of a colour

on an arbitrarily selected portion of a shoe, namely, the outsole of a shoe, to designate its origin” is not something that can be finally determined *suo motu* by the Court at the very first hearing of the suit.

30. It must be recalled here that the Plaintiff is the holder of a registered trademark and the suit is one for infringement. Under Section 31 of the Act, there is a *prima facie* presumption of validity of a mark that is registered. It is not even the case of the Defendants that they or anyone else applied for cancellation of the Plaintiff’s trademark. In the circumstances, the exercise undertaken by the learned Single Judge as above, at the very first hearing of the trade mark infringement suit, was uncalled for.

31. However, this Court would not like to comment anything further on these aspects, lest it might prejudice the case either in one way or the other. The above discussion is only to highlight that at the very first stage of the suit, it was simply not possible for the learned Single Judge to come to such a definite conclusion on whether the mark was unique; whether it was validly registered in favour of the Plaintiff; and whether the Plaintiff could seek the relief of restraining the Defendants from infringing the said trademark. Question (ii) is accordingly answered in the negative.

Question (iii)

32. The learned Single Judge noted in the impugned judgment that the Plaintiff relied on two decisions of Single Judges of this Court in ***Deere & Company v. Mr. Malkit Singh*** and ***Christian Louboutin SAS v. Mr. Pawan Kumar*** in support of the plea that the device mark in question deserved

protection from infringement. In *Christian Louboutin SAS v Mr. Pawan Kumar* the suit was for infringement of the very same ‘RED SOLE’ trademark of the Plaintiff. The Single Judge who decreed the suit held that the said device mark was a ‘well known’ mark. The learned Single Judge in the impugned judgment has disagreed with the above decisions, which were of co-ordinate benches, on the ground that they have been incorrectly decided and that they did not consider the definition of ‘trademark’ under Section 2 (m) of the Act and Section 30 (2) (a) of the Act. While it was perhaps open to the learned Single to disagree with a co-ordinate bench, he could not have proceeded to deliver the impugned judgment, without referring the matter to a larger Bench. This was not the course of action that was available to the learned Single Judge. Being bound as he was by the doctrine of *stare decisis* as explained by the Constitution Bench of the Supreme Court of India in *Union of India v Raghubir Singh (1989) 2 SCC 754* as follows:

“It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in

the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges.”

33. The above exposition was a distillation of the law explained in a number of earlier decisions including *Mattulal v. Radhe Lal* [1975] 1 SCR 127 where it was held that where the view expressed by two different Division Benches of the Supreme Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. In *Acharya Maharajshri Narandrapra Sadji Anandprasadji Maharaj v. The State of Gujarat* [1975] 2 SCR 317, it was held that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other.

34. The departure by the Division Bench of a High Court from the well established practice noted above was adversely commented upon by the Supreme Court in *Mahadeolal Kanodia v. Administrator General of West Bengal* AIR 1960 SC 936 in the following words:

“Before we part with this appeal, however, it is our duty to refer to one incidental matter. We have noticed with some regret that when the earlier decision of two judges of the same High Court in *Deorajan's Case* (58 CWN 64) was cited before the learned judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench.

Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. **The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.**

As far as we are aware it is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench. In the Calcutta High Court a rule to this effect has been in existence since 1867. It is unfortunate that the attention of the learned judges was not drawn in the present case to that rule. But quite apart from any rule, considerations of judicial propriety and decorum ought never to be ignored by courts in such matters.” (emphasis supplied)

35. In view of the legal position explained in the above decisions, the learned Single Judge in the present case ought to have referred the matter to a larger bench of two Judges since he was unable to agree with the decisions of co-ordinate Single Judges which supported the case of the Plaintiff. Question (iii) is accordingly also answered in the negative.

36. The Court has refrained from discussing the merits of the issues decided by the learned Single Judge for the reason that the suit requires consideration at the hands of the learned Single Judge after the Defendants enter appearance and make their submissions in accordance with law.

37. Ms. Nupur Kumar, learned counsel for the Defendants/Respondents submitted that the suit of the Appellant would not be maintainable and referred to Section 134 of the Act and the decision of the Supreme Court in *Indian Performing Rights Society v. Sanjay Dalia (2015) 10 SCC 161*. It will be open to the Defendants to raise all their pleas, including the above plea, before the learned Single Judge, which will then be dealt with by the learned Single Judge in accordance with law.

Conclusion

38. For the aforementioned reasons, this Court sets aside the impugned judgment dated 25th May 2018 of the learned Single Judge and restores the suit CS (COMM) No. 890 of 2018 and the applications pending therein to the file of the learned Single Judge for disposal in accordance with law. The Court's attention has been drawn to Order 41 Rule 23 CPC which enables the Appellate Court, while remanding the case to issue further directions. In terms thereof, the Court directs that both the counsel for the Plaintiff and the Defendants shall remain present before the learned Single Judge on 13th May 2019, when the aforementioned suit with all the pending applications therein, shall be listed for directions.

39. This Court clarifies that it has not in the present judgment expressed any

opinion on the merits of the case, one way or the other, of either the Plaintiff or the Defendants. The appeal is allowed and the pending applications are disposed of in above terms.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 11, 2019

rd

