

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.10.2020

Pronounced on : 15.10.2020

CORAM

THE HONOURABLE MR. JUSTICE **C.V.KARTHIKEYAN**

A.Nos.2027, 2028 & 2029 of 2020
in
C.S. (Comm. Div.) No.748 of 2018

Hatsun Agro Product Ltd.,
Having registered office at
No.1/20-A, Rajiv Gandhi Salai (OMR)
Karapakkam, Chennai – 600 097.
And also carrying on its business at
Old No.AD-83/New No.AD13,
Anna Nagar, Opp.:IOB Towers Branch,
Chennai - 600 040.
Represented by its Authorized Signatory

...Applicant/Plaintiff
(in all the Applications)

Vs.

M/s.Sri Ganapathy Dairy,
A Partnership Firm,
Represented by its Partners,
Having office at
No.1, Thair Ittery Street,
Kannappa Nagar,
Coimbatore – 641 027.

...Respondent/Defendant
(in all the Applications)

Prayer in A.No.2027 of 2020:- This application filed under Order XIV Rule 8 of the O.S Rules R/w. Order VII Rule 14(3) of C.P.C., prayed to permit the applicant to file the documents as mentioned in the Application.

Prayer in A.No.2028 of 2020:- This application filed under Order XIV Rule 8 of the O.S Rules R/w. Order XVIII Rule 17 of C.P.C., prayed to reopen plaintiff witness evidence.

Prayer in A.No.2028 of 2020:- This application filed under Order XIV Rule 8 of the O.S Rules R/w. Order XVIII Rule 17 of C.P.C., prayed to recall the plaintiff witness for adducing additional evidence before the Court.

For Applicant/Plaintiff : Mr.G.Kalyan Jhabakh

For Respondent/Defendant: Mr.H.Karthik Seshadri

COMMON ORDER

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These applications have been filed by the plaintiff in the suit, seeking permission to file additional documents, to reopen the evidence of the plaintiff and to recall the witness examined on behalf of the plaintiff for adducing additional evidence.

2.Even before examining the averments in the affidavit, it must be stated that during trial, both the parties were given sufficient opportunity to tender evidence and they had also taken the advantage of the same.

3.The plaintiff had examined one witness as PW-1, whose cross examination was completed on 04.10.2019. Thereafter, the defendant had also examined one witness as DW1 and cross examination was completed on 19.02.2020. The matter was then posted before this Court for arguments.

4.At this stage, the plaintiff had filed the present Applications seeking permission to file additional documents, seeking to reopen the evidence on the side of the plaintiff and to recall the witness examined on the side of the plaintiff, for marking additional documents.

5.In the affidavit filed in support of the applications, the Authorized Signatory of the plaintiff Company had stated that after the evidence of the plaintiff was closed on 04.10.2019, the defendant filed Application No.7708 of 2019, seeking permission to file additional documents, which documents have not been mentioned in the written

statement. The said application was allowed on 15.10.2019 and a learned Single Judge of this Court had stated that the documents shall be received subject to proof and relevancy. It was also noted that the respondent in the said application namely, the plaintiff had not raised serious objections. It was also stated that if there were any objections, they can be raised and shall be recorded at the time of marking the documents and shall be dealt with at the time of disposal of the suit.

6.In the affidavit, it had been further stated that the plaintiff now seeks to bring on record relevant documents to establish use of the trademark “ARUN” from 1970. It had been stated that the plaintiff had adopted the trademark “ARUN” as early as 1970 and the business structure of the plaintiff had evolved and it is now a Public Limited Company. It had been stated that the plaintiff had also applied for Legal User Certificates for the trademark “ARUN” which had been granted in their favour and they had obtained the same only in December 2019 and were not in the possession of the same at the time of filing the suit. It was stated that the Legal User Certificates of the trademark registrations had been obtained for the period till the month of October 2018 and were now sought to be filed as additional documents.

7.It was further stated that a consolidated list of distribution channels from various States including Tamil Nadu, Kerala, Andhra Pradesh, Telangana and other States could not be filed along with the plaint. However, they were mentioned in the plaint. It was stated that they were not filed owing to procedural / administrative challenges involved in obtaining, gathering and consolidating the same.

8.It was further stated that along with the plaint, certificates from the Chartered Accountant certifying the total sales turnover and the promotional expenditure incurred till March 2018 have been filed. The original certificate is now being filed.

9. It was stated that the non-production of the above documents were owing to various factors such as constraint of time and non-availability of documents, difficulties in procuring the documents, change of counsels all of which were beyond the control of the plaintiff and not due to any willful intent to conceal the documents.

10.It was further stated that the Legal User Certificates are already available in the public domain and are not the documents created for the

purpose of case. It was stated that non-production of the documents were neither willful nor wanton. It was therefore stated that the additional documents may be permitted to be filed and for that purpose the evidence of the plaintiff may be reopened and the witness of the plaintiff may be re-examined for marking of the said documents.

11.A common counter affidavit had been filed. It was stated that the documents stated to be produced were always in the custody of the plaintiff and now are being produced without proper explanation. It was stated that the documents are produced only to improve the case of the plaintiff. It was stated that the Commercial Courts Act is a special enactment brought in for speedy disposal of cases.

12.The timeline of the progress of case was also given in the counter affidavit and it was alleged that the reason for delay in the progress of the trial in the case was entirely due to the plaintiff. It was also stated that the application filed at the time of advancing arguments is prejudicial to the defendant. The reasons advanced that the additional documents produced by the defendant had given rise to fresh facts, has been denied. It was stated that in the written statement, it had been

categorically stated that the defendant had adopted the mark 'ARUN' as honest and concurrent user from 1989 for the manufacture of Ghee and the promoter of the business had commenced manufacturing Ghee and Butter in 1967 itself. It was stated that the additional documents which were permitted by the Court to be produced on behalf of the defendants were with respect to the above facts. They were produced as additional documents, since old records have to be collated, which process took time beyond what was provided in the Commercial Courts Act, 2015.

13.It had been further stated that Ex.P15 had been marked, which is the photocopy of the Trademark Registration Certificate No.391526 and now the plaintiff seeks to produce the same certificate along with Legal User Certificate, which was issued in December 2019. It was stated that the plaintiff had already been cross examined on 04.10.2019, with respect to Ex.P15 and the lacunae in this document had also been pointed out. It was stated that Legal User Certificates are not necessary when the plaintiff had already produced the Trademark Registration Certificates themselves. It was stated that the reason for not filing the comprehensive list of distribution channels was to cover the lacunae which had emerged during cross examination with respect to Ex.P10. It

was further stated that the Auditor Certificate had been filed to fill up the lacunae emerging out of the questions raised in the cross examination. It was therefore stated that the applications are an abuse of process and the Applications should be dismissed.

14.Heard arguments advanced by Mr.G.Kalyan Jhabakh, learned counsel for the applicant / plaintiff and Mr.H.Karthik Seshadri, learned counsel for the respondent / defendant.

15.For the sake of convenience, the parties would be referred as plaintiff and defendant.

16.The suit in C.S.(Commercial) No.748 of 2018 had been filed under Sections 29 and 134 of the Trade Marks Act, 1999 and under the relevant provisions of the Original Side Rules and the Code of Civil Procedure, 1908 and the Commercial Courts Act, 2015, seeking a Judgment and Decree against the defendant for permanent injunction restraining the defendant from infringing the plaintiff's trademark "ARUN" by using the trademark "ARUN" and for permanent injunction restraining the defendants from passing off their products as that of the

plaintiff's product by using the offending trademark "ARUN" and also for consequential relief to surrender the products with the offending label and to render accounts of the profits earned and also for the costs of the suit.

17.Interlocutory Applications were filed seeking interim injunctions. The defendant had entered on caveat. Suit summons were also served under Order IV Rule 7(3) of the Original Side Rules. Written Statement was also filed. Thereafter, following the procedures stipulated under the Commercial Courts Act, 2015, Statements of Admission / Denial of documents were also filed. Issues were also framed on 22.07.2019. The parties were then invited to adduce evidence in accordance with the Case Schedule Management, which had also been filed.

18.One witness was examined on behalf of the plaintiff and the cross examination was completed on 04.10.2019. The defendant then filed A.No.7708 of 2019 on the same date, 04.10.2019 to file additional documents. This application was allowed on 15.10.2019, as stated, with a caveat that objections shall be recorded during the evidence and answered during the time of disposal of the suit.

19.The plaintiff then filed A.No.9643 of 2019 to amend the cause title regarding the legal status of the defendant. Orders were passed on the said application on 21.01.2020 permitting amendment.

20.Thereafter, evidence on the side of the defendant was recorded and cross examination of the witness for the defendant was completed on 19.02.2020. The matter was then posted for advancing arguments. At this stage, the plaintiff has come forward with these three Applications.

21.Mr.G.Kalyan Jhabakh, learned counsel for the plaintiff stated that the documents could not be filed on an earlier date, owing to the fact that they were not available and the 1st document relate to Legal User Certificates for the trademark 'ARUN', the 2nd document relate to the certificate issued by the Chartered Accountant regarding the sales turnover and the promotional expenses for the financial years 2013 -2018 and the 3rd document relate to the consolidated list of distribution channels between 13.12.2013 and 31.07.2020.

22.Learned counsel stated that necessity to file the said documents arose owing to the fact that the defendant themselves had introduced

additional documents which were not mentioned in the written statement and therefore stated that it would only be just and proper that the applications are allowed and the documents be taken on record and the evidence on the side of the plaintiff be reopened and witness examined again for that purpose.

23.Mr.H.Karthik Seshadri, learned counsel for the defendant however, opposed grant of any relief for the plaintiff in these Applications. The learned counsel stated that the plaintiff had been granted more than sufficient opportunity to produce documents on their side and they had produced photocopies, which were subjected to cross examination and the learned counsel stated that the applications have been filed with intention to fill in the lacunae which had arisen owing to the cross examination of the witness for the plaintiff.

24.The learned counsel pointed out the cross examination of the witness for the plaintiff, wherein, he had stated that prior to incorporation of the plaintiff's Company, the plaintiff was doing business in the name of a partnership firm M/s. Chandramohan & Co., but stated that documents indicating that the assets and liabilities of M/s.

Chandramohan & Co., were taken over by the plaintiff have not been produced and that documents with specific reference to the brand name 'ARUN' had been taken over by the plaintiff Company had also not been produced.

25.Cross examination with respect to the audited balance sheets was also pointed out, wherein, the witness stated that though the promotional expenditure had been mentioned in the plaint, the audited balance sheets had not been produced.

26.The learned counsel also pointed out the cross examination relating to the sales turnover, advertisements expenses or promotional expenditure with specific reference to Exs.P11, P12, P13 and P14 and stated that in those documents there was no reference to the audited balance sheet and that the said documents are false documents. It was also pointed out that the Legal User Certificates are being produced to clean up the lacunae already created during cross examination. The learned counsel therefore stated that the applications should be dismissed.

27.The defendant had earlier filed A.No.7708 of 2019, seeking permission to produce additional documents. This application was filed on 04.10.2019, on same date when cross examination of PW1 had been completed. The documents which were sought to be produced under that application included the book of record of sales of the defendant between 1964 and 1966, advertisement and promotion expenditure bills between 1989 to 2018, approval from the Agricultural Officer for usage of Agmark in the pouch of the defendant in the year 2000 and GST Registration Certificate, Certificate of Importer and Exporter Code and such other documents.

28.In the affidavit filed in support of the said Application, the defendant had stated that the said documents were filed to substantiate their case that there was no infringement of the plaintiff's trademark "ARUN" and that there was no passing off of the plaintiff's products by the defendant. It had also been stated that the documents could not be filed along with the written statement as they could not be obtained in a short span of time as they included old records of the defendant. It was stated that the documents were gathered after earnest efforts and the delay in filing was neither willful nor wanton. That application, as stated

above, came to be considered by a learned Single Judge of this Court on 15.10.2019 and noting that the counsel for the plaintiff had not raised serious objections and subject to proof and relevancy and for objections if any raised, to be decided at the time of advancing arguments, the defendant was permitted to file those documents.

29. In the affidavit filed in support of the present applications, the plaintiff had stated that the defendant had not mentioned about the documents produced under A.No.7708 of 2019 in the written statement.

30. A perusal of the written statement shows that the defendant had claimed that they are a registered Partnership Firm registered on 01.06.1990 and had honestly adopted the label mark 'ARUN' and had been continuously using the mark from 1989. It was therefore claimed that they were the prior user. They also produced their sales turnover from the Assessment Year 1989 - 1990 onwards.

31. It was subsequently stated that Mr. Arunachalam, promoter of the defendant had actually commenced business in the year 1967 itself, manufacturing Butter and Ghee and had established the business

gradually and later converted the same into a Partnership Firm, Sri Ganapathy Dairy in the year 1987. It was stated that the Partnership Firm had been manufacturing and selling Ghee from 1989 under the brand name “ARUN”.

32.The relevant portion of the written statement alone had been extracted and though there was a remark that the business actually commenced in the year 1967, a categorical statement was made that the mark “ARUN” had been used on and from 1989 onwards.

33.It is to be noted that documents sought to be filed along with Application No.7708 of 2019 were also in the possession of the defendant at the time when the written statement was filed, but the reason stated for not filing the same was that the written statement had to be prepared within a time schedule and the documents being old, had to be collated and filed. Among other reasons, these are also the reasons now advanced by the plaintiff for filing the documents now under consideration.

34.It is a settled principal that the Trademark Registration Certificate cannot be used in legal proceedings and the Legal User Certificates are issued by the Registrar of Trademarks which are actually documents in public domain. The Legal User Certificates would give the details, whether the mark which had been registered had been renewed periodically and whether the registration is subsisting as on date. It is not a new document by itself. It is an extension of the Registration Certificate and it only signifies that the registration granted subsists and has been renewed.

35.The learned counsel for the defendant had pointed out Ex.P15 and stated that the documents are now being filed only to cover the lacunae as the document originally filed was inadmissible.

36.The suit being one for infringement and passing off and the registration of the trademark “ARUN” by the plaintiff not being questioned or disputed in the written statement, I hold that the plaintiff should be granted permission to produce necessary documents relating to such registration.

37.The documents relating sales turnover and advertisement expenditure relate only to relevant facts to the reputation of the plaintiff. Similarly, the documents relating to distributorship chain are also relevant only to show the extent of the reputation of the plaintiff. The fact in issue in the instant suit is whether the plaintiff has obtained registration of their trademark and whether such registration is in force as on date. To that extent, among the three documents now sought to be filed, I hold that the 1st document is necessary for adjudicating the issues raised by the plaintiff in the suit. With respect to the 2nd and 3rd documents, I hold that the plaintiff will have to rely on the pleadings already pleaded and the evidence already let in and their weightage will have to be analysed at the time of arguments.

38.Order XI of the Code of Civil Procedure, 1908 had been amended with the introduction of the Commercial Courts Act, 2015, under Order XI Rule 1, it had been stipulated that the plaintiff shall file a list of all documents in their possession, pertaining to the suit, along with the plaint, including, documents referred to and relied on by the plaintiff in the plaint, but also relating to any other matter in question.

39.However, it had been provided that this Rule will not apply to documents produced by the plaintiff in answer to any case set up by the defendant subsequent to the filing of the plaint. This is a crucial aspect which permits the plaintiff to file additional documents to counter any stand taken by the defendant in their written statement. In this case, the defendant produced additional documents after completing the cross examination of the witness for the plaintiff. Naturally, this gives rise to cause for the plaintiff to produce additional documents.

40.Order XI Rule 1 is extracted below:

“1. Disclosure and discovery of documents.

—(1) Plaintiff shall file a list of all documents and photocopies of all documents, in its power, possession, control or custody, pertaining to the suit, along with the plaint, including:—

(a) documents referred to and relied on by the plaintiff in the plaint;

(b) documents relating to any matter in question in the proceedings, in the power, possession, control or custody of the plaintiff, as

on the date of filing the plaint, irrespective of whether the same is in support of or adverse to the plaintiff's case;

(c) nothing in this Rule shall apply to documents produced by plaintiffs and relevant only—

(i) for the cross-examination of the defendant's witnesses, or

(ii) in answer to any case set up by the defendant subsequent to the filing of the plaint, or

(iii) handed over to a witness merely to refresh his memory.”

41.Order XI Rule 5 is as follows:-

“(5) The plaintiff shall not be allowed to rely on documents, which were in the plaintiff's power, possession, control or custody and not disclosed along with plaint or within the extended period set out above, save and except by leave of Court and such leave shall be granted only upon the plaintiff

*establishing reasonable cause for non-disclosure
along with the plaint.”*

42.It is thus seen that if a defendant had set up a case subsequent to the filing of the plaint, then, the plaintiff shall be permitted to file further documents and if they were in possession of the plaintiff, but not disclosed in the plaint, they can be filed only if leave is granted by the Court on establishing reasonable cause for non-disclosure along with the plaint.

43.In the instant case, as pointed out above, on the very same day, 04.10.2019, when the cross examination of the plaintiff witness was completed, the defendant filed a series of documents in A.No.7708 of 2019. Naturally, the plaintiff will have to be given an opportunity to answer those documents. Even if the, present documents are not directly related to the documents produced as additional documents by the defendant, still the Legal User Certificates had been received by the plaintiff only in Dec-2019. They are documents already available in the public domain.

44. Section 137 of the Trade Marks Act, 1999, is as follows:-

“Sec.137. Evidence of entries in register, etc., and things done by the Registrar.—(1) A copy of any entry in the register or of any document referred to in sub-section (1) of section 148 purporting to be certified by the Registrar and sealed with the seal of the Trade Marks Registry shall be admitted in evidence in all courts and in all proceedings without further proof or production of the original.

(2) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act or the rules to make or do shall be prima facie evidence of the entry having been made, and of the contents thereof, or of the matter or things having been done or not done.”

45.The Legal User Certificates had been issued only under Section 137 of the Trade Marks Act, 1999. They shall be prima facie evidence of the entries having been made, and of the contents of the certificates. No doubt, the documents are being produced after conclusion of trial, but the documents relate to issues raised in the plaint and on which the parties are now litigating.

46.But this reason would not hold for the certificates of the Chartered Accountant and the consolidated list of distribution channels. As stated they are not directly related to the fact in issue, but are only relevant to the fact in issue when normally reputation of the plaintiff will have to be established, since it is a suit laid under Section 29 of the Trade Marks Act, 1999. The evidence on that line had already been recorded on those issues cannot be permitted to be revisited.

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47.I therefore hold that the plaintiff can be granted permission only to file Document No.1 relating to Legal User Certificates which are documents already under public domain. The other two documents cannot be permitted to be introduced at this stage.

48.With these observations,

i).A.No.2027 of 2020 is allowed only insofar as the Document No.1 is concerned namely, Legal User Certificates for the trademark “ARUN” for the period 1982 to 2018, but dismissed with respect to other two documents namely, Chartered Accountant certificates and consolidated list of distribution channels.

ii).A.No.2028 of 2020 to reopen plaintiff witness evidence is allowed insofar as Document No.1 alone is concerned.

iii).A.No.2029 of 2020 to recall the plaintiff witness for adducing additional evidence is allowed insofar as Document No.1 alone is concerned.

iv).All these applications are partly allowed. No order as to costs.

15.10.2020

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Index : Yes / No
Internet : Yes / No
Speaking order : Yes / No

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C.V.KARTHIKEYAN, J.,

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Pre-delivery order made in
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