

A.No.3240 of 2008
in
C.S.No.759 of 2007

R.SUBRAMANIAN, J.

This application has been filed by the defendant in the suit seeking to revoke the leave under Clause 12 of the Letters Patent in A.No.5800 of 2007.

2. The suit is one for permanent injunction to restrain the defendant from passing off its goods as that of the plaintiffs. The claim of the plaintiffs is that they are engaged in manufacture and sale of fried snacks in the name of FRYUMS & YUMMIES. Contending that the plaintiffs have been in the market since 1987 and the defendant who is a competitor has launched ready to cook snacks with deceptively similar name YUMMIEZ, the plaintiff has come up with the suit. According to the plaintiff, the sale of the goods of the defendant within the jurisdiction of this Court would confer jurisdiction of this Court to entertain a passing off action. Claiming that the goods are sold within the jurisdiction of this Court and producing certain documents to show such instances of sales, the plaintiffs sought for leave to institute the suit in this Court. This Court had granted the application.

3. Upon service, the defendant has come up with this application for revocation of leave, on the ground that mere sale of the defendant's goods within the jurisdiction of this Court would not cloth this Court with the power or jurisdiction to decide the passing off action. It is also pointed out that the plaintiffs have in fact approached the District Court, Thiruvallur with a similar suit in O.S.No.102 of 2007. The District Court, Thiruvallur, found that it had no jurisdiction and rejected the plaint. The order rejecting the plaint was not challenged. Thereafter, the plaintiffs have come up with the present suit with this application for leave to sue. It is also contended that this Court while granting leave under Clause 12 of the Letters Patent should also look at the cause of action alleged and the doctrine of forum conveniens would also apply.

4. Heard Mr.Madhan Babu, learned counsel appearing for the applicant and Mr.Rahul M.Shankar, learned counsel appearing for the respondents.

5. Mr.Madhan Babu, learned counsel appearing for the applicant would draw my attention to the judgment of the Full Bench of this Court in *M/s.Duro Flex Pvt Ltd., Vs. M/s.Duroflex Sitzings System and Another* reported in **2014 (5) LW 673**, the judgment of the Hon'ble Supreme Court in *Kusum Ingots & Alloys Ltd. Vs. Union of India and another* reported in **2004 (6) SCC 254** and the judgment of the Calcutta High Court in *Madanlal Jalan Vs. Madanlal and others* reported in **AIR 1949 Cal 495**.

6. According to Mr.Madhan Babu, a combined effect of those judgments of the Full Bench, Hon'ble Supreme Court and the Calcutta High Court would make it clear that the Court has to look into the concept of forum conveniens while considering grant of leave and the mere fact that a small fraction of cause of action arose within the jurisdiction of this Court would not be sufficient to grant leave under Clause 12 of the Letters Patent. It is the further contention that the convenience of the defendant must be predominant in the mind of the Court when the Court considers the application for leave.

7. Contending contra, Mr.Rahul M.Shankar, learned counsel appearing for the respondents would submit that neither the Hon'ble Supreme Court of India nor the Full Bench have held that convenience of the defendant alone has to be looked into.

8. While dealing with the powers of the High Court under Article 226 of the Constitution of India, the Hon'ble supreme Court in ***Kusum Ingots & Alloys Ltd. Vs. Union of India and another*** reported in **2004 (6) SCC 254** pointed out that when two or more High Courts have jurisdiction to entertain the writ, the choice of forum will be with the petitioner.

9. The Hon'ble Supreme Court after referring to the judgment of the Calcutta High Court in ***Madanlal Jalan Vs. Madanlal and others*** reported in **AIR 1949 Cal 495**, held that the forum conveniens would be an aspect that should be considered by the Courts while granting leave in civil suits and by the Constitutional Court while exercising jurisdiction under Article

226 of the Constitution of India.

10. Mr.Rahul M.Shankar, learned counsel would also rely upon the judgment of this Court in *Sulphur Mills Limited Vs. Dayal Fertilizers Pvt Ltd. And 3 others* reported in 2020 (8) MLJ 544 in support of his submission that even if a part of the cause of action had arisen within the jurisdiction of this Court, this Court can entertain the suit particularly in a passing off or infringement action.

11. I have considered the submissions of the counsel appearing for the parties.

12. As already pointed out leave was granted as early as in the year 2008. While the application for injunction was disposed of, there was an appeal against the orders passed in the injunction application in O.S.A.No.378 of 2008 and the application to revoke leave, though filed in the year 2008, was not taken up. Thereafter, the Division Bench in

O.S.A.No.378 of 2008 requested the Single Judge to dispose of the application for revocation of leave.

13. Mr.Madhan Babu, learned counsel appearing for the applicant/defendant would not dispute the fact that the products of the defendant are sold within the jurisdiction of this Court. Therefore, the fact that a part of the cause of action had arisen within the jurisdiction of this Court is not in dispute. The question will be only forum conveniens. Whether this Court while deciding on the grant of leave should look into convenience of the defendant alone or look into the convenience of both the parties would be the moot question.

14. The Full Bench of this Court in *M/s.Duro Flex Pvt Ltd., Vs. M/s.Duroflex Sitzings System and Another* reported in 2014 (5) LW 673 had after considering the judgment of the Calcutta High Court in *Madanlal Jalan Vs. Madanlal and others* reported in AIR 1949 Cal 495 case while answering the following question that was referred to it

*II. Whether the principles of forum
conveniens or analogous principles apply to
consideration of an application for leave to sue
under Clause 12 of the Letters Patent in case
part of cause of action arises at Chennai?*

held as follows:

*The test applied is of appropriateness or
suitability of the forum which ought to apply,
whether it be called forum conveniens or that the
jurisdiction of the Court under Section 20 of the
Code of Civil Procedure is different from Clause
12 of the Letters Patent (Food Corporation of
India case (supra)).*

*We are thus of the view that in
considering an application for grant of leave or
revocation thereof, the appropriateness or
suitability of the forum would be material and to
that extent, principle akin to forum conveniens
would apply.*

15. The Hon'ble Supreme Court in *Kusum Ingots & Alloys Ltd.*

Vs. Union of India and another reported in **2004 (6) SCC 254** considered
the question of forum conveniens in the context of jurisdiction under Article

226 of the Constitution of India. The Hon'ble Supreme Court had found that the test of forum conveniens could be applied even in the case under the writ jurisdiction. While doing so, the Hon'ble Supreme Court after referring to various judgments including the judgment of the Calcutta High Court in ***Madanlal Jalan Vs. Madanlal and others*** reported in ***AIR 1949 Cal 495*** case concluded as follows:-

The said decision is an authority for the proposition that the place from where an appellate order or a revisional order is passed may give rise to a part of cause of action although the original order was at a place outside the said area. When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum (emphasized applied)

16. A similar issue was considered by the Division Bench of this Court in ***Sulphur Mills Limited Vs. Dayal Fertilizers Pvt Ltd. And 3 others*** reported in ***2020 (8) MLJ 544***. The Division Bench considered the judgment of the Hon'ble Supreme Court in ***Kusum Ingots & Alloys Ltd. Vs.***

Union of India and another reported in **2004 (6) SCC 254** and the Full Bench of this Court in ***M/s.Duro Flex Pvt Ltd., Vs. M/s.Duroflex Sitzings System and Another*** reported in **2014 (5) LW 673**, and observed as follows:

However, in suit filed for a bare injunction based on the specific averment in the plaint that the respondents/ defendants were offloading their offending products in violation of the appellant's/ plaintiff's patent within the jurisdiction of this court, the leave already granted by the Court cannot be revoked. It would be preposterous to drive the appellant/ plaintiff to another jurisdiction where the appellant/ plaintiff may not be able to get direct evidence. Further, the appellant/ plaintiff is the dominus litis. The plaintiff is entitled to choose not only the parties but also the defendants and the Forum within whose jurisdiction the cause of action or part of cause of action arises. It is for the defendants to show that there exist another forum which is more appropriate and convenient for trying the suit. Sine qua non for applying

Forum conveniens/ Forum non conveniens is appropriate. It is for the defendants to demonstrate the same.

17. The Division Bench further went on to point out that it is for the defendant to show that some other forum would be more convenient. No doubt, the defendant would claim that the Court at Bombay would have jurisdiction to entertain the suit, since the defendant has its Office at Bombay. In a passing off action, the cause of action would arise on the sale of the products containing the offending mark or a deceptively similar mark. If the sale happens within the jurisdiction of this Court, this Court would also have jurisdiction to try the same.

18. Admittedly, the plaintiff in this case is carrying on business within the jurisdiction of this Court and the defendant is also marketing its products within the jurisdiction of this Court. Merely because of the registered Office of the defendant is situate at Bomaby, the plaintiffs cannot be driven to Bombay to file the suit. The doctrine of forum conveniens is not restricted to one of the parties.

19. No doubt, the observations of the Calcutta High Court in *Madanlal Jalan Vs. Madanlal and others* reported in *AIR 1949 Cal 495* would lead to a suggestion that the forum conveniens principle should be applied to the convenience of the defendant. The subsequent decisions of the Full Bench of this Court or the judgment of the Hon'ble Supreme Court in *Kusum Ingots & Alloys Ltd. Vs. Union of India and another* reported in *2004 (6) SCC 254* which considered the concept of forum conveniens had not re-iterated the said conclusion of the Calcutta High Court. The Hon'ble Supreme Court has in fact in *Kusum Ingots & Alloys Ltd. Vs. Union of India and another* reported in *2004 (6) SCC 254* observed that the choice will be of the petitioner. If the statement of law made by the Hon'ble Supreme Court is applied, then choice in civil suit has to be left only to the plaintiff.

20. No doubt the Courts are not powerless to look into the cause of action and find out whether any other Court would be in a better position to consider the claim of the plaintiffs. The suit on hand is a simple passing off

action and the goods of the plaintiffs are manufactured and sold within the jurisdiction of this Court. The defendant is also marketing its goods within the jurisdiction of this Court. The fact that the defendant's products are being sold within the jurisdiction of this Court is not denied.

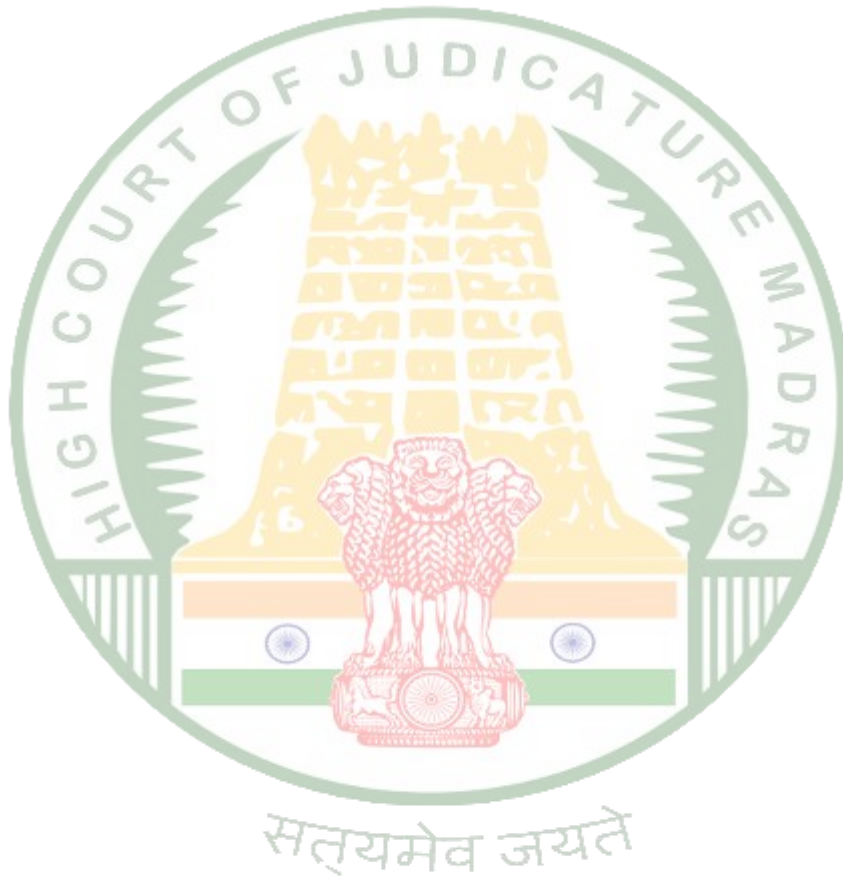
21. In the above circumstances, I am of the opinion that even applying the doctrine of forum conveniens, this Court would be in a better position to adjudicate upon the suit. I therefore do not find any reason to revoke the leave granted by this Court. This application is therefore **dismissed**.

22. It is seen that the suit was filed prior to the advent of Commercial Courts Act, 2015. The Commercial Division took cognizance of the suit only on 29.06.2021. Hence, time is granted to the defendant till 17.08.2021 for filing written statement under proviso to Section 15 of the Commercial Courts Act, 2015.

23. Post the suit on 17.08.2021.

20.07.2021

dsa

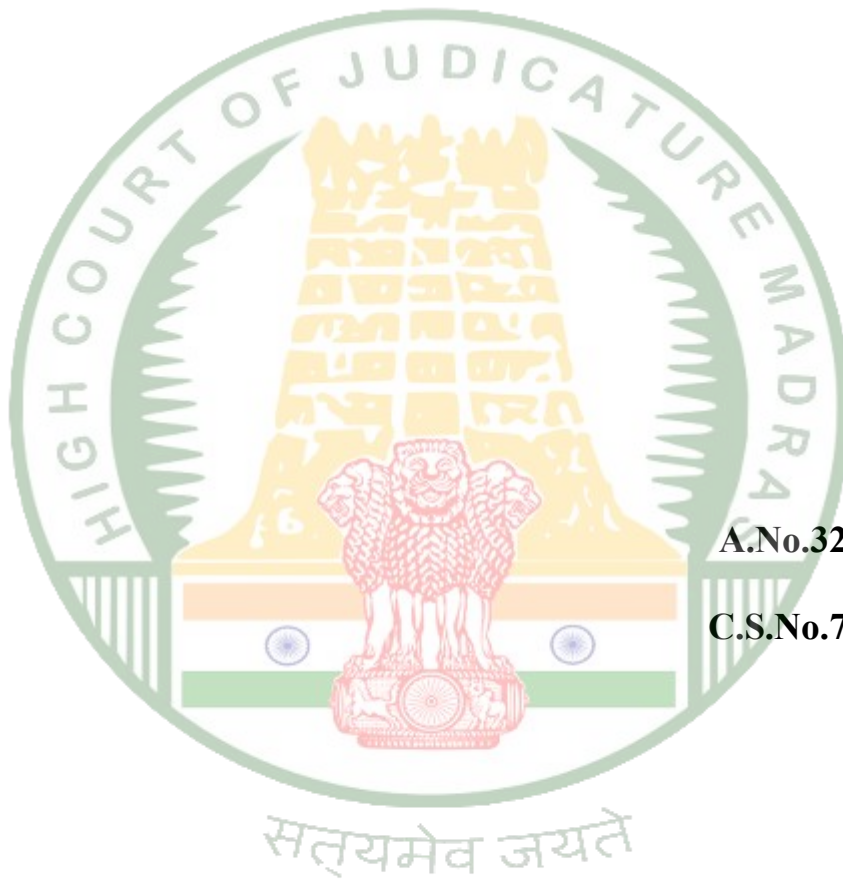


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