

IN THE HIGH COURT OF ORISSA, CUTTACK

CRP No.09 of 2021

In the matter of an application under Section 115 of the Code of Civil Procedure, 1908.

KD Gold and Diamonds
Private limited

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Petitioner

-Versus-

M/s. Khimji and Sons

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Opp. Party

For Petitioner:

Mr. M. Vashisht, Sr. Advocate,
M/s. S.K. Mohanty,
J. Mohanty, & R.R. Dash

For Opposite party:

Mr. G. Mukherji, Sr. Advocate,
M/s. S.D. Ray, M. Wright,
M. Agrawal, K. Banerjee,
A. Mishra, S. Acharya &
D.K. Dash

P R E S E N T:

MR. JUSTICE BISWAJIT MOHANTY

Date of Hearing: 13.10.2022

Date of Judgment: 20.10.2022

B. Mohanty, J. The present Civil Revision has been filed by the petitioner praying for quashing of the order dated 01.10.2021 passed by the learned District Judge, Khurda at Bhubaneswar in

C.S. No.02 of 2021 under Annexure-1. It has also prayed for rejection of the plaint or to pass any order/orders as would be deemed fit and proper.

2. According to the petitioner/defendant, the opposite party/plaintiff herein filed the above noted Civil Suit alleging infringement of trade mark by suppressing many material facts and documents before the learned District Judge, Khurda and obtained an interim order temporarily restraining the present petitioner/defendant from infringing trade mark “Khimji” of the opposite party/plaintiff. On 09.06.2021 vide Annexure-6, the learned District Judge, Khurda transferred the case record to the Court of learned Sr. Civil Judge (Commercial Court), Bhubaneswar for disposal of the same according to law notwithstanding the objection of the petitioner/defendant that since the specified value of the present suit was valued by the opposite party/plaintiff was Rs.1,00,000/-, the same cannot be transferred as the minimum pecuniary jurisdiction of the Commercial Court as per State Government notification was Rs.5,00,000/-. This has been averred at para 7 of the Civil Revision Petition. On 01.07.2021, the opposite party/plaintiff filed a petition under Order-6, Rule 17 under Annexure-23 before the Commercial Court, Bhubaneswar for change of its

name and for introducing the specified value of the subject of dispute to be at Rs.499.899 Crores. The petitioner/defendant filed his reply to the said petition under Annexure-9, which is same as Annexure-24 opposing the prayer for amendment. While such was the position, vide order dated 07.07.2021 under Annexure-10, the learned Commercial Court transferred the case back to the learned District Judge, Khurda considering the lack of jurisdiction holding therein that the plaintiff has choosen his option to value the suit at Rs.1,00,000/- and the said value can be taken into account for determining the specified value and in view of the relevant provisions of the Commercial Courts Act, 2015 for short 'the Act' and in view of the notification dated 11.12.2020 of the Government of Odisha specifying the pecuniary value of the commercial disputes to be not less than Rs.5,00,000/-, the Commercial Court had no pecuniary jurisdiction to entertain the suit. It is not disputed that none has challenged the order dated 07.07.2021. After the matter was transferred back to the learned District Judge, Khurda, the petitioner/defendant filed a petition under Order-7, Rule-11 on 15.07.2021 before the learned District Judge which has been enclosed as Annexure-11. Under Annexure-14, the opposite party/plaintiff filed its objection to such petition. While

so, vide order dated 19.07.2021 under Annexure-12, the learned District Judge partly allowed the Order-6, Rule-17 petition filed by the opposite party/plaintiff. While it allowed the proposed amendment at Sl. Nos.1 & 2 of the Order-6, Rule 17 petition however, the learned Court rejected the prayer for proposed amendment at Sl. Nos.3 & 4 as indicated in the Order-6, Rule 17 petition wherein an attempt was made by the opposite party/plaintiff to incorporate the specified value of the subject matter of the dispute i.e. market value of the trade marks right of mark “Khimji” owned by plaintiff valued at Rs.499.899 Crores in the plaint. It is not disputed by both the parties that none has challenged this order dated 19.07.2021 under Annexure-12. Ultimately, vide impugned order dated 01.10.2021 under Annexure-1, the learned District Judge, who did not allow the application of the opposite party/plaintiff for introduction of specified value i.e. the market value of the trade mark valued at Rs.499.899 Crores, relying upon the averments made at para-22 of the plaint regarding turnover of the opposite party/plaintiff which was Rs.1,37,56,229/- for the year 2019-20 determined such turn over as the specified value of the lis and transferred the case again to the Sr. Civil Judge (Commercial Court),

Bhubaneswar. Challenging the order under Annexure-1, the present Civil Revision has been filed.

3. Mr. M. Vashisht, learned Sr. Advocate for the petitioner/defendant submitted that once the learned District Judge, Khurda came to a conclusion that the valuation suit warranted that the matter should be decided by the Commercial Court, he should have rejected the plaint as prayed for by the opposite petitioner/defendant and should not have transferred the same to the Commercial Court. Secondly, he submitted that once the matter came within the purview of 'the Act' and since though the suit was filed on 22.02.2021 without any application filed under Order-39, Rule-3 and since the urgent petition under Order-39, Rule-3 read with Section 151 of C.P.C. was filed and moved later on 01.03.2021 after a gap of more than a week, it showed that there was no urgency in the matter and since the opposite party/plaintiff filed the suit without taking recourse to Pre-institution mediation as provided under Section 12-A of 'the Act', on that ground alone, the learned District Judge should have rejected the plaint. In this connection he relied upon the decision of the Supreme Court in the cases of **M/s. Patil Automation Private Limited & others Vs. Rakheja Engineers Private Limited**, 2022 (12) SCALE 153. Thirdly, he submitted

that on 13.11.2020 the State had notified for the establishment of Commercial Courts at the level of Sr. Civil Judge in the District of Sambalpur, Berhampur, Cuttack and Khurda in supersession of the earlier notification dated 28.10.2017. Therefore, opposite party/plaintiff should have filed the suit before the said Court since the lis was covered under 'the Act' instead of filing of the same before the learned District Judge. In this connection, he further submitted that even though by the date the suit was filed i.e on 22.02.2021 though the above noted Commercial Courts have not been made functional however, in the background of doctrine of necessity as espoused by the Supreme Court in the case of **Election Commission of India and another Vs. Dr. Subramaniam Swamy and another**, (1996) 4 SCC 104, the opposite party/plaintiff should have filed the suit before the Civil Judge, Sr. Division at Khurda. That not having been done, he submitted that the plaint should have been rejected on this account.

4. Mr. G. Mukherji, learned Sr. advocate appearing for the opposite party/plaintiff submitted that a perusal of the plaint would show that it is primarily a suit for injunction and valuation of such suit does not depend upon the valuation of the property involved. He also submitted that the turnover as

indicated in the plaint cannot be taken to be the market value of its trade mark rights. He further submitted that in the plaint there exists no estimation by the opposite party/plaintiff with regard to market value of its trade mark rights. He also submitted that the learned court below has gone wrong in determining the specified value on the basis of the turnover figures. He reiterated that the suit filed by the opposite party/plaintiff is principally for injunction when an intangible right of his in the form of trade mark was misused and accordingly, it has valued the suit at Rs.1,00,000/-. In such background, he submitted that no wrong has been committed by the learned District Judge in not rejecting its plaint however, by transferring the suit to the learned Commercial Court on the basis of a wrong reading of fact and law and by assessing the specified value at Rs.1,37,56,020/- which was not at all there in the plaint, the learned court below has committed a mistake. In such background, he submitted that the learned court below has gone wrong in transferring the suit to the Commercial Court as the same has been valued at less than Rs.5,00,000/-. He also submitted that the opposite party/plaintiff has filed C.M.P. No.615 of 2021, in which the present petitioner/defendant has already entered appearance, challenging the same impugned

order and praying that the present impugned order be set aside and the suit be transferred back to the learned District Judge, Khurda to proceed further in accordance with law. He also submitted that since its suit has been valued at Rs.1,00,000/- only, the same should be tried only by the learned District Judge as suit with such valuation will not come under the provisions of 'the Act'. In this context, he relied upon the decisions rendered by Rajasthan High Court in the case of **Neelkanth Healthcare Pvt. Ltd., Jodhpur Vs. M/s. Neelkanth Minechem Partnership Firm, Jodhpur, AIR 2018 Rajasthan 67**. With regard to contention of Mr. Vashisht that the suit was filed on 02.02.2021 without any application filed under Order 39, Rule-3, he submitted the same is not correct as such application was filed on the same date and the reference to the same is there in order dated 22.02.2021 under Annexure-3, wherein it has been clearly mentioned that another petition was filed praying for ex-parte hearing. On the same date, P.O. was on leave and though the same was adjourned to 03.03.2021, however a motion was made on 25.02.2021 for taking up the hearing. On that date, the learned District Judge directed for removal of defects and for putting up the matter on 01.03.2021 and accordingly temporary restraint order was passed on

01.03.2021. With regard to submission of Mr. Vashisht that once vide notification dated 13.11.2000, the State Government had notified Civil Judge (Senior Division), Bhubaneswar as a Commercial Court, therefore the opposite party/plaintiff should have filed the suit before the said Court, Mr. Mukherji submitted that the said notification made it clear that the establishment of such Commercial Court would be with effect from the date from which such Court would become functional. According to him, such Courts were made functional w.e.f. 07.06.2021 and since the suit in the present case with valuation of Rs.1,00,000/- was filed on 22.02.2021, it was rightly filed before the learned District Judge. In this context, he relied on the decision of the Calcutta High Court rendered in the case of **Sayan Sarker Vs. Austin Distribution Private Limited**, AIR 2021 Calcutta 169.

5. Heard Mr. M. Vashisht, learned Sr. Advocate for the petitioner and Mr. G. Mukherji, learned Sr. Advocate for opposite party.

6. It is well settled that in a matter involving a prayer for rejection of plaint averments made in the plaint are only material and are to be scanned. A perusal of the plaint under Annexure-2 series shows that the opposite party/plaintiff has filed the suit for infringement of trade mark under Section 134

of the Trade Marks Act, 1999. At para-22, the opposite party/plaintiff has indicated its turnover for the year 2005-2007 at Rs.26,94,386/- and for the year 2019-2020 at Rs.1,37,56,020/- and it has also indicated at para-25 that the prayer for injunction is valued at Rs.1,00,000/- for the purpose of court fee and jurisdiction. The plaint nowhere indicates market value of trade mark rights of the plaintiff as estimated by it. It is not disputed that for the purpose of present case, the only relevant provision is Clause (d) of Sub-Section (1) of Section 12 of 'the Act' as the right involved in this case is an intangible right. As per the said clause, the market value of the intangible right as estimated by the plaintiff (*emphasis supplied*) shall be taken into account for determining specified value. As indicated earlier, in the plaint no such estimation of market value of the trade mark rights of plaintiff has been indicated by the plaintiff. It is further well settled that in a suit for injunction, court fee is payable on the amount at which relief is valued and for the purpose of suit valuation, valuation of property is not material. A reading of the prayer at para-26 also shows that the suit is primarily a suit for injunction. Though a prayer has been made for delivery accounts of profits, however, the opposite party/plaintiff has not quantified the same amount as at the

stage of filing of suit the plaintiff may not be a position to know the quantum of such profits. It is equally well settled that when such a prayer for accounts is made, the plaintiff can put a tentative valuation. Correct amount can only be ascertained when accounts are examined and ordinarily the Court is not supposed to examine the correctness of valuation at the inception of the suit as the real value can only come to the picture after a suit is decreed.

Further a reading of Section 2 (1)(i) of 'the Act' makes it clear that specified value relating to a commercial dispute means the value of the subject matter in respect of a suit as determined in accordance with Section 12 of 'the Act'. A perusal of Section 12 of 'the Act' as indicated earlier shows that the relevant provision of law vis-à-vis that Section for our purpose is Clause-(d) of Sub-Section-1 of Section 12 which makes it clear that where the relief sought in a suit relates to intangible right, the market value of the said right **as estimated by the plaintiff** shall be taken into account for determining the specified value. Here it is not disputed that there exists no such estimation of the market value of the trade mark rights whose infringement is sought to be protected by the opposite party/plaintiff in the plaint. It may further be noted here that though the opposite

party/plaintiff wanted to amend its plaint for incorporating its estimation of the specified value of the subject matter i.e the market value of its trade mark rights at Rs.499.899 Crores, however, the same was not allowed by the learned District Judge himself vide order dated 19.07.2021 under Annexure-12. Further while returning the plaint to the learned District Judge, the Commercial Court, Bhubaneswar vide its order dated 07.07.2021 vide Annexure-10 has clearly observed that since the present plaintiff has chosen its option to value the suit at Rs. 1,00,000/-, the said value can be taken into account to determine the specified value. This order has not been challenged by anybody. In such background, the question arises as to whether by determining the specified value at Rs.1,37,56,020/- by relying upon the turnover given by the plaintiff, the learned District Judge acted with material irregularity? The answer to this question should be a resounding yes. As indicated above specified value in respect of an intangible right in trade mark depends upon the market value of the said right "as estimated" by the plaintiff. Here, admittedly, the opposite party/plaintiff has not indicated its estimation of such value in the plaint and when he wanted to incorporate the same by amendment, that was negated by the learned District

Judge vide order dated 19.07.2021 under Annexure-12. In such background, he ought not to have entered into the exercise of determining the specified value in absence of clear cut estimation of the same given by the plaintiff in the plaint particularly, when he himself has earlier rejected the introduction of the specified value by way of an amendment. This exercise of the learned District Judge also creates difficulty in the background of existence of order dated 07.07.2021 under Annexure-10 passed by the learned Sr. Civil Judge (Commercial Court), Bhubaneswar making an observation that the value of the suit of the plaintiff at Rs.1,00,00/- can be taken into account for determination of specified value, which has not been challenged by anybody. In this context, a reference can also be made to the grounds of challenge as indicated in Civil Revision petition itself at grounds No. A, B, C, D & E, which are quoted here under.

“A. For that, the present suit does not fulfils the test and ingredients of ‘specified value’ as per the Commercial Court Act, 2015 and further the present suit was never filed as a Commercial case as per the provisions of the Act, hence liable to be dismissed on this ground alone.

B. That the suo motu valuation of the present suit by enhancing the valuation to Rs.1.37 Crores and transferring it to Commercial Court is against the provisions Court fee valuation as the opposite party has never valued its suit at such amount.

C. For that the prayer for amendment of the opposite party with respect to specified value being rejected by the Court in the order dated 19.07.2021, there was no occasion for the Court to subsequently give its own interpretation and consider a figure mentioned in the plaint to be the specified value as has been done in the order dated 01.10.2021. Hence the impugned order is liable to be set aside on this ground alone.

D. For that the Court of the District Judge was not acting as a court of appeal so as to send the matter back to the Commercial court when the suit court has already given an observation that the specified value was Rs.1 lakh and had sent the matter back to the court of District Judge on 07.07.2021.

E. For that, the District Judge decided the amendment application under Order-6, Rule-17 vide order dated 19.07.2021 wherein the prayer of the plaintiff seeking amendment of the specified value was rejected. That order having attained finality could not have been recalled or reviewed by any subsequent order by the same court.”

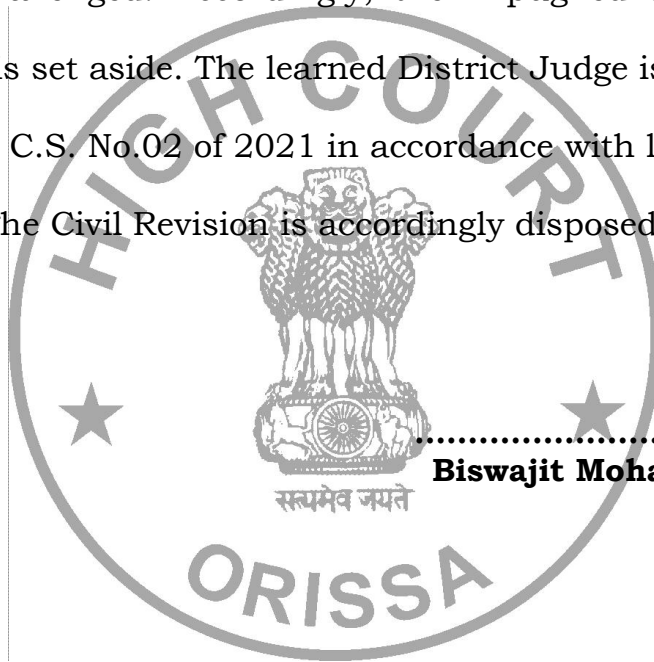
A combined reading of all these valid grounds would show that there was no occasion for the learned District Judge to subsequently give its own interpretation and to consider the figure mentioned in the plaint towards turnover to be specified value as has been done in order dated 01.10.2021 when no estimation of market value of trade mark rights was provided by the plaintiff in plaint itself. Therefore, in the background of the well settled principles of law that in a matter involving rejection of plaint only the averments made in the plaint are material and nothing else can be taken into consideration, this Court is of the

opinion that the suit filed by the plaintiff being principally a suit for injunction and since it has been valued at Rs.1,00,000/- despite being a commercial dispute cannot go before the Commercial Courts constituted under 'the Act' as the same was not covered under 'the Act' on account of less valuation. 'The Act' does not say that all kinds of commercial disputes should be tried before the Commercial Courts created by 'the Act'. Only those commercial disputes so far as Odisha is concerned whose specified value is more than Rs.5,00,000/- should be brought before the Commercial Courts or transferred to the Commercial Courts not all commercial disputes. In **Neelkanth Healthcare Pvt. Ltd., Jodhpur (supra)** Rajasthan High Court has made it clear that Civil Court's jurisdiction is not barred in Commercial dispute when the specified value does not exceed the prescribed limit. This Court humbly agrees with such opinion of Rajasthan High Court. However, one thing is made clear that if the learned District Judge was not satisfied with the valuation of the suit, he should have required the plaintiff to correct the valuation and to pay appropriate court fees on such valuation/revaluation after giving the plaintiff an opportunity on the issue of valuation. This has also not been done in the present case. In such background, this Court is of the opinion that the learned court below has

committed material irregularity in determining the specified value and in passing the consequential order of transfer. Therefore, the submission of the learned counsel for the petitioner that once the Court came to a conclusion that the matter should be tried under 'the Act' on the basis of the recalculation of specified value, it should have rejected the plaint, cannot be accepted as this Court has come to a conclusion that the present matter is not at all covered by 'the Act'. Since the present case is not covered by 'the Act', no question of violation of Section 12-A of the said Act arises and, accordingly, the decision cited by the learned counsel for the petitioner/defendant in the case of **M/s Patil Automation Private Limited & others** (supra) is of no help to the petitioner. Similarly, invocation of doctrine of necessity by the learned counsel for the petitioner in the background of State Government notification establishing the Commercial Courts in the district of Khurda on 13.11.2020 and the decision of the Supreme Court in the case of **Dr. Subramaniam Swamy** (supra) cannot be accepted in the background of the facts as discussed above particularly when provisions of 'the Act' are not at all attracted to a lis of this nature. It is reiterated that in a case of present nature, determination of specified value by the learned

District Judge afresh in the absence of any averment to that effect in the plaint and in the background of his earlier order dated 19.07.2021 under Annexure-12 rejecting the prayer of the opposite party/plaintiff to incorporate the specified value by way of amendment and observation of the Commercial Court in its order under Annexure-10 that since the suit has been valued at Rs.1,00,000/- and the same can be taken as the specified value, is clearly illegal and impermissible when both these two orders remain unchallenged. Accordingly, the impugned order under Annexure-1 is set aside. The learned District Judge is directed to proceed with C.S. No.02 of 2021 in accordance with law.

7. The Civil Revision is accordingly disposed of. No cost.



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Biswajit Mohanty, J.

Orissa High Court, Cuttack
The 20th October, 2022 /Prasant