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A.Nos.450 & 452 of 2022 and C.S.No.415 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on	28.03.2022
Order pronounced on	19.04.2022

CORAM

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Application Nos.450 & 452 of 2022
and
Civil Suit(Comm.Div) No.415 of 2020

Dr.Aravind Chander

... Applicant/Defendant
(in both applications)

vs.

1.Dr.S.Chandralekha
W/o.Dr.K.Veluswamy,
Proprietor, Having Office at
ISWARYA FERTILITY CENTER,
No.13, First Main Road,
Kasturibhai Nagar, Chennai- 600 0020.

2.M/s.Iswarya Fertility Services Pvt. Ltd.,
A Company incorporated under the
Companies Act, 1956.
Having its branch office at;
No.13, First Main Road,
Kasturibhai Nagar, Chennai- 600 0020.
Rep. By its Director Dr.S.Chandralekha

... Respondents/Plaintiffs
(in both applications)



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PRAYER IN A.NO.450 OF 2022: This Application is filed under Order XIV Rule – 8 of O.S. Rules r/w Order I Rule 13 of the CPC praying to dismiss the suit for non-joinder of necessary party in C.S.No.415 of 2020.

PRAYER IN A.NO.452 OF 2022: This Application is filed under Order XIV Rule – 8 of O.S. Rule r/w Order VII Rule 10 of the CPC praying to return the Plaint to the appropriate court since this Court does not have jurisdiction to entertain the present dispute.

For Applicant : Mr.P.H.Arvinth Pandian
Senior Counsel
For M/s.Arun C.Mohan
& Mr.S.V.Pravin Rathinam

For Respondents : Mr.P.S.Raman
Senior Counsel
for M/s.Gladys Daniel
& Ms.Revathy

COMMON ORDER

These two applications were filed by the Defendant. In Application No.452 of 2022, the Defendant prays for return of the plaint on the ground that this Court does not have the jurisdiction to entertain the suit. Application No.450 of 2022 is for dismissal of the suit for non-joinder of a necessary party. The application for return of plaint is dealt with first.



2. The Applicant/Defendant asserts that no part of the cause of action has arisen within the jurisdiction of this Court. The Applicant states that both the Applicant and the first Respondent/first Plaintiff have their principal place of business at Coimbatore. According to the Applicant, the second Respondent/Plaintiff has been unnecessarily joined as a party in order to file the suit at Chennai. With regard to the second Respondent/Plaintiff, it is stated that the said entity is not the registered proprietor of the trademark and, therefore, the second Respondent/Plaintiff is not entitled to sue for infringement. The Applicant also asserts that he is the registered proprietor of the trademark "ISWARYA KARUTHARITHAL MAIYAM" in Tamil and is, therefore, entitled to the benefit of Section 28(3) of the Trade Marks Act, 1999 (the Trade Marks Act). Consequently, it is contended that the suit is not maintainable before this Court. The Applicant relies on the judgment of the Hon'ble Supreme Court in *Indian Performing Rights Society v. Sanjay Dalia and Another (2015) 10 SCC 161 (Indian Performing Rights Society)*, wherein at paragraphs 17 to 24, the Hon'ble Supreme Court dealt with the scope of Section 134 of the Trade Marks Act. The Applicant contends that Sub-section 2 of Section 134 enables the filing of a suit for infringement of a registered trademark or a suit relating to any



right in a registered trademark at the place of residence or business of the plaintiff provided the plaintiff actually resides or carries on business at such place. By relying upon the aforesaid paragraphs, the Applicant contends that the Hon'ble Supreme Court laid down categorically that Section 134 does not enable a person having a principal place of business at a particular place, where the cause of action also arose, to sue at a distant place where a subordinate office is situated although no part of the cause of action arose at such place. By applying the said judgment to the facts of this case, the Applicant points out that the certificate of the chartered accountant at page 32 of the typed set of papers filed by the Respondents/Plaintiffs indicates the annual turn over for various financial years at Coimbatore, Tiruppur, Palaghat, Erode and Salem but not at Chennai. Similarly, with reference to page 316 of the said typed set of papers, it is contended that the principal place of business is at Coimbatore.

3. The Applicant also asserts that the Respondents/Plaintiffs have intentionally provided an address in Tiruppur as his place of residence in spite of knowing fully well that his place of residence is also at Coimbatore. On the merits of the dispute, the Applicant asserts that he is entitled to use



the mark in question as the registered proprietor thereof and also by virtue of the Respondents/Plaintiffs' acquiescence in the use of the said mark by the Defendant.

4. These contentions are refuted by the Respondents/Plaintiffs.

With specific reference to Section 134(2) of the Trade Marks Act, the Respondents/Plaintiffs state that a suit can be filed at the place where the person instituting the suit, or, any of them if there are more than one, actually and voluntarily resides or carries on business or personally works for gain. The Respondents/Plaintiffs state that only a limited company has a registered office, corporate office and branch office. By contrast, an individual may reside at one place and carry on business or personally work for gain at more than one place. As long as the suitor concerned is able to establish that he or she personally works for gain at the place where the suit is instituted, the suit is maintainable at such place as per sub-section 2 of Section 134 of the Trade Marks Act. The Respondents/Plaintiffs assert that the first Respondent/Plaintiff personally works for gain at the Iswarya Fertility Center at Adyar, Chennai, which is one of the principal places wherein the first Respondent/Plaintiff carries on business or personally



works for gain. The Respondents/Plaintiffs submit that they are ready and willing for the appointment of an advocate commissioner to inspect the premises of Iswarya Fertility Center at Adyar in order to verify the veracity of the above statement.

5. For reasons set out in the preceding paragraphs, the Respondents/Plaintiffs contend that the judgment of the Hon'ble Supreme Court in *Indian Performing Rights Society* does not operate against the Respondents/Plaintiffs. According to them, the ratio of the said judgment is that a person should not institute a suit by relying on a post box address at a place where such suitor does not carry on substantial activity. As regards the first Respondent/Plaintiff, it is asserted that she works personally for gain at the Adyar Center, which is one of her principal centres. Indeed, the Respondents/Plaintiffs also rely upon the first Respondent/Plaintiff's Aadhaar Card and Driving Licence which reflect the Chennai address. By drawing reference to the bills at pages 50 to 76 of the typed set of papers, the Respondents/Plaintiffs contend that all these bills disclose the existence of the fertility centre at Chennai. The Respondents/Plaintiffs also rely upon



the receipts at pages 78 to 101 and contend that such receipts also disclose the existence of the centre at Chennai.

6. On the merits, the Respondents/Plaintiffs contend that an action for passing off is maintainable notwithstanding the registration of a trademark by the Applicant/Defendant. In support of such contention, the Respondents/Plaintiffs rely upon the judgment of the Hon'ble Supreme Court in *S.Syed Mohideen v. P.Sulochana Bai* (2016) 2 SCC 683. With regard to the contention that the Respondents/Plaintiffs acquiesced in the use of the mark by the Applicant/Defendant, it is submitted that there was no acquiescence after the rift between the first Plaintiff and the Applicant/Defendant.

7. On examining Section 134, it is evident that a suit for infringement of a registered trademark or in relation to any right in a registered trademark may be instituted by the suitor(s) at the place where any of the suitors actually and voluntarily reside or carry on business or personally work for gain. The second Respondent/Plaintiff is a limited company with its registered office at Chennai. In addition, the first Plaintiff



has asserted that the Iswarya Fertility Center at Adyar, Chennai is one of the main centres. In support of such submission, the Respondents/Plaintiffs rely upon bills and receipts disclosing the Chennai center. The Applicant/Defendant contests such contention by relying upon ***Indian Performing Rights Society***. Paragraphs 17 to 24 of the said judgment interpret Section 134 of the Trade Marks Act and Section 62 of the Copyright Act, 1962 to conclude that the said provisions are not intended to enable the filing of a suit at the place with which the suitor has a tenuous connection. Therefore, the facts of each case should be examined to ascertain whether the connection of the suitor(s) to the place at which the suit is instituted is real and substantial or tenuous.

8. Turning to the facts of this case, the bills and receipts on record clearly disclose the existence of the Iswarya Fertility Center, Adyar at Chennai. In fact, the Respondents/Plaintiffs threw the gauntlet at the Applicant/Defendant and are agreeable to the appointment of an advocate commissioner to verify the existence of such center, including the scale of operation. It should be noticed that Sub-section 2 of Section 134 does not mandate that the suit should be filed only at the principal place of business



or the principal place where an individual personally works for gain. As stated above, as long as the connection between the suitor and the place of institution is real and substantial and not flimsy and tenuous, the suit is maintainable at the place of institution. On the facts of this case, and on the basis of documents produced at this juncture, there is no basis to conclude that the Respondents/Plaintiffs' connection with Chennai is flimsy and tenuous. Therefore, the application for return of plaint is rejected. The application to dismiss the suit for non-joinder of a necessary party remains to be considered.

9. Under Order I Rule 10 of CPC, a necessary party is a person in whose absence an effective decree cannot be passed and a proper person is one whose presence is necessary for the effective adjudication of all issues arising for consideration in the suit. In order to test whether the suit is liable to be dismissed for non-joinder of IFC IVF Private Limited, the inquiry should begin by examining the plaint. The Respondents/Plaintiffs have sued Dr.Aravind Chander for alleged infringement of trademark and passing off. Therefore, the question that arises for consideration is whether the reliefs prayed for by the Respondents/Plaintiffs can be granted in the



absence of IFC IVF Private Limited. If so, the suit is not liable to be dismissed for non-joinder of a necessary party. While on this issue, it should be borne in mind that a suit is not liable for dismissal for non-joinder of a proper party although an application for joining such party may be filed. The Applicant/Defendant asserts that IFC IVF Private Limited is in existence from the year 2020 and has continuously used the mark ISWARYA FERTILITY CENTER. The Applicant/Defendant further contends that the father of the Applicant and husband of the first Respondent/first Plaintiff is a Director and Shareholder of IFC IVF Private Limited. On the ground that the reliefs prayed for would have an impact on the use of the trademark by IFC IVF Private Limited, the Applicant/Defendant seeks dismissal of the suit.

10. Any suit, including the present suit, is an action between the parties thereto. Consequently, the decree is only binding as between the parties to the suit. Assuming that M/s.IFC IVF Private Limited has also used the mark, which is subject matter of the present suit, a stand-alone action only against the Applicant/Defendant herein is clearly maintainable. By virtue of the non-joinder of IFC IVF Private Limited, the



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Respondents/Plaintiffs will not have a decree which is enforceable against the said entity. However, it cannot be said that an effective decree cannot be passed against the Applicant/Defendant herein in the absence of IFC IVF Private Limited. Consequently, IFC IVF Private Limited is not a necessary party to the suit. Since it is not a necessary party, the suit is not liable to be dismissed for non-joinder of such party.

11. In sum, Application Nos.450 and 452 of 2022 are dismissed without any order as to costs. List O.A.No.776 of 2020 and Application No.451 of 2022 for hearing on 25.04.2022.

19.04.2022

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SENTHILKUMAR RAMAMOORTHY, J.

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Pre-Delivery Common Order in
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