A.Nos.1705, 1706 of 2022
in C.S.Nos.987 of 2017, 235 of 2020

SENTHILKUMAR RAMAMOORTHY, J.

C.S.No.987 of 2017 was filed by V.V.V. & Sons Edible Oils Limited against Damodar Foods and R.R.Global Enterprises seeking relief in respect of alleged trademark infringement by use of the impugned marks IDHAYAM and IDHAYAM SOUTH INDIAN DELITE. C.S.No.235 of 2020 was also filed by the same plaintiff but this suit is directed only against Damodar Foods. The relief prayed for in this suit is identical. In both suits, issues were framed and a joint trial was scheduled but was not proceeded with.

2. In both the suits, the defendants have filed applications to reject the plaint. The basis of the applications in the two suits is common. The applicants / defendants state that the respondent / plaintiff had filed several suits previously seeking identical relief against the defendants herein. In paragraph 5(vi) of the affidavit, the applicant set out details of four suits, including these two suits and two earlier suits, namely, C.S.No.726 of 2017 and C.S.No.434 of 2017. As regards C.S.No.726 of 2017, it is stated that the plaint was rejected by a judgment and decree dated 01.02.2019 in A.No.1948 of 2018 on the grounds of re-litigation, suppression of facts and the absence of cause of action. As regards C.S.No.434 of 2017, it is stated that the suit was dismissed

in final disposal through judgment and decree dated 23.08.2021 on multiple grounds, including suppression of facts, the existence of a registered trademark in the United States of America (the USA) in favour of Meenakshi Overseas LLC (Meenakshi Overseas) and on the ground that the defendant is not liable in terms of Section 29(6) read with Section 56 of the Trade Marks Act, 1999 (the Trade Marks Act).

3. Therefore, the applicants / defendants state that the respective plaint is liable to be rejected on the ground that the plaintiff had sued previously on an identical cause of action and therefore the respective suit is barred under Order 2 Rule 2 CPC. In addition, the applicants / defendants contend that the suits are barred by *res judicata* because C.S.No.434 of 2017, in which the parties are common and issues are substantially similar, was adjudicated on merits.

4. Oral arguments were advanced on behalf of the applicants / defendants by Mr.K.Harishankar, learned counsel, and on behalf of the respondent / plaintiff by Mr.R.L.Ramani, learned senior counsel, and Mr.V.Anand, learned counsel.

5. Learned counsel for the applicants referred to paragraphs 8 to 10 of

the plaint in C.S.No.434 of 2017 and pointed out that the cause of action, as indicated therein is identical to the cause of action in the present suits. By referring to the judgment of this Court in C.S.No.434 of 2017, he pointed out that all issues canvassed in these two suits were duly considered and decided in the said suit. With specific reference to the proceedings in the USA relating to the registration of the Trademarks IDHAYAM and IDHAYAM SOUTH INDIAN DELITE, he submitted that these contentions were considered in paragraphs 35 and 36 of the judgment.

6. He further submitted that the allegation of fraud is misconceived because the alleged perpetrator of the fraud, Meenakshi Overseas, is not a party in the suit. He further submitted that particulars of fraud as per Order VI Rule 4 of the Code of Civil Procedure, 1908 (the CPC) were not set out in the plaint. He concluded his submissions by pointing out that these suits were instituted by resorting to clever drafting so as to create the illusion that a distinct cause of action exists as regards these suits.

7. In response, learned senior counsel and learned counsel for the respondent / plaintiff submitted that the cause of action for these suits is distinct in as much as every sale of products bearing the infringing mark constitutes a

distinct cause of action. In support of this proposition, reliance was placed on the judgment of the Hon'ble Supreme Court in *Bengal Waterproof Ltd v. Bombay Waterproof Manufacturing Company and another, AIR 1997 SC 1398,* particularly paragraph 6 thereof. By pointing out that the present suits were triggered by the despatch of subsequent consignments of goods to which the impugned marks were applied in India, he submitted that these suits are not barred under Order 2 Rule 2 CPC.

8. While conceding that the scope of Section 11 of CPC is wider, it was submitted that the registration obtained by Meenakshi Overseas in the USA was based on a misrepresentation that the word IDHAYAM has no meaning in any foreign language. Since the registration of the mark was founded on misrepresentation and fraud, it was submitted that such misrepresentation and fraud vitiates all transactions founded thereon. On this issue, learned counsel relied upon several judgments such as *A.V.Papayya Sastry & others v. Government of Andhra Pradesh & others, 2007-4-L.W.139, S.P.Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. & others, 1994-1-L.W.21, and Raju Ramsing Vasave v. Mahesh Deorao Bhivapurkar & Others, 2008(9) SCC 54*. With reference to the factual context, it was submitted that no findings were recorded in the judgment in C.S.No.434 of 2017 with regard to

the fraud perpetrated for obtaining trademark registration. Therefore, it was submitted that the question of fraud and the implications thereof survive for consideration in the present suits.

9. In light of these contentions, the sustainability of these applications should be examined. The scope of Order VII Rule 11 CPC is undoubtedly restricted, but the said provision is not intended to provide an illusory remedy and may be invoked at any stage of a suit. The applicants / defendants presented these applications primarily on two grounds. The first ground is that the cause of action for these suits is identical as the cause of action in the earlier suits, i.e. C.S.No.434 of 2017 and C.S.No.726 of 2017. In order to decide an application for rejection of plaint, the plaint should be subjected to close scrutiny. The plaint in C.S.No.987 of 2017 refers to the earlier suits by referring, in paragraph 13, to the order of injunction granted in O.A.No.585 of 2017 in C.S.No.434 of 2017. In addition, the said paragraph refers to the plaintiff's discovery in 2017 that the defendant was applying the impugned mark IDHAYAM to products exported from India. Likewise, paragraph 13, which is the cause of action paragraph in C.S.No.235 of 2020, also refers to C.S.No.434 of 2017 and C.S.No.987 of 2017. Reference is also made to the discovery of the application of the impugned mark by the defendant in 2017

and to orders passed in the earlier proceedings. Since the plaint draws reference to the earlier suits, reference to those suits and the orders passed therein may be made for purposes of deciding the present applications.

10. The judgment in C.S.No.434 of 2017 is on record. On perusal thereof, it is evident that the plaintiff is common to the said suit and the present suits. The sole defendant therein is Damodar Foods, which is a defendant in both the suits, except that one additional defendant has been joined in C.S.No.987 of 2017. The added defendant in C.S.No. 987 of 2017 is the agent of Damodar Foods in the USA. C.S.No.434 of 2017 was for remedies in respect of alleged trademark infringement and passing off relating to the use of the impugned mark IDHAYAM by the defendant. The plaintiff raised various grounds on which relief was prayed for, including the allegedly fraudulent registration of the mark IDHAYAM in the USA by Meenakshi Overseas. All the proceedings relating thereto in the USA were also referred to. After considering these submissions in detail, this Court concluded that the products are not similar or identical; that Meenakshi Overseas is the registered proprietor of the trademarks IDHAYAM and IDHAYAM SOUTH INDIAN DELITE, and that the plaintiff cannot prevent the defendant from applying the said marks in India by relying upon Section 29(6) and 56 of the Trade Marks Act.

11. Thus, this Court delivered a judgment on the merits of the dispute

after considering the contentions of both parties and the evidence placed on record. While learned senior counsel / learned counsel for the respondent / plaintiff contended that each sale constitutes a distinct cause of action, the said contention cannot be accepted. While every sale of a product bearing the impugned mark constitutes a material fact in the bundle of facts constituting the cause of action and may therefore be relied upon for purposes of limitation, it cannot be said that the continued sale of products bearing the impugned marks by the defendant/s provide a distinct cause of action to the plaintiff. If so interpreted, notwithstanding earlier judgments of this Court, the plaintiff would be in a position to re-agitate and re-litigate the matter *ad nauseum* based on subsequent events. Therefore, the contention that the despatch of subsequent consignments of goods gives rise to a distinct cause of action is rejected. The contention that orders passed in the earlier proceedings give rise to a distinct cause of action is also untenable in as much as the suits were decided against the plaintiff herein. Even if the plaintiff had material to establish that the interim orders had been violated while in force, the remedy in respect thereof is by applying by Order XXXIX Rule 2A CPC and not by filing a separate suit.

12. Turning to Section 11 CPC, as correctly admitted by learned

counsel for the plaintiff, the scope of Section 11 is wide. The main basis on which the plea of *res judicata* was resisted by the plaintiff was that the fraud perpetrated in the USA was not addressed in the earlier judgment dated 23.08.2021. On this issue, it should be noticed that the contention of fraud and misrepresentation of the plaintiff is on the basis of a statement made before the trademark registration authorities in the USA by Meenakshi Overseas and not by the defendants herein. Moreover, such alleged misrepresentation or fraud was played on the authorities in the USA. Consequently, any challenge to the allegedly fraudulent registration should be before the appropriate appellate authorities in the USA. Indeed, it appears from the documents on record that such a challenge has been mounted in the USA. As regards proceedings in India, ad best, it would be open to the plaintiff to contend that the registration obtained in the USA by playing a fraud should be disregarded in course of deciding the dispute in India. This contention could have been raised in the earlier suit before this Court. Even assuming that the said contention was not addressed or determined in such earlier proceedings, the appellate remedy is always available to the plaintiff in such regard.

13. Thus, the applicant(s)/ defendant(s) is entitled to succeed on both

grounds. Consequently, the respective plaint is rejected. It is needless to say that it is open to the plaintiff to canvass its grievances in appropriate appellate proceedings as regards the judgment in the earlier suits.

01.09.2022

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