

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.141 OF 2023
A/W
INTERIM APPLICATION NO.1360 OF 2023
IN
FIRST APPEAL NO.141 OF 2023**

1. 1RM Fitness Equipment's]
A Partnership Firm registered under]
The Indian Partnerships Act, 1932]
Having its registered office at:]
S. No.391/4, In front of Sandvik]
Company, Old Mumbai Pune Road,]
Dapodi, Haveli, Pune – 411 012.]
Through its Partner]
Mr. Amar Prakash Shivarkar]

2. Mr. Amar Prakash Shivarkar]
Partner of 1 RM Fitness Equipment's]
Age: Adult, Occupation : Business]

3. Mrs. Rashmi Amar Shivarkar]
Partner of 1 RM Fitness Equipment's]
Age: Adult, Occupation : Business,]
Both Partners residing at:]
D-11, Sai Raj Residency, Navi Sangavi,]
Haveli, Pune – 411 027.]

Appellants/
Ori. Plaintiff

Vs.

Ms. Priyanka Barua]
Age: Adult, Occu : Business]
R/at: RZ-J11A, West Sagar Pur,]
New Delhi – 110046]

Respondent
Ori. Defendant

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Mr. Nikhil Dongre a/w Mr. Omkar Kudale, for Appellants.

Mr. Aditya Soni a/w Ms. Rama Somani a/w Chetan Alai, for Respondent.

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 26th JULY, 2023.
PRONOUNCED ON : 2nd AUGUST, 2023.

JUDGMENT:

1. This appeal challenges an order of rejection of plaint passed under Order-7, Rule-11 of the Code of Civil Procedure, 1908 (for short “C.P.C”) dated 27th September, 2022 mainly on the ground that the plaint does not disclose cause of action.
2. Few facts germane for disposal of this appeal are summarized as below.
3. Appellants have filed a suit against respondent for alleged infringement of trademark, passing off, delivery, rendition of accounts etc. On 18th September, 2021, respondent moved an application under Order-VII, Rule-11 of the C.P.C for rejection of the plaint on various grounds. However, respondent emphasized on the aspect of non disclosure of cause of action in the plaint.
4. In paragraph 12 of the plaint, appellants have averred that the respondent has developed a portal “www.1rm.in” by contending

that the respondent is also trying to use the generic term “1RM” on the “www.1rm.in” website. The appellants have sought relief in the light of the business conducted through the aforesaid website. According to the respondent, she has not developed the said portal viz “www.1rm.in” and the said domain is registered in the name of Yash Sharma who is also a Proprietor of “1RM” business entity and, therefore, the appellants cannot claim the relief as prayed for.

5. It is further contended that the appellants have sought relief of “trademark infringement” in the plaint, however, admittedly the appellants did not have trademark registration over their device/logo **“1RM Fitness”** at the time of institution of the suit. The appellants received trademark registration on 17th March, 2021 i.e much after the date of institution of the suit and, therefore, according to the respondent, cause of action did not exist as regards alleged trademark infringement on the date of filing of the suit.

6. It is also the contention of the respondent that even entire plaint, if read as a whole, does not disclose a valid cause of action with respect to passing off as the appellants have not pleaded any form of “deception”, and/or “misrepresentation” in the plaint

against the respondent which are essential elements to constitute the tort of “passing off”.

7. I heard learned Counsel for the appellants and the respondent.

8. Counsel for the appellants, while pointing at para 18 of the plaint submits that a blank space in the said para meant for stating as to when the cause of action first arose to file a suit was a typographical error. Paragraph 18 of the plaint is reproduced below;

“18. Plaintiff state that cause of action for filing present suit firstly arose on ---- when Plaintiff was mistakenly tagged in one of the Facebook post by Defendant thereby marketing under the brand- **“1RM”**. It further arose when Plaintiff got knowledge that Defendant made application to Trademark Registry for registration of mark - **“1RM”**. It further arose on 12.09.2020 when Plaintiff filed Oppositions/Objection to the Trademark Registry. Cause of action further arose on 14.09.2020 when Plaintiff issued legal notice to Defendants thereby directing them to refrain the use of impugned mark. However, Defendants have still continued to use the impugned mark. Therefore, cause of action is continuously arising thereafter”.

The Counsel argues that the plaint ought not to have been rejected only on the ground that there is an omission to mention as to when the cause of action first arose. In support of his contention, he placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Jageshwari Devi and others Vs. Shatrughan Ram, in Civil Appeals No.1456 and 1457 of 2022**. Paragraph 4 of the said judgment is extracted below;

“4. It is relevant to state that there is a difference between the non-disclosure of a cause of action and defective cause of action: while the former comes within the scope of Order 7 Rule 11, the latter is to be decided during trial of the suit. The contention raised on behalf of the Appellant that the cause of action disclosed is vague and incomplete, is not a ground for rejection of the plaint, under Order 7 Rule 11 Code of Civil Procedure no exception can be taken to the order. The other petition which was filed by the Plaintiff was for amendment of the plaint to introduce a prayer for recovery of possession and an averment to the effect that ad valorem court fee is paid on the plaint”.

What has been observed by the Hon'ble Supreme Court is that there is a difference between non disclosure of cause of action and defective cause of action. It is held that if cause of action is defective, it is to be decided only during trial of the suit and the plaint should not be rejected for the said reason.

9. Learned Counsel for the respondent, on the other hand, strenuously urged to dismiss the appeal by contending that what has been said to be a ‘typographical error’ cannot and should not be termed as a mere “typing mistake” or “typographical error” since even after reading the entire plaint, it would reveal that there was no cause of action for filing the suit as the appellants had failed to exercise due diligence and had neglected to perform an action which is obligatory upon them in light of the fact that on 25th September, 2020 i.e on the date of filing of the suit, trademark was not at all registered. It came to be registered on 17th March, 2021 and, therefore, there was no question of infringement.

10. It is a matter of record that the suit was filed on 25th September, 2020. The appellants have received **“1RM Fitness”**. trademark registration on 17th March, 2021. Therefore, there was no statutory recognition of the trademark. It has been observed by the Court below that even the appellants’ trademark is different than the trademark of the respondent, in the sense, the appellants’ trademark is **“1RM Fitness”** whereas the respondent’s trademark is only “1RM” which is allegedly being used by the respondent. It is apparent that since on the date of filing of the suit, alleged

trademark was not registered and, therefore, there was no question of it's infringement by the respondent. That could possibly be the reason for not stating in the plaint as to when cause of action first arose to file the suit.

11. As such, there were no disputed questions to be decided at the time of rejecting the plaint under Order-7, Rule-11 (a) of the C.P.C. It is a settled principle of law that plaint alone has to be considered as to whether it indicates a cause of action. Falsity of the claim is a matter which has to be determined during trial.

12. Learned Counsel for the respondent has rightly placed reliance on a judgment in the case of **Samuel Vs. Gattu Mahesh and others, (2012) 2 Supreme Court Cases 300** in respect of typographical error. It was suit for specific performance of contract of sale of property. There was a specific averment that the plaintiff was and is always ready and willing to perform his part of contract, which is essential under section 16 (c) of Specific Relief Act and Appendix A Form 47 for maintaining a suit which was not there in the plaint. An application for amendment of the plaint to introduce the specific plea on the ground that it was missed by "type mistake"

filed before trial court after arguments were completed and matter was posted for judgment. It was held that omission of such a vital plea amounts to lack of due diligence and cannot be recorded as mere typographical mistake. It is observed that the trial Court had rightly rejected amendment application, however, the High Court erred in allowing the same. It would be advantageous to reproduce paragraphs 20 to 22 of the said judgment;

“20. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term “due diligence” determines the scope of a party’s constructing knowledge, claim and is very critical to the outcome of the suit.

21. In the given facts, there is a clear lack of “due diligence” and the mistake committed certainly does not come within the purview of a typographical error. The term “typographical error” is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographic error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.

22. The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip”.

13. Clear admission of the appellants to the effect that space meant for stating the date as to when cause of action first arose is due to typographical error, cannot be accepted for the reason as already stated above. There was no question of infringement of trademark as it was not statutorily recognized for want of its registration as registration was much latter i.e on 17th March, 2021. This is nothing but absence of due diligence and non compliance of mandatory requirements as regards the date on which cause of action arose for the first time. I, therefore, do not find any merit in the appeal, which needs to be dismissed and hence, is dismissed with costs.

14. In view of the dismissal of the appeal, pending applications, if any, stand disposed of.

[PRITHVIRAJ K. CHAVAN, J.]