



A.Nos.3701 of 2022 etc.

A.No.3701 of 2022 and
A.Nos. 4787 & 4789 of 2021
in
C.S.No.322 of 2020
(Comm. Suit)

Reserved on	07.02.2023
Pronounced on	24.05.2023

C.SARAVANAN, J.

By this Common Order, all the three applications are being disposed of.

2. A.Nos.4787 and 4789 of 2021 have been filed by the first defendant while A.No.3701 of 2022 has been filed by the plaintiff. In order to avoid confusion, the parties are referred to as 'the plaintiff' and 'the defendants', viz., by their ranks in the above commercial suit.

3. The above commercial suit has been filed by the plaintiff for the following reliefs:-

- a) for a Permanent Injunction restraining the defendants, their men, servants and agents from producing or selling the products by name Nivaran 90 Cough Syrup, Nivaran 90 Antacid: Velvette



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Shampoo and Memory Vita and other products manufactured by Sujatha Bio Tech.

- b) for a direction to the defendants to pay the plaintiff the costs of the suit."

4. A.Nos.4784 & 4789 of 2021 have filed by the defendant for the following reliefs:-

A.No.4787 of 2021	A.No.4789 of 2021
To reject the plaint filed in the above commercial suit	To pass a Summary Judgment dismissing the above commercial suit

5. A.No.3701 of 2022 has been filed by the plaintiff, praying to grant leave to file the following documents as additional documents:-

- Memorandum of Association of Nivaran Herbal Product Limited dated 29.09.1995.
- Articles of Association of Nivaran Herbal Product Limited dated 29.09.1995.
- Deed of Assignment dated 29.06.2017.
- Application for post registration changes on Trade Marks in Receipt No.3170862.

6. The plaintiff had earlier secured an interim order in O.A.No.614 of 2020 on 20.11.2020. The first defendant had filed A.Nos.2915 & 2916 of 2020 for suspension of the interim order dated 20.11.2020 granted in



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O.A.No. 614 of 2020 in C.S.No. 322 of 2020 and for vacating the interim injunction dated 20.11.2020.

7. Later, an interim order dated 20.11.2020 came to be vacated by a common order dated 07.12.2020 in O.A.No.614 of 2020, A.Nos.2915 & 2916 of 2020 in C.S.No.322 of 2020, by holding that the plaintiff had not made out a *prima facie* case for grant of interim order and therefore, the plaintiff and the defendants were directed to go for trial in the case.

8. In view of the order passed in A.No.2916 of 2020, the consequential orders came to be passed by vacating the interim order passed in O.A.No.614 of 2020 and consequently, A.No.2915 of 2020 was closed.

9. Thereafter, the third defendant filed A.No.1214 of 2021 for deletion of the third defendant's name from the array of the defendants in the above suit. A.No.1214 of 2021 came to be allowed *vide* order dated 17.11.2021, pursuant to which, the name of the third defendant was deleted from the array of the defendants.



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10. Meanwhile, during the pendency of the proceedings after the institution of the suit, the second defendant passed away. The legal heirs of the second defendant were thus impleaded *vide* order dated 23.08.2021 in A.No.2539 of 2021 filed by the plaintiff. The first defendant is the wife of the deceased second defendant.

11. Thus, in the suit, the fourth, fifth and sixth defendants have been impleaded as the legal representatives of the second defendant apart from the first defendant who is also incidentally party and is also the legal representative of the deceased second defendant.

12. The Court records indicate that the contesting defendants have now filed their Written Statement, which has been adopted by the other defendants. The suit has otherwise matured for trial.

13. It is at this stage, the plaintiff has filed A.No.3701 of 2022 for grant of leave to file the additional documents in the suit while the first defendant has filed A.Nos.4787 and 4789 of 2021 for rejecting the plaint



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under Order VII Rule 11(a) and (d) of C.P.C and for a summary judgment dismissing the suit in terms of Order XIII-A Rule (4) and (5) of C.P.C as amended for the purpose of the Commercial Courts Act, 2015.

14. On behalf of the defendants, it is submitted that the plaintiff ought to have filed the suit for Permanent Injunction based on an Assignment Agreement dated 30.07.2016, which purportedly is said to have been executed by the first defendant (the applicant in A.No.4787 and 4789 of 2021). It is further submitted that the alleged Assignment Agreement dated 30.07.2016 is a forged document and therefore, the Court had also vacated the *ex-parte* interim order which was granted earlier on 20.11.2020.

15. The specific defence of the defendants is that the suit has been filed for a permanent injunction to restrain the defendants from producing or selling the products with the Trade Mark by name "Nivaran", viz., Nivaran 90 Cough Syrup, Nivaran 90 Antacid, Velvette Shampoo, Memory Plus, Memory Vita, Memory Vita Plus on the strength of an alleged Assignment Agreement dated 30.07.2016 between



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the plaintiff and the first defendant in respect of the Trade Marks, which were standing in the name of the second defendant and a Company called M/s.Nivaran Herbal Private Limited. It is submitted that on the strength of the documents filed before this Court, the interim order was vacated and therefore it has to be inferred that no cause of action arises for the relief sought for in the plaint and that in any event, the suit was barred under law.

16. It is submitted that the plaintiff has resorted to clever drafting to file a suit for the above relief based on some forged documents. It is further submitted that the entire body of the plaint states as if the second defendant had entered into the aforesaid Assignment Agreement dated 30.07.2016 when indeed a reading of the documents indicates that it has been signed between the plaintiff and the first defendant (the applicant in A.No.4787 and 4789 of 2021).

17. It is further submitted that the first defendant is not the Proprietor of any of the registered Trade Marks and therefore, even otherwise, the first defendant as a partner of M/s.Sujatha Bio-Tech could



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not have executed the aforesaid Assignment Agreement dated 30.07.2016.

18. In this connection, a reference is made to the decision of this Court in the case of **M/s.Sun TV Network Limited, Represented by its Authorised Signatory Vs M/s.Super Good Films Private Limited, Represented by its Managing Director and others**, in C.S.No.329 of 2014 dated, 12.01.2022, wherein, it has been held as follows:-

"21. The facts of the present case is also governed by the Latin Maxim qui prior est tempore potior est jure. This maxim literally means that "he who is prior in time is better in law". The transferor of a right cannot prejudice the rights assigned to the transferee by any subsequent dealing with the very same property. The 1st defendant cannot be allowed to cause prejudice to the telecast rights of the plaintiff through the subsequent agreement dated dated 31-07-2013 executed in favour of the 2nd defendant. At the best, the 2nd defendant can only get the right of theatrical exploitation of the suit film outside India and nothing more. It is also seen from records that the plaintiff had the benefit of an order of interim injunction in their favour from the year 2014 onwards and hence, the defendants were never able to exploit the telecast rights already assigned in favour of the plaintiff.



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22. In view of the above discussion, this court holds that the plaintiff is the sole and exclusive copyright owner for broadcasting the Tamil film "JILLA" and the agreement in favour of the 2nd defendant dated 31-07-2013, does not in anyway take away the right of the plaintiff conferred through the assignment agreement dated 08-07-2013 and to the extent the agreement dated 31-07-2013 executed in favour of the 2nd defendant transgresses into the right of the plaintiff, the same is held to be invalid. In view of the same, the plaintiff is entitled for the reliefs sought for in the present suit. All the issues are answered accordingly."

19. That apart, it is submitted that even if there was an assignment of Trade Mark in favour of the plaintiff either by the first defendant or by the deceased second defendant, the assignment ought to have been registered and transmitted in accordance with Section 42 read with Section 45 of the Trade Marks Act, 1999.

20. In this connection, there is no assignment of the Trade Mark. Admittedly, there is no valid assignment as there is no registration of the assignment in favour of the plaintiff and therefore, the suit against the defendant is barred under law and therefore, the plaint is liable to be rejected.



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21. It is further submitted that the dispute in the present case is a “commercial dispute” within the meaning of Section 2(aa) of the Commercial Courts Act, 2015. As per provisions of Order XIII-A read with Rule 4 and 5 of C.P.C., the Court is therefore entitled to not only look into the averments but also the documents filed by the defendant to come to a conclusion that the plaintiff has no prospect of succeeding in the suit based on the documents.

22. In this connection, the first defendant has filed the following Certificate of Trade Mark Registration and Legal User Certificates:-

Sl. No.	Trade Mark Registration	Legal User Certificate
1	Trade Mark Registration - Velvette	Legal User Certificate dated 04.02.2021 in respect of the mark "Velvette".
2	Trade Mark Registration - Nivaran	Legal User Certificate dated 15.12.2020 in respect of the mark "Nivaran 90".
3	Trade Mark Registration - Memory Vita	Legal User Certificate dated 08.12.2020 in respect of the mark "Memory Vita".
4	Trade Mark Registration - Memory Vita Plus	-
5	Trade Mark Registration - Memory Plus	Legal User Certificate dated 08.12.2020 in respect of the mark "Memory Plus".



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23. Apart from the above referred documents, the first defendant has filed the following documents:-

- i. Partnership Ship Deed of M/s.Sujatha Bio Tech
- ii. User License Agreement (Renewal Agreement) for use Brands for manufacture of Nivaran 90 Cough Syrup, Nivaran 90 Lozenges, Nivaran Balm, Memory Vita Chooranum Power, Memory Vita Candies, Memory Vita Corn Flakes, Memory Vita Cocas, Memory Plus capsules in Blister Packs/boxes etc.
- iii. Assignment Deed from M/s.Nivaran to Mr.Rajkumar (2nd defendant since deceased).
- iv. Status of the Trade Mark as on date
- v. Sales and Advertising Figures of M/s.Sujatha Bio Tech
- vi. Ledger Statement of M/s.Sujatha Bio Tech showing repayment of loan amounts.

24. It is submitted that in absence of a valid assignment in the eye of law, the suit has to fail. On behalf of the plaintiff, the learned Senior Counsel has relied on the following decisions of the Hon'ble Supreme Court:-

- i. **Orchid Chemicals & Pharmaceuticals Limited Vs Wockhardt Limited, 2013 (3) CTC 841**



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- ii. **M/s.Nico Quality Products, Represented by its Partner, Mylapore, Chennai Vs M/s.N.C.Arya Snuff & Cigar Co., Represented by its Partners, Chennai and others**, 2014 (1) L.W. 731.
- iii. **Anathula Sudhakar Vs P.Buchi Reddy (Dead) by LR's and others**, (2008) 4 SCC 594.
- iv. **T.Arivanandam Vs T.V.Satyapal and another**, (1977) 4 SCC 467.

25. The learned Senior Counsel for the plaintiff submitted that though the application under Order VII Rule 11 (a) and (d) of C.P.C as well as the application under XIII-A Rule (4) and (5) of C.P.C as amended for the purpose of the Commercial Courts Act, 2015 can be filed at any stage of the proceedings, the fact of the matter is that the suit is ready for trial.

26. It is submitted that the arguments that were advanced before this Court in the above mentioned two applications (A.Nos.4787 and 4789 of 2021) filed by the first defendant for vacating the interim order are being advanced once again. This Court by its order dated 07.12.2020 while vacating the interim order in O.A.No.614 of 2020, A.Nos.2915 & 2916 of 2020 in C.S.No.322 of 2020 relegated the parties to trial.



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27. It is further submitted that though the Court concluded that the plaintiff has not made out a *prima facie* case, it cannot be stated that the plaintiff has no prospect of succeeding in the suit. It is further submitted that the plaintiff has a fair chance to succeed on the strength of the aforesaid Assignment Agreement dated 30.07.2016 in terms of which, it has been acknowledged by the first defendant as the partner of M/s.Sujatha Bio-Tech that a sum of Rs.3,00,00,000/- was advanced and received by the second defendant as the partners of M/s.Sujatha Bio-Tech (a Partnership Firm concerned) for the purpose of production.

28. It is further submitted that as per the aforesaid Assignment Agreement dated 30.07.2016, the plaintiff was entitled to receive 10% sales commission based on the sales made by the first defendant through M/s.Sujatha Bio-Tech Productions till the repayment period and that the agreement also stipulated the terms of payment. Specifically, a reference has been made to Clauses (e), (f), (g), (h) and (i) of the Assignment Agreement, which reads as under:-



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- (e) The 2nd party agreed to pay 10% sales commission to 1st party before 10th of every month based on their sales in Sujatha Bio-Tech Production.
- (f) If the 2nd party fails to pay the 10% sales commission as per the agreement, the 2nd party agrees to allow and hereby grants the exclusive rights to the 1st party to use the said Brand manufactured by 2nd party for production and sales by the 1st party during the remaining period till repayment of received amounts and 10% sales commission for which the registration of the said Brand shall stand valid as per this agreement till the repayment period.
- (g) The 1st party will use the said Brand for production and sales of said Brand in India till the repayment of amount by the 2nd party.
- (h) If the 2nd party fails to repay the received amount Rs.3,00,00,000/- (Three Crores) and 10% sales commission based on sale from the executed dated of agreement **within 3 years**, the 1st party has exclusive rights to own a Brand completely as agreed by the 2nd party.
- (i) The 1st party has exclusive legal rights to transfer or sell the Brand to the third party to raise funds for the received amount by the 2nd party for the production and 10% sales commission based on sales, which is to be repaid by 2nd party."

29. It is submitted that the argument that there was no assignment of the Trade Mark in the eye of law in view of Sections 42 and 45 of the



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Trade Marks Act, 1999 cannot be countenanced as the partner of the said M/s.Sujatha Bio-Tech, i.e. the second defendant (since deceased) had agreed as above in clause (e), (f), (g), (h) and (i). It is further submitted that the parties have agreed upon/conferred the Jurisdiction of this Court, and therefore, it is not open for the first defendant to insist for either a summary disposal of the suit in accordance with Order XIII-A Rule (4) and (5) of C.P.C as amended for the purpose of the Commercial Courts Act, 2015 or for rejection of the plaint based on the averments in the Written Statement and the application filed for rejecting the plaint and the documents that have been filed.

30. In this connection, the learned Senior Counsel for the plaintiff has relied upon the following three decisions:-

- i. **Gurdev Singh Vs Harvinder Singh** in Special Leave to Appeal(C)No.19018 of 2022 dated 09.11.2022.
- ii. **Srihari Hanumandas Totala Vs Hemant Vithal Kamat and others**, (2021) SCC Online SC 565.
- iii. **Soumitra Kumar Sen Vs Shyamal Kumar Sen and others**, (2018) 5 SCC 644.
- iv. **Kamala & others Vs. KT Eshwara Sa**, (2008) 12 SCC 661.



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31. It is submitted that the first two decisions relied by the learned Senior Counsel for the defendants are not relevant as they dealt with the order passed under XXXIX Rule (1) and (2) of C.P.C and it was in that context, the observations were made for vacating the interim order. It is further submitted that they have agreed to offer the Trade Mark as a security for the loan advanced plaintiff and therefore the first defendant cannot resile from the express terms of the Assignment Agreement dated 30.07.2016 under Order XIII-A Rule (4) and (5) of C.P.C as amended for the purpose of the Commercial Courts Act, 2015.

32. In A.No.3701 of 2022, it is the case of the plaintiff that the first and second defendants have received a sum of Rs.3,00,00,000/- (Rupees Three Crores only) on various dates from the plaintiff for the purpose of production and sale of their products. At the time of filing of the suit, the plaintiff has filed an Assignment Agreement dated 30.07.2016 along with the cheques, letter, legal notices etc., as supporting documents.

33. Now the plaintiff has filed A.No.3701 of 2022 and seek leave of this Court to file the documents mentioned in paragraph No.5 as



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additional documents to substantiate the case since the first defendant *vide* Agreement dated 29.06.2017 has transferred and assigned Trade Mark products to Mr.C.K.Rajkumar (deceased second respondent) subsequent to the Assignment Agreement dated 30.07.2016.

34. The plaintiff has also made an application to the Trade Mark Registry to register the Assignment Agreement dated 30.07.2016 and in such circumstances, the plaintiff seeks to file the above additional documents to substantiate their case.

35. I have considered the arguments advanced by the learned Counsel for the plaintiff and the defendants. I have also perused the Assignment Agreement dated 30.07.2016, which is said to have been executed by the first defendant in favour of the plaintiff.

36. The first defendant is the wife of the second defendant C.K.Rajkumar (since deceased). Both the first and second defendants are the partners of M/s.Sujatha Bio-Tech (a Partnership Firm concerned). There is no dispute on the same.



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37. The said Partnership Firm which was registered on 10.05.2016 for manufacturing of Herbal and Cosmetic Products. The details of the registration of the Trade Mark are as under:-

Sl. No	Trade Mark Name	Trade Mark Number	Class	Registration Name
1	Velvette	3952186/ 3952188	3	M/s.Velvette International Pharma Products Private Limited.
2	Nivaran 90	1174877	5	M/s.Nivaran Herbal Private Limited.
3	Memory Vita	1315464	30	M/s.Nivaran Herbal Private Limited.
4	Memory Vita Memory Plus	1315465	30	M/s.Nivaran Herbal Private Limited.
5	Memory plus	1751208	5	Dr.C.K.Rajkumar*

* Second defendant (since deceased).

38. However, there have been subsequent assignments and the Legal User Certificates filed by the defendants which itself indicate that there have been subsequent transfers and it is the second defendant (since deceased) who was the proprietor of various Trade Marks.

39. Thus, there are indications that the Trade Marks which originally were registered in the name of different entities in which the second defendant (since deceased) had control have been transferred to



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the second defendant (since deceased). Incidentally, the second defendant was the Promoter/Director/Proprietor of these companies for years.

40. The second defendant is also the partner of M/s.Sujatha Bio-Tech with whom, the plaintiff has entered into an Assignment Agreement dated 30.07.2016. The Assignment Agreement dated 30.07.2016 indicates that in the event of the said M/s.Sujatha Bio-Tech, of which, the first and second defendants were/are the partners failed to repay the amount of Rs.3,00,00,000/-, the plaintiff would be entitled to exclusive right to own the Brand completely as agreed that the plaintiff will have exclusive right to transfer or sell the Brand to a third party to raise funds for the amounts paid to the first defendant. Whether the plaintiff is entitled to all or any relief is to be determined finally.

41. Thus, the plaint cannot be rejected at the threshold even otherwise on the strength of the documents that have been filed or based on the averments in the Written Statement and in the affidavit filed in support of the applications in A.Nos.4787 and 4789 of 2021 for rejecting



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the plaint under Order VII Rule 11 (a) and (d) of C.P.C and for a Summary Judgment, dismissing the suit in terms of Order XIII-A Rule (4) and (5) of C.P.C as amended for the purpose of the Commercial Courts Act, 2015.

42. That apart, the Hon'ble Supreme Court in **Srihari Hanumandas Totala Vs Hemant Vithal Kamat and others**, (2021) SCC Online SC 565, has summarized law with reference to Order VII Rule 11 of C.P.C as follows:-

"20. On a perusal of the above authorities, the guiding principles for deciding an application under Order 7 Rule 11(d) can be summarized as follows:

- (i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to;***
- (ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application;***
- (iii) To determine whether a suit is bared by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii) the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that***



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these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and

(iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11(d), where only the statements in the plaint will have to be perused."

43. Merely because there is no assignment in favour of the plaintiff in the eye of law in accordance with Section 42 read with Section 45 of the Trade Marks Act, 1999 would not mean that the plaintiff cannot exercise the exclusive right to use the Trade Mark/Brand pending repayment of the amount by the defendants. The plaintiff may have a right of lieu. Whether the plaintiff is entitled to succeed in the suit or not, is a matter to be decided after trial. Therefore, the applications filed to short circuit/shortcut the suit after the interim order secured by the plaintiff was vacated cannot be justified.

44. There cannot be any impediment for allowing marking of additional documents sought for by the plaintiff as evidence as such marking of documents during trial is subject to Admissibility, Proof and



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Relevancy.

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45. The contesting parties have filed their respective pleadings and therefore, the suit is otherwise ready for trial. Therefore, I am inclined to reject the applications filed for rejecting the plaint and for a summary disposal of the suit filed by the first defendant and to allow the application filed by the plaintiff for receiving additional documents. The documents that are sought to be introduced as additional evidence can be marked subject to Proof, Relevancy and Admissibility.

46. In the result, A.Nos.4787 and 4789 of 2021 are dismissed and A.No.3701 of 2022 is allowed.

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Pre-Delivery common order made in

A.No.3701 of 2022 and
A.Nos. 4787 & 4789 of 2021
in
C.S.No.322 of 2020
(Comm. Suit)

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(1/2)