IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2023

CORAM

THE HON'BLE MR.SANJAY V.GANGAPURWALA, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.M.A.No.2681 of 2022

1. Sri Thulasi Jewellers
   A registered firm
   rep. by its Partner P.Gowrishankar
   D.No.29, Pon Veethi
   Erode 638 001.

2. P.Gowrishankar

3. G.Radhamani .. Appellants

Vs.

1. K.Yuvaraj

2. N.Kavitha .. Respondents

Prayer: Appeal filed under Section 13 of the Commercial Courts, Commercial Divisional and Commercial Appellate Division of the High Court (Amendment) Act, 2018 read with Order 43, Rule 1 of CPC.

For the Appellants : Mr.G.Ramesh

For the Respondents : Mr.S.Parthasarathy
Senior Counsel
For Mr.P.Dinesh Kumar

JUDGMENT
(Delivered by the Hon'ble Chief Justice)

We have heard Mr.G.Ramesh, learned counsel for the appellants and Mr.S.Parthasarathy, learned Senior Counsel for Mr.P.Dinesh Kumar, learned counsel for the respondents.

2. The appellants herein are the original plaintiffs. The appellants filed a suit bearing O.S.No.191 of 2021 against the respondents for passing off.

3. The trial Court partly allowed the application of the appellants restraining the respondents from using the logo 'STJ' of the appellants. However, the trial Court rejected the prayer restraining the respondents from running their business in the name

of “Sri Thulasi Jewellery”. The said order is assailed in the present appeal.

4. The learned counsel for the appellants submits that the appellants and the respondents constituted a partnership firm on or about 08.06.2016. The partnership deed was registered and it was agreed upon amongst the partners, i.e. the appellants and respondents, that on and from 08.06.2016, they would conduct the business in procuring gold jewels, silver vessels, anklets, toe rings, waist string and gift related things within State and sell those as wholesale or retail through the shop “Sri Thulasi Jewellers” with the address at Door No.29, Pon Street, Erode, Erode Taluk, Erode District. The said business continued and on or about 31.12.2020, the respondents retired from the partnership and under the deed of retirement, it was specifically agreed by the respondents that all the license, goodwill and other relating things through the partnership will belong to the continuing partners. The appellants were the continuing partners. It was agreed by the respondents that the

continuing partners may carry on the same business severally and jointly with others under the name “Sri Thulasi Jewellers” in Erode or any other place and the retired partners will have no objection.

5. Learned counsel for the appellants submits that the respondents are running the business in the name and style as “Sri Thulasi Jewellery”. The same is illegal. The goodwill of the partnership firm is also sold to the appellants. Now, the respondents have no right and title to use the name “Sri Thulasi Jewellers”. The same would amount to passing off. “Sri Thulasi Jewellers” and “Sri Thulasi Jewellery” are phonetically similar. The spelling and all other aspects are similar. The respondents cannot be allowed to pass off the business of the appellants as such.

6. Learned counsel for the appellants relies upon the judgments of the Apex Court in the cases of ***Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. [(2001) 5 SCC 73]*** and ***Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel***

[(2006) 8 SCC 726]. He also relies upon the judgment of the Delhi High Court in the case of ***AMPA Cycles Private Limited v. Jagmohan Ratra [(2021) 87 PTC 608]***.

7. Learned counsel for the appellants, relying upon Section 36 of the Partnership Act, submits that outgoing partner cannot carry on competing business using the partnership firm name or representing himself as carrying on the business of the partnership firm or solicit the custom of persons who were dealing with the partnership firm before he ceased to be a partner. The act of the respondents in carrying on the business in the name of "Sri Thulasi Jewellery" would be contrary to Section 36 of the Partnership Act.

8. Learned counsel for the appellants also relies upon Section 14 of the Partnership Act to contend that the goodwill is also the property of the partnership firm and when the goodwill has been sold to the appellants, the respondents are restrained from carrying on the business in the same or similar trade name of the appellants.

This aspect has not been considered by the Court.

9. It is further submitted by learned counsel for the appellants that just because the respondents were carrying on the business in the name of "Sri Thulasi Jewellery" since 2007, that would not make any difference, as, in 2016, partnership was entered into by these respondents and the partners agreed to carry on the business in the trade name of "Sri Thulasi Jewellers" and upon retirement of the respondents, it was specifically agreed that ongoing firm would be continued by the appellants and the appellants would carry on the business in the name and style "Sri Thulasi Jewellers". So also, the goodwill was parted by the respondents in favour of the appellants. For all these reasons, the respondents cannot take the benefit of running prior business in the name of "Sri Thulasi Jewellery". This aspect has not been considered by the Court below.

10. Learned Senior Counsel for the respondents contends that since 2007, the respondents are running business in the proprietary

name “Sri Thulasi Jewellery”. Even when the partnership firm comprising the appellants and respondents as partners was functioning, the respondents were individually doing business as a proprietary firm in the name of “Sri Thulasi Jewellery”. This aspect has been considered. The Income Tax Returns for the said period have been placed. So also the GST registration is placed on record.

11. According to learned Senior Counsel, in the retirement deed, the respondents were never precluded from running the business in the name of “Sri Thulasi Jewellery”.

12. We have considered the submissions canvassed by learned counsel for the respective parties. We have also gone through the order passed by the trial Court.

13. The suit is filed for passing off and not for infringement of trademark.

14. The Apex Court, in the case of ***Cadila Health Care Ltd.*** (supra), has laid down the following principles to be considered in an action for passing off on the basis of an unregistered trade mark, for deciding the question of deceptive similarity:

> *"35. Broadly stated, in an action for passing-off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity the following factors are to be considered:*
>
> *(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks i.e. both words and label works.*
>
> *(b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.*
>
> *(c) The nature of the goods in respect of which they are used as trade marks.*
>
> *(d) The similarity in the nature, character and performance of the goods of the rival traders.*
>
> *(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on*

their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods.

(g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks."

15. In the present case, the learned trial Judge, while considering the application for temporary injunction, pending suit, has restrained the respondents from using the logo 'STJ'. However, has negatived the relief for temporary injunction with regard to the trade name "Sri Thulasi Jewellery". The partnership firm is carrying on the business in the name of "Sri Thulasi Jewellers". The respondents are carrying on the business in the name of "Sri Thulasi Jewellery". It has been observed by the learned trial Judge that the business was run by the respondents as its proprietary concern since 2007 and even during the continuance of the partnership firm between the appellants and the respondents. The

said business was conducted uninterruptedly even during the continuance of partnership. The partnership business was conducted in the trade name of "Sri Thulasi Jewellers". The proprietary firm of the respondents is carrying on the business in the name of "Sri Thulasi Jewellery".

16. The documents are also placed on record by the respondents to substantiate their contention that even during the continuance of the partnership firm, the respondents were doing the proprietary business in the name of "Sri Thulasi Jewellery". The respondents have given no objection to the appellants, who have continued the partnership after retirement of the respondents, to use the trade name "Sri Thulasi Jewellers". It also appears that in the deed of retirement that the goodwill was to be used by the appellants. No doubt, the goodwill is the property of the firm. The same does not require any debate. Reliance has been placed on Section 36 of the Act. The same will have to be considered with regard to the facts involved in the matter.

17. At this stage, *prima facie* case is required to be considered. The application for temporary injunction has to be decided on three principles, namely *prima facie* case, balance of convenience and irreparable loss. It appears that during the continuance of the partnership firm, the respondents were continuing the business as a proprietary concern in the trade name "Sri Thulasi Jewellery". Whereas, the partnership firm was doing business in the name of "Sri Thulasi Jewellers".

18. The interpretation of the retirement deed and the provisions involved will have to be considered by the trial Judge threadbare while deciding the suit. At this stage, only *prima facie* case has to be considered. The temporary injunction application has to be decided on the basis of the principles enumerated above.

19. At the time of trial, the aspect of waiver will also have to be considered. All these issues would require a trial.

20. The learned Single Judge has arrived at a *prima facie* conclusion which does not appear to be perverse. The final adjudication naturally will have to be based on the evidence adduced by the parties and upon the consideration of the documents placed on record and the provisions.

21. It is also trite that the appellate Court shall be loath in interfering with the discretion exercised by the trial Court unless the discretion exercised is perverse or arbitrary.

22. As, at this stage, the discretion exercised by the trial Court does not appear to be arbitrary or perverse, we are not interfering with the order passed by the trial Court.

23. It is clarified that the observations made by the learned Single Judge and this Court are only based on *prima facie* considerations and the learned trial Judge will decide the suit upon

appreciation of the evidence adduced, documents placed on record and would not be influenced by any of the observations made at this stage.

24. The appeal, as such, disposed of. There will be no order as to costs. Consequently, C.M.P.No.20995 of 2022 is closed.

(S.V.G., CJ.) (D.B.C., J.)
15.11.2023

Index : Yes/No
Neutral Citation : Yes/No

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THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.

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