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W.P.No.5271 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.5271 of 2017 &
WMP.Nos.5586 & 5587 of 2017

Sri Krishna Sweets and Food Products (Chennai) Pvt. Ltd.
No.81, Yukan Tower, 2nd Floor,
Thirumalai Road, T-Nagar,
Chennai – 600 017.

... Petitioner

Vs

1.The Joint Director,
Ministry of Corporate Affairs,
Office of the Regional Director,
Southern Region, Chennai
Sasthri Bhavan, Block – I,
V Floor, 26 Haddows Road,
Chennai – 600 006.

2.Sri Krishna Sweets Pvt. Ltd.
137, D.B.Road, R.S.Puram,
Coimbatore – 641 002.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India
praying to issue a Writ of Prohibition, prohibiting the 1st respondent from
exercising jurisdiction in the impugned proceedings before the 1st respondent,



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pertaining to the application filed by the 2nd respondent under Section 16 of the Companies Act, 2013, for rectification of the name of M/s.Sri Krishna Sweets and Food Products (Chennai) Pvt. Ltd., and to direct the 1st respondent to terminate the said proceedings with immediate effect as the same are wholly lacking in jurisdiction and unconstitutional.

For Petitioner : Mr.Satish Parasaran
Senior Counsel
for Mr.R.Parthasarathy

For Respondents : Mr.Venkaswamy Babu
Senior Panel Counsel – R1

Mr.Athiban Vijay
for Mr.K.Gowtham - R2

ORDER

The petitioner seeks a writ of prohibition calling for the records of the first respondent, being the Joint Director, Ministry of Corporate Affairs (R1) and a direction to him to terminate the proceedings pending before him, with immediate effect. The premise of the challenge is that the proceedings are lacking in jurisdiction and ex-facie, barred by limitation.

2. The second respondent, Sri Krishna Sweets Pvt. Ltd., had filed an application on 27th October 2016 under Section 16 of the Companies Act, 2013 (in short '2013 Act') seeking rectification of the name of the petitioner '*Sri Krishna Sweets and Food Products (Chennai) Pvt. Ltd.*' on the ground of



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similarity in the name of the petitioner to the registered name/marks claimed as owned by R2.

3. The facts, as narrated by Mr.Satish Parasaran, learned Senior Counsel appearing for Mr.R.Parthasarathy, learned counsel on record for the petitioner, are as follows. The Managing Directors of the petitioner and second respondent company, are brothers. The name '*Sri Krishna*' had been identified and adopted for use in the business by their father Late N.K.Mahadeva Iyer in 1948 and thereafter used consensually by both brothers.

4. While this is so and the common understanding was that both brothers had equal claim to the name, a dispute was raised somewhere in September, 2015 by the MD of R2, seeking exclusive claim to the same.

5. R2 instituted a Suit, i.e., O.S.No.425 of 2016, on the file of the District Court, Coimbatore seeking an injunction as against the petitioner for use of the name and mark '*Sri Krishna*'. An order had been passed on 05.06.2017 in I.A.Nos.886, 887 and 888 of 2016 dismissing the interim applications with costs.

6. As against that order, C.M.A.Nos.2266 to 2268 of 2017 had come to be filed before this Court and by order dated 18.09.2017 this Court dismissed the appeals, thereby confirming the dismissal of the interim prayers by the Trial



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Court. A direction was issued to III Additional District Judge, Coimbatore to dispose the Suit within a period of one year from date of receipt of that order.

It is yet pending.

7. While this is so, the petitioner received, on 25.11.2016, a notice from R1 in regard to the application filed by R2 seeking rectification of the name of the petitioner. The pleadings in this Writ Petition touch upon the disputes qua the parties concerning Intellectual Property Rights (IPR), for the reason that at the time of institution of the Writ Petition on 28.02.2017, matters were still at large before the Civil Court.

8. However, today Mr.Athiban Vijay, learned counsel on behalf of Mr.K.Gowtham Kumar, learned counsel for R2, confirms that, no dispute is now raised qua the issue of IPR as those issues are pending before the civil courts. His statement is recorded and the arguments thus proceed on the other grounds.

9. In the counter filed on 24.11.2022, R2 has made a clear distinction between the proceedings pending before the Civil Court and the proceedings at issue in this Writ Petition. This distinction is well founded, as nowhere in the course of this order have I made or intended to make any observations that



would touch upon the disposal of the Civil Suit between the parties involving their intellectual property rights.

10. The petitioner responded to the notice and hearing commenced before R1. The first hearing was on 25.01.2017 when it was adjourned at request of R2. It was re-posted to 14.02.2017, but as the reply of R2 was received very proximate to the date of hearing, the hearing did not take place on 14.02.2017. Though the petitioner sought an adjournment of 2 weeks, the matter was posted on 20.02.2017. In that time, sur rejoinder dated 14.02.2017 had been filed by the petitioner reiterating its request for further time to effectively present its case.

11. Inter alia, the petitioner had also sought an opportunity to cross examine M.Krishnan. At the hearing on 20.02.2017, the petitioner raised a preliminary argument touching upon the assumption of jurisdiction by R1 both on the question of bar of limitation as well to look into the question of authenticity of documents relating to the trademark as the matters were, at that time, sub judice. The hearing was concluded and both parties directed to file written submissions. Such submissions have been filed.

12. It is at that stage that the petitioner has approached this Court reiterating the preliminary objection to assumption of jurisdiction by R1 in the



matter. Though the very same submission has been advanced before R1 vide letter dated 28.02.2017, the petitioner apprehends that R1 might not afford a fair or proper hearing in that regard.

13. The relevant portion of letter dated 28.02.2017 reads as follows:

.....

3. Notwithstanding such clear position of law and the total lack of jurisdiction of this authority, the application has not only been entertained, but is being proceeded with in undue haste and with aspersions cast on the respondent of acts of fraud and misrepresentation. It is respectfully submitted that these are disputes which are best left for adjudication by the civil court in the pending proceedings in O.S.No.425 on the file of the District Judge, Coimbatore.

4. Without prejudice to the above objections as to the very jurisdiction of this authority to proceed with the matter, it is further submitted that, should the ROC still be inclined to proceed with this application, as set out consistently in our pleadings before the authority, then it is considered absolutely necessary, in the interests of justice, that the respondent be afforded with an opportunity to examine the complainant on facts and evidence that are within the special knowledge and custody of the applicant which he had deliberately chosen to withhold in the present proceedings.

14. Both Mr.Venkataswamy Babu, learned Senior Panel Counsel for R1 and Mr.Athiban would submit that this Writ Petition must not be entertained, seeing as the petitioner has, admittedly, participated in the proceedings before R1. There is really no difficulty on this score, since, and as the records



indicate, it has been the consistent request of the petitioner that the authority has no jurisdiction in the matter.

15. This is specifically for the reason that R1 has been insistent upon hearing the matter in entirety while the petitioner would argue that the question of maintainability must be decided at the threshold, since the continuance or otherwise of the matter would be dependent on such decision.

16. In the considered view of this Court, it would have been in the fitness of things for this issue to have been decided first since it goes to the root of the matter and impinges upon the fundamental aspect of assumption of jurisdiction by R1. I thus, see no road block to entertain this Writ Petition merely on this account.

17. That apart, the Writ Petition is itself pending since 2017. Though an interim order was originally granted, records reveal that it has not been extended after 27.06.2017. Thus, for this reason as well, I see no justification in remitting the matter to R1.

18. The issue relating to assumption of jurisdiction and the bar of limitation hinges upon Section 16 of the Companies Act, 2016 (in short '2016 Act'). Section 16 deals with rectification of name of company and states that if, through inadvertence or otherwise, a company on its first registration by a new



name, is registered by a name which, in the opinion of the Central Government, or on an application by a registered proprietor of a trademark, is identical with, or too nearly resembles the trademark of a proprietor under the 1999 Trade Marks Act, such claim may be rectified, if such application were filed within 3 years of incorporation/registration/change of name of the company.

19. The incorporation of the petitioner company is on 06.08.2009 and this admitted position emanates even from the application filed by R2, seeking amendment. The application dated 28.10.2016, in paragraph 2 under the title '*our complaint*' states as follows:

We investigated further and it has now come to our knowledge that a company by the name SRI KRISHNA SWEETS AND FOOD PRODUCTS (CHENNAI) PRIVATE LIMITED has been incorporated in Chennai, Tamilnadu on 6th August 2009 by the Registrar of Companies, Tamilnadu, Chennai. The Corporate Identity Number of the said company is U15400TN2009PTC072500 and its registered office is situated at No.5, Singaravelu Street, Pondy Bazaar, T.Nagar, Chennai-600017.

20. The claim of R2 is that name of the petitioner closely resembles the name of R2 company necessitating amendment. The application has been filed in October, 2016 and is thus time barred in terms of the applicable provisions under the 2016 Act.



21. The defence of R2 is that it came to be aware of the existence of the petitioner company only in 2015 when it had approached the Registrar of Companies (in short 'ROC') for change of the name of a subsidiary company, i.e., *N.K.M. Enterprises Pvt. Limited* to *Sri Krishna Sweets Global Pvt. Limited*. It is only when ROC requested R2 to obtain NOC from the Chennai company, the petitioner company, that the existence of the petitioner came to light.

22. R2 thus urges that the expression '*incorporation or registration or change of name of the company*' in Section 16(1)(b) be understood and interpreted such that the limitation stipulated there, of 3 years, commences from date of knowledge of incorporation of the company.

23. I would straight away reject this argument, seeing as it tantamounts to re-writing the statutory provision. Nowhere does Section 16(1)(b) envisage or provide for such a situation and, on the other hand, the provision is categorical that the period of 3 years shall run from date of incorporation.

24. In this context, useful reference may be made to the proviso to Section 22(1)(b) of the Companies Act, 1956 (in short '1956 Act'). That provision is in pari materia with the provisions of Section 16 of the 2013 Act also dealing with rectification in the name of a company, reading thus:



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22. Rectification of name of company.— (1) *If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which-*

(i).....

(ii) *on an application by a registered proprietor of a trade mark, is in the opinion of the Central Government identical with, or too nearly resembles, a registered trade mark of such proprietor under the Trade Marks Act, 1999, such company,*

(a)

(b) *shall, if the Central Government so directs within twelve months of its first registration or registration by its new name, as the case may be, or within twelve months of the commencement of this Act, whichever is later, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow.*

Provided that no application under clause (ii) made by a registered proprietor of a trade mark after five years of coming to notice of registration of the company shall be considered by the Central Government.

25. The proviso to Section 22(1)(ii)(b) as above reveals that Legislature is cognizant of the difference in 'incorporation' and 'of coming to notice of registration of the company'. The two situations are different and distinct. Had it been the intention of the Legislature that the statutory limitation should run from the date on which an aggrieved person obtained knowledge of the registration/incorporation of a company, it could very well have stated so in Section 16 of the 2013 Act as well. This argument is thus rejected.



26. Section 16 of the 2013 Act, to the extent to which it is relevant,

reads thus:

16. Rectification of name of company.— (1) *If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name, is registered by a name which,*

(a) in the opinion of the Central Government, is identical with or too nearly resembles the name by which a company in existence had been previously registered, whether under this Act or any previous company law, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of three months from the issue of such direction, after adopting an ordinary resolution for the purpose;

(b) on an application by a registered proprietor of a trade mark that the name is identical with or too nearly resembles to a registered trade mark of such proprietor under the Trade Marks Act, 1999, made to the Central Government within three years of incorporation or registration or change of name of the company, whether under this Act or any previous company law, in the opinion of the Central Government, is identical with or too nearly resembles to an existing trade mark, it may direct the company to change its name and the company shall change its name or new name, as the case may be, within a period of six months from the issue of such direction, after adopting an ordinary resolution for the purpose.

27. Section 16 provides for rectification in two situations, first, on an application by the Central Government through the ROC and second on an application by a registered proprietor. The limitation of 3 years from date of



incorporation/registration/change of name of the company, is imposed only in the latter instance.

28. R2 would argue that it had a duty to bring to the attention of the ROC the similarity in the name of the company as the very purpose of Section 16 is to avoid such similarity that would result in public confusion. Stating thus, there is an attempt to bring the application within the ambit of Section 16(1)(a) where there is no limitation provided.

29. Per contra, the petitioner retorts that when the statutory provision envisages two separate modes of redressal, such procedure must be followed strictly. R2 cannot, petitioner argues, mix the remedies available under Section 16, merely to suit its own case. I agree. Section 16 is categorical in extending two methods by which rectification of name can take place. While, the Central Government is given unfettered power to effect rectification at any point in time, a registered proprietor has the responsibility to be vigilant and approach the authority within the time stipulated. This is the scheme of the Act.

30. It has never been the case of either R1 or R2 that the proceedings have been initiated at the behest of R1 and thus, this argument can only be considered as an afterthought, designed to get over the elapse of time, albeit unsuccessfully. The fact that the application in the subject column mentions



only Section 16 and no sub-section or clause does not, in any way, lend credence to this argument, as the very fact that it is an application by a third party would bring it under the sweep of Section 16(1)(b) only.

31. The decision in *Satpuda Infracon Pvt. Ltd. Vs M/s.Satpura Infracon Pvt. Ltd. & Ors.* [ILR (2017 MP 2645] does not advance the case of R2. That case was decided in light of the admitted fact that the application decided under the order impugned was not preferred by a registered proprietor of a trademark. It is thus that the Court held that Section 16(1)(b) of the 2013 Act was not attracted.

32. In that context, they do hold that the Central Government may form an opinion under clause (i) of Section 16(1) taking a cue from an application preferred by an aggrieved person. However, such a situation has not arisen in this case and it has never been anyone's case that the impugned proceedings have their genesis in Section 16(1)(a) of the 2013 Act. This argument is also rejected.

33. The petitioner then presses into service the provisions under the 1956 Act and the limitation thereunder. Their argument appears to be, that at the time when the petitioner company was incorporated, it was the 1956 Act that was in force. Section 22 provided for a limitation of 5 years from coming to know of



the incorporation of a company, to seek rectification of its name. Thus, according to them, the period of 5 years would run only from 2015 when R2 came be aware of the incorporation of the petitioner company.

34. This argument is rejected as, with the repeal of the 1956 Act and the coming into force of the 2013 Act on 29.08.2013, the 1956 Act and the provisions thereunder have no force except to the extent saved under Section 465 of the 2013 Act.

35. Three Judges of the Hon'ble Supreme Court in the case *S.S.Gadgil Vs Lal and Co.* (53 ITR 231) considered a challenge to proceedings for re-assessment under Section 34 of the Income Tax Act, 1922 on the ground that the notice issued was barred by limitation under Section 18 of Finance Act 1956. Section 34 was amended and one of the provisos substituted to state that no notice may be issued thereunder after the expiry of 2 years from the end of the assessment year.

36. The Bench noted that Section 18 of Finance Act, 1956 had not been given retrospective operation. Thus the question that arose was whether notice of assessment may be issued under the amended provision when the period prescribed for such notice had expired before the amended Act came into force.



37. The Bench held that such an event was not possible, in view of the settled position that when a Statute mentions a date on which a provision shall come into operation, it shall be deemed to come into force on the expiry of the previous day. The law did not take into consideration fractions of a date. Thus, the power to issue a notice under the unamended Act expires on 31.03.1956 and no notice could be issued thereafter under that provision.

38. No doubt, amended Section 18 provided that notice could be issued within 2 years from the end of the assessment year. However, the Court held that the application of the amended Act is subject to the principle that unless otherwise provided, if the right to act under the earlier Statute had come to an end, it could not be revived by a subsequent amendment which extended the period of limitation.

39. The right of the officer has come to an end on 31.03.1956 and as on that date, the proceedings lapse. There was no possibility for the dead proceedings to be revived thereafter merely because the amended Section gave vested authority in the power to issue notice. Thus, and since the right to issue notice under the earlier Act had come to an end before the new Act came into force, the notice was struck down.



40. In the present case, it is not merely a provision that has been amended but an entirely new enactment, the 2013 Act that has replaced the 1956 Companies Act. There is simply no avenue for the timelines under the old Act to enure to the benefit of R2.

41. In the case of *B.K.Educational Services Private Limited Vs Parag Gupta and Associates* [2019 (11) SCC 633], while dealing with a matter under the Insolvency and Bankruptcy Code, 2016, the Hon'ble Supreme Court interpreted the phrase '*debt due*'. They held that such debts that were due would obviously refer only to those debts that were due and payable and no debts that were stale or time barred.

42. In this context, while extracting the relevant portion of the decision in the case of *Thirumalai Chemicals Ltd. v. Union of India* [(2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458], they state at paragraphs 59 and 60, as follows:

59. *This aspect of the matter is brought out rather well in Thirumalai Chemicals Ltd. v. Union of India [(2011) 6 SCC 739 : (2011) 3 SCC (Civ) 458] as follows:*

.....

24. *Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is*



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retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

60..... A perusal of this judgment would show that limitation, being procedural in nature, would ordinarily be applied retrospectively, save and except that the new law of limitation cannot revive a dead remedy. This was said in the context of a new law of limitation providing for a longer period of limitation than what was provided earlier. In the present case, these observations are apposite in view of what has been held by the Appellate Tribunal. An application that is filed in 2016 or 2017, after the Code has come into force, cannot suddenly revive a debt which is no longer due as it is time-barred.

43. In light of the discussion as above, the limitation under Section 22 of the 1956 Act had long expired with the repeal of that Act and there is no question of any person being entitled to the benefit of the same thereafter. This argument is rejected.

44. The next argument relates to certain alleged deficiencies in, and non-disclosure by the Director of the petitioner company, of Form 24AA under Section 299(3) of the 1956 Act. R2 points out that as per Form 24AA, the date of disclosure is 01.04.2009, whereas the date of incorporation is 06.08.009. That apart, it is alleged that there were misrepresentations in regard to the disclosures to be made regarding the directorships held. These aspects are, in my considered view, wholly irrelevant and extraneous to the present Writ Petition.



45. In light of the statement of learned counsel for R2 as recorded at paragraph 9 above, the decisions of the Punjab and Haryana and Delhi High Courts in the following cases, placed as part of compilation dated 07.01.2023 are not adverted to.

1. *Vardhaman Crop Nutrients Pvt. Ltd. Vs Union of India and Ors.* [2015 (192) Comp Cas 312 (P & H)]
2. *Everstone Capital Advisors Pvt. Ltd. Vs Everstone Ventures LLP* [2019 SCC Online Del 8111]
3. *Mondelex Foods Pvt. Ltd. Vs Regional Director (North), Ministry of Corporate Affairs and Ors.* [2017 SCC Online Del 9219]

46. Incidentally, I note that there is no disclosure in the counter affidavit in regard to the dismissal of the interim applications by the Trial Court on 05.06.2017 or the decision of this Court in the Civil Miscellaneous Appeals on 18.09.2017. The narration in the counter affidavit stops with the prayer for permanent injunction before the Trial Court.

47. I do believe that it would have been appropriate in the interests of full disclosure, for the subsequent events to have been recorded as well, seeing as the counter has been filed only on 24.11.2022 and these are matters of record.

48. The Hon'ble Supreme Court in *S.Govina Menon Vs The Union of India and Another* [AIR 1967 SC 1274] considered the challenge to a judgment



of the Kerala High court dismissing the Writ Appeal filed by the appellant challenging enquiry proceedings under Rule 5 of the All India Services (Discipline and Appeal) Rules, 1955. The fate of that appeal was against the appellant as the Court was of the view that no case has been made out for grant of Writ of Prohibition.

49. At paragraph 5, they outlined the scope of interference under Article 226 in light of the prayer for prohibition in the following terms:

5. The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well-settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice (See Halsbury's Laws of England, 3rd Edn., Vol. II, p. 114). It was held for instance by the Court of Appeal in The King v. North(1) that as the order of the judge of the consistory court of July 24, 1925 was made without giving the vicar an opportunity of being heard in his defence, the order was made in violation of the principles of natural justice and was therefore an order made without jurisdiction and the writ of prohibition ought to issue. But the writ does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. It is also well-established that a writ of prohibition cannot be issued to a court or an inferior tribunal for an error of law unless the error makes it go outside its jurisdiction (See Regina v. Comptroller-General of Patents and Designs,(1) and Parisienne Basket Shoes Proprietary Ltd. v. Whyte(2). A clear distinction must therefore



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be maintained between want of jurisdiction and the manner in which it is exercised. If there is want of jurisdiction then the matter is coram non Judice and a writ of prohibition will lie to the court or inferior tribunal forbidding it to continue, proceedings therein in excess of its jurisdiction.

50. In the present case, the observations of the Court, as extracted above, would only support my conclusion that the jurisdictional fact of bar of limitation is clearly attractive/established. The Court has observed that a Writ of Prohibition is not normally issued for a mere error of law unless the error makes the proceedings fall outside the jurisdiction of the authority.

51. The decision in *Lords Insulations India Pvt. Ltd. Vs The Regional Director, Department of Company Affairs, Southern Region, Chennai and Another* [2005 (1) CTC 34] would have no bearing on this case as it touches upon the similarities in the names of two companies and not on the legal issue of bar of limitation with which this Court is concerned.

52. In light of the reasoning as above, Writ of Prohibition as sought for is issued and this Writ Petition is allowed. No costs. Connected Miscellaneous Petitions are closed.

03.03.2023

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Index : Yes / No

Speaking Order /Non-speaking order

Neutral Citation: Yes/No

To



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1. The Joint Director,
Ministry of Corporate Affairs,
Office of the Regional Director,
Southern Region, Chennai
Sasthri Bhavan, Block – I,
V Floor, 26 Haddows Road,
Chennai – 600 006.



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