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OSA (CAD) No.52 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.06.2024

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A. (CAD) No. 52 of 2024
and
C.M.P.No.11445 of 2024 in O.S.A. (CAD) No.52 of 2024

The Oriental Insurance Company Ltd.,
rep. By its Managing Director,
A-25/27, Asaf Ali Road,
New Delhi – 110 002.

.. Appellant

Vs

- 1.M/s.Syndicate Bottles Pvt. Ltd.,
rep. By its Managing Director
A.P.Ashok Kumar,
45, Guruvappa Chetty Street,
Chintadripet, Chennai – 2.
- 2.M/s.Himaja Poultries Pvt. Ltd.,
rep. By its Managing Director
S.Divya, Door No.100, S.No.93/1B,
Chettipedu, Mevaloorupam,
Sriperumbudur – 601 105.
- 3.M/s.Space N Place Promoters Pvt. Ltd.,
rep. By its Managing Director
A.P.Ashok Kumar, S.No.405, MTH Road,
Pattabiram, Chennai – 72.
- 4.A.P.Ashok Kumar
- 5.A.Manimala



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6.M/s.Allied Insurance Surveyors &
Loss Assessors Pvt. Ltd., rep. By its
Managing Director,
Room No.5, Building No.7,
Mittal Industrial Estate, Marol,
Andheri East, Mumbai – 400 059.

7.Kotak Mahindra Bank Ltd.,
rep. By its Managing Director,
27 BKC, C27, G Block,
Bandra Kurla Complex,
Bandra (East), Mumbai – 400 051.

Respondents

Appeal filed under Section 13(1) of The Commercial Courts Act, 2015 read with Order 36 Rule 1 of O.S. Rules against the fair and decretal order dated 10.04.2024 in A.No.1168 of 2024 in C.S. (Commercial Division) No.74 of 2021.

For Appellant : Mr.M.V.Swaroop

For Respondents : Mr.Avinash Wadhwani
for R1 to R5

JUDGMENT

(Judgement of the Court was delivered by **M.Sundar, J.**)

Captioned 'Original Side Appeal' (hereinafter 'OSA' for the sake of brevity) is directed against 'an order dated 10.04.2024 made in A.No.1168 of 2024 in C.S. (Commercial Division) No.74 of 2021' by Hon'ble Commercial Division of this Court (hereinafter 'impugned order' for the sake of convenience and clarity).

2. Respondents 1 to 5 before us are the plaintiffs before the Commercial Division and plaintiffs while presenting the



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aforementioned suit took out an application in A.No.1996 of 2021 (in C.S. Diary No.13098 of 2010) with a 'Leave To Sue' (LTS) prayer under Clause 12 of Letters Patent. This LTS prayer was acceded to by the Commercial Division in and by an order dated 01.06.2021. Thereafter, the suit was taken on file as C.S. (Commercial Division) No.74 of 2021 (to be noted, suit number has been mentioned supra).

3. In the suit, the appellant before us is first defendant (D1) and respondents 6 and 7 before us are D2 and D3 respectively. As regards Defendants 2 and 3, we are informed that they remained exparte before the Commercial Division.

4. In the aforementioned backdrop, D1 took out aforementioned application in A.No.1168 of 2024 with a prayer for revocation of LTS granted on 01.06.2021 in A. No.1996 of 2021 and the same came to be dismissed in and by the impugned order.

5. Adverting to the impugned order, Mr.M.V.Swaroop, learned counsel on record for appellant submits that even on a demurrer i.e., even if it is assumed that right of D1 to file written statement stands forfeited that cannot be a ground to dismiss the revoke LTS prayer.



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6. Finding that a prima facie case has been made out, we issued notice and Mr.Avinash Wadhwani, learned counsel who was on caveat for the first plaintiff (first respondent before us) accepted notice for R1 to R5 before us.

7. To be noted, in the light of the narrative thus far, it will be clear that presence of respondents 6 and 7 (D2 and D3) is really not imperative for disposal of the captioned OSA as the matter now perambulates within the legal perimeter of revoke LTS prayer only, however, we would be preserving the rights of R6 and R7 (D2 and D3) details of which will be set out infra in this order. In this scenario, both learned counsel before us i.e., Mr.M.V.Swaroop and Mr.Avinash Wadhwani very fairly agreed to have the main OSA taken up, heard out and disposed of.

8. Main OSA turns on one short point and that is whether the application by first defendant seeking revocation of LTS be dismissed on the ground that the first defendant's right to file written statement stands forfeited in the light of the time line vide 'The Commercial Courts Act, 2015 (Act 4 of 2016)' (hereinafter 'CCA' for the sake of brevity). The only ground on which revoke LTS application has been dismissed vide impugned order is that D1 (appellant before us) who took out the application had lost its right



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or in other words suffered legal forfeiture of its right to file written statement under CCA.

9. Learned counsel for appellant emphasized that on a demurrer even if the right to file written statement stands forfeited, the same will not impede the revoke LTS prayer much less impact and become the sole reason for dismissal of the same. Mr.Avinash Wadhwani submitted that the revocation application is only part of dilatory tactics and that there is no real merit in the revocation plea. In this regard, we deem it appropriate to stop with saying that the law on this point has been elaborately and elucidatively set out in ***Captain Tractors vs. Ashok Leyland*** (*Ashok Leyland* case) reported in ***2018 SCC OnLine Madras 13669 : 2018 (8) MLJ 564***. There is no disputation that there is no appeal against *Ashok Leyland* case and that *Ashok Leyland* case is holding the field.

10. Be that as it may, in the light of Section 120 of 'The Code of Civil Procedure, 1908 (5 of 1908)' [hereinafter 'CPC' for the sake of convenience and clarity], Sections 16, 17 and 20 are not applicable to proceedings in Original Side of this chartered High Court. Therefore, the entire matter is pivoted on Clause 12 of



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Letters Patent. Now that the matter is pivoted on Clause 12 of Letters Patent, grant of LTS is a jurisdictional fact. To put it differently, LTS or revocation of the same is a fact that precedes the suit and it is not a post suit issue. This principle is contained in/set out in *Ashok Leyland* by drawing inspiration from *Premier Distilleries case* being ***Premier Distilleries Pvt. Ltd., Vs. Sushi Distilleries*** rendered by a Division Bench authored by Hon'ble Mr. Justice R. Jayasimha Babu (as His Lordship then was). To be noted, Premier Distilleries case is reported in **(2001) 3 LW 585**. In *Premier Distilleries case*, the issue was whether trade mark registration pending suit can sustain an injunction qua infringement prayer as trade mark registration dates back to/takes effect from date of application which was prior to suit or will the suit remain as one qua passing off as there was no trade mark registration on the date of filing of suit.

11. As already alluded to, the revoke LTS application has not been tested on merits vide Clause 12 of the Letters Patent but it has been dislodged at the threshold on the ground of forfeiture of right to file written statement. Therefore, we deem it appropriate to say that revoke LTS needs to be tested on merits particularly in the light of *Ashok Leyland* principle.



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12. As a jurisdictional fact precedes the suit, the right of a defendant to file written statement having been lost by operation of law i.e., on numbering of suit will not impede the right to seek revocation of LTS. The sequitur is revocation application has to be heard out on merits in the light of principles laid down in *Ashok Leyland* case alluded to supra. Therefore, the dilatory tactics argument of R1 to R5 has to be considered only after hearing out revoke LTS plea on merits.

13. As already alluded to supra, as the captioned OSA is being disposed of in the presence of D1/appellant and plaintiffs, though D2 and D3 have remained exparte in the Commercial Division, we deem it appropriate to preserve the rights of D2 and D3 (R6 and R7 before us) to join the revocation of leave to sue application, if so advised and if so desired but in accordance with law i.e., subject to law permitting them to do so.

14. The sum sequitur of the discussion thus far means that the captioned OSA is allowed and impugned order is set aside. We make it clear that setting aside the impugned order does not mean that LTS is either revoked or sustained as we are remanding



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the matter to Hon'ble Commercial Division for adjudication of the matter afresh on merits. The further sequitur is A.No.1168 of 2024 with a revoke LTS prayer has to be heard out by Hon'ble Commercial Division.

15. Learned counsel for respondents 1 to 5 (plaintiffs before Commercial Division) submits that counter will be filed by a fortnight from today i.e., by 18.06.2024.

16. We request the Hon'ble Commercial Division to dispose of revoke LTS application as expeditiously as the business of Commercial Division would permit. Consequently, captioned Civil Miscellaneous Petition is disposed of as closed. There shall be no order as to costs.

(M.S.J.) (K.G.T.J.)
03.06.2024

Index:Yes/No
Neutral Citation: Yes/No
mmi

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To

The Sub Assistant Registrar,
Original Side, High Court,
Madras.



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**M.SUNDAR.J.,
and
K.GOVINDARAJAN THILAKAVADI, J.,
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