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O.S.A (CAD) No.73 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **12.09.2024**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MRS.JUSTICE **R.SAKTHIVEL**

O.S.A (CAD) No.73 of 2021

1. Mr.A.D.Padmasingh Isaac
Proprietor, Aachi Spices and Foods
Old No.4, New No.181/1
6th Avenue, Thangam Colony
Anna Nagar, Chennai - 600 040
2. Aachi Masala Foods Private Limited
No.1926, 34th Street, I Block
Ishwarya Colony, Anna Nagar West
Chennai - 600 040
Represented by its Director
Mr.Ashwin Pandian
3. Aachi Spices and Foods Private Limited
No.1926, 34th Street, I Block
Ishwarya Colony, Anna Nagar West
Chennai - 600 040
Represented by its Director
Mr.Ashwin Pandian
4. Aachi Special Foods Private Limited
No.1926, 34th Street, I Block
Ishwarya Colony, Anna Nagar West
Chennai - 600 040
Represented by its Director
Mr.Ashwin Pandian



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5. Aachi Spices and Condiments Private Limited
No.1926, 34th Street, I Block
Ishwarya Colony, Anna Nagar West
Chennai - 600 040
Represented by its Director
Mr.Ashwin Pandian

... Appellants

Vs.

Aachiamman Chit Funds Private Limited
No.A.P.234, Ground Floor
Kambar Colony, 31st Street
Anna Nagar West, Chennai - 600 040

.. Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of O.S
Rules read with Section 15 of Letters Patent and Section 13(1) of
Commercial Court 2015 (Act 4 of 2016) to set aside the judgment and
decree dated 07.07.2021 in C.S. (Comm.Div.) No.293 of 2020.

For Appellants : Ms.Gladys Daniel

For Respondent : No Appearance

JUDGMENT

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

Captioned intra-court appeal i.e., 'Original Side Appeal' ['OSA'
for the sake of brevity] has been filed in this 'Commercial Appellate
Division' ['CAD' for the sake of brevity] on 17.08.2021 assailing a



'judgment dated 07.07.2021 in C.S. (Comm.Div.) No.293 of 2020 along with an order in O.A.Nos.549 and 550 of 2020 thereat' [hereinafter 'impugned judgment' for the sake of brevity, convenience and clarity].

2. Ms.Gladys Daniel, learned counsel for appellants is before us. To be noted, in the suit before the Commercial Division being C.S (Comm.Div.) No.293 of 2020, there are five plaintiffs and a lone defendant. The five plaintiffs are on appeal before us and obviously the lone defendant is the sole respondent before this CAD.

3. From hereon and henceforth, the parties shall be referred to by their respective ranks in the Commercial Division for the sake of convenience and clarity. This means that the 'appellants' before this CAD shall be referred to as 'plaintiffs' and the 'sole respondent' before us shall be referred to as 'defendant'. As regards the five plaintiffs, if a need arises to refer to a particular plaintiff, we shall be referring to the particular plaintiff by plaintiff number in the suit (to be noted, appellants 1 to 5 are plaintiffs 1 to 5 respectively in the Commercial Division).

4. The plaintiffs presented a plaint dated 21.09.2020 with prayers *inter alia* for permanent injunction qua infringement of plaintiffs' trademark, passing off and one limb of prayer seeking direction to defendant to surrender alleged offending material. To be noted, the usual



limbs of a plaint prayer in such suits i.e., for accounts of profit, costs and the residuary limb of such other or further orders at the discretion of the Court also form part of the plaint prayer. As can be culled out from the prayer, the plaintiffs are concerned for two registered trademarks, namely Trade Mark Nos.838786 and 3370965.

5. Ms.Gladys Daniel, learned counsel for plaintiffs advertent to the plaint averments submits that Trademark No.838786 is qua a wordmark 'AACHI' and Trademark No.3370965 is qua a label mark



6. Be that as it may, we find that the 'Legal Use Certificates' ('LUCs' for the sake of brevity) were not before the Commercial Division and they are not before this CAD either.

7. As regards the wordmark registration, it is in Class 30 and as regards label mark, the registration is in Class 36.

8. It is the case of the plaintiffs that they came across defendant under the name and style 'Aachiamman Chit Funds Private Limited' sometime in August of 2020 and that necessitated the aforesaid suit. We also find that cease and desist notice has not been issued prior to the institution of the suit much less has there been recourse to Section 12-A



of 'The Commercial Courts Act, 2015 [Act 4 of 2016]' {hereinafter 'CCA' for the sake of brevity}. We are acutely conscious that the plaint is dated 21.09.2020 which is prior to declaration of law in Patel Automation [*Patil Automation Private Limited and Others Vs. Rakheja Engineers Private Limited* reported in *2022 SCC OnLine SC 1028*] rendered on 17.08.2022, the prospective date of 20.08.2022 and *Yamini Manohar* case law [*Yamini Manohar Vs. T.K.D.Keerthi* reported in *2023 SCC OnLine SC 1382*] rendered on 13.10.2023.

9. Be that as it may, as regards the impugned judgment, the same has been made by Hon'ble Commercial Division, by taking recourse to Order XIII-A of 'the Code of Civil Procedure, 1908' [hereinafter 'CPC' for brevity and convenience] which has been inserted in CPC by CCA obviously vide Section 16 read with Schedule thereat. In other words, impugned judgment is a summary judgment.

10. Order XIII-A provides for summary judgment without recourse to oral evidence i.e., without recording oral evidence in cases where the Commercial Division finds that the plaintiff has no real prospect of succeeding 'on the claim' or in cases where the Commercial Division finds that the defendant has no real prospect of successfully defending the 'claim'. 'Claim' has been repeatedly explained to be either



the claim in entirety or part of the claim but we are not really not concerned with that aspect of the matter in the legal drill on hand.

11. Hon'ble Commercial Division in and vide the impugned judgment has dismissed the suit primarily on the ground that 'Aachi' is a generic term, which is widely identified with food products, Indian spices and that it does not vest the plaintiffs with any monopoly qua the word 'Aachi'. Nonetheless Hon'ble Commercial Division has returned a finding that there is no possibility of success for the plaintiff even if the matter is put to trial.

12. In her campaign against the impugned judgment, notwithstanding myriad grounds raised in the memorandum of grounds of appeal, learned counsel predicated her arguments on two points and they are as follows:

a) The impugned judgment i.e., summary judgment has been rendered before the service of suit summons on the sole defendant and this according to learned counsel is impermissible in the scheme provided under Order XIII-A of CPC;

b) The summary judgment ought not to have been rendered without recording *ex parte* evidence on the side of



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plaintiffs, as according to learned counsel, plaintiffs would have brought to light multiple points which would have averted dismissal of the suit.

13. In the captioned appeal before this Commercial Appellate Division (as already alluded to supra), the sole defendant before Commercial Division is the sole respondent and is being referred to as defendant for convenience, but for the sake of enhanced clarity we deem it appropriate to write that service on sole respondent in captioned OSA has been effected by resorting to substituted service, the respondent/lone defendant on being served, has not chosen to come before Court either through a counsel or in any other manner. To be noted, the name and address of the sole defendant as in the short and long cause titles are shown in the cause list, name called out aloud thrice in the Court and in the adjoining corridors but there is no response either in the physical Court or on the 'VC' ['Videoconferencing'] platform. To be noted, this is a hybrid hearing which is a regular/routine/daily feature in this Court. Registry informs us that the sole respondent has not entered appearance through any counsel.

14. In the light of the narrative thus far, we proceed to discuss and give our dispositive reasoning qua the arguments of learned counsel



for appellants/plaintiffs which have been captured supra.

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15. As regards the first point, the point of time at which a litigant can take out an application seeking summary judgment has been set out vide Rule 2 of Order XIII-A and that says that application can be taken out by a party seeking summary judgment after summons has been served on the defendant but it shall be before framing of issues. In the case on hand, there was no application from the plaintiffs and obviously none from the defendant as defendant has not been served with the suit summons and defendant has not come before this CAD in spite of being served in captioned OSA by resorting to substituted service. As already alluded to supra, no cease and desist notice was issued to the defendant before the presentation of the plaint. We hasten to add that we are not writing that cease and desist notice is statutorily imperative or mandatory but we are only recording the obtaining position that the defendant was not put on notice before filing of the suit.

16. In the case on hand, we find that the suit has not been decreed against the defendant but the plaintiffs have been non-suited. IN other words, the suit has been dismissed and therefore, no prejudice has been caused to the defendant and on the contrary impugned judgment is in favour of defendant. The sequitur is, plaintiffs cannot take advantage



of the fact that the defendant has not been served with suit summons.

Therefore, we make it clear that first point does not cut ice with us.

17. This takes this Court to the second point which turns on *ex parte* evidence not having been let in on the side of the plaintiffs and the argument that the impugned judgment ought not to have been rendered without *ex parte* evidence.

18. We are of the considered opinion that aforesaid second point / argument is a non-starter and the reason is, Order XIII-A itself is a mechanism which provides for a judgment i.e., a summary judgment '***without recording oral evidence***'. After all, *ex parte* evidence is also oral evidence. Therefore, second point also does not weigh with us much less does it aid the plaintiffs.

19. Be that as it may, we carefully considered the impugned judgment. We find that the impugned judgment does not record the arguments of the plaintiffs. From the impugned judgment, we find that there is nothing to demonstrate that the plaintiffs have been heard. It proceeds on the basis that the plaint has been perused. Therefore, it comes to light that the plaint has been perused and impugned judgment has been rendered on the basis of plaint averments. To be noted, the impugned judgment has not been rendered by resorting to Order VII Rule



11 (rejection of plaint) or Order VII Rule 10 (return of plaint) of CPC.

Therefore, we are of the considered view that the plaintiffs ought to have been heard, plaintiffs arguments should have been considered and dispositive reasoning ought to have been given qua plaintiffs arguments particularly when the suit is being dismissed vide impugned judgment. In this view of the matter, we deem it appropriate to remand the matter back to the Hon'ble Commercial Division for being heard after giving an opportunity to the plaintiffs to put forth their arguments, consider / discuss the arguments and give dispositive reasoning.

20. As we are remanding the matter back to the Hon'ble Commercial Division, the questions as to a) whether a summary judgment can be rendered only on an application by a party b) whether a summary judgment if it is dismissal of the suit can be rendered before service of suit summons, c) whether the suit on hand is bad for not filing LUCs and d) whether cease and desist notice ought to have been issued in suit on hand are left open.

21. Ergo, the sequitur is, impugned judgment is set aside on the aforementioned short point suit is resuscitated and the matter is remanded back to the Hon'ble Commercial Division for a *de novo* legal drill. All questions are left open for the Commercial Division to embark



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upon the *de novo* legal drill including the questions which have been set out with specificity.

22. Captioned OSA disposed of in the aforesaid manner and there shall be no order as to costs.

(M.S.J.) (R.S.V.,J.)
12.09.2024

Index: Yes/No
Neutral Citation: Yes/No
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**M.SUNDAR.J.,
and
R.SAKTHIVEL, J.,
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