



2024:DHC:8196



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **CM(M)-IPD 12/2024 & CM 64/2024, CM 65/2024****MEHBOOB AHMAD & ANR.**

.....Petitioners

Through: Mr. J. Sai Deepak, Advocate with Mr.
S.K. Bansal, Mr. Aviral Srivastava,
and Mr. R. Abhishek, Advocates
Mob: 9811596201

versus

MUNEER AHMAD & ORS.

.....Respondents

Through: Mr. Sanjeev Sindhvani, Sr. Advocate
with Mr. Alishan Naqvee, Ms. Rupal
Bhatia and Mr. Saurav Chaudhary,
Advocates
Mob: 9891047715

CORAM:**HON'BLE MS. JUSTICE MINI PUSHKARNA****J U D G M E N T****23.10.2024****MINI PUSHKARNA, J:**

1. The present petition has been filed under Article 227 of the Constitution of India, 1950 read with Section 151 of the Code of Civil Procedure, 1908 ("CPC"), challenging the order dated 18th May, 2024 passed by the learned Additional District Judge ("ADJ"), (Commercial-3), South, Saket Court, New Delhi, in suits bearing nos. *CS(COMM)76/2023* and *CS(COMM) 217/2023*. By the impugned order, the learned ADJ has allowed four applications of the respondents herein, for taking on record the additional documents.

2. The petitioners are the plaintiffs in suit, bearing *CS(COMM) 76/2023*,



wherein, the respondents herein, in their capacity as defendants filed two applications under Order XI Rule 1 (10) CPC, as amended by The Commercial Courts Act, 2015, for taking on record additional documents.

3. The respondents are plaintiffs in the suit, being *CS(COMM) 217/2023*, wherein, the petitioners herein, are the defendants. In the said suit, the respondents herein, in their capacity as plaintiffs, filed two applications under Order XI Rule 1 (5) CPC, as amended by The Commercial Courts Act, 2015, for taking on record additional documents.

4. Since, by the impugned order all the four applications filed on behalf of the respondents herein in both the suits, in their capacity as plaintiffs and defendants respectively, have been allowed, the present petition has been filed.

5. The facts canvassed in the petition, are as follows:

5.1 Petitioners are engaged in the business of manufacturing, marketing and trading paint brushes, roller brushes and art brushes. The petitioners have been conducting their business under their proprietary firm named Bharat Brush International.

5.2 Petitioner no. 1 adopted and began using the trademarks/labels 'BHARAT' in September, 2015 in relation to the aforesaid goods. The petitioner no. 2 adopted and began using trademarks/labels 'B-444' and 'BALWAN 444' in October, 2014.

5.3 Respondents are engaged in manufacturing, marketing, soliciting, selling and trading paint brushes and art brushes under the trademarks/labels 'Bharat', 'Smart Bharat', 'AX-444', 'XB-444', 'KFS 444' and trade dress of yellow-black and red-peach colour combinations.

5.4 It is the case of the petitioners that respondents have adopted



impugned marks/labels, identical or deceptively similar to the petitioners' 'BHARAT' formative marks and '444' formative trademarks/labels. The respondents have also copied the yellow-black and red-peach colour combination.

5.5 Thus, the petitioners herein filed suit being *CS(COMM) 76/2023*, alleging trademark and copyright infringement, and passing off, by the respondents herein, in February, 2023. The respondents herein, as defendants in the said suit, filed their written statement on 10th March, 2023.

5.6 The respondents filed a counter suit, being *CS(COMM) 217/2023* on 15th April, 2023.

5.7 The petitioners herein argued their application for interim relief under Order XXXIX Rules 1 & 2 CPC, and completed their arguments on 30th March, 2024. Both the suits were put up for arguments by the respondents on the said application on 18th April, 2024.

5.8 The respondents thereafter filed applications for placing additional documents on record under Order XI Rule 1(10) and Rule 1(5) CPC in the respective suits on 17th April, 2024. The petitioners filed their reply thereto and the said applications came up for hearing on 4th May, 2024. Subsequently, on 4th May, 2024, the respondents herein filed another application under Order XI Rule 1 (10) CPC for placing on record another set of additional documents. By way of the impugned order, the said applications of the respondents have been allowed, against which, the present petition has been filed.

6. On behalf of the petitioners, following submissions have been made:

6.1 The learned Trial Court has erred in accepting the additional documents on extraneous and irrelevant grounds and consideration, which



are not justified by the facts of the case.

6.2 Subject matter suits are commercial suits governed by the Commercial Courts Act, 2015. Under this Act, defendants are required to declare, at the time of filing the written statement that no other documents are in their possession. Therefore, the additional documents, which were within the power and possession of the respondents, could not have been admitted at a later stage.

6.3 Despite noting that the additional documents were always in the respondents' power and possession, the learned Trial Court erred in admitting them without recognising that the respondents provided no plausible reason for their late submission.

6.4 The impugned order failed to analyse individually, whether each document was in the power, possession, control and custody of the respondents. In the present case, all the documents except the Chartered Accountant ("CA") Certificate were in power and possession of the respondents, during the time of filing of the written statement, as well as the counter claim.

6.5 The impugned order erroneously allowed all the documents on the basis of interpretation given in normal civil suits, and without rendering any findings on every document individually, as to whether there was reasonable cause for delay in filing.

6.6 Jurisdiction error has been committed by the trial court, as it has wrongly perceived the rationale and import of 'reasonable cause' for filing additional documents at subsequent stage, by giving a liberal interpretation. There is no reasonable explanation as to why the additional documents were not filed along with the written statement or the counter suit, as the same



were in power and possession of the respondents at the time of filing of the same.

6.7 There are discrepancies in the documents now sought to be filed as additional documents. The additional documents set up a totally different case, which *ex-facie* cannot stand in line with the original pleading. The respondents, by filing these additional documents, are attempting to withdraw their existing admission. The authenticity of these documents is also doubtful, since the content of these documents raises inconsistent pleas.

6.8 There is no bar to challenge the impugned order, as costs imposed were not conditional. The cost imposed upon the respondents by way of the impugned order, was not conditional in nature. Therefore, receipt of the cost by the petitioners, does not serve as a bar to challenge the impugned order. The learned Trial Court had already come to the conclusion that the respondents herein had shown reasonable cause for non-disclosure of the documents. Therefore, cost has been imposed by the court as a fine to the respondents, not a condition precedent.

6.9 The cost was accepted by the petitioner without prejudice. The impugned order does not give any option to the petitioner to not accept the cost.

6.10 Various judgments have been relied upon, by the petitioners in support of their submissions.

7. On behalf of the respondents, following submissions have been made:

7.1 The additional documents have been filed by the respondents to show that they are the prior users of the mark. The respondents' business was established in the year 1997 as 'Bharat Brush Agencies', for manufacturing, marketing, selling and supplying a variety of paint brushes and allied



products under the trademark ‘Bharat’, both as device mark and word mark and its variations. The said business has been continued for the last 47 years.

7.2 The petitioners started the same business much later in September, 2015 under the name and style of ‘Bharat Brush International’, adopting the identical trademark ‘BHARAT’ and its variations. The additional documents, being crucial to the adjudication have rightly been permitted by the learned Trial Court.

7.3 The documents were not in power, control and possession of the respondents at the time of filing the written statement and counter claim. Accordingly, respondents filed the applications to bring on record additional documents.

7.4 The petitioners’ objections to the genuineness of the additional documents, is misconceived, since it is a triable issue. The petitioners will get the opportunity to rebut the documents during evidence, therefore, there is no prejudice caused to them.

7.5 The suit and counter claim are at the initial stage. Therefore, no prejudice shall be caused to the petitioners if the additional documents are taken on record.

7.6 In the present case, the learned Trial Court has allowed the applications to file additional documents, after considering the explanation and relevance of the documents. There is nothing in the impugned order which can be termed as perverse.

7.7 The applications of respondents were allowed subject to costs, which have been accepted by the petitioners. The petitioners are, therefore, estopped from challenging the impugned order.

7.8 Respondents have also relied upon various judgments, in support of



their submissions.

8. I have heard learned counsels for the parties and have perused the record.

9. Additional documents that were sought to be brought on record by the respondents before the learned trial court by way of four applications, are as follows:

I. Certificate issued by the Chartered Accountant confirming annual turnover of Bharat Brush Agencies and its manufacturers, sellers and distributors using the mark Jyoti, 444, Chetak, Deluxe, Star Gold, 555, SKT, Bll 1, Axle, Bharat and Bharat Brush Agencies and their variations in word and device marks for the years 2010 to 2020, i.e., prior to the year 2015 when the plaintiffs claim to have started their business.

II. Screenshots from the website "web.archive.org" [Internet Archive] showing the goods being sold by Bharat Brush Agencies using the marks Bharat, Bharat Brush and its variations in word and device marks since the year 2012 to 2014, i.e., prior to the year 2015 when the plaintiffs started their business.

III. Certificate of Provisional Registration dated 27.06.2017 issued under the GST Act in the trade name of M/s Bharat Brush Agencies.

IV. Emails dated 22.02.2011, 23.02.2011, 18.03.2011, 29.03.2011, 09.04.2011, 02.07.2011, 04.07.2011, 06.06.2012, 28.04.2014 sent by the graphic designers sharing the packaging and sticker designs for the products of Bharat Brush Agencies, alongwith their attachments.

V. Email dated 11.03.2014 received from Indiamart confirming listing of Bharat Brush Agencies with Indiamart for sale of its products.

VI. Letter dated 21.09.2009 issued on the letterhead of Bharat Brush



2024:DHC:8196



Agencies to SDO Rampur requesting closure of STD connection on telephone number "245051" of Bharat Brush Agencies, along with notepad sheet (estimate) containing the aforesaid telephone number and marks of Bharat Brush Agencies.

10. The reasons and cause, as given by the respondents for non-disclosure at the time of filing of the written statement and counter suit, as given in the applications for taking on record additional documents before the learned trial court, are as follows:

10.1 As regards the CA certificate, it has been submitted that the same has been provided by the CA on 8th April, 2024, and therefore, could not be filed along with the written statement and counter suit.

10.2 As regards the screenshots from the website, "web.archive.org", it has been submitted that the documents for the years 2013 and 2014 could not be downloaded at the time of filing of the written statement and counter suit, due to some technical error on the said website. Hence, the same are being filed now. At that time, the defendants could download the archive pages only for the year 2012 and the same had accordingly been filed.

10.3 As regards the certificate of provisional registration under the GST, it is submitted that during the arguments in the application for interim relief, the counsel for the petitioners had attempted to impugn certain bills/invoices of the respondents as forged bill/invoices by specifically pointing out the GST number mentioned on the said invoices, dated prior to the date of issuance of the GST certificate. To counter the said claim of the petitioners, the respondents have sought to place on record copy of the provisional GST certificate dated 27th June, 2017, to show the date on which the provisional certificate was issued, and that is how the bills subsequent



thereto, had the GST number printed on them.

10.4 As regards the various emails sent by the graphic designer, and the email received from Indiamart, it has been submitted by the respondents that the said documents were not within the power, possession and knowledge of the respondents, and therefore, could not be filed earlier. The said emails are from more than 13 years ago and were only found by the respondents after conducting a detailed and deep search of the inbox and other folders, as well as sub folders, mail archive of 'bharat.brushagen@gmail.com', therefore, could not be filed earlier.

10.5 As regards the letter dated 21st September, 2009 issued on the letter head of Bharat Brush Agencies, it has been submitted that the said document could be traced by the respondents only recently, while going through the belongings of the deceased father, which were lying with the respondent no. 1's sister, therefore, could not be filed earlier.

11. The aforesaid explanation and reasons were accepted by the learned trial court by holding that the respondents have shown reasonable cause for non-disclosure of the said documents along with the written statement or counter claim. It was further held by the learned trial court that the additional documents sought to be brought on record by the respondents, do not introduce new case or seek to withdraw the admission made by the respondents. The said documents were held to be aimed at elaborating the case set up by the respondents in the written statement and counter claim.

12. Reading of the impugned order passed by the learned trial court manifests that the said order has been passed after considering the explanation and relevance of the said documents. The objections raised by the petitioners herein were duly considered, and a reasoned order has been



passed by the learned Trial Court. There is nothing in the impugned order which can be termed as perverse, in order to invoke the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

13. In the context of exercise of power by a High Court under Article 227 of the Constitution, while holding that a High Court does not exercise its power as an Appellate Court or substitute its own judgment in place of that of the Trial Court to correct an error, which is not apparent on the face of the record, Supreme Court in the case of ***Estralla Rubber Versus Dass Estate (P) Ltd., (2001) 8 SCC 97***, has held as follows:

“xxx xxx xxx

6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

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14. Likewise, in the case of ***Garment Craft Versus Prakash Chand Goel, (2022) 4 SCC 181***, Supreme Court has held as follows:



“xxx xxx xxx

15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [Prakash Chand Goel v. Garment Craft, 2019 SCC OnLine Del 11943] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. [Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar, (2010) 1 SCC 217: (2010) 1 SCC (Civ) 69] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

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15. As regards the other submissions made by the petitioners regarding the genuineness of the additional documents sought to be placed on record, law in this regard is well settled that at the stage of granting leave to place on record the additional documents, the court is not required to consider the genuineness of the documents/additional documents. The stage, at which the genuineness of the documents is to be considered, is during the trial. (See: ***Agva Healthcare Private Limited and Others Versus Agfa-Gevaert NV and Another, 2023 SCC OnLine Del 7914, Para 16***).

16. The evidentiary or other value of the document *vis-a-vis* the controversy in issue in the plaint, is a consideration alien to what has been ordained under Order XI Rule 1(5) and Rule 1(10) CPC, for considering an



application for placing on record additional documents. (See: ***Md. Islamuddin Versus S.S. Kapoor, 2022 SCC OnLine Del 3608, Para 11***).

17. This Court also notes that the applications of the respondents herein, were allowed by the impugned order dated 18th May, 2024, subject to payment of costs. The cost stands accepted by the petitioners in both the cases, as recorded in the order dated 22nd May, 2024 passed by the learned Trial Court. Thus, the petitioners have waived their right to assail the impugned order. Though, it has been contended by the petitioners that the cost imposed by the learned Trial Court was not a condition precedent for allowing the applications and was imposed as a fine to the respondents, the same is not borne from the records. The impugned order is very categorical to the effect that the applications of the respondents have been allowed, subject to cost to be paid by the respondents herein to the petitioners.

18. Similarly, this Court rejects the contention of the petitioners that the cost was accepted without prejudice by the petitioners. Neither any such statement of the petitioners has been recorded at the time of acceptance of the cost, nor was there any compulsion on the petitioners to accept the cost, if they did not accept the order of the learned Trial Court and intended to challenge the same. Thus, in the case of ***Bijendra Nath Srivastava Versus Mayank Srivastava and Others, (1994) 6 SCC 117***, Supreme Court has held as follows:

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18. That apart the principle of estoppel which precludes a party from assailing an order allowing a petition subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being



deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order. The decision of the Andhra Pradesh High Court in Metal Press Works Ltd. v. Guntur Merchants Cotton Press Co. Ltd. [AIR 1976 AP 205 : (1975) 1 APLJ (HC) 283] on which reliance has been placed by the High Court, proceeds on the basis that awarding of costs was, in fact and substance, a part of the entire order allowing amendment in written statement and the said order was a conditional one. The decision of the Madras High Court in Sree Mahant Prayag Dossjee Varu v. Raja Venkata Perumal [AIR 1933 Mad 410 : 1932 MWN 1118 : 142 IC 903] and the decisions of the Patna High Court in Ramcharan Mahto v. Custodian of Evacuee Property [AIR 1964 Pat 275 : 1964 BLJR 291] and Kapura Kuer v. Narain Singh [AIR 1949 Pat 491 : 27 Pat 187] on which reliance has been placed in the said judgment of the Andhra Pradesh High Court also emphasise that the orders under challenge were conditional orders and payment of costs was a condition precedent to allowing the petition. In J. Devaiah v. Nagappa [AIR 1965 Mys 102], the order allowing amendment of the election petition contained a direction regarding payment of costs. It was held that the application was allowed without any condition and that the order was not a conditional order and principle of estoppel was held inapplicable.

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19. Holding that acceptance of costs, amounts to acceptance of the order as correct, and having taken benefit of one part of the order, a party cannot turn around and say that he will also challenge the order, this Court in the case of **Vikramaditya Bhartia Versus DDA, 2011 SCC OnLine Del 3761**, has held as follows:

“xxx xxx xxx

5. Lord Atkin in the House of Lords in United Australia Ltd. v. Barclays Bank Ltd. (1940) 4 ALL. E.R. 20 held that if a man is entitled to one of the two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose. The said principle



has also been applied by the Courts in dealing with challenges to orders of the Court after acceptance of costs. It has been held that acceptance of costs amounts to acceptance of the order as correct and having taken benefit of one part of the order, a party cannot turn around and say that he will also challenge the order. It has been held that by allowing the party to challenge the order amounts to nullifying the acceptance of costs; a litigant cannot approbate and reprobate; he had two options, either to accept the costs and treat the order as correct or not to accept the costs and to challenge the order; having elected to accept the costs, he is estopped from thereafter challenging the order.

6. As far as the plea of the petitioner of payment under protest is concerned, as aforesaid there is nothing before this Court to show that the payment in fact was under protest. In the present case, there is no pleading of the petitioner being under any compulsion to have the leasehold rights converted into freehold and/or to have been under any disability from challenging the demand if aggrieved therefrom, before complying therewith. The Apex Court in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267 has held that whether a case of coercion is made out or not is a question of fact and dependent upon several factors. The adjudication of the said questions also is not possible in writ jurisdiction and the appropriate fora for adjudication of the said disputed questions of fact is the one where witnesses can be examined and cross examined.

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(Emphasis Supplied)

20. In view of the aforesaid detailed discussion, no merit is found in the present petition. The same is accordingly dismissed, with pending applications.

(MINI PUSHKARNA)
JUDGE

OCTOBER 23, 2024

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