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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 06.02.2024

+ **RFA(OS)(COMM) 20/2018, CM Nos.35421/2018 & 54800/2022**

SUPERON SCHWEISSTECHNIK INDIA LIMITED..... Appellant

Through: Mr. Sanjeev K. Singh & Ms.
Anupriya Alok, Advs.

Versus

MODI HITECH INDIA LTD.

..... Respondent

Through: Ms. Amita Sehgal & Mr. Saurabh
Pandey, Advs.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (ORAL)**

1. The appellant has filed the present intra-court appeal impugning the judgment and decree dated 02.04.2018 (hereafter '**the impugned order**') passed by the learned Single Judge in CS(COMM) No.750/2018 captioned *Superon Schweissttechnik India Ltd. v. Modi Hitech India Ltd.* By the impugned order, the suit filed by the appellant was dismissed ostensibly under Order XIII A of the Code of Civil Procedure Code, 1908 (hereafter '**the CPC**') as introduced by the Commercial Courts Act, 2015.

2. The appellant had filed the said suit, *inter alia*, praying that a decree restraining the respondent from using, selling, offering for sale, advertising or displaying directly or indirectly or dealing in any other manner or mode, in welding electrodes and allied and cognate goods / products under the trade mark / label "VAC-PAC" (hereafter '**the trade mark in question**').



3. The appellant as well as the respondent are engaged in the manufacturing and sale of electrodes. The appellant claims that it is the proprietor of the trade mark in question and exports goods to over seventy countries under the trade mark in question. The appellant had furnished the details of its turnover, which had increased from ₹1,76,31,937/- in the years 2004-2005 to ₹3,13,14,84,815/- in the years 2016-2017. The appellant claims that it has acquired immense goodwill in the market in respect of its goods sold under the trade mark in question.

4. The respondent is also using the trade mark in question (VAC-PAC) on its packaging along with its trade mark “SUPERON”.

5. On the very first date when the plaint was presented to the Court, the same was taken up for hearing and dismissed by the impugned order. The summons in the suit was not issued but the respondent was represented at the hearing held on 02.04.2018. The learned counsel appearing for the respondent at the threshold contested the suit and had advanced submissions, which were accepted by the learned Single Judge. It was accepted by the learned Single Judge that under Order XIII A of the CPC, as applicable to suits involving commercial disputes, the suit could be dismissed on the ground that the appellant had no real prospect of succeeding in the suit. The learned Single Judge had examined the appellant's claim on merits and concluded that the appellant had no possibility in succeeding in the said suit and accordingly dismissed the same.

6. A plain reading of the impugned order indicates that the learned



Single Judge had not accepted the appellant's claim that the trade mark in question, which was admittedly being used by the respondent on its packaging, was unique to the appellant. The trade mark in question was derived from the expression 'vacuum packaging/pack'. The learned Single Judge reasoned that all electrodes were vacuum packed and the trade mark in question was merely descriptive. Thus, the appellant would not claim any exclusive rights for use of the said mark.

7. The threshold question that falls for consideration of this Court in the present appeal is whether the learned Single Judge had erred in dismissing the suit on merits at the first hearing without issuing summons and without putting the appellant / plaintiff to notice that the Court intended to dispose of the suit by a summary decision under Order XIII A of the CPC.

8. In this regard, it is relevant to refer to Order XIII A of the CPC, as set out below:

**“ORDER XIII A
SUMMARY JUDGMENT**

1. *Scope of and classes of suits to which this Order applies.*

— (1) This Order sets out the procedure by which Courts may decide a claim pertaining to any Commercial Dispute without recording oral evidence.

(2) For the purposes of this Order, the word “claim” shall include—

(a) part of a claim;

(b) any particular question on which the claim (whether in whole or in part) depends; or

(c) a counterclaim, as the case may be.



(3) Notwithstanding anything to the contrary, an application for summary judgment under this Order shall not be made in a suit in respect of any Commercial Dispute that is originally filed as a summary suit under Order XXXVII.

2. *Stage for application for summary judgment.*— An applicant may apply for summary judgment at any time after summons has been served on the defendant:

Provided that, no application for summary judgment may be made by such applicant after the Court has framed the issues in respect of the suit.

3. *Grounds for summary judgment.*—The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that—

- (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and
- (b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

4. *Procedure.*—(1) An application for summary judgment to a Court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (a) to (f) mentioned hereunder:—

- (a) the application must contain a statement that it is an application for summary judgment made under this Order;
- (b) the application must precisely disclose all material facts and identify the point of law, if any;
- (c) in the event the applicant seeks to rely upon any documentary evidence, the applicant must,—
 - (i) include such documentary evidence in its application, and
 - (ii) identify the relevant content of such



documentary evidence on which the applicant relies;

(d) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;

(e) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief.

(2) Where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of:—

(a) the date fixed for the hearing; and

(b) the claim that is proposed to be decided by the Court at such hearing.

(3) The respondent may, within thirty days of the receipt of notice of application of summary judgment or notice of hearing (whichever is earlier), file a reply addressing the matters set forth in clauses (a) to (f) mentioned hereunder in addition to any other matters that the respondent may deem relevant:—

(a) the reply must precisely—

(i) disclose all material facts;

(ii) identify the point of law, if any; and

(iii) state the reasons why the relief sought by the applicant should not be granted;

(b) in the event the respondent seeks to rely upon any documentary evidence in its reply, the respondent must—

(i) include such documentary evidence in its reply; and

(ii) identify the relevant content of such documentary evidence on which the respondent relies;



- (c) the reply must state the reason why there are real prospects of succeeding on the claim or defending the claim, as the case may be;
- (d) the reply must concisely state the issues that should be framed for trial;
- (e) the reply must identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment; and
- (f) the reply must state why, in light of the evidence or material on record if any, the Court should not proceed to summary judgment.

5. *Evidence for hearing of summary judgment.*—(1) Notwithstanding anything in this Order, if the respondent in an application for summary judgment wishes to rely on additional documentary evidence during the hearing, the respondent must:—

- (a) file such documentary evidence; and
- (b) serve copies of such documentary evidence on every other party to the application at least fifteen days prior to the date of the hearing.

(2) Notwithstanding anything in this Order, if the applicant for summary judgment wishes to rely on documentary evidence in reply to the defendant's documentary evidence, the applicant must:—

- (a) file such documentary evidence in reply; and
- (b) serve a copy of such documentary evidence on the respondent at least five days prior to the date of the hearing.

(3) Notwithstanding anything to the contrary, sub-rules (1) and (2) shall not require documentary evidence to be:—

- (a) filed if such documentary evidence has already been filed; or



- (b) served on a party on whom it has already been served.

6. *Orders that may be made by Court.*—(1) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following:—

- (a) judgment on the claim;
- (b) conditional order in accordance with Rule 7 mentioned hereunder;
- (c) dismissing the application;
- (d) dismissing part of the claim and a judgment on part of the claim that is not dismissed;
- (e) striking out the pleadings (whether in whole or in part); or
- (f) further directions to proceed for case management under Order XV-A.

(2) Where the Court makes any of the orders as set forth in sub-rule (1) (a) to (f), the Court shall record its reasons for making such order.

7. *Conditional order.*—(1) Where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so, the Court may make a conditional order as set forth in Rule 6 (1) (b).

(2) Where the Court makes a conditional order, it may:—

- (a) make it subject to all or any of the following conditions:—
 - (i) require a party to deposit a sum of money in the Court;
 - (ii) require a party to take a specified step in relation to the claim or defence, as the case may be;



- (iii) require a party, as the case may be, to give such security or provide such surety for restitution of costs as the Court deems fit and proper;
- (iv) impose such other conditions, including providing security for restitution of losses that any party is likely to suffer during the pendency of the suit, as the Court may deem fit in its discretion; and

(b) specify the consequences of the failure to comply with the conditional order, including passing a judgment against the party that have not complied with the conditional order.

8. *Power to impose costs.*—The Court may make an order for payment of costs in an application for summary judgment in accordance with the provisions of sections 35 and 35A of the Code.”

9. It is apparent from a plain reading of Order XIII A of the CPC that a Court can pass an order or a judgment on claims at the threshold stage, before framing the issues. In terms of Rule 2 of Order XIII A of the CPC, an applicant is entitled to apply for summary judgment at any time after the summons has been served on the defendant. Further, no such application under Rule 2 of Order XIII A of the CPC can be made after the Court has framed issues in respect of the suit. If an application, as provided under Sub-rule (a) of Rule 2 of Order XIII A of the CPC is made, the Court may give a summary judgment on the claims if it considers that the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the suit. This is subject to there being no other compelling reasons as to why the claim should not be disposed of before recording of oral evidence.



10. Rule 4 of Order XIII A of the CPC prescribes the procedure to be followed. Sub-rule (1) of Rule 4 of the CPC expressly provides matters that are required to be included in an application for summary judgment. First of all, the application must state that it is for summary judgment under Order XIII A of the CPC. Secondly, it must also disclose all material facts and identify the point of law, if any. Thirdly, the applicant is also entitled to rely on any documentary evidence, which is required to be included in the application and the relevant contents of it are also required to be identified. Fourthly, the applicant must clearly state the reasons that there is no real prospect of succeeding in the suit. And lastly, the applicant must state the relief which is sought.

11. If an application for a summary judgment is made in accordance with Sub-rule (1) of Rule 4 of Order XIII A of the CPC at the stage as mentioned in Rule 2 of Order XIII A of the CPC, the Court is required to fix a date for hearing the said application. The said date necessarily has to be after the period of thirty days because Sub-rule (2) of Rule 4 of Order XIII A of the CPC mandates that the respondent is required to be given at least thirty (30) days prior notice of the date fixed for hearing. The Court is not only required to give at least thirty days' notice of the date of hearing but also the claim that is proposed to be decided by the Court at such hearing.

12. The respondent has thirty days to file a response to the said application for the summary judgment and the notice of hearing.

13. The respondent is also entitled to rely on documentary evidence in reply to the said application which must accompany the said reply.



14. In terms of Rule 5 of Order XIII A of the CPC, the respondent in an application for a summary judgment is also entitled to rely on the additional documentary evidence during the hearing. However, the respondent is required to not only file such documentary evidence but give notice of the same to every other party to the application. In terms of Sub-rule (2) of Rule 5 of Order XIII A of the CPC, the applicant also has the similar opportunity of relying on documentary evidence in response to the documentary evidence relied upon by the respondent.

15. It is clear from the above that the procedure adopted under Order XIII A of the CPC is mandatory. It embodies the principles of natural justice, which are required to be followed in judicial proceedings in an adversarial system.

16. In the present case, although the learned Single Judge has drawn sustenance from Order XIII A of the CPC for adjudicating the disputes raised by the appellant in the suit but, the procedure as set out in Order XIII A of the CPC has been completely disregarded. First of all, no summons were issued in the said suit. Thus, the occasion for the respondent / defendant for making an application for a summary judgment had not arisen. Second, even if the above is overlooked, the respondent / defendant had, in fact, not made any application for a summary judgment under Order XIII A of the CPC. Thus, there was no application before the Court setting out the reasons for which the appellant's claim was liable to be rejected. Absent any such application, the recourse to a summary judgement under Order XIII A of the CPC was not triggered. The appellant / plaintiff had no opportunity to respond to the contentions raised by the respondent in its



application.

17. This Court has in a number of decisions held that the procedure, as prescribed under Order XIII A of the CPC, is mandatory and is required to be followed if a summary judgment under Order XIII A of the CPC is to be rendered.

18. In *Bright Enterprises Pvt. Ltd. & Anr. v. MJ Bizcraft LLP & Anr.*: 2017 SCC OnLine Del 6394, this Court had observed as under:

“22. The provisions relating to summary judgment which enables courts to decide claims pertaining to commercial disputes without recording oral evidence are exceptional in nature and out of the ordinary course which a normal suit has to follow. In such an eventuality, it is essential that the stipulations are followed scrupulously otherwise it may result in gross injustice.....”

19. We find that in the present case, the failure to follow the procedure as prescribed under Order XIII A of the CPC has in fact resulted in injustice as it has precluded the appellant / plaintiff from effectively contesting the contentions advanced in opposition of its suit.

20. In view of the above, the impugned order is liable to be set aside on this ground alone.

21. We also have reservations as to the merits of the findings returned by the learned Single Judge. The learned Single Judge appears to have proceeded on the basis that a trade mark which is derived from an english expression would implicitly carry the same meaning and is, therefore, incapable of serving as a source identifier. It is well settled that even certain words of common usage may acquire a secondary meaning and are



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capable of being a source identifier of the goods of the proprietor. Having stated the above, we refrain from making any further observations in this regard as the disputes are required to be addressed by the trial court in the first instance. Further, in view of our conclusion that the mandatory provisions of Order XIII A of the CPC were not followed, the impugned order is liable to be set aside and it is not necessary to address the appellant's claims on merits.

22. The impugned order is accordingly set aside. The suit [CS(COMM) No.750/2018 captioned *Superon Schweissttechnik India Ltd. v. Modi Hitech India Ltd.*] is restored to the position as obtained on 02.04.2018. The trial court shall consider the disputes uninfluenced by any observations made in the impugned order.

23. The pending applications are also disposed of.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

FEBRUARY 06, 2024

‘gsr’

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