

(2012) 07 DEL CK 0239

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 19 of 2011

Ahmed Oomerbhoy and Another

APPELLANT

Vs

Gautam Tank and Others

RESPONDENT

Date of Decision : 27-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151
Trade Marks Act, 1999 — Section 124(1)

Citation : (2012) 52 PTC 229

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Jagdish Sagar and Mr. Raunak Kamath, for the Appellant; Prathiba M. Singh, Advocate with Mr. Sudeep Chatterjee, Ashwin Kumar and Ms. Chandrika Gupta, for the Respondent

Judgement

Manmohan Singh, J.—This Regular First Appeal arises from the judgment of the original side, dated 24th December, 2010 whereby the suit of the appellants/plaintiffs was dismissed. The brief facts are that the appellants (hereinafter referred to as the "Plaintiffs") instituted the suit being CS(OS) No.806/2005 for permanent injunction against infringement of trade mark and passing off and the consequential relief of damages, rendition of accounts etc. against the respondents (hereinafter referred to as the "Defendants") who, allegedly, infringed the plaintiffs' trademark "Postman" by using of the mark "Super Postman" in relation to edible groundnut oil.

2. Along with the suit, the plaintiffs filed the application under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure, 1908 being I.A. No. 4575/2005 and on 30th May, 2005, an ex parte ad-interim injunction was granted.

3. Upon service, immediately the defendants filed the application under Order XXXIX, Rule 4 CPC being I.A. No. 4820/2005 and after hearing of interim applications, the ex parte injunction granted on 30th May, 2005 was confirmed

by order dated 20th December, 2007. Against the said order of confirmation of injunction, the defendants filed the appeal being FAO(OS) No. 141/2008 before the Division Bench of this Court.

4. Thereafter, issues were framed in the suit on 1st December, 2008 by the learned Single Judge. The plaintiffs were granted ten weeks" time to file the evidence and the matter was put up before the Joint Registrar on 16th March, 2009.

5. It appears from the record that various adjournments were taken by the plaintiffs when the matter was listed before the Joint Registrar on 16th March, 2009, 6th May, 2009, 6th July, 2009 and 28th October, 2009 for the purpose of filing affidavit of evidence and the matter was sent to the Court.

6. On 14th January, 2010 when the matter was listed before the Court, one last opportunity was granted to the plaintiffs to file the affidavit within two weeks subject to payment of Rs. 30,000/- as cost and the matter was listed before the Joint Registrar on 22nd February, 2010, on which date the evidence by way of affidavit of Badri Prasad Sharma, representative of plaintiff No.1 was filed along with an application being I.A. No.2173/2010 for condonation of delay in filing the said affidavit.

7. When the application was listed before the Court on 9th April, 2010, in the meanwhile, one fresh application was filed by the plaintiffs being I.A. No.4444/2010 under Order XVIII, Rule 4 read with Section 151 CPC seeking permission to produce the Court Receiver/plaintiff No. 2 as another witness to record the oral evidence. As far as the delay in filing of affidavit was concerned, the request of the plaintiffs was allowed subject to further cost of Rs. 5,000/- to be paid by the plaintiffs. In fresh application, time was granted to the defendants to file the reply by 5th May, 2010.

8. On 5th May, 2010, at the request of the learned counsel for the defendants, the matter was adjourned to 28th July, 2010, on which date, the Court was on leave and the matter was adjourned to 21st September, 2010.

9. By order dated 21st September, 2010, the application of the plaintiffs being I.A. No.4444/2010 was allowed by the Court giving opportunity to them to examine second witness from the office of the Official Liquidator, Bombay for examination of the said witness orally before the Joint Registrar on 26th October, 2010.

10. On 26th October, 2010, the Joint Registrar re-notified the matter for 16th December, 2010 for examination of the witness.

11. On 16th December, 2010, the Joint Registrar closed the evidence of the plaintiffs on the reasons that an official from the office of Official Liquidator could not be served, as no steps were taken by the plaintiffs and put up the matter on 28th March, 2011 for production of evidence by the defendants within eight weeks.

12. In the meanwhile, the defendants' appeal was listed before the Division Bench on 20th December, 2010. The factum of closing of evidence was indicated to the Bench who felt that the suit must be placed for necessary directions before the learned Single Judge on 23rd December, 2010 and adjourned the appeal to 15th February, 2011 for directions.

13. When the matter was taken up on 24th December, 2010, the suit of the plaintiffs was dismissed by the impugned judgment, inter-alia, on the reasons that onus of proof of those issues was on the plaintiffs who failed to discharge the same.

At the time of dismissal of the suit, it was brought to the notice of the learned Single Judge by the plaintiffs regarding filing of the Chamber Appeal against the order dated 16th December, 2010 passed by the Joint Registrar closing thereby the evidence of the plaintiffs. It has been noticed by the learned Single Judge in the judgment dated 24th December, 2010 that the plaintiffs had already collected the appeal from the Registry on which objection had been raised that it was not supported by an affidavit of the signatory to the appeal in original.

It was observed by the learned Single Judge that "as on date, there was no appeal which was pending before the Court against the order dated 16th December, 2010." It was also observed by the learned Single Judge in the impugned order that, "Without considering as to whether any appeal is pending or not against the order of closure of evidence of the plaintiff if one goes from the previous order sheets, it becomes clear that there is nothing illegal or irregular in the order which has been passed by the learned Joint Registrar who has been literally forced to close the evidence of the plaintiff as he has failed to produce the witness despite the sufficient number of opportunities having been given to him."

14. It also appears from the trial Court record that the Chamber Appeal being O.A. No.9/2011 was listed before Court on 14th January, 2011 after removing the objections raised by the Registry. The Court passed the following orders:-

1. The plaintiff has challenged the order dated 16th December, 2010 passed by the learned Joint Registrar whereby the plaintiff's evidence was closed.
2. In the meantime, this Court has passed the judgment dated 24th December, 2010 whereby the suit filed by the plaintiff has been dismissed.
3. The learned counsel for the plaintiff submits that he has received the copy of the judgment dated 24th December, 2010 only yesterday. It is further submitted that the plaintiff has not yet received the certified copy of the judgment. The learned counsel further submits that the plaintiff has instructed him to challenge the judgment dated 24th December, 2010 and the plaintiff would challenge the order dated 16th December, 2010 in the appeal against the main judgment.
4. In that view of the matter, the learned counsel for the plaintiff seeks permission to withdraw this suit with liberty to challenge the order dated 16th

December, 2010 in the appeal against the judgment dated 24th December, 2010.

5. This appeal is dismissed as withdrawn with liberty as prayed for.

15. Both, the impugned judgment of the learned Single Judge dated 24th December, 2010 and the order dated 16th December, 2010 passed by the Joint Registrar have been challenged by the plaintiffs by filing the present appeal which was admitted on 26th April, 2011 for pacca hearing.

16. When the FAO(OS) No. 141/2008 was listed before the Division Bench on 15th February, 2011, it was informed by the respondents herein that the suit was dismissed on 24th December, 2010, the said appeal was allowed to be dismissed as withdrawn by the respondents.

17. We have heard the learned counsel for the parties in the main appeal. The following admitted facts have emerged from the pleadings as well as the orders passed:-

(a) The suit was dismissed on 24th December, 2010, but at that time, the plaintiffs' Chamber Appeal was pending.

(b) When by order dated 16th December, 2010, the evidence of the plaintiffs was closed, though the matter was sent to the Joint Registrar to examine the Court Receiver by recording the oral evidence. There is no finding in the impugned order about the evidence already filed by way of affidavit of Badri Prasad Sharma on behalf of plaintiff No.1.

18. Admittedly, the learned Single Judge passed the order on 21st September, 2010 in I.A.No. 4444/2010 and refer the matter before the Joint Registrar for 26th October, 2010 for the purpose of examination of Court Receiver to record the oral statement as mentioned in the order of the learned Single Judge. The Court Receiver, Mr. M.V. Deshmukh, plaintiff No.2 was the second witness of the plaintiffs. There was no order on that date about the examination of another witness whose affidavit was already on record. The relevant extracts of the said order read as under:-

5. Be that as it may, keeping in view the fact, that the official from the Office of the Official Liquidator is sought to be examined, I feel that there should be no difficulty in giving the plaintiffs one opportunity to examine one witness from the office of the official Liquidator, Bombay, however, it shall be the sole responsibility of the plaintiffs to produce the said witness. The application stands disposed of.

6. The learned Joint Registrar is directed to fix up the date for examination of the witness orally. Needless to say, it may be done as expeditiously as possible.

19. It is also necessary to reproduce the said order passed by the Joint Registrar on 16th December, 2010 by which the evidence of the plaintiffs was closed. The same reads as under:-

Counsel for plaintiff was given one opportunity to examine the official from the office of "Official Liquidator" and the witness was ordered to be served at the responsibility of the plaintiff. However, no steps have been taken by the plaintiff.

Witness is also not present as steps not taken by the plaintiff to produce the witness despite opportunity given to do so as per the directions of the Hon''ble Court vide order dated 21.09.2010. Accordingly, evidence of the plaintiff stands closed. Relist for defendant's evidence on 28th March, 2011. Affidavit in support of defendant evidence be filed within 8 weeks with advance copy of the same to the counsel for plaintiff.

Sd/-

(D.K.Malhotra)

Joint Registrar

20. In the Chamber Appeal filed by the plaintiffs, they challenged the order dated 16th December, 2010, inter-alia taking the following grounds:-

(i) The Learned Joint Registrar erred in holding that the evidence of the plaintiff stands closed as "steps not taken by the plaintiff to produce the witness despite opportunity given to do so as per the directions of the Hon''ble Court vide order dated September 21, 2010". The Learned Joint Registrar fell into error in failing to appreciate that the Appellants had been granted by the order dated September 21, 2010 one opportunity to produce the official/representative from the office of the Court Receiver being the Second Witness to examine him orally in order to prove the writing and signatures of the person who had filed the plaint originally. The Learned Joint Registrar erred in failing to appreciate that the appellant's first witness had to be cross-examined before closing the rights of the appellants to lead the evidence.

(ii) That the Learned Joint Registrar fell into error in failing to examine the list of witnesses filed on behalf of the appellants on November 27, 2009 which mentioned two witnesses: Mr. Badri Prasad Sharma as the First Witness and a Representative from the office of the Court Receiver as the second witness and thus, erroneously went onto conclude that the appellant's/plaintiff's evidence stands closed due to the inability of the plaintiffs to produce the Court Receiver.

In doing so:-

(a) The Learned Joint Registrar erred in failing to appreciate the evidence by way of affidavit of Mr. Badri Prasad Sharma being the first witness of the appellants.

(b) The Learned Joint Registrar erred in failing to consider that the matter had to be fixed for cross examination of the plaintiff's aforesaid witness.

(iii) That the Learned Joint Registrar while overlooking the submissions made by the counsel for the appellant, erred in failing to appreciate that the provisions of Section 124(1) of the Trade Marks Act, 1999 are mandatory and the Hon''ble

Court, on its own accord, should have rightfully stayed the suit as soon as the Respondents had filed their Rectification Petition. The Hon''ble Court's oversight in this regard prompted the appellants to request the learned Joint Registrar to place the matter before the Hon''ble Court in order to enable them to file the aforesaid application.

21. The factum of filing of the appeal was brought to the notice of the Court and even the appeal paper-book was produced before the Court along with the scanned copy of the affidavit. However, the learned Single Judge observed in the impugned judgment that the Court could not entertain the appeal due to non-filing of the proper affidavit, and held that there was no appeal pending before this Court against the order dated 16th December, 2010 passed by the Joint Registrar closing the evidence of the plaintiffs. It was also observed in para 17 of the order that even without considering as to whether any appeal was pending or not against the order of closure of evidence of the plaintiffs, if one goes from the previous order-sheets, it becomes clear that nothing was illegal or irregular in the order which has been passed by the Joint Registrar.

22. In normal course, we would not have interfered with the order passed by the learned Single Judge as we feel that it is a case of negligence and non-production of evidence by the plaintiffs despite of various opportunities were granted. But, the fact of the matter is that both orders i.e. order dated 16th December, 2010 passed by the Joint Registrar for closure of evidence and the impugned judgment dated 24th December, 2010 whereby the suit was dismissed suffer from procedural irregularity.

23. In the order dated 16th December, 2010, the Joint Registrar had closed the entire evidence of the plaintiffs, although as per order dated 21st September, 2010 passed by the Court, the matter was listed for examination of the witness from the office of Court Receiver orally. When the order was passed, affidavit as evidence by way of first witness of the plaintiffs was already available on record. Whatsoever are, we feel, at best, the Joint Registrar ought to have closed the evidence of the Court Receiver as no steps were taken by the plaintiffs for summoning him for recording the evidence. Thus, closure of entire evidence was a procedural lapse on the part of the Joint Registrar.

24. Similarly, in the judgment dated 24th December, 2010, despite of pendency of the Chamber Appeal filed by the plaintiffs against the order dated 16th December, 2010, the learned Single Judge had observed that "as on date, there was no appeal which was pending before the Court against the order dated 16th December, 2010."

25. As regards finding negligence on the part of the plaintiffs, we agree that despite of many opportunities, the plaintiffs had failed to produce the evidence in time but at the same time, we feel that the learned Single Judge ought to have disposed of the appeal while passing the impugned order or at least would have waited for couple of days for removal of objection and listing before Court, rather

to brush aside the remedy available with the plaintiffs under the law. In fact, the Chamber Appeal was pending when the impugned judgment was delivered. Even on the next date when the appeal was listed after removing the objections, the learned Single Judge had granted the liberty to challenge the said order before the Division Bench at the request of the counsel appearing on behalf of the plaintiffs. We are of the view that the approach of the learned Single Judge on this aspect was not correct though the findings with regard to default on the part of the plaintiffs cannot be faulted with.

26. Considering the over-all facts and circumstances of the matter, we set-aside the order dated 16th December, 2010 passed by the Joint Registrar. Consequently, the subsequent judgment passed on 24th December, 2010 dismissing the suit of the plaintiffs does not survive and hence, the same is set-aside. Suit as well as interim application is restored to the original position.

27. The present appeal is allowed, but subject to cost of Rs. 1 lac which is imposed upon the plaintiffs due to the reason of continuous default on the part of the plaintiffs for non-production of evidence in time. We also expedite trial in the matter.

28. We appoint Sh. S.M. Chopra, Retired Additional District Judge as a Court Commissioner to record the evidence of the parties. The plaintiffs shall be granted last and final opportunity by the Court Commissioner to produce the evidence before him at their own. If necessary, the plaintiffs are allowed to take dasti notice for summoning of witness from the office of Court Receiver. Parties shall not take unnecessary adjournment. The Court Commissioner would make his endeavour to complete the evidence of the parties within the period of 4-6 months. The entire fee of the Local Commissioner shall be paid by the plaintiffs.

29. Let the matter be listed before the Court Commissioner on 16th August, 2012 for directions regarding the recording of evidence of the parties in the High Court premises. The plaintiffs shall also pay sum of Rs. 60,000/- to the Court Commissioner as part fee. The remaining fee would be fixed by the Court depending upon the evidence and time consumed in the matter to be paid by the plaintiffs. The Dealing Assistant of the matter will produce the record of the case before the Court Commissioner on all the dates fixed by him for the purpose of recording the evidence of the parties. He be paid diet money as per rules, by the parties concerned. A copy of this order be sent to the Court Commissioner.