
(2012) 08 GAU CK 0075
In the Gauhati High Court
Case No : Civil Rev. Petition No. 361 of 2011

Asha Agarwal and Another	Vs	APPELLANT
Arbind and Co. (M/s.) and Others		RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 39 Rule 1, Order 39 Rule 2, Order 7 Rule 10, 151
Trade Marks Act, 1999 — Section 134, 135(2), 53

Citation : (2012) 5 GLT 645

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : G.N. Sahewalla, Md. Alam, Mr. D. Senapati, Ms. K. Kalita and Mr. P. Deka, for the Appellant; G. Sarmah, Mrs. A. Bhattacharjee, B. Kaushik, J.K. Parajuli, D.M. Nath and Mr. N. Choudhury, for the Respondent

Judgement

A.K. Goswami, J.—Heard Mr. G.N. Sahewalla, learned senior counsel for the petitioners. Also heard Mr. N. Choudhury, learned counsel for the respondents. The challenge in this application under Article 115 read with Section 151 CPC is the order dated 16.09.2011 passed by the learned District Judge, Jorhat in Title Suit No. 3 of 2008 disposing the case on withdrawal but refusing to grant liberty to the plaintiff to file a fresh suit.

2. The plaintiff instituted Title SuitNo. 3 of 2008, as it appears from the application under Order 23 Rule 1 CPC, for perpetual injunction for infringement of Trade Mark, Copy Right, passing off, damages etc. along with a petition under Order 39 Rule 1 and 2 CPC read with Section 135(2) of Trade Mark Act, 1999 and Section 151 CPC.

3. The prayer for injunction was rejected by the learned District Judge, Jorhat in Misc. (J) Case No. 178 of 2008 by an order dated 09.12.2009 on, amongst other, the ground that the Court had no jurisdiction to entertain the suit u/s 134 of the Trade Mark Act or u/s 20(b) CPC.

4. The appeal carried against the said order to this Court by filing FAO No. 2 of 2010 was also dismissed by an order dated 25.05.2011.

5. The plaintiff filed a petition under Order 23 Rule 1 CPC on 23.08.2011 in view of the said finding, to permit the plaintiff to withdraw the suit with permission to file a fresh suit before the competent Court having jurisdiction.

6. By the order impugned, as noted earlier, the learned District Judge allowed the plaintiff to withdraw the suit but declined the prayer for permitting to institute a fresh suit.

7. Mr. G.N. Sahewalla, learned senior counsel for the petitioner submits that the application filed by the petitioner under Order 23 Rule 1 CPC was for withdrawal of the suit with liberty to file a fresh suit and as such the learned District Judge could have either allowed the petition in toto or could have dismissed the petition but the learned District Judge was wholly wrong in partly allowing the petition as a result of which grave prejudice has been caused to the petitioner. It is also submitted by him that findings recorded in an injunction matter is an expression of prima facie satisfaction and the same cannot be held to be conclusive and final adjudication of the case in merits. He has also submitted that there was already an application under Order 7 Rule 10 CPC filed by the defendants pending for consideration and that application, in view of the dismissal of the suit on withdrawal, cannot also be considered now.

8. Mr. N. Choudhury, learned counsel for the respondents submits that no illegality has been committed by the learned District Judge in passing the impugned order as this Court had also, by an order dated 25.05.2010, recorded the finding that the order of the learned District Judge dated 09.12.2009 had not suffered from any error or illegality.

9. The substance of argument of Mr. Chudhury is that the suit being without jurisdiction the same is liable to be dismissed on merit and that under the provision of Section 53 of the Trade Mark Act, 1999, the petitioners could not have filed the suit and, therefore, when the suit was destined to fail, the learned District Judge had committed no illegality in allowing withdrawal of the suit by refusing to grant any liberty to file a fresh suit.

10. I have heard and considered the submissions of the learned counsel for the parties.

11. A perusal of the petition filed under Order 23 Rule 1 CPC would go to show that the petitioners had prayed for withdrawal of the suit hedged with a condition, namely, granting of liberty to file a fresh suit. This Court is of the considered opinion that what would be the ultimate result of the suit need not be gone into at the stage of consideration of a petition under Order 23 Rule 1 CPC. On valid and tenable grounds, the learned Court would be entitled either to allow the petition or to reject the same for the reasons assigned. Because of the nature of the petition that was filed by the petitioners, this Court: is of the

opinion that it was not open for the learned District Judge to have partly allowed the petition. The learned Court could have either dismissed or allowed the entire petition but such an order as is passed by the learned Judge is beyond the ambit of Order 23 Rule 1 CPC. In other words, an application to withdraw the suit with liberty to file afresh must either be allowed or refused in toto and it is not permissible for the Court to grant the prayer for withdrawal and refuse the leave.

12. Mr. G.N. Sahewalla, learned senior counsel for the petitioners, during the course of his argument, has submitted that as the learned Trial Court had not granted liberty, the suit should remain on record and the learned Trial Court should pass such orders as may be called for in the application under Order 7 Rule 10 CPC. The substance of the argument is that he has no objection if the entire application is rejected. No objection has been raised by Mr. N. Choudhury to this submission of Mr. Sahewalla.

13. In the considered opinion of the Court, the order dated 16.09.2011 cannot sustain in law and, therefore, the same is set aside. As Mr. G.N. Sahewalla had conceded that the application filed under Order 23 Rule 1 CPC may be dismissed, and no objection has been raised by Mr. N. Choudhury, this Court rejects the said application filed under Order 23 Rule 1 CPC. Result of the aforesaid discussions and directions is that suit is not dismissed on withdrawal and the same is on record which needs to be decided in accordance with law. As submitted by the learned counsel for the parties, as an application under Order 7 Rule 10 CPC is pending disposal, the learned District Judge, Jorhat will take up that application for consideration and disposal.