

(2019) 07 DEL CK 0468

In the Delhi High Court

Case No : Civil Suits (COMM) No. 1259 Of 2016

Cadbury Uk Limited & Anr

APPELLANT

Vs

Lotte India Corporation Ltd

RESPONDENT

Date of Decision : 30-07-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 10, 11, Order 39 Rule 2A, Order 6 Rule 17

Citation : (2019) 07 DEL CK 0468

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Chander M. Lall, Karan Bajaj, Jyotideep Kaur, Nancy Roy, K. Roda, Gaurav Pachnanda, Mohit Goel, Sidhant Goel, Eshna Kumar, Aditya Goel, Deepankar Mishra

Final Decision : Disposed Of

Judgement

Rajiv Sahai Endlaw, J

IA No.12329/2017(of the defendant under Section 10 CPC) & IA No.3474/2019(u/ O.VI R.17 CPC filed by the plaintiffs)

1. IA No.12329/2017 of the defendant filed under Section 10 CPC and IA No.3474/2019 of the plaintiffs for amendment of the plaint are for consideration.

2. Though, the senior counsel for the plaintiffs suggested that the application filed earlier in point of time being the application under Section 10 of the CPC, be taken up for consideration first, but after hearing the Senior Counsel for the defendant on the said application to some extent, I am of the opinion that once an application for amendment of the plaint is pending consideration, even if filed after the filing of an application under Section 10 of the CPC, the amendment application should be decided first, inasmuch as the applicability of Section 10 will have to be seen in the light of the amended plaint.

3. The Senior Counsels have been heard on the application of the plaintiffs under

Order VI Rule 17 CPC.

4. The plaintiffs instituted this suit for permanent injunction, to restrain the defendant from passing off its confectionary as that of the plaintiffs under the mark CHOCLAIRS, by use of the marks CHOCLAIRS/PARRY'S CHOCLAIRS/LOTTE CHOCLAIRS or any other mark similar to the trade mark CHOCLAIRS of the plaintiffs.

5. The plaintiffs now want to amend the plaint to, in addition to the relief on the ground of passing off, also claim reliefs already claimed of injunction and ancillary reliefs, on the ground of infringement by the defendant of the mark of the plaintiffs. It is pleaded, that during the pendency of the suit, the mark CHOCLAIRS of the plaintiff no.1, has been registered.

6. Considering that the amendment sought is to plead an event subsequent to the institution of the suit and that issues in the suit have not been framed as yet and the trial has not begun, the amendments sought are found to be relevant to the adjudication of the matter in controversy and are allowed.

7. IA No.3474/2019 is allowed and disposed of.

8. With respect to the application under Section 10 of the CPC, the Senior Counsel for the defendant has contended, (i) that the defendant, in June, 2013, instituted a suit against both the plaintiffs, in the High Court of Madras, to restrain the plaintiffs herein from infringing the defendant's trade mark PARRY'S CHOCLAIRS, by use of CHOCLAIRS or any other trade mark containing the word CHOCLAIRS, in respect of chocolates, confectionary, candies including toffees and from in any other manner passing off their goods as those of defendant, and for ancillary reliefs; (ii) no ex parte order sought was granted to the defendant in the Madras Suit but summons thereof were ordered to be issued; (iii) the plaintiffs, immediately on receipt of the summons of the Madras suit, instituted the present suit in this Court, for restraining the defendant as aforesaid, from passing off its goods as that of the plaintiffs and which suit now stands amended to also include the reliefs on the ground of infringement; (iv) that in the present suit filed by the plaintiffs herein, ex parte injunction was granted to the plaintiffs and which ex parte injunction has since been confirmed and has attained finality; (v) owing to the said interim injunction, the defendant stands restrained from using the mark CHOCLAIRS or any other mark containing the word CHOCLAIRS; and, (vi) that though the defendant in its written statement filed to the present suit did not take any plea of Section 10 of CPC, but subsequently, after about four years of the institution of the present suit, in the year 2013, has filed IA No.12329/2017 for stay of proceedings in this suit.

9. The Senior Counsel for the defendant has referred to Durgaprasad Vs. Kantichandra Mukherji AIR 1935 Cal 1, Suraj Industries Vs. Manek Industries (1991) 11 PTC 141, Xpress Logistics Service Vs. Inditex Trent Retail India (P) Ltd. 243 (2017) DLT 510, and Aspi Jal Vs. Khushboo Rustom Dadyburjor 2013 (4) SCC 333, to contend that Section 10 of the CPC is attracted to the present

situation and is mandatory.

10. The Senior Counsel for the defendant has also taken me through the written statement filed by the plaintiffs herein in the Madras suit, to show that the plaintiffs therein have taken a plea of the Madras suit being required to be stayed in view of the subsequent filing of the present suit.

11. Per contra, the Senior Counsel for the plaintiffs has contended, (i) that the plea of Section 10 of the CPC has been taken after five years of the institution of the present suit; (ii) that in fact the defendant was proceeded against ex parte in the present suit but subsequently, by an order of the Supreme Court, got the suit restored to its original number and is now participating in the same and which explains why issues have not been framed in the present suit as yet; (iii) that the defendant also applied to the Supreme Court for transfer of the present suit to Madras, but vide the order dated 6th October, 2017 the Transfer Petition (Civil) No.1724/2017 was dismissed by the Supreme Court (iv) that the defendant had also approached the Supreme Court by way of SLP(C) No.24206/2017; (v) that the Supreme Court vide order dated 6th October, 2017 in Civil Appeal No.15866/2017, while granting liberty to the defendant to contest the suit and restoring the suit to the position where it was prior to the defendant being proceeded ex parte, directed this Court to ensure that the trial is expedited; (vi) that the application under Section 10 of the CPC is in overreach to the said direction of the Supreme Court; and, (vii) that Section 10 of the CPC is not even attracted to the Madras suit inasmuch as in the Madras suit, reliefs have been sought by the defendant only and no relief has been sought by the plaintiffs and the plaintiffs cannot be granted reliefs in the Madras suit as sought by the plaintiffs in the present suit; reliance is placed on Durga Prasad supra and on Aspi Jal supra in this regard.

12. I have considered the rival contentions.

13. On enquiry, it is informed that both the suits are at about the same stage i.e., pleadings have been completed and issues have not been framed.

14. However, while in the present suit, there is an interim injunction till the disposal of the present suit, restraining the defendant from use of the subject mark, there is no interim order in favour of the defendant in the Madras suit. Resultantly, till the disposal of the lis between the parties, whether by the Delhi Court or by the Madras Court, it is the defendant herein who stands restrained.

15. Though, I do not agree with the contention of the Senior Counsel for the plaintiffs, of Section 10 being not attracted owing to the plaintiffs being not the claimants of the reliefs in the Madras suit, inasmuch as the test to be applied is of Section 11 of the CPC, and the language whereof only requires that the Court where the earlier suit is pending is competent to try the subsequent suit, and which cannot be disputed in the present case, and whether the decision in the previously instituted suit acts as res judicata in the subsequent suit, but for the reasons here-in-after appearing, it is not deemed necessary to deal in detail with

the said aspect.

16. Section 10 of the CPC, though held in several of the judgments cited at the Bar, to be mandatory, is a procedural Section, enacted in public interest, inter alia to prevent the parties and the Court at more than one place being vexed with the same question. A decree passed in contravention of Section 10 CPC, is not a nullity.

17. In my view, the same cannot be applied pedantically, in all situations, even when application thereof would result in miscarriage of justice.

18. I feel, that mandatory application of Section 10 would result in miscarriage of justice because the same would result in the interim order against the defendant continuing and which would again be against the spirit of the various statutes with which the subject is concerned. Both, plaintiffs as well as the defendant, ought to have surety/certainty of their affairs and the Court cannot mechanically contribute to a situation where both continue to carry on business and invest monies therein, without knowledge of whether they have a right to subject trade mark or not.

19. It has been held by the Supreme Court in Pukhraj D. Jain Vs. G. Gopalakrishna (2004) 7 SCC 251 that, a) mere filing of an application under Section 10 of CPC does not in any manner put an embargo on the power of the Court to examine the matter on merits; b) it is not for the litigant to dictate to the Court as to how the proceedings should be conducted and it is for the Courts to decide what will be the best course to be adopted for expeditious disposal of the case; and, (c) that it is always open to the Court to decide the relevant issues and not keep a suit pending which has been instituted with an oblique motive and to cause harassment to the other side.

20. Since the interim order has been granted in the present suit, it is deemed expedient that the proceedings in the present suit be expedited, as also mandated by the Supreme Court in order dated 6th October, 2017 aforesaid. There is merit also in the contention of the Senior Counsel for the plaintiffs, that all the aforesaid facts were in the knowledge of the Supreme Court while passing the aforesaid orders of dismissal of the Transfer Petition and directing the trial in the Delhi suit to be expedited. Allowing the application under Section 10, by mechanically applying Section 10, would also be in contravention of the spirit of the said orders.

21. Section 10 is intended to put a stop to the suit at the threshold, to avoid duplication of proceedings. The defendant having applied for stay of proceedings after four years of the institution of the present suit, is not entitled to mandatory application of Section 10 for this reason as well.

22. Rather, I find it inexplicable as to why the defendant, while suffering an interim stay in this suit, is also wanting to get the proceedings in the present suit stayed and which would perpetuate the interim order in operation against the

defendant. Moreover, even after the Madras suit is decided, if in favour of the defendant, this Court will still have to consider, whether the interim order is to continue or not.

23. For all the aforesaid reasons, I do not find any reason to stay the proceedings in the present suit under Section 10 of the CPC.

24. IA No.12329/2017 is dismissed.

IA No.936/2018(u/O.XXXIX R.2A CPC)

25. This application has been filed by the plaintiffs under Order XXXIX Rule 2 A of the CPC.

26. The Senior Counsels have been heard thereon as well.

27. The Senior Counsel for the plaintiffs contends that vide ex parte order dated 8th July, 2013, the defendant, besides being restrained from manufacturing, selling, marketing, promoting or in any other manner whatsoever using the marks CHOCLAIRS / PARRY'S CHOCOLAIRS / LOTTE CHOCLAIRS / CHOCOLAIRS / LOTTE CHOCOLAIRS, were also restrained from asserting any right to use and/or also from applying to register or to maintain the applications, or to register any of the said marks or any other similar mark in violation of the plaintiffs rights, but the defendant in spite of the said order, applied to the Registrar of Trade Marks for renewal of the registration of the mark PARRY'S CHOCOLAIRS.

28. Considering that the defendant, in applying for renewal, was exercising a statutory right and the purport of the order to be not to so restrain the defendant from exercising statutory rights and which would have resulted in an undue benefit to the plaintiff, of thereafter contending that the registration earlier in favour of the defendant had also lapsed, I am not inclined to proceed with this application.

29. The application is disposed of.

CS(COMM) No.1259/2016

30. The amended plaint stated to be filed along with the application for amendment is taken on record and be transposed to Part I File.

31. The defendant to file written statement to the amended plaint within 30 days.

32. Replication within further 30 days thereafter.

33. List for framing of issues, if any, on 28th November, 2019.