

(1979) 11 OHC CK 0007
In the Orissa High Court
Case No : Misc. Appeal No. 152 of 1978

Doki Adinarayana Subudhi and Brothers	APPELLANT
Vs	
Doki Surya Prakash Rao	RESPONDENT

Date of Decision : 17-11-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4, Order 3 Rule 4(1), Order 3 Rule 4(5)

Citation : AIR 1980 Ori 110 : (1979) 48 CLT 609

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Advocate : R. Mohanty, for the Appellant; Asok Das, C.A. Rao and S.N. Satpathy, for the Respondent

Judgement

P.K. Mohanti, J.—The appellant as plaintiff brought Original Suit No. 2 of 1978 for a declaration that the defendant-respondent has no right to use the plaintiffs trade mark in respect of the Masala (chewing tobacco) branded as "Bharat Vikhyat Khetaki Khara Masala No. 666" of which the plaintiff claimed to be the registered owner under the Trade and Merchandise Marks Act and the Copyright Act. The plaintiff also filed an application for issue of a temporary injunction restraining the defendant from infringing his right to the trade mark. After hearing the parties, the learned District Judge rejected the prayer for temporary injunction by order dated 4-10-78 on the finding that even though the plaintiff had prima facie title and exclusive right to the use of the trade mark, he having suppressed the material fact of a settlement deed dated 12-11-63 and the fact of association of the defendant in the business was not entitled to the grant of a temporary injunction.

2. Aggrieved by the order, the plaintiff preferred this Misc. Appeal which came up for admission and hearing on 1-11-78. In course of hearing of the appeal, Mr. R. Mohanty, the learned counsel for the appellant and Mr. C.V. Murty, the learned counsel for the respondent agreed that the appeal be disposed of on the

following terms :--

"(1) The respondent undertakes not to interfere with the trade mark and copyright of the plaintiffs in any manner whatsoever until disposal of the suit.

(2) He also undertakes not to sell or offer for sale, until disposal of the suit, the Masala not of the plaintiffs" manufacture or merchandise or any other appliances in respect thereof bearing the marks Bharat Vikhyat Khetaki Khara Masala Flag Brand No. 666 with wrappers containing the photo of the plaintiffs" father and the registered trade mark No. 19313/78.

(3) The suit may be disposed of within a period of two months hence".

3. By order dated 1-11-78, this Court disposed of the appeal on the above terms and directed the District Judge, Berhampur to dispose of the suit within two months from that date. On 8-11-78, Mr. C.A. Rao, Advocate for the respondent filed an application for modification of the order dated 1-11-78 contending, inter alia, that the respondent on being informed of the orders of this Court expressed his unwillingness to give an undertaking as envisaged in the said order and that the order passed by this Court was not in accordance with the submissions at the hearing. On 20th Dec., 1978, Mr. Asok Das, the learned counsel appearing for the respondent submitted that he would not press the allegation in the respondent's petition dated 8-11-78 to the effect that the order passed by this Court was not in accordance with the submissions made in the Court and filed a memorandum to that effect. He, however, contended that the respondent was not consulted by Mr. C.V. Murty, Advocate about the terms of agreement on the basis of which the appeal was disposed of.

4. On a reference to the records, it appears that Mr. C.V. Rao and Mr. G. B. Vyas, Advocates had filed vakalatnama for the respondent, but Mr. C.V. Murty who is a Senior Advocate had filed a memorandum of appearance being authorised by Mr. C.A. Rao, Advocate to plead on behalf of the respondent. The question for consideration is whether Mr. C.V. Murty who had not filed vakalatnama for the respondent and was authorised only to plead, could settle terms of agreement by giving undertakings on behalf of the respondent,

5. Sub-section (8) of Section 16 of the Advocates Act provides that Senior Advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may in the interest of the legal profession prescribe. Section 49 confers powers on the Bar Council of India to make rules for discharging its functions under the Act. Part VI of the Bar Council of India Rules deals with the rules governing Advocates. Chapter I of this Part imposes restrictions on Senior Advocates as contemplated u/s 16(3) of the Act. Restrictions under the rules relevant for the purpose are as under:

"Rules governing Advocates.

Senior Advocates shall, in the matter of their practice of the profession of law mentioned in Section 30 of the Act, be subject to the following restrictions :--

(a) A Senior Advocate shall not file a vakalatnama or act in any Court, or Tribunal, or before any person or other authority mentioned in Section 30 of the Act.

Explanation : "To act" means to file an appearance or any pleading or application in any Court, or Tribunal, or before any person or other authority mentioned in Section 30 of the Act, or to do any act other than pleading required or authorised by law to be done by a party in such Court, or Tribunal, or before any person or other authority mentioned in the said Section either in person or by his recognised agent or by an advocate or an attorney on his behalf.

XX XX XX XX (d) He shall not accept directly from a client any brief or instructions to appear in any Court, or Tribunal, or before any person or other authority in India.

XX XX XX XX."

6. The words "act" and "plead" occur in sub-rules (1) and (5) of Rule 4 of Order III, C. P. C. and they read as under:--

"4 (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment.

XX XX XX XX (5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court memorandum of appearance signed by himself and stating -

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court, on behalf of such party."

It is clear that "act" and "plead" found in Sub-rules (1) and (5) respectively stand on different footings. An Advocate can plead by filing a memorandum of appearance, but no Advocate is allowed to act without filing a vakalatnama. The interpretation of the words "acting" and "pleading" has been the subject-matter of judicial decisions under Order III, C. P. C. "Pleading" has been interpreted to mean addressing the Court. "Acting" means doing of something as the agent of the principal party, which shall be recognised or taken notice of by the Court as the act of the principal. The undertakings given by Mr. C.V. Murty on behalf of the respondent are, in my opinion, covered by the word "acting".

7. When a pleader gives an undertaking, he acts as the agent of the client and as representing him. He derives his authority from the client and that is why he

is required to file a vakalatnama duly signed by the client as required under Order III, Rule 4. C P. C. He is prohibited from acting without a vakalatnama. A Senior Advocate is debarred from filing a vakalatnama, taking instructions from the client and from doing "any act other than pleading required or authorised by, law to be done by a party". An Advocate, who appears on behalf of another Advocate engaged by a party can only plead but he has no power to "act" on behalf of a party without a document in writing in his favour, It is the agency created by a client in favour of his Advocate which clothes the latter with the power to act on behalf of the former and it is by virtue of the vakalatnama that the client becomes bound by the actions of his Advocate within the limits of authority. In the absence of a Vakalatnama executed by the client and duly accepted by the Advocate and filed in Court, no agency at all is created and no undertaking so as to bind the client can be given.

8. Admittedly, there is no vakalatnama on record signed by the respondent engaging Mr. C.V. Murty as his pleader. He was authorised by Mr. C.A. Rao. Advocate only to plead. It is Mr. C.V. Murty, who gave the undertaking on behalf of the respondent and on the basis of that undertaking the appeal was disposed of. If no vakalatnama was held by Mr. Murty. he could not have acted for the respondent although he could plead.

9. Admittedly, the respondent was not present in Court on the date when on the basis of the undertakings given by Mr. C. V. Murty, the appeal was disposed of by the Court. In view of the fact that the respondent has not consented to the undertakings given by Mr. C.V. Murty, there is no escape from the conclusion that the disposal of the appeal was under a mistaken impression that Mr, C.V. Murty had the authority to act and plead on behalf of the respondent.

10. In view of my above findings, I would recall the order dated 1-11-1978 and restore the appeal for fresh disposal in accordance with law.