
(1977) 12 DEL CK 0003

In the Delhi High Court

Case No : Regular First Appeal No. 22 of 1967

Invest Import, Beograd (Yugoslavia)

APPELLANT

Vs

Watkin Mayors and Co.

RESPONDENT

Date of Decision : 09-12-1977

Acts Referred:

Citation : (1977) 13 DLT 17 : (1978) ILR Delhi 658 : (1978) RLR 249

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Advocate : S.C. Singh, Amarjit Singh and Anoop Singh, for the Appellant;

Judgement

Prakash Narain, J.

(1) The first appeal is directed against the final decree passed by the Additional District Judge, Delhi on August 24, 1966, in favor of the respondent herein and against the appellant and M/s. Raj Kumar Khanna and Sons.

(2) The respondent M/s. Watkin Mayors and Co., filed a suit against the appellant. M/s. Invest Import, Beograd, and M/s. Raj Kumar Khanna and Sons through Raj Kumar Khanna or any other persons in charge of the business of the firm, claiming a permanent injunction against the aforesaid defendants restraining them from marking, importing, selling or offering for sale directly or through their agents or representatives chaff cutter knives and blades and/or other agricultural implements and machines or parts thereof with the name or picture of a Lion or one resembling a Lion. On the allegation that the defendants had marked, imported and sold chaff cutter knives and blades in violation of the plaintiff's registered trade mark thus causing loss to them, the plaintiffs also claimed a decree for Rs. 30,000 as damages with interest at the rate of 6 per cent per annum from the date of the suit till payment against the aforesaid defendants. A preliminary decree was passed in favor of the plaintiffs, the respondent and against the two defendants, namely, the appellant and M/s. Raj Kumar Khanna and Sons. A local commissioner was appointed. On receipt of the

report of the local commissioner and after hearing the objections to his said report a final decree for recovery of Rs. 30,000 was passed against the aforesaid defendants. It is against that decree that the appellant comes in appeal before us.

(3) As we have said the respondent was the plaintiff, the appellant was the first defendant and M/s. Raj Kumar Khanna was the 2nd defendant in the suit. In the plaint the plaintiffs had, inter alia, pleaded that on or about the end of October and November, 1956 and thereafter, defendant No. 2 through defendant No. 1 imported chaff cutter knives bearing a trade mark of "lion brand" and wrongfully sold the same in the market in the year 1957 and thereafter. It was alleged that the two defendants conspired and flooded the market with the spurious chaff cutter knives during 1957-58 and the sales of the plaintiff fell very considerably. It was also pleaded, that the defendants, besides other quantities, imported 40,000 pairs of the above referred chaff cutter knives during the aforesaid period. The plaintiff further contended that the defendants had been requested to desist from selling the said spurious goods but they did not listen. On the other hand, the defendants openly declared and affirmed a right in them to import in India and sell and offer for sale in the market chaff cutter knives and blades and other agricultural implements and machines and parts there- of with the name and picture of a lion or one resembling a lion and also to mark the said material or to have them marked for purposes of sale with the name and picture of a lion or one resembling it.

(4) The suit was tried by the then District Judge, Delhi. Defendant No. 2 did not appear in court despite service. The suit was, Therefore, proceeded ex parte against it. Defendant No. 1 put in appearance and filed a written statement asserting that the plaintiffs did not have any valid registered trade mark as claimed nor did it in any way infringe the trade mark of the plaintiffs. It was not disputed that the goods were imported into India by the defendants and marketed but it was denied that there was any conspiracy between the defendants to infringe the trade mark, if any, of the plaintiffs or that the sales by the defendants in any way adversely affected the business of the plaintiffs. A right to , import, market and sell goods in Indian market was claimed.

(5) After the plaintiffs had filed a replication reiterating the earlier stand, the trial court framed eight issues. It was agreed by the parties before the trial court on June 11, 1960 that the issue of damages may not be decided initially but other issues be decided first. The parties 2nd (1978) 1 Delhi M/s. Invest Import, Beograd (YUGOSLAVIA) 661 Vs. M/S. Watkin Mayors & CO. JULI.UNI>UR

Awent to trial. As we noticed earlier, the District Judge passed a preliminary decree in favor of the plaintiff and against the defendant.

(6) Issues Nos. 3 and 4 which were settled by the District Judge read as under :

"3. Have the defendants used a mark which is the same as or which is a colourable imitation of the plaintiff's registered trade mark ?

4. Have the defendants sold goods so marked as to designed ?f calculated to lead purchasers to believe that they are the plaintiff's goods ?"

On these issues the trial court held :

"I have already observed above that the chaff cutter blades of the defendant contained the pictorial representation of a Lion, which is the registered trade mark of the plaintiffs. The plaintiff's chaff cutter blades are known in the "market as "SINGH MARKA" or "SHER MARKA". In the circum- stances, I see no reason whatsoever to disbelieve the state- ment of P. N. Mayor (Public Witness I) that the chaff cutter blades of the defendants created confusion in the market and were taken as those of the plaintiffs. I, Therefore, am of the view that the contention of the learned counsel for the plaintiffs that the chaff cutter blades of the defendants were passed off as those of the plaintiffs is well-founded."

(7) No appeal was filed against the preliminary decree and it became final between the parties. As observed by us earlier, on receipt of the report of the local commissioner and after hearing objections G against it, the Additional District Judge, Delhi accepted the report of the local commissioner and passed a final decree for recovery of Rs. 30,000 with costs in favor of the plaintiff and against the defendants.

(8) Now in the appeal before us, filed by the first defendant, M/s Invest Import, M]s Raj Kumar Khanna have not been imp leaded as respondents. A preliminary objection has been raised by the counsel for the respondent that the appeal is liable to be dismissed inasmuch as M]s Raj Kumar Khanna and Sons, defendant No. 2 in the suit, has I not been imp leaded as a respondent. We have heard the learned counsel on this preliminary objection. We now proceed to give judgment on the preliminary objection.

(9) It has been urged on behalf of the respondent that M]s Raj Kumar Khanna and Sons were a necessary party to the appeal and had to be imp leaded as a respondent. Inasmuch as that has not been done and the decree against M/s. Raj Kumar Khanna and Sons has become final and binding, the present appeal must fail as not properly instituted. In support of this contention learned counsel relies on .

(10) As against the above contention, learned counsel for the appellant has urged that although this suit was brought and decreed against the two defendants, there is no provision in the CPC or the Rules and Orders of the High Court, which compels that all the parties to the suit must be imp leaded as parties in an appeal. Furthermore, it is submitted, defendant No. 2 is not a necessary party in the appeal. It has been contended that according to the plaintiffs two persons committed a tort and there is no essential relationship to connect the two in the commitment of the alleged tort. Relying on Order 1 Rules 1 and 3 CPC ., it has been urged that it was up to the appellant to join or not to join M/s. Raj Kumar Khanna and Sons as a respondent in the appeal. An analogy is sought to be drawn between these provisions and Order 41 Rule 4. It is also

urged that if the decree passed by the trial court is varied or set aside the order would be to the benefit of all the defendants. It has also been suggested that under Order 41 Rule 33 CPC this Court has jurisdiction to do justice between the parties and pass such orders as it deems fit while disposing of the suit by its judgment in appeal. Pleading Order 41 Rule 20 CPC it is urged that this Court has power to implead M/s Raj Kumar Khanna and Sons and it may do so if it considers it necessary.

(11) We will first deal with the question as to whether M/s Raj Kumar Khanna and Sons is a necessary party.

(12) The distinction between a necessary party and a proper party is well settled. This has to be assessed on the basis of the allegations in the plaint. We have already noticed the allegations in the plaint. According to it both the defendants were joint tort-feasors. No relationship of principal and agent or master and servant was pleaded. This fact was in terms not denied by defendant No. 1, the present appellant. The finding of the trial court while passing the preliminary decree is also to this effect. In this view of the matter, we are of the view that M/s Raj Kumar Khanna and Sons were necessary party to the suit, but the question that now arises is whether they are necessary party to the appeal or not ?

(13) Order 41 Rule 4 lays down that where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on ground common to all the plaintiffs or to all the defendants, any one of all the plaintiffs or all the defendants may appeal from the whole decree and thereupon the appellate court may reverse or vary the decree in favor of .all the plaintiffs or all the defendants, as the case may be.

(14) It has been urged on behalf of the appellant that if the appeal was accepted or the terms of the decree were varied to the advantage of the appellant this court would have the power to set aside or vary the decree against M/s Raj Kumar Khanna also, the appellant has a right of appeal independent of the right of defendant No. 2 but the decision in the appeal can ensure to the benefit of both.

(15) Learned counsel referred to several decisions. In Brij Mohan Lal Murli Dhar Vs. Raj Kishore and Another, , a Division Bench of the Punjab High Court sitting in circuit bench at Delhi observed that the word "parties" in the expression "all or any of the respondents or parties" occurring in Order 41 Rule 33 has not been used merely as equivalent to "respondents". The word "parties" as distinguished from the word "respondents" only means parties to the suit and not necessarily parties to the appeal. It was held that inasmuch as the appellants claimed relief only against the plaintiff- landlord and not against their brother or mother, Therefore, non- impleading of the brother and the mother did not make the appeal as instituted defective or liable to be thrown out. In this case one Brij Mohan Lal Murii Dhar obtained an ex parte decree against the respondent Mannu Lal for ejectment "and for recovery of arrears of rent. Mannu Lal applied for

setting aside the ex parte decree. During the pendency of this application Mannu Lal died and his three sons and widow came on record as his legal representatives. The application was dismissed. Against that decision two sons of Mannu Lal filed an appeal in the court of the Senior Sub Judge, Delhi without impleading their third brother and the mother. The Senior Sub Judge accepted the appeal and set aside the ex parte decree. Against that order a revision was filed in the High Court. An, objection was raised in the revision that the appeal before the Senior Sub Judge was incompetent in the absence of all the legal representatives of Mannu Lal. A learned Single Judge hearing the revision petition referred the matter to a larger Bench. That is how the matter came up before the Division Bench. It was urged that under Order 41 Rules 4 and 33 CPC the appeal was competent and the revision must be dismissed. Holding that the heirs of Mannu Lal claimed relief against the landlord on the ground common to all and the relief was claimed only against the landlord, it was observed, that there was no express provision in the CPC which lays down that an appeal filed without impleading proforma respondent would be incompetent. In our opinion, this decision does not help the appellant. Mannu Lal's heirs had a common interest and so one could plead for all. In the instant suit the appellant could not and did not plead for defendant No. 2. Furthermore, it has to be kept in mind that the decree was passed against both the defendants and defendant No. 2 having not appeared the decree against it has become final. Defendants Nos. 1 and 2 were joint tort-feasors. Both of them were alleged to have committed the infringement : defendant No. 1 by sending chaff cutter blades from Yugoslavia and defendant No. 2 by marketing them here.

(16) Tarapada Mandal and Another Vs. Hajia Khatum Bibi and Another, , arose out of a mortgage suit. It was held that failure to bring all persons interested in the equity of redemption on record does not necessitate dismissal of the suit. The suit was under Order 34 Rule 1 CPC It was held that the suit as framed :-

"NEEDnot necessarily fail, the provisions of Order 1 Rule 9 being just as applicable to a mortgage suit as to any other suit."

(17) In Ram Dass Vs. Board of Revenue and Others, : it was held that in a writ petition where rival question of tenure-holdership under "section 176 of U.P. Zamindari Abolition and Land Reforms Act were raised as there was no statutory provision for impleading the State it could not be said that the writ petition must fail for no-impleading of the State. It was further held that the State was a proper party and not a necessary party in such proceedings.

(18) In the question in the second appeal before the High Court was whether an appellate court can grant a decree in favor of all the plaintiffs and all the defendants even though some of the plaintiffs or defendants had not appealed and non-appealing parties had not been made parties to the appeal. Relying on the provisions of Order 41 Rule 4 CPC it was held that the appellate court did have power to grant a decree in favor of all the plaintiffs and all the defendants even though some of them had not been imp leded as parties in the appeal.

(19) In a Full Bench of that Court held that Rule 4 of Order 41 cannot be applied where the non-appealing plaintiff or defendant, as the case may be, has not been impleaded in the appeal at all and is not before the appellate court.. After careful analysis of the entire case law on the point, it was held that if an inconsistent decree can be avoided the appeal can proceed but not otherwise.

(20) In *Sir Hari Sankar Pal and Another v. Anath Nath Mitter and others.* (1949) F.C.R. 36 it was held that the powers under Order 41 Rule 33 CPC being discretionary, no court can be compelled to make an order under this rule; but if an appellate court, while it allows an appeal, refuses to make any order in favor of a non-appealing party, whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of the said rule and without considering whether it should or should not exercise its powers under that rule, the court is competent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an application for review. This decision is really on the power of the court and not on what could be done under Order 41 Rule 4 or under Order 41 Rule 20 CPC .

(21) The above decisions cited on behalf of the appellant, Therefore do not help the appellant at all. We have noticed them in detail as it was submitted that though there was divergence of judicial opinion yet the court has power to do justice in the circumstances of the case as there is no provision compelling the appellant to join defendant No. 2 as a respondent.

(22) We may notice one or two other decisions : In *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur.* (by his Paricharaks and Shebaits) and another, 44 Indian Appeals 65(8), the Privy Council observed that if the principal defendant by his appeal brings the entire decree before the High Court disputing it in toto then even if the second defendant had not appealed inasmuch as there was one decree and not two, the High Court was competent to decide the matter in a way which would do justice between all the parties to the suit whether they were before it in the appeal or not. This inherent power of court is saved by Order 41 Rule 33 CPC There is no doubt about this salutary principle of law, but the inherent power of the court should be exercised only, in a circumstance where there is no other provision dealing with a situation or if no rights are jeopardized. The present case is one in which we are not required to dilate upon the power of the court under Order 41 Rule 33 CPC This is a matter where we have to decide whether the appeal is incompetent when it has come up for hearing before us, and whether defendant No. 2 was necessary party to the appeal.

(23) Now the suit was filed long back on October 20, 1959. The preliminary decree was passed on April 20, 1962. The final decree was passed on August 24, 1966. The appeal was filed in January, 1967. It has come up for hearing in January, 1977. Any appeal by defendant No. 2 would obviously be time barred now. As far as defendant No. 2 is concerned both the preliminary and the final decrees have become final and binding. The plaintiff respondent has. not rights which have become crystalised.

(24) The test for determining whether a person is a necessary party in appeal or not or whether the appeal can proceed without his presence and whether in the event of the appeal being allowed as against the remaining respondents or respondents there would or would not be inconsistent decrees in the same litigation in respect of the same subject matter. The principle has always been accepted that if the appeal succeeds which will lead to incongruous position of inconsistent decrees on account of a particular person not being made a party in the appeal, even though he was a party to the suit, the entire appeal must fail. This view has been expressed by a Bench of the Orissa High Court in . It is in that context that we feel the observations of the Supreme Court in Ch. Surat Singh's case (supra) are binding. The decrees against M/s. Raj Kumar Khanna and Sons have become final and binding. If the appeal is allowed to go on and is accepted then, the decree against defendant No. 1, the present appellant, would have to be set aside while the decree against Raj Kumar and Sons would remain. This would be inconsistent as the suit was one and the subject matter was the same.

(25) We are, Therefore, of the view that the appeal must fail as being incompetent and we dismiss the same. Inasmuch as the appeal fails on a technical ground, we leave the parties to bear their own costs.