

(2016) 01 DEL CK 0175
In the Delhi High Court
Case No : CS (OS) No. 2934/2011

J.C. Bamford Excavators Limited and Others

APPELLANT

Vs

Bull Machines Pvt. Ltd.

RESPONDENT

Date of Decision : 04-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 6 Rule 17, Order 7 Rule 11, Order 8 Rule 1, Section 151

Citation : (2016) 226 DLT 22 : (2016) 65 PTC 185 : (2016) 1 RajdhaniLR 117

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Pravin Anand, Vaishali Mittal and Geetanjali Visvanathan, Advocates, for the Appellant; A.N. Haskar, Sr. Adv. and Udyan Jain, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

Manmohan Singh, J.—I.A. No. 23988/2015 (u/o VI R.17 CPC, by plaintiffs)

1. This is an application filed by the plaintiffs under Order VI Rule 17 read with Section 151 CPC for amendment of the plaint. The plaintiffs wish to enhance the valuation of the suit for the purposes of Court fee and jurisdiction at Rs. 2,00,00,000/- and quantum of damages from Rs. 20,05,000/- to Rs. 2,00,00,000/-.

2. The plaintiffs have filed the suit for permanent injunction restraining infringement of copyright, passing off, damages and delivery up against the defendant.

3. It is stated in the application that since the suspension of ad- interim injunction vide order dated 12th December, 2011 on account of a mutually workable arrangement arrived at between the parties, no ad interim injunction has been operating against the defendant and the defendant continues to infringe the plaintiffs' copyright and design rights in their 3DX Backhoe Loader

by manufacturing and selling the impugned Bull Smart Backhoe Loader. Thus, on account of these continuing infringing activities, the plaintiffs estimates that the defendant would have at least made a profit of Rs. 2 crores since 12th December, 2011 till date and such profit earned by the defendant are the losses suffered by the plaintiffs.

4. In view of the said reasons, the plaintiffs seek to amend the paragraph 26(iii) and 27(c) of the plaint, the details of which are mentioned in para 8 of the plaint.

5. In support of the averments made in the application, the learned counsel for the plaintiffs has referred the following decisions:-

(i) Common order dated 3rd December, 2015 passed by a Division Bench of this Court in Vifor (International) Limited v. The High Court of Delhi, W.P.(C) No. 11035/2015 and Asian Patent Association (Indian Group) v. Registrar General, Delhi High Court, W.P.(C) No. 11043/2015.

(ii) Jiva Institute of Vedic Science & Culture & Ors. v. The Indian Hotels Company Limited & Anr., CS(OS) No. 1960/2006, decided on 4th December, 2015.

6. On the other hand, it is argued by the learned Senior counsel appearing on behalf of the defendant that the present application filed by the plaintiffs is not maintainable. He has referred to the order dated 25th November, 2011 where at the time of issuing the summons, the defendant was restrained from making, selling, offering for sale, dispatch, advertising, directly or indirectly dealing in/ launching Backhoe Loaders bearing components that are: (a) obvious and fraudulent imitations of the designs of the plaintiffs' various components of the backhoe loaders amounting to infringement of plaintiff No. 1's registered design Nos. 200016, 200017, 200018 and 200019; and (b) substantial reproduction of the plaintiffs' various components drawings amounting to infringement of the plaintiffs' copyright. The defendant was also restrained from putting the impugned machines on display in any of its stall in the Exhibition, which was being held at EXCON 2011, Bangalore International Exhibition Centre, Bangaluru, Karnataka, India. He pointed out that subsequently, by order dated 12th December, 2011 the above said interim order was suspended in view of the workable interim arrangement arrived at between the parties, the details of which are mentioned in the said order.

7. Learned Senior counsel has also pointed out the subsequent order dated 4th September, 2012 and has submitted that after the above said workable interim arrangement arrived at between the parties, the plaintiffs withdrew the application for injunction. He argued that initially, the suit was filed as quia timet action, thus the relief for enhancement of the damages as mentioned in the present application is malafide. It is done deliberately after the ordinance is passed by the Parliament. He submitted that in case the plaintiffs have now calculated the damages from Rs. 20,05,000/- to Rs. 2 crores, they should file a separate suit against the defendant. In support of his submissions, learned Senior counsel has referred to a decision of the Supreme Court in the case of

Kuldip Singh v. Subhash Chander Jain and others, , (2000) 4 Supreme Court Cases 50 (paras 5, 8 & 12) which reads as under:-

"5. We have heard the learned counsel for the parties. Shri Jaspal Singh, learned Senior Counsel for the appellant has submitted that in the suit filed by the plaintiff- respondents they were seeking an injunction against an apprehended injury likely to be caused by nuisance not in existence on the date of the suit which injunction could not have been granted in the facts and circumstances of the case. In his submission the action initiated by the plaintiff- respondents was quia timet action which, on the settled legal principles, was premature on the date of initiation and hence ought not to have been entertained. The learned counsel for the appellant has invited our attention to Fletcher v. Bealey [(1885) 28 Ch D 688 : 54 LJ Ch 424 : 52 LT 541] which in his submission is the leading authority on the point. Shri V.R. Reddy, learned Senior Counsel for the plaintiff-respondents has, on the other hand, supported the judgment of the High Court.

8. In our opinion a nuisance actually in existence stands on a different footing than a possibility of nuisance or a future nuisance. An actually-existing nuisance is capable of being assessed in terms of its quantum and the relief which will protect or compensate the plaintiff consistently with the injury caused to his rights is also capable of being formulated. In case of a future nuisance, a mere possibility of injury will not provide the plaintiff with a cause of action unless the threat be so certain or imminent that an injury actionable in law will arise unless prevented by an injunction. The court may not require proof of absolute certainty or a proof beyond reasonable doubt before it may interfere; but a strong case of probability that the apprehended mischief will in fact arise must be shown by the plaintiff. In other words, a future nuisance to be actionable must be either imminent or likely to cause such damage as would be irreparable once it is allowed to occur. There may be yet another category of actionable future nuisance when the likely act of the defendant is inherently dangerous or injurious such as digging a ditch across a highway or in the vicinity of a children's school or opening a shop dealing with highly inflammable products in the midst of a residential locality.

12. The appeal is allowed. The judgment and decree passed by the trial court and restored by the High Court against appellant-Defendant 1 are set aside. The suit filed by the plaintiff-respondents against appellant-Defendant 1 is directed to be dismissed. However, such dismissal shall not prejudice the right of the plaintiff-respondents to bring another action and seek an appropriate relief by making out a case of actual injury or imminent danger. No order as to the costs."

8. In case para 12 of the above said judgment is read, it is clearly held by the Supreme Court that the plaintiff would be entitled to bring another action and seek an appropriate relief by making out a case of actual injury or imminent danger. The action in the said case was filed as quia timet action. The facts and circumstances of this case are entirely different. In the present case, admittedly, the suit was filed as quia timet action. The interim order was suspended by order

dated 12th December, 2011. The defendant has not denied the fact that after suspending the order, they have continued using the impugned products. It may be different thing whether they are guilty of imitation or not.

9. Learned counsel for the plaintiffs has referred the rejoinder filed in the application. Along with the rejoinder, counsel has relied upon the annual report of the defendant-Company wherein at page 8 of the report ending by 2013, the net profit shown is about Rs. 5 crores. Therefore, he submitted that though the merit is not to be considered at the time of considering the application for amendment, the said aspect has to be decided after the trial but still the plaintiffs are showing the prima-facie proof that the intention of the plaintiffs is not malafide. He further submitted that admittedly, after passing of the order dated 12th December, 2011, the defendant continued to manufacture and sell the impugned Bull Smart Backhoe Loader and made considerable profits. He submitted that as far as the merit of the case is concerned, it has to be decided after the trial whether the plaintiffs have made out a case for the grant of permanent injunction against the defendant or not. But at this stage, the prayer made in the application is liable to be allowed.

10. Learned Senior counsel appearing on behalf of the defendant has not denied the fact that the separate suit even otherwise is maintainable. It is settled law that in case the separate suit from the same cause of action is maintainable, it would be appropriate to allow the amendment in the plaint unless the amendments are barred by limitation. Admittedly, the said situation has not occurred in the present case. It is a continuous cause of action as per the settled law by the Supreme Court in the case of M/s. Bengal Waterproof Ltd. Vs. M/s. Bombay Waterproof Manufacturing Co., , AIR 1997 SC 1398 (para 20) which reads as under:-

"20.It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach or infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. It is difficult to agree how in such a case when in historical past earlier suit was disposed of as technically not maintainable in absence of proper relief, for all times to come in future defendant of such a suit should be armed with a license to go on committing fresh acts of infringement and passing off with impunity without being subjected to any legal action against such future acts."

11. In the similar situation, this Court in the case of Jiva Institute of Vedic Science & Culture & Ors. vs. The Indian Hotels Company Ltd. & Anr., being CS(OS) No. 1960/2006, decided on 4th December, 2015, has dealt with the

same aspect. Paragraphs 6 to 12 of the said order reads as under:

"6. In the present application, it is stated by the plaintiffs that at the time of filing of the suit, the same was valued for the relief of rendition of accounts at Rs. 25 lac and the ad-valorem Court fee was paid. The plaintiffs at that time had also undertaken to pay the requisite Court fee on the account of the defendants being liable to pay in excess of the amount of Rs. 25 lac. Learned Senior counsel for the plaintiffs submits that since the plaintiffs have re-assessed the damages likely to be served, therefore, the relief for rendition of accounts is likely to assess at Rs. 1 crore in view of the statement of accounts produced by the defendants. Therefore, the plaintiffs wish to amend para 59 as well as prayer clause (b) of the plaint by enhancing the pecuniary jurisdiction for the reliefs of rendition of accounts/damages from Rs. 25 lac to Rs. 1 crore.

7. Learned Senior counsel for the plaintiffs submits that the present suit is not required to be transferred in view of the Proviso to Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015.

Section 7 and the First Proviso to Section 7 of the Ordinance read as under:

"All suits and applications relating to commercial disputes of a Specified value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court.

Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court."

8. Learned Senior counsel has also pointed out the order dated 3rd December, 2015 passed by the Division Bench in writ petitions being W.P.(C) No. 11035/2015, titled as Vifor (International) Limited v. The High Court of Delhi and W.P.(C) No. 11043/2015, titled as Asian Patent Association (Indian Group) v. Registrar General, Delhi High Court, whereby it was directed that "...The cases arising out of Patents Act, 1870; Trademarks Act, 1999; Designs Act, 2000; Copyright Act, 2000; and The Geographical Indications of Goods (Registration And Protection) Act, 1999, shall not be transferred and in case application seeking amendment in the pecuniary value is filed, they shall be considered by the respective Single Judges in accordance with law."

9. Even otherwise, it is stated that this Court is not ousted from its jurisdiction or power to pass an order in the application for amendment of plaint, assuming the interpretation of Section 7 of the Ordinance, 2015 is ultimately not accepted in the writ petitions.

10. It is the admitted position that while passing the order by the Division Bench on 3rd December, 2015, liberty is granted to the parties for amendment of pecuniary value. In the case of Balar Marketing Pvt. Ltd. v. Lakha Ram Sharma, ,

2002(97) DLT 424, the order of the Additional District Judge, dated 10th August, 2000 whereby the amendment was allowed, was set-aside, inter-alia, on the grounds that the amendment sought is not bonafide one and such a sum may be found due, if any, from the defendants on accounting the same and the said aspect will be decided when ultimately the decree would be passed. Thus, the prayer made in the application in the said case appeared to be arbitrary and not on the basis of the cogent material.

11. In the present case, on the face of it, there is cogent material available on record in view of the grounds rendered by the defendants. Further, the order of the Single Bench in Balar Marketing Pvt. Ltd. (supra) was challenged in the Supreme Court who set-aside the order of this Court in the case of Lakha Ram Sharma v. Balar Marketing Pvt. Ltd., , (2008) 17 SCC 671. The contents of the said judgment read as under:-

"3. A very short question is involved in this appeal. The appellant had filed a suit claiming that he is the proprietor of a trade mark "KUNDAN" and "KUNDAN CAB" in respect of PVC wires and cables and that the respondent was using the appellant's trade mark. Permanent injunction, rendition of accounts and other reliefs were claimed. The appellant applied for an amendment of the suit. The application for amendment was granted by the trial court. The High Court, however, by the impugned order, has disallowed only one portion of the amendment, namely, where the appellant sought to raise the valuation of the suit from Rs. 1,00,000 (Rupees one lakh) to Rs. 10,00,000 (Rupees ten lakhs). The High Court has held that such a claim is arbitrary and not based on any cogent material. The High Court has held that the application to raise valuation is not bona fide as it is done with the purpose of taking the suit out of the jurisdiction of that court.

4. It is settled law that while considering whether the amendment is to be granted or not, the court does not go into the merits of the matter and decide whether or not the claim made therein is bona fide or not. That is a question which can only be decided at the trial of the suit. It is also settled law that merely because an amendment may take the suit out of the jurisdiction of that court is no ground for refusing that amendment. We, therefore, do not find any justifiable reason on which the High Court has refused this amendment. Accordingly, the impugned order is set aside and that of the trial court is restored. We, however, clarify that as the appellant has now raised the claim from Rs. 1 lakh to Rs. 10 lakhs, the trial court will determine, whether or not court fees are correctly paid".

12. Similar view was taken by the Supreme Court in the case of Mount Mary Enterprises v. Jivratna Medi Treat Pvt. Ltd., , (2015) 4 SCC 182. The Supreme Court has also dealt with the objection raised by the defendant in the said case in para 9 of the application. The relevant paras are reproduced as under:-

"2. The facts giving rise to the present litigation in a nutshell are as under: the

appellant, who has been described as a plaintiff hereinafter, filed a suit against the present respondent, who has been hereinafter described as a defendant, for specific performance of a contract in relation to the suit property. The suit property was initially valued at Rs. 13,50,000 (Rupees thirteen lakhs and fifty thousand only). The plaintiff, thereafter, realised that market value of the property in question was around Rs. 1,20,00,000 (Rupees one crore and twenty lakhs only) and therefore, filed an application for amending the plaint. The said application for amendment was rejected by the trial court and thereafter, the aforestated writ petition was filed by the plaintiff challenging the order rejecting the amendment application. The said petition has also been dismissed and therefore, the plaintiff has approached this Court and prayed that the impugned judgment confirming the order rejecting the amendment of the plaint be set aside and the plaintiff be permitted to amend the plaint so as to state correct value of the property in question, which is Rs. 1,20,00,000.

7. In our opinion, as per the provisions of Order 6 Rule 17 of the Civil Procedure Code, the amendment application should be normally granted unless by virtue of the amendment nature of the suit is changed or some prejudice is caused to the defendant. In the instant case, the nature of the suit was not to be changed by virtue of granting the amendment application because the suit was for specific performance and initially the property had been valued at Rs. 13,50,000 but as the market value of the property was actually Rs. 1,20,00,000, the appellant-plaintiff had submitted an application for amendment so as to give the correct value of the suit property in the plaint.

9. The main reason assigned by the trial court for rejection of the amendment application was that upon enhancement of the valuation of the suit property, the suit was to be transferred to the High Court on its original side. In our view, that is not a reason for which the amendment application should have been rejected.

11. In our opinion, on the basis of the aforestated legal position, the amendment application made by the plaintiff should have been granted, especially in view of the fact that it was admitted by the plaintiff that the suit property was initially undervalued in the plaint and by virtue of the amendment application, the plaintiff wanted to correct the error and wanted to place correct market value of the suit property in the plaint.

12. For the aforestated reasons, we are of the view that the amendment application should not have been rejected by the trial court and the High Court should not have confirmed the order of rejection. We, therefore, set aside the impugned judgment [Mount Mary Enterprises v. Jivratna Medi Treat (P) Ltd., WP No. 12099 of 2013, order dated 10-3-2014 (Bom)] delivered by the High Court and the order dated 22-11-2013 of the trial court, whereby the amendment application had been rejected".

13. It is a commercial dispute and the Court dealing with the commercial matters should not have a narrow approach, as the Court has to examine the application

from commercial angle, though the same is subject to the condition that a valid case for amendment is made out, once the said condition is fulfilled, the prayer has to be allowed. The judgment rendered by the Supreme Court and the order passed by the Division Bench on 3rd December, 2015 have the binding effect.

14. In the present case, all the conditions are fulfilled. Thus, there is no impediment in allowing the application for amendment. The prayer in the present application is allowed. The amended plaint filed along with the application is taken on record.

15. The application is disposed of.

CS(OS) No. 2934/2011, I.A. No. 702/2015 (u/o VIII R.1 CPC), I.A. No. 1732/2015 (u/o VII R.11 CPC), I.A. No. 1733/2015 (u/o XII R.6 CPC) and I.A. No. 1752/2015 (u/o VI R. XVI CPC)

In view of the order passed in I.A. No. 23988/2015, let the deficient Court fee be furnished within two weeks. Written statement, if any, to the amended plaint be filed within four weeks. Replication, if any, be filed within two weeks thereafter.

List the pending applications on 16th March, 2016.