

(2010) 09 DEL CK 0135
In the Delhi High Court
Case No : FAO (OS) No. 68 of 2009

Mr. Manjunath Hedge and Others	Vs	APPELLANT
Jaypee Brothers Medical Publishers (P) Ltd.		RESPONDENT

Date of Decision : 01-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 151, 24
Contract Act, 1872 — Section 25, 27
Delhi High Court Act, 1966 — Section 10
Penal Code, 1860 (IPC) — Section 408

Citation : (2010) 44 PTC 534

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Pratibha M. Singh, for the Appellant; Jagdish Sagar and Tanvi Misra, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The challenge by means of this appeal is to the impugned order dated 10.12.08 whereby the appellant/defendant's application u/s 24 of Code of Civil Procedure, 1908 (CPC) has been dismissed by the Learned Single Judge. Though, we are doubtful as to the maintainability of the appeal u/s 10 of the Delhi High Court Act, 1966, however since we have otherwise heard the matter on merits, we are not going into the preliminary issue raised by the respondent with regard to the maintainability of the appeal.

2. The suit in which the application u/s 24 CPC was moved by the appellants/defendants was a suit filed by the respondent No. 1 herein, inter alia, for declaration and injunction restraining infringement of copyright with respect to an assignment in its favour a future copyright work, being a book authored by the defendant No. 1 (appellant No. 3) alongwith defendant No. 4 (appellant No. 4) as the co-author titled as "Clinical Operative Dentistry- Principles & Practice". The substratum of the suit is the violation of the ownership in the copyright which was claimed by the plaintiff in terms of an agreement executed on 3.9.03 and

under which agreement, appellant No. 3 was to write the subject book for the plaintiff. The defendant Nos. 2 and 3, and who are the appellant Nos. 1 and 2 before this Court, were sued by the publishers who were going to publish the book authored by the appellant Nos. 3 and 4. In view of the averments made in the plaint the gist of which has been referred above, the following paragraph No. 23 was set out in the plaint:

23. Thus, taking all the facts and circumstances together it is clearly proved that the book published by Defendant No. 2 through Defendant No. 3 is the very same book that Defendant No. 1 wrote in pursuance of the agreement executed in September 2003. It is submitted that the assignment of the book as a future work, which in the book, for authorizing Defendants Nos. 2 and 3 to publish it. Further, defendants Nos. 2 and 3 are liable for infringement of the plaintiff's copyright in the book, which they have printed and sold without authorization. It is further submitted that defendant No. 2 has breached his contract of employment with the plaintiff by making personal use of the plaintiff's confidential information for his own business at the cost of the plaintiff. Defendant No. 4 has participated in or has acquiesced in the said acts by Defendant No. 1.

3. At this stage, it is necessary to refer to the averments made in the plaint in the suit which is filed by the respondent/plaintiff only against the appellant No. 1 herein pending in the District Court. Some of the relevant averments in the said suit are as under:

6. That in order to ensure that the defendant do not run away from the service or misuse the trade secrets acquired during the period of service and cause determent to the plaintiff's business, an appointment letter containing the terms and conditions of the service was executed on 25.10.2002. The same was duly signed, acknowledged and accepted by the defendant without any coercion and duress. The Clauses No. 4 to 6 of the said appointment letter read as under:

Clause No. 4: That you will not give out to anyone by words or by mouth or otherwise the particulars of the business process and details/matter of confidential secret in nature, which it may be your personal privilege to know you by virtue of being employee of the company.

Clause No. 5: That you shall be whole time employee of the company and shall not take any other business work or public office on payment or otherwise, except with the prior written permission of the management.

Clause No. 6: If you are leaving the company on your own, you agreed that you will not join any other company who dealing/carrying on business of publishing and marketing medical books for the next three years from the resignation.

The photocopy of the appointment letter dated 25.10.2002 is annexed herewith as Annexure-C.

8. That on 5.2.2006, the defendant left the service of the plaintiff's company

without any reason and rhyme or prior permission of the plaintiff-company. While leaving the company the defendant left many incomplete works. He did not return the important files; Cud's and documents containing the secret data, which were entrusted to him during the course of his service. Besides that he did not hand over the charge to the concerned person of the plaintiff's company, although on good faith the plaintiff has already made the payment to him in full and final settlement.

12. That during the period of service, the defendant acquired all technical information, know-how, knowledge of secret documents, manner of business, the material used in the books, experience, data and list of customers of the plaintiff company.

13. That at the time of appointment, the defendant undertook to keep the secrecy of the plaintiff's business but after leaving the company he breached the terms and conditions of the service contract resulting into causing a substantial loss to the business and reputation of the plaintiff company. On the perusal of the terms and conditions of the appointment letter it is crystal clear that the defendant was restrained from running his own publishing business in any capacity within the period of three years from the date of resignation. In the month of April, 2006 it revealed to the plaintiff that the defendant has started his own business of publishing the medical books under the name and style of "EMM ESS Medical Publisher No. 26, 1st Floor, 1st R-Block, 1st Cross Road, Near ISCON Temple, Rajajee Nagar, Bangalore-560010. Since the defendant has breached the terms and conditions of the service contract and thus he has committed an offence u/s 408 I.P.C.

22. That having considered the aforesaid facts as stated above it is clear that the defendant is openly violating the terms and conditions of the service contract by carrying on the same business and publishing the same medical books within a period of three years from the date of resignation. In addition to that the defendant is further soliciting the customers of the plaintiff-company, directly and indirectly.

25. That in view of the facts stated above, if the defendant is not restrained from soliciting the customers of the plaintiff-company as well as from running the similar business as that of the plaintiff of publishing the medical books for a period of three years as per the terms of the appointment letter, the plaintiff would suffer further irreparable loss and injury which cannot be compensated in terms of money. Moreover, the very purpose of filing the present suit would also be frustrated.

4. In view of the aforesaid averments made in the suit pending in the District Court, the relief with respect to damages suffered by the respondent herein, and the plaintiff in the said suit, were claimed on account of loss of business reputation, goodwill and the breach of the terms and conditions of service. A decree of Permanent Injunction was also claimed to prevent the defendant

therein and the appellant No. 1 herein from carrying on the printing business for three years from the date of resignation dated 6.2.2006 or from soliciting the customers etc. of the respondent/plaintiff company. The relief has also been claimed with respect to rendition of accounts.

5. By the impugned order, the Learned Single Judge besides dismissing the application of the appellant u/s 24 CPC has also framed issues which read as under:

On the pleading of the parties, the following issues are framed:

1. Whether the agreement between the defendant No. 1 and the plaintiff is of assignment of copyright in future works? OPP
2. If the issue No. 1 is decided in favour of the plaintiff, whether the work of the defendant No. 1 published by the defendant No. 2 is in infringement of the said copyright and if so whether the plaintiff is entitled to the reliefs of rendition of accounts and delivery? OPP
3. Whether the agreement between the plaintiff and the defendant No.1 had expired by efflux of time? OPD
4. If issue No. 1 is decided in favour of the plaintiff, then whether the said agreement is onerous and hit by Sections 25 and 27 of the Contract Act? OPD
5. Whether the plaintiff had abandoned the agreement with the defendant No. 1? OPD
6. Relief No other issue arises or if pressed.

6. A reading of the aforesaid issues shows that no issue has been framed in the suit pending in the original side of this Hon'ble Court, and in which the impugned order has been passed, with respect of any cause of action or claim pertaining to the claim of damages arising from the violation by the appellant No. 1 of the terms of his contract of employment with respondent or any damages arising from breach of such contract of employment or claiming damages on the basis of such violations. The respondent has not sought to frame any issue pertaining to breach of the terms of the employment of the appellant No. 1/defendant No. 2 with the respondent/plaintiff.

7. No doubt, averments in the suit before Learned Single Judge have been made with respect to breach of contract committed by the appellant No. 1/defendant No. 2, however, the averments which have been made are in aid of the issue with respect to violation of copyright which the plaintiff/respondent had pursuant to the agreement dated 3.9.03 entered into between it and the appellant No. 3 herein i.e. to impute malafides and other illegal actions of appellant Nos. 1 and 2/ Defendant Nos. 2 and 3. The averments with respect to the defendants are of acting inter se for violating the copyright of the plaintiff in the subject book. The claim for damages in the suit before the Learned Single Judge are not towards the cause of action forming the subject matter of suit in District Courts as the

plaintiff/respondent has clarified in para 15 of the plaint that the same is the subject matter of the suit in the District Court.

8. A comparison of the averments made in the two plaints therefore shows that except to the extent of certain common averments, the nature and character of both the suits is intrinsically different. In fact, any doubt that the issues in the two suits cannot be substantially common becomes clear from a reference to the issues as framed by the Learned Single Judge in the impugned order which show that the issues framed have no connection with the plaint/cause of action in the suit which is pending in the District Court.

9. The Learned Counsel for the appellant has argued before us that causes of action of both the suits are substantially similar and common witnesses will also be examined in both the suits. It has been argued that since the issues will be common and witnesses are also common, the present was a fit case for exercise of jurisdiction u/s 24 of CPC. The Learned Counsel for the appellant relied upon paras 9 and 12 of the judgment of the Supreme Court in the case of Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, and which paragraphs read as under:

9. On the facts averred in the two plaints filed by the two parties before two different courts, it is clear that the parties are substantially the same. Jaypee Rewa have alleged and Willard India or Chitivalasa Jute Mills do not deny that Chitivalasa Jute Mills is nothing but a division of Willard India Limited. The fact remains that the cause of action alleged in the two plaints refers to the same period and the same transactions i.e. the supply of jute bags between the period 7-1-1992 and 31-12-1993. What is the cause of action alleged by one party as foundation for the relief prayed for and the decree sought for in one case is the ground of defence in the other case. The issues arising for decision would be substantially common. Almost the same set of oral and documentary evidence would be needed to be adduced for the purpose of determining the issues of facts and law arising for decision in the two suits before two different courts. Thus, there will be duplication of recording of evidence if separate trials are held. The two courts would be writing two judgments. The possibility that the two courts may record finding inconsistent with each other and conflicting decrees may come to be passed cannot be ruled out.

12. The two suits ought not to be tried separately. Once the suit at Rewa has reached the court at Visakhapatnam, the two suits shall be consolidated for the purpose of trial and decision. The trial court may frame consolidated issues. The CPC does not specifically speak of consolidation of suits but the same can be done under the inherent powers of the court flowing from Section 151 CPC. Unless specifically prohibited, the civil court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial

and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment. However, as the suits are two, the court may, based on the common judgment, draw two different decrees or one common decree to be placed on the record of the two suits. This is how the trial court at Visakhapatnam shall proceed consequent upon this order of transfer of suit from Rewa to the court at Visakhapatnam.

There is no quarrel with the ratio of the judgment of the Supreme Court and in fact we seek to apply it in the present case. Surely, when most of the issues in two cases are common or where evidence to be lead in pursuant to the issues would be common, then, there is no point of duplication of recording of evidence and wasting of time of the Court and the parties. Also, if common issues are heard by the two separate Courts, there is a possibility of inconsistent findings and conflicting decrees. It is to avoid this eventuality that powers of consolidation are exercised once there is complete or even substantial and sufficient similarity of the issues arising for decision in the suits. However, a reading of the two complaints clearly show that most of the issues in the two suits would be different and in fact possibly there may not even be any one substantial common issue between the two suits, in view of the fact that we have already referred to the pleadings of the suit before the Learned Single Judge and also the issues framed.

10. The rationale of the impugned order is contained in the following paragraphs of the impugned order:

To my mind the scope and ambit of the two suits is entirely different. While the inquiry in the suit before the learned Additional District Judge would be limited to the contract alleged of the defendant No. 2 herein with the plaintiff and the alleged breach thereof and if so whether the plaintiff would be entitled to damages and injunction, the inquiry in the present suit is as to whether there was a future assignment of copyright under the contract of the defendant No. 1 with the plaintiff. If this Court finds that there was such an assignment and the work so published infringes the same, then naturally the defendant No. 1 as the author and the defendant No. 2 as the publisher may be liable for infringement of the said copyright.

Xxxxx

In my opinion the need for the plaintiff to make identical averments qua the defendant No. 2 in the complaint in the present suit arose only for the reason that the defendant No. 2 is the publisher of the book in the present case also and only as an ancillary to the case of the plaintiff of a contract for assignment of copyright by the defendant No. 2 in favour of the plaintiff and breach thereof by the defendant No. 1 in collusion with the defendant No. 2. The reason for the said averments appears to be to show that the contract of publishing of the

defendant No. 1 with the defendant No. 2 is not an independent or a fresh contract but is in continuation of the transaction of the defendant No. 2 on behalf of the plaintiff, with the defendant No. 1. Otherwise, the rights, if any, of the defendant No. 2 to carry on business as a publisher are not to be adjudicated in the present suit. Seen in this light, it will be found that though the witnesses maybe the same in both the suits but their evidence would be entirely different. While the contract of the plaintiff with the defendant No. 1 would not be the subject matter of adjudication in the suit before the learned Additional District Judge, that would be the main concern in the present suit.

(Emphasis added)

11. In view of the above, we are of the opinion that the Learned Single Judge has correctly exercised his discretion in dismissing the application u/s 24 CPC inasmuch as most of the issues, and in fact all the issues in two suits are wholly different. The reliefs claimed are wholly different. The parties are also different in that whereas the suit in the District Court is only against Ex-employee who is now into printing business, in the suit in the original side of this Court there are four defendants; two being the authors and the other two being the Ex-employee and the firm which is carrying on printing/publishing business. The fact that there are some common averments does not mean that there are common issues of law and fact which is required for consolidation of suits. Any doubt that two suits cannot go on merely because and assuming that some of the issues are common is clear from the explanation 1 to Section 11 of CPC which shows that two suits can simultaneously go on and principle of res judicata will apply with respect to that suit/issue which will be decided earlier.

We, therefore, find the appeal to be wholly misconceived and dismiss the same with costs of Rs. 20,000/-