

(2008) 12 MAD CK 0213

In the Madras High Court

Case No : C.R.P. (PD) No. 3943 of 2008 and M.P. No. 1 of 2008

Mr. Muthukumar, Mrs. Padmavathi and Alama International APPELLANT
Vs

Aloha India (A Division of K.K. Academy (P) Ltd.) and Mrs. RESPONDENT
J.V. Vasantha Laxmi

Date of Decision : 16-12-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 2(4)
Constitution of India, 1950 — Article 226
Copyright Act, 1957 — Section 62(2)
Madras City Civil Courts Act, 1892 — Section 16
Trade and Merchandise Marks Act, 1958 — Section 106
Trade Marks Act, 1940 — Section 73
Trade Marks Act, 1999 — Section 134(2)

Citation : (2008) 12 MAD CK 0213

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : K.S. Natarajan, for T. Saikrishnan, for the Appellant;
Nithiyanantham, for Devi, for 1st Respondent and P.V. Rajeswari, for 2nd
Respondent, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—The revision petitioners/respondents 2 to 4/defendants 2 to 4 have filed this revision petition as against the order dated 13.11.2008 in I.A. No. 19215 of 2008 in O.S. No. 7909 of 2008 passed by the XV Assistant City Civil Court, Chennai in granting ad-interim injunction in favour of the first respondent/petitioner/plaintiff.

2. The trial Court, while passing orders in I.A. No. 19215 of 2008 filed by the first respondent/petitioner/plaintiff (under Order 39 Rule 1 and 2 of Civil Procedure Code), has observed as follows:

Heard the petitioner's counsel. Perused the documents. Satisfied that the

petitioner has made out a prima facie case by production of relevant documents. Document No. 5 reveals that the business of the respondent No. 4 is in the line of the petitioner's business with a similar and resembling name of the petitioner registered under the Trade Marks Act. Balance of convenience is in favour of the petitioner and he may suffer loss which can not be compensated. Hence, issue notice to the respondents for the hearing on 27.11.2008. Ad-interim injunction till then. Order 39 Rule 3 CPC is to be complied with. The petitioner is permitted to take private notice.

3. The learned Counsel for the revision petitioners/respondents 2 to 4/defendants 2 to 4 submits that the order of the trial Court in granting ad-interim injunction in I.A. No. 19215 of 2008 in favour of the first respondent/petitioner/plaintiff is beyond the jurisdiction of the Court and the same is an abuse of process of law and that the trial Court has committed an error in entertaining the suit filed under the Trade Marks Act and that the first respondent/petitioner/plaintiff has suppressed the material facts and has misled the trial Court and moreover, the trial Court has not appreciated the fact that abacus is a system or theory of mathematics and the same is beyond taught all over the world by several institutions using different ways and the first respondent/petitioner/plaintiff is complaining that the first defendant in the suit, a party to the agreement should not use the name of the first respondent Trade Mark or a similarly deceptive Trade Mark and when one of the terms of the agreement speaks of compensation has liquidated damages then, the order of ad-interim injunction passed by the trial Court is unsustainable in the eye of law and therefore, prays for allowing the civil revision petition in the interest of justice.

4. The main thrust of the contention of the learned Counsel for the revision petitioners is that a matter relating to Trade Mark is beyond the jurisdiction of the trial Court and that the first respondent/petitioner/plaintiff has filed the suit under the guise of "enforcing an agreement and seeking relief or violation and breach of the agreement and a consequential relief, but not for an injunction of carrying on a similar business etc." and therefore, the suit filed by the first respondent/petitioner/plaintiff is not maintainable before the trial Court.

5. Contending contra, the learned Counsel for the first respondent/ petitioner/plaintiff submits that the averments in para 9 of the plaint shows how the suit is filed and according to him, during the course of the business the first respondent/petitioner/plaintiff has appointed the second respondent/first defendant as its Master Franchisee for the state of Andhra Pradesh, for the course program "Aloha Mental Arithmetic" by entering into an agreement dated 25.01.2006 at Chennai on an agreed terms and conditions and as per the terms of the agreement the Master Franchisee has undertaken that she shall not enter into any agreement either directly or indirectly through its associates, with any other company which operates abacus mental arithmetic courses and that the said agreement is valid for a period of three years from the date of execution and the same can be renewed on mutual agreement for a further period of three years

on payment of 50% of the Master Franchisee License fee and that the Master Franchisee shall fully promote and market the Company diligently and to the best of its ability in the state of Andhra Pradesh and that the Master Franchisee has agreed that confidential information and knowledge that may be made available to it should not be divulged to any person other than its employees and that the Master Franchisee shall include a secrecy obligation relating to the above matters in the contracts of employment and further that the Master Franchisee shall not be interested or concerned in any undertaking or business, which is similar in nature or being deceptively similar to that of the company, during the term of this agreement and upto 60 months after the termination of the agreement and that the second defendant/ first civil revision petitioner is the son-in-law of the second respondent/first defendant looking after the day to day affairs of the business, accounts and profits of the Master Franchisee, the first defendant and that the Company has all money transactions with the second defendant on behalf of first defendant and that the third defendant is the daughter of the first defendant and wife of the second defendant and is also working for the plaintiff company as Master trainer by an agreement dated 01.04.2007 and all the profit and loss accounts of the company for the state of Andhra Pradesh arising through the said agreement of master franchisee dated 25.01.2006 is in second defendant's name and the second defendant was maintaining the day to day affairs of the business etc. and that the defendants were working as agents/ franchisees of the plaintiff from the date of signing of the agreement and that the first defendant sent a letter dated 12.10.2008 which has been received on 5.10.2008 stating that she has resigned from the Master Franchisee of Andhra and that during the last week of October 2008 the plaintiff has come to know through the unit franchisees at Andhra Pradesh that the Master Franchisee along with second and third defendants has started of her business of abacus and mental arithmetic program which is similar and identical to that of the plaintiff under the name and style "ALAMA INTERNATIONAL", the fourth defendant and the said competitive business of the first defendant is in collusion with the second and third defendants and that the fourth defendant's address is "Alama International" available on the internet and defendants 1 to 3, who were working as the Franchisee/agents of the plaintiff have floated a competitive business and that the defendants have acted detrimental to the interest of the plaintiff's company and therefore, the first respondent/plaintiff has filed a suit for permanent injunction restraining the defendants, their men, servants, agents or any of the competitive business of abacus and mental arithmetic or any business which is similar or identical to that of plaintiff and in contravention to the agreement dated 25.01.2006 and additional agreement dated 01.04.2007 and therefore, the suit filed before the City Civil Court is maintainable in law.

6. Furthermore, the learned Counsel for the first respondent/ plaintiff contends that the averments made in the plaint cumulatively must be taken into account for the purpose of deciding the jurisdiction of the Civil Court and that the revision petitioners/ defendants should not merely refer to some paragraphs of the plaint

to take a plea that the suit is not maintainable before the City Civil Court.

7. The learned Counsel for the revision petitioners/defendants submits that the first respondent/petitioner/plaintiff has averred in the plaint that the first respondent/plaintiff is popularly known as "Aloha India" and the education provided by it is well appreciated and recognised by the parents and by virtue of which lots of goodwill and reputation has accrued to the name of "Aloha" and that the plaintiff has acquired an exclusive right in respect of their course programs involved in their business and by virtue of such long, continuous and uninterrupted use and due to the tireless efforts and skillful sales promotional activities etc. The plaintiff has earned good reputation in the said business and in the additional affidavit filed by M/s.B.Girija, Power of Attorney Holder of the plaintiff's company, before the trial Court at para 11 it is mentioned that "immediately thereafter, the petitioner company asked the unit franchisee as to their stand with company and some of the unit Franchisees have strongly informed the illegal act of the defendants and have affirmed their intention to continue to be with "Aloha", the plaintiff etc. and further that it is averred in para 14 of the said additional affidavit that the trade mark "ALOHA and ALAMA" are one and the same etc. and further they are claiming the course programs as if the same were one invented by them and on these lines, an interim injunction relief has been sought for by the first respondent/plaintiff company and as per Section 2(4) of the CPC "District" means the local limits of the jurisdiction of a Principal Civil Court of original jurisdiction (herein after called a District) and includes the local limits of the ordinary original civil jurisdiction of a High Court and as such, the present suit filed by the first respondent/plaintiff ought to have been filed before the Hon"ble High Court in exercise its ordinary original civil jurisdiction and since the same has not been done by the first respondent/plaintiff, the present suit is not maintainable before the XV Assistant City Civil Court, Chennai.

8. In this connection, this Court points out that "suit is not defined under the Trade Marks Act, but as the same meaning given to it under the Code of Civil Procedure, since the suit is to be instituted before a District Court or High Court. Further, this Court aptly points out that in the decision in *Swamy v. Sultan Mohideen* AIR 1958 Madras 490 (decided u/s 73 of the Trade Marks Act, 1940), this Court has held that City Civil Court is not a District Court or a Court superior to a District Court within the meaning of the Section.

9. In determining the question of jurisdiction of the Court to entertain an application for interim injunction, the averments set out in the plaint ought to be considered and certainly it will not depend upon the defense of the defendants. It cannot be gainsaid that the term "District Court" has the meaning assigned to it in the CPC Code as per decision in *Brook Bond v. Balaji* 1993 PTC 40. Moreover, this Court pertinently points out that the CPC has not defined "District Court" but it defines only "District" and it means local limits of the jurisdiction of the Principal Civil Court of original jurisdiction hereinafter called the District Court

and includes the local limits of the ordinary civil jurisdiction of the High Court as per decision in Mohan Meaken v. Pravara Sahakari 1990 IPLR 191.

10. The learned Counsel for the revision petitioners/defendants 2 to 4 relies on the decision in Wipro Limited, Thiru Vi Ka Industrial Estate and Wipro Chandrika Limited Vs. Oushadha Chandrika Ayurvedic India (P) Limited, Oushadha Chandrika Research Centre and Narayana Stores, wherein this Court in para 11 and 14 has held as follows:

11. In Section 62(2) of the Copyright Act as well as in Section 134(2) of the Trade Marks Act, a deliberate departure is made from Section 20 of the C.P.C. to enable the plaintiff to sue one who infringed his copyright in the Court within whose local limit he carried on business at the time of the institution of the Suit or other proceedings. If the contrast as between two expressions namely, "actually and voluntarily resides" and "carries on business" is correctly perceived, it would reveal that while there is limitation, regarding residence, there is no such restriction with reference to "carrying on business". This is a clear indication that the term "carries on business" is not confined to only principal place of business. If the Legislature intended to mean the principal place only, it would have suitably qualified the expression "carries on business". The plain meaning of the above expression will only convey that wherever there is a business activity - be it the principal place or branch or branches -the party is said to carry on business in all such places.

14. It is, thus, seen that Section 62 of the Copyright Act and Section 134 of the Trade Marks Act prescribe an additional ground for attracting the jurisdiction of a Court over and above the normal ground, as laid down in Section 20 of the C.P.C. In other words, a special right is conferred on the proprietor of the registered trade mark to institute a Suit for infringement of any trade mark or copyright in the district within whose jurisdiction he resides or carries on business. The provision contained in non-obstante clause by using the phrase "notwithstanding anything contained in the C.P.C., 1908 (5 of 1908) or any other law for the time being in force" is made with a view to give a overriding effect to the said provision. It is equivalent to saying that the provision would hold the field notwithstanding anything contained in the C.P.C. or any other law for the time being force. Moreover, by virtue of Section 120 of the C.P.C., the provisions of Section 20 are not applicable as far a High Court is concerned. Therefore, the scope of this Section cannot be curtailed by reference to Section 20 of the C.P.C. or Clause 12 of the Letters Patent. Therefore, in a case of infringement of trade mark or copyright covered by Section 134(2) of the Trade Marks Act or Section 62(2) of the Copyright Act, the question of plaintiff taking prior leave under Clause 12 of the Letters Patent does not arise and the plaintiff need not take leave of the Court under Clause 12 of the Letters Patent even if only a part of the cause of action or no part of the cause of action arose within the jurisdiction of this Court, if the plaintiff ordinarily resides or carries on business within the jurisdiction of the Court.

11. Furthermore, the learned Counsel for the revision petitioners also relies on the aforesaid decision wherein at para 11 it is held that "for the purpose of deciding an Application to reject plaint under Clauses (a) & (b) of Order 7, Rule 11, averments made in Plaint are germane, and plea taken by defendant in written statement would be wholly irrelevant at that stage."

12. He further relies on the decision *Surya Dev Rai Vs. Ram Chander Rai and Others*, wherein the Hon''ble High Court has observed that "the power of the High Court under Articles 226 and 227 of the Constitution is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court u/s 115 CPC by Amendment Act 46 of 1999 does not take away and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court, nor is the power of superintendence conferred on the High Court under Article 227 of the Constitution taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 CPC, and is available to be exercised subject to rules of self-discipline and practice which are well settled."

13. He also pressed into service another decision in *Sundaram Finance Limited Vs. M.K. Kurian and Tomy Thomas Mathew*, wherein this Court in para 5, 6 and 7 has observed as follows:

5. So far as the city of Chennai is concerned, the ordinary original civil jurisdiction is vested in the High Court and not in the City Civil Court. The very preamble of the Chennai City Civil Court Act speaks of establishment of an additional Civil Court for the city of Chennai. It is the Civil Court of limited pecuniary jurisdiction having power to deal with the matters involving the value of less than Rs. 10 lakhs, whereas under Clause 12 of the Letters Patent, the High Court has unlimited original jurisdiction and this jurisdiction was expressly saved u/s 16 of the Chennai City Civil Court Act. Competency embodied by this section is pecuniary competency and it has been held that this Section lays down a rule of procedure and not of jurisdiction. While it enjoins the institution of a suit in the Court of the lowest grade competent to try it, it does not oust the jurisdiction of the Court of a higher grade. Even if the Court of a higher grade tries and disposes of a suit which could have been instituted in a Court of a lower grade, the decision rendered is not without jurisdiction see *V. Ramamirtham, Sole Proprietor, Glorious Pictures Vs. Rama Film Service*, . It is thus clear that as far as the City of Chennai is concerned, the words "principal Civil Court of original jurisdiction", as defined in Section 2(1)(e) of the Act, would mean the High Court exercising jurisdiction on the original side and not the City Civil Court. Moreover, the interpretation suggested by the learned single Judge would mean that there would be two principal Civil Courts, i.e. the High Court and the City Civil Court and such an interpretation is clearly ruled out by the words "but does not include any Civil Court of a grade inferior to such principal Civil Court".

6. A reference may also be made to a decision of the Supreme Court in *Raja Soap Factory and Others Vs. S.P. Shantharaj and Others*, , wherein the Supreme

Court, while construing the definition of the "District Court" u/s 2(e) of the Trade and Merchandise Marks Act, 1958, has observed in para 3 as follows:

3...The expression "District Court" has by virtue of Section 2(3) of Act 43 of 1958 the meaning assigned to that expression in the Code of Civil Procedure, 1908. Section 2(4) of the Code defines a "district" as meaning the local limits of the jurisdiction of a principal Civil Court "called the District Court" and includes the local limits of the ordinary original civil jurisdiction of a High Court. If, therefore, a High Court is possessed of ordinary original civil jurisdiction, it would, when exercising that jurisdiction be included, for the purpose of Act 43 of 1958, in the expression "District Court."

7. Similar is the view taken by the Division Bench of this Court in *The Daily Calendar Supplying Bureau, Sivakasi Vs. The United Concern*, wherein it has been held that the term "District Court", as defined in Section 62(1) of the Copyright Act, should be given the same meaning as in Section 2(4) of the CPC and that as far as the area of the Presidency Town of Madras is concerned, the High Court exercising its original civil jurisdiction over the city limits and not the City Civil Court.

14. The learned Counsel for the first respondent/plaintiff contends that the entire suit is based only on agreement and that the plaintiff has established more than 150 franchisees and that the second respondent has been appointed as a Master Franchisee by means of an agreement dated 25.01.2006 which has been executed in Chennai for a period of three years and that the first respondent is the mother-in-law of the petitioners and the mother of the second petitioner and subsequently, on 01.04.2006 a tripartite agreement has been entered into between the first respondent, second respondent and the second petitioner and on 12.10.2008 the second respondent herein, when agreement has been in existence, unilateral rescinded the agreement and sent a letter dated 12.10.2008 to the first respondent/plaintiff and therefore, the present suit filed before the trial Court in regard to the violation of agreement and praying for a relief of permanent injunction is maintainable in law.

15. The second respondent herein has taken out an I.A. No. 20614 and 20615 of 2008 under Sections 8, 9 of the Arbitration and Conciliation Act, 1996 to refer the matter for arbitration and to stay the suit and the matter is posted for filing counter on 15.12.2008.

16. The learned Counsel for the second respondent submits that in the suit injunction relief is sought for against her and that the training agreement dated 01.04.2007 is between the second petitioner and the first respondent and since as per agreement of Master Franchisee dated 25.01.2006 entered into between the plaintiff and the second respondent Clause XV (A) any disputes arising from and out this Agreement or otherwise, between the parties hereto, only the Courts in the City of Chennai, Tamil Nadu shall have exclusive Jurisdiction and as per Clause B the parties agree that any dispute arising under this Agreement

shall be referred to in Arbitration as per the provisions of the Arbitration and Conciliation Act 1996 etc. and therefore, as against the second respondent the suit is not maintainable and resultantly, the order of interim injunction granted in I.A. No. 19215 of 2008 dated 13.11.2008 is without jurisdiction.

17. The learned Counsel for the revision petitioners submits that the jurisdictional error committed by the trial Court can be interfered with by this Court under Article 227 of the Constitution of India.

18. The learned Counsel for the revision petitioners refers to the order in O.A. No. 766 of 2005 in C.S. No. 687 of 2005 and O.A. No. 871 of 2005 and A. Nos. 4180 and 4181 of 2005 in C.S. No. 788 of 2005 between M/s. Smart Brain Company Limited, Bangkok 10250, Thailand and Smart Brain International, West CIT Nagar, Chennai - 600 035 V. Brainobrain Kids Academy Pvt. Ltd., Chennai-17 and 2 others passed by this Court on 27.01.2006 wherein this Court has held that "since no monopoly could be claimed by the applicants company, to the teaching system, claimed in the plaints, as if they are the sole owner or exclusive owner over which others have no right etc. and in this view, while teaching the arithmetic, both are using different methods, using the name same numerical, preparing different materials and different style and get up, which cannot be prevented by the grant of injunction, as if the applicants alone are the exclusive owners or they are the original work of the applicant and having regard to the facts and circumstances of the case, the applicants/plaintiffs company has not made out a case for injunction prima facie showing the balance of convenience also in their favour, either on the grounds of infringement of copyright, or on the ground of passing off, whereas the defendants/respondents have made out a case prima facie, in their favour including balance of convenience and this being the position, no injunction order could be passed in their favour and interim order granted has to be vacated and even assuming, if there was any infringement at some point of time that could be compensated in terms of money, for which there is arbitration clause also, which has been invoked and resultantly, vacated the injunction granted in O.A. No. 871 of 2005 in C.S. No. 788 of 2005 and dismissed the O.A. No. 871 of 2005 and O.A. No. 766 of 2005 and allowed the applications I.A. Nos. 4180 and 4181 of 2005.

19. In the suit C.S. No. 687 of 2005 referred to by the revision petitioners/defendants filed before the High Court the plaintiffs therein have filed the suit u/s 27, 29, 105 and 106 of the Trade and Merchandise Marks Act, 1958 alleging that the first respondent/first defendant is passing off the technical know how of the applicants' technical know how of teaching of Mental Arithmetic Abacus Brain Development, Company's Trade Name, products, items, etc., complaining that because of the illegal acts committed by the first respondent/defendant and other respondents/defendants, they are liable to render an account of profit made by using the applicants/ plaintiffs' technical know how of Smart Brain, a program about Abacus Brain Development Programme and seeking a final decree also with the main relief of permanent injunction to restrain the first respondent/

defendant from passing off the technical know how of the applicants/plaintiffs as if it belongs to them.

20. It is not out of place to point that in the decision in John Richard Brady and Ors. v. Chemical Process Equipments P. Ltd. and Anr. AIR 1987 Del. 372 it is observed that "application for interim injunction against defendants restraining them from manufacturing, selling their products and dealing in machines that were substantial imitation of design of plaintiff's unit and denial of jurisdiction in Court by defendants held it is a mixed question of law and fact and could not be decided at such stage, only averments in plaint could be seen."

21. Continuing further, this Court cites the decision T. Arivandandam v. T.V. Satyapal and Anr. AIR 177 SC 2421 wherein the Hon"ble Supreme Court has observed that "if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial Court should exercise its power under Order 7, Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. The trial Courts should insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch.XI) and must be triggered against them." This Court may also add that in the aforesaid decision at para 5 at page 2423 it is among other things observed that "... And if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under O.X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage etc." and at para 7 it is further observed that "... Another moral of this unrighteous chain litigation is the gullible grant of ex parte orders tempts gamblers in litigation into easy courts. A judge who succumbs to ex parte pressure in judicial process."

22. As far as the present case is concerned, even though the learned Counsel for the first respondent/plaintiff contends that the suit is based on agreement dated 25.01.2006 and the relief of permanent injunction is sought for with reference to contravention of agreement and the additional agreement dated 01.04.2007, the entire substance of plaint allegations go to show that the first respondent/plaintiff has sought a relief in the suit relating to any right in a registered trade mark as per Section 134(b) of the Trade Marks Act, 1999 and the enforcement of this right u/s 134(b) of the Trade Marks Act, 1999 can be done by way of filing of the suit and the first respondent/plaintiff by a clever device and camouflage cannot evade proper forum and further from the reading of Section 134 of Trade Marks Act, 1999 it appears that this Court (Hon"ble High Court) has original jurisdiction and therefore, the relief sought for by means of permanent injunction in the suit before the City Civil Court is to be initiated only in the High Court and the word "District Court" under CPC even though it defines only "District" it means the local limits of the jurisdiction of the Principal Civil Court of original

jurisdiction though called as "District Court" includes the local limits of ordinary civil jurisdiction of the High Court in the considered opinion of this Court and viewed in that perspective, the first respondent/plaintiff ought to have instituted the suit before this Court (High Court in its ordinary original civil jurisdiction) and instead the suit O.S. No. 7909 of 2008 filed by the first respondent/plaintiff before the City Civil Court is not per se maintainable in the eye of law and as such, the trial Court has no jurisdiction to grant the relief of interim injunction in I.A. No. 19215 of 2008 through its order dated 13.11.2008 and resultantly, the suit filed by the first respondent/ plaintiff and the interim order of injunction granted by the trial Court in I.A. No. 19215 of 2008 clearly constitute an abuse of process of law, in the considered opinion of this Court and therefore, this Court in exercise of its power under Article 227 of the Constitution of India (which is to be exercised sparingly) strikes off the plaint from the file of XV Assistant City Civil Court, Chennai as a fit case and the interim injunction granted in I.A. No. 19215 of 2008 by the trial Court stands vacated and allows the civil revision petition to prevent aberration of justice and to promote substantial cause of justice.

23. In fine, the Civil Revision Petition is allowed, leaving the parties to bear their own costs. The plaint filed in the suit before the XV Assistant City Civil Court, Chennai is struck off from the file. The order of injunction granted by the trial Court in I.A. No. 19215 of 2008 shall stand vacated. It is open to the first respondent/plaintiff to institute a suit before this Court seeking necessary relief against the concerned which has its original jurisdiction in the manner known to law if so advised.