
(2009) 08 MAD CK 0031

In the Madras High Court

Case No : A. No. 4143 of 2008 and A. No. 5194 of 2008 in C.S. No. 874 of 2008

Mrs. M.K. Sowbhagyam, Proprietrix - Cholayil
Pharmaceuticals, Mr. A.V. Anoop, Proprietor, Cholayil Products
and Services and Cholayil Private Ltd. APPELLANT

Vs

Wipro Ltd.
Wipro Ltd. Vs Mrs. M.K. Sowbhagyam,
Proprietrix - Cholayil Pharmaceuticals, Mr. A.V. Anoop,
Proprietor, Cholayil Products and Services and Cholayil
Private Ltd. RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Copyright Act, 1957 — Section 62, 62(1), 62(2)
Trade Marks Act, 1999 — Section 134, 134(2), 142, 142(1), 142(4)

Citation : (2009) 5 LW 833 : (2010) 1 MLJ 683 : (2010) 42 PTC 410

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This is an application filed seeking the following relief:

to revoke the leave granted in A. No. 4143 of 2008 dated 4.9.2008 for want of jurisdiction as there is no cause of action arisen within the jurisdiction of this Court.

2. Compendiously and concisely, the relevant facts absolutely necessary and germane for the disposal of this application would run thus:

The respondents herein,, as the plaintiffs, filed the suit seeking the following reliefs:

i) to declare the threat for an action for infringement of the registered trade marks ""Sanjeevanni"" of the defendant by its legal notice dated

14.8.2008 bearing reference AAM/RS/5545/8592 issued to the 1st plaintiff and/

or any other notice that may be issued to any of the plaintiffs by the defendant or any other person associated with it whether directly or indirectly in any manner including but not limited to circulars, notice through print electronic, internet media and/or orally or in writing and/or in any other manner with a view interfere with the peaceful use of trade"" registered trade mark ""Cholayil Sanjeevanam"" and/or ""Sanjeevanam"" by the 2nd plaintiff or his nominee or assignee as groundless, unjustifiable and unwarranted;

ii) to grant a permanent injunction restraining the defendant and person associated with the defendant from proceeding further with its/their

groundless threat of alleged infringement of the trade mark ""Sanjeevani"" of the defendant or its associated companies against one or any of the

plaintiffs or their nominee for their use of the registered trade mark ""Cholayil Sanjeevanam"" and/or ""Sanjeevanam"" in any of the classes mentioned

in IV Schedule to Trade Marks Rules, 2002;

iii) to declare that the use of the Trade Mark ""Sanjeevanam"" and/or ""Cholayil Sanjeevanam"" by the 2nd plaintiff or any person claiming rights from

the 2nd plaintiff will not constitute infringement of the defendant's and/or its associated companies registered trade mark ""Sanjeevani"" in any of the

classes mentioned in IV schedule to Trade Marks Rules, 2002;

iv) to award costs and legal expenses of this suit.

(extracted as such)

3. The respondents/plaintiffs also filed O.A. No. 4143 of 2003 seeking the following relief:

to grant leave to the applicants to institute the above suit against the defendant before this Hon''ble Court.

4. My learned predecessor granted leave as per Clause 12 of the Letters Patent of Madras High Court. The applicant/defendant, after entering

appearance, filed this application for revocation of the leave, as set out supra.

5. Heard both sides.

6. The learned Counsel for the applicant/defendant, by inviting the attention of this Court to the averments in the affidavit, accompanying the

application and the plaint averments and also the typed set of papers, would set forth and put forth his argument to the effect that the plaint

averments should be taken into consideration for assessing the jurisdiction of this Court; accordingly, if viewed it is clear that the main plaintiff, namely, the second plaintiff is residing at No. 26, Kalaivanar Colony, Padipudhu Nagar, Chennai, which is admittedly beyond the territorial original jurisdiction of this Court; whereas, the first plaintiff herself would come forward with the case that she is not a necessary party to the suit and the third plaintiff might be the registered owner, but even as per the plaint averments, the third plaintiff transferred such right in favour of the second plaintiff; in paragraph 56 of the plaint, the justification for attracting the jurisdiction is found set out to the effect that the plaintiffs are residing within the jurisdiction of this Court and that the defendant is having its registered office outside Chennai, and hence, the leave was sought. According to the learned Counsel for the applicant/defendant the very averment found set out in paragraph 56 of the plaint is turned out to be an erroneous one, based on wrong facts, and as such the leave granted has to be revoked for the reason that the very main plaintiff, namely, the second plaintiff himself is not residing within the territorial original jurisdiction of this Court.

7. Per contra, by way of torpedoing and pulverising the averments as put forth on the side of the applicant/defendant, the learned Senior Counsel for the respondents/plaintiffs, by inviting the attention of this Court to the typed set of papers and to the averments in the plaint, would develop his argument to the effect that the entire plaint has to be read and not certain portions of it in isolation; even though the second plaintiffs place of residence is shown as Kalaivanar Colony, Padipudhu Nagar, Chennai, which is beyond the territorial original jurisdiction of this Court, nonetheless in paragraph No. 28 of the plaint, it is found set out that the second plaintiff is having his place of business in as many as seven places in Chennai, Kerala and Pune and as such, even on that ground this Court is having jurisdiction.

8. According to the learned Counsel for the respondents/plaintiffs the third plaintiff is the registered owner of the Trade Mark, concerned and no doubt, he transferred it in favour of the second plaintiff, but the registration of the transfer is yet to take place and as of now, the third plaintiff continues to be the registered owner, here, all the three plaintiffs joined together and instituted the suit and if any one of the plaintiffs is having place

of business or residence within the territorial original jurisdiction of this Court, then the maintainability of the suit before this Court cannot be challenged.

9. Inviting the attention of this Court to the pre-suit notice dated 12.8.2008, addressed by the applicant/defendant to the first plaintiff, the learned

Counsel for the respondents/plaintiffs would develop his argument that even though the first plaintiff was not actually concerned with the trade mark

"Sanjeevanam", nonetheless the threat was held out by the defendant by their notice to the first plaintiff, who is very much a party here, and as

such, Section 142 of the Trade Marks Act also could be pressed into service; the first plaintiff is none but the mother-in-law of the second plaintiff

and as such, the second plaintiff, sensing that the threat was actually focussed as against him, who is the person dealing with the trade mark

"Sanjeevanam", has chosen to file the suit. It is also the contention of the learned Counsel for the respondents/plaintiffs that Section 134 of the Act

contains the inclusive definition, which enables the plaintiffs to file this suit.

10. The point for consideration is as to whether as per Sections 134 and 142 of the Trade Marks Act, the plaintiffs can maintain the suit invoking

the original jurisdiction of this Court and whether the leave granted by this Court is sustainable.

11. A poring over and perusal of the plaint averments in C.S. No. 874 of 2008 filed by the respondents/plaintiffs would project and portray that

the first and third plaintiffs are having their places of residence, admittedly, within the territorial original jurisdiction of this Court, whereas,

admittedly, the address as found set out relating to the second plaintiff is situated beyond the territorial original jurisdiction of this Court. However,

I could see considerable force in the submission made by the learned; Counsel for the respondents/plaintiffs that in paragraph 23 of the plaint, the

plaintiffs spelt out that they are also having place of business in Chennai, over which, this Court has act territorial original jurisdiction.

12. By way of finding support to the plea of the respondents/plaintiffs, the learned Counsel would place reliance on the subsequent notice dated

4.9.2008 sent by the applicant/defendant to the second plaintiff and develop his argument that the very fact that the respondent/defendant specified

that the address of the second plaintiff as the one within the jurisdiction of this

Court, would speak volumes that the second plaintiff is having place of business here, and in such a case, the applicant/defendant cannot veer round and take a plea quite antithetical to what they committed themselves in black and white in the form of the said notice dated 4.9.2008.

13. No doubt the notice dated 4.9.2008, which emerged subsequent to the filing of this Suit would not lend a cause of action for the plaintiffs.

However, for the purpose of probabalising the case of the plaintiffs that the plaintiffs are having place of business, the plaintiffs to that limited extent, could place reliance on it and this Court could consider it.

14. It has been made clear from the records that the third plaintiff-the registered owner of the said trade mark "Sanjeevanam" is very much

admittedly residing within the extraterritorial original jurisdiction of this Court and it was he, who transferred that trade mark in favour of the second

plaintiff and; the transfer of the registration of trade mark has not yet taken place. The first plaintiff, who received the pre-suit "cease" and desist

notice from the defendant, and the second plaintiff, who is now dealing with the trade mark "Sanjeevanam" and the third plaintiff, who is the

registered owner of the trade mark "Sanjeevaham", as of now, have all joined together and filed this suit and over and over that, it is also the

contention of the plaintiffs that they are having their place of business within the jurisdiction of this Court and in such a case, Sections 134 and 142

of the Trade Marks Act would backup the plea of the plaintiffs that this Court is having territorial jurisdiction in this matter.

15. The learned Counsel for the applicant/defendant would try to put forth and set forth his argument to the effect that Section 134 of the Act

exclusively deals with suits relating to infringement of Trade Mark and it cannot be pressed into service in support of the suit based on Section 142

of the Trade Marks Act. In my considered opinion, the distinction which is sought to be made by the applicant/defendant is not one that of chalk

and cheese, but it is one that of tweedledum and tweedledee for the following reasons:

Second 134 of the Trade Marks Act, which I could describe as the one, procedural in nature. It is not too difficult to discern the object behind

Section 134 of the Act. In fact, the Legislators thought fit to give support to the alleged hapless and helpless victim of violation of the rights relating

to the registered Trade Marks. In other words, the Legislators want to encourage the victims of violation of Trade Marks to institute suit in their

own place, instead of going to the place of the defendant and institute a suit there. As such, in my opinion, Section 134 of the Act should be taken

as one recognising the fight of the plaintiff, who is having the genuine grievance that he has been wronged in any manner by another person, relating

to his right concerning the registered Trade mark, which includes threat, as contemplated u/s 142 of the Act, to file the suit in his own place of

residence or place of business.

16. The heading of Section 134 of the Trade Marks Act is reproduced hereunder, Suit for infringement, etc., to be instituted before District Court.

(emphasis supplied)

which means, the suits which could be instituted under the Trade Marks Act 1999, are covered by Section 134 of the Act.

17. Whereas, the learned Counsel for the applicant/defendant would try to carve out an exception to Section 134 of the Act by pointing out that

Section 134 should be restricted only relating to the suits regarding infringement of a registered trade mark and not to the suits based on Section

142 of the Act.

18. Section 142(4) is extracted hereunder for ready reference:

142(4) A suit under Sub-section (1) shall not be instituted in any Court inferior to a District Court.

It would contemplate that a suit of the nature contemplated in Section 142 of the Act should be instituted in a District Court.

19. The learned Counsel for the applicant/defendant would submit that if a distinction was not thought of, I as submitted by him, the Legislators

would not have taken pains to incorporate Sub-section (4) of Section 142.

20. In my opinion, such an argument cannot be countenanced for the reason that the Legislators, by way of abundant caution, so to say ex

abundanti cautela, incorporated Sub-section (4) to Section 142 of the Act, so that (sic) litigants would not approach the Munsif Court or Sub

Court, seeking relief u/s 142 of the Act. As such, this Sub-section (4) of Section 142 of the Act is nothing but an adjunct to Section 134 of the

Trade Marks Act and it should not be read in isolation.

21. The learned Counsel for the applicant/defendant would cite the following decision:

1998 1 L.W. 640 Scientific Compounds and Processes Private Limited v. National Soapnut Works, Bangalore, an excerpt from it would run thus:

15. The learned single Judge has revoked the leave granted, holding that this Court has no jurisdiction on the basis of the statement made in the

affidavit of the respondent filed in support of Application No. 1539/91. In the said affidavit the respondent has denied that its products were sold

at Madras at all. It is relevant to state here itself that the appellant has made specific averment in the plaint that the respondent's goods are sold

within the city of Madras at several places.

22. Placing reliance on the above decision, learned Counsel for the applicant/defendant would advance his argument that the plaint averments alone

are germane for deciding the jurisdictional issue and not any other fact.

23. In my considered opinion once the parties are at logger heads and they cannot see eye to eye regarding jurisdictional issue, the Court is not

expected to close its eye to other documents and materials available before it and consider only The plaint averments.

24. To the risk of repetition and pleonasm but without being tautologous, I would like to point out that even the plaint averments in this case are

sufficient to attract the territorial original jurisdiction of this Court, as set out supra. Over and above that in this case; the documents found enclosed

in the typed set of papers, would support the contention of the respondents/plaintiffs that cause of action has arisen within the jurisdiction of this

Court and as such, I am of the view that the said decision cited on the side of the applicant/defendant is not applicable to the faces of this case.

25. Whereas, the learned Counsel for the respondents/plaintiffs would cite the following decision of the Honourable Apex Court reported in

Exphar SA and Another Vs. Eupharma Laboratories Ltd. and Another, , an excerpt from it would run thus:

12. We would like to emphasise the word ""include"". This shows that the jurisdiction for the purposes of Section 62 is wider than that of the Court

as prescribed under the Code of Civil Procedure, 1908. The relevant extract of the report of the Joint Committee published in the Gazette of India

dated 23.11.1956 which preceded and laid the foundation for Section 62(2) said:

In the opinion of the Committee many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new Sub-clause (2) accordingly provides that infringement proceedings may be instituted in the District Court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business etc.

26. A plain reading of the above decision would certainly lend support to the contention of the respondents/plaintiffs that Section 134 of the Act is in the nature of expanding the scope of Section 20 of C.P.C.

27. The learned Counsel for the respondents/plaintiffs also would cite the Division Bench decision of this Court reported in 2008 (3) CTC 274

Wipro Limited v. Oushadha Chandrika Ayurvedic India (P) Limited, and excerpt from it would run thus:

11. Where it is the contention of the plaintiffs that they can institute a suit either in a Court, within whose local limits the principal place of business

or its branch or branches where its business is carried on, is situate, the defendants submitted that it is the principal place of business that is

material. According to the defendants, it is the only reasonable interpretation of Section 62(2) of the Copyright Act and Section 134(2) of the

Trade Marks Act, and therefore, as the head office of the plaintiffs is at Bangalore, Courts in Bangalore alone will have jurisdiction. Section 62(1)

of the Copyright Act stipulates the forum for institution of infringement proceedings, etc., to be the District Court. Section 62(2) provides that the

term ""District Court having jurisdiction"", notwithstanding anything contained in the C.P.C. or any other law for the time being in force, would

include a District Court within the local limits of whose jurisdiction, the person, or one of the persons, instituting the Suit actually or voluntarily

resides or carries on business or personal works for gain. By inserting Section 134(2) of the Trade Marks Act, the legislature has brought the

Trade Marks law in line with the provisions contained in the Copyright Act, as very often a trade mark is also registered as an artistic work under

the Copyright Act. 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 where ever 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.

28. This decision is on the same line as that of the one cited by the learned Counsel for the respondents/plaintiffs reported in Exphar SA and

Another Vs. Eupharma Laboratories Ltd. and Another, As such, if the plaintiffs are carrying on business within the jurisdiction of this Court, the

suit of this nature could be instituted in this High Court.

Accordingly, I could see no merit in this application and it is dismissed.