

(1997) 10 MAD CK 0082
In the Madras High Court
Case No : O.S.A. No. 130 of 1992

M/s. Scientific Compounds and Processes Private Limited	APPELLANT
Vs	
M/s. National Soapnut Works Bangalore	RESPONDENT

Date of Decision : 18-10-1997

Acts Referred:

Citation : (1997) 10 MAD CK 0082

Hon'ble Judges : Shivaraj Patil, J;K. Gnanaprakasam, J

Bench : Division Bench

Advocate : C. Saravanan, for the Appellant; K. Raghunathan, for the Respondent

Judgement

Shivaraj Patil, J.—Heard Shri C. Saravanan, learned counsel for the appellant, and Shri K. Raghunathan, learned counsel for the respondent, in this appeal. The plaintiff in the suit C.S. No. 44 of 1991 has filed this appeal challenging the order dated 15.4.1991 passed by the learned single Judge in Application No. 1539 of 1991 in the said suit. The appeal was admitted on 6.7.1992. There was delay of 292 days in filing the appeal. The appellant filed C.M.P. No. 3878 of 1992 seeking condonation of delay in filing the appeal. A Division Bench of this Court passed the following order on 6.7.1992 in the said C.M.P.:-

"The delay is condoned, for the present, subject to objection, if, any, that can be taken on behalf of the respondent, at the time of hearing of the Appeal,"

2. When this appeal came up for hearing, on the previous occasion, the learned counsel for the respondent pointed out that the delay was condoned without hearing the respondent, and the respondent would like to file counter opposing the application filed for condonation of delay. In view of the said submission, this Court passed the order on 22.9.1997 granting time to the respondent to file counter. Accordingly, counter affidavit is now filed by the respondent opposing the condonation of delay of 292 days in filing the appeal.

3. We will consider, at the outset, as to whether the delay of 292 days caused in filing the appeal should be condoned.

4. The appellant in the affidavit filed in support of the C.M.P. No. 3878 of 1992 has explained the circumstances under which there was delay of 292 days in filing the appeal. The learned counsel for the appellant submitted that the order under appeal was passed on 15.4.1991, application for copy of the order was made in time, and the copy was made ready on 6.6.1991, since certain decisions relied on by the counsel for the appellant were not taken into consideration by the learned single Judge, the appellant filed a Review Application on 10.6.1991 which application was dismissed on 11.11.1991; it is thereafter the present appeal was filed; thus there was delay of 292 days in filing the appeal, but that delay was neither deliberate nor wanton, inasmuch as the appellant bona fide believed that there were good grounds for review of the order of the learned single Judge, particularly having regard to the question of law that arose for consideration relating to jurisdiction. Hence the review application was filed, and in case the delay is not condoned, the appellant would suffer great injury. On these grounds, and in view of the affidavit filed by the appellant in support of the C.M.P. No. 3878/92, the learned counsel for the appellant prayed for condoning the delay.

5. Shri Raghunathan, learned counsel for the respondent, on the basis of the counter affidavit filed, urged that mere filing of review application was not a ground to condone the delay nothing prevented the appellant from filing the appeal within the time even if it were to file a review application as well. According to him there was no bona fide on the part of the appellant, and hence the delay cannot be condoned.

6. Having regard to the facts and circumstances of the case, and taking note of the fact, in particular that the appellant applied for copy of the impugned order within time, and made application for review of the order under appeal before the learned single Judge within four days from the date of getting copy of the order and that the review sought for was one based on question of law; the review application was dismissed on 11.11.1991 and thereafter the present appeal was filed. It cannot be said that the appellant was either negligent or deliberately delayed in filing the appeal. We are also not able to see any obvious advantage to the appellant in delaying to file the appeal. Further, looking at the order under appeal and the legal question that arose for consideration, it cannot be said that there was no bona fide attempt on the part of the appellant in filing the review application, and that the appellant deliberately delayed in filing the appeal, or that the appellant was negligent.

In this view, we are condoning the delay of 292 days in filing the appeal.

7. Having condoned the delay in filing the appeal, now, we take up the appeal itself for consideration on merits, in the light of the submissions made by the learned counsel for the parties.

8. The facts which are considered necessary and relevant for the purpose of this appeal, briefly stated, are the following:-

The appellant who is the plaintiff in the suit C.S. No. 44/91 filed the said suit for permanent injunction restraining the defendant who is the respondent herein, and its mean from using the word "Saheena" together with the symbol of two trees, and from using the trade style, colour scheme, etc, imitating the plaintiffs trade mark "Sabeena", and for permanent injunction restraining the defendant from passing off its goods as the goods of the plaintiff by using the word Sabeena and for rendition of accounts. The appellant-plaintiff made averments in the plaint that the respondent-defendant is engaged in manufacture and sale of cleaning powder under the brand name of "Sabeena" together with the symbol of two trees, deceptively similar to the registered trade mark of the appellant "Sabena", and that the respondent's cleaning power is being sold in various shops in the city of Madras. The cause of action arose on or about August, 1990 when the appellant came to know of the sale of the respondent's products.

9. On these basis the appellant filed Application No. 6774 of 1990 for grant of leave to the plaintiff to institute the suit against the respondent in this Court. Even in the affidavit filed in support of the said application the appellant has stated that the respondent was selling the goods with the trade mark "Sabeena" in the City of Madras in several shops within the jurisdiction of this Court, and therefore the cause of action to file the suit had arisen at Madras, within the original jurisdiction of this Court although the respondent is manufacturing the product in Bangalore.

10. On 19.2.1990 the learned single Judge granted leave to institute the suit to the Appellant without notice to the respondent, it is thereafter the respondent on its appearance filed Application No. 1539 of 1991 to revoke the leave granted in Application No. 6774/90.

11. In the affidavit filed in support of Application No. 1539/91 the respondent denied that the defendant's products were sold within the City of Madras, besides stating that the respondent has not appointed any distributor, dealer, or agents to sell its products, and that it has not registered even under the provisions of the Tamil Nadu General Sales Tax Act. On these statements the respondent sought for revocation of the leave granted to the appellant.

12. After hearing the learned counsel for the parties, the learned single Judge, by the order under appeal, revoked the leave granted in Application No. 1539/91. In the result, the learned single Judge directed for return of the plaint to the appellant for presentation to the proper Court. Hence the present appeal is filed, as stated above, by the plaintiff, aggrieved by the said order.

13. Few facts which are not in dispute are the following :-

The appellant-plaintiff is manufacturing and trading in the cleaning powder with the trade mark "Sabena" which is registered at Madras, and the goods of the plaintiff are to be sold in the States of Tamil Nadu, Andhra Pradesh, Karnataka and Kerala; the appellant obtained certificate of registration of the trade mark under the Trade and Merchandise Marks Act, 1955 dated 31.7.1976; the

respondent is engaged in the manufacture and sale of cleaning powder under the trade mark Sabeena; and manufacture of goods of the respondent takes place at Bangalore, and not at Madras.

14. 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.

15. We find force in the submission of the learned counsel for the appellant that, whether the Court has jurisdiction or not, could not have been decided on the basis of the statement made in the affidavit filed by the respondent, in support of the Application No. 1539/91; and the Court, at the time of deciding whether it has jurisdiction or not would have taken note of the averments made in the plaint, which is the settled law. Further the appellant had no opportunity to rebut the statement made by the respondent in the affidavit that its products are not sold in Madras. The proper course would have been, after the respondent had filed the written statement, an issue could be taken as to the jurisdiction and that could have been dealt with either as a preliminary issue or along with other issues on the basis of the evidence that could be let in by the parties.

16. The decision cited on behalf of the appellant to show that this Court has jurisdiction on the original side as the appellant's trade mark was registered at Madras, and the cause of action to the plaintiff to file the suit arose here as the products of the respondents were sold in the City of Madras, were distinguished by the learned single Judge referring to a decision of the Division Bench of this Court in the case of *Harold Charles Pinto v. Hilda Menezes* (1977 T.L.N.J.214), if one reads carefully the said Judgment, it becomes clear that the suits, even though however remotely connected with the trade mark, cannot be maintained in this Court on the original side. But, that Judgment has not laid down that suits filed complaining the infringement of trade mark on the ground that the goods are sold by the defendant within the jurisdiction of this Court in the city of Madras, are not maintainable.

17. Be that as it may, application of the Judgment of the Division Bench of this Court depended again on the establishment of facts in that case. As already stated by us, the averment made in the plaint alone should have been taken into consideration in order to decide the jurisdiction, at that stage by the learned single Judge. This must not be understood as saying that the respondent cannot raise the question of jurisdiction of this Court to try the suit in the written statement that may be filed; and in the event such a question is raised, essentially an issue ought to be raised and thereafter that issue has to be decided either as a preliminary issue or along with other issues. Under the circumstances, we find it difficult to sustain the order under appeal. In the result,

for the reasons stated, we allow this appeal and set aside the order of the learned single Judge dated 15.4.1991. We leave the question of jurisdiction to be decided in the suit. Now, the appellant shall represent the plaint to this Court on the original side within a period of one week from today, if the plaint is already taken back. If the return is not taken, the suit shall be restored.. The respondent shall file written statement within a period of six weeks from today. No costs.