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**(2014) 05 CAL CK 0024**

**In the Calcutta High Court**

**Case No : A.P.D. No. 64 of 2014 and C.S. No. 28 of 2013**

Prapti Fashions Private Limited and Another

APPELLANT

Vs

Monoj Kumar Gupta

RESPONDENT

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**Date of Decision : 07-05-2014**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 23 Rule 1(4), Order 23 Rule 23, 10  
Constitution of India, 1950 — Article 226, 227

**Citation : (2014) 59 PTC 667 : (2015) 2 WBLR 979**

**Hon'ble Judges : Arijit Banerjee, J;A.K. Banerjee, J**

**Bench : Division Bench**

**Advocate : Ranjan Bachawat, Mr. Prithwiraj Sinha and Mr. Victor Dutta, Advocate for the Appellant; Debnath Ghosh, Mr. Sayan Roy Chowdhury, Mr. A. Poddar, Mr. P. Patra and Ms. Namrata Barmecha, Advocate for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Ashim Kumar Banerjee, J.

Curtain-Raiser:

1. The subject lis would involve the authority to use the trade name "Prapti Fashion". The plaintiff would claim, they have outlets all over India under the name and style of "Prapti" and they are prior user of the brand. The defendant started using the same at a later point of time that would give rise to a cause of action where the plaintiff would be entitled to claim monopoly on the brand as a prior user. Significant to note, the defendant was using the label "Prapti Collections". The plaintiffs would claim, by passage of time, they acquired goodwill and reputation that the defendant sought to infringe hence, the plaintiff was entitled to permanent injunction restraining the defendant from using the brand "Prapti" in their product. The records would reveal, the plaintiff filed another suit, prior in time, being T.S. suit No. 122 of 2012. They however, did not proceed further in the suit and allowed the same to be dismissed. Earlier,

simultaneously with the filing of the suit, they made identical prayer for injunction that the learned City Civil Court refused, on appeal, the Division Bench directed expeditious disposal of the suit. The Division Bench also declined to give any interim protection.

2. Soon after filing of the later suit, the appellant/plaintiff filed an application for injunction. The respondent/defendant filed another application for dismissal of the suit on the ground, the same was not maintainable in view of Order XXIII rule 1(4) of the Code of Civil Procedure.

Judgment and Order Impugned:

3. Learned Single Judge disposed of both the applications by dismissing the suit being barred by Order XXIII of the Code of Civil Procedure. His Lordship held, both suits being T.S. No. 122 of 2012 and C.S. No. 28 of 2013 would claim identical reliefs. Since the plaintiffs allowed the former suit to be dismissed without having express leave being obtained for the second suit, the second suit would be barred hence, this appeal.

Contentions:

4. Mr. Ranjan Bachawat learned Counsel appearing for the appellant would advance his argument by contending, Order XXIII rule 1 would have no application since the second suit was filed at a time when the earlier suit was also in existence. The earlier suit was dismissed at a stage when the later suit had already been filed hence, question of obtaining leave for filing a fresh suit would not arise. He would however, not admit the contentions of the defendant; the suits would have identical reliefs. According to him, the later suit was more comprehensive and in any event, would be based on continuing cause of action. He would refer to the pleadings contained in the plaint that would show, defendant opened two more branches after filing of the prior suit.

5. He would also rely on the registration of the label mark that he had. According to him, apart from registration of label mark he was admittedly prior user that would give right to him to claim for appropriate injunction claiming monopoly on the mark.

6. On the continuing cause of action, Mr. Bachawat relied on the following decisions:

1. M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, .

2. N.R. Narayan Swamy Vs. B. Francis Jagan, .

3. Nakoda Dairy (P) Ltd. Vs. Kewal Chand Vinod Kumar, K.B. Products Pvt. Ltd. and Hirachand Bakthawarmal, .

7. On the applicability of Order XXIII rule 1 he would rely on the following decisions:

1. AIR 1930 599 (Lahore) .
2. Girdhari Lal Bansal Vs. The Chairman, Bhakra Beas Management Board, Chandigarh and Others, .
3. Vimlesh Kumari Kulshrestha Vs. Sambhajirao and Another, .
8. Distinguishing the Lahore decision *Mangi Lal and Another* (supra) that the learned Judge relied upon, Mr. Bachawat contended, the law was different when the said decision was rendered that would make the difference. According to him *Bengal Water Proof* (supra) was wrongly applied. He would rather rely upon paragraph 8 of the said decision that would support his contention on the issue. He would distinguish the decision in the case of *Vimlesh Kumari* (supra) by contending, the suit was dismissed on a technical defect that would make the difference.
9. Per contra, appearing for the respondent, Mr. Sayan Ray Chowdhury would heavily rely on the decision in the case of *Bengal Water Proof* (supra). He would rather distinguish the decision in *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, heavily relied on Mr. Bachawat by contending, the facts of the present case would not fit in. According to Mr. Ray Chowdhury, the Rajasthan decision in the case of *Hari Ram Vs. Lichmaniya and Others*, was not the correct law.
10. Replying to what the respondent would contend, Mr. Prithiraj Sinha learned Counsel also appearing for the appellant would submit, in *Bengal Water Proof* (supra) finality was the prime factor whereas the Rajasthan case considered the conduct of the parties that prompted the Court to spring into action. He would refer to page-480 of the paper book to contend, the respondent themselves admitted; it was a fresh cause of action. Hence, the subsequent suit would lie.

Our View:

11. We have considered the issue and the proposition of law that the precedents would espouse. We also carefully perused the relevant provisions of the Code of Civil Procedure. Order XXIII rule 1(4) would suggest, when the plaintiff abandons any suit or withdraws any suit without the permission of the Court he shall be liable for cost and would be precluded from instituting any fresh suit on the self-same cause of action. In the present case, the T.S. No. 122 of 2012 was admittedly prior in time. The plaintiff filed the suit in this Court in January 2013 whereas the City Civil Court dismissed the suit at the time when both the suits were pending. We have carefully perused the prayers in both the suits. We fully agree with the respondent, it was for the same purpose, may be by articulation, the prayers were differently couched. In the High Court suit, the plaintiff prayed for permanent injunction restraining the defendant from using the trade name "Prapti Fashion" as also "Prapti Collections" or from infringing the registered trade mark that the plaintiff had on the label. The plaintiff also prayed for declaration that they were only entitled to use such trade name.

12. The City Civil Court suit would have the same prayer of declaration, the defendant was not entitled to use the trade name "Prapti" as also for permanent injunction restraining them from using such trade name. We hold, the suits were identical.

13. The City Civil Court passed the following order at the instance of the appellant:

Both parties file hazira. The defendant file a written objection against the application under Order XXIII read with Section 151 C.P.C.

The application under Order XXIII read with Section 151 C.P.C. filed by the plaintiff Prapti Fashions Private Limited for withdrawing the case is taken up for hearing.

Heard both sides. Strong objection is raised by the learned Advocate for the defendant.

It appears that the plaintiff has already filed C.S. No. 28 of 2013 before the Hon'ble High Court, Calcutta regarding the selfsame matter.

So, I think that there is no impediment to allow the application of the plaintiff to withdraw the case.

Accordingly, the prayer is allowed.

Hence

Ordered

That the application under Order XXIII read with Section 151 C.P.C. filed by the plaintiff Prapti Fashions Private Limited is allowed with cost of Rs. 1,000/- to the defendant.

The plaintiff is permitted to withdraw the case that without any liberty to sue afresh and on payment of cost of Rs. 1,000.

14. The Order would show, the plaintiff approached the City Civil Court for withdrawal of the suit as they had already filed the present suit. The learned Judge found no impediment to allow the plaintiff to withdraw the suit. Question of liberty to sue afresh, was not there and in any event, not granted. The premise of the application was based upon the subsequent filing of the High Court suit hence, it was ridiculous to suggest, the prayer for fresh suit was refused or not granted. We hold, it was not required at all in the present circumstance. The real issue, in our view, should be, whether the later suit could be filed or not. If it was filed wrongly it would be liable to be dismissed. Order XXIII would have no application at all. The relevant date would be the date of filing of the later suit and not the date of dismissal of the earlier suit. Now question would remain what would happen if the plaintiff did not approach the City Civil Court for withdrawal and pursue both the suits. Section 10 would prevent them. Section 10 would provide, no Court shall proceed with the trial of

any suit in which the matter in issue is already directly and substantially in issue in a previous suit between the same parties in the same or any other Court. So it is a fetter on the Court to hear a later suit that would preclude the present suit to be heard until the earlier suit is disposed of. Once the earlier suit is disposed of Section 11 would come to play. Section 11 would suggest, no Court shall try any suit in which the matter was directly and substantially in issue in a former suit that got finally decided. Both these provisions referred to above, would impose a fetter on Court to hear a later suit when, either a former suit is pending on the issue or the former suit has already been disposed of and finality has reached on the issue. Section 10, 11, Order XXIII read together, would unequivocally suggest, legislature did not want any conflict of decision on the same issue as also wanted to stop multiplicity of proceeding. In the present case, the plaintiff filed two suits on the identical cause of action. His later suit could be stayed till the disposal of the earlier suit however, no suit could be dismissed because of pendency of the other suit. Once the former suit is decided the result would preclude the Court to hear the later suit. To avoid such situation, the plaintiff prayed for withdrawal of the earlier suit that could at best help the defendant/respondent to criticize the conduct of the plaintiff and pray for adequate damage for the harassment.

15. Take a situation worse. During pendency of both the suits the earlier suit got dismissed for default and the plaintiff would not apply for restoration. There would be no finality on merit hence, subsequent suit could be heard. At best, the Court could refuse to extend any relief considering the conduct that the learned Single Judge of the Rajasthan High Court did. However, that would not be the abstract proposition of law.

16. The above proposition of law could be proper if we could ignore the true spirit of sub-rule 4. We have already held, sub-rule 4 would not have any application however; the spirit could not be ignored. Had there been no continued cause of action the appellant would be out of Court.

17. Order XXIII rule 1(4) would contemplate a situation when plaintiff abandons his suit or withdraws the same without the leave of the Court. In the cases cited at the bar, decisions were rendered considering the conduct of the parties. In the Bengal Water Proof (supra), the Apex Court considered the illustration below Order II rule 2 to the extent, if a landlord sues the tenant for the rent due till that year and omits to sue for the rent in case of previous years the claim would be barred in a subsequent suit. The present case would not fit in. In Bengal Water Proof case, the first suit was based on infringement of the trade mark whereas the second suit was based upon passing off action. The Apex Court held, the plaintiff could have based his claim on passing off in the earlier suit. In the present case, we have already come to conclusion, the reliefs are identical. In such event, the issue would be covered by Section 10 and 11. Pendency of both the suits may not attract dismissal of the later one however, would preclude the plaintiff to proceed with both. Sub rule 4 would contemplate a situation prior to

filing of the subsequent suit. It did not speak of any situation like the present one. The decisions cited at the bar would not fit in squarely in the present case except the Rajasthan decision. In the case of Narayan Swami (supra) the first suit was for eviction on the ground of bonafide requirement. The subsequent suit was based upon the requirement that came subsequently. The Apex Court permitted the subsequent suit to continue holding, Order XXIII rule 1(4) would have no application. The decision was rendered on the logic of continued cause of action. In the present case, rightly or wrongly, the plaintiff filed the former suit that they did not want to proceed with that might preclude their claim based on the cause of action as on the date of filing of the suit. However, user of the trade name is a continued cause of action that cannot prevent the subsequent suit to be proceeded with. Bengal Water Proof (supra) could be distinguished as two suits were not on identical premise that would make the difference. However, the conduct of the plaintiff should certainly be considered, so was the harassment that the defendant suffered. The City Civil Court awarded only a sum of Rs. 1000 as cost that would be pittance.

18. In Sarbuja Transport, the petitioner withdrew a revisional application without permission to institute a fresh one. The subsequent petition was barred. A revisional application or a writ petition is based upon a particular Order or action. In the said case, the Regional Transport Authority rejected the application for renewal of permit on the ground of limitation. The society challenged the Order before the appellate Tribunal. The appellate Tribunal got the same disposed of along with other connected appeals. The petitioner approached the High Court under Article 226/227. When the petition was taken up for hearing the learned Counsel withdrew the same. The petitioner again filed an identical petition that the High Court dismissed. The Apex Court upheld the decision. The learned Counsel relied on paragraph 5 of the decision where the Apex Court considered Order XXIII rule 1 and held, withdrawal without permission would bar the fresh one. The Apex Court observed, "In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule 4 of rule 1 of Order XXIII of the Code when the first suit is withdrawn without permission referred to in sub rule 3 in Order to prevent the abuse of the process of the Court." The subsequent suit could be termed as abuse of process that would have an adverse reflection on the plaintiff however, per se, we cannot support dismissal as the cause of action was continuing in nature.

Results:

19. The appeal succeeds and is allowed. The judgment and Order of the learned Single Judge is set aside. C.S. No. 28 of 2013 is restored and be heard on merits. In the peculiar circumstance as discussed above, we impose a cost of Rs. 1.5 lac on the appellants out of which the appellants would pay Rs. 1 lac to the respondent and Rs. 50,000 to the High Court Legal Service Committee. Costs

must be paid within one week after summer holidays.

Arijit Banerjee, J.

20. I agree