

(1987) 02 CAL CK 0012
In the Calcutta High Court
Case No : Suit No. 617 of 1986

Revlon Inc. and Others

APPELLANT

Vs

Kemco Chemicals and Others

RESPONDENT

Date of Decision : 23-02-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 25 Rule 1(1)

Citation : AIR 1987 Cal 285

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : Biswarup Gupta and A. Gupta, for the Appellant; Goutam Chakraborty and P.K. Ghosh, for the Respondent

Judgement

Pratibha Bonnerjea, J.—The above suit is a passing off action instituted by the plaintiffs against the defendants for permanent injunction restraining them, their servants, assigns and each of them from manufacturing, selling or purchasing perfumery, cosmetics and toiletries containing the name "Ontue" or any other similar name on the allegation that the name "Ontue" not only sounds similar to plaintiffs' trade mark "Jontue" but its style of writing "Ontue" is almost a facsimile of stylized writing "Jontue". There is also a prayer for damages for Rs. 1,01,000/- or an enquiry into damages and decree for the amount found due on such enquiry. It is also alleged in the plaint that the plaintiffs Nos. 2 and .1 are wholly owned and are subsidiaries of the plaintiff No. 1 and they have been carrying on business all over the world including India since 1976 using their trade mark "Jontue". In the above suit an interlocutory application was taken out by the plaintiffs for restraining the defendants from carrying on business in the name of "Ontue" and the said application is pending. The plaint in the suit has been verified by one Debashis Sen on behalf of the plaintiffs and the petition has been verified by one Sudhir Ahuja and both of them are claiming to be the constituted attorneys of the plaintiffs.

2. There is a controversy between the plaintiffs and the defendants regarding the

representative capacities of Debashis and Sudhir Ahuja on the grounds that in spite of repeated demands on behalf of the defendants, inspection of the alleged original power of attorney was not given to the defendants. A xerox copy was shown which contained the alleged signature of the plaintiff No. 1 only. It is the defendants' case that all three plaintiffs are independent juristic persons, having separate legal identity. The plaintiff No. 1 was incorporated under the appropriate American Law and has its registered office in New York. The plaintiff No. 2 was incorporated in Switzerland under its appropriate law and the plaintiff No. 3 was incorporated in accordance with the appropriate law of France. This allegation of the defendants are corroborated by the cause title in the suit. Under the circumstances, the defendants allege that all these three companies must execute the power-of-attorney in favour of the aforesaid two persons for instituting the present suit on their behalf as otherwise the plaintiffs Nos. 2 and 3 will remain unrepresented.

3. The present petition has been taken out by the defendants for striking out the names of the plaintiffs Nos. 2 and 3 on the grounds mentioned above.

4. In dealing with the said allegations, Sudhir Ahuja did not specifically deny that the three plaintiffs have separate legal entities, neither he made any express averment that the alleged power-of-attorney was executed by the three plaintiffs in favour of Debashis Sen and Sudhir Ahuja. He only denied the allegations in the petition and alleged that in spite of plaintiffs Advocate-on-record making several appointments for giving inspection of the original power of attorney, the defendant's Advocate-on-record did not take inspection of the same in time. Hence the original document was returned to M/s. P. D. Ahuja and Co., keeping a xerox copy thereof. The defendants have taken inspection of this xerox copy.

5. The next point taken by the petitioners herein is that all the three plaintiffs are foreign companies having their respective registered offices outside India and none of them has any immovable property in India. Hence they should be directed to furnish security for costs under the provisions of the proviso to Order 25, Rule 1, Sub-rule (1) of the Code of Civil Procedure. The fact that none of the plaintiffs has any immovable property in India has been clearly admitted by Sudhir Ahuja in Para 11 of his affidavit-in-opposition filed in this proceeding. It is also an admitted fact that all the plaintiffs are foreigners. To understand the petitioners' contention, Order 25, Rule 1, C.P.C. is set out below : --

"1. (i) At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by the defendant. Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is or (when there are more plaintiffs than one) that all the plaintiffs are, residing outside India and that such plaintiff does not possess or that on one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit."

The consequence of default of furnishing security in terms of Court's order has been provided in Order 25, Rule 2, Sub-rule (1) of C.P.C.

"2(1). In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw there from"

6. The petitioners' counsel submits that the facts of the present case are clearly coming within the scope of the proviso to Order 25, Rule 1, Sub-rule (1) of the CPC and the provisions are mandatory as will be evident from the word "shall" contained therein. Therefore, the Court should pass an order for security as prayed in the petition. The petitioners' counsel relies on *Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others*, in support of his contention that Order 25, Rule 1, Sub-rule (1) of C.P.C. confers a discretion on the Court to order the plaintiff to furnish security either on its own motion or at the instance of the defendant but for passing such an order the Court will consider the facts of case and will record its reason for passing such an order. But the proviso is an exception to the general law contained in Sub-rule (1) of Order 25. He relies on *Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others*, .

"It is well settled that the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

Mr. Gupta, on behalf of the petitioners, submits that the proviso is not only an exception to the provisions enacted in Sub-rule (1), but it takes away the discretion conferred on Courts under this sub-rule. The proviso is mandatory. If the plaintiffs are residing outside India and have no other immovable property in India excepting the property in suit the order for furnishing security for costs must be passed. In this case, none of the plaintiffs has any immovable property in India. Therefore this proviso applies in full force.

7. Mr. Chakraborty, the counsel for the respondents, however, contends, that the proviso to Rule 1, Sub-rule (1) of Order 25, does not take away the discretion conferred on the Courts. The word "shall" in the proviso must be read as "may". In support of his contention, he relies on *S. Sundaram Pillai and Others Vs. R. Pattabiraman and Others*, where it has been held :--

"..... a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment."

He also relies on Para 43 (of SCC) : (Para 42 of AIR) of this case where the manner of construction of provisos has been set out as follows : --

"To sum up, a proviso may serve four different purposes :

(1) qualifying or excepting certain provisions from the main enactment.

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable.

(3) it may be so imbedded in the Act as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

Mr. Chakraborty also relies on Craies on Statute Law, 17th Edn. page 218, dealing with construction of provisos.

"Construction of Provisos.

".....a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing it that effect."

".....the natural presumption is that but for the proviso, the enacting part of the section would have included the subject-matter of the proviso".

Mr. Chakraborty also strongly relies on a quotation from the judgment of Lord Herschell in 1897 AC 647.

"I decline to read into any enactment words which are not to be found there and which would alter its operative effect because of provisions to be found in any proviso."

He submits that Order 25, Rule 1, Sub-rule (1) of C.P.C. confers a discretion on the Court whether to pass an order for furnishing security by the plaintiff or not. The proviso to Sub-rule (1) does not take away this discretion conferred, on Courts by Sub-rule (1). Hence it cannot be construed as "Mandatory" because such a construction would alter the purpose and/or the object of Sub-rule (1). This proviso should fairly and properly be construed as discretionary by treating the word "shall" as "may" and that will be a fair and proper construction. It is not possible to construe that the proviso has enlarged the scope of sub-rule by conferring an additional mandatory power on Court under the proviso. Craies on Statute Law clearly stated that a proviso cannot be construed as enlarging the scope of an enactment. Moreover if this proviso is construed as mandatory, then the proviso has to be torn apart from the main enactment and in that case it must be held that Court's discretionary power has been taken away by this proviso. If so, it will nullify and/or set at naught the real object of the main enactment as has been held in *S. Sundaram Pillai and Others Vs. R. Pattabiraman and Others*, set out above. Such construction is not permissible in law. I am unable to accept the contention of Mr. Chakraborty. The real purpose and object of the Proviso to Order 25, Rule 1, Sub-rule (1) of C.P.C. is to protect the defendant in case the decision goes against the plaintiff who resides outside India and does not have any immovable property within India. In that case the

defendant will not be able to recover his costs. Hence the proviso has been made mandatory. Rule 1, Sub-rule (1) gives the discretionary power to Court to order for security for costs considering the facts and circumstances of the case and after recording the reasons therefore in all cases excepting the case covered by the proviso. In *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, the Supreme Court has shown, how a proviso can be construed. It can qualify or except certain provisions from the main enactment. A proviso can also entirely change the very concept of the intendment by introducing a mandatory provision in order to make the enactment workable as will be evident from the manner of construction shown in (1) and (2) *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, . Craies on Statute Law, 17th Edn. page 219 stated as follows : --

"But sections, though framed as provisos upon preceding section, may exceptionally contain matter which is in substance a fresh enactment, adding to and not merely qualifying what goes before."

This observation applies in full force to the proviso under consideration. This proviso is not an extension of the provisions contained in Rule 1, Sub-rule (1) of Order 25 and has not been enacted for keeping Court's discretion unfettered. If that was the intention of the legislature, then there was no necessity of introducing this proviso at all. This proviso has been enacted for excluding the situation contemplated therein from the main enactment by making it mandatory in order to fulfil the very concept of the intendment of the main enactment and to make it workable. As a matter of fact this proviso should be construed in the manner as if in substance it is a fresh enactment making it mandatory for the Court to direct the plaintiff to furnish security in all cases where the requirements of the proviso are fulfilled with the view to make the enactment effective. This proviso can also be construed as an exception to the preceding portion of the enactment. In this connection the 1st and 2nd method of construction as given in *S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others*, is worth noticing. I have carefully gone through the proviso and has given my anxious thought before coming to this conclusion that this proviso is a mandatory provision. Considering that all the plaintiffs are foreign companies having their respective registered office outside India and that they have no Immovable property in India, the facts of this case fulfil all the requirements of the proviso to Order 25, Rule 1, Sub-rule (1) and as such the plaintiffs must furnish security for costs.

8. In the premises, I direct that the plaintiffs either jointly or any of them must furnish security to the extent of Rs. 50,000/- either by way of a Bank guarantee through a nationalised bank in favour of the defendant No. 1 the petitioner herein, or deposit Rs. 50,000/- in cash with the Advocate-on-record of the petitioner and such security must be furnished within six weeks from the date of receipt of the signed copy of the minutes of this order. In case the security is furnished by way of a Bank guarantee, the plaintiffs or the plaintiff furnishing

such security will go on renewing the same as and when such renewal is required and will inform the defendant's Advocate-on-record about the renewal of the same within seven days from the date of renewal. The plaintiff's Advocate on record is directed to intimate the Advocate on record of the petitioner as soon as the security is furnished in terms of this order. If, however, the security is furnished in cash, then the said Rs. 50,000/- to be deposited with the Advocate-on-record of the petitioner within the period mentioned above. The said Advocate-on-record will hold the same free from any lien and will invest the same in a short term fixed deposit not exceeding three months with a nationalised Bank and will go on renewing the same along with its accrued interests subject to further order of Court, the petitioner's Advocate on record will intimate the plaintiff's Advocate-on-record within one week after each renewal. The petitioner's Advocate-on-record will intimate the plaintiff's Advocate-on-record, the name and address of the Bank where the money has been invested within one week of such investment.

9. Regarding the prayer for striking out the names of the plaintiffs Nos. 2 and 3, I am not giving my decision on this point at this stage in this application as neither the original power of attorney nor the xerox copy was produced in Court. This question remains open and will be decided later on at the appropriate time. The application taken out by the plaintiffs is adjourned and the plaintiffs are directed not to take any step in the suit until security is furnished in terms of this order. The defendant will be entitled to the cost of this application. Liberty to mention as soon as the security is furnished.