
(2013) 07 BOM CK 0291
In the Bombay High Court
Case No : Suit No. 56 of 2012

SABMiller India Ltd.

APPELLANT

Vs

Jagpin Breweries Ltd.

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Citation : (2014) 58 PTC 556

Hon'ble Judges : S.J. Kathawalla, J

Bench : Single Bench

Judgement

S.J. Kathawalla, J.—The Plaintiff has filed the above suit alleging that the Defendant is guilty of infringement of the Plaintiff's registered trade mark "HAYWARD 5000" and "FIVE THOUSAND" bearing Nos. 436744 and/or 1521743 both in class 32 by using in relation to beer the trade mark "COX 5001" and is guilty of passing off its goods as and for the goods of the Plaintiff. The Defendant has contended that the present suit is barred under Order II Rule 2 of Code of Civil Procedure, 1908.

2. In view thereof, this Court by its order dated 13th March 2013 has framed the following issue as a preliminary issue:

Whether the Suit is barred under Order II Rule 2 of the Code of Civil Procedure, 1908 as contended by the Defendants in paragraphs 3J and 21 of the Written Statement?

3. Admittedly, before filing the present suit, the Plaintiff has filed Suit No. 652 of 2011 in the High Court of Madras at Chennai against the Defendant for restraining the Defendant from making, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in bottles that infringe the Plaintiff's registered Design No. 223479 and from making, selling, distributing, advertising, exporting, offering for sale, and in any other manner, directly or indirectly, dealing in bottles having the Plaintiff's trademarks SABMILLER and/or SABMILLER INDIA that amounts to passing off.

4. Mr. Anand appearing for the Defendant, submits that though the Plaintiff became aware of the Defendant's use of the bottles bearing the trade mark COX 5001 in or about the first week of September 2011, the Plaintiff in its earlier Suit No. 652 of 2011 filed before the High Court of Madras, restricted its claim to infringement of its registered Design No. 223479 and passing off the Defendant's bottles embossed with the mark SABMILLER and/or SABMILLER INDIA as and for the bottles of the Plaintiff embossed with the mark SABMILLER and/or SABMILLER INDIA. He submits that the Plaintiff deliberately omitted to sue the Defendant in respect of the causes of action for infringement of trademark "HAYWARDS 5000" and "FIVE THOUSAND" bearing Nos. 436744 and 1521743 both in class 32 and passing off the Defendant's beer bearing the trademark COX 5001 as and for the Plaintiff's beer bearing the trade mark HAYWARDS 5000. He submits that the Plaintiff ought to have included all the causes of action in the previous suit filed before the Madras High Court and ought to have claimed all the reliefs in one suit.

5. Mr. Anand submits that before omitting to sue the Defendant in respect of all the reliefs based on all the causes of action in the previous suit before the Madras High Court, the Plaintiff ought to have taken leave of the Madras High Court under Order 2 Rule 2(3) of the CPC. He submits that no such leave was obtained by the Plaintiff and hence the present suit is barred under Order 2 Rule 2 of the CPC. He further submits that for the above reasons, the Plaintiff is not entitled to file the present suit for infringement of its registered trade marks bearing Nos. 436744 and/or 1521743 both in class 32 and for passing off the Defendant's beer bearing the impugned trade mark COX 5001 as and for the Plaintiff's beer bearing the trade mark HAYWARDS 5000. In support of his submissions, he relies on the decision of the Hon"ble Supreme Court in Virgo Industries (Eng.) P. Ltd. Vs. Venturetech Solutions P. Ltd.,

6. Mr. Kane submits that the earlier suit filed before the Madras High Court is based on two causes of action viz. (i) infringement of the Plaintiff's registered design No. 223479 and (ii) passing off of Defendant's bottles having the Plaintiff's trademarks SABMILLER and/or SABMILLER INDIA embossed on them, as and for the bottles of Plaintiff. On the other hand, the present suit is filed on the basis of causes of action for infringement of the Plaintiff's registered trade marks "HAYWARDS 5000" & "FIVE THOUSAND" bearing Nos. 436744 and/or 1521743 both in class 32 and passing off of Defendant's beer bearing the trade mark COX 5001 as and for the Plaintiff's beer bearing the trade mark HAYWARDS 5000.

7. Mr. Kane submits that the causes of actions in both the suits are different and distinct from each other. The Plaintiff has not relinquished any portion of the claim while filing the previous suit for infringement of Plaintiff's registered design and passing off as aforesaid, before the Madras High Court. He further submits that the Plaintiff has not omitted to sue for all the reliefs in respect of the causes of action on the basis of which the earlier suit is filed in the Madras High Court.

He submits that Order II Rule 2 contemplates the situations where both the suits are based on a single cause of action and the Plaintiff omits to sue for all the reliefs in respect of the same cause of action in the earlier suit. In the present case, the said provision is not applicable since the suit filed by the Plaintiff in High Court of Madras and the present suit filed before this Court are not in respect of the same causes of action but are based on two different and distinct causes of action. He submits that therefore the question of obtaining leave from the High Court of Madras or the present suit being barred under the provisions of Order 2 Rule 2 does not arise at all.

8. In support of his submissions Mr. Kane relied on Smithkline Beecham Consumer Healthcare GMBH and Others Vs. Hindustan Lever Limited and Another, wherein the Division Bench of this Court has, inter alia held as follows:

16. A perusal of Order II, Rule 2 of the C.P.C. clearly reveals that this provision applies to cases where the plaintiff omits to sue portion of the cause of action to which such a suit is based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such a case, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished..... "

18. Order II, Rule 2 requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order II. Rule 2 will not get attracted. If there is recurring cause of action or there is fresh cause of action and if the plaintiff is pursuing the suit on such cause of action the bar under Order II, Rule 2 would not be attracted.

9. Mr. Kane also relied on the decision in M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another, , wherein the Hon''ble Supreme Court inter alia held as follows:

10. As seen earlier, Order 2 Rule 2 sub-rule (3) requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order 2 Rule 2 sub-rule (3) will not get attracted.....

10. I have considered the submissions advanced by the Learned Advocates appearing on behalf of the parties. Order II Rule 2 of the Code of Civil Procedure, 1908 reads as follows:

2. Suit to include the whole claim-- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim--Where a plaintiff omits to sue in respect of,

or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs--A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation--For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

11. A perusal of the above provisions makes it clear that the bar of Order 2 Rule 2 gets attracted only if the cause of action in the earlier suit is the same on which the subsequent suit is based. Order 2 Rule 2(3) contemplates that when a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted. In order that a plea of a bar under Order 2 Rule 2 of the Code of Civil Procedure, 1908 should succeed, the Defendant who raises the plea must make out that the second suit in respect of the same cause of action as that on which the previous suit was based and if in the earlier suit Plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in that suit cannot be subsequently prayed for except with the leave of the Court.

12. The law relating to the bar under Order 2 Rule 2 has been correctly stated in *Smithkline Beecham Consumer Healthcare GMBH & Ors. Vs. Hindustan Lever Limited & Anr.* (supra) and *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co.* (supra) relied upon by Mr. Kane. If the Plaintiff comes to a Court for getting any redress basing his case on an existing cause of action he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on the said cause of action or omits to sue in connection with the same then he cannot subsequently resurrect the said claim based on the same cause of action. The provision has, however, no application to cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. Order II, Rule 2 requires that the cause of action in the earlier suit must be the same on which the subsequent suit is based and unless there is identity of causes of action in both the suits the bar of Order II. Rule 2 will not get attracted. In such a case, it is open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he had omitted while filing the previous suit.

13. The case of *Virgo* (supra) cited by the Defendant lends no assistance to the Defendant and in fact, supports the contention of the Plaintiff. In paragraphs 10 and 11 of the said decision, the Hon'ble Supreme Court has held as follows:

10. The situations where the bar under Order II Rule 2(2) and (3) will be

attracted have been enumerated in a long line of decisions spread over a century now. Though each of the aforesaid decisions contain a clear and precise narration of the principles of law arrived at after a detailed analysis, the principles laid down in the judgment of the Constitution Bench of this Court in *Gurbux Singh v. Bhooralal* may be usefully recalled below:

In order that a plea of a bar under O. 2. r. 2(3), CPC should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.

The above principles have been reiterated in several later judgments of this Court. Reference by way of illustration may be made to the judgments in *Deva Ram & Anr. v. Ishwar Chand & Anr.* and *M/s. Bengal Waterproof Ltd. v. M/s. Bombay Waterproof Manufacturing Co. & Anr.*

11. The cardinal requirement for application of the provisions contained in Order II Rule 2(2) and (3), therefore, is that the cause of action in the later suit must be the same as in the first suit.

14. From the facts of the present case it is clear that the suit filed by the Plaintiff in the High Court of Madras at Chennai is based on the following two causes of action:

- i) Infringement of Plaintiff's registered Design No. 223479 in Class 09-01 and
- ii) Passing off the Defendant's beer bottles bearing the trademarks SABMILLER and/or SABMILLER INDIA as and for the Plaintiff's bottles.

Whereas the present suit filed by the Plaintiff is based on the following two causes of action:

- i) Infringement of Plaintiff's trademarks bearing registration Nos. 436744 and 1521743 both in class 32 and
- ii) Passing off the Defendant's beer bearing the impugned trade mark containing the numeral 5001 as and for the Plaintiff's beer bearing the trade mark HAYWARDS 5000.

Hence, both the suits filed by the Plaintiff are in respect of different causes of action. The Plaintiff is entitled to initiate separate actions on the basis of separate causes of action and the provisions of Order 2 Rule 2 of CPC will not be a bar to

the subsequent suit filed by the Plaintiff on a separate and distinct cause of action. Hence, the present suit filed by the Plaintiff before this Court restraining the Defendant from infringing the Plaintiff's registered trade mark and from passing off its beer as and for the Plaintiff's beer is not barred under the provisions of Order II Rule 2 of the Code of Civil Procedure, 1908.

In view of the above, Defendant's objection under Order II Rule 2 is rejected and the preliminary issue framed by this Court by its order dated 13th March 2013 is answered in the negative.