

(2012) 02 BOM CK 0067

In the Bombay High Court

Case No : Appeal (Lodging) No. 71 of 2012 in Notice of Motion No. 50 of 2012 in Suit No. 2727 of 2011 Alongwith Appeal (Lodging) No. 72 of 2012 in Leave Petition No. 849 of 2011 in Suit No. 2727 of 2011

Shree Siyaram Fab Private Limited

APPELLANT

Vs

Siyaram Silk Mills Ltd., Mr. Satya Narayan Tawani, Mr. Kailash Chand Tawani and Mr. Kamal Kishore Gupta

RESPONDENT

Date of Decision : 06-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151, 28(3), 29, 30

Citation : (2012) 2 ALLMR 806 : (2012) 2 BomCR 489 : (2012) 3 MhLj 387

Hon'ble Judges : Mohit S. Shah, C.J;Ranjit More, J

Bench : Division Bench

Advocate : Venkatesh Dhond, with Mr. Ashish Kamat instructed by M/s. Paras Kuhad Associates, for the Appellant; Vishal Kanade, Ms. Mamta Chandan and Mr. Manish Saurastri instructed by y M/s. Krishna and Saurastri Associates, for the Respondent

Judgement

1. Both these appeals arise from the orders passed by the learned Single Judge in the same suit, between the same parties and therefore, are being disposed of by this common judgment.

2. Appeal (Lodging) No.71 of 2012 is directed against the order dated 13 January 2012 of the learned Single Judge of this Court dismissing the appellant's notice of motion under Order 7 Rule 11 of the CPC and u/s 151 of the CPC for rejecting the plaint filed by respondent No.1 herein under the infringement in passing off under the Trade Mark Act, 1999.

3. Appeal (Lodging) No. 72 of 2012 is directed against the another order dated 13 January 2012 by which the learned Single Judge granted leave under clause 14 of the Letters Patent permitting the plaintiff to prosecute the suit for passing off as well.

4. The learned Single Judge has held that there was no reason to put the plaintiff

through the difficulty for filing a separate action for passing off and the infringement action before different Courts, as the appellant-defendant had contended that the alleged cause of action for passing off had not arisen within the territorial jurisdiction of this Court.

5. The appellant filed notice of motion invoking Order 7 Rule 11 of the C.P.C read with section 151 of the C.P.C. on the ground that the plaintiff's suit for infringement was not maintainable in view of the fact that the appellant-defendant itself has a registered trade mark. The appellant-defendant invoked the provisions of sections 28(3), 29 and 30 sub-section 2(e). It was submitted that since both, the plaintiff as well as defendant have registered trade marks, the plaintiff has no right to file suit for infringement.

6. The learned Single Judge dismissed the notice of motion after holding that it may be open to the defendants to raise defences available under the aforesaid provisions of the Trade Mark Act, but that would not mean that the Court lacks inherent jurisdiction to entertain or try the suit for infringement. The learned Judge also held that since the plaint itself does not refer to the defendant's label mark being registered, the notice of motion based on Order 7 Rule 11 cannot be decided on the basis of the statements in the affidavit in reply. For the purpose of deciding the notice of motion under Order 7 Rule 11, the Court is only supposed to see the averments in the plaint and that in the facts of the present case, it cannot be stated that the plaint does not disclose any cause of action. The plaintiff has clearly stated that the plaintiff is a registered proprietor of the mark. Whether in the plaint, the plaintiff succeeds or not is a question which relates to the merits of the contention but on the basis of the statements of the plaintiff in the plaint, it cannot be held that suit is barred by any law.

7. Mr.Dhond, learned Counsel for the appellant-defendant has relied upon the decision of the Supreme Court in Shipping Corporation of India Ltd. Vs. Machado Brothers and Others, , in support of the contention that the Court can pass orders u/s 151 to prevent the abuse of process of Court or to put an end to the unnecessary litigation.

8. As regards the appeal challenging the order granting leave under clause 14 of the Letters Patent, Mr.Dhond submits that by erroneously rejecting the notice of motion under Order 7 Rule 11 with reference to the action for infringement, the learned Judge has thereafter granted leave and that, therefore, once this Court would hold that the suit for infringement itself is not maintainable, the question of granting leave for the suit for passing off action would not arise.

9. On the other hand, Mr. Vishal Kanade, learned counsel for the respondents-defendants has opposed the appeals and has relied upon the decision of the Supreme Court in Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, in support of the contention that with reference to Order 7 Rule 11 of the C.P.C., the relevant facts which need to be looked into for deciding the application are the averments in the plaint and that the pleas taken

by the defendants in the affidavit in reply or other submissions are wholly irrelevant at this stage.

10. Having heard the learned counsel for the parties, we find considerable substance in the submission made by the learned counsel for the respondent-plaintiff that for the purpose of deciding the application under Order 7 Rule 11, the relevant facts which need to be looked into are the averments in the plaint and not the pleas taken by the defendants in the written statement or affidavit-in-reply. Reliance placed by the learned counsel for the appellant on the decision in the case of Shipping Corporation of India (supra) is misconceived because in that case, the Court invoked the provisions of section 151 C.P.C. for holding that there is a duty cast on the trial Court to put an end to the litigation if the same has become infructuous with reference to the subsequent events. The Court also held that there is no specific provision in the C.P.C. which prohibits the grant of relief u/s 151 of the Code as Courts have necessary powers u/s 151 of C.P.C. to make a specific order to prevent the abuse of process of the Court.

11. In the facts of the present case, the decision in Shipping Corporation case (supra) would not be applicable as there is no question of the litigation having become infructuous. The question whether there is an abuse of the process of the Court cannot be decided at this stage without the Court hearing the parties on merits of the dispute. We are, therefore, of the view that the order dated 14 September 2011 rejecting the defendants' notice of motion under Order 7 Rule 11 does not suffer from any infirmity.

12. At this stage, the learned counsel for the appellant-defendant submits that since the question of territorial jurisdiction is an important question which is required to be decided, but the appellant has not moved any application u/s 9A of the C.P.C. on account of pendency of the application under Order 7 Rule 11, the appellant would like to file notice of motion u/s 9A of the C.P.C. and that the same may be ordered to be heard alongwith the notice of motion filed by the respondents-plaintiffs for interim injunction being Notice of Motion No. 3679 of 2011 which is pending since 15 October 2011.

13. The learned counsel for the respondents-plaintiffs submits that there is no need for the application u/s 9A to be directed to be heard immediately and that the said application may be heard in due course.

14. Without expressing any opinion on merits of the controversy between the parties, we are of the view that interests of justice would be served if both these appeals are disposed of in terms of the following:-

i) The appellant-defendant shall file affidavit-in-reply to the notice of motion No.3679 of 2011 within two weeks from today during which time the appellant will also be at liberty to file application u/s 9A of the C.P.C.

ii) The respondents-plaintiffs may file their rejoinder in notice of motion No.3679 of 2011 and reply to section 9A application within two weeks from the date of

receipt of the reply/application from the appellant.

iii) The learned Single Judge is requested to hear and decide both, the notice of motion No.3679 of 2011 and the application u/s 9A C.P.C. as expeditiously as possible and preferably within six weeks after the pleadings are completed.

The appeal is accordingly disposed of in the above terms.