
(2018) 03 UK CK 0065

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 373 of 17

SHRI BEHARI JI CATTLE FEED PVT LTD AND ANOTHER	APPELLANT
Vs	
G. R. SOLVENT AND ALLIED INDUSTRIES LIMITED	RESPONDENT

Date of Decision : 22-03-2018

Acts Referred:

Trade Marks Act, 1999 — Section 27
Code of Civil Procedure, 1908 — Order 7 Rule 11, Order 6 Rule 16
Trade and Merchandise Marks Act; 1958 — Section 27, 106, 105

Citation : (2018) 03 UK CK 0065

Hon'ble Judges : MANOJ K. TIWARI, J

Bench : Single Bench

Advocate : Neeraj Garg, Sunil Khera

Final Decision : Dismissed

Judgement

Manoj K. Tiwari, J

1. By means of this petition, petitioners have challenged the order dated 13.01.2017, whereby their application under Order 7 Rule 11 of Code of Civil

Procedure (hereinafter referred to as C.P.C.) has been rejected by learned District Judge, Dehradun.

2. Brief facts of the case are as follows:

M/s G.R. Solvent and Allied Industries Limited (respondent herein) filed a suit before learned District Judge, Dehradun seeking relief of perpetual

injunction against the defendants (petitioners herein) restraining them from passing off animal feed/Cattle Feed or any other cognate or allied goods

under the Trade Mark "Gwala", which was registered as Original Suit No. 14 of 2014. Petitioners/defendants filed their written statement in the

said suit and thereafter they also moved an application under Order 7 Rule 11 of

C.P.C for rejection of plaint. The said application was rejected by learned District Judge, Dehradun vide order dated 13.01.2017. Thus, feeling aggrieved, present writ petition has been filed by the defendant/petitioner, under Article 227 of the Constitution of India.

3. It was the contention of defendants/petitioners in the application under Order 7 Rule 11 that the plaint does not disclose any cause of action,

therefore the same is liable to be rejected under Clause (a) of Order 7 Rule 11 of C.P.C. In the said application, it was further contended that the

learned District Judge, Dehradun has no jurisdiction to entertain the suit.Â

Learned counsel for the petitioners/defendants submits that as per plaint allegations, the trade mark â??GWALAâ?? was not registered, therefore, in

view of Section 27 of Trade Marks Act, 1999, the suit was not maintainable. He further submits that the plaintiff had himself admitted in paragraph

no.10 of the plaint that the products of the defendants under the trade mark â??GWALAâ?? are not available in the market, although it is alleged in

the said paragraph that on 04.05.2014, defendants/petitioners had issued an advertisement for appointing Distributor for marketing of Cattle Feed

under the Trade Mark â??GWALAâ??. Thus, according to learned counsel for the petitioners, the plaint does not disclose any cause of action. He

further submits that the learned court below did not consider the issue of jurisdiction, while rejecting petitioners/defendants application under Order 7

Rule 11.

3. Learned Counsel for the respondents, on the other hand, submits that a suit for passing off goods or services is maintainable even in respect of an

unregistered trade mark. In support of his contention, learned counsel for the respondents has relied upon a judgment rendered by Honâ??ble

Supreme Court in the case of Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd. reported in (2001) 5 SCC 1973. Paragraph no.10 of the said

judgment is extracted below:Â

â??10. Under Section 28 of the Trade and Merchandise Marks Act on the registration of a trade mark in Part A or B of the register, a registered

proprietor gets an exclusive right to use the trade mark in relation to the goods in respect of which trade mark is registered and to obtain relief in

respect of infringement of the trade mark in the manner provided by the Act. In the case of unregistered trade mark, Sub-Section 1 of Section 27(1)

provides that no person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade

mark. Sub-section (2) of Section 27 provides that the Act shall not be deemed to affect rights of action against any person for passing off goods as the

goods of another person or the remedies in respect thereof. In other words in the case of un-registered trade marks, a passing-off action is

maintainable. The passing off action depends upon the principle that nobody has a right to represent his goods as the goods of some body. In other

words a man is not to sell his goods or services under the pretence that they are those of another person. As per Lord Diplock in *Erven Warnink BV*

Vs. J. Townend & Sons the modern tort of passing off has five elements i.e. (1) a misrepresentation (2) made by a trader in the course of trade, (3) to

prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of

another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the

trader by whom the action is brought or (in a *quia timet* action) will probably do so.Â

4. Learned counsel for the respondent cited another judgment rendered by Delhi High Court in the case of *Century Traders Vs. Roshan Lal Duggar*

& Co. reported in AIR 1978 Delhi 250. Paragraph no. 9 of the said judgment is relevant, which is extracted below:

â??(9) The prima facie case in favor of the appellant stands established by admitted user of the mark by the appellant on voiles produced and

marketed by it. It has been rightly so held even by the learned Single Judge. But this prima facie case made out by the appellant is said to be

considerably watered down or weakened by the fact that the mark is alleged to be common to the trade and the various registrations adverted to in the

learned Single Judge's order. The first point, therefore, that arises for consideration is whether this approach is correct. It must be remembered that

the suit is one based on a claim of passing off. It is not a suit for infringement of a registered trade-mark. In a passing off action registration of the

trade mark is immaterial. Section 27 of the Trade and Merchandise Marks Act; 1958, hereinafter referred to as the Act, reads as under :-

27.No action for infringement of unregistered trade mark :--

(1) No person shall be entitled to institute any proceeding to prevent, or recover damages for the infringement of an unregistered trade mark.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

The relevant parts of Section 106 of the Act read as under :-- "106. Reliefs in suits for infringement or for passing off :-

(1) The relief which a court may grant in any suit for infringement or for passing off referred to in Section 105 includes an injunction (subject to such terms, if any, as the court thinks fit) and at the option of the plaintiff, either damages or an account of profits, together with or without any order for delivery-up of the infringing labels and marks for destruction or erasure.

(2) Notwithstanding anything contained in sub-section (1), the court shall not grant relief by way of damages (other than nominal damages) or an account of profits in any case-

(A)...

(B)...

(C) where in a suit for passing off the defendant satisfies the court- (I) that at the time he commenced to use the trade mark complained of in the suit

he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was in use; and (II) that when he came aware of the

existence and nature of the plaintiff's trade mark, he forthwith ceased to use the trade mark complained of."

5. Learned counsel for the respondent submits that cause of action has been disclosed in the plaint and he refers to paragraph no. 16 of the plaint in

support of his submission. Paragraph no. 16 of plaint is extracted below:

That cause of action for this suit arose on 4th May, 2014 on publication of advertisement in Amar Ujala for appointment of dealers for marketing

of cattle feed under the trade mark Gwala by defendant and thereafter 18 & 19 of September 2014 when the plaintiff came to know that the

defendants are making inquiries and trying to appoint distributors for their products under the trade name GWALA in the territories of Dehradun,

Haridwar, Tehri/Pauri Garhwal of Uttarakhand and is arising day-today.

7. Hon'ble Supreme Court in the case of Mayar (H.K.) Ltd. and others vs.

Owners & Parites, Vessel M.V. Fortune Express and others reported

in (2006) 3 SCC has discussed the scope of order 7 Rule 11 of C.P.C. Paragraph nos. 10, 11 & 12 of the said judgment are extracted below:

10. The aforesaid finding clearly indicates that the order of permanent stay of the suit was made by the Division Bench not because the plaint is liable

to be rejected on the grounds that it falls within the parameters of Order 7 Rule 11 of the Code or that the suit is liable to be stayed in exercise of the

powers under Section 10 of the Code or that the Court has passed an order under Order 6 Rule 16 of the Code which has not been complied with.

The Division Bench, in fact, has exercised the jurisdiction for stay of the suit as the plaintiffs did not disclose the forum selection clause whereby the

Court at Calcutta had no jurisdiction to entertain the suit and further suppressed the fact that the claim in the suit shall be governed by the laws

applicable in the Singapore Court and that the plaintiffs have no case because the claim is in regard to deck cargo.

11. Under Order 7 Rule 11 of the Code, the Court has jurisdiction to reject the plaint where it does not disclose a cause of action, where the relief

claimed is undervalued and the valuation is not corrected within a time as fixed by the court, where insufficient court fee is paid and the additional

court fee is not supplied within the period given by the court, and where the suit appears from the statement in the plaint to be barred by any law.

Rejection of the plaint in exercise of the powers under Order 7 Rule 11 of the Code would be on consideration of the principles laid down by this

Court. In *T. Arivandandam vs. T.V. Satyapal* this Court has held that if on a meaningful, not formal, reading of the plaint it is manifestly vexatious, and

meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order 7 Rule 11 of the Code taking care to see

that the ground mentioned therein is fulfilled. In *Roop Lal Sethi vs. Nachhattar Singh Gil* this Court has held that where the plaint discloses no cause of

action, it is obligatory upon the court to reject the plaint as a whole under Order 7 Rule 11 of the Code, but the rule does not justify the rejection of any

particular portion of a plaint. Therefore, the High Court therein could not act under Order 7 Rule 11(a) of the Code for striking down certain

paragraphs nor the High Court could act under Order 6 Rule 16 to strike out the paragraphs in the absence of anything to show that the averments in

those paragraphs are either unnecessary, frivolous or vexatious, or that they are such as may tend to prejudice, embarrass or delay the fair trial of the case, or constitute an abuse of the process of the court. In *ITC Ltd. v. Debts Recovery Appellate Tribunal*, it was held that the basic question to be decided while dealing with an application filed by the defendant under Order 7 Rule 11 of the Code is to find out whether the real cause of action has been set out in the plaint or something illusory has been projected in the plaint with a view to get out of the said provision. In *Saleem Bhai and Others vs. State of Maharashtra* this Court has held that the trial court can exercise its powers under Order 7 Rule 11 of the Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial and for the said purpose the averments in the plaint are germane and the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage. In *Popat and Kotecha Property vs. State Bank of India Staff Assn.* this Court has culled out the legal ambit of Rule 11 of Order 7 of the Code in these words.

“19. There cannot be any compartmentalisation, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time, it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those

averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

8. Honâ??ble Supreme Court in the case of Popat and Kotecha Property vs. State Bank of India and Staff Association reported in (2005) 7 SCC 510

has issued guidelines regarding the manner, in which application under Order 7 Rule 11 should be dealt with. Paragraph no. 19 of the said judgment is extracted below:

â??19. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.â??

8. Upon going through the averments made in the plaint, I am of the opinion that the plaint does disclose a cause of action and the objection raised by petitioners/defendants in their application under Order 7 Rule 11, is not sustainable in the eyes of law.

9. I have gone through the order impugned in the writ petition. Learned District Judge, Dehradun has given cogent reasons for rejecting the

application. It has been held in the said order that cause of action arose when the defendants published an advertisement regarding Trade Mark

â??GWALAâ??. In such view of the matter, I find no reason to interfere with the order dated 13.01.2017 passed in O.S. No. 14 of 2014.Â Â The

writ petition lacks merit and the same is hereby dismissed. No order as to costs.

10. However, it is clarified that whatever has been said herein is for the purpose of decision on application under Order 7 Rule 11 of the CPC and will

not come in the way of decision, on any issue as to territorial jurisdiction, if pressed by the defendants. It is also provided that learned Court below

shall decide the issue without being prejudiced by any observation made in this order.

11. Interim order, if any, stands vacated.