

(2001) 03 MAD CK 0065
In the Madras High Court
Case No : O.S.A. No. 367 of 2000

Smithkline and French Laboratories Ltd. and another	APPELLANT
Vs	
Indoco Remedies Limited, Mumbai	RESPONDENT

Date of Decision : 19-03-2001

Acts Referred:

Madras High Court (Original Side) Rules, 1956 — Order 3 Rule 1

Citation : (2001) 2 MLJ 557

Hon'ble Judges : R. Jayasimha Babu, J;K. Gnanaprakasam, J

Bench : Division Bench

Advocate : Mr. C.S. Gopalakrishnan for Mr. A.A. Mohan, for the Appellant; Ms. Gladys Daniel, for the Respondent

Judgement

R. Jayasimha Babu, J.—The plaintiffs have filed this appeal against the order declining to grant have to sue. The suit was for an injunction to

prevent infringement as also to prevent passing off of the defendant's product as that of the plaintiffs, the product being a tablet named as

"FESOVIT. There is no dispute about the fact that this is intended for the average consumer to whom such goods were sold through chemical

shops. The defendant is based in Bombay, whereas one of the two plaintiffs has an office at Madras.

2. The plaintiff produced the invoices under which it had purchased the product manufactured by the defendant, such purchase having been take

place at Madras. The purchase was effected from chemists who normally deal in medicines. This tablet, it is stated, is an iron tonic and is sold

through chemists and druggists shop. The fact that it is manufactured by the defendant was not disputed by the defendant.

3. The only ground on which the defendant wanted the leave not to be granted

was that the plaintiffs had not stated in the plaint that the defendant has a distributor in the city of Chennai for the product manufactured by them. The fact that the product had been sold by the chemists in Chennai and that the invoice produced by the plaintiffs related to these sales was not disputed. Though the defendant filed an affidavit before the single Judge, the defendant did not state that it had no distributors in Tamil Nadu or in the city of Chennai or that it had not authorised any one to sell its products in the city of Chennai or in the State of Tamil Nadu.

4. It is evident from the conduct of the defendant that the product manufactured by the defendant is, in fact, being sold at Madras and such sale could reasonably be inferred to have been effected through the normal commercial channels of wholesale distributors and dealers etc. It is the defendant who knows best how this marketing is done, but it has not chosen to disclose the same. It has not even averred that it has no distributor in the city of Chennai or other areas including Chennai.

5. Learned counsel for the defendant submitted that it has been the law from 1947 in India that in the absence of proof of commercial distribution of products within the jurisdiction of the Court in which the suit is instituted, such a Court would not have jurisdiction to entertain the same. Counsel

referred to a decision of the learned single Judge of the High Court at Lahore in the case of *Firm Bhagwan Das v. Watkins Mayor & Co* AIR

1947 Lah. 289, that of a learned single Judge of Punjab & Haryana High Court in *Himachal Pradesh Horticulture Produce Marketing and*

Processing Corporation Ltd. Vs. Mohan Meakin Breweries Limited, ; that of a learned single Judge of this Court in *Amrutanjan Ltd. v. Mehta*

Pharmacy Company, 77 IPLR 20 and an unreported Judgment of the Karnataka High Court in the case of *Ambika Food Products v. New*

Swastic Flour Mill in MFA No.2438 of 1991 decided on 7.1.1994. Counsel also relied on the judgment of another learned single Judge of the

Delhi High Court in *Glen Raven Mills Inc. v. Vaspar Concepts Private Limited & Anr.* PTC (15) 392.

6. In the first of the cases relied upon, it was held that in order that the Court may exercise jurisdiction there must be something to establish that the

defendant was responsible for sending the goods to the place where the goods had been sold. In the case decided by the Punjab and Haryana

High Court it was found that there was no evidence to show that any transaction of sale of goods under the trade mark that was impugned by the defendant in the suit has taken place where the suit had been filed. In the case decided by the learned single Judge of this Court in the case of Amrutanjan Ltd. it was found that the defendants were selling in the State of Gujarat and that there had been no real sale of the products in the city of Madras, fn the case decided by the learned single Judge of the Karnataka High Court it was found that the applicant-in the plaint nor the document produced by the plaintiff showed that the defendants had sold any goods within the jurisdiction of the trial Court. In the case decided by the single Judge of the Delhi High Court it was held that a single trap order placed upon the defendant and supply of goods on that basis to a person for use in Delhi could not give raise to a cause of action at Delhi in order to render the suit maintainable in the High Court there.

7. All the cases relied on by the counsel for the defendant are distinguishable on facts. In this case it is not disputed that the product is manufactured by the defendant. It is also not disputed that the product had been sold in Chennai by retail drug shops which stocks such goods for sale. There is no statement by the defendant, inspite of the defendant having filed an affidavit that it has no distributor or that it has no organisation for commercial marketing of its products in the city of Chennai or in the State of Tamil Nadu.

8. In the background of these facts, the denial of leave to sue cannot be sustained. When the passing off within the jurisdiction of this Court has been prima facie shown, there is no reason to deny leave. However, one reference to passing off, we must caution does not imply that there is a finding that the goods were in fact passed off that matter is open for examination in the application for injunction filed by the plaintiff.

9. In the result, the appeal is allowed. Leave to sue is Granted.