

(2017) 04 MAD CK 0243
In the Madras High Court
Case No : 284 of 2011

Tamanna Santhosh Bhatia

APPELLANT

Vs

M/s.Power Soaps Limited

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

Citation : (2017) 04 MAD CK 0243

Hon'ble Judges : T.Ravindran

Bench : SINGLE BENCH

Advocate : T.Ravindran

Judgement

1. The suit is laid by the plaintiff for damages and permanent injunction.
2. The averments contained in the plaint are briefly stated as follows: The plaintiff is a renowned and popular multi lingual actress and has acted in many popular films and has vast and wide range of fan following. Her profile has high potential value in the current film as well as in the advertisement fields. The defendants approached the plaintiff for promoting the sale of the first defendant's products by appearing as their brand ambassador. In order to utilize her popularity and commercial value attached to the presence of the plaintiff, the defendants offered a honorarium and based upon the discussions, an agreement dated 07.10.2008 was entered into between the plaintiff and the first defendant in the presence of the second defendant and the said agreement was to have effect only for one year, i.e. till 06.10.2009. As per the agreement, the photo shoots of the plaintiff to promote the products of the first defendant had been taken and on account of the plaintiff's presence in the advertisement of the first defendant products, there has been quantum increases many fold of the products of the first defendant and considering the increase in the volume of business of the first defendant, they expressed their intention to continue the agreement for further periods, but the plaintiff refused to give her consent to the same. After the expiry of the above said agreement, the first defendant has no right or consent from the plaintiff to use her appearance in their products or

advertisements. However, subsequent to the expiry of the above said agreement, when the plaintiff was approached by M/s.Wipro Ltd. (Consumer Care and Lighting Division) to promote their products (soaps etc.) and the negotiations, with reference to the same, were going on during the last quarter of 2010, to shock and surprise of the plaintiff, it was brought to her knowledge that the first defendant, who is the competitor of M/s.Wipro Ltd., is using the plaintiff's videos and photos for promotion and thereby, exploiting the presence of the plaintiff illegally. Immediately, the plaintiff warned the first defendant orally and the matter was also taken up through the 2nd defendant, who is their authorized agent. Despite the said warnings, the first defendant continued to project the plaintiff's appearance in the commercials of the first defendant in a clandestine manner through multiple channels, materials published in journals and the wrappers used in their products, carried the presence of the plaintiff's photos/profiles and in particular, the soaps manufactured during November 2010 & February 2011. The plaintiff had been thereby put to disadvantage with her other commercials endeavors. Inasmuch as the first defendant did not respond to the oral warnings, the plaintiff issued a notice to the first defendant on 18.01.2011 complaining about the violations and misdeeds committed by them. Again, the plaintiff issued another notice on 01.02.2011 complaining the breach committed by the first defendant. The first defendant gave an evasive reply on 09.02.2011 making untenable allegations and falsely contended that they are not responsible for the exploitations of the plaintiff's appearance in their products. Inasmuch as the first defendant did not mend their way and has continued with exploitation of the plaintiff photoprofile in their commercials and been making unlawful use of the popularity of the plaintiff to their advantage and inasmuch as the plaintiff has also to suffer in her subsequent commercial endeavours with other business concerns, as regards the advertisement fields and as the act of the defendants amounts to invading the privilege and personal right of the plaintiff and despite notices, the first defendant did not take steps to make any corrective measures on their part, the plaintiff has been constrained to lay the suit for adequate compensation and damages in a sum of Rs.1crore and also for consequential permanent injunction.

3. The averments in the written statement filed by the first defendant are briefly stated as follows:- The suit is not maintainable either in law or on facts and except the facts that are admitted by the defendant, as regards the other averments in the plaint, the plaintiff is put to strict proof of the same. The plaintiff is not a popular film personality as averred in the plaint and the plaintiff was paid Rs.1,00,000/- per year as per the agreement entered into on 07.10.2008 and the said agreement was not entered before the second defendant and the agreement was negotiated by an intermediary known as N.D.Communication Private Limited and not J & D Communication Private limited. The plaint, thus, suffer from vice of non-joinder of necessary party and mis-joinder of party. The plaintiff has permitted and given consent to the first defendant in using her photographs for promotion trade mark related registration

in India and Abroad under the above said agreement. It is false to state that on account of the plaintiff's presence in the advertisements of the first defendant's products, there has been increase in the business manifold as regards the products of the first defendant. The first defendant's products are well received in the market due to the quality of their products and every year, there is an increase in their business irrespective of the picture of the actors. The plaintiff cannot claim any credit for increase in the business of the first defendant. The defendant is not aware of the negotiations of the plaintiff with M/s.Wipro limited, which is a small player compared to the first defendant and not a competitor to the first defendant. With regard to the allegations that the first defendant advertising the product with the plaintiff's picture are absolutely false and the first defendant had given instructions to their advertisement associates and agents not to use the pictures of the plaintiff anymore. The first defendant's product being a popular product, they were many service providers to earn their visibility and thereby, certain acts could have been committed, for which, the first defendant cannot be mulcted with. The first defendant is aware of the intellectual property rights. The plaintiff has laid the suit against the first defendant to make unjust enrichment for the illusory damages. The first defendant has not committed any breach of agreement. It is false to state that on account of the breach of the agreement by the first defendant by displaying the profile of the photo of the plaintiff in its products commercially after the period stipulated in the agreement, the plaintiff had been put to monetary loss and also business loss. The claim of damages is exorbitant. The first defendant has not advertised or published the pictures or photos of the plaintiff much against the agreement above mentioned in any manner. The claim for damages by the plaintiff is without any basis. There is no cause of action for the suit and hence, the suit is liable to be dismissed.

4. On the basis of the pleadings, the following issues are framed for determination:- " 1. Whether the plaintiff is entitled to a decree of damages of Rs.1 Crore for exploitation of her popularity for the business of the first defendant in breach of the agreement dated 7.10.2008?

2. Whether the plaintiff is entitled to a decree of injunction restraining the defendants from publicizing, advertising or using the advertisement materials with her presence in their products, wrappers and sales promotions etc., including advertisement in medias?

3. Relief and cost?"

5. In support of the plaintiff's case, PW1 has been examined and Exs.P1 to 22 were marked. On the side of the first defendant, DW1 has been examined and Exs.D1 to 6 were marked.

6. Issue nos. 1 and 2 The plaintiff is a film actress. The first defendant is a company dealing with soap products. It is admitted that an agreement had been entered into on 07.10.2008 marked as Ex.P2 between the plaintiff and the first

defendant, wherein, the plaintiff had agreed to use her photographs and pictures on the wrappers of the soap products manufactured by the first defendant. As seen from the averments contained in Ex.P2, it is found that the same is valid till 06.10.2009. After the period above mentioned, it is found that the agreement had not been renewed further between the parties.

7. Now according to the plaintiff, after the period stipulated in the agreement, it has come to her knowledge that the first defendant has exploited her pictures and photographs in the advertisement of their products. It is stated that the plaintiff is thereby put to irreparable loss and hardship both in her film and advertisement business and therefore, according to the plaintiff, she had called upon the first defendant to desist from engaging in such illegal activities and further, inasmuch as the first defendant, according to the plaintiff, continued to exploit her pictures/photographs in their advertisements and on account of the acts of the first defendant as well as the second defendant, the plaintiff had been put to loss, quantifying the same in a sum of Rs.1crore, the plaintiff has laid the suit claiming the above said amount towards damages from the defendants and also, the consequential relief of permanent injunction restraining the defendants from carrying on their illegal activities.

8. The case of the plaintiff has been vehemently resisted by the first defendant and according to the first defendant, it had not committed any breach of agreement dated 07.10.2008 and it is contended that the plaintiff has, without any cause of action, laid the lis against the defendants and the first defendant is not responsible for any advertisement in the name of the first defendant carrying the pictures/photographs of the plaintiff, after the period stipulated in the agreement and despite intimations, the plaintiff had not cared or endeavored to produce the incriminating materials, which had come to her knowledge as regards the breach of agreement Ex.P2 and hence, according to the first defendant, the plaintiff is not entitled to claim any amount much less the suit amount from the first defendant towards the imaginary damages claimed by her.

9. As seen from the pleas made by the respective parties and also the evidence adduced in the matter, it is found that the suit has been laid by the plaintiff claiming that the first defendant had exploited the plaintiff's pictures in its advertisements, even after the period stipulated under Ex.P2 had come to an end. The agreement, in question, as adverted to earlier, has been marked as Ex.P2. Further, as adverted supra, it is found that the period stipulated in the said agreement is till 06.10.2009.

10. Now according to the plaintiff, on being put on notice about the exploitation of her pictures/photographs by the first defendant in its advertisements, she had brought the same to the notice of the first defendant and its advertisement agency, the second defendant and despite the same, inasmuch as the defendant persisted in their actions exploiting her pictures/photographs, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs. As seen supra, the case of the plaintiff has been stoutly denied by the first defendant.

11. In such view of the matter, as rightly put forth by the first defendant's counsel, it is for the plaintiff to establish that the first defendant had acted in breach of the agreement Ex.P2 and even after the period stipulated in Ex.P2 had come to an end, the first defendant had continued in exploiting her pictures/photographs in its advertisements.

12. It is found that the plaintiff has generally averred in the plaint as to the exploitation of her pictures/photographs by the first defendant in its advertisements. But on the basis of which material, she had come to know or put on notice that the first defendant is exploiting her pictures/photographs in its advertisements has not been clearly depicted by the plaintiff in the plaint. However, it is found that during the course of evidence, the plaintiff seems to have rested her claim for damages mainly upon Exs.P8, P9 and also Ex.P7. Now, according to the plaintiff, on purchasing the soaps from a shop at Tambaram under Ex.P9, she had come across the products of the first defendant using her pictures/photographs in the wrappers of the Soap products, which have been marked as Ex.P8 series and therefore, according to the plaintiff, the first defendant, after the time limit stipulated in Ex.P2 had expired by making use of the pictures/Photographs in the wrappers of the soap products in breach of the agreement, had committed the illegal acts and liable to compensate her with adequate damages. The first defendant has repudiated the genuineness of Exs.P8 series and P9 and according to the first defendant, it has no nexus whatsoever with the said documents produced on the side of the plaintiff. In such nature of the defence projected by the first defendant, it is for the plaintiff to establish that the first defendant is in anyway responsible for the existence of Exs.P8 series and P9.

13. According to the plaintiff, only through Ex.P9, she had purchased the soap products of the first defendant company and thereby noted that in the wrappers of the soap products purchased under Ex.P9, the wrappers marked as Ex.P8 series, she had come to know that her pictures/photographs had been exploited by the first defendant, after the period stipulated in Ex.A2 had come to an end. Therefore, it has to be seen whether the above case of the plaintiff merits acceptance. Considering the defence projected by the first defendant, a perusal of Ex.P9 would go to show that it is dated 12.02.2011. According to the plaintiff, Ex.P9 is the copy of the bill for the purchase of the products of the first defendant at a shop in Tambaram. It is found that on the face of it, Ex.P9 does not depict that it is a bill. It is only found to be an estimate of Isaiah Agencies at Tambaram West, Chennai-45 and it appears with the date 12.02.2011. It is, therefore, found that Ex.P9 not being a bill and only an estimate, as rightly contended by the first defendant's counsel, no product could have been purchased under Ex.P9. In this connection, the plaintiff's father, who has been examined on behalf of the plaintiff (The plaintiff has not chosen to examine herself in this case) during the course of cross examination, has admitted that in business, when a quotation is asked the same is given either as quotation or estimate and no money is collected and no goods are given at that time. Further,

he has also admitted that in Ex.P9, it is written as estimate and it is addressed to Nadeasan stores and as regards the particulars of the goods mentioned therein, according to PW1, it is mentioned as N.P. He is not able to explain as to what N.P. mentioned in Ex.P9 referred to. When it was questioned to him as to whether any plaint averments have been made about Ex.P9 or the soaps wrappers marked as Ex.P8, he would only feign ignorance. Further, according to PW1, Ex.P9 was given to him by one Thangadurai, his friend and further also admitted that Ex.P9 is addressed to Nadeasan stores. Therefore, it could be seen that when there is nothing in Ex.P9 to show that it is the bill issued or given for the purchase of soaps products of the first defendant and when there is no indication in Ex.P9 that the same had been issued to the plaintiff in connection with the soap products of the first defendant and the wrappers marked as Ex.P8 series and when it is admitted by PW1 that Ex.P9 has been addressed to or issued to Nadeasan Stores and even further, according to him, when Ex.P9 has been given to him only by one Thangadurai, his friend, it could be seen that the claim of the plaintiff that she had acquired the soap products of the first defendant through Ex.P9 and thereby, came to know that the first defendant had exploited her pictures/photographs in the wrappers of the soap products as such cannot be countenanced in any manner. Admittedly, it is found that the plaintiff or as the case may be, PW1 is not directly associated with Ex.P9. When the person, to whom, it is found to have been issued i.e. Nadeasan stores or the person, from whom, it is claimed to have been acquired by PW1 i.e. Thangadurai has not been examined in support of the plaintiff's case and when in particular Ex.P9 is not shown to be having any nexus with the soap products of the first defendant or particularly, the Ex.P8 series of wrappers and when the description of the goods found in Ex.P9 does not resemble in any manner with the soap products of the first defendant and when the plaintiff has not established that she had been directly involved in the acquisition of the products purchased under Ex.P9 and the same had been issued to her, it is found that as rightly contended by the first defendant's counsel, the basis for the plaintiff's claim for damages under Ex.P9 cannot merit acceptance and therefore, it could be seen that as contended by the first defendant's counsel, Ex.P9 has to be thrown out of any consideration in this matter.

14. It is only on the basis of Ex.P9 even according to the plaintiff's case, she had acquired the soap products of the first defendant and accordingly, the wrappers of the soap products had been marked as Ex.P8 series. When it is found that the plaintiff has miserably failed to establish that Ex.P9 is related to Ex.P8 series or the so called soap products contained therein, it could be seen that no link could be attached between Exs.P9 and P8 series, particularly, when the alleged soap products claimed to have been purchased under Ex.P9 had not been seen the light of the day. Only the wrappers stated to have contained the soap products are marked as Ex.P8 series. It has not been established that the wrappers marked as Ex.P8 series, actually contained the soap products of the first defendant and the wrappers along with soap products of the first defendant had

been indeed purchased under Ex.P9. Therefore, the plaintiff having failed to establish the veracity or nexus between Exs.P9 and P8 series, it could be seen that Ex.P8 series cannot be the foundation or basis for upholding the plaintiff's claim.

15. As regards Ex.P8 series, it is found that excluding Ex.P9, they do not have any legs to stand on their own. Further, it is found that PW1 during the course of cross examination, though would claim that the packing dates and date of MRPS are mentioned in Ex.P8 series and printed, when it is found that the same had not been established to have been purchased Under Ex.P9 and when it is also found that the plaintiff has not established that the first defendant had been instrumental for the existence of the same, solely on the production of Ex.P8 series alone, it can not be construed that the first defendant is responsible for the pictures/photographs of the plaintiff in the wrappers marked as Ex.P8 series. In this connection, the P.W.1 has also admitted that things are possible on account of the technical development to the question will there be gossips or obscene photographs or films, which depicts leading personalities including heroes and heroines of the film industries and further according to him, it is also called morphing. According to the first defendant, it is not in any manner instrumental for the existence of Ex.P8 series and therefore, it is contended that the first defendant had not brought about the wrappers and further, it is also contended that in the absence of the soap products alleged to have been contained in Ex.P8, it cannot be held that Ex.P8 wrappers pertain to the products of the first defendant company. The above contention of the first defendant's counsel merits acceptance. As seen above, when the basis for the existence of Ex.P8 namely Ex.P9 has not been established by the plaintiff, resultantly seen, Ex.P8 series of its own cannot merit acceptance as such and therefore, it is seen that Ex.P8 series would not in any manner advance the case of the plaintiff.

16. As seen above, the plaintiff has based her claim for the reliefs sought for in the plaint upon Ex.P8 series and Ex.P9. It is found that the first defendant is no way connected with Ex.P9. Therefore, it could be seen that Ex.P9 has not been controverted by DW1, who has been examined on behalf of the first defendant. However, as regards Ex.P8 the only question that is posed to DW1 is whether Ex.P8 wrappers pertaining to the products of the first defendant or not and DW1 has answered that it relates to power soap only. That apart, no other question has been put to DW1, as regards Ex.P8. Therefore, it could be seen that as such Ex.P8 series had not been admitted by DW1 as pertaining to the products of the first defendant Company or that they had been instrumental in the existence of the same, particularly, after the expiry of the period stipulated in Ex.P2. Therefore, it could be seen that no endeavor has also been made by the plaintiff to elicit any answer in support of the plaintiff's case during the course of the cross examination of DW1.

17. In the light of the above discussions, it is found that Ex.P8 series and Ex.P9 had not been established to be true documents and also not established to have

come into existence at the instance of the first defendant or in other words, it has not been established by the plaintiff that the first defendant was in particular responsible for the existence of Ex.P8 series. It could be thus seen that the case of the plaintiff that the first defendant had exploited her pictures/photographs in their advertisement after the period stipulated in Ex.P2 cannot be accepted in any manner.

18. As regards Ex.P7, it is found that the same is stated to be the computer generated copy dated 21.02.2011 from Internet between the plaintiff and the defendant. A perusal of Ex.P7 would go to show that it had been downloaded from India Mart.com. In this connection, PW1 examined on behalf of the plaintiff has admitted that Ex.P7 is the material collected from the Internet and it was uploaded by one India Mart and when he was questioned whether there is any indication in Ex.P7 that the first defendant had authorized India Mart to publish the same, PW1 has admitted that there is no explicit instruction contained in Ex.P7. However, according to him, the same can be inferred from the photographs and the other information that it is only the first defendant, who had instructed India Mart to publish the same. However, the suggestion has been put to PW1 that the first defendant had not directed India Mart to upload the photographs of the plaintiff in the soap wrappers. No doubt, the same had been denied by PW1. Therefore, it could be seen that Ex.P7 is found to be only a computer generated copy of the Internet download from India Mart.com and when it is admitted that there is no explicit instruction contained therein that the first defendant had authorised India Mart to publish the pictures/photographs of the plaintiff contained therein, it could be seen that merely on the basis of Ex.P7 alone, it cannot be held that the first defendant was responsible for the photographs /pictures of plaintiff contained therein. With reference to the same, DW1 in his evidence has denied the suggestion that only on the instruction or on the authority of the first defendant, India Mart has uploaded Ex.P7 containing the pictures/photographs of the plaintiff. In such view of the matter, when Ex.P7 has been opposed tooth and nail by the first defendant and also claimed to have not emanated from its directions, the plaintiff having come forward with the case seeking for appropriate reliefs in order to establish that India Mart had the authority of the first defendant to publish Ex.P7. particularly, the photographs of the plaintiff, it has not been explained by plaintiff's counsel as to why no endeavour had been made to examine any one from India Mart to establish as to under what authority it had chosen to upload Ex.P7, particularly, containing the photographs/pictures of the plaintiff. Merely because, Nature Power Soap is shown as the products of the first respondent therein, it cannot be inferred without any material that the first defendant had been responsible for the upload of the same, particularly, when the same had been stoutly resisted by the first defendant. Thus no safe reliance could be attached to Ex.P7 for uploading the plaintiff's claim.

19. Barring Exs.P9, P8 and P7, the plaintiff has not placed any other material for sustaining her case. Though the plaintiff in the plaint would claim that the first

defendant had exploited her photographs/pictures in various media for promotion of their products illegally in breach of Ex.P2 agreement, particularly, after the period stipulated in Ex.P2, as regards the same, no acceptable and reliable material is forth coming, on the part of the plaintiff. The only materials produced to sustain the plaintiff's case are Exs.P9,P8 and P7. When in the light of the above discussions, it is found that no safe credence could be attached to the above said materials projected on the side of plaintiff, it could be seen that the plaintiff, as rightly put forth by the first defendant's counsel, has come forward with the present case without any cause of action as such.

20. Prior to the institution of the suit, it is found that the plaintiff had chosen to issue the notices to the first defendant as regards the alleged exploitation of her photographs/pictures in their advertisements, which are marked as Exs.P3 and P4. The same had been negatively responded by the first defendant in the replies marked as Exs.P5 and P6. As seen from the Exs.P5 and P6, the first defendant had called upon the plaintiff to furnish the materials, which are in her possession, so as to enable the first defendant to know or understand, on what basis, the plaintiff had been making her claim under Exs.P3 and P4. However, despite the above request of the first defendant, the plaintiff had not chosen to respond positively and it is found that the alleged incriminating materials, which are claimed to have come to the knowledge of the plaintiff, at the time of issuance of Exs.P3 and P4, had not been passed on to the first defendant even after Exs.P5 and P6. It has been admitted by PW1 that the incriminating evidence sought for under Ex.P5 have not been sent. When the reason is sought for the same, according to PW1, since the same is already available to public knowledge, according to him, the same had not been sent. However, according to the first defendant, in as much as no material was available with the plaintiff at that point of time and therefore, it has been suggested that the plaintiff was unable to furnish any incriminating materials called upon under Exs.P5 and Ex.P6. No doubt, the same had been denied by PW1. Further, suggestion has also been put to PW1 that only after the issuance of the reply notice, the plaintiff had made a fishing expedition to collect the documents in support of her case and laid the suit falsely. No doubt, the said suggestion had been denied by PW1.

21. In the pre suit notice also marked as Ex.P10, there is no particular reference about Exs.P8 and P9. As adverted to earlier, even as regards Exs.P8 and P9, there is no specific averment in the plaint. Be that as it may, as seen from the above discussions, it has been found that the plaintiff has not been able to establish the genuineness of Exs.P9, P8 and P7 and more further, unable to prove that the first defendant had been instrumental in the making of the same and in such view of the matter, it could be seen that, as rightly contended by the first defendant's counsel, the plaintiff has come forward with the present suit on the basis of unreliable and unacceptable materials and accordingly, unable to establish her case for obtaining the reliefs sought for.

22. In the light of the above reasons, I hold that the plaintiff has failed to

establish that the first defendant, in breach of the agreement dated 07.10.2008, has exploited her popularity for the business of the first defendant and therefore, I hold that the plaintiff is not entitled to obtain the damages to the extent of Rs.1 crore claimed in the plaint. Consequently, I hold that the plaintiff is not entitled to obtain the relief of permanent injunction claimed in the plaint. Accordingly, issue Nos. 1 and 2 are answered against the plaintiff.