

Order on I.A. No.4

Defendant No.1 to 5 have filed I.A. No.4 u/O.1 R.10(2) r/w S.151 of CPC praying to pass an order directing the Plaintiff to remove/delete them as parties from the array of parties in the cause title of the plaint.

In the affidavit it is stated that, he is the Managing Partner of M/s. Sachin Trading Company. M/s. Sachin Trading Company is a registered partnership firm having its business interest into wholesale and retail business of various FMCG, food products, packed daily groceries, cement etc, having multiple product line of distribution and sales in and around Dakshina Kannada District and neighbouring districts. His family is into business of distribution and sales for several decades which has passed through generations.

Further, in the field of his business they have been appointed as sole agency for the entire district and neighbouring districts for several products of multiple manufacturers including public listed companies like Ambuja, Ultratech etc. The reputation of our firm has been known as a daily household name for the customers for several decades now.

The Plaintiff has filed the above suit as a futile attempt to protect their so called copyright without fulfilling the basic requirements under the law. The very plaint is non-maintainable for failing to meet the legal ground as prescribed under the law. The applicant reserves to meet the contentions of the plaint separately in case the Court refuses to exercise the provisions of the annexed application. Further, in the cause title, the Plaintiff has mentioned the name of their firm attributing it as a registered company/proprietorship etc, as such, out of the Defendant Nos.1 to 5 only Defendant No.3 is appropriate address of the M/s Sachin Trading Company and the

Defendant Nos.1, 2, 4 and 5 are also unnecessary party.

He is not the manufacturer/proprietor /owner of the product 'Vedgiri' as alleged in the plaint. His firm which is into wholesale and retail distribution of various food and grocery products have been an authorized distributor of the 'Vedgiri' tea powder manufactured and marketed by Defendant Nos.7 and 8. The product 'Vedgiri' is one of the product which is being distributed by their firm along with the other products.

The plaint filed by the Plaintiff lacks clarity and is similar to a fact-finding mission, without any clarity in the pleadings. As a distributor, their firm is not involved in any production and packaging of the product 'Vedgiri', hence, in the array of the parties in the cause title, the Defendant Nos.1 to 5 have been attributed to their firm in different forms, which is a clear indication that the plaint lacks clarity.

The Defendant No.3 being a business entity involved only in wholesale and retail distribution of the product is an unnecessary party to the proceeding. They

have no direct or indirect involvement in any sought manufacturing/packaging of the 'Vedgiri'. Hence, the cause of action as against the Defendant Nos.1 to 5 does not survive.

Hence, the necessity of the presence of the Defendant No.3 mainly as Defendant will not aide in adjudication of the above matter as the Defendant Nos.1 to 5 have no direct involvement in either manufacturing or packaging of the product as alleged by the Plaintiff. If the application is not allowed, irreparable injury and hardship will be caused. Hence, prayed to allow the I.A.

In the objection the Plaintiff has stated that the application filed by the Defendants claiming that Defendant Nos.1 to 5 to be deleted from the plaint on the ground that the Defendant Nos.1 to 5 have no direct involvement in the manufacturing or packing of the product as alleged. Accordingly, the necessity of the presence of the Defendant No.3 mainly as Defendant will not aide in adjudication of the above matter. The trial would conclude and bring

out all allegations and claims of the Plaintiff. Hence, at this stage the per-determination of the role of the Defendants and the claim made by the applicants/ Defendants at this stage do not come for consideration. Hence, prayed to reject the I.A.

Heard on both sides.

It is the case of the plaintiff, that she is the registered proprietrix of trade mark

‘DEVGIRI’ and registered owner and author of Copy right artistic work titled ‘DEVGIRI’. The defendant’s are unknown and third parties to her and in the recent past through her distribution channels and through customers, gained the knowledge that defendant’s jointly and severally have been indulged in manufacturing and selling the tea powder and various tea powder variant’s by affixing deceptively similar artistic work and trade mark as ‘VEDGIRI’ and has committed passing off of the registered IPR rights of plaintiff.

On the other hand, no document putforth by defendant Nos.1 to 5 to show

that they are the agent of defendant No.7. Further, there is no reference of any agency of defendant Nos.1 to 5 under defendant No.7 in the Written statement of defendant No.7. Hence, contention of defendant No.1 to 5 that they are only distributor and their firm is not involved in any production and packaging of the product 'Vedgiri'. They are sole agency for the entire district and neighbouring districts for several products of multiple brands. Therefore, are protected under Section 230 of the Indian Contract Act, where the name of the principal is disclosed, agent cannot be sued and in this case, defendant No.7 being his principal involved in manufacturing and processing of 'Vedgiri' product, they are not necessary parties to this suit holds no substance.

Further, in the authorities relied by the learned counsel for the Defendant nos.1 to 5 reported in 2009 o AIR(SC) 567 in case of Prem Nath Motors Limited -Vs- Anurag Mittal – observed, it is pertinent to note that Premnath Motors Limited was a dealer of Pal Motors with whom the Peugeot

Company had entered into an agreement. Petitioner before commission had nothing to do with the advertisement, in response to which the individuals had applied for the same. Infact, Individuals had submitted their applications at Premnath Motors office only due to above reason and the cheques submitted by individual person interested in purchasing the car was given in the name of M/s Pal Peugeot Limited and Premnath Motors Limited. The Appellant had no role except to send the same to M/s Pal Peugeot Limited.

Section 230 of Contract Act makes clear that an agent is not liable for the acts of disclosed Principal subject to a contract of the contrary. No such contract to the contrary has been pleaded. An identical issue was considered in case of Marine Contained services south Pvt Ltd -Vs- Go Go Garments in AIR 1999(SC) 80 where similar order was passed under the Consumer Protection Act was set-aside by this Court.

2012 0 AIR(SC) 264 in case of the National Textile Corporation Limited -Vs-

Nareshkumar Badrikumar Jagad and others- observed that not permissible for the Appellant to canvass that the Central Government has any concern so far as the tenancy rights are concerned. Rights vested in Central Government stood transferred and vested in the Appellant. Both are separate Legal entities and are not synonymous. The Appellant being neither the Government nor Government Department cannot agitate that as it has been substituted in place of the central Government and acts merely as an agent of the Central Government, thus protection of the Act 1999 is available to it.

It is settled position that an agent cannot be sued where the Principal is known. In the instant case, Appellant has not taken plea before either of the courts below. Under Order 8 Rule 2 CPC, Appellant was under obligation to take specific plea to show that the suit was not maintainable. In his written statement ought to have taken plea that it was merely an agent of Central Government, thus suit was not maintainable. Pleadings and

particulars are necessary to enable the court to decide the right of the parties in the trial. It narrow down the controversy involved. Settled legal position “as a rule relief not founded on the pleadings should not be granted”. The vague plea to the extent that suit is bad for non-joinder and thus was not maintainable did not meet the requirement of law. Whether A is an agent of B is a question of fact and has to be properly pleaded and proved by adducing evidence.

In the present case, as noted no proof putforth by defendant Nos.1 to 5 as to their agency under defendant No.7. Further, the documents enclosed by the plaintiff reflect that they are the registered owner of artistic work and name of the ‘Dev giri’ product and photo’s reflect the distribution and sale of product ‘Ved giri’ by defendant Nos.1 to 5.

Further, Plaintiff is the Dominus litis-right to choose the people to sue. As pleaded, from its distributors and customers plaintiff came to know about the sale of deceptively similar product ‘Ved giri ‘ by these defendants. Hence, another

contention of defendant Nos.1 to 5 that other distributors have not been made as parties to this suit, holds no substance.

In the authorities relied by the learned counsel for the Plaintiff :

In 2013(137) DRJ 273 in case of Malhotra Book Depot and others -Vs- MBD Electronics Pvt. Ltd. It is observed that,

Plaintiff hold as many as 20 registrations and using this trade mark since the year 1956. Defendant has been using this trade mark since 1986. A perusal of the plaint shows that the Plaintiffs have adopted 'MBD' in most of the group markets and has achieved a housemark as the same prominently features in trade journals, periodicals magazines, cyber space with domain names having the house mark "MBD" . Where the trading name becomes a house hold name, under which trading name variety of activities are undertaken, even an action for passing off exclusively lies if the Defendant adopts identical or similar trademarks, even when the Defendant does not carry on similar activities .

In 2019(77) PTC 139 in case of Luxottica Groupo SPA and another -Vs- Mify Solutions pvt. Ltd and others. It is observed that,

Plaintiff is the owner, registered proprietor and copyright owner of trademark 'OAKLEY', whereas Defendants are shifting the blame among themselves. Invoice admitted by Defendants 1 and 2, there being no denial that product was counterfeit. Defendants held guilty of infringement of Plaintiff's Trademark and Copyright. Suit decreed.

In 1995 (2) ILR (Del) 685 in case of R. Prakash -Vs- Chowdhary Plastic Works. It is observed that,

“Where the claims stated at the end of specifications in the patent are alleged to have been infringed, the Court should construe the claims without reference to the body of the specifications and refer to the specifications only, if there is any ambiguity or difficulty in the construction of the claims in question. To find out whether the patent has been infringed the patented article or process has to be

compared with the infringing article or process and unessential features in the infringing article or process are of no account and if the infringing goods are made with the same object in view which is attained by the patented article, then a minor variation does not mean that there is no privacy and a person is guilty of infringement if he makes what is in substance the equivalent of the patented article and some trifling or unessential variation has to be ignored.”

Considering the principle of interpretation of specifications and the claims of the patent granted to a party as stated above, I am of the view that on the same principles it cannot be said that the manufacturing, making or selling of the film disc by the Defendant is not an infringement of the patent granted to him.

In 2010(7) MLJ 497 in case of Consim Info Pvt. Ltd -Vs- Google India Pvt. Ltd- observed, Since the first part of the discussion of the Grand Chamber revolved around Article 5(1) (a) and (b) of Directive 89/104 and Article 9(1)(a) and (b) of

Regulation No.40/94, it is necessary to extract these provisions, in order to have a contextual understanding of the opinion delivered by the European Court of Justice. Article 5(1)(a) and (b) of Directive 89/104 reads as follows:

“5.1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered:

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.”
Article 9(1)(a), (B) and (c) of Council Regulation No.40/94 reads as follows:

“9.1 A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with or similarity to the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public, the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with or similar to the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, There the latter has a reputation in the community and where use of that sign without due cause

takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the community trade mark.”

Applying the above principle, the Court held that from the advertiser's point of view, the selection of a keyword identical with a trade mark has the object and effect of displaying an advertising link to the site on which he offers his goods or services for sale and that since the sign selected as a key word is the means used to trigger that display, the advertiser must be held to be using it in the context of commercial activity and not as a private matter. Even from the point of view of the referencing service provider (search engine), the Court held that the storage as keywords, of trademarks, for the benefit of the clients of the search engine constituted a commercial activity carried on with a view to economic advantage. Consequently, the Court held that the referencing service provider was actually operating “in the course of trade” while permitting advertisers to select, as keywords, signs identical, with trademarks, stores those signs and displays to its

clients' on the basis thereof. However, the Court clarified that it does not follow as a corollary that the service provider itself uses those signs within the terms of Article 5 of Directive 89/104 and Article 9 of Regulation No.40/94. The Court then pointed out that the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign.

In other words, the service provider should have had neither knowledge nor control over the information which is transmitted or stored. The role of the service provider should be neutral, in order to establish that its liability was limited under Article 14.

If the service provider had not played such a role, the **ECJ pointed out that they cannot be held liable for the date which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of**

those data or of that advertiser's activities, it failed to act expeditiously.

According to Mc Carthy, 'the issue of descriptiveness is usually tested from the view point of the hypothetical customer, who has the basic amount of knowledge about the product, which is conveyed by advertising and promotion currently available in the market place'.

Section 29 reads as follows:

“29. Infringement of registered trade marks – (1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark,

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by

way of permitted use, uses in the course of trade, a mark.

A registered trade mark is infringed by a person if he uses such registered trade mark, as his trade name or part of his trade name or name of his business concern or part of the name, of his business concern dealing in goods or services in respect of which the trade mark is registered. (6) For the purposes of this section, a person uses a registered mark, if, in particular, he-

(b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trade mark, or offers or supplies services under the registered trade mark. Accordingly, I proceed to pass the following:

Order

I.A. No.4 filed by Defendants Nos.1 to 5 u/O.1 R.10(2) r/w S.151 of CPC is hereby dismissed.

To hear on IA No.3 by 02-01-2025.

IV ADJ, Mangaluru.

