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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(COMM) 156/2017**

ZENNER INTERNATIONAL GMBH & CO KG AND ANR

..... Plaintiffs

Through: Mr.Abhimanyu Mahajan, Mr.S.Seth,
Ms.Anusha Goel, Mr.Mayank Joshi,
Ms.Shambhavi, Advs.

versus

ANAND ZENNER COMPANY PVT LTD Defendant

Through: Mr.Kartikey Anand, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

14.10.2022

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I.A. 16769-71//2022

1. These applications under Section 10 of the Code of Civil Procedure, 1908 (in short 'CPC') have been filed by the defendant/applicant praying that the present suit is liable to be stayed pending the final outcome of the appeal before the Hon'ble High Court of Kerala, being RFA No.745/2015, and pending consideration of the said application, the recording of evidence of the parties be stayed/cancelled.
2. It is the case of the defendant /applicant that prior to the filing of the present suit, the defendant/applicant had instituted a suit, being OS No.24/2010, *inter alia*, against the plaintiffs herein, before the District Court, Ernakulam, Kerala. The present suit has been filed thereafter.
3. It is further contended that though the said civil suit filed by the defendant/applicant has been dismissed, an appeal challenging the said judgment has been filed, being RFA No.745/2015, which has been admitted for hearing by the Hon'ble High Court of Kerala vide order dated



02.11.2015.

4. It is submitted by the learned counsel for the defendant/applicant that since the appeal is a continuation of the suit, provisions of Section 10 of the CPC would still continue to apply.

5. The learned counsel for the defendant/applicant submits that in case the defendant/applicant is to succeed in the suit/appeal, the same would act as *res judicata* in the present suit and the present suit would be liable to be dismissed; on the other hand even if the defendant/applicant fails in the said suit/appeal, the plaintiffs would still have to prove its case before this Court and to its entitlement to the relief prayed for.

6. It is contended by the learned counsel for the defendant /applicant that though the plea of the present suit being stayed under Section 10 of the CPC was taken by the defendant/applicant in the written statement and has even been highlighted by various orders of this Court, the same has not been adjudicated upon. The learned counsel for the defendant/applicant submits that therefore, the trial of the present suit should be stayed pending outcome of the appeal before the High Court.

7. On the other hand, the learned counsel for the plaintiffs submits that the present application is a gross abuse of the process of the Court. He submits that the Issues in the present suit were framed vide order dated 23.02.2017. There was no issue framed with respect to the applicability of Section 10 of the CPC. Thereafter, the Issues were amended on 08.05.2017 and again there was no issue of Section 10 of the CPC being applicable put forth by the defendant /applicant. The suit came to be dismissed on account of default of the plaintiffs, vide order dated 23.01.2018, however, was restored in an appeal filed vide order dated 06.11.2019. The suit is at the



stage of recording of evidence of the plaintiffs and it is the defendant/applicant who sought time to cross examine the witness of the plaintiffs. The present application has therefore, been filed belatedly and as an afterthought to somehow stall the trial of the suit.

8. Placing reliance on the judgment of this Court in ***Cadbury UK Limited and Another v. Lotte India Corporation Ltd.***, 2019 SCC OnLine Del 9810, he submits that there is a gross delay of almost ten years in filing of the present application.

9. I have considered the submissions made by the learned counsels for the parties.

10. Section 10 of the CPC reads as under:

“10. Stay of suit.—No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government] and having like jurisdiction, or before [the Supreme Court].”

11. Though the said provision is mandatory in nature, it is also a mixed question of fact and law. The Court has to consider if the issues in the second suit are directly and substantially in issue in the previously instituted suit between the same parties.

12. In the present case, this issue was highlighted at the initial stage itself by the Court in its order dated 25.05.2012, and thereafter, in the order dated



19.05.2016. It is only thereafter that firstly, summons in the suit were issued vide order dated 17.05.2013, and issues framed by the order dated 23.02.2017. The issues were thereafter amended vide order dated 08.05.2017. The defendant/ applicant never pressed the issue of Section 10 of the CPC in spite of having taken the said plea in the written statement. The reason for not pressing the same is for the defendant/applicant.

13. As noted hereinabove, the suit came to be dismissed for default of the plaintiffs on 23.01.2018, and thereafter was restored on 06.11.2019. The parties were thereafter directed to proceed for trial.

14. As held in ***Cadbury UK Ltd. (supra)***, Section 10 of the CPC though mandatory in nature, cannot be applied pedantically and in all situations even when the application thereof would result in miscarriage of justice. Section 10 of the CPC is intended to put a stop to the suit at the threshold, to avoid duplication of proceedings.

15. In the present case, the defendant/applicant has woken up after a period of ten years to apply for the stay of the suit. It is the case of the defendant/applicant itself that even if the appeal pending before the Hon'ble High Court of Kerala was to be decided against the defendant/applicant, as was the fate in the suit, the plaintiffs would still be left remediless and would have to come back and pursue this suit.

16. In my view, therefore, the present application is liable to be dismissed on account of the delay itself.

17. Accordingly, the present applications are dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

OCTOBER 14, 2022/RN