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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. Saurabh Seth, Ms. Anubha Goel, Mr. Mayank Joshi and Ms. Sambhavi K., Advocates

versus

ANAND ZENNER COMPANY PVT LTD ..... Defendant

Through: Mr. Kartike Anand, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% **13.03.2023**

I.A. 13581/2022 (*Order XII Rule 6 CPC seeking a judgment on admission*)

1. The Plaintiffs invoke Order XII Rule 6 of Code of Civil Procedure, 1908 [hereinafter "***CPC***"] seeking a judgement on admissions as also Order XIII-A of CPC for a summary judgment, against the Defendant.

PLAINTIFF'S CONTENTIONS

2. Mr. Abhimanyu Mahajan, counsel for Plaintiffs, makes the following submissions:

2.1. Plaintiff No. 1 is the registered owner of the trademark "ZENNER" bearing No. 662970 in Class 09 [hereinafter "***subject mark***"] and is engaged in the manufacture and marketing of a range of water meters under the mark.

Plaintiff No. 2[1] is an Indian subsidiary of Plaintiff No. 1 and a permissive user of the subject mark.

2.2. The aforesaid registration was initially obtained in the name of Karl Adolf Zenner Wasserzaehlerfabrik GmbH [hereinafter "***KAZW***"] and then on account of a merger in 2000, it was transferred to Zenner GmbH & Co KGAA [hereinafter "***Zenner GmbH***"]. When Zenner GmbH went into liquidation, Mr. Jochen Eisenbesis was appointed as the liquidator [hereinafter "***Liquidator***"] by the Court of Saarbruecken, Germany on 04th October, 2005. During the liquidation proceedings, Plaintiff No. 1 purchased certain assets of Zenner GmbH including the right, title and interest in the subject mark.

2.3. Deed of Assignment dated 03rd November, 2009 [hereinafter "***Deed of Assignment***"] was executed by Zenner GmbH, whereby Plaintiff No. 1 became the registered proprietor of the subject mark and was granted exclusive statutory and common law rights therein. The Trademark Registry has recorded Plaintiff No. 1 as the owner and registered proprietor of the subject mark.

2.4. Defendant was granted a non-exclusive license *vide* a Trademark License Agreement [hereinafter "***TLA***"] executed on 25th March, 1996 for use of the subject mark. Per clause 6.01 of the TLA, term of the license expired on 25th March, 2001, after a period of five years from date of execution and admittedly has never been renewed thereafter. As per Clause 6.02 of the TLA and by operation of law, the TLA between Zenner GmbH and the Defendant stood annulled when Zenner GmbH went into liquidation.

2.5. Despite the above, Defendant unauthorizedly and illegally continued to

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[1] Zenner Aquamet India Pvt. Ltd., an Indian company, having its registered office in B-17, Friends Colony (West), New Delhi-l10065.

use the subject mark, in blatant disregard of the terms of TLA. Defendant continued to assert its rights in the subject mark and even went to the extent of filing a suit [bearing OS No. 24/2010] before the District Court VII, Ernakulam, Cochin, Kerala [hereinafter "***Ernakulam District Court***"] in May, 2012, seeking a declaration that Defendant was the absolute owner of the mark "Anand Zenner" and to restrain Plaintiffs from using the subject mark.

2.6. The Defendant in its pleadings before this Court as well as the Ernakulam District Court admits that: (i) KAZW is the owner of the subject mark and that they are only a licensee under the TLA, and (ii) that the TLA expired by efflux of time and Plaintiff No. 1 is carrying on the business of KAZW. This entitles Plaintiff to a judgment on admissions.

2.7. The suit before the Ernakulam District Court was dismissed *vide* judgment dated 12th June, 2015, with the following categorical findings: (i) "*Plaintiff No. 1 is the owner of the trademark "Zenner"*"; (ii) "*The license granted to the Defendant expired by efflux of time on 25.03.2001*"; (iii) "*Notwithstanding the above, the license granted to the Defendant automatically terminated in terms of the license on the commencement of liquidation proceedings in respect of the Licensor*"; (iv) "*Defendant has no right to use the trademark ZENNER*"; and (v) "*In terms of paragraphs 6.05 of the license, the Defendant ought to immediately cease and desist from using the trademark ZENNER and destroy all material pertaining to the said trademark.*" Considering the Defendant's stance that the instant suit should be stayed under Section 10 of CPC due to significant similarity with the case at the Ernakulam District Court, and the judgment there would act as *res* *judicata,* they cannot argue that the above-mentioned findings do not bind them in the present suit.

2.8. Defendant has since challenged the aforesaid judgement in appeal before the High Court of Kerala in RFA No. 745 of 2015, however, no stay has been granted despite lapse of over seven years. Nonetheless, the admissions made by Defendant entitles the Plaintiffs to a judgement under Order XII Rule 6 read with Section 151 of CPC, as also Order XIII-A CPC as there is no possibility of the Defendant succeeding in the present suit.

2.9. Defendant has also not impugned the Deed of Assignment or the recordal of Plaintiff No. 1 as successor of the subject mark with the Trademark Registry.

DEFENDANT'S CONTENTIONS

3. *Per contra*, Mr. Kartike Anand, counsel for Defendant, submits that:-

3.1. No such admission made by Defendant which would entitle Plaintiffs to a judgement under Order XII Rule 6 of CPC.

3.2. The version of facts claimed by Plaintiffs are categorically disputed, and hence, the parties are in trial.

3.3. At this juncture, when one witness of the Plaintiffs has already been examined, they cannot be permitted to invoke either Order XII Rule 6 or Order XIII-A of the CPC.

3.4. Proceedings in the present suit are liable to be stayed under Section 10 of the CPC, considering that there is a pending suit before the District Court as also an appeal before High Court of Kerala, where substantially the same issues have arisen. This is also supported by Plaintiff's averments in the present application.

3.5. On merits as well, Plaintiffs have no case to seek judgment on admissions. In fact, Plaintiffs are not entitled to the ownership and/or use of the trademark and/or tradename "ZENNER". KAZW entered into Joint Venture Agreement [hereinafter "***JVA***"] with Anand Water Meter Manufacturing Company Private Limited on 01st January, 1996, and in terms thereof Defendant-Company was constituted and incorporated. Further thereto, KAZW executed a Name Protection Agreement [hereinafter "***NPA***"], as well as the aforenoted TLA, both dated 25th March, 1996, in favour of Defendant. By virtue of NPA, KAZW granted the license and the right to use the name and/or the word "ZENNER" as part of its corporate name and/or trade-name and/or trading style. Further, a Technical Assistance Agreement [hereinafter "***TAA***"] was also executed on 25th March, 1996, for the Defendant to obtain technical know-how and managerial expertise as possessed by KAZW in the field of water meters. Defendant continues to be a beneficiary of the said agreements and has made no admission to the contrary.

3.6. KAZW never informed Defendant of any merger, much less with Zenner GmbH. It was only through letter dated 11th May, 2010 from the Liquidator, that Defendant learnt of an alleged merger of KAZW with Zenner GmbH, and sale of assets to Plaintiff No. 1 in liquidation. In the same letter it was alleged that by virtue of clause 6.02, that said TLA was no longer in force. In correspondence with the Liquidator, the Defendant asserted its rights under the JVA, arguing that the Plaintiff lacked the authority to terminate agreements with the Defendant. Consequently, faced with threats from the Plaintiffs and the Liquidator, the afore-noted suit was instituted in the Ernakulam District Court.

ANALYSIS

(i) Under Order XII Rule 6 of CPC

4. The Court has considered the aforenoted contentions. Issues were framed *vide* order dated 23rd February, 2017, over five years ago. Plaintiffs' evidence is currently being recorded and one witness on their behalf has been examined and discharged. At this juncture, Order XII Rule 6 of CPC is being invoked to seek a judgment on admissions.

5. Plaintiffs argue that as long as the conditions for applying the afore-noted provision are met, the present application should be accepted. Undoubtedly, Order XII Rule 6 can be invoked at any stage of the suit proceedings as the same is not explicitly forbidden by any provision of the CPC. This flexibility allows courts to expedite the litigation process and, save time and resources for both parties and the court system. However, the tool to expedite the disposal of suits, should not be used in a manner that would cause injustice to any party. The provision is not to be applied mechanically and the Court needs to strike a balance between fairness and efficiency. When parties are already engaged in a trial and the case is approaching final arguments, the criteria for entertaining a request under Order XII Rule 6 must be set at a higher threshold. Plaintiffs have not shown any urgency in invoking this provision while the trial has been in progress for more than five years. There is no drastic change in circumstances that has triggered the instant application. In fact the timing of the application exhibits Plaintiffs lack of inclination to undergo the challenges of proving their case through evidence presentation. The Court has to thus proceed with caution and exercise discretion to avoid any potential prejudice to either party.

6. In the instant case, the Defendant has refuted the Plaintiffs' version of facts, which are crucial to determining the outcome of the present suit. Defendant has specifically denied Plaintiff's claims, inasmuch it is contended that Plaintiffs' acquisition of any right, title and/or interest in the subject trademark or any asset that originally belonged and still belongs to KAZW. Thus, denying the devolution of such rights by way of any merger of KAZW with Zenner GmbH and its subsequent liquidation, to Plaintiff. Defendant has also asserted rights under a number of agreements executed between Defendant and KAZW, which include the JVA, NPA, TAA and TLA.

7. The Defendant further contends that if it succeeds in the suit before the Ernakulam District Court, it will be able to establish their exclusive right to use the subject mark within India, to the exclusion of the Plaintiff. However, if the Plaintiffs prevail, they will only prove that the Defendant is not the sole and exclusive owner of the subject mark and does not have the right to use it exclusively within India, to the exclusion of the Plaintiffs. Consequently, Plaintiffs would need to establish their title, ownership, and entitlement to the subject trademark, in exclusion of Defendant, based on evidence.

8. In view of the above stand, appearing from the pleadings, Court does not find any clear, unambiguous and unconditional admissions on behalf of Defendant. The Defendant's objections against delivering a judgment under Order XII Rule 6 strike at the heart of the issue. Defendant has highlighted contradictions in Plaintiffs' own stand-discernible from the pleadings, which requires Plaintiffs to prove their case, in order to succeed. Accordingly, in the instant suit, the trial cannot be short-circuited, it must cross the evidence stage and reach its logical conclusion. No firm opinion can be formed at this stage to pass a judgment on admissions, in light of the contentious issues between

the parties. Thus, the Court is not inclined to entertain the present application under Order XII Rule 6 of the CPC.

(ii) Under Order XIII-A of CPC

9. In addition to the above, Plaintiffs have also sought to invoke Order XIII-A of CPC and contend that the Defendant has no real prospects in succeeding in its defence. However, to overcome the statutory bar on filing this application after framing of issues, they rely upon the decision of a Coordinate Bench of this Court in ***K.R. Impex v. Punj Lloyd Ltd***,[2] relevant portion whereof reads as under:

> *"20. Though this application has been filed after the issues have been framed and is thus not maintainable under Order XIIIA by virtue of Rule 2 thereof but otherwise on the basis of the aforesaid contentions of the parties, not only is there an admission of liability by the defendant towards the plaintiff in the sum of Rs. 1,69,73,766/- but the present case also falls in the category of the defendant having no real prospect of successfully defending the claim and/or there being other compelling reasons why the claim should not be disposed of before recording of oral evidence.*
>
> *xxx ... xxx ... xxx*
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> *26. Though in view of above, there is no need for me to deal with Order XIIIA CPC as applicable to Commercial Courts but a word on that too.*
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> *27. Though proviso to Rule 2 of Order XIIIA unequivocally lays down that no application for summary judgment may be made after the Court has framed the issues, but it cannot be forgotten that Supreme Court in ITC Limited v. Debts Recovery Appellate Tribunal (1998) 2 SCC 70 has held that merely because issues have been framed, is no reason for the trial to be undertaken, if it is brought to the notice of the Court that the same is not necessary. The Courts have in innumerable judgments referred to in Dr. Zubair Ul Abidin v. Sameena Abidin @ Sameena Khan, (2014) 214 DLT 340 (DB) (SLP(C) No. 369/370 preferred where against was dismissed on 16 January, 2015), Geodis Overseas Pvt. Ltd. v. Punjab National Bank, 2016 SCC OnLine Del 1037 as well as in A.N. Kaul v. Neerja Kaul, 2018 SCC OnLine Del 9597 held that the Court on each and every date of hearing has to ensure that no litigation which is deadwood remains pending on the roster of the Court at the cost of other deserving litigations and it is the duty of the Court to eliminate the deadwood on each and every stage. Rule 1 of newly added Chapter XA of the Delhi High Court (Original Side) Rules, 2018, introduced with effect from 1 November,*

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[2] 2019 SCC OnLine Del 6667.

<u>2018 also permits the Court to, of its own, pass summary judgment at the time of Case Management Hearing which can also be post framing of issues in the suit.</u>

28. The purpose of the proviso to Rule 2 of Order XIIIA is to discourage filing of applications for summary judgment after issues have been framed, thereby delaying trial and to empower the Court to, if finding the same to be dilatory, dismiss the same in limine. <u>The proviso to Rule 2 of Order XIIIA, in my opinion, cannot be read mandatorily and to that extent is directory.</u>

29. The objective of the Commercial Courts Act even otherwise is to expedite the disposal of the commercial suits and none of the provisions thereof can be interpreted as counterproductive to the said objective of the Commercial Courts Act and it would delay rather than expedite the disposal of commercial suits, if inspite of finding a suit to be befitting of summary judgment, the Court considers itself constrained merely on account of issues having been framed."

[Emphasis Supplied]

10. Paragraph 20 of the aforenoted judgment reads, "*Though this application has been filed after the issues have been framed and is thus not maintainable under Order XIIIA by virtue of Rule 2 thereof but otherwise on the basis of the aforesaid contentions of the parties, not only is there an admission of liability by the defendant towards the plaintiff…..*". From this, it is clear that that the Court determined that an application under Order XIII-A after framing of issues was not maintainable and instead relief was granted on the basis of admissions made by the Defendant. In light of this stand, the opinion expressed in paragraph 28 holding the proviso to Rule 2 of Order XIIIA to be directory and not mandatory is only an *obiter dicta*, not part of the *ratio decidendi* (the legal reasoning behind the court's decision) and hence, does not carry the same weight as a binding precedent. This is also evident from the preface of the discussion accompanying the above opinion, recorded at paragraph 26 of the judgment which reads, "*Though in view of above, there is no need for me to deal with Order XIIIA CPC as applicable to Commercial Courts but a word on that too.*"

11. Further, reliance upon Rule 1 Chapter X-A of the Delhi High Court

(Original Side) Rules, 2018 [hereinafter "***2018 Rules***"] in paragraph 27 of the aforesaid judgment is in conflict with the view expressed by the Division Bench in ***Surya Food and Agro Limited v. Om Traders and Anr.***[3] In the said judgment, the Court noted an inherent conflict between Order XIII-A of the CPC and Chapter X-A of the 2018 Rules on summary judgements, and held that the provision of Order XIII-A, introduced by virtue of Section 16(1) of the Commercial Courts Act, 2015, would prevail as per Section 16(3) of the same Act. An application under Order XIII-A must satisfy the procedure specified thereunder and 2018 Rules to the contrary would not apply. Given that the issues have already been framed in the present suit, an application for a summary judgment under Order XIII-A of CPC would not be maintainable and Plaintiff's reliance on ***K.R. Impex*** (*supra*) is misconceived.

12. Considering the foregoing, the Court is not inclined to grant the relief sought in the present application.

13. Dismissed.

14. Needless to say, the Court has not expressed any opinion on the merits of this case and the observations made hereinabove are only for deciding the application, which shall not prevail upon the Court at the stage of final hearing.

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15. List before Joint Registrar on 21st March, 2023.

16. List before Court on 09th August, 2023.

SANJEEV NARULA, J

MARCH 13, 2023/tp

(Corrected and released on 02nd April, 2023)

[3] 2023/DHC/000494, decided on 20th January, 2023.