

**PGK**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

Suit No.224 of 2008

Dr.Ashok M. Bhat & anr. .. .. Plaintiffs  
v/s.  
Harichand Nagpal & anr. .. .. Defendants

Dr.Veerendra Tulzapurkar, Sr.Advocate with M.V.A.Bhagat &  
Mr.Amit Jamsandekar for Plff.

Mr.R.V. Bhasin with Ms.Jaya Meghani i/by M/s.Gajaria & Co.  
for Defts.

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**CORAM : SMT.ROSHAN DALVI, J.**

**DATED : 19<sup>th</sup> July, 2010**

**P.C. :**

1.The Plaintiffs have filed this Suit for a passing off action and upon infringement of their trademark. The Defendants have claimed that this Court does not have the territorial jurisdiction to try the Suit. Upon that issue being raised, it was required to be tried under Section 9A of the Civil Procedure Code (CPC) as a jurisdictional issue pending the Notice of Motion itself. The parties are required to lead oral as well as documentary evidence. The Plaintiffs have filed their Affidavit of examination-in-chief and produced the original documents. The admissibility of the

documents is considered. The cross-examination of the Plaintiffs has to be recorded. It was to be recorded by the Court Commissioner in view of the heavy docket of the Court. Consequently, the order under Order XVIII Rule 4(2) of the CPC and the proviso thereto came to be passed. The relevant factors, which were required to be considered for the Commission appointed under the provisions of Order XVIII were to be considered. The parties attended before the Commissioner.

2. The Defendants contend that they cannot afford and shall not pay the fees of the Commissioner. This is despite the fact that the Defendants are represented by their Advocate and Counsel. Their Counsel states that the Defendants, who are in Nagpur, have been advised by retired Judges of this Court that the Defendants need not pay the costs of the Commission. He has drawn my attention to Order XXVI Rule 15 of the CPC. The said rule relates to the appointment of Commissions generally. It relates to the expenses of the Commission to be paid into Court. It runs thus:-

*General provisions*

**15. Expenses of commission to be paid into Court.**

Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to

be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

3. In this case, the issue of jurisdiction has been raised as a preliminary issue by the Defendants. It is, therefore, required to be answered. For that purpose, evidence has to be led. For that purpose, costs will have to be incurred. This would be just as a party incurs costs of the Advocate and Counsel (as also the advice of other Counsel or retired Judges). This is only a step in the proceeding. Like every other step this entails certain expenses. Such expenses are usually met by the parties equally. Since the Defendants have drawn my attention to Order XXVI and it is seen that it is at their instance that the evidence on the preliminary issue has to be recorded, the Defendants themselves must bear the costs of the Commission. However, the benefit of the Commission would accrue to both the parties since both the parties would be entitled to bring forward their case on merits in evidence.

4. Mr. Tulzapurkar on behalf of the Plaintiffs, who are present in Court, upon instructions from the Plaintiffs, states that they shall commence the evidence by cross-examination of the Plaintiffs and pay

the entire costs of the Commission, including fees of the Commissioner (who is also an Advocate of this Court) for the first 5 days of the Commission. Mr.Tulzapurkar contends that thereafter this Court may see as to whether the Commission, which has progressed, could continue and on which terms and upon which relevant factors under the proviso to Rule 4(2) of Order XVIII of the CPC.

5. Under these circumstances, by consent, the Commission shall continue on 26.7.2010 at 5 p.m.
6. The other directions passed in the order dated 13.4.2010 are not modified.

**(SMT.ROSHAN DALVI, J.)**