

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

% **Pronounced on: 29th March, 2022**

+ CM(M)-IPD 1/2022, CM APPL. 4146/2022 (by the petitioner under Section 151 CPC for stay)

PUJA AGGARWAL Petitioner

Through Mr. Abhinay Sharma, Mr. Utsav Trivedi, Ms. Shivani Bhushan & Ms. Manini Roy, Advocates.

versus

PRAVESH NARULA Respondent

Through Mr. Ashok Goel, Mr. Anshul Goel and Mr. Ranjeev Kumar, Advocates.

**CORAM:
HON'BLE MS. JUSTICE ASHA MENON**

JUDGMENT

1. This petition under Article 227 of the Constitution of India has been filed by the defendant before the learned Commercial Court, Central District, Tis Hazari, against its orders dated 15th December, 2021, dismissing the application under Order VII Rule 11 CPC filed by the petitioner/defendant for rejection of the suit as there was no cause of action.

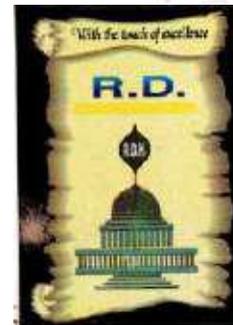
2. The respondent before this Court had filed a suit for permanent injunction to restrain the petitioner/defendant from infringing the

copyright of the respondent/plaintiff with further directions of delivery up, damages and rendition of accounts.

3. The respondent/plaintiff is the proprietor of M/s Capital Enterprises and claimed to be carrying on an old, established and reputed business of manufacturing and trading in socks etc. In his suit he claimed to have adopted the trade mark/logo 'R.D. Special'

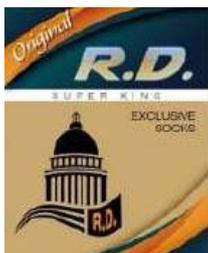


in the year 1994. He applied for registration of the logo under No.4242962 in respect of socks and other goods included in class 25. He



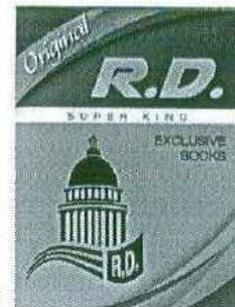
also claimed to have created an artistic packaging in the year 1994 which was an original artwork and thus, he was the owner of the copyright in the same.

4. The suit was filed alleging that in the last week of July, 2021, the respondent/plaintiff came to know that the petitioner/defendant had filed an application for registration of a deceptively similar logo and packaging

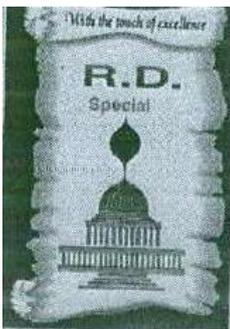


under No.4793702 dated 24th December, 2020 in respect of

socks in class 25 under the Trade Marks Act, 1999, claiming the use of the impugned logo and packaging since 1st January, 2019. Hence, the suit was filed for a decree of perpetual injunction restraining the defendant, their agents, employees, dealers, representatives and all other persons acting on their behalf from reproducing, publishing and/or visually



representing in any manner of the logo/packaging or any other logo/packaging which was deceptively similar or was a substantial reproduction of the respondent's/plaintiff's said packaging



and amounting to infringement of the respondent's/plaintiff's copyright in his artistic work/packaging.



5. Though the petitioner/defendant filed a written statement, she also filed an application under Order VII Rule 11 CPC which has been placed on the record as Annexure P-3. It was submitted that the plaint was liable to be rejected, as it did not disclose any cause of action. Vide the impugned order dated 15th December, 2021, two applications were disposed of, one under Order VII Rule 10 CPC filed by the petitioner/defendant for return of the plaint as the courts in Delhi had no jurisdiction, and another under Order VII Rule 11 CPC, for rejection of the plaint.

6. With regard to the application under Order VII Rule 11 CPC, the learned Trial Court observed that para 18 and para 28 of the plaint were sufficient to show that the cause of action existed for the filing of the suit. It was also noted that the respondent/plaintiff had also pleaded that the petitioner/defendant had been clandestinely selling socks using the impugned logo and packaging. Therefore, the issue of cause of action was a disputed question of fact which could be decided on merits, only after the evidence was led by both the parties. Aggrieved thereby, the petitioner/defendant has filed the instant petition. It is to be noted that the present petition does not question the decision of the learned Trial Court in dismissing the application under Order VII Rule 10 CPC, though in the written submissions, reference has been made to the absence of jurisdiction with the courts at Delhi to deal with the suit by contending that none of the products of the petitioner/defendant were being sold in Delhi.

7. Both sides have filed written submissions alongwith the compilation of judgments they were relying upon.

8. It has been submitted by Mr. Abhinay Sharma, learned counsel for the petitioner/defendant that the learned Trial Court had failed to deal with the contention of the petitioner/defendant that the pleadings and documents of the respondent/plaintiff were contradictory and no relief, as sought in the plaint could be granted. Therefore, it would be grave injustice upon the petitioner/defendant to be subjected to an unwarranted trial. It was submitted that the suit has been camouflaged under the Copyright Act, 1957, which was but an illusionary cause of action.

9. Furthermore, in the Copyright Certificate, the mark was described as 'unpublished', which meant that it had not been communicated to the public in terms of Section 3 of the Copyright Act, 1957. Though there was a reference to a Trade Mark Certificate in entry 14 of the same Certificate, such a trade mark certificate has not been brought on record by respondent/plaintiff. Why the so-called artistic work of the respondent/plaintiff remained unpublished has not been explained in the plaint. It was submitted that even if there was a thematic similarity, that would not entitle the respondent/plaintiff to any injunction.

10. It was further submitted that the documents at page 194 of the e-file established that it was the petitioner/defendant who was the prior user and whose rights were safeguarded under Section 34 of the Trade Marks Act, 1999. Reliance has been placed on the judgment of the Supreme Court in *Dhodha House v. S.K. Maingi*, (2006) 9 SCC 41, to submit that

merely filing an application for registration of a trade mark would not give rise to any cause of action.

11. Reliance has been placed on the judgment of the Supreme Court in *Rajendra Bajoria v. Hemant Kumar Jalan*, 2021 SCC OnLine SC 764, to seek the dismissal of the suit, which being a frivolous one, intermingling the cause of action under the Trade Marks Act and Copyright Act and also claiming passing off, ought to be dismissed at the threshold. It was prayed that the impugned order be set aside and the matter be remanded back to the learned Trial Court for a fresh decision of the application under Order VII Rule 11 in accordance with law.

12. Mr. Ashok Goel, learned counsel for the respondent/plaintiff, submitted that there was no error in the reasoned order of the learned Trial Court. It was submitted that the present petition itself was barred under Section 8 of the Commercial Courts Act, 2015. Further, all arguments on behalf of the petitioner/defendant were on merits of the case, whereas in an application Order VII Rule 11 CPC, the court was required to only consider the disclosure of a cause of action. The Trial Court has held that this was a mixed question of fact and law as it also hinged on questions of prior usage, as claimed by petitioner/defendant. Moreover, the suit was not under the Trade Marks Act, 1999 but was for enforcement of copyright in the artistic work, namely, the label which the petitioner/defendant had copied. Furthermore, it was submitted that under Section 62 of the Copyright Act, 1957, the respondent/plaintiff being the initiator of the suit could file it before the court in whose jurisdiction, he resided or carried on his business. Moreover, there was no confusion in

the pleadings, as no case for passing off or infringement had been pleaded nor any relief in this regard had been sought. Therefore, the filing of the application for registration of a trade mark had no bearing in the present case.

13. I have heard the learned counsel for the parties and have considered the written submissions and the cited judgments.

14. At the outset, the preliminary objection raised by the learned counsel for the respondent/plaintiff may be dealt with, regarding the maintainability of the present petition. The issue has been answered by a Division Bench of this court in ***Black Diamond Trackparts Pvt. Ltd. v. Black Diamond Motors Pvt. Ltd.***, 2021 SCC OnLine Del 3946. In that case, an order of the District Judge of dismissal of an application of the petitioners/defendants under Order VII Rule 11 of the CPC in a commercial suit, was impugned. While dealing with the very question of maintainability of a petition under Article 227 of the Constitution of India in respect of proceedings in a commercial suit before the District Judge, in the light of Section 8 of the Commercial Courts Act, 2015 it was held as under:

“32. We thus hold the petition under Article 227 of the Constitution of India to be maintainable with respect to the order impugned in CM(M) No. 132/2021. However the discretion, whether in the facts and circumstances such petition is to be entertained or not, having under the roster been vested in the Single Judge, we leave it to the Single Judge to exercise such discretion.”

Thus, it is clear that the present petition is maintainable before this court.

15. Next, we come to the scope of Article 227 of the Constitution of India. In numerous decisions, the Supreme Court as well as this court has held that the powers under Article 227 of the Constitution of India are not of the same nature as appellate powers of the High Court. The observations of the Supreme Court in *India Pipe Fitting Co. v. Fakruddin M.A. Baker*, (1977) 4 SCC 587 in this regard are apposite :

“5. The limitation of the High Court while exercising power under Article 227 of the Constitution is well-settled. Power under Article 227 is one of judicial superintendence and cannot be exercised to upset conclusions of facts however erroneous those may be. It is well-settled and perhaps too late in the day to refer to the decision of the Constitution Bench of this Court in Waryam Singh v. Amarnath [AIR 1954 SC 215 : 1954 SCR 565 : 1954 SCJ 290] where the principles have been clearly laid down as follows:

“This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee [AIR 1951 Cal 193] to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

The same view was reiterated by another Constitution Bench of this Court in Nagendra Nath Bora v. Commissioner of Hills Division and Appeals, Assam [AIR 1958 SC 398 : 1958 SCR 1240 : 1958 SCJ 798] . Even recently in BathutmalRaichandOswal v. Laxmibai R. Tarta [(1975) 1 SCC 858] dealing with a litigation between a landlord and tenant under Bombay Rents, Hote'l and Lodging House Rates Control Act, 1947, this Court relying on its earlier decisions observed as follows:

“If an error of fact, even though apparent on the face of the record, cannot be corrected by means of a writ of certiorari it should follow a fortiori that it is not subject to correction by the High Court in the exercise of its jurisdiction under Article 227. The power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal. The High Court cannot in guise of exercising its jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts.”

(emphasis added)

As has been reiterated by the Supreme Court in ***Garment Craft Vs. Prakash Chand Goel*** 2022 SCC OnLine SC 29:-

“18. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary

relief must be exercised to ensure there is no miscarriage of justice.....” **(emphasis added)**

In other words, this Court has to consider whether the impugned order has been passed by the learned Trial Court within the bounds of its authority and whether there was any perversity or unreasonableness in the impugned order resulting in miscarriage of justice.

16. When the court is dealing with an application under Order VII Rule 11 CPC, it is required to look at the averments in the plaint and plaint alone. The documents filed alongwith the plaint can also be considered. However, the stand of the defendant is irrelevant. It has been reiterated in ***Dahiben Vs. Arvinbhai Kalyanji Bhanusali*** (2020) 7 SCC 366:-

“23.11. The test for exercising the power under Order 7 Rule 11 is that if the averments made in the plaint are taken in entirety, in conjunction with the documents relied upon, would the same result in a decree being passed. This test was laid down in Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I [Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I, (2004) 9 SCC 512] which reads as : (SCC p. 562, para 139)

“139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose, the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed.”

23.12. In Hardesh Ores (P) Ltd. v. Hede & Co. [Hardesh Ores (P) Ltd. v. Hede & Co., (2007) 5 SCC 614] the Court further held that it is not permissible to cull out a sentence or a passage, and to read it in isolation. It is the substance, and

not merely the form, which has to be looked into. The plaint has to be construed as it stands, without addition or subtraction of words. If the allegations in the plaint prima facie show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact. D. Ramachandran v. R.V. Janakiraman [D. Ramachandran v. R.V. Janakiraman, (1999) 3 SCC 267; See also Vijay Pratap Singh v. Dukh Haran Nath Singh, AIR 1962 SC 941]

17. Order VII Rule 11(a) CPC deals with a situation where the plaint does not disclose a cause of action. What is a cause of action has been defined in *Swamy Atmananda Vs. Sri Ramakrishna Tapovanam* (2005) 10 SCC 51 and has been reiterated in *Church of Christ Charitable Trust and Educational Charitable Society v. Ponniamman Educational Trust* (2012) 8 SCC 706, as being a bundle of facts that are material and relevant for the decision of the case and which are required to be proved by the plaintiff to be entitled for reliefs claimed in the suit. In *T. Arivandandam Vs. T.V. Satyapal* (1977) 4 SCC 467, trial courts were advised to not allow clever drafting to raise an illusion of a cause of action. In the words of the Supreme Court—

“5. ... The learned Munsif must remember that if on a meaningful—not formal—reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down

at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them....”

Thus, the Trial Court would be justified in putting an end to vexatious, frivolous, meaningless and sham litigation. But this power may be exercised only where the plaint clearly discloses no cause of action or any of the other grounds contained in Order VII Rule 11 CPC are made out and not otherwise. This is so as the consequences of such exercise of power are immediate and decisive and shuts the door of the court firmly upon a plaintiff who ostensibly approached it for legal remedy.

18. That brings us to the facts of the present case. A scrutiny of the plaint would show that the respondent/plaintiff has averred that he has been using the logo and name “R.D. SPECIAL” in a particular packaging since long and in the last week of July, 2021, he had come across an application of the petitioner/defendant for registration of the trade mark “R.D.”, whereupon, he immediately moved the court to prevent the use of his artistic work of a building which has been copied by the petitioner/defendant. The capital letters R.D. have also been used in a similar fashion. It is to protect his interest in his artistic work, that the suit has been filed. It would be the defence of the petitioner/defendant that she has been in prior use, that the copying of a theme would not amount to infringement and that the artistic work itself has not been published. These pleas would be an answer to the suit but not indicative of an absence of cause of action. There can be no confusion between the existence of a cause of action and the absence of merit in the suit.

Whether the respondent/plaintiff would ultimately succeed or not, cannot dictate the existence of a cause of action.

19. In fact from the averments made in the application under Order VII Rule 11(a) CPC filed by the petitioner/defendant, (placed on the record as Annexure P-3), it is more than apparent that she has pleaded her defence to seek a dismissal of the suit, rather than a rejection of the same. When the pleas raised by the petitioner/defendant to repel the claims of the respondent/plaintiff cannot be considered at this stage, the learned Trial Court was right in observing that the questions raised by the petitioner/defendant being one of facts, would require trial. An appropriate issue regarding the existence and non-existence of the cause of action, amongst other issues can also be framed to be disposed of together, after evidence is recorded.

20. This court finds no error or perversity in the decision of the learned Trial Court, calling for any interference in the exercise of powers under Article 227 of the Constitution of India.

21. The petition being devoid of merits is dismissed alongwith the pending application.

22. Nothing contained in this order shall tantamount to an opinion on the merits of the case.

23. The judgment be uploaded on the website forthwith.

(ASHA MENON)
JUDGE

MARCH 29, 2022

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