

(2020) 09 TEL CK 0006

High Court For The State Of Telangana:: At Hyderabad

Case No: Civil Revision Petition No. 894, 895, 897 Of 2020

MS Industries & Spirits
(P) Ltd.

APPELLANT

Vs

M/s. Allied Blenders
And Distillers Pvt Ltd.

RESPONDENT

Date of Decision: Sept. 1, 2020

Acts Referred:

Copyright Act, 1957 " Section 2(c)#Code Of Civil Procedure, 1908 " Section 141, Order I Rule 10, Order 6 Rule 17, Order 16 Rule 1, Order 22 Rule 3, Order 39 Rule 1, Order 39 Rule 2

Citation: (2020) 09 TEL CK 0006

Hon'ble Judges: M.S. Ramachandra Rao, J

Bench: Single Bench

Advocate: S. Ravi, M. Naga Deepak, Sunil B. Ganu

Final Decision: Allowed

Judgement

1. These three Revisions arise out of the same suit between the same parties and are therefore being disposed of by this common order.

2. The petitioner in the Revision Petitions is defendant in O.S.No.106 of 2020 on the file of XI Additional Chief Judge, City Civil Court at

Hyderabad.

THE CASE OF THE RESPONDENT/PLAINTIFF IN THE SUIT

(iii) The respondent herein had filed the said suit against the petitioner contending that it is in the business of manufacturing and marketing of

alcoholic beverages including Indian Made Foreign Liquor (IMFL); that it sells alcoholic beverages under various distinctive trade marks and

labels, such as OFFICER'S CHOICE, OFFICER'S CHOICE BLUE, OFFICER'S CHOICE BLACK,

etc; that it acquired the said OFFICER'S CHOICE trade mark under a deed of assignment dt.26.02.1991 from its predecessor;

that it has been using the same since 1988; that its products using the said trade mark have acquired reputation and goodwill as a result of

their excellent quality, distinctive packaging etc.; that it has also secured registration of the trade mark OFFICER'S CHOICE and

its variants as mentioned in para-9 of the plaint not only in English but also in other languages as well which are still subsisting and it has

proprietary rights in the said marks; that the label OFFICER'S CHOICE used by it has a distinctive design, colour scheme, font,

layout and getup along with the epaulette as its trade dresses/labels which constitute an original artistic work within the meaning of

Section 2(c) of the Copyright Act, 1957 and that it is the owner of the said Copyright; that it has also registered its labels mentioned in para-11

of the plaint under the Copyright Act, 1957; that one of the labels contains a combination of red, white and gold/yellow.

4. It is contended by the respondent that the petitioner/defendant is also claiming to be a manufacturer and marketer of liquor brands and

products in the States of Telangana and Andhra Pradesh; that the petitioner is using a label "Manjeera Classic No.1 Whisky,

"Manjeera Classic Reserve Whisky and "Manjeera Special Reserve Whisky in these States which are similar and identical to the

respondent's OFFICER'S CHOICE trade mark, trade dress and labels; and this conduct of the petitioner is dishonest and in

bad faith and proves its intention to ride on the goodwill and reputation enjoyed by the respondent; that the petitioner's labels are

deceptively and confusingly similar to the respondent's labels and violate the statutory rights and common law rights of the respondent.

5. Therefore the respondent sought perpetual injunctions (a) restraining the petitioner from infringing its registered trademark

“OFFICER” and “S CHOICE” and its variants, (b) restraining the petitioner from infringing its copyright; (c) restraining the petitioner from

manufacturing, selling, exporting etc with the labels “Manjeera

Classic” and “Manjeera Special” and from doing anything which is likely to cause confusion or deception leading to “passing off”,

of the petitioner’s goods business as those of the respondent, damages etc.

THE WRITTEN STATEMENT OF THE PETITIONER

6. Written statement was filed by petitioner denying the said averments and justifying the use by it in the existing form of the marks and labels

“Manjeera Classic” and “Manjeera Special”. It is also contended that there is no similarity with the respondent’s mark or labels.

IA No.s 401,402 and 403 of 2020 filed under or.39 rule 1 and 2 CPC

7. Pending suit, I.A.No.401 of 2020 was filed by the respondent under Order 39 Rules 1 and 2 C.P.C. for a temporary injunction restraining

the petitioner from infringing its trade mark “OFFICER” and “S CHOICE”; I.A.No.402 of 2020 was filed under Order 39 Rules 1 and

2. C.P.C. by the respondent to restrain the petitioner from “passing off” of its goods and business as that of the respondent; and

I.A.No.403 of 2020 was filed under Order 39 Rules 1 and 2 C.P.C. to restrain the petitioner from infringing the respondent’s copyright.

8. Counter-affidavits had been filed by the petitioner on 6.07.2020 opposing the said applications.

9. Rejoinders to the counter-affidavits were also filed by the respondent on 13.07.2020.

10. Written submissions were filed by the respondent on (21) 07.2020 in the three I.As.

I.A.Nos.489, 490 and 490 of 2020

(k) On 07.08.2020, the petitioner filed I.A.No.489 of 2020 in I.A.No.401 of 2020, I.A.No.490 of 2020 in I.A.No.402 of 2020 and I.A.No.491

of 2020 in I.A.No.403 of 2020 under Order VI Rule 17 C.P.C. contending that due to inadvertence a wrong reference was made to the

paragraph Numbers in I.A.Nos.401, 402 and 403 of 2020 while filing counter-affidavits therein; these amendments are clerical in nature and

typographical errors; and it is necessary to permit the petitioner to amend the incorrectly referred paragraph numbers in the said counter-

affidavits.

COUNTER-AFFIDAVITS FILED BY RESPONDENTS.

12. Counter-affidavits were filed by the respondent to I.A.Nos.489, 490. and 491 of 2020 opposing the said applications.

13. It is contended that the said applications were not maintainable and that the petitioner cannot invoke Order VI Rule 17 C.P.C. to amend

I.A.Nos.401, 402 and 403 of 2020 since Order VI Rule 17 C.P.C. applies only to
Pleadings in the suit i.e. the plaint and the written

statement only and will not apply to Interlocutory Applications.

14. It is also alleged that there were certain admissions made in the counter-affidavits filed by the petitioner in I.A.Nos.401, 402 and 403 of

2020 and that the filing of the amendment applications is an ingenious device to withdraw the said admissions by a back door method. It is

stated that filing of these applications is an abuse of process of law.

THE IMPUGNED ORDERS OF THE COURT BELOW

- By separate orders dt.07.08.2020, the Court below dismissed I.A.Nos.489, 490 and 491 of 2020.

- It held that an affidavit is a solemn declaration of a party which is attested by an Advocate and therefore it cannot be permitted to be

amended invoking Order VI Rule 17 C.P.C. which applies to pleadings.

- It also held that subsequent to filing of counter-affidavit by the petitioner, the respondent filed reply affidavits also apart from written

arguments taking a plea that there was failure on the part of the petitioner to deny that the respondent is a prior user of the trademark in the

market or the reputation acquired by the respondent or the validity of trademark registrations, and the contention of the petitioner that there

were typographical errors in the preparation of the counter-affidavit is not acceptable.

- The Court below relied on A.Govindasamy and another Vs. S.Saravanakumar (2014) 2 MWN (Civil) 378 and Jai Bharat Plywood and

Hardware, Hyderabad Vs. Vinod (2010) 2 ALD 702.

The present CRPs (19) Challenging the said orders passed by the Court below refusing to permit amendments to I.A.Nos.401, 402 and 403 of

2020 by dismissing I.A.Nos.489, 490 and 491 of 2020, the present C.R.Ps. are filed by the petitioner.

20. Heard Sri S.Ravi, learned Senior Counsel for M/s.R.S.Associates and Sri M.Naga Deepak, counsel for petitioner and Sri Sunil B.Ganu,

learned counsel for respondent.

Contentions of counsel for the parties

21. Learned counsel for petitioner contended that the Court below erred in taking the view that there cannot be an amendment to affidavits

filed in Interlocutory Applications.

He also contended that there was never any admission by the petitioner of any of the averments made either in the plaint or in the interim

injunction applications I.A.Nos.401, 402 and 403 of 2020.

According to him, the petitioners, while drafting counter-affidavits in the I.A.Nos.401, 402 and 403 of 2020, referred to the paragraph numbers

given in the plaint by the respondent on account of an inadvertent mistake instead of referred to the paragraph numbers given in the affidavits

filed in I.A.Nos.401, 402 and 403 of 2020 and grave prejudice would be caused to the petitioner, if it is not permitted to amend the said

counter-affidavits.

22 Learned counsel for respondent supported the order passed by the Court below.

THE CONSIDERATION BY THE COURT.

23. I have noted the contentions of the counsel for parties.

24. I shall first deal with the contention of the counsel for the respondent that affidavits filed in Interlocutory Applications cannot be amended

invoking Order VI Rule 17 C.P.C.

25. No doubt, Order VI Rule 17 C.P.C. refers to amendment to

pleadings. The term "pleadings" normally refers to the

plaint and the written statement in a suit. Technically, an affidavit filed in an Interlocutory Application might not amount to a plaint or a written

statement.

26. But we have to take note of Section 141 C.P.C. which states:

"141. Miscellaneous proceedings :- The procedure provided in this Code in regard to suit shall be followed, as far as it can be made

applicable, in all proceedings in any Court of civil jurisdiction.

Explanation:- "Suit" means

27. An Interlocutory Application is a miscellaneous proceeding and Section 141 C.P.C. permits the procedure in regard to suit to be

applied to such interlocutory applications as well.

28. In *Gunnam Venkateswara Rao Vs. Vetcha Vanaja Kumari and others* 2004 (4) ALD 786, the sole plaintiff in a suit for recovery of

money had died pending the suit.

The deceased plaintiff had 3 sons and 3 daughters. One daughter Vetcha Vanaja Kumari (the respondent in the Revision) filed I.A. under

Order 22 Rule 3 C.P.C. to come on record as his legal representative on the basis of a Will said to have been executed in her favour by the

deceased.

The petitioner in the Revision opposed the said application contending that she is not the sole legal heir and there were three other brothers

and two sisters of the respondent, who were also the legal heirs.

The respondent Vanaja Kumari then filed I.A.No.847 of 2001 to implead her three brothers and sisters in the earlier I.A. filed under Order

XXII Rule 3 C.P.C. by her.

This application was allowed by the trial Court.

The said order of the trial Court was challenged in Revision before the Andhra Pradesh High Court.

A contention was advanced by the petitioner that Order I Rule 10 C.P.C. is applicable only to suits and not to Miscellaneous Applications like

applications filed under Order XXII Rule 3 C.P.C.

This contention was rejected by the High Court relying on Section 141 C.P.C. and holding that the procedure provided in relation to suits

equally applies to miscellaneous proceedings as well. The order passed by the trial Court impleading the three brothers and two sisters of the

respondent was upheld and the revision was dismissed .

29. In Yale Malleshappa and others Vs. Chinna Hotur Bale Eramma 2004(6) ALD 285, the Andhra Pradesh High Court held that Order XVI

Rule 1. C.P.C. which deals with issuance of summons to a witness at the instance of a party to a suit equally applies to applications filed

under Order 39 Rule 1 and 2 C.P.C. in a suit. There also Section 141 C.P.C. was invoked and it was held that the procedure that is adopted in

a regular suit can also be applied to Interlocutory matters.

30 Therefore as a matter of principle, in view of Section 141 C.P.C., it cannot be said that Order VI Rule 17 C.P.C. which applies normally to

suits, cannot apply to Interlocutory Applications such as Order 39 Rules 1 and 2 C.P.C.

31. No doubt in the decision in A.Govindasamy (1 supra), an observation is made that a solemn declaration made in an affidavit, which was

also attested by an Advocate cannot be permitted to amended and that only an additional affidavit can be permitted to be filed to make further

averments.

32. But no precedent of any High Court is cited by the learned Judge to take the said view.

When the pleadings in the main proceeding i.e. a suit can be amended, I do not see any reason why an affidavit filed in an Interlocutory

Application in a suit, cannot be amended.

When such amendment is being made through a Court order after obtaining permission of the Court, any technical view that solemn

declaration of a party contained in an affidavit being prohibited from amendment, cannot be taken.

Once amendment is permitted, the party who has secured permission for the amendment, would any way file a fresh affidavit incorporating

the amendments with a similar solemn declaration as was given in the original affidavit and the amended affidavit would also be attested by an

Advocate.

33. Therefore I do not agree with the view taken in the said decision by the Madras High Court. Moreover, the said decision is only a

persuasive value and is not binding on this Court.

34. Coming to the other plea about alleged admissions made by the petitioner in the counter-affidavits filed earlier in I.A.Nos.401, 402 and 403

of 2020 being taken away if the amendments as sought by the petitioner are permitted is concerned, I do not agree with the said contention of

the counsel for the respondent.

35. I have perused the contents of the written statement and there is no admission by the petitioner of the nature claimed by the respondent.

36. No inference of any admission by the petitioner of the contents of the affidavit filed along with I.A.Nos.401, 402 and 403 of 2020 can be

drawn merely because while drafting the counter-affidavits to the said I.As, by oversight the petitioner referred to the corresponding

paragraphs in the plaint instead of the affidavits filed in the said I.As. Drawing such an inference of admission by the petitioner by the trial

Court, in my opinion, is clearly perverse and unwarranted in the facts and circumstances of the case.

37. Accordingly, the C.R.Ps. are allowed; the orders dt.07.08.2020 in I.A.Nos.489, 490 and 491 of 2020 of the XI Additional Chief Judge,

City Civil Court at Hyderabad are set aside; and the said I.As. are allowed. The Court below shall proceed to decide I.A.Nos.401, (cdii) and

403 of 2020 after permitting the petitioner to file amended counter-affidavits in the said I.As. within two (02) weeks from the date of receipt

of copy of this order. No costs.

38. As a sequel, miscellaneous petitions pending, if any, shall stand closed.