

(2013) 07 CAL CK 0089

Calcutta High Court

Case No: G.A. No. 1278 of 2013 and C.S. No. 28 of 2013

Prapti Fashions Private Limited
and Another

APPELLANT

Vs

Manoj Kumar Gupta

RESPONDENT

Date of Decision: July 5, 2013

Citation: (2014) 2 CALLT 129 : (2013) 3 CALLT 612 : (2013) 4 CHN 366 : (2013) 55 PTC 234 :
(2013) 3 WBLR 641

Hon'ble Judges: Nadira Patherya, J

Bench: Single Bench

Advocate: Ranjan Bachawat, Mr. Rudraman Bhattacharya, Mr. Prithwiraj Sinha, Mr. Siddhartha Banerjee, Mr. Victor Dutta and Mr. Soumya Sen, for the Appellant; Sayan Roy Chowdhury, Anirudh Poddar, A. Mondal, Riti Basil and Mr. Arindom Bit, for the Respondent

Judgement

Nadira Patherya, J.

In a suit for a decree of permanent injunction restraining the respondents from using the tradename Prapti Fashions, G.A. 396 of 2013 has been filed for interim relief. The said application has been opposed by the respondent on the ground that the suit is barred by the provisions of the CPC and therefore be dismissed. For such purposes G.A. 1278 of 2013 has been filed. It has been contended by counsel for the defendant that prior to the instant suit proceeding was initiated by the plaintiff herein before the 3rd Court, City Civil Court, Calcutta being T.S. 122 of 2012 praying for a declaration that it was not entitled to use the trademark Prapti Fashions or the tradename Prapti. In fact the reliefs sought in T.S. 122 of 2012 was similar to the reliefs sought in the instant suit. Subsequently Title suit No. 122 of 2012 was abandoned and the instant suit filed. After the filing of the instant suit Title suit No. 122 of 2012 was withdrawn without obtaining leave to institute a fresh suit. Therefore the instant suit is hit by Order 23 Rule 1(4) of the Code of Civil Procedure.

2. Reliance is placed on [Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others](#), [Hanuman Singh and Others Vs. Board of Revenue and Others](#), and [Hari Ram Vs. Lichmaniya and Others](#), for the proposition that without taking leave under Order 23 Rule 1(4) CPC a fresh suit cannot be filed. The notice on which Title suit No. 122 of 2012 was filed forms the basis also of the instant suit. No separate or independent notice has been given for filing the suit in the High Court.

3. In the plaint filed in C.S. 28 of 2013 the plaintiffs have categorically stated that there is every possibility of T.S. 122 of 2012 being decreed in their favour and against the defendant. Therefore there was no reason to withdraw the said suit. The cause of action was against Prapti Fashions and such cause of action continues but as C.S. 28 of 2013 has been filed without leave renders the same bad. This however will not prevent the plaintiffs from filing another suit in this High Court. The instant suit is hit by Order 23 Rule 1(4) CPC and as forum or bench hunting has been deprecated the instant suit be dismissed.

4. The decision in the Duck Back case which has permitted filing of multiple suits for every infringement as it gives rise to a fresh cause of action was initially dismissed. Prapti is the name of the daughter of the defendant and therefore it is used as a tradename.

5. Counsel for the plaintiffs submits that the plaintiff is registered in the tradename under Clause 25 of Schedule IX. The plaintiff No. 1 is also a prior user and the respondent with knowledge of such registration has adopted the business name Prapti and therefore the dishonest intention of the defendant is evident. By virtue of Section 2(m) and Section 28 of the 1999 Act the plaintiffs are entitled to use the trade word and trademark "Prapti" as a business name. The defendant was put on notice in September, 2011 and inspite thereof bills and stickers in the name of Prapti Fashions has been used by the defendant and orders be passed as the plaintiff has suffered irreparable loss due to the acts of the respondent.

6. Order 23 Rule 1 CPC does not apply in case of pending suits. There is no bar to filing of a suit before withdrawal. The bar under Order 23 Rule 1(4) applies to withdrawal before filing. In a case where a suit is pending, Section 10 and Section 11 CPC will apply. As held in [M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another](#), a recurring cause of action will permit filing of a subsequent suit, the instant suit has been filed as a new cause of action arose when new outlets were opened by the defendant.

7. The plaint is to be taken as true and correct and withdrawal of a suit after filing a fresh suit is not covered by Order 23 Rule 1(4). Order 23 only applies to withdrawal prior to filing of a suit, therefore the Order 7 Rule 11 application ought to fail. As a recurring cause of action gives rise to multiple suits the proposition laid down in [Hari Ram Vs. Lichmaniya and Others](#), will not apply [Sarguja Transport Service Vs.](#)

[State Transport Appellate Tribunal, M.P., Gwalior and Others,](#) and [Hanuman Singh and Others Vs. Board of Revenue and Others,](#) are distinguishable as both were cases of writ petitions. In view of 40 PTC 428 an order of injunction be passed.

8. Having considered the submissions of the parties the plaintiff seeks an order of injunction restraining the defendant from using the tradename Prapti or the mark Prapti in which it is registered. Admittedly prior to C.S. 28 of 2013 filed in this Court T.S. 122 of 2012 was filed before the City Civil Court at Calcutta. Before the City Civil Court the plaintiff sought for a declaration that the defendant was not entitled to use the tradename Prapti Fashions or the trademark Prapti and also sought a decree for permanent injunction restraining the defendant from using the said tradename and mark. Being unsuccessful in getting an order of injunction on an application filed under Order 39 Rules 1 and 2 CPC an appeal was filed and order passed therein. The said application was pending disposal and during such pendency C.S. 28 of 2013 was filed for the same reliefs. This will appear from the reliefs sought in T.S. 122 of 2012 and C.S. 28 of 2013 which for convenience sake is set out hereinbelow:

Reliefs in T.S. 122 of 2012

- a) Declaration that the defendant whether by himself or by his employees, servants, agents or otherwise is not entitled to use the tradename Prapti Fashions and/or the tradename/trademark PRAPTI and/or any trademark/tradename deceptively similar thereto or any imitation thereof in respect of garments;
- b) Decree of permanent injunction restraining the defendant, whether by himself, his partners, employees, servants, agents or otherwise from using or causing to be used and/or enabling others to use the tradename PRAPTI and/or the trademark PRAPTI and/or any trademark/tradename or any other trademark/tradename which is identical to the plaintiffs corporate name PRAPTI FASHIONS and the trademark/tradename PRAPTI and/or any other trademark/tradename similar thereto;
- c) Decree of permanent injunction restraining the defendant whether by themselves, their partners, employees, servants, agents, or otherwise from passing off the goods under the tradename/trademark PRAPTI as that of the plaintiff under the trademark PRAPTI and/or any other trademark/tradename similar thereto;
- d) Preliminary form for accounts of all profits made by the defendants from the sale of goods under the tradename PRAPTI FASHIONS and/or trademark PRAPTI;
- e) An enquiry into the damages suffered by the plaintiff and a decree for such sum as may be found due upon such enquiry;
- f) Declaration that the defendants be directed to produce on oath all articles bearing the tradename/trademark PRAPTI FASHIONS/PRAPTI in violation of the plaintiffs' property rights for destruction;

g) decree of Rs. 5,000;

h) attachment;

i) receiver;

j) injunction;

k) costs.

Reliefs in C.S. 28 of 2013

a) Decree of permanent injunction restraining the defendant whether by himself, his partners, employees, servants, agents or otherwise from using the tradename PRAPTI FASHION for his shops at Satyanarayan Park A.C. Market, Shop No. 101, Upper Basement, Kolkata- 700007, Satyanarayan Park A.C. Market Shop No. 25/45, Upper Basement, Kolkata-700007, Shops No. 45 & 46, Satyanarayan A.C. Market, Kalakar Street, Kolkata-700007 and 29/A, Sir Hariram Goenka Street (Banstala), Burrabazar, Kolkata-700007 and 7 No. Hardatt Rai Chamaria Road, (near Bansal Nursing Home), Howrah-711101 and/or at any other place having tradename identical and/or deceptively similar thereto;

b) Decree of permanent injunction restraining the defendant whether by himself, his partners, employees, servants, agents or otherwise from infringing the registered trademark No. 1015837 being "PRAPTI COLLECTIONS" (LABEL) by using the tradename/trademark PRAPTI FASHIONS and/or any other trademark and tradename similar thereto;

c) Decree of permanent injunction restraining the defendant whether by himself, his partners, employees, servants, agents or otherwise from passing off the goods under the tradename/trademark PRAPTI as that of the plaintiffs under the trademark PRAPTI and/or any other trademark/tradename similar thereto;

d) Preliminary form for accounts of all profits made by the defendant from the sale of goods under the tradename PRAPTI FASHIONS and/or trademark PRAPTI;

e) An enquiry into the damages suffered by the plaintiffs and a decree for such sum as may be found due upon such enquiry;

f) Declaration that the defendant whether by himself or by his employees, servants, agents or otherwise is not entitled to use the tradename Prapti Fashions and/or the tradename/trademark PRAPTI and/or any trademark/tradename deceptively similar thereto or any imitation thereof in respect of garments;

g) Decree of permanent injunction restraining the defendant, whether by himself, his partners, employees, servants, agents or otherwise from using or causing to be used and/or enabling others to use the tradename PRAPTI and/or the trademark PRAPTI and/or any trademark/tradename or any other trademark/tradename which is identical to the plaintiff No. 1's corporate name PRAPTI FASHIONS and the

trademark/tradename PRAPTI and/or any other trademark/tradename similar thereto;

h) Declaration that the defendant be directed to produce on oath all articles bearing the tradename/trademark PRAPTI FASHIONS/PRAPTI in violation of the plaintiffs' property rights for destruction;

i) decree of damages of Rs. 11,00,000;

j) attachment;

k) receiver;

l) injunction;

m) costs;

n) Such further or other relief or reliefs as to this Hon'ble High Court may deem fit and proper in the interest of justice.

9. On a close scrutiny it will be seen that the reliefs sought is same in both the suits and all that has been done is to re-arrange the prayers. It is only in respect of the assessed damage that the amount in the High Court suit has been increased to Rs. 11 lacs as against Rs. 5,000/- in T.S. 122 of 2012.

10. Although C.S. 28 of 2013 was filed before the withdrawal of T.S. 122 of 2012 but the said amounted to abandonment of claim by the plaintiff in T.S. 122 of 2012. Order 23 Rule 1(4) postulates that where a plaintiff abandons a suit or part of claim or withdraws from a suit without permission with liberty to institute a fresh suit as in respect of the subject matter of such suit he shall be precluded from instituting any fresh suit in respect of such subject matter or claim.

11. In the instant case by filing C.S. 23 of 2013 the plaintiff has abandoned its claim in T.S. 122 of 2012 and if liberty was taken to institute a fresh suit, C.S. 28 of 2013 may have been saved but the plaintiff not only did not take any leave but abandoned its claim in T.S. 122 of 2012 and withdrew the suit without such leave. Therefore C.S. 28 of 2013 is hit by Order 23 Rule 1(4) CPC.

12. In [Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others](#), the principle underlying Order 23 Rule 1 has been discussed and it has been held that when once a plaintiff institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file a fresh suit. This is based on public policy and not on res judicata and also to prevent the abuse of process of Court.

13. Although [Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others](#), was a case of writ petition but it is only after discussing the

principle underlying Order 23 Rule 1 CPC it has been applied to writ petition. Therefore although the plaintiff sought to distinguish the said decision on the ground that it was a case of writ petition the same is not germane.

14. On the contrary the facts in [Hari Ram Vs. Lichmaniya and Others](#), was similar to the case in hand. In the reported decision also the prior suit was withdrawn after the second suit was instituted without taking permission and after discussing Sections 10, 11 and 12 so also Order 2 Rules 1 and 2 CPC and other relevant provisions it was held that the fundamental aim and object is to avoid multiple suits founded on same cause of action or may be relating to same subject matter but a bar has been imposed against initiation of a fresh suit without permission taken. In the instant case also the plaintiff seeks to reagitate the same cause of action for which he had approached the City Civil Court and once the suit filed in the City Civil Court was unconditionally withdrawn, his claim and all his rights was lost and therefore no scope was left to reagitate the subject matter of the first suit in the second suit.

15. Paragraph 25 of the said reported decision is set out hereinbelow:

It is immaterial whether plaintiff files another suit with respect to the subject-matter against the same party during the pendency of his earlier suit or after withdrawal of the earlier suit without leave of the Court to file fresh suit, consequence is the same and i.e., abandonment of his claim with statutory restriction against second suit as provided in sub-rule (4) of R. 1 O. 23 CPC.

16. In view of [Hari Ram Vs. Lichmaniya and Others](#), succeeds and C.S. 28 of 2013 is dismissed as barred by law.

17. According to counsel for the plaintiff the only reason for instituting C.S. 28 of 2013 was the opening of new outlets by the defendant which was after filing of T.S. 122 of 2012. The reliefs sought in T.S. 122 of 2012 would have covered the subsequent outlets too, as it would be an order in respect of the tradename and mark and would be applicable to all the outlets of the defendant. Therefore this can be no reason for filing of the second suit.

18. In C.S. 28 of 2013 the plaintiff is pursuing the abandoned claim and [M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another](#), (Duck Back's Case) is distinguishable on facts as it was a case where a suit had been dismissed on the ground that there was no infringement of the plaintiff's trademark by the defendant and thereafter a new cause of action arose and the suit was filed, but such is not the case here.

19. 40 PTC 428 relied on by the plaintiffs will not apply in the facts of this case. In view of the aforesaid G.A. 1278 of 2013 succeeds and C.S. 28 of 2013 is dismissed.