

(2007) 08 DEL CK 0287

Delhi High Court

Case No: IA No. 4325 of 2006 in CS (OS) No. 1230 of 2002

Godrej Sara Lee Ltd.

APPELLANT

Vs

Karamchand Appliances (P) Ltd.
and Others

RESPONDENT

Date of Decision: Aug. 13, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 6 Rule 17

Citation: (2007) 35 PTC 341

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: Manmohan Singh, N. Rai and Vishal Jain, for the Appellant; Pratibha M. Singh, for the Respondent

Final Decision: Dismissed

Judgement

Shiv Narayan Dhingra, J.

This application has been made by the plaintiff for amendment of the suit. The plaintiff wants to add paragraphs 4(a) and 24(a) to the suit so as to bring on record that the plaintiff was registered proprietor of "JUMBO GOLD" under Trade Mark and the Registration Certificate was issued to the plaintiff on 8.10.2003. The plaintiff also wanted to amend the prayer clause that the defendants and its agents be restrained from using the trade mark JUMBO or any other trade mark deceptively similar to the registered trade mark of the plaintiff namely "JUMBO GOLD".

2. The application is opposed by the respondent/defendant. The plea of the defendant is that the suit of the plaintiff was filed alleging that the plaintiff was the owner of trade mark "JUMBO". This contention of the plaintiff was contested by the defendant in the written statement on the ground that word "JUMBO" was being used by many manufacturers of mosquito coil, mosquito repellent liquids and by other product manufacturers for a packing containing large quantity of product.

"JUMBO" is normally used in concern with the economy or family packs of the product showing that the quantity was more than ordinary pack. The defendant placed on record a number of packings of different products where the word "JUMBO" has been used to denote the larger packing. It is also submitted that the plaintiff had made an application with the Trade Mark Registrar for registration of word "JUMBO" as his trade mark to which opposition was filed by the defendant and the word "JUMBO" and no registration of this trade mark has been done. The plaintiff surreptitiously obtained registration of the trade mark "JUMBO GOLD" without disclosing the pendency of the present suit. It is also submitted that the suit in the present case was filed in August 2002 and the written statement to the suit was filed in October 2002. Thereafter, issues were framed in the case on 13th September 2005 and the case proceeded for trial thereafter. The plaintiff applied for trade mark JUMBO GOLD on 8.10.2003 i.e. after the filing of the suit and written statement. The application filed by the plaintiff for amendment of the suit was not maintainable since there was no dispute before the Court in respect of the trade mark "JUMBO GOLD" of which registration has been obtained by the plaintiff and the dispute was only about the word "JUMBO".

3. Counsel for the plaintiff submitted that the averments made by the defendant were false. The plaintiff got trade mark "JUMBO GOLD" published in Trade Mark Journal. No opposition was given by the defendant to this trade mark. The registration of the word "JUMBO GOLD" as trade mark gives a right to the plaintiff to use the word "JUMBO" either separately or jointly with "GOLD".

4. The plaintiff relied upon [Rajesh Kumar Aggarwal and Others Vs. K.K. Modi and Others](#), and [Lakha Ram Sharma Vs. Balar Marketing Pvt. Ltd.](#), Lakha Ram Sharma v. Balar Marketing Pvt Ltd. In Rajesh Kumar Aggarwal's case the Supreme Court observed as under:

15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit

cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judge of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

5. After amendment of CPC in 1976, the amendment can be allowed by the Court after commencing of the trial only if the Court comes to the conclusion that despite due diligence, the party could not have raised the matter before commencement of the trial. In the present case, the plaintiff did not file the suit in respect of trade mark "JUMBO GOLD". The suit of plaintiff is in respect of trade mark "JUMBO". "JUMBO GOLD" and "JUMBO" are two different trade marks for which the plaintiff made separate applications. They were not considered by the plaintiff as same trade mark. Neither the plaintiff raised this issue before the Court that "JUMBO GOLD" and "JUMBO" were identical same trade mark over which the plaintiff had ownership. The plaintiff applied for "JUMBO GOLD" trade mark during the pendency of the suit in October 2003. If he had any cause of action in respect of "JUMBO GOLD" trade mark, he was free to file a fresh suit. The present suit is not in respect of "JUMBO GOLD" but only in respect of "JUMBO" for which the registration has not been granted to the plaintiff despite his application being prior in time to the application for "JUMBO GOLD".

6. The plaintiff had also issued a caution notice in the newspaper claiming ownership over Trade Mark "JUMBO". On an application made by the defendant under Order 39 Rule 1 and 2, the plaintiff was restrained by this Court from issuing such caution notices claiming ownership of trade mark "JUMBO". In view of the fact that the amendment is sought by the plaintiff in respect of altogether new trade mark and the plaintiff has not sought amendment in the body of the plaint to the effect that the JUMBO and JUMBO GOLD are one and the same thing, the application is liable to be dismissed. At no point of time prior to filing of the registration application for "JUMBO GOLD", plaintiff used trade mark "JUMBO GOLD". I consider that the present application under Order 6 Rule 17 CPC is nothing but a gross misuse of the provisions of law with an effort to sneak a new trade mark in the suit for which there are no pleadings at all. It is well settled that in case the plaintiff had to establish a case in respect of trade mark, plaintiff has to plead ownership of the

trade mark at the time of filing plaint and has to prove his ownership during evidence. If the plaintiff has not laid claim over JUMBO GOLD in the plaint and has laid claim only over JUMBO for which no registration has been granted to the plaintiff despite application, the plaintiff cannot be allowed to amend the suit on the ground that the plaintiff has been granted registration in respect of JUMBO GOLD which also contains word "JUMBO".

7. I find no force in the application. The application is dismissed with cost of Rs. 10,000/-.

CS (OS) No. 1230/2002

List the suit before regular Bench on 27.8.2007, subject to orders of Hon"ble the Chief Justice.