SUPREME COURT OF INDIA

Shalimar Chemicals Works Ltd.

Vs.

Surendra Oil & Dal Mills (Refineries)

C.A.No.52 of 2005

(Aftab Alam and R.M. Lodha JJ.)

27.08.2010

JUDGEMENT

Aftab Alam, J.

1. This is the plaintiff's appeal arising from a suit for permanent injunction based on allegations of infringement of its registered trade mark.

> "The appellant is a company incorporated and registered under the Companies Act. The case of the appellant is that from the year 1945 it is engaged in the business of manufacture and sale of high grade coconut oil used for cooking as well as manufacturing of various toilet products under the distinctive trade mark "Shalimar". The appellant claims to be the registered owner of the trade mark "Shalimar" in Class 03 in respect of coconut hair oil and in Class 29 in respect of all edible oils included in that class. Alleging that the respondents were marketing their product in infringement of its registered trade mark, the appellant filed a suit (OS No.1 of 1995) before the Third Additional Chief Judge, City Civil Court, Hyderabad, seeking permanent injunction restraining the defendants from marketing or offering for sale edible oil products bearing the name "Shalimar" on containers, labels or wrappers, or using any name identical or deceptively similar to the appellant's trade mark."

2. In course of the trial, the appellant produced before the court photocopies of registration certificates under Trade and Merchandise Marks Act, 1958 along with the related documents attached to the certificates. The photocopies submitted by the appellant were "marked" by the trial court as Exs.A1-A5, "subject to objection of proof and admissibility". At the conclusion of the trial, the court dismissed the suit of the appellant by judgment and order dated September 28, 1998 inter alia holding that the available evidence on record did not establish the case of the plaintiff and there was no prima facie case in favour of the plaintiff nor the balance of convenience was in favour of the plaintiff. The trial court arrived at its findings mainly because the appellant did not file the trade mark registration certificates in their original. In that connection, the trial court made the following observations:

"All the above documents i.e. Ex.A1-A5 are marked subject to objection of proof and admissible (sic admissibility) and also mention so in the deposition of PW1. PW1 is his cross- examination has admitted that all the above documents are xerox copies. He has also admittedly not filed legal certificate for the same.

Sec.31 of Trade and Merchandise Marks Act, 1958 specifically reads as follows:

Sec.31(1) "In all legal proceedings relating to a trade mark registered under the Act, the original registration of the trade mark and of all subsequent assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof."

Therefore the plaintiff has to file the original of the registration or the certified copies thereof. Exs.A1-A4 are xerox copies. It is well settled law that xerox copies are not admissible in evidence. Once those documents are not held admissible, the plaintiff cannot be permitted to rely on it. These documents Ex.A1-A4 are basic documents of Trade Mark and Merchandise Act."

3. Against the judgment and decree passed by the trial court, the appellant filed appeal (CCC Appeal No.17 of 1999) before the Andhra Pradesh High Court. In that appeal, the appellant also filed an application under Order 41, Rule 27 (CMP No.2972 of 2000) for accepting the originals of the trade mark registration certificates and the allied documents (of which Xerox copies were filed before the trial court) as additional evidence. A learned single judge of the High Court took up the application for additional evidence along with the hearing of the appeal. He allowed the application and, together with it the appeal, setting aside the judgment and decree passed by the trial court and allowing the appellant's suit granting decree of permanent injunction against the defendants/respondents.

4. The respondents filed an intra-court appeal (LPA No.111 of 2001) against the judgment and decree passed by the single judge. The division bench of the High Court took the view that there was no occasion or justification for admitting the original trade mark registration certificates at the appellate stage as additional evidence. Referring to the provisions of Order 41, Rule 27 of the Civil Procedure Code (hereafter `CPC'), the division bench made the following observations:

"In three circumstances production of additional evidence can be allowed by the Appellate Court. Firstly, the Trial Court had refused to admit evidence which ought to have been admitted.

Secondly the party who wanted to produce additional evidence had exercised due diligence and such evidence was not within his knowledge or reach during the trial of the suit. Thirdly, the additional evidence can be ordered to be produced if the Court feels that a document was necessary for pronouncing of the judgment. Neither of these three conditions were satisfied in this case. The original documents were all

along in possession of the plaintiff. At no stage the Trial Court had refused to admit them in evidence. Since the documents were all along in the possession of the plaintiff, therefore he could not fill up the lacuna by producing them in the Appellate Court. It may also be necessary to mention that production of these documents and allowing of the application under Order 41, Rule 27 of the Code while disposing of the appeal has also caused a prejudice to the defendants because when the cross-examination of P.W.1 which were not admissible in evidence."

5. Once the original trade mark registration certificates were taken off the record of the case, the appellant's suit was bound to be dismissed. And that is how the division bench dealt with the appeal. It allowed the appeal of the defendant-respondent by judgment dated April 25, 2003 setting aside the judgment of the learned single judge and restoring the judgment passed by the trial court.

6. The appellant has now brought this matter in appeal before this Court by grant of a special leave.

7. Mr. P.P. Rao, learned senior advocate, appearing for the appellant assailed both, the procedure adopted by the trial court and the view taken by the division bench of the High Court, on the basis of the provisions of Order 41, Rule 27. Mr. Rao submitted that if the trial court was of the view that the Xerox copies of the documents in question were not admissible in evidence, it ought to have returned the copies at the time of their submission. In that event, the appellant would have substituted them by the original registration certificates and that would have been the end of the matter. But once the Xerox copies submitted by the appellant were marked as exhibits, it had no means to know that while pronouncing the judgment, the court would keep those documents out of consideration, thus, causing great prejudice to the appellant. Mr. Rao submitted that the provision of Order 13, Rule 4 of CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, and the endorsement signed or initialed by the judge amounts to admission of the document in evidence. An objection to the admissibility of the document can be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend, the document being endorsed admitted or not admitted in evidence. In support of the submission he relied upon a decision of this Court in *R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and Another*[1], (paragraph 20) where it was observed as follows:

"20..... The objections as to admissibility of documents in evidence may be classified into two classes:-(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is

tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.

The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular.

The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court."

8. Learned counsel contended that since the procedure followed by the trial court was contrary to the procedure prescribed by Order 13, Rule 4, in appeal against the trial court judgment, the learned single judge of the High Court was fully justified in accepting the originals of the documents concerned in evidence and the division bench was not right in holding that the originals of the concerned documents were wrongly taken in evidence.

"Mr. Rao submitted that while enumerating the circumstances in which production of additional evidence may be allowed, the division bench overlooked the words "or for any other substantial reason" at the end of clause (b) of rule 27 (1). He submitted that those words greatly enlarged the scope of the provision and were especially relevant for a case like the one in hand where the plaintiff had suffered great prejudice due to the incorrect procedure followed by the trial court. In support of his submission he relied upon the decision of this Court in *K. Venkataramiah vs. A. Seetharama Reddy & Ors.*[2], (at page 46).

"... Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the

state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment," it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27(1)(b) of the Code."

9. Mr. Rao further submitted that the very narrow view of Order 41, Rule 27 taken by the division bench has only led to frustrate the ends of justice. In order to lend strength to his submission, Mr. Rao referred to the illuminating and perennially relevant passage from the judgment of Vivian Bose, J. in *Sangram Singh vs. Election Tribunal, Kotah, Bhurey Lal Baya*[3], (at page 8) :

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties;

not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

10. Mr. P.S. Narasimha, learned senior advocate, appearing for the respondents submitted that in terms of section 31 of the Trade and Merchandise Marks Act, 1958 original registration certificate of the trade mark was the primary evidence in the case instituted by the appellant and in the absence of the original registration certificates brought on record, the only course open to the trial court was to dismiss the suit, which it rightly did. Mr. Narasimha further pointed out that the learned single judge after taking the originals on record, straightaway proceeded to pronounce the final judgment in the appeal even without allowing the defendants/ respondents an opportunity of rebuttal. The denial of any opportunity of rebuttal of the additional evidence taken by the appellate court caused immense prejudice to the defendants/ respondents.

11. To an extent Mr. Narasimha is justified in his submission. Having regard to the manner in which the proceedings took place before the trial court, the learned single judge was not unjustified in taking the originals of the certificates of registration as additional documents but the error lay in the fact that the learned single judge allowed the application for taking additional evidence and at the same time proceeded to finally allow the appeal on the basis of the evidence taken by him on record. Alluding to this aspect of the matter, the division bench made the following criticism:

"We have seen that the cross-examination of P.W.1 was very brief and it only related to the fact that the photo stat were being produced. Any good lawyer would do the same thing, but had the original documents been produced, which were admissible in

evidence at the time of trial, the cross-examination perhaps would have covered these documents as well. Once the learned single Judge, had decided to allow the plaintiff to produce the documents, then it was necessary also to provide an opportunity to the defendants to further cross-examine the witness who produced those documents. But we have seen from the judgment of the learned single Judge that the application under Order 41, Rule 27 of the Code was decided along with the appeals itself."

12. On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded. The learned single judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41, Rule 27. But then the single judge seriously erred in proceeding simultaneously to allow the appeal and not giving the defendants/respondents an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence. The division bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order 41, Rule 27. As shown above the additional documents produced by the appellant were liable to be taken on record as provided under Order 41, Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned single judge disposed of the appeal caused serious prejudice to the defendants/respondents. In the facts and circumstances of the case, therefore, the proper course for the division bench was to set aside the order of the learned single judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to give opportunity to defendants/respondents to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so.

"The judgment and order dated April 25, 2003 passed by the division bench is set aside and the matter is remitted to the learned single judge to proceed in the appeal from the stage the original of the registration certificates were taken on record as additional evidence. The learned single judge may allow the defendants/respondents to lead any rebuttal evidence or make a limited remand as provided under Order 41, Rule 28."

13. In the result, the appeal is allowed, as indicated above but with no order as to costs.

[1]*2003 (8) SCC 752*
[2]*1964 (2) SCR 35*
[3]*1955 (2) SCR 1*