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

% **Date of Decision: 12th January, 2023**

\+ **FAO(OS) (COMM) 3/2023, CM APPL.1397-1398/2023**

BHUSHAN OIL AND FATS PVT. LTD. ..... Appellant
Through: Mr. Ankit Sahani, Mr. Chirag Ahluwalia, Mr. Aashish Arora, Advocates.

Versus

MOTHER DAIRY FRUIT AND VEGETABLES PVT. LTD. ..... Respondent
Through: Mr. Chander M. Lall, Sr. Advocate, Mr. Atul Batra, Ms. Ananya Chug and Mr. Kundan Kumar, Advocates.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

SAURABH BANERJEE, J: (ORAL)

1. The appellant-*original defendant before the learned Single Judge* seeks to impugn the order dated 22nd September, 2022, whereby, the learned Single Judge has dismissed an application under Order VII rule 11 of the Code of Civil Procedure, 1908 (hereinafter referred as "**CPC**") read with Section(s) 28(3), 30(2)(e) and 134 of the Trade Marks Act, 1999 (hereinafter referred as "**TMA**") of the appellant seeking dismissal of the suit instituted by the respondent-*original plaintiff before the learned Single Judge*.

2. Learned Single Judge, vide the impugned order, after appreciating the position of law with respect to the provisions of Order VII Rule 11 of the CPC and the aforenoted Section(s) 28(3), 30(2)(e) and 134 as also Section 124 of the TMA dismissed the application of the appellant as meritless upon making the following observations qua the above as under: -

> *"12. Having perused the aforesaid judgments, in my view, the contention of the Defendant that the suit is not maintainable and the plaint should be rejected at the outset, invoking Order VII Rule 11 CPC is bereft of merit and cannot be accepted. The consistent position of law, which is palpably clear from the legal regime on this issue, as aforementioned, is that a suit filed by a registered proprietor for infringement against another registered proprietor would be maintainable and cannot be rejected at the threshold. In Dabur v. Alka (supra), this Court also observed that Section 28(3) of the Act does not prohibit a suit for infringement if the mark of the Defendant is also registered. Section 28(1), by a plain reading, vests in the registered proprietor of the trademark, the exclusive right to use the mark in any manner provided by the Act. Thus, the exclusive right vested in the registered proprietor is subject to the other provisions of the Act and to the registration being valid. As a corollary, if there is another provision in the Act not vesting such an exclusive right in the registered proprietor or if the registration is invalid, such exclusive right would not vest in the registered proprietor of the mark. It was further observed that the words 'the exclusive right to the use of any of those trademarks' in Section 28(3) would have to take colour from the exclusive right conferred under Section 28(1) which would not accrue if the registration is invalid.*
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> *13. This Court cannot lose sight of the fact that Section 124 of the Act expressly recognises and envisages filing of a suit alleging infringement against the Defendant even when the impugned trademark is registered, albeit such a suit may be stayed at an appropriate stage when the circumstances arise. Learned Senior Counsel on behalf of the Plaintiff has rightly contended that the contentions of the Defendant are based on a misreading of the provisions of the Act, as none of these provisions bar filing of a suit for infringement against a registered proprietor and to the contrary, Section 124 of the Act is an enabling provision which contemplates the filing of such a suit and the course of action that needs to be adopted during the pendency of the suit where the Defendant raises a*

> *defence under Section 30(2)(e) of the Act that its mark is also registered and Plaintiff pleads invalidity of the Defendant's mark. No doubt, if the registration is found to be invalid, it would be invalid ab initio, but if the Plaintiff fails in the cancellation proceedings in establishing invalidity, the suit would fail. This, however, cannot imply that at the outset, the Plaintiff should be deprived of an opportunity to establish the invalidity by dismissing the suit. This view is fortified by Section 124(5) of the Act which goes a step further and gives discretion to the Court to make an interlocutory order even while staying the proceedings in the suit. In the absence of any specific or explicit bar excluding the Court's jurisdiction from entertaining such a suit, this Court finds no reason to reject the plaint under Order VII Rule 11 CPC in the light of the statutory provisions and scheme of the Act as well as plethora of judicial precedence, aforementioned.*
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> *14. It also needs a mention that Plaintiff has already filed an application under Section 124 of the Act which is pending consideration and if the plaint is rejected at this stage, Plaintiff would be deprived of its right under Section 124 of the Act to plead invalidity of the registration of the impugned mark and this would render Section 124 of the Act redundant, which would be against the settled principles of law that every phrase, sentence and word used by the Legislature must be given effect to. This Court also finds no merit in the contention of the Defendant that Plaintiff has not raised a plea of invalidity of registration of Defendant's trademark, as a mere reading of the application under Section 124 of the Act, being I.A. 2946/2018, shows to the contrary."*

3. Although the appellant had filed an application under Order VII rule 11 of the CPC read with other aforenoted provisions of the TMA, however the prime contention put forth by the learned counsel for the appellant before us hinges upon the rejection of the said application vide the impugned order passed by the learned Single Judge. Hence, today learned counsel for the appellant commenced his arguments by primarily contending that the learned Single Judge has wrongly rejected the application under Order VII rule 11 of the appellant as it failed to consider the lack of jurisdiction in view of Section 134(1)(c) of the TMA as regards the relief of passing off as the plaint was bereft of any such

pleadings and further that the suit involving an action for infringement was, *per se*, not maintainable before the learned Single Judge and lastly that the learned Single Judge has misinterpreted the provisions of Section 124 of the TMA.

4. To buttress the said contentions, learned counsel for the appellant, during the course of hearing, drawing our attention to the order dated 01.08.2016 passed by a Co-ordinate Bench of this Court in FAO(OS) 116/2016 titled as ***M/s. Satyadeva Bokaro & Anr. vs. M/s. Sachdeva College Limited*** and order dated 18.08.2009 passed by a learned Single Judge of this court in CS(OS) 1567/2007 titled as ***The Coca Cola Company & Anr. vs. M/s. Three Leaves (India) Pvt. Ltd.***, submitted that the suit filed by the respondent before the learned Single Judge was not maintainable qua the relief for passing off.

5. *Per contra*, learned senior counsel for the respondent, relying upon the judgement of the Apex Court in ***Kandla Export Corporation & Anr. vs. OCI Corporation and Anr.*** (2018) 14 SCC 715 and of a Co-ordinate Bench of this Court in ***Odean Builders (P) Ltd. Vs. NBCC(India) Ltd***. 2021 SCC OnLine Del 4390 raised a preliminary objection with respect to the maintainability of the appeal in the present form.

6. Before partaking the present appeal on merits, in the opinion of this Court, it is imperative to first deal with the aforesaid preliminary objection of maintainability of the present appeal before us. At the outset, upon a bare perusal of the provisions of Order XLIII rule 1 of the CPC, we find that the only reference to the provisions of Order VII of the CPC as envisaged in Order XLIII rule 1 is as under:-

> "*1. Appeal from orders.—An appeal shall lie from the following orders under the provisions of section 104, namely : —*

> *(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court 1 [except where the procedure specified in rule 10A of Order VII has been followed];"*

7. The aforesaid reveals that the provisions of Order XLIII rule 1 of the CPC only envisage filing of an appeal against an order passed by a Court as specifically provided therein. As such, since there is no provision for filing an appeal from an order of refusal of an application under Order VII rule 11 of the CPC passed by a Court and in view of the clear intent of the legislature as there is no mention thereof, no appeal can be maintainable under the said provisions of Order XLIII rule 1 of the CPC. The said provision of Order VII rule 11 of the CPC does not find any mention in Order XLIII rule 1 of the CPC.

8. What is mentioned is the provision of Order VII rule 10 of the CPC in Order XLIII rule 1(a) of the CPC. But the same cannot come to any assistance of the party challenging the order of refusal of an application under Order VII rule 11 of the CPC by a Court since the scope and guiding factors of an application under Order VII rule 10 of the CPC are very different from that of an application under Order VII rule 11 of the CPC and they stand on a completely different footing. Thus, no appeal can be filed under the provisions of Order XLIII rule 1 of the CPC against such an order of refusal by a Court. As such, reliance placed by the learned counsel for the appellant on ***M/s. Satyadeva Bokaro (supra)*** and on ***The Coca Cola Company (supra)*** is misplaced as both cases are dealing with provision of Order VII Rule 10 of the CPC, against which the scope of an appeal is provided under the provision of Order XLIII rule 1(a) of the CPC.

9. However, coming to the facts of the present case, it is an unwritten principle of law that all parties to a suit, including the parties before this Court, are bound by the Statute. There being no provision envisaged for an appeal

against such an order, including the impugned order herein, in the provisions envisaged in Order XLIII rule 1 of the CPC, no appeal can lie against the impugned order of rejection of an application under Order VII rule 11 of the CPC. There being no provision for such an appeal under the provisions of Order XLIII rule 1 of the CPC, the present appeal is not maintainable in the eyes of law.

10. Interestingly, ***Odean Builders (P) Ltd. (supra)*** is a judgment passed by a Co-ordinate Bench of this Court, which vide its common order decided three appeals, being ***Odean Builders (P) Ltd vs. NBCC(India) Ltd., M/s Rayban Foods Pvt. Ltd. vs. M/s Gac Logistics Pvt. Ltd. and Arindam Chaudhuri vs. Zest Systems Pvt. Ltd. & Anr.***. While dealing with a similar issue therein qua maintainability of an appeal against an order for which no provision of an appeal is provided under the provisions of Order XLIII of the CPC, after dealing with a contrary view of a Co-ordinate Bench of this Court in ***D & H India Ltd. v. Superon Schweisstechnik India Ltd***., 2020 SCC OnLine Del 477 and re-affirming what already stood settled by the Hon'ble Supreme Court in ***Kandla Export Corporation and Anr. (supra),*** it was held that no appeal is maintainable against any such order(s) not provided in the provisions of Order XLIII of the CPC. Needless to say, the said decision of this Court in ***Odean Builders (P) Ltd. (supra)*** has since been upheld by the Hon'ble Supreme Court as the appeal by one of the parties therein, being ***M/s Rayban Foods Pvt. Ltd. vs. M/s Gac Logistics Pvt. Ltd*** [SLP(C) No. 901/2022] was dismissed vide order dated 31.01.2022.

11. Thus, noting the settled principles of law and the factual matrix of the present case, since the appeal in the present form is not maintainable in the eyes

of law or on facts, there is no occasion for this Court to proceed with either the merits of the contentions raised therein by the appellant of the matter or give any finding qua the legal aspects sought to be argued by the learned counsel for the appellant before us.

12. Accordingly, the present appeal, alongwith the pending applications, is dismissed *in limine* with no order as to costs.

SAURABH BANERJEE, J.

MANMOHAN, J.

JANUARY 12, 2023
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