

2013 SCC OnLine Del 331 : (2013) 198 DLT 407 (DB) : (2013) 53
PTC 256 (DB)

In the High Court of Delhi
(BEFORE SANJAY KISHAN KAUL AND VIPIN SANGHI, JJ.)

Flight Center Travels Pvt. Ltd. Appellant

Mr. Saikrishna Rajagopal, Mr. Sidharth Chopra & Ms. Sneha Jain,
Advs.

Versus

Flight Centre Limited & Anr. Respondents

Mr. Rajiv Dutta, Sr. Adv. with Ms. Misha, Adv.

FAO (OS) No. 255 of 2012

Decided on January 24, 2013

A. Civil Procedure Code, 1908 — Or. 9 R. 13 — Ex parte decree — Non-service of notice and summons — Setting aside on grounds of — Use of “May” in Or. 5 R. 1(1) — Not necessary to issue summons in all cases — Defendant having advance knowledge of summons entered appearance through counsel — Technical process of service of summons need not be adhered to

(Paras 23, 24, 28, 30 and 31)

B. Civil Procedure Code, 1908 — Or. 6 R. 17 — Amendment of Plaint — Grant of permission without notice to Defendant — Notice not necessary for every amendment, only if nature of suit or relief claimed is changed — Amendment sought only to bring subsequent fact of registration of trademark on record — Fact of pending trademark application already known — No additional relief claimed — Subsequent registration of the mark was only a fact which fortified case of appellant further, and such an amendment did not necessitate fresh summons and notices to be issued to the respondents — Amendment is really in nature of additional mode of relief and not substantive in nature

(Paras 34, 35 and 38)

Sunil Poddar v. Union Bank of India, (2008) 2 SCC 326; *Sangram Singh v. Election Tribunal*, AIR 1955 SC 425; *Ramnik Vallabhdas Madhvani v. Taraben Pravinlal Madhvani*, (2004) 1 SCC 497; *Gomzi Active v. Reebok India Co.*, (2007) 10 SCC 632; *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.*, (2000) 5 SCC 573; *Hari Ram Keer v. State Bank of India*, (2005) 3 MP HT 147, referred to

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.

1. The appellant as plaintiff filed suit for a decree of permanent

injunction against the four original defendants restraining them from passing off, rendition of accounts and commencing business under the mark "FLIGHT CENTER" or a mark/trade style deceptively similar to it which would amount to passing off qua the services being provided by the plaintiff and for rendition of accounts. The appellant alleged in the plaint that it is a reputed travel agency in India and had commenced business under the trading style of M/s. Flight Center Travels (P) Ltd. Its trademark/service mark "FLIGHT CENTER" offers various lucrative and affordable holiday packages apart from medical insurance schemes on travel abroad. The latter is in pursuance to its tie up with agencies such as M/s. Bajaj Allianz and ICICI Lombard. The website of the appellant is www.flightcenter.co.in, which is a medium through which the services are offered. The appellant was accorded International Air Transport Accreditation (IATA) after fulfilling all norms in the year 1996 which permits it to issue international tickets for passengers travelling overseas on IATA member airlines. The appellant also claims to be an active member of various other travel organizations.

2. The appellant claims that it has sponsored sports events under the trademark/service mark and has, thus, been using the trademark/service mark FLIGHT CENTER in India since the year 1994 on extensive and continuous use and in support thereof filed bills and invoices since the year 1994. The proprietorship of the trademark/service mark is claimed by virtue of priority of adoption.

3. The appellant also claimed that it had also applied for registration of trademark/service mark in Class 39 under application No. 1316760 which had been advertised in Trademark Journal No. 1328 Supplementary (4) dated 28.2.2005. The revenue turnover commencing from the financial year 1995-1996 to 2004-2005 showing continuous growth to Rs. 4.51 crore has been set out.

4. The appellant alleged in the plaint that defendant No. 2, M/s. F Cm Travel Solutions is a joint venture between defendant No. 3, M/s. Flight Centre Limited, Australia and defendant No. 4, M/s. Friends Globe Travels Limited. Defendant No. 1 was the CEO of defendant No. 2. We may notice here that in the appeal there are only two respondents. Defendant No. 3 as respondent No. 1 and defendant No. 2 as respondent No. 2 except referring to it as F Cm Travel Solutions (India) Private Limited. The appellant claims to have come to know about defendant No. 3/respondent No. 1 through a letter on 26.7.2005 sent by that party to the appellant through fax claiming to be a follow up of the letter dated 27.4.2005 alleged to have been sent to the appellant earlier, the receipt of which the appellant denied. In the said letter unsubstantiated allegations of passing off were made against the appellant qua the same trademark/service mark. The website of the plaintiff www.flightcenter.co.in was stated to be similarly designed to

the website of defendant No. 3/respondent No. 1 www.flightcentre.com, an aspect denied by the appellant. It was alleged that the travel agency in India has been acquired by defendant No. 3/respondent No. 1. The aspect of joint venture came to the knowledge of the appellant from a report in the news daily Hindustan Times dated 5.3.2005. The appellant claimed that their business had commenced in India and, thus, a restraint against passing off was sought as it was likely to cause irreparable damage and injury to the appellant.

5. The order sheet of CS (OS) No. 1193/2005 shows that summons in the suit and notice in the interim application were issued on 30.8.2005 for 5.10.2005 whereafter the matter was adjourned for settlement. The defendants in the suit were represented through a counsel from the inception. Since no settlement was arrived at, on 11.5.2006 they were directed to file the written statement which they failed to file. None appeared for the defendants on 19.7.2006 or thereafter on a number of occasions and on 25.8.2006 the defendants were proceeded *ex parte* and the appellant was directed to file affidavits of evidence. The appellant led *ex parte* evidence and the case was listed for arguments.

6. It is at the aforesaid stage that application, being IA No. 14074/2007, was filed for amendment of the plaint under Order VI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code'). This application was necessitated on account of certain changed circumstances as the trademark FLIGHT CENTER came to be registered on 18.8.2006 vide registration certificate of the said date. In the plaint a reference has already been made to the application for registration. The order dated 7.12.2007 shows that after noticing that the defendants were *ex parte*, the amendment was allowed without notice to the defendants on the ground that it was necessary and proper for final adjudication of the suit on merits and the amended plaint was taken on record. The counsel for the appellant took time to move the application seeking permission to lead additional evidence. The affidavit of evidence was amended bringing on record the registration certificate. The decree of permanent injunction qua the trademark FLIGHT CENTER was ultimately passed on 10.9.2010 by a speaking order. Since adequate evidence had not been led for rendition of accounts it was held that the said relief could not be granted. No costs were awarded. The decree sheet was accordingly drawn up.

7. It appears that it is at that stage that the original defendants 3 & 4 woke up to the aspect of the *ex parte* decree and filed applications seeking recall of the order dated 10.9.2010 along with application for condonation of delay. The applicants - defendant No. 3/respondent No. 1 and defendant No. 4 succeeded vide order dated 25.5.2012 whereby the *ex parte* judgement and decree dated 10.9.2010 was set aside qua

the said defendants giving time to them to file the written statement. This order dated 25.5.2012 has been assailed in the present appeal. Vide order dated 25.7.2012 the appeal was admitted and the operation of the impugned order was stayed.

8. The order dated 1.6.2012 in appeal while issuing notice, noticed the principal contention to be examined, i.e., "Whether the *ex parte* decree could have been passed without notice to the respondents post amendment of the plaint".

The Impugned Order:

9. A perusal of the impugned order shows that the reason disclosed by the respondents herein for filing the application under Order IX Rule 13 of the said Code belatedly is stated to be the absence of proper service and that they came to know of the *ex parte* decree only on 18.4.2011 and, thus, filed the application on 20.5.2011. On the other hand, the counsel for the appellant pleaded that post judgement and decree dated 10.9.2010, the respondents started using the mark FLIGHT CENTRE on 1.4.2011 in violation of the decree dated 10.9.2010 and the appellant addressed a cease & desist notice to the respondents on 13.4.2011. On 29.4.2011 a meeting was held between the parties to find out the possibility of a settlement. On 2.5.2011 an e-mail was received from the counsel for respondent No. 1 that his client had decided to continue to use the brand FLIGHT SHOP in connection with its business in India and not FLIGHT CENTRE and that they were taking all steps to remove FLIGHT CENTRE in India. However, instead of doing so they filed the application on 20.5.2011 to set aside *ex parte* decree with application for condonation of delay.

10. The other aspect pointed out by learned counsel for the appellant was that mere irregularity of service of summons would not be suffice to set aside a decree if it is shown that the defendants had sufficient knowledge of date of hearing and proceedings. Defendants 1, 2 & 4 have been served by ordinary process on 14.9.2005 and by registered AD on 27.9.2005 while service report of defendant No. 3 was awaited. The counsel entered appearance for all the defendants on three dates, i.e., 5.10.2005, 30.1.2006 & 11.5.2006 when the factum of settlement discussions was recorded. However, when no settlement was forthcoming, on 11.5.2006 time was given to file reply to the interim application and the written statement. The claim of the respondents of counsel having entered appearance in a casual manner on those dates, without authority, was denied especially when the same counsel represented defendant No. 3 in relation to the Share-Purchase Agreement and had even filed an application for registration of defendant No. 3's mark FLIGHT SHOP in 2007.

11. The learned Single Judge thereafter has proceeded to discuss the legal principles. The learned Single Judge found that, admittedly

defendant No. 3 was the main defendant who was claiming the trademark, being a prior user of brand name FLIGHT CENTER, and defendant No. 4 may not have had interest in protecting the rights of defendant No. 3. Defendant No. 2 was the joint venture. The service of summons on defendant No. 3 had not been shown, except the appearance of the counsel on its behalf and the knowledge of the suit apparent from e-mails exchanged between the parties. *Vakalatnama* had also not been filed. The other aspect noticed by the learned Single Judge is that undisputedly the application for amendment was allowed without notice to the defendants. A catena of judgements have been cited by the learned Single Judge for the proposition that not affording an opportunity to contesting party to contest the plea, which has been allowed to be amended is negation of justice.

Appellant's submissions:

12. The appellant's grievance is that the learned Single Judge acknowledged that both the respondents herein had knowledge of the pending proceedings and were exchanging e-mails and conducting meetings with the counsel for the appellant regarding settlement of the dispute and the counsel had further entered appearance for all the defendants, but the decree has been set aside on the ground that there was no service on defendant No. 3/respondent No. 1. The counsel who entered appearance on 5.10.2005 entered appearance for defendants 2 to 4, which includes defendant No. 3/respondent No. 1 herein. If no service of summons was effected there was no reason for the counsel to appear. The submission that the counsel entered appearance in a casual manner was not substantiated by any cogent evidence and an affidavit in this behalf could not have been taken as the gospel truth. No affidavit was sought from the counsel who appeared in the suit proceedings. Thus, no conclusion could have been reached, it is pleaded, at least without examination of the witnesses especially in view of Chapter 7 Part B Rule 4 of Instructions Applicable to Both Civil and Criminal Courts in Delhi (Vol. IV) of the High Court Rules & Orders which reads as under:

"4. Proof of service is imperative - The Court should in all cases obtain the proof which is above described as requisite by the verified statement, recorded in writing, of the person by whom the service was effected, or, if deemed necessary, by the examination of Court, as witnesses, of such persons as the Court may think fit to examine."

13. It has been pleaded that no reason has been given to condone the delay in moving the application for setting aside of the decree other than stating that it is for the reasons disclosed in the application.

14. One of the main grievances made is that the ratio of the judgements in *Sunil Poddar v. Union Bank of India* AIR 2008 SC 1006 and of the Allahabad High Court in *Sri Nath Agrawal v. Sri Nath* AIR

1981 All 400 - which is that, if a party to the suit had knowledge of the suit proceedings and the date of hearing, and had sufficient opportunity to defend the proceedings the *ex parte* decree would not be set aside, has not been followed.

15. Insofar as the lack of notice to the defendants at the stage of amending of the plaint is concerned, it is submitted that it is not as if for every amendment, notice must be issued. It is only if the nature or character of the suit, or the reliefs claimed therein are changed, would the occasion arise for issuance of notice to the parties who are already *ex parte*. The original suit filed was for the violation of the trademark/service mark FLIGHT CENTER and for passing off. It was through continuous use that exclusive privilege was claimed qua the said trademark/service mark. The factum of the pending application for registration was known. Only the subsequent fact of registration having taken place was brought on record. No additional relief was claimed on the basis of the registration of the mark.

16. Learned counsel for the appellant qua the aforesaid aspect submitted that the consequence of registration of the trademark was only that the burden of proof became less as, in view of Section 29(3) of the Trade Marks Act, 1999 (hereinafter referred to as the 'TM Act'), a presumption is raised that it is likely to cause confusion on the part of the public. We reproduce the relevant part of Section 29 as under:

"29. Infringement of registered trade marks.-

(1) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of-

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public,

or which is likely to have an association with the registered trade mark.

(3) In any case falling under clause (c) of sub-section (2), the court

shall presume that it is likely to cause confusion on the part of the public.” (emphasis supplied)

17. It is submitted that, thus, confusion and deception need not be proved in case of registration of the trademark.

18. Learned counsel for the appellant in conclusion assailed the impugned judgement on the following aspects.

i. The nature and character of the suit did not change by the amendment.

ii. The amendment was only a sequitur to the registration of the trademark of the appellant, the consequence of which would be that there would be a presumption and the burden of proof would be less in view of Section 29(3) of the TM Act.

iii. The prayers remain the same pursuant to the amendment and no further relief for damages, etc. was added as a consequence of the registration of the trademark. In fact, the decree was only injunctive in character.

iv. It is not as if every amendment will require notice to be issued when the defendants have been proceeded *ex parte*.

v. The decree is both for infringement of trademark and passing off. The same cannot be set aside on account of subsequent registration of trademark as the decree is not severable.

vi. Defendant No. 3 had entered appearance through counsel and had full knowledge of the proceedings and, thus, cannot hide behind technicalities of non-service of summons/notice.

vii. Even if defendant No. 3 was not served, the decree against the other respondents could not have been set aside.

19. Learned counsel for the appellant referred to various judicial pronouncements to canvas his case.

i. Proposition: The cause of action in infringement and passing off actions are substantially the same in law and the statute law relating to infringement of trademarks is based on the same fundamental idea and, thus, the amendment of suit from an action for passing off to an action for infringement will not change the cause of action and would only be in the nature of alternative relief. To support his contention learned counsel for the appellant has relied upon the following pronouncements:

a. *Usha International v. Usha Television Limited* 2002 (25) PTC 184 (Del) (DB).

b. *A. Abdul Karim Sahib v. A. Shanmugha Mudaliar* 1967 MLJ 468.

c. CM (M) No. 903/2008 titled *Arihant Tea Company v. Jayshree Tea & Industries Ltd.* decided on 22.4.2009 by a learned Single Judge of the Delhi High Court.

ii. Proposition: As the nature & character of the suit cannot change

and the amendments sought were not substantive, summons were not required to be re-served prior to amendment of the plaint especially when the defendants are *ex parte*.

Hari Ram Keer v. State Bank of India 2005 (3) MPHT 147 - para 8, where it was observed as under:

8. *The next contention of the appellant is that the learned Trial Judge ought to have issued summons/notice to the defendant/appellant about the amendment effected after the ex-parte proceedings were drawn against the defendant/appellant. Normally a civil suit shall proceed on the basis of pleadings contained in the plaint at the time when the defendant is served with the summons/notice and in case of amendment of substantive nature, it is always desirable that such a defendant shall be again served with the summons/notice in respect of the amended averments. However, every amendment incorporated after drawal of ex parte proceedings does not entitle a defendant with re-service of summons/notice. It depends on the nature of amendment inserted after drawal of ex parte proceedings. In the present case, the amendment inserted on 9-10-1997 is in respect of merely an additional mode of relief in the relief clause. It did not provide any additional factual foundation and did not give any additional or new cause of action to the plaintiff. The amendment effected in the plaint is not of substantive nature so far as the pleadings are concerned. Therefore, no notice was necessary on the defendant even though ex parte proceedings were already drawn against him....." (emphasis supplied)*

iii. Proposition: An *ex parte* decree in favour of the appellant cannot be set aside on mere technical ground that the summons had not been duly served when admittedly they had knowledge of the proceedings and date of hearing.

a. *Sri Nath Agrawal* case (supra) - para 5, where it was observed as under:

"5. According to the learned counsel for the revisionist since no summons was served, therefore, the Explanation would not be at all attracted in the instant case, and, therefore, his right to deposit the amount continues and cannot in any way be cut down by any other consideration. This leads us to an enquiry as to what is meant by the words "summons of the suit". The summons is issued by the court after institution of a suit requiring the defendant to appear before it on a particular date mentioned therein either for filing the written statement and appearance or for final disposal of the suit (see Order V, Rule 1, C.P.C.). It is based on the maxim audi alteram partem i. e., hear the other side or no one should be condemned unheard. The policy appears to be that some method should be evolved to inform the defending party about the claim made by the plaintiff and the date fixed for the

appearance of the defending party. It is with this object that provision has been made for issue of summons in Order 5, Rules 1 to 8 of the Civil P.C. Rule 1 of O, V of the Code reads as under : --

"An appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his authorized agent, or by a pleader appearing, applying or acting, as the case may be on his behalf:

Provided that any such appearance shall, if the Court so, directs, be made by the party in person."

It is significant to note that in Sub-clause (1) of Rule 1 the word 'may' has been used instead of the word 'shall'. It is because it is not necessary to issue summons in all cases. In cases covered by the proviso where the defendant makes his appearance at the presentation of the plaint and admits the claim, no summons need be issued. So, also if the defendant is a person of such rank as, in the opinion of the Court, requires service in the form of a letter, the Court can direct dispensing with issue of summons to him. A proviso now added in 1976 to Order V, Rule 1, C, P. C, as proviso to the existing proviso also shows that when a defendant appears after the summons has already been issued, he can be directed by the Court to file his written statement on the date of his appearance. This provision also authorizes the Court to dispense with the service of the summons. The entire scheme of the Civil P.C. in this regard aims at only one thing to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him and also of the date when he is supposed to appear in Court to answer the claim. If the defendant party appears before the court after the registration of the suit, and he is informed about the nature of the claim and the date fixed for reply thereto it must be deemed that the defendant has waived the right to have a summons served on him. This can be seen from the record and also from the subsequent conduct of that party. The same legal position will arise when a party suo motu appears before the Court before actual service of summons either himself or through the counsel. In such a case if some date is fixed for filing the written statement and for hearing of the suit it would rather be too technical a view to take that service of summons in the ordinary course were still to be insisted upon and to hold that further proceedings in the suit would take place only thereafter. This is neither the purpose nor the way to look at various provisions of the Civil P.C. The whole basis on which the procedure laid down for the service of summons has very elaborately been dealt with by the Supreme Court in the case of *Sangram Singh v. Election Tribunal Kotah*. The matter arises out of an election petition. After

review of various authorities, it was observed that the basic purpose of the procedure was that the defendant must be made aware of the date fixed for the hearing of the case and for steps which are to be taken by that party, It is not meant as a measure of punishment if he fails to appear but then it becomes the duty of the Court to see that the party is aware of the date fixed in the suit If this be the intention of the law of procedure, the defendant cannot demand anything greater than this. As already narrated above the defendant had put in appearance in response to a notice on the application for attachment before judgment, After that he sought time for filing objections and on 11-9-1978 his counsel was present when the court fixed for filing the written statement and for final hearing the case, The defendant, in fact, never protested against this, nor he ever requested the court for obtaining copy of the plaint He never complained during the trial of the suit that he was not aware of the date fixed in the suit and therefore he could not deposit the amount on that date. In fact, on several dates he made applications praying for time and ultimately filed the written statement on 25-11-1978. In these circumstances, the least that can be said about the defendant is and it is also obvious from his conduct throughout that he had never felt the necessity of service of a summons on him and he never raised any objection about it, Thus even if he had a right to have summons served on him that right stood forfeited due to his waiver, writ so large in the proceedings and also reflected in his actions before the Court, If at any stage he had raised the least doubt about his rights being prejudiced in any manner, he would have protested to the court as he was duly represented by a counsel. He cannot now be allowed to take shelter behind a stale plea that summons had not been served on him, It is not possible for me to countenance a situation in which the defendant though present in the court and on all dates fixed therein, is still allowed to insist that unless proper summons be served upon him he should be deemed to be unaware of the proceeding. In this case, I am clearly of the opinion that the order sheet dated 11-9-1978 itself should be treated to be a 'summons' to the defendant for the purposes of Explanation to Section 20(4) of U.P. Act No. XIII of 1972, because from this he got intimation of filing of the written statement as also for the final hearing of the suit It is this date which must be treated to be the date of 'first hearing' of the suit, within the meaning of S, 20(4) read with Explanation to the Section." (emphasis supplied)

b. *Sunil Poddar* case (supra), where it has been observed in paras 16 to 19 as under:

"16. Original Rule 13 of Order IX of the Code thus provided that when a decree had been passed ex parte against the defendant who satisfied the Court that summons was not duly aside the decree. It was

immaterial whether the defendant had knowledge about the pendency of suit or whether he was aware as to the date of hearing and yet did not appear before the Court, The Law Commission considered that aspect and the expression "duly served". In its Twenty-seventh Report, the Commission stated;

1. Under Order IX, Rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the ex parte decree should be set aside. The two branches of the rule are distinctive and the defendant, whatever his position may be in respect of one branch, is the court that he has made good his contention in respect of the other branch.

2. Now, cases may arise where there has been a technical breach of the requirements of "due service", though the defendant was aware of the institution of the suit. It may well be, that the defendant had knowledge of the suit in due time before the date fixed for hearing, and yet, apparently he would succeed if there is a technical flaw. This situation can arise e.g., where the acknowledgement on the duplicate of the summons has not been signed. There may be small defects in relation to affixation, etc., under Order V, Rule 15, At present, the requirements of the rules regarding service must be strictly complied with, and actual knowledge (of the defendant) is immaterial. (There are not many decisions which hold that even where there has not been due service, yet the decree can be maintained, if the defendant knew the date of hearing.)

3. Where a literal conformity with the C.P.C. is wanting, the second part of column third of Article 164, Indian Limitation Act, 1908 (now Article 123, Limitation Act, 1963) applies. As to substituted service, see discussion in under-mentioned decision.

4. The matter was considered exhaustively by the Civil Justice Committee, which recommended a provision that a decree should not be set aside for mere irregularity. Local Amendments made by several High Courts (including Allahabad, Kerala, Madhya Pradesh, Madras and Orissa) have made a provision on the subject, though there are slight variations in the language adopted by each. Such a provision appears to be useful one, and has been adopted on the lines of the Madras Amendment.

17. The Commission again considered the question and in its Fifty-fourth Report, reiterated;

9.12. Under Order 9, Rule 13, if the court is satisfied either that the summons has not been served, or that the defendant was prevented by sufficient cause from appearing, etc., the ex parte decree should be set aside. The two branches of the rule are distinctive, and the defendant, whatever his position may be in respect of one branch, is entitled to benefit of the other branch, if he satisfies the court that he has made

good his contention in respect of the other branch.

9.13. In the earlier Report, several points were considered with reference to this rule, and amendments suggested on one point, -the broad object being to ensure that a decree shall not be set aside merely on the ground of irregularity in service, if the defendant had knowledge of the decree. After consideration of the points discussed in the earlier Report, we have reached the same conclusion.

18. Accepting the recommendations of the Law Commission, the rule was amended by the Code of Civil Procedure (Amendment) Act, 1976. Rule 13 of Order IX with effect from February 1, 1977 now reads thus;

13. Setting aside decree ex parte against defendant-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or' that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall Set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.-Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree. (emphasis supplied)

19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim, of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non

service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside." (emphasis supplied)

c. *Siraj Ahmad Siddiqui v. Prem Nath Kapoor* (1993) 4 SCC 406 which partly approved the ratio in *Sri Nath Agrawal* case (supra) and *Advaita Nand v. Judge, Small Cause Court, Meerut* (1995) 3 SCC 407.

Respondents' submissions:

20. Learned counsel for the respondents, on the other hand, submitted that it was the notice of the respondents itself which had triggered off the issue. It was pleaded that the respondents have a worldwide presence and, thus, sought to protect its trademark. However, on the other hand, it is the appellant who instituted the suit and undoubtedly some endeavour was made to settle the dispute but to no avail. Thus, there was no reason for the respondents to have deliberately stayed away from the proceedings once the settlement talks failed. Learned counsel for the respondents emphasized the following aspects:

- i. Summons were not served on respondent No. 1/defendant No. 3 in suit and, thus, there had been non-compliance with the provisions of service of summons as per the said Code.
- ii. The appellant sought amendment of the suit at which stage no fresh notice/summons were issued to the defendants in the suit.
- iii. The order allowing amendment also has not discussed as to what is the effect of the amendment but appears to be the basis as if there was no requirement to issue notice/summons once the defendants were *ex parte* which is contrary to settled legal position.
- iv. There was no *vakalatnama* or any letter of authority on behalf of either of the respondents on record.

21. Learned counsel for the respondents referred to case law to advance his propositions:

- i. Proposition: There is a mandatory requirement of law that copies of summons along with plaint and documents are to be served on the defendants under Order 5 Rule 2 of the said Code.

Nahar Enterprises v. Hyderabad Allwyn Ltd. (2007) 9 SCC 466 - paras 9 to 12.

"9. Order 5 Rule 2 of the CPC reads as under:

2. Copy of plaint annexed to summons. - Every summon shall be accompanied by a copy of the plaint.

10. The learned Judge did not address itself the question as to how a defendant, in absence of a copy of the plaint and other documents, would be able to file his written statement. The Court, furthermore, in our opinion, committed a manifest error in so far as it failed to take into consideration that the summons having been served upon the appellant after the date fixed for his appearance, it was obligatory on its part to fix another date for his appearance and filing written statement and direct the plaintiff to take steps for service of fresh summons. This legal position is explicit in view of the provisions of Order 9 Rule 6(1)(c) of CPC which reads:

"6.(1)(c) When summons served but not in due time - If it is proved that the summons was served on enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

11. The Court, therefore, committed an illegality in dismissing the application for setting aside the ex-parte decree. It was a fit case where the Court should have exercised its jurisdiction under Order 9 Rule 13 of CPC.

12. The third ground on which the learned Trial Judge dismissed the application for setting aside the ex-parte decree was that it was barred by limitation. The said ground in our opinion, is also without substance. The summons had not been duly served upon the appellant inasmuch as the provisions of Order 9 Rule 2 CPC or provisions of Order 9 Rule 6 (1)(c) had not been complied with. In that view, the second part of Article 123, in terms whereof an applicant would be deemed to have knowledge of passing of the said ex-parte decree would be the date from which the limitation will begin to run, would be attracted in the instant case and not the first part thereof."

ii. Proposition: If the defendant is able to show that the summons were not duly served on him it is mandatory that the *ex parte* decree be set aside under Order IX Rule 13 of the said Code. The question of the defendants having, or not having, knowledge of the suit has no relevance for purposes of Order IX Rule 13 of the said Code.

a. *Ravi Bhushan Seth v. Meena Seth* 2002 (50) BLJR 331.

b. *Sambhunath Das v. Sirish Ch. Mohapatra* AIR 1985 Orissa 215.

c. *Radha Ballav Thakur v. Dayal Chand Bose* AIR 1962 Orissa 15.

(The aforesaid proposition was advanced qua respondent No. 1 alone as service on respondent No. 2 was not in dispute).

iii. Proposition: No fresh notice was issued to both the respondents on the amendment of the plaint either at the stage of application or

post allowing the amendment of the plaint, which is contrary to the mandate of law. This principle applies equally even if a party is *ex parte*.

a. *Ramnik Vallabhdas Madhvani v. Taraben Pravinlal Madhvani* AIR 2004 SC 1084.

b. *Smt. Son Kunwar Bai v. Indra Bai* 1986 (1) Madhya Pradesh 1087.

c. *Jharkhand Mines & Industries Ltd. v. Nand Kishore Prasad* AIR 1969 Pat 228.

iv. Proposition: The appellant sought to plead a case of trademark infringement over and above its original case of passing off which are two distinct and separate cause of action. The action of passing off in substance is an action of deceit while a trademark infringement action is statutory remedy available to a proprietor of a registered trademark for vindication of exclusive rights in relation to these goods. The nature and threshold of evidence for both the actions significantly differ.

a. *Durga Dutt Sharma v. Navratna Pharmaceuticals Laboratories* AIR 1965 SC 980.

b. *S.M. Dyechem Ltd. v. Cadbury (India) Ltd.* (2000) 5 SCC 573.

c. *Gomzi Active v. Reebok India Co.* (2007) 10 SCC 632.

Rejoinder of the Appellant:

22. Learned counsel for the appellant while, once again, emphasizing the facts and the legal principles submitted that the lack of seriousness of the respondent qua the trademark was apparent from the facts that:

- i. The trademark application of the respondents was abandoned;
- ii. The respondents never filed objections to the trademark of the application of the appellant;
- iii. Till date no proceedings have been initiated for cancellation of the trademark of the appellant.

Conclusion:

23. The first significant issue to be examined is as to whether it can be said that the absence of service of summons and notice on respondent No. 1 amounts to in effect, nullifying a decree passed against the said respondent and requiring the *ex parte* decree to be set aside. We have already noticed that this plea is available to respondent No. 1 and not to respondent No. 2, a position undisputed by learned counsel for the respondents.

24. The facts, as they emerge from the suit records, have already been noticed above in detail at the inception of the judgement. The facts show that the counsel did enter appearance for defendants 1 to 4 and thereafter continued to appear for the respondents. It is also a fact that there is nothing on record to show the completion of service qua respondent No. 1 herein. It has been rightly emphasized by learned counsel for the appellant that the service of summons is in furtherance

of rules of *audi alteram partem*, i.e., opposite side may get a chance to answer the case and no one should be condemned unheard. Let us say, if a defendant having advanced knowledge of the summons enters appearance through counsel and accepts notice in Court, can it still be said that the technical process of issuance of summons and notices to him should still be adhered to? The answer to this question, in our view, would be in the negative. This is the reason why the word used in Order V Rule 1(1) of the said Code is "may" instead of "shall". This position is abundantly clear in view of proviso added by the amendment of 1976 to Order V Rule 1 of the said Code in addition to the existing proviso, in terms whereof no such summons are to be issued where a defendant appears at the presentation of the plaint and admitted the plaintiff's claim. For convenience of reference we reproduce Order V Rules 1 & 2 of the said Code as under:

"ORDER V

ISSUE AND SERVICE OF SUMMONS Issue of Summons

1 Summons - [(1) When a suit has been duly instituted, a summons may issued to the defendant to appear and answer the claim and to file the writ statement of his defence, if any, within thirty days from the date of service summons on that defendant;

Provided that no such summons shall be issued when a defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim:

Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other days as may be specified by the Court for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.;

(2) A defendant to whom a summons has been issued under sub-rule (1) m appear-

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as appoints, and shall be sealed with the seal of the Court.

[2. Copy of plaint annexed to summons.- Every summon shall be accompanied by a copy of the plaint]."

25. The objective of the process of issuance of summons is to obtain the presence of the defendant for final opportunity to be given to him to rebut the claim against him. Thus, if he appears at the initial stage in a sense there is waiver of the right to have summons served on him.

This position has been explained in the case of *Sri Nath Agrawal* case (supra) and to that extent the aforesaid has been upheld by the Supreme Court in *Siraj Ahmad Siddiqui* case (supra).

26. In our view the significance of the judgement in *Sunil Poddar* case (supra) has somehow escaped the attention of the learned Single Judge, i.e., the observations contained in para 19, record that if the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiffs claim, he cannot put forward a ground of non-service of summons for setting aside *ex parte* decree passed against him by invoking Order XIII Rule 9 of the said Code.

27. There is no doubt qua the aforesaid proposition in view of the second proviso to Order XIII Rule 9 of the said Code inserted by the amending Act 104 of 1976 w.e.f. 1.2.1977 which clearly stipulates that no decree is to be set aside passed *ex parte* merely on the ground that there has been irregularity in the service of summons. We reproduce Order 9 Rule 13 of the said Code as under:

“ORDER IX-APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE

xx xx xx xx xx xx xx xx xx xx

13. Setting aside decree *ex parte* against defendant

In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim]" (emphasis supplied)

28. In the present case if the sequence of facts is seen keeping in mind the aforesaid principles it would be apparent that post issuance of summons and notice in the suit, meetings were held *inter se* the parties. The defendants had entered appearance and dates were taken by both parties. This is apparent from documents exchanged *inter se* parties in the form of e-mails dated 3.1.2006 and 23.1.2006 whereafter

also time was taken for settlement. It is thereafter that the respondents appeared to have abandoned the right to defence by stopping to appear.

29. We fail to appreciate as to how weightage can be given to an additional affidavit filed on behalf of the respondents stating that the counsels who were entering appearance did so in a casual manner and were not authorized to do so. It cannot be seriously contended that these counsels were appearing just for the sake of it for the respondents, when simultaneously the respondents were in serious discussions with the appellant. These counsels are stated to be also the counsels for respondent No. 1 in the Share Purchase Agreement as also the counsels who had filed the application for registration of the mark FLIGHT SHOP in 2007 after the respondents had been proceeded *ex parte*. The story, thus, set up by the respondents on behalf of respondent No. 1 is completely unbelievable.

30. A great emphasis was laid on the international reputation of respondent No. 1 and there would have been no reason why the said respondent would take the matter non-seriously. We, however, find force in the contention of the learned counsel for the appellant that if the respondents had been serious about contesting the appellants' claim, they would not only have not abandoned their application for registration of the same trademark/service mark, but also filed objections to the application for registration of the trademark of the appellant, and also taken steps towards initiation of proceedings for cancellation of the trademark which they have not done till date.

31. It is the common case of the parties that it is the respondents who initiated the matter by first issuing notice whereafter the appellant claimed knowledge of the endeavour of respondent No. 1 to enter the market and instituted the suit. The discussions took place thereafter.

32. The judgements cited by learned counsel for the respondents do not come to the aid of respondent No. 1 as they are general in nature qua the aspect of service of summons and notice and as to what is the requirement thereof. The other set of judgements are on the consequences of there not being prior service of summons, and do not deal with the aspect as in the present case-where the defendants had entered appearance; taken adjournments for settlement; settlement discussions had taken place, and; it is thereafter that the defendants had absented themselves from the proceedings.

33. We are, thus, of the view that no case has been made out by respondent No. 1 for the decree being set aside on the ground of absence of service.

34. The more significant aspect is arising from the plea that if an amendment is sought by the plaintiff, the defendants must be put to notice thereof as they may not be interested in the suit as originally

framed but the consequences may be different post amendment. This is a salutary principle over which there can be no dispute. However, simultaneously it is not as if every minor amendment would necessitate such a right being given to defendants who are *ex parte*. It will have to be seen as to what is the nature, character and effect of the amendment.

35. Learned counsels for both the parties sought to emphasise the aforesaid aspect in the context of the nature of a suit for passing off and that of infringement of trademark. Learned counsel for the appellant, as noticed above, has canvassed that the aspect of application for registration of trademark already formed a part of the original plaint. It is only the subsequent development of registration which was brought in through the process of amendment which only fortified the case of the appellant, thereby effecting the degree of proof in view of the provisions of Section 29(3) of the TM Act raising a presumption in favour of the appellant. We find force in the contention of the learned counsel for the appellant, especially when there was really no change in the nature of relief in the suit post the amendment. In species the relief sought essentially was for an injunction against the respondents to restrain the respondents from using the mark "FLIGHT CENTER". This relief did not undergo any change because of the amendment. The only aspect incorporated is the factum of registration of the trademark and the consequent relief in respect thereof. No additional relief qua damages or other amounts has been inserted and no relief in that behalf was granted.

36. In *Ramnik Vallabhdas Madhvani* case (supra), relied upon by learned counsel for the respondents, the relief itself was altered seeking to enhance the rate of interest from 6 per cent to 13 per cent which materially affected the defendant. In fact, while examining the matter the Supreme Court, has while considering the relevant paragraphs of amendment of the plaint, observed that while one was a procedural aspect, the other was a legal aspect. Thus, in respect of the aspect, amendment to be allowed without prior notice, while the legal aspect required the defendant to be given an opportunity to contest the matter. Not only that, the High Court had passed the decree while allowing the amendment far exceeding it. This is what persuaded the Court to interfere in the matter. We are unable to agree with the conclusion in *Smt. Son Kunwar Bai* case (supra) where a general observation has been made that even if a party is *ex parte*, if an amendment application is made, notice must be served to the party concerned.

37. Insofar as the significance of a decree in a passing off action, and infringement action is concerned, the judgement relied upon by learned counsel for the respondents in *Gomzi Active* case (supra) itself

shows what is material and reliance has been placed on the observations on the Halsbury's Laws of England where it was observed that it is possible that, on the same facts, a suit for passing off may fail but a suit for infringement may succeed because the additions, the get-up and trade-dress may enable a defendant to escape in a passing-off action. An infringement action may fail where a plaintiff may not prove registration. To the same effect are the observations in *S.M. Dychem Ltd.* case (supra).

38. It is in the aforesaid context that the plea of the appellant becomes significant that the cause of actions are substantially the same in the two actions, but that it would be in the nature of an alternative relief. The original suit as laid by the appellant clearly set out the reputation of the trademark/service mark that they had a right in, in view of *Usha International* case (supra) and they pleaded that the mark should be protected for which application for registration was pending. The subsequent registration of the mark was only a fact which fortified the case of the appellant further, and in our view the aforesaid facts & circumstances, such an amendment did not necessitate fresh summons and notices to be issued to the respondents. In fact, the respondents were not unaware of the application having been filed by the appellant for registration of its mark in view of what was set out in the plaint, yet they chose to abandon their defence; did not oppose the registration of the mark; did not file any proceedings for cancellation of the mark and, in fact, were seeking registration of their mark FLIGHT SHOP. Once the mark of the appellants was registered, the respondents cannot claim not to have knowledge of the same. This was not a fact which they were ignorant of, or could not have come to know without being put to notice of the amendment application or the amended plaint. The amendment is really in the nature of additional mode of relief and it was not substantive in nature [*Hari Ram Keer* case (supra)]. In the present case, however, it is based on passing off and registration of the mark post amendment.

39. The plea of the respondents for condonation of delay for setting aside the *ex parte* decree is also vague. The respondents sought condonation of delay from date of knowledge which was pleaded as 18.4.2011 qua the decree dated 10.9.2010 when legal notice is stated to have been received for infringement.

40. The very premise is wrong because the respondents cannot rely on the date of knowledge when they knew of the proceedings going on and chose to absent themselves from the proceedings either deliberately or negligently.

41. It, thus, appears that the respondents belatedly have had a second thought and have raked up the issues as set out in their application only to somehow get out of the rigours of the injunctive

relief granted against them qua the trademark/service mark FLIGHT CENTER which is not permissible.

42. We, thus, set aside the impugned order and consequently dismiss the applications of the respondents seeking setting aside of the *ex parte* decree and condonation of delay in making application. The result is that the original decree dated 10.9.2010 stands.

43. The appeal is accordingly allowed leaving the parties to bear their own costs.

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