

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.547 of 2010

O R D E R

Date of hearing : 28.11.2013.

Plaintiff : M/s Gul Ahmed Textile Mills
Limited through Mirza Mehmood
Baig, Advocate

Defendants No.1 : Mr. Shakoor through Mr. Saleem
Ghulam Hussain, Advocate

NAZAR AKBAR, J. Through this common order I intend to dispose of CMA No.1126 of 2011 and 1128 of 2011, both under Order I Rule 10 CPC filed by defendants No.1 and 2 respectively as the contents of counter affidavits to both these applications filed by the plaintiff are hundred percent same.

2. The applicants have claimed that they have unnecessarily been impleaded as defendant in the instant suit. The defendant No.1 on the first date of hearing, when he appeared through his counsel, filed a statement at the bar, categorically stating therein that the defendant No.1 neither sold nor intend to sell the cloths mentioned in annexure H/1 and H/3 of the plaint, from his shop and same is the stance of defendant No.2 in his affidavit in support of the application under Order I Rule 10 CPC that he has a small business and he has neither sold nor intend to sell the disputed printed design cloths, as of the plaintiff, at his shop.

3. Before commenting upon the respective contentions of the counsel I must refer to the order dated 20.4.2010, whereby this Court has already deleted the name of defendant No.1 from the

array of defendants in view of the statement referred above with the caution that any breach thereof will expose the defendant No.1 to contempt of Court proceedings. This order was passed by consent of the counsel for the plaintiff and the condition was also made in the order on her request. However, on 22.4.2010, she claimed that she has not extended any no objection to the deletion of name of defendant No.1 and claimed that it seems to be a typographical error and she further requests that her consent may be deleted from the order dated 20.4.2010. Therefore, after noting in the order that the order was passed by consent in presence of both counsel fresh notice was issued to Mr. Salim Ghulam Hussain, Advocate for 26.4.2010 at 11:00 a.m. for further proceedings. On 26.4.2010, the order dated 20.4.2010 was recalled by the Court with a heavy heart in the following terms: -

“In my view the order was in fact passed in favour of the plaintiff whereby the defendant No.1 was strictly warned to abide by his undertaking and in case of any breach, he will be exposed to the contempt of Court proceedings. Learned counsel for the plaintiff insists that let this order be continued but only her consent may be deleted from the order, which shows that the learned counsel wants to derive the benefit of the order but simply avoiding her consent which is unfair. In view of the above circumstances, I have left with no other option but to recall my order dated 20.4.2010. Learned counsel for the defendant No.1 is at liberty to move appropriate application under Order I Rule 10 CPC. Let this matter be fixed before any other Bench in future.”

In this backdrop, these two applications have been filed with identical prayer for deleting the names of the defendants in identical circumstances.

4. I have thoroughly examined the plaint, in which the plaintiff has sought the permanent injunction against the defendants for restraining them from infringing / imitating / counterfeiting any of the plaintiff's prints, patterns and all artistic work in Fabrics /

Cloth and a decree for furnishing detail account of sales and profits made through the sale of infringing / imitated counterfeit goods as well as a decree of directing the defendants jointly and severally to pay a sum of Rs.100 million as compensation for causing loss of business and opportunities to the plaintiff. For all these prayers, the plaintiff from paragraphs 1 to 12 of the plaint has praise himself by showing his class of fabrics. In paragraph 13, without disclosing any source have declared that in November, 2009, the plaintiff has come to know that the defendant No.5 was illegally trading upon the plaintiff's hard earned goodwill by manufacturing imitated and counterfeited products sold through its distributors / agents being defendants No.1 to 4.

5. The plaintiff has not filed any document showing that the defendants No.1 to 4 are distributors and agents of defendant No.5. In paragraph 14, the plaintiff has referred to a legal notice sent by him only to defendant No.5 and attached with the plaint as annexure 'G'. I have examined annexure 'G' to the plaint very carefully. In the legal notice he has not even referred to the sale of infringed material by the defendant No.5 through the defendants No.1 to 4. He has, however, claimed an amount of Rs.50 million as loss of business and Rs.10 million as a token of compensation for the aforesaid mala fide and unlawful acts only of the defendant No.5. The names of defendants No.1 to 4 were not mentioned in the legal notice to the defendant No.5 nor separate legal notices were issued to these defendants prior to filing the suit. Not a single averment in the plaint is against the defendants No.1 to 4. Interestingly enough the defendant No.5 is ex-parte since 27.1.2011.

6. In the counter affidavit Plaintiff has filed copy of order passed in suit No.1350/2010 and it is averred that in case of grant of present application Plaintiff suit No.1350/2010 shall be adversely affected. The plaintiff probably realizing the legal position and the orders of this Court dated 20.4.2014 and 26.4.2014 mentioned/reproduced above, pending the present suit, has filed another suit bearing No.1350/2010 on 31.8.2010, wherein the present defendants No.1 and 2 are impleaded and defendants No.3 and 4 have not been impleaded. The subsequent Suit No.1350 of 2010 is the one, in which plaintiff has again claimed injunction and damages for infringement of registered designs under the Registered Designs Ordinance, 2002 and Artistic Work under the Copyright Ordinance, 1962 as well as Competition under the Trademark Ordinance, 2001 read with all other enabling provisions of law and have already obtained injunction orders, therefore, even otherwise, if the plaintiff have any remote claim against the defendants No.1 and 2, that is already covered in the subsequent suit. Anything stated in the counter affidavit to these applications, if it is other than the stand taken in the plaint, it cannot advance the case of Plaintiff.

7. The plaintiff, in the circumstances, has failed to make out even a cause of action against the defendants No.1 and 2 to claim any compensation jointly and severally with the defendant No.5. *Prima facie* there is no connection between these defendants and defendant No.5. In the absence of any allegation with any *prima facie* material to connect the defendants No.1 and 2 with the so-called loss claimed by the plaintiff against the defendant No.5, I am of the considered opinion that by going on trial the plaintiff shall not be able to connect the defendants No.1 and 2 with the so-

called losses maintained by the plaintiff in the prayer clauses as no details of such losses are given in the plaint nor role of defendants No.1 and 2 has been described in causing such loss. Evidence would be confined to the pleadings and what is not pleaded, even if proved, would not be considered by the Court as the Courts are required to confine their verdicts only to the pleadings of the parties. The defendants No.1 and 2 have categorically stated that they have not sold the material claimed by the plaintiffs nor they intend to do so, therefore, in the present case I do not see any justification for keeping the names of defendants No.1 and 2 on the Court file.

8. In view of above discussion, both the applications are allowed, consequently, names of defendants No.1 and 2 being unnecessarily inserted in the instant suit, are hereby deleted. The plaintiff is directed to file amended title of the plaint after deleting the names of defendants No.1 and 2 within two weeks from the date of announcement of this order.

JUDGE

Karachi
Dated:_____