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

+ CS(COMM) 152/2021, I.A. 4672/2021(Order XXXIX Rules 1 and 2 of the CPC), I.A. 4673/2021 (Order XI Rule 1(4) of the CPC) and I.A. 19395/2022 (Order VIII Rule 1 of the CPC)

AMIT JAIN

..... Plaintiff

Through: Mr. Sushant Singh, Ms. Geetika Kapur, Mr. Sourav Pattanaik, Mr. Kunal Khana, Mr. Pankaj Kumar and Mr. Mankaran Singh, Advs.

Versus

VIKAS GUPTA

..... Defendant

Through: Mr. Sachin Gupta, Ms. Swati Meena and Ms. Yashi Agrawal, Advs.

**CORAM:**

**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**ORDER**

**17.05.2023**

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**CS(COMM) 152/2021 & I.A. 19395/2022 (Order VIII Rule 1 of the CPC)**

1. This is a suit which was instituted as far back as in 2021 and which came up for hearing, for the first time, on 26<sup>th</sup> March 2021. We are more than two years since that date and, till date, summons are yet to be issued in this suit.

2. A perusal of the order-sheet in this matter indicates that the learned Counsel for the defendant had objected to the maintainability of the suit, which was why this Court had demurred from issuing summons.

3. The law relating to issuance of summons in a suit is well settled. It has been authoritatively held by the Division Bench of this



Court in *Bright Enterprises Pvt. Ltd. v MJ Bizcraft LLP*<sup>1</sup> that summons are a matter of right in every suit except where the suit can be rejected under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) or the suit can be returned for presentation before the appropriate forum under Order VII Rule 10 of the CPC. In all other cases, issuance of summons is a matter of right.

4. It is nobody's case that the present suit is liable to be returned for presentation before any other forum; accordingly, Order VII Rule 10 of the CPC is not applicable.

5. Mr. Gupta submits, however, that he would pray that the suit may be dismissed under Order VII Rule 11 of the CPC. To a query from the Court as to the exact provision of Order VII Rule 11 of the CPC that he seeks to invoke, Mr. Gupta cites Clause a and submits that the suit does not disclose a cause of action.

6. "Cause of action", it is well settled, refers to the bundle of facts which the plaintiff has to assert and prove in order to be entitled to a decree. Equally, it has been categorically held by the Supreme Court in *Popat & Kotecha Property v. SBI*<sup>2</sup> that an application under Order VII Rule 11 of the CPC has to be decided on the basis of the averments in the plaint, treating them as correct. A Court, adjudicating on an application under Order VII Rule 11 of the CPC, cannot proceed on the basis of any material outside the plaint. The application has to be decided on demurrer and all assertions in the plaint have to be treated as correct for that purpose.

7. Mr. Gupta has referred only to two documents, in order to

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<sup>1</sup> 2017 SCC OnLine Del 6394

<sup>2</sup> (2005) 7 SCC 510



substantiate his plea for rejection of the present plaint under Order VII Rule 11 of the CPC. The first is the written statement filed by the defendant in CS(Comm.) 363/2019 (**Vikas Gupta v. Amit Jain**). Mr. Gupta submits that, in the said case, the present plaintiff has taken a stand that the mark of the defendant is different and distinguishable from his mark. Mr. Gupta submits that in view thereof, the plaintiff cannot possibly take a different stand in the present case.

8. The pleadings in the present suit reveal that, in this suit, the plaintiff has categorically taken a stand that the impugned mark of the defendant is deceptively similar to the plaintiff's mark. One may refer, in this context, to para 20 (i) of the present plaint, which reads thus:

“That the defendants have adopted and started using the impugned trademark NEHA in relation to their impugned goods and business dishonestly and malafidely. The impugned trademark is identical with and/or deceptively similar to the plaintiff's said trademark and the impugned goods and business of the defendants under the impugned trademark are also same/similar/cognate and allied”

9. The averments in the present plaint, therefore, clearly make out a cause of action in favour of the plaintiff. It would be for the defendant to raise all pleas challenging the said averments in accordance with law. So long as, in the present plaint, it has been specifically pleaded that the impugned mark of the defendant is deceptively similar to the plaintiff's mark, this ground, as urged by Mr. Gupta, cannot constitute the basis to reject the plaint under Order VII Rule 11 of the CPC.

10. Mr. Gupta then refers to an affidavit of the plaintiff in CS(Comm.) 363/2019, in which the plaintiff is stated to have set out the number of cases pending against him. Mr. Gupta submits that the



plaintiff is a habitual infringer and has a habit of filing cross suits whenever an infringement suit is instituted against him. Such cross suits, he submits, are merely for harassing the opposite party and are completely devoid of merit.

**11.** This plea, too, clearly cannot constitute a basis to reject the present suit under Order VII Rule 11 of the CPC.

**12.** To repeat Order VII Rule 11(a) of the CPC to be justifiably invocable in the present case, the onus would be on the defendant to show that on the basis of the assertions in the plaint, treating the assertions as correct, no cause of action would inure in favour of the plaintiff. In other words, the defendant would have to show that even if every assertion taken in the plaint were taken to be as correct, the plaintiff would not be entitled to the relief sought in the plaint.

**13.** Clearly, the two solitary submissions advanced by Mr. Gupta do not make such a case.

**14.** Accordingly, the submission of Mr. Gupta that the plaint is liable to be rejected under Order VII Rule 11 of the CPC and that, therefore, no summons should be issued in the suit is manifestly without justification. It is accordingly rejected.

**15.** In the circumstances, let the plaint be registered as a suit. Summons are accepted on behalf of the defendant by Mr. Sachin Gupta.

**16.** Written statement, accompanied by affidavit of admission and denial of the documents filed by the plaintiff be filed within 30 days with advance copy to learned Counsel for the plaintiff who may file



replication thereto, accompanied by affidavit of admission and denial of the documents filed by the defendant within 30 days thereof.

17. List before the learned Joint Registrar (Judicial) for completion of the pleadings, admission and denial of documents and marking of exhibits on 18<sup>th</sup> July 2023, whereafter the matter would be placed before the Court for case management hearing and further proceedings.

**I.A. 4672/2021 (Order XXXIX Rules 1 and 2 of the CPC)**

18. Issue notice, returnable before the Court on 16<sup>th</sup> August 2023.

19. Notice is accepted on behalf of the defendant by Mr. Sachin Gupta.

20. Reply be filed within four weeks with advance copy to learned Counsel for the plaintiff, who may file rejoinder thereto, within four weeks thereof.

**I.A. 4673/2021 (Order XI Rule 1(4) of the CPC)**

21. This is an application by the plaintiff for permission to place additional documents on record. As summons in the suit are being issued only today, the plaintiff is permitted to place additional documents, if any, on record within a period of 30 days.

22. The application stands disposed of in the aforesaid terms.

**C.HARI SHANKAR, J**

**MAY 17, 2023/rb**