THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.01.2017

\+ **RFA(OS)(COMM) 8/2016 & CM 37888/2016**

BRIGHT ENTERPRISES PRIVATE LTD & ANR ... Appellants

versus

MJ BIZCRAFT LLP & ANR ... Respondents

<u>Advocates who appeared in this case</u>:-

For the Appellants	:	Mr J. Sai Deepak with Mr Mohit Goel, Mr Sidhant Goel, Ms Pragya Mishra and Mr Ashutosh Nagar, Mr Avinash Sharma and Mr Siddhant Goel
For the Respondent No.1	:	Mr Sidhart Chopra with Ms Sneha Jain and Ms Suhasini Raina
For the Respondent No.2	:	Ms Shagun Parashar

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J

"*The hurrier I go, the behinder I get" – Lewis Carroll, Alice in Wonderland.*

1. This appeal is directed against the judgment dated 08.08.2016 delivered by a learned Single Judge of this Court, whereby the suit filed by the appellants/plaintiffs has been dismissed at the admission stage itself. The learned Single Judge, *inter alia*, invoked the provisions of Order XIIIA

of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') in dismissing the appellants/plaintiffs' suit.

2. The appellants/plaintiffs had instituted the suit against the respondents/defendants for permanent injunction restraining infringement of trade mark, passing off, dilution of goodwill, unfair competition, rendition of accounts etc.. Essentially, the claim of the appellants/plaintiffs was that the respondents were using the trade mark 'PRIVEE' which was identical to or deceptively similar to the trade mark of the plaintiffs – MBD PRIVE and PRIVE. The plaintiffs are, *inter alia*, in the hotel business.

3. The appellants/plaintiffs had filed the said suit as a commercial suit because the damages claimed by them were to the extent of Rs 1 crore which satisfied the definition of 'specified value' as contained in Section 2(1)(i) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter referred to as 'the Commercial Courts Act'). The plaint contained the following prayers:-

> "(i) Decree for permanent injunction restraining the Defendants, its directors, partners or proprietors as the case may be, its assigns in business, franchisees, store owners, licencees, distributors, affiliates, subsidiaries, and agents from using for any or all business activities the Infringing Trade Mark PRIVEB, or any other trade mark or logo/device, which is identical to and/or deceptively similar to the Plaintiffs' trade marks MBD PRIVE and PRIVE or incorporates the words

"Prive", or any other trade mark or logo/device, which is identical to and/or deceptively similar to the abovementioned Plaintiffs Trade Marks, amounting to infringement of the Plaintiffs trade mark under Section 29 of the Trade Marks Act;

(ii) Decree for permanent injunction restraining the Defendants, its directors, partners or proprietors as the case may be, its assigns in business, franchisees, store owners, licencees, distributors, affiliates, subsidiaries, and agents from using for any or all business activities the Infringing – Trade Mark PRIVEE, or any other trade mark or logo/device, which is identical to and/or deceptively similar to the Plaintiffs' trade marks MBD PRIVE and PRIVE or incorporates the words "Prive", or any other trade mark or logo/device, which is identical to and/or deceptively similar to the abovementioned Plaintiffs Trade Marks, amounting to passing off of the goods/products of the Defendants for those of the Plaintiffs;

(iii) Decree for delivery up of all the goods, stationery, hoardings, boards, printed material, dies, blocks, etc., bearing Infringing Trade Marks PRIVEE to an authorised representative of the Plaintiffs for destruction.

(iv) Order for rendition of accounts of profit illegally earned by the Defendants and a decree for the amount so found due, or in the alternate, a decree for damages of at least Rs. 1,00,00,000/- may be passed in favour of the Plaintiff and against the Defendant.

(v) An order for costs in the proceedings.

(vi) Any further order as this Hon'ble Court deems fit and proper in the facts and circumstances of this case."

4. The suit came up for hearing before a learned Single Judge of this Court on 19.07.2016, whereupon it was directed that the matter be listed before another Bench on 22.07.2016. On 22.07.2016, when the matter appeared before another learned Single Judge on the Original Side of this Court, he heard the counsel for the plaintiffs on admission and reserved orders. This was followed by the impugned judgment dated 08.08.2016, whereby, as pointed out above, the learned Single Judge, without issuing any summons to the defendants/respondents, dismissed the suit, after going into the merits of the claims raised by the plaintiffs. The suit was dismissed in *limine* by the learned Single Judge by apparently following a decision of a Division Bench of this Court in ***Dr Zubair Ul Abidin v. Sameena Abidin @ sameena Khan*: 214 (2014) DLT 240 (DB)**. It was observed by the learned Single Judge that suits which are doomed to fail and of which there is no chance of success should be dismissed at whatever stage the court finds it to be so. Another decision relied upon by the learned Single Judge was of an earlier Single Bench in the case of ***Camlin Private Limited v. National Pencil Industries*: (1986) VI PTC 1**. At the outset, we may state that the reliance by the learned Single Judge on these judgments was misplaced. The case of ***Dr Zubair Ul Abidin*** *(supra)* was one under Order VII Rule 11 CPC and in that case also both parties were represented and the

case was heard by the learned Single Judge after issuance of summons. The decision in the case of ***Camlin Private Limited*** *(supra)* is of a learned Single Judge of this Court and does not, in any event, bind the Division Bench. That case, too, was decided after the appearance of the defendant and, therefore, stands on a different footing altogether.

5. The other reason given by the learned Single Judge for dismissing the suit even prior to the issuance of summons was his reliance placed on the provisions of Order XIIIA of the CPC which sets out the procedure by which courts may decide a claim pertaining to any commercial dispute "without recording oral evidence". The learned Single Judge, while invoking the provisions of Order XIIIA of the CPC, observed as under:-

> "22. There has also been a change in law now. The plaintiffs, though had an option to institute this suit before the District Judge, have chosen to file it as a commercial suit before the Commercial Division of this Court. Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 has amended CPC vis-à-vis commercial disputes and Order 13A of the CPC as applicable to commercial disputes allows for summary dismissal of the suit. The plaintiffs having chosen to file the suit as a commercial suit have taken a chance of the suit being summarily dismissed. Even otherwise, today, when the Courts are facing the problem of docket explosion, unless the Courts weed out such suits which on the reading of the plaint and the documents filed therewith do not

show any right in favour of the plaintiffs, the trial of such suits would be at the cost of expeditious disposal of deserving suits."

6. Before we proceed any further, the provisions of Order XIIIA CPC need to be set out:-

"ORDER XIII-A
SUMMARY JUDGMENT

1. *Scope of and classes of suits to which this Order applies.*—(*1*) This Order sets out the procedure by which Courts may decide a claim pertaining to any Commercial Dispute without recording oral evidence.

(*2*) For the purposes of this Order, the word "claim" shall include—

(*a*) part of a claim;

(*b*) any particular question on which the claim (whether in whole or in part) depends; or

(*c*) a counterclaim, as the case may be.

(*3*) Notwithstanding anything to the contrary, an application for summary judgment under this Order shall not be made in a suit in respect of any Commercial Dispute that is originally filed as a summary suit under Order XXXVII.

2. *Stage for application for summary judgment.* – An applicant may apply for summary judgment at any time after summons has been served on the defendant:

Provided that, no application for summary judgment may be made by such applicant after the Court has framed the issues in respect of the suit.

3. *Grounds for summary judgment.*— The Court may give a summary judgment against a plaintiff or defendant on a claim if it considers that—

(*a*) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and

(*b*) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence.

4. *Procedure.* – (*1*) An application for summary judgment to a Court shall, in addition to any other matters the applicant may deem relevant, include the matters set forth in sub-clauses (*a*) to (*f*) mentioned hereunder:—

(*a*) the application must contain a statement that it is an application for summary judgment made under this Order;

(*b*) the application must precisely disclose all material facts and identify the point of law, if any;

(*c*) in the event the applicant seeks to rely upon any documentary evidence, the applicant must,—

(*i*) include such documentary evidence in its application, and

(*ii*) identify the relevant content of such documentary evidence on which the applicant relies;

(*d*) the application must state the reason why there are no real prospects of succeeding on the claim or defending the claim, as the case may be;

(*e*) the application must state what relief the applicant is seeking and briefly state the grounds for seeking such relief.

(*2*) Where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of:—

(a) the date fixed for the hearing; and

(b) the claim that is proposed to be decided by the Court at such hearing.

(*3*) The respondent may, within thirty days of the receipt of notice of application of summary judgment or notice of hearing (whichever is earlier), file a reply addressing the matters set forth in clauses (*a*) to (*f*) mentioned hereunder in addition to any other matters that the respondent may deem relevant:—

(*a*) the reply must precisely—

(*i*) disclose all material facts;

(*ii*) identify the point of law, if any; and

(*iii*) state the reasons why the relief sought by the applicant should not be granted;

(*b*) in the event the respondent seeks to rely upon any documentary evidence in its reply, the respondent must—

(*i*) include such documentary evidence in its reply; and

(*ii*) identify the relevant content of such documentary evidence on which the respondent relies;

(*c*) the reply must state the reason why there are real prospects of succeeding on the claim or defending the claim, as the case may be;

(*d*) the reply must concisely state the issues that should be framed for trial;

(*e*) the reply must identify what further evidence shall be brought on record at trial that could not be brought on record at the stage of summary judgment; and

(*f*) the reply must state why, in light of the evidence or material on record if any, the Court should not proceed to summary judgment.

5. *Evidence for hearing of summary judgment.* – (*1*) Notwithstanding anything in this Order, if the respondent in an application for summary judgment wishes to rely on additional documentary evidence during the hearing, the respondent must:—

(*a*) file such documentary evidence; and

(*b*) serve copies of such documentary evidence on every other party to the application at least fifteen days prior to the date of the hearing.

(*2*) Notwithstanding anything in this Order, if the applicant for summary judgment wishes to rely on documentary evidence in reply to the defendant's documentary evidence, the applicant must:—

(*a*) file such documentary evidence in reply; and

(*b*) serve a copy of such documentary evidence on the respondent at least five days prior to the date of the hearing.

(*3*) Notwithstanding anything to the contrary, sub-rules (*1*) and (*2*) shall not require documentary evidence to be:—

(*a*) filed if such documentary evidence has already been filed; or

(*b*) served on a party on whom it has already been served.

6. *Orders that may be made by Court.*– (*1*) On an application made under this Order, the Court may make such orders that it may deem fit in its discretion including the following:—

(*a*) judgment on the claim;

(*b*) conditional order in accordance with Rule 7 mentioned hereunder;

(*c*) dismissing the application;

(*d*) dismissing part of the claim and a judgment on part of the claim that is not dismissed;

(*e*) striking out the pleadings (whether in whole or in part); or

(*f*) further directions to proceed for case management under Order XV-A.

(*2*) Where the Court makes any of the orders as set forth in sub-rule (*1*) (*a*) to (*f*), the Court shall record its reasons for making such order.

7. *Conditional order.* – (*1*) Where it appears to the Court that it is possible that a claim or defence may succeed but it is improbable that it shall do so, the Court may make a conditional order as set forth in Rule 6 (*1*) (*b*).

(*2*) Where the Court makes a conditional order, it may:—

(*a*) make it subject to all or any of the following conditions:—

(*i*) require a party to deposit a sum of money in the Court;

(*ii*) require a party to take a specified step in relation to the claim or defence, as the case may be;

(*iii*) require a party, as the case may be, to give such security or provide such surety for restitution of costs as the Court deems fit and proper;

(*iv*) impose such other conditions, including providing security for restitution of losses that any party is likely to suffer during the pendency of the suit, as the Court may deem fit in its discretion; and

(*b*) specify the consequences of the failure to comply with the conditional order, including passing a judgment against the party that have not complied with the conditional order.

8. *Power to impose costs.* – The Court may make an order for payment of costs in an application for summary judgment in accordance with the provisions of sections 35 and 35A of the Code."

7. The provisions of Order XVA of the CPC and particularly Rule 6(1)(a) thereof is also relevant and the same reads as under:-

"6. *Powers of the Court in a Case Management Hearing.* – (1) In Case Management Hearing held under this Order, the Court shall have the power to –

(a) Prior to the framing of issues, hear and decide any pending application filed by the parties under Order XIIIA;

xxxx xxxx xxxx xxxx”

8. The learned counsel for the appellants submitted that before a summary judgment can be made under Order XIIIA CPC, there has to be an application moved by the plaintiff or the defendant. In case no such application is made, summary judgment cannot be delivered by the Court. It was also contended that in view of Rule 2 of Order XIIIA CPC, not only was an application for summary judgment necessary, but such application could only be made at any time after summons had been served on the defendant. It was, therefore, contended that the impugned judgment was liable to be set aside on, *inter alia*, the ground that it had been delivered at a stage prior to the issuance of summons and without there being any application for summary judgment. Rules 4(2) and 4(3) of Order XIIIA CPC were also referred to by the learned counsel for the appellants to submit that in a case where hearing for summary judgment is fixed, the respondent must be given notice of the hearing and the respondent may file a reply to the application for summary judgment. According to the learned counsel for the appellants, this provision makes it clear that apart from an

application being made for summary judgment, the Court cannot make a summary judgment without the other side being heard or in other words there cannot be a summary dismissal of a suit under Order XIII A without the other side being present.

9. It was also contended that the observation made by the learned Single Judge with regard to the appellants/plaintiffs not making out even a *prima facie* case and that suits which are doomed to fail and of which there is no chance of any success ought to be dismissed in limine does not take into account the averments contained in the plaint. It was contended that whether a plaintiff makes out a *prima facie* case or not, may be a consideration for the grant or non-grant of an interim order, but, insofar as the suit is concerned, it cannot be dismissed at the admission stage without the issuance of summons. It was contended that if the plaint is filed in a court which does not has territorial jurisdiction, then the plaint may be returned under Order VII Rule 10 CPC. Furthermore, the plaint may also be rejected under Order VII Rule 11 CPC if any of the conditions stipulated therein are satisfied. In such eventualities, it may be possible that the Court, at the admission stage itself, passes orders either under Order VII Rule 10 or under Order VII Rule 11 CPC. But it was contended that if the

plaint is neither returned under Order VII Rule 10 or rejected under Order VII Rule 11 CPC, the same would have to be registered as a duly instituted suit and summons would have to be served upon the defendants and, therefore, at this stage, the suit could not be dismissed by the Court upon an examination of the merits without the issuance of summons. It was contended that as long as there is a cause of action which is disclosed in the plaint, the case cannot be thrown out without issuing summons to the defendants, on the mere ground that it is weak and is not likely to succeed. The learned counsel for the appellants also submitted that there were other infirmities in the impugned judgment and particularly, the observation of the learned Single Judge that the claim for infringement had been given up. It was asserted before us that no such concession was made before the learned Single Judge. It was further pointed out that the learned Single Judge had arrived at certain findings particularly in paragraphs 10 and 11 of the impugned judgment by carrying out independent research without affording an opportunity to the appellants/ plaintiffs to rebut the same.

10. On the other hand, the learned counsel for the respondents and in particular the respondent No.1 submitted that the Court had jurisdiction to issue a summary judgment against the plaintiffs in view of the provisions of

Rule 3 of Order XIIIA CPC. It was submitted that the power of a court to pass a summary judgment in a commercial matter is quite distinct from the procedure to be adopted/invoked by parties to the suit to seek a summary judgment. It was contended that the provisions of Order XIIIA Rule 3 of the CPC vest the court with wide powers and the mechanism for invoking such powers which have been provided to a party under Rule 2 could not be treated as a condition precedent to the exercise of that power. It was also submitted that a provision has to be interpreted in such a manner that every procedure is to be regarded as permitted to the Court unless it is expressly prohibited and not the other way round that every procedure is prohibited unless expressly permitted. Reliance was placed on the Supreme Court decision in the case of ***Rajendra Prasad Gupta v. Prakash Chandra Mishra and Others**: (2011) 2 SCC 2 SCC 705*.

11. Reliance was also placed on a Full Bench decision of the Allahabad High Court in ***Narsingh Das v. Mangal Dubey**: ILR 5 All 163 (FB) (1882).*

12. It was contended by the learned counsel for the said respondent that where the legislature intended to prohibit or put a restriction or limitation on issuance of summary judgment, it had done so by specifically

prohibiting it such as in Rule 2 of Order XIIIA, where it is provided that no application for summary judgment may be made by such applicant after the Court has framed issues in the suit. It was submitted that in contradistinction to Rule 2, the legislature, in its wisdom, did not think it proper to out any limitation on the ability of the Court to issue a summary judgment in the eventualities contemplated in Rule 3 of Order XIIIA. It was, therefore, contended that the power of a court under Rule 3 could not be given a restrictive meaning as that would frustrate the very object of the provision. It was, therefore, contended that keeping in mind the Statement of Objects of enacting the Commercial Courts Act and of effecting consequential amendments to the CPC, in order to expeditiously dispose commercial matters and also having regard to the fact that there was no requirement of recording oral evidence in order to pass a judgment in proceedings where there was no real prospect of success, it was open to Court to pass a summary judgment without notice to the defendants.

13. It was also contended by the learned counsel for the said respondent that Order V Rule 1 which deals with the issuance of summons also uses the word 'may' as opposed to 'shall'. This, according to the learned counsel, meant that it was not incumbent upon the Court to issue summons

in every suit which has been duly instituted. It was, therefore, contended that having regard to the provisions of Order V Rule 1 read with Order XIIIA Rule 3 CPC, the Court had the power and jurisdiction in a commercial matter to dismiss a suit on merits without issuance of notice to the defendant in case the Court was of the opinion that the plaintiff had no real prospect of succeeding in the claim and that there was no other compelling reason as to why the claim should not be disposed of before recording oral evidence. It was contended that the general power of the Court under Order XIIIA Rule 3 could not be curtailed or whittled down by making it subject to the fulfilment of the condition of filing an application. It was, therefore, contended that no interference with the impugned judgment was called for and the appeal be dismissed.

14. First of all, let us deal with certain provisions of the CPC. Section 9 of the CPC makes it clear that Courts, subject to the other provisions of the CPC, shall have jurisdiction to try all suits of a civil nature except those suits whose cognizance is either expressly or impliedly barred. Section 26 CPC deals with the institution of suits and sub-Section (1) thereof stipulates that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Furthermore, in every plaint, the facts

shall be proved by affidavit as provided in sub-Section (2) of Section 26. With regard to commercial disputes of a specified value, a proviso has also been added which stipulates that such affidavit has to be in the form and manner as prescribed under Order VI Rule 15 A.

15. Section 27 CPC deals with the issuance of summons to defendants. It stipulates that where a suit has been 'duly instituted', a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed etc. Section 33 of the CPC stipulates that the Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

16. Order V Rule 1 CPC stipulates that when a suit has been 'duly instituted', a summons 'may' be issued to the defendant to appear and answer the claim and to file the written statement of his defence etc. It is clear that the provisions of Order V Rule 1(1) reflect the substantive provision contained in Section 27 CPC.

17. From the above and particularly upon examining the provisions of Section 27 and Order V Rule 1(1) CPC, it is evident that when a suit is regarded as having been 'duly instituted', a summons may be issued to the

defendant. The use of the expression ‘duly instituted’ has to be seen in the context of the provisions of Orders VI and VII of the CPC. In the present matter, it is nobody’s case that the suit had not been duly instituted in the sense that it did not comply with the requirements of Order VI and VII CPC. It is neither a case of return of a plaint under Order VII Rule 10 nor a case of rejection of a plaint under Order VII Rule 11 CPC. The present case is one of dismissal of the suit itself on merits. Therefore, the only thing that needs to be examined is whether the Court had a discretion to issue or not to issue summons given that the suit had been duly instituted. In our view, the use of the word ‘may’ does not give discretion to the Court and does not make it optional for it to issue summons or not. This is further fortified by the fact that the first proviso to Order V Rule 1(1) itself gives a situation where summons must not be issued and that happens when a defendant appears at the presentation of the plaint and admits the plaintiff’s claim. Therefore, in such a situation, there is no requirement for issuance of summons and that is why the word ‘may’ has been used in Order V Rule 1(1). In all other cases, when a suit has been ‘duly instituted’ and is not hit by either Order VII Rule 10 or Order VII Rule 11 CPC, summons has to be issued to the defendant.

18. In the present case, the learned Single Judge has neither returned the plaint under Order VII Rule 10 nor rejected the plaint under Order VII Rule 11 CPC. Therefore, it was incumbent upon the learned Single Judge to have issued summons to the respondents /defendants, particularly because the respondents/defendants had not appeared at the time of presentation of the plaint and did not admit the claim of the appellants / plaintiffs. The Rule of *audi alteram partem* is embedded in Order V Rule 1 sub-rule (1) read with Section 27 CPC.

19. We may also point out that there is a clear distinction between 'return of a plaint', 'rejection of a plaint' and 'dismissal of a suit'. These three concepts have different consequences. A dismissal of a suit would necessarily result in a subsequent suit being barred by the principles of *res judicata*, whereas this would not be the case involving 'return of a plaint' or 'rejection of a plaint'. What the learned Single Judge has done is to have dismissed the suit of the appellants/plaintiffs at the admission stage itself without issuance of summons and this, we are afraid, is contrary to the provisions of the statute.

20. Apart from this, we are of the view that the learned Single Judge has gone wrong in invoking the provisions of Order XIIIA CPC for rendering a summary judgment. It is true that Rule 3 of Order XIIIA CPC empowers the Court to give a summary judgment against a plaintiff or defendant on a claim if it considers that – (a) the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and (b) there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. But, in our view, this power can only be exercised upon an application at any date only after summons have been served on the defendant and not after the Court has framed issues in the suit. In other words, Order XIIIA Rule 2 makes a clear stipulation with regard to the stage for application for summary judgment. The window for summary judgment is after the service of summons on the defendant and prior to the Court framing issues in the suit.

21. The provisions relating to summary judgment which enables courts to decide claims pertaining to commercial disputes without recording oral evidence are exceptional in nature and out of the ordinary course which a normal suit has to follow. In such an eventuality, it is essential that the

stipulations are followed scrupulously otherwise it may result in gross injustice. As pointed out above, a specific period of time has been provided during which an application for summary judgment can be made. That period begins upon the service of summons on the defendant and ends upon the court framing issues in the suit. Even if we were to accept, which we do not, the argument of the respondents that the Court had *suo moto* powers to deliver summary judgment without there being any application, those powers also would have to be exercised during this window, that is, after service of summons on the defendant and prior to framing of issues. In addition to this, we also reiterate that, in our view, a summary judgment under Order XIIIA CPC is not permissible without there being an appropriate application for summary judgment. The contents of an application for summary judgment are also stipulated in Rule 4 of Order XIIIA. The application is required to precisely disclose all material facts and identify the point of law, if any. In the event, the applicant seeks to rely on any documentary evidence, the applicant must include such documentary evidence in its application and identify the relevant content of such documentary evidence on which the applicant relies. The application must also state the reason why there are no real prospects of succeeding or defending the claim, as the case may be.

22. Rule 4(2) of Order XIIIA also requires that where a hearing for summary judgment is fixed, the respondent must be given at least thirty days' notice of the date fixed for the hearing and the claim that is proposed to be decided by the Court at such hearing. Rule 4(3) of Order XIIIA makes provision which enables the respondents to file a reply within the stipulated time addressing the matters set forth in clauses (a) to (f) of the said sub-rule. In particular, the reply of the respondent ought to precisely disclose all the material facts and identify the point of law, if any, and the reasons why the relief sought by the applicant for summary judgment should not be granted. Just as in the case of the applicant, the respondent is also given the opportunity to rely upon documentary evidence in its reply which must be included in the reply and the relevant content identified. The respondent's reply is also required to give reason as to why there are real prospects of succeeding on the claim or defending the claim, as the case may be. Importantly, the reply must also concisely state the issues that should be framed for trial and that it must identify what further evidence would be brought on record at trial that could not be brought on record at the stage of summary judgment. The reply should also state as to why in

the light of the evidence or material on record, if any, the Court should not proceed to summary judgment.

23. From the provisions laid out in Order XIIIA, it is evident that the proceedings before Court are adversarial in nature and not inquisitorial. It follows, therefore, that summary judgment under Order XIIIA cannot be rendered in the absence of an adversary and merely upon the inquisition by the Court. The Court is never an adversary in a dispute between parties. Unfortunately, the learned Single Judge has not considered the provisions of Order XIIIA CPC in this light.

24. In view of the discussion above, since no summons had been issued and obviously no application had been filed by the respondents for a summary judgment, the learned Single Judge could not have dismissed the suit invoking the provisions of Order XIIIA CPC.

25. Before parting with this appeal, we would also like to point out that the learned Single Judge has indeed made certain observations and returned certain findings based on his own research without any opportunity of rebuttal having been given to the appellants/plaintiffs. This is evident from

paragraphs 10, 11 and 12 of the impugned judgment which we reproduce herein below:-

> "10. "PRIVE" is a word from old French and was derived from the Latin word 'privatus' and translated in English language meant 'private' or 'a private place' and has been found by me to be common to the hospitality industry particularly the hotels, with areas / zones in hotels which are not meant to be accessible to all the guests of the hotel being marked therewith. As far as I recollect, the business centre of erstwhile hotel Holiday Inn at Barakhamba Road, New Delhi, now Hotel The Lalit, was also called "PRIVE" and the business centre facility at hotel Dusit Devarana now is called "PRIVE". It is for this reason only that I entertained doubts as to the maintainability of the case made out by the 'plaintiffs, of use by the defendants of the word "PRIYEE" in relation to a nightclub, not a standalone nightclub but in hotel Shangri-La's Eros, would amount to passing off by the defendants of their business of a nightclub as that of the plaintiffs - the simple law of passing off being that one man is not entitled to sell his goods under such circumstances as to induce the public to believe that they are of someone else.
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> 11. Not only so, a 'Google' search of the word "PRIVE" throws up use of the said word in "CLUB PRIVE" at hotel Dusit Devarana, New Delhi and "PRIVEE" at Shangri-La's Eros Hotel, New Delhi and "MBD PRIVE" appears much much later, even after hotel "PICASSO PRIVE" at A-14, Naraina Vihar, New Delhi and a host of other hotels providing services or having restaurant or spa with the name "PRIVE".
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> 12. The plaintiffs, along with their documents at page 34 have filed the download from Google website of the search result "MBD PRIVE" and the counsel for the plaintiffs argued that the plaintiffs are prior user of the word "PRIVE" with the defendants having commenced used thereof only in January, 2016. In support thereof, the counsel for the

> plaintiff drew attention to the news reports of May, June and July, 2009 of introduction of the new room category "PRIVE" in the Radisson Blue MBD Hotel. However not only does a Google search again so disclose but the plaintiffs also along with their documents at page 76 have filed news reports of 18th May, 2016 of launch of "all new MBD PRIVE COLLECTION" at the plaintiffs' hotels. There is nothing to show that the "PRIVE" category of rooms which were launched in the plaintiffs' hotel in May and June, 2009 continued till now."
>
> (underlining added)

26. From the paragraphs extracted above, we find that the learned Single Judge has based his conclusions on, *inter alia*, on what he could "recollect" about a certain state of facts. Moreover, he has used the expression that it is only for 'this reason' that he entertained doubts as to the maintainability of the case made out by the plaintiffs. We are of the view that the learned Single Judge could not himself become a witness in a case before him and that, too, without any opportunity of rebuttal (or cross-examination) to the plaintiffs / appellants. At the stage of admission of a suit, it has only to be seen as to whether it has been duly instituted or not. The statements contained in the plaint are to be taken by way of demurrer and they can only be proved or disproved through evidence based on issues that may be struck. A Court may feel that the case of a plaintiff is weak but that is no

ground whatsoever for throwing out the suit log, stock and barrel without giving the plaintiff an opportunity of proving and establishing its case.

27. Before concluding, we would like to make a brief comment on the court's concern with 'docket explosion'. No doubt, it is a problem for the judicial system to contend with. But, that does not concern the individual litigant who comes to court seeking justice. Our endeavour must never be to deny justice to anyone in our over zealousness to dispose cases. As Benjamin Franklin said – great haste makes great waste, courts while endeavouring to deliver speedy justice, must not hand out hasty decisions without any concern for justice.

28. For all these reasons, the impugned judgment cannot be sustained at all. The same is set aside. The suit is restored and the same shall be proceeded with by the learned Single Judge in accordance with law. The appeal is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

JANUARY 04, 2017
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