

**IN THE HIGH COURT OF SINDH AT KARACHI**

BEFORE:  
**Mr. Justice Muhammad Shafi Siddiqui**

Revision Application No. 166 of 2012

Jacob's Bakery Limited  
Versus  
English Biscuits Manufacturers (Pvt.) Ltd. & others

Date of Hearing: 06.12.2017

Applicant: Through Mr. Zahid F. Ebrahim and Ms. Nazia Advocates.

Respondent No.1: Through M/s. Shaiq Usmani, Abdullah Munshi and Muhammad Ali Talpur advocates along with Mr. Muhammad Azam Shakil, Company Secretary of respondent No.1.

Respondents No.2&3: Nemo

**J U D G M E N T**

**Muhammad Shafi Siddiqui, J.** - This Revision application is arising of an order passed in Suit No.405 of 1996 having assigned new number on its transfer on account of pecuniary jurisdiction to District Court, as Suit No.1562 of 2002, dismissing an application of applicant under section 10 CPC.

2. The aforesaid suit involves a dispute as to proprietorship and user of trademark "Peek Freans" (subject trademark) as the said trademark is alleged to be abandoned and res derelicta.

3. The earlier proceedings before the Registrar Trademarks commenced on 29.03.1994 when the predecessor in interest of the applicant moved an application before the Registrar of the Trademarks. Such proceedings consequentially brought to the notice of the Registrar of Trademarks and culminated in an order dated 20.01.2001 against which an independent appeal bearing Misc. Appeal No.21 of 2001 filed

by the applicant is pending. The applicant claimed that the relief prayed for in the above referred suit instituted subsequently, overlaps the relief which is likely to be granted to the applicant, as being a registered proprietor of the subject trademark in a pending appeal. Thus an application under section 10 read with section 151 CPC was filed on 13.03.2004 by the applicant subsequent to the decision of the Registrar of the Trademarks impugned separately in Misc. Appeal No.21 of 2001, which application was dismissed and impugned here.

4. It is pleaded by applicant that there is imminent danger of conflicting orders in relation to common and identical reliefs and in view of multiplicity of proceedings and conflicting orders that may be passed, such application was moved. The application was dismissed vide impugned order dated 30.05.2012 hence this Revision Application.

5. Applicant's counsel Mr. Zahif F. Ebrahim contended that the issue in the aforesaid subject suit and the appeal is directly and substantially the same insofar as it pertains to the ownership of the subject trademark owned by the applicant which relief is part of the reliefs claimed by respondent No.1 in the subject suit. Learned counsel for the applicant submitted that outcome of the suit would operate as res judicata insofar as the appeal is concerned, which is against all norms of justice as the appeal is arising out of an earlier lis, which is pending and since the appeal is a continuous proceeding of an original list therefore all principles applicable to an original lis would apply at the appellate stage as well. He in this regard has relied upon the case of *M/s H & B General Trading Co. v. International Marketing Co.* reported in 2009 CLC 359.

6. Learned counsel has further relied upon the case of *Salim Industries Limited v. Burhani Trading Co.* reported in 1982 CLC 973

insofar as inherent powers under section 151 CPC is concerned. He submitted that in case all ingredients, as required under section 10 CPC, are not available, the principle can still be invoked in case the interest of justice so required. He submitted that the Courts of Pakistan have consistently held that independent of Section 10 of CPC, the power to stay a suit can also be exercised pursuant to Section 151 CPC and has further relied upon the case of Dr. Haider Ali Mithani v. Ishrat Swaleh reported in PLD 1999 Karachi 81.

7. Learned counsel further submitted that even though the application and the appeal filed under the Act were repealed by the Trademarks Ordinance 2001, the proceedings initiated pursuant to Trademark Act 1940 will continue to be governed by it as provided in Section 6 of the General Clauses Act, 1897. In support of this contention he submitted that High Court Rules formulated in pursuance of Section 77 of the Act, Chapter 17 Part (e) Rule 6 (High Court Rules) provides for the stay of pending suits and proceedings.

8. He further relied upon the meaning of suit in terms of Black's Law Dictionary 10<sup>th</sup>. Edition that it means any proceeding by a party or parties against another in a Court of law. Insofar as the phrase "Court of law" is concerned, learned counsel submitted that pursuant to Section 70 of the Act, the Registrar has been vested with all powers of a Civil Court and hence Registrar was a Court of competent jurisdiction for the adjudication of the application and the jurisdiction for deciding it vested exclusively with the Registrar.

9. As against this Mr. Shaiq Usmani, learned counsel appearing for respondent No.1, has challenged the maintainability of the Revision Application before proceeding to the merits of the case.

10. He submitted that for a revision to lie it is necessary that in the impugned order the Court:

*(a) has exercised jurisdiction not vested in it by law*

*(b) have failed to exercise jurisdiction so vested or*

*(c) have acted in exercise of its jurisdiction illegally or with material irregularity.*

He submitted that the District Judge had the jurisdiction to decide the application under section 10 CPC as the suit relating to the Trademark, in view of its pecuniary range, had to be filed before a District Judge who had passed a reasoned order stating justification of its rejection/dismissal as all the ingredients required in terms of Section 10 were not available. He further submitted that it is irrespective of the fact that the decision was right or wrong, it had the jurisdiction and that, irrespective of it being wrong order, jurisdiction had been exercised in accordance with law. He submitted that the remedy with the applicant lies in an appeal, which it could have availed, however this Revision application would not lie.

11. Coming to the merits of the case, learned counsel for respondent No.1 contended that Jacob's Bakery Limited (JBL) and Associated Biscuits International Limited (ABIL) have no locus standi to pursue this application as the rights were assigned to Associated Biscuits International Limited and since ABIL is not party to the suit bearing No.1562 of 2001, therefore, even ABIL has no locus standi and the revision is liable to be dismissed on this count.

12. He further argued that section 10 incorporated the principle of res-subjudice and is dependent upon five ingredients. He submitted that the matter in issue in both the cases must be directly and substantially the same. He argued that while Suit No.1562 of 2001 is a suit, Misc. Appeal No.29 of 2001 is not the one and hence the argument that the appeal is continuation of the suit is also not relevant since the appeal

must originate from a suit. The order impugned in Misc. Appeal No.29 of 2001 originates from the order of the Registrar of Trademarks and not suit.

13. He further argued that the matter in issue in both the proceedings is directly and substantially not the same. He submitted that the stay was not sought on the ground of previously instituted suit as it is urged by the appellant's counsel that in view of pendency of the appeal an order, as required in terms of Section 10, be passed. He submitted that the proceedings before the Registrar were initiated in view of order passed in the aforesaid suit on 15.12.1997 whereas before that no proceedings were initiated with regard to NGGD and JBL's application. Since the order of the High Court directing the Registrar was subsequent to the filing of the suit, therefore, ingredients, as required are not made out. He maintained that thus, in view of above, previously instituted suit is Suit No.1562 of 2001 and a previously instituted suit under the frame of Section 10 cannot be stayed. He further claimed that the litigation and a claim by them is not between the same parties or through which they are claiming.

14. He further argued that no doubt section 151 CPC can be invoked if the ingredients in terms of Section 10 are not available for the ends of justice but since the revision is not preferred under the provisions of section 151 CPC therefore such provision cannot be applied. He submitted that applying principles of section 151 CPC the Court is required to reach to a conclusion that the ends of justice are being denied on account of possibility of contrary decisions of the two proceedings and since the prayer in the Misc. Appeal No.29 of 2001 is arising out of the decision of the Registrar and the order passed in suit whereby the application under section 10 CPC was dismissed would not overlap therefore the required ingredients are not met.

15. I have heard the learned counsel and perused the material available on record.

16. The dispute amongst the parties revolves around a renowned trademark "Peek Freans" bearing No.44140. The said mark was registered with respondent No.3 in the year 1965 and English Biscuit Manufacturer (EBM) were recorded as its user with the Registrar of Trademark in the Register of Trademark somewhere in the year 1971. The original proprietor of the trademark was Associated Biscuits Limited (ABL). As per admitted facts at some stage another foreign company Nabisco Group Grocery Division (NGGD) applied on 05.07.1986 for its registration as proprietor of the said trademark under a Deed of Assignment. The said Deed of Assignment was followed by another deed between NGGD and JBL in the year 1994/95. Though these facts, which touches the merits of the case, as to the entitlement of being a proprietor and a registered user may not be the relevant but to keep things straight at least to the extent of admitted facts it is necessary that these facts be recorded before the moot question in this Revision be considered. While these Assignment Deeds were pending for an order, respondent No.1 filed the suit bearing No.405 of 1996 (Old number) for following relief:

*"A) Declare that the trade mark No.44140 "PEEK FREAN'S stands abandoned and is res derelicta, and that its use by defendant No.1 for anyone claiming on their behalf would be deceptive in terms of Sec. 8(a) of the Trade Marks Act, 1940.*

*B) Declare that reputation in Trade Mark No.44140, over the years has accrued to the plaintiffs and they have vested right in the Mark and hence are entitled to have the said trade mark registered in their own name.*

*C) In the alternative declare that plaintiffs are entitled to the use of the said Mark in perpetuity as per their agreement dated 14.10.1970 with defendant No.1 and grant permanent injunction restraining the defendant No.1 or any person or persons acting or purporting to act, on their behalf or under or through them or any other*

*person or persons whatsoever from interfering in plaintiffs' use of Trade Mark No.44140.*

*D) Grant permanent injunction restraining the Defendant No.2 from cancelling plaintiff's registration as the registered user of the Trade Mark No.44140.*

*E) Grant any other or better relief that this Hon'ble Court may deem fit and proper under the circumstances of the case."*

17. In pursuance of an interlocutory order, the Registrar Trademark, before whom the Deed of Assignments were pending for last so many years, got triggered to pass an order. In compliance of the directions, the Registrar of Trademark was pleased to decide the controversy arising out of the two Deeds of Assignment. The prime object of such Deed of Assignments was a claim of proprietorship over the mark by an ultimate assignee i.e. JBL who is applicant here. For the reasons disclosed in the said order of the Registrar, which is impugned in separate Misc. Appeal, the applications of the assignee supported by Assignment deeds were dismissed. While the Misc. Appeal was pending, an application under section 10 CPC for staying the proceedings in Suit No.1562 of 2002 (Old No.405/1996) was filed on the ground that it involves the same controversy as involved in the applications supported by Deed of Assignments concerning the proprietorship of the subject mark "Peek Freans".

18. Respondent's counsel has raised a preliminary point as to maintainability of the Revision Application on the ground that it is beyond the permissible scope of Section 115 CPC as no case within its parameter is made out. It is argued that it is neither a case of misreading or non-reading of evidence nor it is alleged that the trial Court had no jurisdiction or had not acted within the jurisdiction hence no case for indulgence is made out and the Revision Application is liable to be dismissed on this score alone.

19. No doubt Section 115 CPC requires that interference could only be made in case the trial Court had not exercised jurisdiction vested in it or had exercised jurisdiction not vested in it or if it had exercised its jurisdiction illegally or with material irregularity, it is yet to be seen whether the parameters, which are prerequisites and required to determine an application under section 10 CPC read with section 151 CPC in particular, were applied as in the absence of such yardstick being applied, it cannot be said to be an exercise of jurisdiction under section 151 CPC and thus would be material irregularity as stay cannot be confined to the requirement or prerequisites of Section 10 CPC. The law has enlarged its scope.

20. No doubt there are certain ingredients before Section 10 CPC could be invoked but at times in order to dispense justice it becomes inevitable that the substance of the matter is to be seen rather than the technical limits. What escaped from the attention of the District Judge/ trial Court was that section 10 CPC is not the only instrument through which the application could be seen. It may also attract the provisions of Section 151 CPC and hence without discussing the application of 151 CPC, the dismissal of the application under section 10 CPC on account of not meeting the five ingredients of Section 10, could be reckoned as an exercise of jurisdiction with material irregularity hence on this count and consideration I am not inclined to agree with the suggestion of Mr. Usmani. Since the law does not provide a remedy of appeal, the Revision Application is thus maintainable on both the counts.

21. In order to understand the arguments of both the learned counsels it is necessary that substance and relief, as claimed by the applicant in their application before Registrar supported by Deed of Assignment and by the respondent No.1 in their suit, is reconciled. The applicant who has filed an application supported by a Deed of Assignment has



attempted to obtain an order of being a proprietor of the subject mark whereas in the suit respondent No.1 claimed that since the subject mark stands abandoned and is *res derelicta* therefore its use by Associated Biscuit Limited, the original proprietor, or by any one claiming on their behalf, would be deceptive in terms of Section 8f of the Trade Mark Act. They (respondent No.1) have further prayed that all along this period on account of its consistent use they have earned reputation and the vested right of respondent No.1 has accrued over the mark and hence are entitled to have the said mark registered in their own name. In the alternate respondent No.1 has prayed that they are entitled to use the mark in perpetuity as per agreement of 1970 with the Associated Biscuits Limited.

22. On comparison, if not the alternate relief of use then at least the prayer clause 'A' and 'B' would stand at par with the relief claimed by the applicant on the basis of Deed of Assignments. Hence, there is a possibility of a conflicting decision between two *lis* to the extent of claim of proprietorship of the mark and a prior decision in a subsequent suit may operate as *res judicata* against a prior *lis*. Though the applications supported by the Deed of Assignment of the applicant have been disposed of but they are subject matter of Misc. Appeal No.21 of 2001 which is a statutory appeal and it is nothing but continuation of an original *lis*.

23. In response to question raised by Mr. Usmani that the basic conditions, which are even required to be seen for staying the proceedings under section 151 CPC i.e. the litigation should be in the form of two suits, is now required to be considered. In the case of *Muhammad Amin v. Muhammad Yasin* reported in 1991 CLC 1298 learned Judge of High Court observed and dealt with a similar situation in the following manner:-

*“...As the appeal arising from the said suit having been admitted and is pending in this Court, the same very issue which has arisen for determination in the present suit filed by the respondent therefore, in my view section 10 of the C.P.C. was fully applicable. No matter that in the previously instituted suit apart from the parties in the present suit the sisters were also joined as defendants. Any finding recorded in the said previously instituted suit would certainly operate as res judicata between the parties in this suit regarding the property in dispute, and its ownership.*

5. *The learned counsel for the respondent maintained that in the present suit which is though instituted later in time, can proceed for determination of the question of recovery of mesne profits and damages of the property which matters are not directly and substantially in issue in the previously instituted suit of administration of property therefore to that extent the learned trial Court should be allowed to proceed with the trial of the suit. I am afraid the argument in my opinion is plainly unsound. The claim of the respondent for recovery of mesne profits for use and Occupation of the property by the present petitioner and for recovery of damage are based on his alleged right of ownership of the property exclusively therefore, the said reliefs cannot be treated as independent from his claim of ownership. To amplify the matter it can safely be said that the reliefs of mesne profits and damages are dependent on the determination of the question of title as alleged by the petitioner in the property in dispute and cannot be granted till such time the said question is first decided. The argument is therefore repelled*

6. *Learned counsel for the respondent faintly argued that in the previously instituted for administration of property apart from the two brothers who are party in this suit, four sisters are also defendants therefore the previously instituted suit cannot be held to be between the same parties. This submission to has no force. So far the parties in the present suit are concerned they are party in the previously instituted suit and question of title of the property is an issue between the plaintiff and the defendant in both the suits and the applicability of Section 10 of C.P.C. is not adversely affected even if in that suit apart from the parties in the present suit the sisters have also been impleaded as defendants. The criteria in my view is that if the finding on the question of title given in the previously instituted suit would operate as res judicata in the present suit, the present suit would be liable to be stayed under section 10, C.P.C. Applying this principle I am*

*satisfied that the finding on the question of title of the property between the parties in the present suit if recorded in the said administration suit against any of the parties the same would operate as res judicata therefore, section 10 of the C.P.C. was fully applicable and the erroneous view taken by the learned trial Court as a result of which the proceedings with the trial of the suit though the same is debarred under section 10 as such the learned trial Court has decided to exercise jurisdiction not vested in it under the law to proceed with the trial of the suit.*

*7. For the foregoing reasons this revision petition is accepted. The impugned order of the learned trial Court is set aside. It is ordered that the proceedings in the suit shall remain stayed till the disposal of the aforementioned previously instituted suit of administration pending in appeal. The parties are left to bear their own costs.”*

24. In the case of *Habib Ank Limited v. Ali Mohtaram Naqvi* reported in PLJ 1987 Karachi 215, learned Judge of this Court in paragraph 11 observed that the concept of Section 10 CPC is that no two adjudications should be produced which may clash against each other. Whether these adjudications are made by ordinary courts or a special Banking Court is not of much of a consequence.

25. Similar view was taken in the case of *Amras Singh v. Behari Lal* reported in AIR 1930 Lahore 526 as under:-

*“...Still I consider that this is a case in which an order is necessary to safeguard the interests of the defendant, in case the suit is decreed against him and the appeal is subsequently accepted by this Court. In that case it would be necessary for the defendant to appeal from the decree that may be passed against him in the present suit. On the other hand the plaintiff has instituted the suit assuming that the plea of the defendant in the previous suit was correct. Under the circumstances I consider that under S. 151, Civil P.C., the following order will be suitable in the case:*

*The trial Court may proceed with the trial of suit instituted by Bihari Lal for recovery of the money, but shall not pronounce any judgment on the merit till the decision of the appeal in this Court. I leave the parties to bear their own costs in this Court.*

*Order accordingly.”*

26. The case of Makhan Lal Chaudhury v. Chandi Nath Majumdar reported in AIR 1931 Calcutta 779(1) may be helpful which resolved similar issue in the following manner:-

*“We observe that when an application is made in the trial Court for stay of hearing of a suit on the ground that an appeal is pending in another Court for a similar suit or from a suit on a similar cause of action, it is generally refused on the ground that S. 10 Civil P.C., does not apply, but the principle of S.10 has been extended to such case as the present. As a rule has been obtained by this Court we do not propose to discharge it on this technical ground. Mr. Chaudhuri, on behalf of the opposite party, agrees that it is in the interest of all parties concerned that the hearing of Civil Rule 1303 of 1928, pending in the Court of the Munsif, Third Court, Pabna, should be stayed pending the hearing of the appeal, and we order accordingly. The petitioner must pay the opposite party one gold mohur as costs of the rule.*

*Having regard to the point at issue in the appeal we direct that the hearing of it be expedited.”*

27. Thus, under inherent powers the Court can stay its own process where it is necessary in order to secure the ends of justice and to prevent abuse of process of Court. Reliance may be placed on the cases of Ch. Muhammad Afzal v. Mst. Sardar Begum (PLD 1949 Lahore 16), Salim Industries Ltd. v. Burhani Trading Co. (NLR 1982 UC 606) and Kondapaneni Raghavaial v. Inguva Lakshminarayana (AIR 1955 Andhra 04).

28. In the case of Haider Ali Mithani (Supra) the Division Bench of this Court observed as under:-

*“Where all the aforesaid conditions are fulfilled it is incumbent upon the Court trying the subsequently instituted suit to stay further proceedings but if all the conditions of the exercise of jurisdiction under section 10 CPC are not strictly fulfilled in order to achieve the ends of justice, the suit may be stayed under section 151 CPC or trial of the two suits may be consolidated.”*

29. In addition to the aforesaid case, observations of the Bench in the case of H & B General Trading Co. (supra) is relevant for the purpose of

deciding the controversy in the present case, which is reproduced as under:-

*“15. The intention and spirit behind the scheme of section 10 CPC appears to avoid duplication of trial on the same cause of action and to obviate conflict of decisions as well as unnecessary labour on adjudication of a common suit.*

*27. Even otherwise, it is well settled principle of law that if all the above mentioned conditions are fulfilled then the subsequent suit must be stayed under provisions of section 10, CPC. However, in case any one of the above mentioned conditions are not present even then the subsequent suit can be stayed under section 151, CPC in the interest of justice as held in a number of authorities, provided that the decision in the previously instituted suit would attract the provisions of section 11, CPC. Reliance is placed on Salim Industries Limited v. Messrs Burhani Trading Co. (1982 CLC 973).”*

30. In the event where the appellant in appeal is successful and the conclusion ended up in favour of the appellant contesting the appeal, the loss that may arise to the appellant from the execution or fruits of the decree in a subsequent suit, would be either beyond repair or the decree holder would get into a position from where, in the event of a favourable decision in appeal it would only be a futile attempt to dislodge prior decree holder in a subsequent suit from a position where the decree would take it to.

31. I would not comment about the mark being abandoned or not however on the basis of common evidence what is evident is that the respondent has claimed its use not as being abandoned mark but under the permission of ABL. Further endoscopic scrutiny of the pleadings, either of the application or of respondent No.1, is not required as it may prejudice the case of either party and hence only on the tentative analyses I have to reach to a conclusion as to whether there is any possibility of a conflicting decision or overlapping decision and/or the earlier decision in a subsequent case may be res judicata for an earlier case. The form of litigation may not matter; it is the substance of litigation that counts.

32. I may however of the view that the kind of evidence and the reasoning required by the respondent No.1 in support of prayer clause 'A' and 'B' may or may not be the same as required for determining the application of the applicant on the basis of Deed of Assignment but the ultimate result may overlap and contradict each other. For example it is to be independently decided whether the subject mark stands abandoned and is res derelicta and/or its consistent use (if it is of any help) before the Court could declare it in favour of respondent No.1 whereas the application of the applicant supported by the Deed of Assignment may require a different set of evidence and reasoning.

33. The appeal was filed under the provisions of the Trademark Act 1940 which though stands repealed by the Trademark Ordinance 2001 but the proceedings initiated pursuant to the Act will continue to be governed by Section 6 of the General Clauses Act, 1897. Provisions of Section 77 of the Act, Chapter 17 Part (e) Rule 6 of the High Court Rules provides for the stay of the suit proceedings. Rule 6 as referred is reproduced as under:-

*“6. Stay of pending suits or proceedings: If any application or appeal is made to the High Court under the Act and any suit or other proceeding concerning the Trade Mark in question is pending before the High Court or any District Court, the High Court may stay suit or proceeding until the disposal of the said application or appeal.”*

34. The Registrar was equipped in pursuance of Section 70 of the Act to adjudicate the application having powers of a Civil Court.

35. In view of the above, I propose to dispose of this Revision Application as under:

- a) Civil/District Court may proceed with the trial and record evidence of the parties as it may involve a different set of evidence as delay in recording evidence may cause prejudice to the respondents;

b) Civil/District Court seized of the matter may not however pass a final judgment till the decision of Misc. Appeal No21 of 2001, the disposal of which may enabled the Court to proceed and determine the ultimate fate of the suit.

Revision Application stands disposed of in the above terms.

Dated:

Judge