

MANU/DE/0153/2012

**Equivalent Citation:** 2012(127)DRJ743, 2012(49)PTC440(Del)**IN THE HIGH COURT OF DELHI**

IA No. 17230/2011 &amp; IA No. 17646/2011 in CS (OS) No. 2683/2011

Decided On: 13.01.2012

Appellants: **Shree Ganesha Enterprises**  
**Vs.**Respondent: **Sandeep Gullah****Hon'ble Judges/Coram:**

Hon'ble Mr. Justice Manmohan Singh

**Counsel:**

For Appellant/Petitioner/Plaintiff: Mr. S.K. Bansal, Adv.

For Respondents/Defendant: Ms. Prathiba M. Singh, Adv. with Mr. Jaspreet Singh, Adv.

**Subject: Intellectual Property Rights****Acts/Rules/Orders:**

Indian Copyright Act, 1957 - Section 2; Indian Partnership Act, 1932 - Section 14, Indian Partnership Act, 1932 - Section 48, Indian Partnership Act, 1932 - Section 46, Indian Partnership Act, 1932 - Section 53, Indian Partnership Act, 1932 - Section 55; Indian Contract Act, 1872 - Section 27; Code of Civil Procedure (CPC) - Section 151, Code of Civil Procedure (CPC) - Order 39 Rule 1; Code of Civil Procedure (CPC) - Section 151, Code of Civil Procedure (CPC) - Order 39 Rule 2; Code of Civil Procedure (CPC) - Section 151, Code of Civil Procedure (CPC) - Order 39 Rule 3; Code of Civil Procedure (CPC) - Section 151, Code of Civil Procedure (CPC) - Order 39 Rule 4

**Cases Referred:**

Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation; MANU/SC/0140/1967 : AIR 1968 SC 676; Spalding & Bros. Vs. A.W. Gamage Ltd.; (1915) 32 R.P.C. 273

**Citing Reference:**Relied On ■ 2**Case Note:**

**Intellectual Property Rights - Injunction - Application filed seeking an ad-interim injunction restraining Defendant from using, advertising or dealing in impugned trade mark and trade name CITY BANQUETS or any other trade mark which was deceptively similar or identical to trade mark and trade name CITY BANQUET and CITY PALACE BANQUETS - Held, Plaintiff had been able to make out a strong case for grant of interim injunction and balance of convenience also laid in favour of Plaintiff and against Defendant - In case interim injunction already granted would not continue, Plaintiff would suffer an irreparable loss and injury, as Defendant started his business from same area and under same name - Hence, Plaintiff's application bearing I.A. No.17230/2011 was allowed and ex-parte interim order granted was confirmed - Defendant had failed to make out any ground to vacate interim injunction. Hence, application of Defendant being IA No.17646/2011 was dismissed.**

**JUDGMENT****Manmohan SINGH, J.**

1. By this order, I propose to decide the applications filed by the parties, i.e. application bearing I.A. No. 17230/2011 filed by the plaintiff under Order XXXIX, Rules 1 & 2 read with Section 151 of CPC seeking an ad-interim injunction restraining the defendant from using, advertising or dealing in the impugned trade mark and trade name CITY BANQUETS or any other trade mark which is deceptively similar or identical to the trade mark and trade name CITY BANQUET and CITY PALACE BANQUETS, and another application bearing I.A. No. 17646 of 2011 filed by the defendant under Order XXXIX, Rule 4 read with Section 151 of CPC for vacation/immediate suspension of the ex-parte ad-interim order dated 01.11.2011.

CASE OF THE PLAINTIFF

manupatra 2. It is stated in the plaintiff-firm which is engaged in the business of catering and food outlets and banquets hall (herein after referred to as the said business and services) was initially constituted vide partnership deed dated 03.08.2009 between Shri Shyam Sunder Suri, the Managing Partner of the plaintiff firm and Shri Sandeep Gullah, the defendant herein. Thereafter, upon the retirement of the defendant, the plaintiff firm was reconstituted vide Re-Constitution Deed dated 10.07.2011.

3. It is averred by the plaintiff that since its constitution on 03.08.2009, the plaintiff adopted the trade mark/trade name CITY BANQUET and started using the same in the course of its said business and services. The defendant, upon his retirement, assigned all his rights, title, interest in good will and other assets of the business in the favour of the re-constituted firm by way of the Re-Constitution Deed dated 10.07.2011. Further, it is stated by the plaintiff that it has filed for registration of its CITY formative trade mark, the details of which are given in para 6 of the application.

4. The plaintiff, also claims copyright in the artwork of the plaintiff's said trade mark and trade name CITY BANQUET. It is stated that the same is an original artistic work within the meaning of Section 2(c) of the Indian Copyright Act, 1957 and the plaintiff is its owner. The said trade mark and copyright is one of the most valuable assets of the plaintiff.

5. The grievance of the plaintiff against the defendant is that after taking retirement from the plaintiff firm on 10.07.2011, defendant has started the same business and services as that of the plaintiff firm in the vicinity of the plaintiff at 36, Rama Road, Industrial Area, New Delhi and has adopted an identical/deceptively similar trademark and trade name CITY BANQUETS in relation to his business and services. It is stated by the plaintiff that the defendant has no right to use the impugned trade mark after assigning the same in favour of the reconstituted plaintiff firm.

6. It is further stated that the plaintiff first came to know about the use of the impugned trade mark and trade name in the 2nd week of October, 2011 when the defendant served a legal notice dated 03.10.2011, upon the plaintiff claiming his rights over the impugned trade mark and trade name. In the said notice, it was also stated that the defendant is the proprietor of the trade mark and trade name CITY BANQUET and that his application for registration of the said trade mark is in the final process of registration. The defendant even filed an application bearing No. 1851182 in class 42 for registration of the said trade mark CITY BANQUET label on 17.08.2009. According to the plaintiff, it has filed a fresh application for registration of the trade mark CITY BANQUET label and is also taking steps for opposing the application of the defendant for registration of the impugned trade mark.

7. The plaintiff avers that the use of the impugned trade mark and trade name by the defendant is in violation of the plaintiff's proprietary rights in the said trade mark and trade name thereby-

- (a) Passing off and enabling others to pass off his business and services as that of the plaintiff;
- (b) Infringing the copyright involved in the artwork of the plaintiff's trade mark and trade name CITY BANQUET;
- (c) Diluting the said trade mark and trade name of the plaintiff.

8. The suit and the interim application being I.A. No. 17230/2011 were listed before the court 02.11.2011 and after hearing the counsel for the plaintiff the court passed the order restraining the defendant from using, soliciting, displaying, advertising and dealing in the impugned trademark and trade name CITY BANQUETS in relation to his business and services of catering and running food outlets and banquet halls and from doing anything which may amount to cause confusion and deception. Before hearing, the plaintiff also filed a large number of original additional documents in order to establish its case.

9. Upon service, the defendant filed an application being I.A. No. 17646/2011 under Order XXXIX, Rule 4 whereby the defendant is seeking vacation/suspension of the ex-parte ad-interim order granted on 02.11.2011. It is stated by the defendant that the said ex-parte order dated 02.11.2011 is liable to be vacated as the plaintiff has concealed some material facts from this court. As per the defendant, compliance of Order XXXIX, Rule 3 CPC in terms of the order dated 02.11.2011, which is mandatory in nature, has not been done and copies of the additional documents filed by the plaintiff have not been served upon the defendant.

10. Further, it is stated by the defendant that he is running CITY BANQUET which has been booked by many of its customers during the wedding season, therefore, an injunction order at this time serve as a disastrous blow to the defendant and to all those families who have booked defendant's banquet hall. Thus, the order dated 02.11.2011 should be suspended. It is also stated that the defendant is the first user and the registered proprietor of the mark CITY BANQUET in Class 16 vide trade mark registration No. 1073467. The plaintiff was only a permissive user of the mark CITY BANQUET which is the sole property of the defendant. The defendant is also the copyright owner of the in the label/logo "CITY" and "CITY BANQUET".

11. As per the defendant, it adopted the trade mark and logo "CITY BANQUET" and "CB" respectively in the year 1992 and since then, he has been using it in respect of his business activities. Vide a relinquishment deed dated 01.04.2005, 4 out of 7 partners (excluding the defendant) in the partnership firm named Rajinder &

manupatra Co. wherein the defendant is a partner released their entire share in the said partnership firm in favour of the remaining 4 partners including their rights in the trade mark "CITY BANQUET". Thereafter, the said trade mark continued to be exclusively used by the said partnership firm. The said firm continued to carry on its business under the trade mark "CITY BANQUET" irrespective of the changes in its constitution and as per the last partnership deed dated 27.02.2008 with respect to the abovementioned firm, only the defendant and his wife remain as partners in the said firm, therefore, all rights in the trade mark "CITY BANQUET" vest with them.

12. It is averred by the defendant that vide partnership deed dated 03.08.2009, the defendant entered into a partnership with Shri Shyam Sunder Suri to form another partnership firm M/s Shree Ganesha Enterprises i.e. the plaintiff herein. Thereafter, the defendant permitted the plaintiff firm to use of the name "CITY BANQUET" but, did not assign any of its rights in the trade mark to the plaintiff firm. On 02.07.2011, after the Revocation Agreement was executed between the plaintiff and the defendant the permission of the defendant to use the trade mark "CITY BANQUET" was also revoked by him. Therefore, when the defendant came to know that the plaintiff has started a food outlet at the same place with an identical/deceptively similar mark CITY PALACE, the defendant issued the legal notice dated 03.10.2011 which was replied by the plaintiff on 20.10.2011 stating that the defendant has no right in the said trade mark.

13. As per the defendant, the plaintiff has intentionally concealed the material facts from this court in order to obtain the ex-parte interim order dated 02.11.2011. The plaintiff has also not filed any document on record to establish that rights in the trade mark "CITY BANQUET" have been assigned to it. The plaintiff has illegally applied for registration of the various versions of the mark "CITY BANQUET" in Class 43 by application No. 2225808 on 27.10.2011 after the legal notice dated 03.10.2011 of the defendant. According to the defendant, the present suit has been filed as a counter blast to the legal notice dated 03.10.2011.

14. The plaintiff has filed the reply to the application under Order 39 Rule 4 read with Section 151 of CPC along with the affidavit. In the affidavit, the plaintiff has specifically denied his signature on the Certificate of Permissive Use dated 17.03.2011 and on the Revocation Agreement/lease deed. As per the plaintiff, the said documents are forged and fabricated and the same have been prepared by the defendant with the ulterior motive to base his claim. The defendant was directed to produce the originals by order dated 11.11.2011. However, the originals were not produced by the defendant rather, after hearing of interim application the learned counsel appearing on behalf of the defendant has fairly conceded that the Certificate of permissive use as well as the Revocation Agreement of City Banquet may not be considered at this stage in the absence of original documents.

15. In the reply, it is also stated by the plaintiff that it is clear from the lease deed dated 11.08.2009 that the right to use the trademark "CITY BANQUET" got vested in the new constituted plaintiff firm. It is further stated that a bare perusal of the Reconstitution deed dated 10.07.2011 shows, that upon his retirement, the defendant assigned all his rights, title, interest in the goodwill and other assets, benefits and advantage of the business in favour of the reconstituted plaintiff firm. On 17.08.2009 the defendant, without the knowledge of the other partner filed application for registration of the trademark CITY BANQUET in class 42 in his personal name claiming user since 01.04.1995.

16. It is also stated by the plaintiff that the contention of the defendant that one partnership firm, M/s Rajinder and Co. of which he was one of the partners, were running the banquet hall at 17-A, North West Avenue, Punjabi Bagh, New Delhi under the trademark CITY BANQUET and logo CB and that it was continued by him and his wife vide partnership deed dated 27.02.2008, is wrong, as admittedly there was no business by the said firm after 2007, hence, the continuation of the partnership of M/s Rajinder and Co. by the defendant and his wife remained only on papers. It is also stated that the defendant has no right in the trade mark and trade name CITY BANQUET since the defendant, upon his retirement, has assigned all his rights, title, interest in the goodwill and other assets of the business in favour of the reconstituted plaintiff firm through the Re-constitution Deed dated 10.07.2011.

17. The following are the admitted facts between the parties :

- (a) The partnership deed dated 03.08.2009 between the plaintiff and defendant;
- (b) The said partnership was running business of catering and food outlets and banquets hall under the trade mark/trade name/Copyright CITY BANQUET.
- (c) The retirement of defendant from the said firm by virtue of re-constituted firm
- (d) At the retirement, the defendant assigned all rights, title and goodwill and assets of the business in favour of the plaintiff.

18. There are sufficient documents produced on record by the plaintiff pertaining to the abovementioned admitted facts. The plaintiff has submitted that the defendant might be a former partner in the firm M/s. Rajinder and Company who may have been using the name CITY BANQUET and the logo CB and as per documents but the fact remains which is admitted that the defendant has invested the name CITY BANQUET in the partnership dated 3.8.2009 between the plaintiff and defendant. The defendant has not denied the

manupatra factum of his retirement from the said partnership business except the arguments were addressed that his retirement from the said firm and assigning the will and other assets etc. in favour of the plaintiff was subject to the balance sheet belonging to the continuing parties. The relevant clauses 7 to 9 of the Re-constitution deed dated 10.7.2011 are reproduced here below :

7. That the continuing parties hereby take over the goodwill of the firm i.e. they shall be at liberty to carry on the business under the name and style of M/s. Shree Ganesha Enterprises. The continuing parties shall be at liberty to take any other partners in the said business and the retiring party shall have no objection whatsoever.

8. That the goodwill and other assets etc. as per the balance sheet shall belong to the continuing parties and the retiring party shall have no interest whatsoever in the said business from the date of retirement.

9. That w.e.f. 10th July, 2011 the retiring party shall not be entitled to any privilege and rights of a partner in the business of the firm which shall be continued by the continuing parties.

Ms. Pratibha M. Singh, learned counsel appearing on behalf of defendant submitted that the entire consideration against the goodwill on the date of retirement was not received by the defendant. She orally admitted that the defendant has received the part amount from the plaintiff in cash. On the other hand, Mr. Bansal, learned counsel appearing on behalf of plaintiff has informed that in terms of clause 8 of the deed the entire amount was paid to the defendant. He further argued that once the defendant has been retired from the firm, no arguments of this nature are available to the defendant who can file the separate proceeding in this regard.

19. It becomes necessary to discuss in law as to what is nature of the partnership property and what happens when the firm is dissolved/ reconstituted. The Indian Partnership Act, 1932 provides for a mechanism for dealing in property which has been the subject matter of partnership firm upon dissolution of the firm. In this context, the relevant section of the Partnership Act, 1932 relating to the same is reproduced herein after:-

Section 46:

46. Right of partners to have business wound up after dissolution. On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

20. From a bare reading of the above section 46, it becomes clear that the assets /properties belonging to the partnership vests in the firm as the section uses the expression "property of the firm" and not in the individuals and upon dissolution.

21. In this context, the observations of Supreme Court in the case of Commissioner of Income Tax, Madhya Pradesh Vs. Dewas Cine Corporation; MANU/SC/0140/1967 : AIR 1968 SC 676 are worth noting wherein the court observed thus:

Under the Partnership Act, 1932, property which is brought into the partnership by the partners when it is formed or which may be acquired in the course of the business becomes the property of the partnership and a partner is, subject to any special agreement between the partners, entitled upon dissolution to a share in the money representing the value of the property. **When the two partners brought in the theatres of their respective ownership into the partnership, the theatres must be deemed to have become the property of the partnership. Under s. 46 of the Partnership Act, 1932, on the dissolution of the firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.** Section 48 of the Partnership Act provides for the mode of settlement of accounts between the partners. It prescribes the sequence in which the various outgoing are to be applied and. the residue remaining is to be divided between the partners. **The distribution of surplus is for the purpose of adjustment of the rights of the partners in the assets of the partnership; it does not amount to transfer of assets.**

**On dissolution of the partnership, each theatre must be deemed to be returned to the original owner, in satisfaction partially or wholly of his claim to a share in the residue of the assets after discharging the debts and other obligations. But thereby the theaters were not in law sold by the partnership to the individual partners in consideration of their respective share in the residue.**

22. One thing immediately becomes clear from the reading of aforesaid observation of the apex court which is that once the property being in ownership of the partners is brought into the partnership, it becomes the property of the firm.

23. Section 14 of the Indian Partnership Act, 1932 expressly stipulates that the property of the firm will include the goodwill of the business. Section 53 provides the right of the partner to restrain another partner from carrying on business in the firm until the affairs of the firm had been completely wound up. That section reads as follows:-

53. Right to restrain from use of firm-name or firm-property.

After a firm is dissolved, every partner or his representative may, in the absence of a contract between the partners to the contrary, restrain any other partner or his representative from carrying on a similar business in the firm-name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up:

Provided that where any partner or his representative has brought the goodwill of the firm, nothing in this section shall affect his right to use the firm-name.

24. Section 55 provides for the disposal of the goodwill. It reads as follows:-

55. Sale of goodwill after dissolution.

(1) In setting the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

Rights of buyer and seller of goodwill.

(2) Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not-

(a) use the firm-name.

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

Agreements in restraint of trade.

(3) Any partner may upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, and, notwithstanding anything contained in Section 27 of the Indian Contract Act, 1872 such agreement shall be valid if the restrictions are reasonable.

It is clear from the above provisions that the goodwill of a firm and the dissolution does not exist upon dissolution and survives. It may be sold either separately and along with other property of the firm. The proprietary right, title and interest of the partnership firm in its trade mark and name is one of the parts of the goodwill.

(1) If the firm is dissolved, and there is no agreement, either express or implied, to the contrary, the goodwill must be sold for the benefit of all the partners, if any of them insist on such sale:

(2) So far as it possible, having regard to the right of every partner to carry on business himself, the court will, on dissolution, interfere to protect and preserve the goodwill until it can be sold;

(3) If a partner has himself obtained the benefit of the goodwill, he can be compelled to account for its value, i.e. for what it would have sold, on the footing of his being himself at liberty to compete in business with the purchaser.

25. In the case of Spalding & Bros. Vs. A.W. Gamage Ltd.; (1915) 32 R.P.C. 273, Lord Parker observed that there is also no dispute that in partnership the trade marks is always considered to be an integral part of the goodwill of the business. Lindley on the Law of Partnership, Four tenth Edition, says thus:-

Goodwill in connection with trade marks The use of partnership trade marks is another very important element in the goodwill of the business. Such marks, as assets of the firm, are saleable on a dissolution like any other asset.

manupatra 26. In view of the settled law on the point raised by the parties, I am of the view that there is no force in the submission of the learned counsel appearing on behalf of the defendant that the defendant is entitled to take the benefit of his earlier prior user right in the previous business, he carried out being a partner under the Partnership Act, 1932. As per settled law, once the property/mark is invested in the partnership business, the same becomes the asset of the joint business. In the present case, undisputedly the defendant has brought the said name in the partnership business between them which was a joint business of the plaintiff and the defendant, therefore, the said name "CITY BANQUETS" became an asset of the partnership business. The defendant was only entitled to his shares of profits from time to time and after the dissolution of the partnership or his retirement from the partnership of the value of his share.

27. As appeared from Clauses 7 to 9 of the Reconstitution Deed dated 10.07.2011, the defendant has assigned the goodwill and other assets in favour of the continuing partners.

28. One of the other grievances of the defendant during the course of the hearing of the interim application is that the entire consideration of the goodwill has not been received by the defendant. The learned counsel for the plaintiff has denied the said submission by stating that the entire consideration was received by the defendant.

29. The said submission of the defendant, prima facie is without any force as admittedly after retirement from the business, the defendant issued the legal notice dated 03.10.2011 to the plaintiff asking him not to use the trade mark "CITY PALACE". It was the best opportunity for the defendant to raise all his grievances. It is pertinent to mention here that even in the said notice, the defendant has not mentioned about the partnership business or his retirement from the said firm, though at that time all opportunities were available with him. In order to demolish the case of the plaintiff, the defendant placed two photocopies of documents; one Certificate of Permissive Use dated 17.03.2011 and the second Revocation Agreement, in order to impress the Court that the partnership business was carried out by the parties and his retirement under permissive user by the defendant who revoke the same. However, the said move of the defendant was not successful, as the defendant was not able to produce the originals when asked by the court, a mere statement was made that those may not be considered while deciding these applications in the absence of originals.

30. From the above said facts and reasons, it is clear that the plaintiff has been able to make out a strong case for the grant of interim injunction and balance of convenience also lies in favour of the plaintiff and against the defendant. In case the interim injunction already granted will not continue, the plaintiff will suffer an irreparable loss and injury, as the defendant started his business from the same area and under the same name. Hence, the plaintiff's application bearing I.A. No. 17230/2011 is allowed and the ex-parte interim order granted on 02.11.2011 is confirmed, to the effect that till the final decision of the suit, the defendant is restrained from using, soliciting, displaying, advertising and dealing in the impugned trademark and trade name CITY BANQUETS in relation to his business and services of catering and running food outlets and banquet halls and from doing anything which may amount to cause confusion and deception.

31. I am also of the considered view that the defendant has failed to make out any ground to vacate the interim injunction. Hence, the application of the defendant being IA No. 17646/2011 is dismissed, with cost of Rs. 10,000/- which shall be deposited by the defendant with the Delhi High Court Advocates' Welfare Fund.

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32. The defendant is granted two weeks' further time to file the written statement with an advance copy to the learned counsel for the plaintiff who may file the replication within three weeks thereafter.

33. List the matter before the Joint Registrar on 09.02.2012 for admission/denial of the documents. Thereafter, the same shall be listed before the Court on 22.02.2012 for framing of issues and directions for trial.