

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

% **Date of Decision : 10th January, 2023**

+ CS(COMM) 1222/2018 & I.A. 13481/2019 (O-XXXIX R-1 & 2 of CPC), CC(COMM) 7/2020, I.A. 10917/2021(O-XXXIX R-2A of CPC)

COMMUNICATION COMPONENTS

ANTENNA INC.

..... Plaintiff

Through: Mr. J. Sai Deepak, Mr. Sidhant Goel,
Mr. Mohit Goel and Mr. Deepankar
Mishra, Advocates

versus

ACE TECHNOLOGIES CORP. AND ORS.

..... Defendants

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Vineet Rohilla and Mr. Rohit
Rangi, Advocates

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

AMIT BANSAL, J. (Oral)

I.A. 13482/2019 (O-XXV R-1(1) of CPC)

1. The present application has been filed on behalf of the defendants under Order XXV Rule 1(1) of the Code of Civil Procedure, 1908 (CPC) seeking a direction to the plaintiff to deposit a security of Rs 8,00,00,000/- with this Court.
2. Notice in this application was issued on 27th September, 2019. Reply has been filed on behalf of the plaintiff.
3. Senior counsel for the defendants submits that in terms of the proviso to Order XXV Rule 1(1) of the CPC, in all cases, where the plaintiff is residing outside India and does not possess any immovable property in

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India, it is mandatory for the Court to direct the plaintiff to deposit security for payment of costs incurred or likely to be incurred by the defendant for contesting the suit. Reliance has been placed on behalf of the defendants on the judgments in ***Kiran Shoes Manufacture v. Welcome Shoes Pvt. Ltd.***, 2017 SCC Online Del 6590, ***S.A. Brothers & Co. and Anr. v. Bartholomow & Sons Ltd.& Ors***, 2000 (56) DRJ 68 and ***Gotham Entertainment Group LLC and Ors v. Diamond Comics Pvt. Ltd.***, (2010) 42 PTC 136.

4. *Per contra*, the counsel appearing on behalf of the plaintiff submits that in the proviso to Order XXV Rule 1(1) of the CPC, the word ‘shall’ has to be read as ‘may’ and therefore, it is not mandatory for the plaintiff to deposit security for costs with the Court in all cases where the plaintiff resides outside India and does not own any immovable property in India.

5. Counsel for the plaintiff has placed reliance on the judgment dated 5th March, 2018 passed in CS(COMM) 774/2016, titled ***Millennium & Copthorne International Limited v. Aryans Plaza Services Pvt. Ltd. & Ors.***, wherein it has been held that the proviso to Order XXV Rule 1(1) of the CPC shall only apply in relation to the suits, the subject matter of which is an immovable property. In the alternative, the counsel for the plaintiff submits that the proviso to Order XXV Rule 1(1) of the CPC has to be interpreted in the light of sub-rule (2) of Order XXV Rule 1 of the CPC and therefore, the deposit of security for costs is not mandatory.

6. I have heard the counsels for the parties.

7. Since the submissions of the counsels for both the parties revolve upon the interpretation of Order XXV Rule 1 of the CPC, it may be relevant to set out Order XXV Rule 1 of the CPC:

“1. When security for costs may be required from plaintiff - (1) At

any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant:

Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit.

2. Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1). ”

8. There is no dispute that in terms of the main provision of Rule 1(1) of Order XXV of the CPC, the Court has a discretion for directing the plaintiff to deposit security for costs in view of the use of the word ‘**may**’. However, the proviso to Order XXV Rule 1(1) has been the subject matter of various judgments passed by the Coordinate Benches of this Court.

9. In **S.A. Brothers** (supra), another Coordinate Bench of this Court held that the proviso to Order XXV Rule 1(1) of the CPC is mandatory in terms. The relevant observations of the court in **S.A. Brothers** (supra) are set out below:

“A perusal of its provisions suggests that it was mandatory in terms. This is apparent from the use of expression “shall be made in all cases” occurring therein. The provision prescribes only two requirements for passing such an order, viz., (i) where plaintiff resided outside India and (ii) where it was not possessed of any sufficient immovable property within India. From this it becomes clear that Trial Court had no option but to pass an order asking for security of costs

from plaintiff where it found that he was residing outside India and was not possessing sufficient immovable property within India. It could not divert to examination of any other issue, including prima facie evaluation of rival claims/counter claims for passing such an order.”

10. In **Alberto-Culver USA Inc. v. Nexus Health & Home Care (P) Ltd.**, ILR (2010) 1 Delhi 680, a Coordinate Bench of this Court observed that it is not mandatory under Order XXV Rule 1 of the CPC to direct the plaintiff to deposit security for costs in every case. The Court has to exercise discretion as per the facts and circumstances of each case. The relevant observations of the Court are set out below:

28. From the provisions of Order XXV it appears that at any stage of the suit, the court after assigning reason may direct any security to be deposited for payment of costs, if incurred or likely to be incurred by the defendant and pass such order if the plaintiff does not reside and possess any immovable property within India other than the property in the suit.

29. It is clear from the said provision that it is not a mandatory provision that in every case of such a nature, the court must direct the plaintiff to furnish security for costs. The mandate of this provision is that if the court is satisfied that there is no resource to recover the cost incurred and Likely to be incurred by defendant in the facts and circumstances of a particular case, it can pass the orders to the plaintiff for furnishing security. The court has to exercise its discretion as per the merit and circumstances of each case.

11. In **Gotham Entertainment Group** (supra), another Coordinate Bench of this Court relying upon the judgment of the Calcutta High Court in **Revlon Inc. & Ors. v. Kemco Chemicals & Ors.**, AIR 1987 Cal 285, observed that under Order XXV Rule 1(1) of the CPC, the Court has the

power to exercise discretion only in respect of quantum of the amount to be deposited by the plaintiff as security for the costs to be incurred by the defendant.

12. In **Kiran Shoes** (supra), another Coordinate Bench of this Court observed that the proviso to Order XXV Rule 1(1) of the CPC is mandatory. The Court while referring to the judgment passed by another Coordinate Bench of this Court in **Alberto-Culver** (supra) also observed that the said judgment does not address the language of the proviso to Order XXV Rule 1(1) of the CPC and also does not take into consideration the earlier decision of the Coordinate Bench of this Court in **S.A. Brothers & Co.** (supra). The relevant observations of the court are set out below:

“11. The plaintiff is a foreign entity and it is admitted that plaintiff does not have any immovable assets in this country. Although it is stated that the plaintiff has a large turnover in India, it is not disputed that the plaintiff does not have a bank account in India. In these circumstances, the apprehension of the defendants that it would be difficult for the defendants to recover the costs, if any, that may be awarded in its favour is merited.

*12. The question whether the proviso to Order XXV Rule 1 of the CPC is mandatory or not must be considered in the context of the express language and the object of the said proviso. **The rationale of the said proviso is clearly to ensure that the defendant is not put to any inordinate inconvenience of enforcing the award of costs in another jurisdiction. The use of the word shall also indicates that the proviso is mandatory.**”*

13. In **Millennium & Copthorne** (supra), yet another Coordinate Bench of this Court while referring to the judgments in **Gotham Entertain Group** (supra), **S.A. Brothers** (supra), **Kiran Shoes** (supra) and **Alberto-Culver USA** (supra), came to the conclusion that the proviso to Order XXV Rule

1(1) of the CPC would apply only in cases where the subject matter of the suit is an immovable property and the same would not apply in a suit where the subject matter is an ‘intellectual property’. The relevant observations of the Court in **Millennium & Copthorne** (supra) are set out below:

“41. While in the judgments cited by the counsel for the plaintiff, it has been held that where on a reading of the plaint, it does not appear that the suit of the plaintiff is false and frivolous, the Court is not bound to pass an order under Order XXV Rule 1 of the CPC, in the judgments cited by the counsel for the defendants, it has been held that a perusal of proviso to Order XXV Rule 1(1) of the CPC suggests that it is mandatory in terms and where the conditions, of the plaintiff residing outside India and not possessing any sufficient immovable property within India, are satisfied, the Court has no option but to pass an order asking for security of costs from the plaintiff and the Court cannot divert to examination of any other issue including prima facie evaluation of rival claims/counter-claims for passing such an order. It was however held that the mandatory language of the proviso to Order XXV Rule 1(1) of the CPC does not take away the discretion of the Court with respect to the quantum of the amount. In Kiran Shoes Manufacturers supra, it was also held that Alberto-Culver USA Inc. supra does not address the language of the proviso to Order XXV Rule 1 of the CPC and also did not notice the earlier decision of the Coordinate Bench in S.A. Brothers & Cos. supra.

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43. A literal reading of Order XXV Rule 1 and its proviso does initially indicate that while the sub-Rule, by use of the word ‘may’, vests a discretion in the Court whether to order the plaintiff to give security for payment of costs or not, the proviso thereto, by use of the word ‘shall’, does not leave the Court with any

discretion where the conditions in which the proviso applies are attracted. However, what none of the judgments aforesaid appear to notice, is that while sub-Rule (1) refers to ‘a suit’, whatsoever may be the claim therein, the proviso thereto refers to ‘all cases in which the plaintiff is residing out of India and does not possess any sufficient immovable property within India other than the property in suit’. Such language of the proviso conveys no other meaning than, that the same applies to cases subject matter whereof is immovable property. Though the word ‘property’ in the expression ‘property in suit’ is not qualified by the word ‘immovable’ but the word ‘immovable’ is found to have been used just prior thereto and the only interpretation can be that the expression ‘property in suit’ also refers to immovable property in suit. Thus, the proviso applies only to cases subject matter whereof is immovable property and not to cases subject matter whereof is not immovable property. Admittedly, the subject matter of the present suit is trade marks which though generally are referred to as ‘intellectual property’ but are certainly not immovable property. The fact that the trade marks in the present case are used in the context of immovable property also does not make the present suit as concerning any immovable property.

44. Seen in this light, the proviso to sub-Rule (1) of Rule 1 of Order XXV would have no application to the present case and the suit would be governed by sub-Rule (1) which it is not in dispute, is discretionary.”

14. From the discussion above, there appears to be a clear inconsistency in the views expressed by different Coordinate Benches of this Court. On one hand, in **Kiran Shoes** (supra) and **S.A. Brothers** (supra), it has been observed that the proviso to Order XXV Rule 1(1) of the CPC is mandatory in nature. On the other hand, it has been observed in **Millennium & Copthorne** (supra) and **Alberto Culver USA** (supra) that the provisions of

Order XXV Rule 1(1) of the CPC are not mandatory in nature and the Court has a discretion.

15. Counsels for both the sides agree that in view of divergent opinions expressed by different Benches of this Court and as a matter of judicial propriety, the present matter may be referred to a larger Bench of this Court, so that an authoritative judgment may be passed by the Court on the interpretation of Order XXV Rule 1(1) of the CPC.

16. Accordingly, the following questions are referred to a larger Bench of this Court:

- (i) Whether it is mandatory for the court to direct the plaintiff residing outside India and not possessing any sufficient immovable property within India, to furnish a security in terms of Order XXV Rule 1(1) of the CPC for payment of costs incurred or likely to be incurred by the defendant or whether the Court can exercise discretion in this regard?
- (ii) Whether the proviso to Order XXV Rule 1(1) of the CPC is only applicable in respect of the suits relating to immovable property?

17. Let the matter be placed before Hon'ble the Chief Justice for constitution of a Larger Bench/Division Bench for consideration of the interpretation of Order XXV Rule 1(1) of the CPC.

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18. List on 20th April, 2023 along with pending applications.

JANUARY 10, 2023/dk

AMIT BANSAL, J.