IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.01.2023

\+ **RFA(OS)(COMM) 28/2019**

SURYA FOOD AND AGRO LIMITED ..... Appellant

versus

OM TRADERS AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Darpan Wadhwa, Senior Advocate with Mr N. Mahabir, Mr P.C. Aryaa and Mr Noopur Biswas, Advocates.

For the Respondents : Mr Sanjay Kumar Shandilya, Mr Apoorva Agrawal, Mr Abhishek Singh, Mr Hemant Sharma, Mr Adit Srivastava and Ms Shambhavi Singh, Advocates for R-2.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present intra court appeal impugning a judgment dated 26.03.2019 (hereafter '**the impugned judgment**') passed by the learned Single Judge, whereby the appellant's suit, **CS(COMM) 10/2019** captioned ***Surya Food and Agro Limited v. Om Traders & Anr.***, was dismissed.

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2. The appellant had filed the above-captioned suit alleging infringement of copyright, passing off, rendition of accounts and damages. The petitioner, *inter alia*, sought a decree of permanent injunction against the respondent (defendant) from selling, offering for sale any goods, advertising or promoting any product under the packaging, get-up and/or trade dress of the defendant's product 'BUTTER KRUNCH' or any other packaging, get-up and/or trade dress that is deceptively similar to the appellant's product 'BUTTER DELITE'.

3. The learned Single Judge declined the appellant's (plaintiff's) prayer for interim relief and at the next effective hearing, dismissed the suit as the Court found that the plaintiff was not entitled to any relief.

Factual Context

4. The appellant, a company incorporated in the year 1992, is engaged in the manufacturing and sale of cookies, cakes, confectionaries juices and beverages. The appellant is the owner of several trademarks such as "Butter Bite", "Italiano", "Classic Crème", "Bourbon Crème", "CNC", "Snacks Zig Zag", "Puff Crème", "Cheese Cracker", "Cheez Bit", "Snakker", "Marie Lite Biscuits", "Oats Bite", "Butter Milk", "Crackle Coconut", "Choco Chekkers", "Jeera Top", Cashew, "Magic Cake", "Choco Gold", "Hungger", "Kickker", "coffito", "Toffito", "Treat" and "Fresh Gold".

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5. Respondent no.1, Om Traders, is a retailer selling products of respondent no.3 (Raja Udyog Private Limited).

6. The appellant had filed a suit in respect of its product sold under the trademark "BUTTER DELITE". The appellant claimed that its product is highly successful, reputed, and well-known in the market. It claimed that it commenced sale of the said product in a distinctive packaging, in the month of October 2015. And, by long and continuous use of the distinctive packaging for more than three years, the packaging, trade dress and get-up had become distinctive of its product 'BUTTER DELITE'. It claimed that by virtue of prior use coupled with extensive publicity and promotion, it had the exclusive common law and proprietary right in the packaging, get-up and trade dress of the product sold under the mark "BUTTER DELITE". The appellant disclosed the annual sales figure of its product 'BUTTER DELITE' as under:

YEAR	**BUTTER DELITE (INR)**
2015-2016	7,18,21,553.06
2016-2017	53,12,56,916.44
2017-2018	1,20,07,91,276.87
2018 (30 November 2018)	83,40,94,532.60

7. The appellant claimed that the packaging of its product 'BUTTER DELITE' is also an artistic work under the Copyright Act, 1957 (hereafter '**the Copyright Act**'). It claimed that the said work was

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created by one Mr. Sachin More, Designer at Oberoi IBC India Pvt. Ltd. in the month of August 2015, under the instructions of the appellant. He had, thereafter, assigned the copyright and all rights in the art work in the said packaging to the appellant (plaintiff) in terms of a deed of assignment dated 10.08.2015. The appellant states that during the pendency of the present appeal, the said packaging was registered under the Copyright Act bearing Copyright Registration No.A-132116 of 2019. It further claims that the packaging, trade dress and get-up has also been registered as a trademark bearing Registration No. 4329956 in Class 30.

8. The appellant (plaintiff) claims that during the second week of the month of December 2018, its representative came across the respondents' product sold under the trademark "BUTTER KRUNCH". It claims that the packaging of the said product is substantially similar to the packaging of the appellant's product 'BUTTER DELITE'. The appellant (plaintiff) alleges that the respondent had copied the art work, printed and written contents, of the packaging of 'BUTTER DELITE'. The appellant claimed that the defendant had copied various features and the placing of different elements on the said packaging. It further claims that the reproduction and copying of the appellant's packaging constituted infringement of its copyright in the packaging. In its plaint, the appellant (plaintiff) set out a tabular comparison of the packaging of the two products 'BUTTER DELITE' and 'BUTTER KRUNCH'.

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The said comparative statement, as set out in the plaint, is reproduced below:

APPELLANT	RESPONDENT
FRONT VIEW	**FRONT VIEW**
	
Background colour is a two layered colour scheme/pattern.	Background colour is the same two layered colour scheme/pattern.
BUTTER DELITE is written on left side	BUTTER KRUNCH is written on left side.
Company name is placed on left top corner in a box.	Company name is placed on left top corner in a box.
Namkeen Butter Biscuits in mentioned at the front bottom.	Namkeen Butter Biscuits is mentioned at the front bottom.
Biscuits are shown to be dipped in butter.	Biscuits are shown to be dipped in butter.
A distinct line runs through the butter and biscuits and the two layered colour scheme/pattern.	A distinct line runs through the butter and biscuits and the two layered colour scheme/pattern.
The distinct line is golden in colour.	The distinct line is golden in colour.
One curly slice of butter is presented on right top corner.	One curly slice of butter is presented on right top corner.
SIDE VIEW	**SIDE VIEW**
	
BUTTER DELITE is written on the right side.	BUTTER KRUNCH is written on the left side
Company Name is placed on the left top corner in a box.	Company name is placed on left top corner in a box.
Namkeen Butter Biscuits in mentioned at the front bottom.	Namkeen Butter Biscuits in mentioned at the front bottom.
A distinct line runs through the butter and biscuits and the two layered colour scheme/pattern.	A distinct line runs through the butter and biscuits and the two layered colour scheme/pattern.

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The distinct line is golden in colour.	The distinct line is golden in colour.
One curly slice of butter is presented on right top corner.	One curly slice of butter is presented on right top corner.

9. The appellant claims that the packaging used by the respondents/defendants for its product 'BUTTER KRUNCH' is confusing the customers. It also avers that the respondents had adopted the packaging for its product 'BUTTER KRUNCH' solely to deceive the consumers into buying its product believing it to be the appellant's product.

10. It is apparent from the above that the case set up by the appellant is that the respondent no.2 was passing off its product (BUTTER KRUNCH) as that of the appellant and had also violated its copyright.

11. On 07.01.2019, summons in the suit were issued. However, the appellant's prayer for an *ex parte* injunction, interdicting the respondents from using the impugned packaging, was declined.

12. Thereafter, on 26.02.2019, respondent no.2 entered appearance and sought time to file a written statement as well as reply to the application filed by the appellant under Order XXXIX Rule 1 and 2 of the CPC.

13. Respondent no.2 (defendant no.2) filed its written statement and the appellant filed it replication. However, the documents filed by respondent no.2 were found defective and were returned by the Registry

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of this Court. None entered appearance on behalf of respondent no.1 (defendant no.1) in response to the summons issued in the suit.

14. On 25.03.2019, the learned Single Judge proceeded against respondent no.1 (defendant no.1) *ex parte.* The Court heard oral submissions of the counsel who appeared on behalf of the appellant (plaintiff) and respondent no.2 (defendant no.2). The appellant contends that the arguments were advanced in support of its application under Order XXXIX Rule 1 and 2 of the CPC being IA No.259/2019. However, a perusal of the impugned judgment indicates that the Court had proceeded to hear final arguments in the suit as well. Paragraph no. 4 of the impugned judgment records that the Court had clarified to the parties that "*unless in the hearing any factor requiring evidence to be led is found, the suit would be disposed of on the basis of pleadings and admitted documents."* The Court, thereafter, proceeded to finally adjudicate the disputes on merits without framing any issues or providing the parties any opportunity to lead evidence.

15. At this stage, it is relevant to refer to the findings of the learned Single Judge on the basis of which the appellant's suit was dismissed. The Court found that the similarities in packaging of the two competing products, as articulated by the appellant, also included elements which were "*common to packaging of all marketeers / producers of biscuits".* The Court found that none of the entries listed out in the tabular comparison of the two products, as set out in the plaint, were distinctive to the packaging of the appellant's products. The Court was of the view

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that the same were "*generally to be found in the same product of nearly all marketeers / producers of biscuits/cookies*". Further, the Court held that the packaging of the product depends on and takes the form of the size and shape of the product. Since the shape of biscuits available in the market is either rectangular or round, the packaging would necessarily take the said shape of the biscuits. The Court concluded that if the shape and size of the biscuits of two manufacturers is the same, the size of the packages in which those products are sold would also be the same.

16. The Court referred to the decisions of the Second Circuit of United States in ***The Paddington Corporation v. Attiki Importers & Distributors, Inc.: 996 F.2d 577 (2d Cir. 1993)*** and ***Fun-Damental Too, Ltd. v. Gemmy Industries Corp.: 111 F.3d 993 (2d Cir. 1997)*** The said decisions supported the proposition that where the custom of an industry is to package its product in a particular manner and in a given trade dress and style; the trade dress and style would be generic and not inherently distinctive. It is apparent that the Court was of the view that the packaging of 'BUTTER DELITE' was generic to the trade and therefore, was not entitled to any protection.

17. The Court also held that the colour scheme of the packaging of the plaintiff's/appellant's product 'BUTTER DELITE' was not unique or distinctive of the product as there were a large number of biscuits available in the market, which were sold in the packages with the same colour scheme. The Court held that the products in question are targeted

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towards children and generally packaging of all products targeted towards children are of the colour red, which the children find attractive. The learned Single Judge also recollected from his memory that biscuits sold under the mark "Britannia Tiger Biscuits" and "Britannia Vita Marie Gold" were also packaged in red colour.

18. The learned Single judge also examined the packaging and found that the packaging foil used by the plaintiff was without any gloss and the packaging used by respondent no.2 was glossy. Although both packaging were red in colour, the Court found that there was a difference in the shade of red used in packaging of the competing products.

19. The Court referred to the decision of US District Court in ***Keebler Company v. Nabisco Brands, Inc.: 1992 U.S. Dist. LEXIS 6826*** and held that it was common in the cookie and cracker market to find similar product types in similar packaged colours. In that case, the Court had also made observations to the effect that virtually every colour is used by cookie manufacturers, which makes it impossible to select new colours without using a colour which is already in use.

20. The learned Single Judge referred to the decision of this Court in ***Colgate Palmolive Company Limited & Anr. v. Patel & Anr.: 2005 SCC OnLine Del 1439*** and, on the strength of the said decision, held that no party could claim any monopoly over a particular colour.

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21. Next, the learned Single Judge found that the period for which the appellant had been using its packaging could not be considered as long. The Court referred to a number of decisions where the courts had found competing packaging and trademarks to be dissimilar. Finally, the Court noted that whereas the packaging of the appellant's product mentions its trademark "PRIYA GOLD", the packaging of respondent no.2's product displays its trademark "RAJA". The Court held that the element of brand loyalty, if any, in respect of the appellant's goods would not let the consumers eschew the all-important trademark on the goods that they intend to buy. The Court held that the consumers are likely to remember and recall the goods of the appellant (plaintiff) with 'PRIYA GOLD' and/or 'BUTTER DELITE', which is not similar to the brands 'RAJA' and 'BUTTER KRUNCH'.

22. In view of its findings, the learned Single Judge found it unnecessary to frame issues or put the suit to trial. The Court held that even if the appellant (plaintiff) was a prior adopter of the subject packaging, it would not be entitled to relief in view of its findings that the packaging used by the appellant was not entitled to protection.

23. It is apparent that the learned Single Judge has rendered conclusive findings on some of the questions, which were in controversy in the suit and has dismissed the suit in view of his findings on merits of the claim.

24. The principal question to be addressed is whether it was permissible for the learned Single Judge to finally render findings

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without striking any issues and without permitting the parties to lead any evidence.

25. This Court is unable to concur with the procedure adopted by the learned Single Judge in deciding the suit on merits. The learned Single Judge has, in effect, rendered a summary judgment without following the necessary procedure for doing so.

26. Order XIII-A of the Code of Civil Procedure (hereafter '**the CPC**') as applicable to commercial suits enables the courts to decide a claim pertaining to any commercial dispute without recording oral evidence. It is necessary to refer to Order XIII-A of the CPC and the same is set out below:

"**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

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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 as 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;

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(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;

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(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

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(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;

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(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."

27. In terms of Order XIII-A Rule 2 of the CPC, an application for summary judgment may be made at any time after summons are served on the defendant but prior to framing of the issues in the suit. The plain language of Order XIII-A of the CPC makes it amply clear that a summary judgment cannot be rendered except pursuant to an application moved by any of the parties. The said application requires to set out certain matters as mentioned in Sub-clause (a) to (f) of Sub-rule (1) of Rule 4 of Order XIII-A of the CPC.

28. In terms of Sub-rule (2) of Rule 4 of Order XIII-A of the CPC, the respondent is required to be given at least thirty days prior notice of the hearing of the application for summary judgment and the claims that are proposed to be decided by the court. The respondent is entitled to,

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within thirty days of receipt of notice of an application of summary judgment, file a reply to the specific matters as set forth in the said application. Order XIII-A of the CPC also provides for a procedure for relying on additional documentary evidence by any party.

29. The procedure adopted by the learned Single Judge is clearly contrary to the procedure for summary judgment as specified under Order XIII-A of the CPC. It is important to note that the procedure under Order XIII-A of the CPC embodies the principles of natural justice, which are essential for rendering a fair decision in any action.

30. In ***Bright Enterprises Private Limited & Anr. v. MJ Bizcraft LLP & Anr.: 2017 SCC OnLine Del 6394***, a Coordinate Bench of this Court emphasised the necessity of following the procedure as set out in Order XIII-A of the CPC and held as under:

> "21. 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

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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.

22. 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.

23. Rule 4(2) of Order XIIIA also requires that where a hearing for summary judgment is fixed, the respondent

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> 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."

31. In the aforesaid decision, this Court had also explained that proceedings before a civil court are adversarial in nature and not inquisitorial. It follows that the court is required to adjudicate only the matters at which the parties are at variance. In this case, it is respondent no.2's stand that the packaging or the trade dress used by it for biscuits sold under the mark "RAJA BUTTER KRUNCH" is completely different from the appellant's packaging of its product 'BUTTER DELITE'. However, the learned Single Judge had concluded that the packaging of 'BUTTER DELITE' is generic and common to trade and

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therefore, is not entitled to protection. Respondent no.2 had not set up any such defence and respondent no. 1 was proceeded *ex parte*.

32. The learned counsel appearing for the respondents contended that the matter was at the stage of conducting a case management hearing and in terms of Order XV-A of the CPC, as applicable to commercial disputes, and Chapter X-A of the Delhi High Court (Original Side) Rules, 2018 (hereafter the **'2018 Rules'**), it was within the jurisdiction of the Court to *sou moto* render a summary judgment.

33. Since the suit was a commercial suit, it was necessary for the Court to hold the case management hearing in terms of Order XV-A of the CPC. In terms of Rule 2 of Order XV-A of the CPC, the Court was required to strike issues, if it found that there were issues of fact and law, which were required to be tried. The Court was required to pass further directions for listing of witnesses to be examined by the parties; fixing the date by which the affidavit of evidence would be filed by the parties; schedule for recording of evidence and filing written arguments; and further fixing the date on which the oral submissions would be heard by the Court. Rule 6 of Order XV-A of the CPC sets out the powers of the court in a case management hearing. Order XV-A of the CPC, as applicable to commercial disputes, is set out below:

"ORDER XVA

CASE MANAGEMENT HEARING

1. *First Case Management Hearing.* — The Court shall hold the first Case Management Hearing, not later than four weeks from the

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date of filing of affidavit of admission or denial of documents by all parties to the suit.

2. *Orders to be passed in a Case Management Hearing.* — In a Case Management Hearing, after hearing the parties, and once it finds that there are issues of fact and law which require to be tried, the Court may pass an order—

(a) framing the issues between the parties in accordance with Order XIV of the Code of Civil Procedure, 1908 (5 of 1908), after examining pleadings, documents and documents produced before it, and on examination conducted by the Court under Rule 2 of Order X, if required;

(b) listing witnesses to be examined by the parties;

(c) fixing the date by which affidavit of evidence to be filed by parties;

(d) fixing the date on which evidence of the witnesses of the parties to be recorded;

(e) fixing the date by which written arguments are to be filed before the Court by the parties;

(f) fixing the date on which oral arguments are to be heard by the Court; and

(g) setting time limits for parties and their advocates to address oral arguments.

3. *Time limit for the completion of a trail.* —In fixing dates or setting time limits for the purposes of Rule 2 of this Order, the Court shall ensure that the arguments are closed not later than six months from the date of the first Case Management Hearing.

4. *Recording of oral evidence on a day-to-day basis.* —The Court shall, as far as possible, ensure that the recording of evidence shall be carried on, on a day-to-day basis until the cross-examination of all the witnesses is complete.

5. *Case Management Hearings during a trial.* —The Court may, if necessary, also hold Case Management Hearings anytime during the trial to issue appropriate orders so as to ensure adherence by the parties

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to the dates fixed under Rule 2 and facilitate speedy disposal of the suit.

6. *Powers of the Court in a Case Management Hearing.* — (1) In any 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 XIII-A;

(b) direct parties to file compilations of documents or pleadings relevant and necessary for framing issues;

(c) extend or shorten the time for compliance with any practice, direction or Court order if it finds sufficient reason to do so;

(d) adjourn or bring forward a hearing if it finds sufficient reason to do so;

(e) direct a party to attend the Court for the purposes of examination under Rule 2 of Order X;

(f) consolidate proceedings;

(g) strike off the name of any witness or evidence that it deems irrelevant to the issues framed;

(h) direct a separate trial of any issue; (i) decide the order in which issues are to be tried;

(j) exclude an issue from consideration;

(k) dismiss or give judgment on a claim after a decision on a preliminary issue;

(l) direct that evidence be recorded by a Commission where necessary in accordance with Order XXVI;

(m) reject any affidavit of evidence filed by the parties for containing irrelevant, inadmissible or argumentative material;

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(n) strike off any parts of the affidavit of evidence filed by the parties containing irrelevant, inadmissible or argumentative material;

(o) delegate the recording of evidence to such authority appointed by the Court for this purpose;

(p) pass any order relating to the monitoring of recording the evidence by a commission or any other authority;

(q) order any party to file and exchange a costs budget;

(r) issue directions or pass any order for the purpose of managing the case and furthering the overriding objective of ensuring the efficient disposal of the suit.

(2) When the Court passes an order in exercise of its powers under this Order, it may—

(a) make it subject to conditions, including a condition to pay a sum of money into Court; and

(b) specify the consequence of failure to comply with the order or a condition.

(3) While fixing the date for a Case Management Hearing, the Court may direct that the parties also be present for such Case Management Hearing, if it is of the view that there is a possibility of settlement between the parties.

7. *Adjournment of Case Management Hearing.* — (1) The Court shall not adjourn the Case Management Hearing for the sole reason that the advocate appearing on behalf of a party is not present: Provided that an adjournment of the hearing is sought in advance by moving an application, the Court may adjourn the hearing to another date upon the payment of such costs as the Court deems fit, by the party moving such application.

(2) Notwithstanding anything contained in this Rule, if the Court is satisfied that there is a justified reason for the absence of the advocate, it may adjourn the hearing to another date upon such terms and conditions it deems fit.

8. *Consequences of non-compliance with orders.* — Where any party fails to comply with the order of the Court passed in a Case Management Hearing, the Court shall have the power to—

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(a) condone such non-compliance by payment of costs to the Court;

(b) foreclose the non-compliant party's right to file affidavits, conduct cross-examination of witnesses, file written submissions, address oral arguments or make further arguments in the trial, as the case may be, or

(c) dismiss the plaint or allow the suit where such non-compliance is wilful, repeated and the imposition of costs is not adequate to ensure compliance."

34. Sub-clause (a) of Rule 6(1) of Order XV-A of the CPC expressly empowers the court to decide a pending application filed by the parties under Order XIII-A of the CPC at a case management hearing. As is apparent from the plain reading of Rule 6 of Order XV-A of the CPC, the court can also pass further orders for effectively concluding the hearing. The court also has the powers to exclude an issue from consideration.

35. The procedural scheme under CPC, as applicable to commercial disputes, is unambiguous. After the stage of completion of pleadings and admission and denial of documents, the court is required to hold the first case management hearing within a period of four weeks from the date of filing of the affidavit of admission or denial of documents by the parties to the suit.

36. In terms of Order XIV of the CPC, the court is required to, at the first hearing of the suit, after completion of the pleadings and after examination under Order X Rule 2 of the CPC, ascertain the material propositions of fact and law in respect of which the parties are at variance. Thereafter, the court is to proceed to strike the issues on which

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the decision of the case depends. However, prior to striking of the issues by the court, the parties are entitled to file an application under Order XIII-A of the CPC to seek a summary judgment. If after hearing the parties, the court finds that there are issues of fact and law, which require to be decided, the court is required to frame the issues in accordance with Order XIV of the CPC.

37. In case an application for summary judgment is moved by any party in terms of Order XIII-A of the CPC prior to framing of issues, the court is required to decide the same in accordance with the procedure as set out in Order XIII-A of the CPC. In terms of Sub-clause (a) of Rule 6(1) of Order XV-A of the CPC, the Court may, at the case management hearing, decide the application for summary judgment under Order XIII-A of the CPC.

38. Order XIII-A of the CPC does not empower the court to *suo motu* render a summary judgement. According to the learned counsel for the respondents, this power is available under Chapter X-A of the 2018 Rules.

39. Chapter X-A of the 2018 Rules was inserted by virtue of the Notification dated 16.10.2018 and came into effect from 01.11.2018. Chapter X-A of the 2018 Rules reads as under:

> "CHAPTER XA
>
> **CASE MANAGEMENT**
>
> 1. **Summary Judgment.** – At the time of Case Management hearing, a Court, may of its own, decide a claim

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pertaining to any dispute, by a summary judgment, without recording oral evidence.

2. **'Claim'.** – 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 its part) depends; or

(c) a counter claim, as the case may be.

3. **Grounds for summary judgment**. – The Court may, of its own, 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. **Other orders / directions. –** The Court may, *inter-alia,* pass orders / directions as it may think fit for the speedy disposal of the suit or narrowing the controversy between the parties, including:-

(a) calling upon the parties to admit or deny such allegations of fact as are made in the plaint or written statement and are not expressly or by implication admitted or denied by the party against whom they are made as provided in Order X Rule 1 of the Code.

(b) recording the statement of the parties under Order X Rule 2 of the Code with a view to elucidate the matter in controversy or answer the material questions relating to the suit.

(c) calling upon parties to conduct inspection of documents as required under Order XI Rule 3 of the Code as applicable and direct the inspection to be conducted at any place convenient to the

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parties within a fixed time schedule not exceeding 30 days form the date of filing of the written statement;

(d) calling upon the parties to, after inspection of the documents, file statements of admission / denial as per Order XI Rule 4 of the Code.

(e) passing an order of admission of a document under Order XII rule 2A of the Code, in case a party to which a notice has been given under Order XII Rule 2 of the Code, has failed to deny specifically or by necessary implication and also passing an order of compensation where a party unreasonably neglects or refuses to admit a document after the service of notice.

(f) passing an order for paying cost of proving a document or a fact by a party, refusing or neglecting to admit a document.

(g) direct listing of the matter before the Registrar for marking of exhibits on all admitted documents as also public documents of third parties for e.g., documents issued by government authorities, reputed publications, newspaper articles, electronic printouts from websites which are accessible openly;

(h) conduct a Case Management hearing under Order XV-A of the Code and as part of the said case management hearing –

(i) explore the possibility of settlement between the parties as per Section 89 of the Code.

(ii) explore the possibility of deciding the dispute by a summary judgment, without a specific application for the said purpose, on the basis of pleadings dispensing with the trial of the suit on the questions of law or of facts on which the parties are not at issue;

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(ii-a) strike out defences or pleas or claims which the Court considers either unreasonable, frivolous or not maintainable,

(iii) frame only such issues that arise for adjudication and upon insistence by any parties for framing of issues which the Court considers either frivolous or not maintainable, affix costs on a per issue basis to be paid by the losing party after trial;

(iv) decide such issues which do not require evidence as preliminary issues; V. fix a date for filing of list of witnesses by both parties;

(vi) examine the list of witnesses and direct only such witnesses to be examined as are essential for adjudication of the issues so framed so as to not permit unnecessary protraction of trial with large number of witnesses;

(vii) fix time schedules for filing of affidavits in evidence by all parties including rebuttal evidence, if any;

(viii) Where Court/ Registrar/ Commissioner deems appropriate, keeping in view volume/ number of documents required to be marked/ identified, it may dispense with marking of documents in presence of witnesses, by directing a pre-trial hearing before Court/ Registrar/ Commissioner, when identification and marking of exhibits/ affixation of suitable marks of identification can be carried out in terms of respective affidavit(s) of witnesses filed. While doing so the Court/ Registrar/ Commissioner would record objections, if any, of any party objecting to marking / identification of documents.

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(ix) monitor the trial being carried out by fixing periodic dates before itself every 3 months after the Case Management hearing;

(x) direct consolidation of trials in cases where identical or similar issues arise;

(xi) direct filing of synopsis in the suit;

(xii) direct pagination of the record and convert them to digital copies to be given to all parties in the case;

(xiii) fix time limits for final arguments."

40. Rule 1 of Chapter X-A of the 2018 Rules expressly empowers the court to render a summary judgment on its own without recording oral evidence. The grounds for seeking summary judgement, as stated in Rule 3 of Chapter X-A of the 2018 Rules, are identical to those stated in Rule 3 of Order XIII-A of the CPC.

41. Although the grounds on which the summary judgment can be rendered in terms of the 2018 Rules and Order XIII-A of the CPC are identical, it is apparent that insofar as commercial disputes of above a specified value are concerned, there is a conflict between the provisions of Rule 1 of Chapter X-A of the 2018 Rules and Order XIII-A of the CPC. Under Order XIII-A of the CPC, a court cannot render a *suo motu* summary judgment. It can do so only on an application by any party. But under the 2018 Rules, a Court can, *suo motu*, decide the disputes by a summary judgment without being moved by any party.

42. It was contended on behalf of the respondent that Rule 1 of Chapter X-A of the 2018 Rules can be read harmoniously with Order XIII-A of the CPC. Order XIII-A of the CPC does not expressly

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proscribe a court from rendering a summary judgment on the grounds as set out in Rule 3 of Order XIII-A of the CPC and therefore, there is no conflict with the provisions of Order XIII-A of the CPC if power to render a *suo motu* decision is conferred on the High Court, in addition to the provisions under Order XIII-A of the CPC.

43. Although the aforesaid proposition seems attractive at first blush, a closer examination of the provisions of Chapter X-A of the 2018 Rules and Order XIII-A of the CPC clearly indicates that there is an inherent conflict between the two provisions. Order XIII-A of the CPC enables a party to a suit to apply for summary judgment and sets out a detailed procedure for doing so. A plain reading of the procedure as stipulated under Rules 4 and 5 of Order XIII-A of the CPC indicates that the said Rules stipulate a procedure, which entails full opportunity to the respondent to agitate or resist the claim as the case may be. Under Order XIII-A of the CPC, the procedure to secure a summary judgement cannot be triggered without an application filed by any party. The provisions of Chapter X-A of the 2018 Rules do not provide for any such procedure and there is no scope for following the procedure as set out in Rule 4 of Order XIII-A of the CPC in case of a *suo motu* summary judgment by the Court.

44. It is well settled that it is not necessary that there be a direct conflict between two provisions or enactments for the same to be otherwise in conflict with each other. The contention that Rule 1 of Chapter X-A of the 2018 Rules confers an additional power and

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therefore, both Rule 1 of Chapter X-A of the 2018 Rules and Order XIII-A of the CPC can co-exist is unpersuasive. As noted above, it is clear that under the scheme of Order XIII-A of the CPC, there is no scope for the court to, *suo motu*, render a summary judgment. Thus, in effect, the provision of Rule 1 of Chapter X-A of the 2018 Rules, which provides that the Court can, *suo motu,* render a summary judgment, is in clear conflict with the provisions of Order XIII-A of the CPC in respect of commercial disputes of above a specified value.

45. It is relevant to refer to the following observations made by the Calcutta High Court in ***G.P. Stewart v. Brojendra Kishore Roy Choudhury: 1939 SCC OnLine Cal 116***, although the same was made in an altogether different context:-

> "It is sometimes said that, two laws cannot be said to be properly repugnant unless there is a direct' conflict between them, as when one says "do" and the other "don't," there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test: *there may well be cases of repugnancy where both laws say "don't" but in different ways*. For example, one law may say "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time." Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant,

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> for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

46. The Delhi High Court had also issued Practice Directions under Section 18 of the Commercial Courts Act, which empower the court to issue practice directions to supplement the provisions of Chapter-II of the Commercial Courts Act or the CPC insofar as such provisions apply to hearing of commercial dispute of above a specified value. Clause (h) of Rule 9 of the Practice Directions expressly refers to the orders which can be passed by a court for a speedy disposal of the suit involving commercial disputes and narrowing the controversy between the parties. Sub-Clause (ii) of Clause (h) of Rule 9 of the Practice Directions is set out below:

> "9. In the case of commercial disputes, the Court may, *inter-alia*, pass orders as it may think fit for the speedy disposal of the suit or narrowing the controversy between the parties, including:-
>
> (h) conduct a Case Management hearing under Order XV-A of the Code and as part of the said case management hearing –
>
> ii. explore the possibility of deciding the dispute by a summary judgment, without a specific application for the said purpose, on the basis of pleadings dispensing with the trial of the suit on the questions

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of law or of facts on which the parties are not at issue;"

[emphasis supplied]

47. The said clause limits the power of the court to explore a possibility of deciding the dispute by summary judgment without specific application for the said purpose on the basis of pleadings by dispensing with the trial of the suit on questions of law and facts *on which the parties are not in issue*. The said Practice Directions clearly do not enable the court to adjudicate the disputes between the parties where the parties are at variance on matters of law or on facts.

48. It is relevant to note that Order XIII-A of the CPC, as applicable to commercial disputes, was inserted in the CPC by virtue of Section 16 of the Commercial Courts Act, 2015 (hereafter '**the Commercial Courts Act**') as the same was included in the Schedule to the said Act. Section 16 of the Commercial Courts Act reads as under:

> "**16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes**.—(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.
>
> (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.
>
> (3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure,

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> 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail."

49. In terms of Sub-section (2) of Section 16 of the Commercial Courts Act, the Commercial Divisions and Commercial Courts are required to follow the provisions of the CPC as amended by the Commercial Courts Act, 2015. Sub-section (3) of Section 16 of the Commercial Courts Act expressly provides that the provisions of the CPC, as amended by the Commercial Courts Act, would prevail in case there is any conflict between the provisions of any Rule of the jurisdictional High Court or any amendment to the CPC by the State Government. The Commercial Courts Act is a special enactment and the same would prevail in case of any conflict with the 2018 Rules.

50. In ***HPL (India) Ltd. & Ors. v. QRG Enterprises & Anr.: 2017 SCC OnLine Del 6955***, this Court had referred to the provisions of Section 16 of the Commercial Courts Act and held that if there was any conflict with the provisions of the said Act and the provisions contained in any other law for the time being in force, the Commercial Courts Act would have an overriding effect. In ***Indian Style Wrestling Association of India & Anr. v. Wrestling Federation of India: 2019 SCC OnLine Del 9902***, this Court had expressly held that the provisions of Commercial Courts Act would prevail in case of any conflict with the provisions of the 2018 Rules.

51. We are of the view that the provisions of Rule 1 of Chapter X-A of the 2018 Rules are in conflict with the provisions of Order XIII-A of the CPC. As noted above, Order XIII-A of the CPC does not permit a

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summary judgment to be rendered *suo motu* by the court without being moved by any party.

52. It is also necessary to refer to Sub-rule (3) of Rule 1 of Order XIII-A of the CPC, which contains a *non obstante* clause and expressly provides that an application for summary judgment would not be made in respect of any commercial dispute, which was originally filed as a summary suit under Order XXXVII of the CPC. Chapter X-A of the 2018 Rules does not contain any such exclusion either. As noticed above, there is no scope for following the procedure as stipulated under Rule 4 of Order XIII-A of the CPC if a court, *suo motu*, renders a summary judgment and no other specific procedure is stipulated under Chapter X-A of the 2018 Rules. An application for a summary judgment under Order XIII-A of the CPC must specify the material facts and identify the point of law, if any, on which such summary judgment is sought. It necessarily implies that the said judgment would be rendered in an adversarial procedure and on points which are based on fact and law contested by the party moving the said application. There is no scope for rendering a summary judgment by a Court *suo motu* on points that are not in contest between the parties.

53. It is material to note that a summary judgment is a judgment on merits. It is not a decision under Order VII Rule 11 of the CPC where the court finds that the relief is barred by any law or plaint does not disclose any cause of action. We are of the view that Order XIII-A of the CPC does not permit a *suo motu* summary judgment by the court and the same militates against the procedure as set out in Order XIII-A

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of the CPC. Thus, clearly, the provisions of Rule 1 of Chapter X-A of the 2018 Rules are in conflict with the said provision of Order XIII-A of the CPC. By virtue of Section 16(3) of the Commercial Courts Act, the provisions of Order XIII-A of the CPC, introduced by virtue of Section 16(1) of the Commercial Courts Act, would prevail in the event of any such conflict.

54. As noticed hereinbefore, the pleadings in the suit indicated several controversial points for consideration. The appellant/plaintiff had founded its claim in the suit on the basis that the overall commercial impression of the defendant's product 'BUTTER KRUNCH' was deceptively similar to the appellant's/plaintiff's product 'BUTTER DELITE'. The packaging of both the product was in similar size and in a similar colour scheme. The appellant/plaintiff had also claimed that placing of various elements such as the trademark "BUTTER DELITE" and "BUTTER KRUNCH" were similarly placed on the package.

55. As noticed above, the suit was dismissed mainly on the finding that the trade dress and the colour schemes used were generic to the trade. This was not the defence pleaded by the defendants and there was no evidence on record to return a finding to the aforesaid effect. The learned Single Judge had also proceeded on the basis that packaging of all biscuits would necessarily take the shape of the biscuit, which would be either rectangle or round and no such defence was raised in the pleadings and there is no material to support this finding. The learned Single Judge had concluded that both the products were aimed towards children. This impression that biscuits, as a commodity, are meant for

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consumption by children or that the packaging of the biscuits mainly targets children is based on impressions and not on cogent material available on record. The learned Single Judge found that the packaging of both the competing products used red colour, which was common to trade. This finding too is based only on impressions and not on the basis of pleadings and material on record.

56. In ***Bright Enterprises Private Limited & Anr. v. MJ Bizcraft LLP & Anr.*** (*supra*), the Division Bench had faulted the Trial Court for rendering a decision based on impressions and recollections of facts, which were not part of the record. Paragraph 27 of the said decision reads as under:

> "27. 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."

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57. In the present case, the learned Single Judge recalled from his memory that biscuits sold under the trademarks "Britannia Tiger Biscuits" and "Britannia Vita Marie Gold" were also packaged in red colour. We are of the view that the learned Single Judge fell in error in founding the impugned judgment on recollection of facts, which were not a part of the record, from his memory.

58. In view of the above, the present appeal is allowed and the impugned judgment is set aside.

59. The suit [CS(COMM) 10/2019] is restored to the position as obtaining on 26.03.2019.

60. The Registry is directed to list the suit before the concerned Roster Bench on 30.01.2023.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JANUARY 20, 2023
RK/gsr

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