NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No(s). 5775 OF 2019
(Arising out of SLP(C)No.2910 of 2016)

U.C. SURENDRANATH **Appellant(s)**

VERSUS

MAMBALLY'S BAKERY **Respondent(s)**

J U D G M E N T

BANUMATHI, J.

Leave granted.

2. This appeal arises out of judgment and order dated 05th January, 2016 passed by the High Court of Kerala at Ernakulam in FAO No.2 of 2016 in and by which the High Court has affirmed the order of the Trial Court passed under Order XXXIX Rule 2A of the C.P.C. and also the sentence of imprisonment of one week imposed upon the respondent.

3. Brief stated facts are as under. The respondent-Mambally's Bakery filed a suit for permanent injunction restraining the appellant from passing off the goods by using respondent's trade mark "Mambally's Bakery" or any other trade mark deceptively identical or similar to the respondent's mark and also to restrain the appellant from wrongfully selling the product using the trade mark "Mambally's Bakery". The Trial Court vide Order dated 04.11.2015 granted the interim injunction and the same was served upon the appellant on 09.11.2015. In the said suit the Trial Court appointed an advocate Commissioner who inspected the appellant's shop on

07.11.2015 and submitted a report on 26,11.2015 wherein the Commissioner stated that the appellant is conducting the bakery and tea shop business and tea cakes and masala cakes are sold using respondent's trade mark "Mambally's Bakery". The Commissioner has also pointed out that a big hoarding with the name "Mambally's Bakery" has been displayed in front of the appellant's shop. Based on the Commissioner's report, upon perusal of the averments made in the counter affidavit and also hearing the parties, the Trial Court came to the conclusion that there is a willful disobedience on the part of the appellant and directed that the appellant be sentenced to undergo imprisonment for one week. Being aggrieved, the appellant has preferred appeal before the High Court which came to be dismissed as aforesaid in para (2).

4. We have heard Mr. P.V. Surendranath, learned senior counsel appearing for the appellant and Mr. P.B. Suresh, learned counsel appearing for the respondent and also perused the impugned judgment and materials on record.

5. By perusal of the impugned judgment and also the order of the Trial Court, it is seen that the Commissioner has inspected the appellant's premises on 07.11.2015; whereas the interim order was served on the appellant on 09.11.2015. On the date of inspection i.e. 07.11.2015 the Commissioner has noticed that all the tea cakes and masala cakes prepared were covered having trade mark "Mambally's Bakery". Since the interim order was served on the appellant only on 09.11.2015 whatever was noticed by the Commissioner on 07.11.2015 cannot be in violation of the

interim order, much less willful disobedience.

6. At the request of the respondent, the Commissioner again inspected the appellant's shop on 20.11.2015. It is to be pointed out that on his second visit, the Commissioner noted that the sale of tea cakes and masala cakes prepared, were without "wrappers/labels" meaning thereby that on the date of second visit of the Commissioner the appellant was not using the mark of the respondent "Mambally's Bakery". During the second visit, of course, the Commissioner noted that the hoarding "Mambally's Bakery" was displayed in front of the appellant shop was not removed. In this regard, the appellant has offered his explanation stating that since the hoarding is situated at height of 13 feet and also due to the scarcity of the labour force, he could not immediately remove the hoarding. Mr. P.V. Surendranath, learned senior counsel appearing for the appellant, has submitted that the appellant is 40% disabled and he was incapacitated from climbing up and removing the hoarding by himself.

7. For finding a person guilty of willful disobedience of the order under XXXIX Rule 2A C.P.C. there has to be not mere "disobedience" but it should be a "willful disobedience". The allegation of willful disobedience being in the nature of criminal liability, the same has to be proved to the satisfaction of the court that the disobedience was not mere "disobedience" but a "willful disobedience". As pointed out earlier, during the second visit of the Commissioner to the appellant's shop, tea cakes and masala cakes were being sold

without any wrappers/labels. The only thing which the Commissioner has noted is that "non removal of the hoarding" displayed in front of the appellant's shop for which the appellant has offered an explanation which, in our considered view, is acceptable one.

8. In the facts and circumstances of the case, we do not find any "willful disobedience" on the part of the appellant warranting invoking Order XXXIX Rule 2A of the C.P.C. and sentencing the appellant to one week civil imprisonment.

9. Accordingly, the impugned order is set aside and this appeal is allowed. Since, O.S.NO.1 of 2015 is pending consideration, the Trial Court shall proceed with the said suit and dispose of the same as expeditiously as possible. We make it clear that we have not expressed any opinion either on the merits of the matter or the contentions raised by the parties. There shall be no order as to costs.

.....J.
(R. BANUMATHI)

.....J.
(A.S. BOPANNA)

NEW DELHI,
JULY 22, 2019.