

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

+ CS(OS) 2208/2006

Judgment delivered on: 24.05.2012

M/s Lakhan Pal Shyam Kumar Plaintiff
Through Mr. Suwarn Rajan with
Mr. Santosh Kumar, Advs.

versus

M/s Ram Prasad Gupta & Anr.

..... Defendants
Through Mr. Sushant Singh with
Mr. Debmalya Bhattacharya
with Mr. V.K. Shukla and
Mr. Tejendr Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR:

KAILASH GAMBHIR, J.

1. The present suit has been filed by the plaintiff for permanent injunction and rendition of accounts against the defendant alleging infringement of its trademark “Shyam Surti”.
2. Briefly stated the case of the plaintiff is that it is in the

business of manufacturing, processing, marketing and distribution of chewing tobacco, khaini and surti under the trademark “Shyam Surti” since 1969 which is duly registered vide registration no. 312720 in class 34. It is the case of the plaintiff that in the month of May 2006 the plaintiff came to know that the defendants are manufacturing and marketing same goods as that of the plaintiff under the name “Om Shyam Surti” and even the packing is identical and deceptively similar to that of the plaintiff. According to the plaintiff the defendants are using the impugned mark out of greed with a view to take advantage of the reputation and goodwill of the plaintiff. The defendant no.1 and 3 however filed a suit for declaration, injunction and damages under section 134(c) and 142 of the Trademarks Act against the plaintiff at Chitrakoot, U.P which is being contested by the plaintiff herein.

3. It is important here to give the sequence of events which has led the court to decide the matter at this stage. Vide orders dated 17th March, 2008 this Court framed issues arising out of the pleadings of the parties. Issue No. 1 which deals with the

territorial jurisdiction of this Court was treated as a preliminary issue and counsel representing the parties had agreed that issue No.1 should be taken up first. Issue No. 1 is reproduced as under:-

"1. Whether this court does not have territorial jurisdiction in respect of the present suit? OPD."

On 31st October, 2008 learned counsel representing the plaintiff conceded that Section 134 of the Trade Marks Act, 1999 may not be applicable to determine the jurisdiction of this Court but yet stated that this Court has territorial jurisdiction to entertain the present suit so far as passing off the trademark SHYAM SURTI is concerned. Counsel also submitted that the suit for passing off against the defendant before this Court will be maintainable, even though the defendant is not working or residing for gain in Delhi, because it had made an application for registration in the trademark Registry at Delhi. This Court on the said submission of the counsel for the plaintiff observed that prima facie the contention of learned counsel for the plaintiff does not appear to

be correct for in a suit for passing off, place of registration of the trademark is irrelevant and is not a part of cause of action. The Court further observed that the suit or the plaint can be filed in the Court where cause of action or part of cause of action has arisen. On the said observation of the Court, the learned counsel representing the plaintiff took time to examine the decisions of this Court and of the Supreme Court on the said aspect. It would be relevant to reproduce the order dated 31st October, 2008 as under:-

“Learned counsel for the plaintiff concedes that Section 134 of the Trade Marks Act, 1999 may not be applicable but insists that this Court has territorial jurisdiction to entertain the present suit for passing off as the defendant, who is not working or residing for gain in Delhi, had made an application for registration in the trademark Registry at Delhi.

Prima facie, the contention of the learned counsel for the plaintiff does not appear to be correct for in a suit for passing off, place of registration of the trademark is irrelevant and is not a part of cause of action. Suit or plaint can be filed in the Court where cause of action or part of cause of action has arisen.

At this stage learned counsel for the parties pray for some time to examine decisions of this Court and the Supreme Court dealing with this aspect.

Relist on 13th January, 2009.”

The matter was thereafter listed on various dates and vide order dated 3rd February, 2011 and 11th July, 2011 this Court again directed for listing the matter for hearing on the preliminary issue No. 1.

4. Addressing the arguments on the said preliminary issue No. 1, counsel representing the plaintiff submitted that the issue relating to territorial jurisdiction is a mixed question of law and fact, therefore, without granting opportunity to the plaintiff to lead evidence on the said issue the same cannot be decided based on the oral arguments. Counsel for the plaintiff also submitted that under Order 14 Rule 2 CPC this Court can dispose of the suit on the preliminary issue only when it is of the opinion that the case can be disposed of on an issue of law only and not on an issue, which is a mixed question of law and fact. Counsel for the plaintiff further submitted that for deciding the territorial jurisdiction, this Court has to only look at the averments made by the plaintiff in the plaint and nothing beyond that. The contention raised by the counsel for the plaintiff was that in a plaint if the plaintiff has made necessary averments

clearly disclosing territorial jurisdiction of this Court, then this Court will not disbelieve the said averments to dismiss the present suit at the very threshold due to the lack of territorial jurisdiction. Elaborating his arguments, counsel submitted that in para 24 of the plaint the plaintiff has clearly averred that both the plaintiff and defendants are carrying on business in Delhi and that the defendants are committing the impugned acts of infringement and passing off within the jurisdiction of Delhi in a clandestine and surreptitious manner i.e. without issuing any formal invoices against the sales. The plaintiff in the said para has also averred that defendant No. 1 had filed its application for registration of the impugned trademark/label in Delhi on all India basis. Counsel for the plaintiff also submitted that the defendant had earlier filed an application under Order 7 Rule 11 CPC on the same ground for challenging the jurisdiction of this Court and the said application was withdrawn by the defendant vide orders dated 8.5.2007 and, therefore, the defendants cannot reagitate the issue of lack of territorial jurisdiction after the withdrawal of the said application. Counsel for the plaintiff

further submitted that in OS No. 2/2006 filed by defendant No. 1 in the District Court of Chitrakoot, U.P. the defendant who was plaintiff in the said suit itself claimed sale of their products throughout India and, therefore, with the said admission by the defendant, they cannot claim that in Delhi they are not selling their products. The contention raised by counsel for the plaintiff was that the said averment of the defendant in the suit filed by it clearly proves the territorial jurisdiction of this Court, as the defendants are also selling their products in Delhi. Based on these averments counsel for the plaintiff claimed jurisdiction of this Court under Section 134 of the Trade Marks Act, 1999 and Section 62 of Copyright Act, 1957. In support of his arguments, counsel for the plaintiff placed reliance on following judgments:-

1. Pfizer Enterprises Sarl vs Cipla Ltd. (2009) (39) PTC 358 (Del.) (DB).
2. Ford Motor Company & Anr. Vs. C.R. Borman & Anr. 2008 (38) PTC 76 (Del.) DB.
3. Shree Rajmoti Industries versus Rajmoti Oil Mill Pvt. Ltd. & Anr. 2005 (30) 38 (Del.)
4. Konzerv Systems (P) Ltd. vs. T.K. Babu and Ors. 2009 (40) PTC 255 (Del.)
5. Dashmesh Mechanical Works vs Hari Singh and Anr. 2010 (42) PTC 288 (Del.)
6. Alberto-Culver USA Inc. vs Nexus Health & Home Care (P) Ltd. 2009 (41) PTC 197 (Del.)
7. Major S.S. Khanna vs. Brig.F.J.Dillon AIR1964SC497
8. Madhabananda Ray & Anr. vs. Spencer & Company Ltd. AIR1988Ori35

9. Ramdayal Umraomal vs. Pannalal Jaganathji AIR1979MP153
10. Mohammad Yasin vs. Abdul Kalam & Anr 32(1987)DLT143

5. Refuting the said submissions of the counsel for the plaintiff, Mr. Sushant Singh, learned counsel representing the defendants submitted that except the bald averments made by the plaintiff in para 24 of the plaint, no other material has been placed on record by the plaintiff to even prima facie show that this court has the territorial jurisdiction. Counsel also submitted that this Court has also treated the said issue of territorial jurisdiction as a preliminary issue and, therefore, the same can be decided by this Court taking into account the pleadings of the parties and documentary evidence placed on record by them. The contention raised by the counsel for the defendant was that no documentary evidence has been placed on record by the plaintiff to show that the defendant was engaged in carrying on its business in Delhi and in the absence of any such documentary evidence, the plaintiff will not be able to establish the territorial jurisdiction of this Court even in the trial. Counsel further

submitted that this Court will not readily accept the existence of jurisdiction based on a bald averment made by the plaintiff unless the plaintiff is able to satisfy this Court as to how it has invoked the territorial jurisdiction of this Court. Counsel for the defendant further submitted that from the memo of parties itself it would be evident that both the parties are neither residing nor working for gain within the territorial jurisdiction of this Court and, therefore, clearly this Court has no territorial jurisdiction to entertain the present suit in terms of Section 20 of the Code of Civil Procedure, 1908. Counsel further submitted that even no cause of action either wholly or in part has arisen based on which territorial jurisdiction of this Court could be invoked by the plaintiff. Counsel for the defendant further submitted that so far the suit filed by the defendant before the Chitrakoot Court is concerned, the same would not help the case of the plaintiff to decide the jurisdiction of this Court as in the said suit the defendant vaguely referred to its sales throughout India. Counsel also submitted that even the consent of the defendant in the earlier suit or in the present suit would not confer any

jurisdiction on this Court which even otherwise it does not have. In support of his arguments, counsel for the defendant placed reliance on the following judgments:-

1. K. Narayanan and Anr. Vs S. Murali (2008) 10 SCC 479.
2. Alberto Co. vs. R.K. Vijay & Ors. 2010 (42) PTC 300 (Del.).
3. Dhodha House vs S.K. Maingi (2006) 9 SCC 41.

6. I have heard learned counsel for the parties.

7. The short controversy to be decided at this juncture in the present case is that whether this court has territorial jurisdiction to entertain the present suit or not. As per the case set up by the plaintiff this court has the territorial jurisdiction to try and entertain the present suit as both the plaintiff and the defendants are carrying on business in Delhi and the defendants are committing the acts of infringement and passing off within the jurisdiction of this court. The plaintiff has also claimed that by virtue of fact that the plaintiff obtained registration of their trade mark in Delhi and also that the defendant no.1 has filed application for registration of the impugned trade mark in

Delhi, therefore this court has the territorial jurisdiction to entertain the present suit. The plaintiff has invoked Section 134 of the Trade Marks Act, 1999 and Section 62 of the Copyright Act 1957, for carving out the jurisdiction of this court. Here it would be relevant to reproduce herein para 24 of the plaint which deals with territorial jurisdiction:

“That this Hon’ble Court has the territorial jurisdiction to try and adjudicate upon the present suit. Both the plaintiff and the defendants are carrying on business in Delhi. The defendants are committing the impugned acts of infringement and passing off within the jurisdiction of this Hon’ble Court by conducting business under the impugned trade mark in Delhi in a clandestine and surreptitious manner i.e. without issuing any formal invoices against sales. The plaintiff also filed and obtained registration of their trade mark in Delhi. The defendant no.1 also filed application for registration of impugned trade mark/label in Delhi on all India basis. This Hon’ble Court has jurisdiction under Section 134 of the Trade Marks Act, 1999 and Section 62 of Copyright Act, 1957 to entertain and adjudicate upon this suit.”

8. The defendant on the other hand has contended that the plaintiff cannot invoke the jurisdiction of this court under Section 134 of the Trade Marks Act as the present suit is not a suit for infringement of trade mark as the registration of the plaintiff’s trademark is for the states of Uttar Pradesh and

Madhya Pradesh only. The defendant has also averred that the suit for infringement of copyright under Section 62 is also not maintainable as neither the plaintiff nor the defendants are carrying on any business within the territory of this court. The submission of the counsel for the defendant was that the suit for passing off is also not maintainable as the plaintiff has not produced anything on record in order to show any intention of the defendants to use the mark in question within the territory of this Hon'ble Court. The other plank of the argument of the defendants is that as far as the application for registration of trademark by the defendants is concerned, the same is filed in Delhi because the defendant is residing and carrying on business in the State of Uttar Pradesh and there is no trademark office in Uttar Pradesh and the same has to be filed in Delhi. The counsel also submitted that it is not in dispute that the defendants application is still pending and that the defendants have not made any claim in the application that they are selling the goods in Delhi and hence the plaintiff cannot

be allowed to take advantage of the fact that the defendants have applied for registration of their trademark in Delhi.

9. Before dealing with rival contentions of the parties, it would be necessary to reproduce the relevant provisions as under:

“134. Suit for infringement, etc., to be instituted before District Court.—

(1) No suit—

(a) for the infringement of a registered trade mark; or

(b) relating to any right in a registered trade mark; or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a “District Court having jurisdiction” shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—For the purposes of sub-section (2), “person” includes the registered proprietor and the registered user.

62. Jurisdiction of court over matters arising under this Chapter –

(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub section (1), a "district court having jurisdiction" shall notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

It is no more res integra that Section 134 of the Trade Marks Act which is similar in its sweep to Section 62 of the Copyright Act gives the plaintiff the advantage of filing the suit at a place convenient to him instead of taking the dispute to the doorstep of the defendant. Section 134 which is available to the plaintiff for filing a suit wherein he actually or voluntarily resides or carries on business or personally works for gain is a forum in addition to Section 20 of the CPC (*Dhodha House vs. S.K Maingi*(2006)9SCC41). It would be relevant to reproduce Section 20 of CPC here as under:

“20. Other suits to be instituted where defendants reside or cause of action arises.

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

¹[* * *]

²[Explanation].-A corporation shall be deemed to carry on business at its sole or principal office in ³[India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

10. The legal position with regard to the fact that whether section 134 or section 62 can oust section 20 of the CPC is no more res integra. The Hon’ble Division Bench of this Court in the case of ***Indian Performing Right Society Ltd. vs. Sanjay Dalia & Anr. 155(2008)DLT164*** discussed in detail the scope of section 134 of TM Act vis a vis section 20 of CPC and held that they are both to be read conjointly and if conflict arises then

Section 134 would prevail over section 20 CPC. The relevant para of the said judgment is reproduced as under:

" 3. We have carefully cogitated upon the contentions articulated before us on behalf of the litigating adversaries. *Intas Pharmaceuticals Ltd. v. Allergan Inc.* : AIR2007Delhi108 lays down an important principle of law in that it interprets Section [134](#) of the Trade Marks Act as not whittling down the provisions of Section [20](#) of the CPC but providing an additional forum and a place for filing a suit in case of an infringement of a trademark. The Division Bench presided over by Dr. Mukundakam Sharma, J. (as his Lordship then was) has also opined that the words 'notwithstanding anything contained in the CPC' are indicative of the position that Section [134](#) of the Trade Marks Act has to be read conjointly with and in addition to the provisions of Section [20](#) of the CPC. To those observations we may add that it is only in the event of a conflict between the provisions of Section [20](#) of the CPC and those of Section [134](#) of the Trade Marks Act that the latter would prevail. The effort of the Court must be, so far as is possible, not to curtail the role that can be played by either of the provisions acting conjointly or simultaneously. This Court in *Intas* had predicated its decision on the opinion of the Supreme Court in *Dhodha House v. S.K. Maingi* : 2006(32)PTC1(SC) in which it has been enunciated that Section [62\(2\)](#) of the Copyright Act provides an additional forum to enable the holder of a copyright to file a suit at the place of his residence, thereby insulating him from the tedium or vexatiousness of taking the fight to the doorstep of the violating Defendant. The Trade and Merchandise Marks Act, 1958 did not contain a provision akin to Section [134\(2\)](#) of the Trade Marks Act, 1999 enabling the plaintiff to enjoy the convenience of filing a suit at the place where he resides or carries on business etc. The extant provisions are indeed salutary in purpose and effect, since otherwise the legal remedy available for a breach of copyright or an infringement of trademark often remains illusory. It appears to us that the Court would be acquiescing in an assault on a general principle of law prevalent at least in all common law systems if it were to allow a lis to continue at a place where neither has the cause of action arisen nor has the Defendant have a residence or place of business. This legal principle attempts to obviate the use of litigation as a device of harassment calculated to force an adversary into succumbing into a settlement for fear of fighting a lis at an inconvenient venue. Having

made this observation, we see no impediment in extrapolating this impeccable reason onto an interpretation of Section [62\(2\)](#) of the Copyright Act and Section [134\(2\)](#) of the Trade Marks Act, (which are verbatim to each other), by requiring the plaintiff to file a suit at the place where it has its principal or subordinate place of business if the cause of action has arisen there. Alternatively, the plaintiff may take recourse to the provisions of Section [20](#) of the CPC.

4. Let us analyse the amplitude of Section [20](#) of the CPC. It enjoins that a suit must be instituted in a court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides, or carries on business, or personally works for gain, or where the cause of action wholly or in part arises. The Explanation to that Section is important; it prescribes that a corporation shall be deemed to carry on business at its sole or principal office, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. Since this provision primarily keeps the Defendant in perspective, the corporation spoken of in the Explanation, obviously refers to the Defendant.

7. We have perused the Parliamentary Debates relating to the amendments carried out to the law of copyright and trademark. One of the Objections that was raised was that the new jurisdictional dispensation would favour multinational corporations as they would be able to initiate litigation according to their choice and secondly that a poor holder of a trademark will be at a disadvantage. In the context of the first Objection it was clarified that the new provisions would be to the advantage of the petty trader incidentally doing his trade on the basis of a registered trademark, and that if this purpose was not achieved, an amendment would be brought in. If the interpretation of Section [62](#) which we intend to impart, (which would also apply to Section [134](#) of the Trade Marks Act) is accepted, both these apprehensions would be addressed and resolved. Plainly, if the cause of action has arisen at a particular place where the plaintiff has its principal or subordinate office, and it is restricted to filing a case in that place alone, the Defendant would not be put to any unfair disadvantage. The intendement of Section [62](#) of the Copyright Act and Section [134](#) of the Trade Marks Act is to enable the plaintiff to initiate litigation at a forum convenient to it. It is not intended to allow the plaintiff to choose a territorial forum which is not convenient to either of the parties, as is demonstrated by the case in hand. Bill No. XV of 1955 sought to 'amend and consolidate the law relating to copyright'. The Parliamentary Committee was of the opinion that 'many authors are deterred from instituting infringement proceedings because the

court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new sub-clause (2) accordingly provides that infringement proceedings may be instituted in the district court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business, etc.' This is a manifestation, in reverse, of what we have assessed as a general principle of law, viz., that the intendment behind prescribing the place of suing is to ensure that litigation should be as best possible not a weapon of harassment. Since experience had exposed the reality that if a plaintiff in an action for infringement of copyright or trademark may not be able to enjoy the fruits thereof if he was compelled to file at the transgression's place of business, the amendment was brought about. It could not have been the intention of Parliament to enable the plaintiff to choose the place of suing on the basis of what would be the inconvenience to the Defendant.

8. *The learned Single Judge is unassailably correct in opining that 'the plaintiff would be deemed to carry on business at a branch office only if a cause of action has arisen in Delhi'. In doing so he has extracted and infused the rationale of Section [62](#) of the CPC into the Copyright Act. As we have already recorded above, it is the uncontrovered case of the parties that the cause of action has not arisen in Delhi. The neat question is whether a court of law is proscribed from introducing the aspect of cause of action merely because it has not been prescribed in the legislation. Alternatively, in the absence of an Explanation as is to be found in Section [20](#) of the CPC can the pragmatic and equitable principles not be injected into the relevant Section. It is beyond cavil that the concept of cause of action is inseparably intertwined in each and every litigation. Without it the lis would be liable for rejection under Order VII Rule 11 of the CPC. The cause of action, therefore, permeates every sinew of the suit and all procedural provisions, which are but handmaidens of justice.*

11. *The intention of the legislature is evident, inter alia, in the non-obstante clause pertaining to the CPC. The word 'notwithstanding' in ordinary parlance means 'inspite of' or despite. (See Concise Oxford Dictionary as well as Black's Law Dictionary). This word does not indicate that the CPC has no role to play. In the factual matrix before us the word 'notwithstanding' connotes that in addition to Section [20](#) of the CPC, by virtue of Section [62\(2\)](#) of the Copyright Act, the plaintiff is free to choose a forum convenient to it, that is, wherever it actually and voluntarily resides or carries on business or personally works for gain, provided the cause of action arises there.*

This is in contradistinction to that of the defendant as prescribed by Section 20 of the CPC. It is difficult for us to conceive of a situation where the ameliorative advantage bestowed on the plaintiff by virtue of Section 62 of the Trade Marks Act or Section 134 of the Trademarks Act could be frustrated if this interpretation is given effect to. Let us assume that the cause of action has arisen in Kanyakumari. It is axiomatic that in the case of a violation of a trademark or copyright the Defendant would have some presence, that is, actual and voluntary residence, or carrying on of business or working for gain, in Kanyakumari. If the plaintiff also carries on business etc. in Kanyakumari there would be no justifiable reason not to bring the suit only at Kanyakumari. Assuming, however, that the plaintiff does not carry on business in Kanyakumari but in Delhi or in Bombay or Calcutta, he would face the disadvantage of having to file his suit at a hostile or inconvenient place. Section 62 would then enure to his benefit and enabling it to file the action in any of the three cities. However, if the plaintiff were to be free to choose from any of the places where he is carrying on business etc. with no correlation to the cause of action, the consequence would be that his choice would create for the Defendant the very disadvantage which the legislation has sought to alleviate for the plaintiff. In that event, no useful purpose would be served for the plaintiff except for additional harassment to the Defendant. This could never have been the intention or purpose of Parliament and if this pragmatic and commonsense interpretation is not imparted to the Section, the comment of Hon'ble Minister, Mr. Murosoli Maran that an amendment would be brought in would become imperative. Since the cause of action is an integral, inseparable and inevitable part of any litigation, by reading it into Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, the law is made meaningful and expedient. This is the bounden duty of any Court which is called upon to interpret a provision of law."

It would be evident from the above that the object of enacting section 134 on the statute book was to help the plaintiff to enforce his rights and take action in case of infringement of its registered trademark and for mitigating the arduousness to sue at the place of residence or business of the defendant. The Hon'ble Division Bench in *Sanjay Dalia (Supra)* also clearly

observed that it could not have been the intention of the legislature to harass the defendant and make section 134 a weapon for the same by allowing the plaintiff to sue at a place where he neither resides nor carries on business and where the cause of action, substantially has not arisen. Section 20 of the CPC has been held to be by virtue of the non obstante clause arising in section 134 to be all pervasive being the edifice of jurisdictional issue arising in any statute. The plaintiff in the case at hand has averred that he carries on business in Delhi and according to him, so does the defendant. The Hon'ble Apex Court in *Dhodha House(supra)* laid down as to what is to be construed by the expression "carries on business". It would be fruitful to reproduce the relevant paras of the said judgment as under:

"40. The expression 'carries on business' and the expression 'personally works for gain' connotes two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase 'carries on business' at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within

the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely:-

"(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does not "carry on business" in Bombay so as to render itself liable to be sued in Bombay.

(2) The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an "agent" within the meaning of this condition.

(3) To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. therefore, a retail dealer who sells goods in the mufassil cannot be said to "carry on business" in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance Co. had a branch office was held not maintainable. Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company through incorporated outside India gets itself registered in India and

does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India."

Hence it is manifest that where only the goods are being sold would not mean that the plaintiff or the defendant carries on business at that place. In the case hand, the plaintiff has averred that the plaintiff as well as the defendant carries on business in Delhi, however no material has been placed on record by the plaintiff even to prima facie substantiate the said claim. Neither the address of the plaintiff is of Delhi nor has the plaintiff anywhere claimed having any subordinate or corporate office or any agent in Delhi. Thus in the umbrella of the above settled legal position , it is clear that the plaintiff cannot invoke the jurisdiction of this court either under section 134 of the Trademarks Act or section 62 of the Copyright Act and the governing section would be section 20(c) of the CPC.

11. The cause of action as is trite is a bundle of facts which are necessary to be proved in a given case and if the cause of action arises within the jurisdiction of the court

concerned, it empowers the court to entertain the same. It is also settled legal position that to decide whether or not the cause of action has arisen within the jurisdiction of this court, only the pleadings in the plaint have to be looked at and nothing more. Para 24 of the plaint reproduced herein above elaborates how the plaintiff has invoked the jurisdiction of this court. Apart from the said para the plaintiff has in the body of the plaint, particularly in para 3 & 4 stated as under:

“3. That the plaintiff adopted the trademark Shyam Surti label (Annexure P-1) in the year 1969 and has been continuously using the said trademark in relation to said goods since then upto the present time. The business carried on by the plaintiff is very extensive and the goods bearing the said trademark have been practically distributed in Uttar Pradesh, Madhya Pradesh and surrounding areas.”

4. That the trademark SHYAM SURTI label(Annexure P-1) is registered on in favour of the plaintiff under the Trademarks Act,1999 in class 34 of Fourth Schedule appended to Trade Marks Act,1999.the details of the aforesaid are furnished hereinunder:-

Trade Mark: SHYAM SURTI Label

Registration No. : 312720 in Class 34

Dated: 24.02.1976

Goods: Chewing Tobacco

Status: Registered and Renewed

Territory: For sale in States of Madhya Pradesh and Uttar Pradesh.

The plaintiff has also in the plaint made general statements that they have made an enviable reputation in the market and that both the plaintiff and the defendant operate in the same line of businesses and markets. The plaintiff has nowhere stated as to what are the markets, which territory is their area of dealing in their products, what kind of business operations are taking place in Delhi or where are the alleged infringing goods being sold by the defendant in Delhi or anywhere else. In the documents, the plaintiff has placed on record the copy of the Partnership Deed, the registration certificate of its trademark, the packaging of its product and the alleged infringing copy of the defendants product, copy of the legal notice issued by the plaintiff, copy of the plaint in O.S No.2/2006 filed by the defendants at Chitrakoot, Income Tax Returns and sale receipts of certain buyers within the territory of Mahoba, Uttar Pradesh. The plaintiff has not placed on record any invoice or receipt showing that it does business within the territory of Delhi. More so, the plaintiff has not placed on record any invoice indicating the fact that the defendants' infringing goods are sold within the

territory of Delhi. In the absence of any material placed on record to substantiate its averments made in the plaint, the argument of the counsel for the plaintiff that the cause of action has arisen within the territorial jurisdiction of this court cannot be conceded to. Bald averments in the plaint, not based on any cogent material cannot form the basis to raise a presumption of jurisdiction by this Court, which it otherwise does not have. A measured perusal of the plaint in the present case does not advance the case of the plaintiff as it is nothing but a spate of vague assertions devoid of any pith or substance, indefensible by any material which does not fulfil the requirement of law.

12. Dealing with the other facet of the argument of the plaintiff that this court would have the territorial jurisdiction to try and entertain the present suit as the plaintiff has registered its trademark in Delhi and the defendant has also applied for its trademark in Delhi, is of no merit. The Apex Court in the case of *Dhodha House(supra)* very aptly clasped the controversy in the following paras:

"27. A cause of action will arise only when a registered trade mark is used and not when an application is filed for registration of the trade mark. In a given case, an application for grant of registration certificate may or may not be allowed. The person in whose favour, a registration certificate has already been granted indisputably will have an opportunity to oppose the same by filing an application before the Registrar, who has the requisite jurisdiction to determine the said question. In other words, a suit may lie where an infringement of trade mark or copyright takes place but a cause of action for filing the suit would not arise within the jurisdiction of the court only because an advertisement has been issued in the Trade Marks Journal or any other journal, notifying the factum of filing of such an application."

Hence, filing of the application by the defendant for registration of its trademark in Delhi will not confer jurisdiction on this court. This Court also finds merit in the contention of the counsel for the defendant that the defendant has its operations in the State of Uttar Pradesh and as per the division of the zones for the registration of Trademark, the State of Uttar Pradesh falls within the Registrar of Trademark having its head office at Delhi and thus naturally they would apply for registration at Delhi. It also weighs against the plaintiff that in the registration certificate the plaintiff has mentioned against the territory for use of its trademark as the State of Uttar Pradesh and Madhya Pradesh and not Delhi, thus also the factum of having its trademark registered at Delhi would not alleviate his case. As far

as the issue of passing off is concerned the plaintiff has not placed on record any material to justify his apprehension that the defendants would pass off their goods as that of the plaintiff particularly in the light of the categorical submission of the counsel for the defendant that the defendants have no business operations whatsoever in Delhi. This Court also does not find force in the argument of the counsel for the plaintiff that in the suit for infringement filed by the defendant against the plaintiff herein at Chitrakoot,U.P the defendant has itself stated that the defendant does business on all India basis and thus would include the territory of Delhi as the argument is rather far fetched so as to read into a general statement to be a particular admission. It is also pertinent to mention here that the plaintiff herein had moved an application for amending para 24 of the plaint relating to territorial jurisdiction reproduced herein above so as to include the said pleading, but the said application was dismissed by this court vide orders dated 3.2.2011. The judgments cited by the counsel for the plaintiff in this regard will

not be applicable to the facts of the case at hand as the same reiterate the legal position discussed herein above.

13. The last argument of the counsel for the plaintiff was that the defendant had earlier moved an application under Order 7 rule 11 for rejection of the present plaint on the ground of territorial jurisdiction which was subsequently withdrawn by him and hence now the defendant cannot be allowed to reagitate the said issue of lack of territorial jurisdiction. To deal with this argument it is important to reproduce the order of this court dated 8.5.2007 whereby the application bearing IA No.5321/2007 under order 7 rule 11 was disposed of as under:

“08.05.2007

Present: Mr. S.K Bansal, Advocate for the Plaintiff.

Mr. M.M.Singh, Advocate for the Defendant

IA No.5321/2007(u/o 7 rule 11 of CPC) in CS(OS) No.2208/2006

Learned counsel for the defendant states that he will file the written statement along with the application for condonation of delay and at the stage of framing of the issues he will make necessary submissions for treating some of the issues as preliminary issues. The application is not pressed at this stage and is accordingly disposed of.”

From the above order it is manifest that the defendant did not forego his right to agitate the issue of lack of jurisdiction or that by not pressing the said application his right to raise the said issue was closed.

14. Another angle of the case set up by the plaintiff was that the issue of jurisdiction cannot be treated as a preliminary issue by this court as the question of jurisdiction is a mixed question of law and fact and thus barred by order 14 rule 2 of CPC. It is pertinent to mention here that vide order dated 17.3.2008, this court framed the issue wherein it is categorically recorded that the counsel for the parties agree that issue No.1(the issue under adjudication presently relating to jurisdiction) should be taken up first as a preliminary issue. In the face of such a forthright submission of both the counsels recorded by this court, the counsel for the plaintiff cannot be allowed to expostulate this issue. Be that as it may, the provision of Order 14 rule 2 reads as under:

“ORDER XIV. SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON

2. Court to pronounce judgment on all issues

(1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.”

Before the amendment to the said provision by the Amendment Act of 1976 the categorization of cases was only in relation to the issues of law and issues of fact and it was mandatory for the court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after the issues of law had been determined. However after the said amendment, rule 1 makes it obligatory on the court to pronounce judgment on all issues subject to the provision of sub rule 2 which gives

discretion to the court to frame issue of law only if it relates to the jurisdiction of the court or to bar to the institution of the suit itself. The intention of the legislature thus is clear that the disposal of the suit should be expedited and therefore it has been left to the discretion of the court to frame an issue on jurisdiction as a preliminary issue if the court thinks that the suit can be disposed of on that issue. The judgments cited by the counsel for the plaintiff enunciate the well settled legal position that wherever the issue of jurisdiction is a mixed question of law and fact it cannot be treated as a preliminary issue in terms of order 14 rule 2. There is no dispute with the said settled legal position however in the present case the preliminary question of jurisdiction is a pure question of law and can be thus decided by this court in consonance with the provision of order 14 rule 2 sub rule 2. It is no more res integra that wherever determination of the issue of jurisdiction necessitates the recording of evidence, in those cases the question of jurisdiction would be a mixed question of law and fact. Here it would be relevant to refer to the Full Bench decision of the High Court of Madhya

Pradesh in the case of ***Ramdayal Umraomal vs. Pannalal Jagannathji*** AIR1979MP153 where it was held as under:

“This provision makes it clear that the issue as to jurisdiction may be an issue of law or of fact or a mixed issue. The obligation to try the issue of jurisdiction as preliminary arises only when it is an issue of law. Issue of jurisdiction depending on question of fact and, or mixed question of law and fact, must be decided on merits at one and the same time, along with the other issues. If the court finds, on a trial, on merits so far as this issue of jurisdiction goes, that the case is not cognizable by the court because of want of territorial or pecuniary jurisdiction, the plaint will be ordered to be returned for presentation to the proper court, and if, on the other hand, it finds that having regard to the nature of the suit, it is not cognizable by the class of courts to which the court belongs, the plaintiffs suit will have to be dismissed in its entirety. Discretion to try preliminary issue of law relating to jurisdiction or bar of suit should be exercised only when it is so clear that the decision will decide the suit finally once and for all without re-cording of any evidence.

Therefore, after reviewing the entire case-law on the point, we are of opinion that under Order 14 Rule 2 C. P. Code, an issue relating to jurisdiction of the Court can be tried as a preliminary issue only if it can be disposed of without recording any evidence. If the issue about jurisdiction is a mixed question of law and fact requiring recording of evidence, the same cannot be tried as a preliminary issue.”

Hence, in the case at hand the issue of jurisdiction is a pure question of law and thus can be decided as a preliminary issue. The question whether this court has the territorial jurisdiction to try the present suit can be determined by looking at the averments in the plaint and does not need recording of any evidence. The purpose of adducing evidence is to corroborate

the averments made in the plaint and not to supplant or add any new ground for conferring jurisdiction on a court which it otherwise does not have. The question of jurisdiction in the present case goes to the root of the matter and thus has to be decided as a preliminary issue. Ingeminating what has been held in the preceding paragraphs, the bald averments made in the plaint would not require adducing any evidence as they are nothing but hollow assertions.

15. The plaintiff in the present case has joined two causes of action; infringement of his trademark and infringement of his copyright. However it would suffice to say that in the present case, none of the causes of action arose within the jurisdiction of this court and hence this Court would not have the territorial jurisdiction to try and entertain the present suit in respect of both the causes of action.

16. In the light of the above discussion, this court is of the considered view that this court does not have the territorial jurisdiction to try and entertain the present suit. Having decided

the issue no.1 in favour of the defendants and against the plaintiff, this court can dispose of the present suit on the said ground alone without giving a finding on the merits of the case.

17. The suit is accordingly dismissed due to lack of territorial jurisdiction of this court.

18. Decree sheet be drawn accordingly.

KAILASH GAMBHIR, J,

May 24, 2012