

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

% *Judgment Pronounced on : January 09, 2013*

+ **FAO(OS) 36/2012**

JUST LIFESTYLE PVT. LTD. Appellant

Represented by: Ms.Manmeet Arora, Advocate with
Ms.Fareha Ahmed Khan, Advocate.

versus

ADVANCE MAGAZINE PUBLISHERS INC. & ANR...Respondents

Represented by: Mr.Sumit Wadwa, Advocate with
Ms.Megha Chandra, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The backdrop facts leading to filing of the above captioned appeal are that on November 12, 2009 the respondents filed a suit on the Original Side of this Court inter-alia praying for a decree of permanent injunction restraining the appellant or any other person acting under its authority from using the trade mark 'VOGUE' as part of its trade mark 'JUST IN VOGUE' in relation to its goods/services, in any manner whatsoever. Prayer(s) for rendition of accounts and delivery/destruction of infringing goods were also made in the suit. Along with the suit, the respondents filed an application under Order XXXIX Rule 1 and 2 CPC being I.A.

No.14609/2009 praying for an interim injunction till the disposal of the suit.

2. In the plaint filed, it was pleaded by the respondents that the respondent No.1 together with its affiliates is engaged in the business of publication and distribution of magazines and journals internationally. The respondent No.2 is the wholly owned subsidiary of the respondent No.1 as also the licensed/permitted user of trade mark of the respondent No.1, having its branch office at Unit No.15, First Floor, Plot No.D-2, Southern Park, Saket Business District, New Delhi-110017. Since last several years the respondent No.1 has been selling fashion and lifestyle magazine under the trade mark 'VOGUE' in around 145 countries including India. Since the year 1976, the respondent No.1 is the registered proprietor of trade mark 'VOGUE' in India in relation to publications. Since the year 2007 the respondent No.2 is publishing a magazine under the trade name 'VOGUE INDIA' at Mumbai and selling and distributing the same from its branch office at New Delhi. The appellant is a limited company engaged in the business of retail of various luxury brands of watches, jewelry, perfumes, cosmetics, writing instruments, crystals and leather goods in India. In or around January, 2009 the respondent No.1 came to know that one Priority One Marketing Pvt. Ltd. filed an application in the Trade Marks Registry for registration of trade name 'JUST IN VOGUE' in respect of class 35. Immediately thereafter the attorney of the respondent No.1 filed a notice of opposition against the aforesaid application of registration of trade name 'JUST IN VOGUE' and the same is pending adjudication in the Trade Marks Registry. In the meanwhile, the respondent No.1 came to know that Priority One Marketing Pvt. Ltd. is using the trade name 'JUST IN

VOGUE’ in respect of its retail stores, sales services, advertisements etc. The attorney of the respondent No.1 issued a letter to Priority One Marketing Pvt. Ltd. requiring it to desist from using its trade mark ‘VOGUE’ as part of its trade name ‘JUST IN VOGUE’ to which Priority One Marketing Pvt. Ltd. replied that the claim(s) made by the respondent No.1 is untenable and that it has changed its name to M/s.Just Lifestyle Pvt. Ltd. i.e. the appellant. The use of the trade mark ‘VOGUE’ by the appellant is illegal and unlawful and constitutes the acts of infringement and passing off as it is attempting to ride on the goodwill and reputation created by the respondent No.1 by selling its fashion and lifestyle magazine in India. This Court had territorial jurisdiction to try the present suit for the reason the respondent No.1 through the respondent No.2 carries on its business within the territorial jurisdiction of this Court inasmuch as respondent No.2 has its branch office within the jurisdiction of this Court.

3. Before proceeding further, it would be relevant to note the following paragraphs of the plaint filed by the respondents:-

“12. That the Plaintiffs magazine published under the trade mark ‘VOGUE’ is sold/circulated in around 145 countries around the world, including India and the same has been available/sold in India since at least last two decades and has established enormous and enviable reputation and goodwill in India, among other countries. The trade mark ‘VOGUE’ was first used in India in the year 1939. That the first Plaintiff is internationally well-known and is the registered proprietor of the trade mark ‘VOGUE’ in around 145 countries including India.

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14. That the second Plaintiff is publishing a magazine under the trade mark ‘VOGUE INDIA’ in Mumbai. The second Plaintiff is distributing and selling the magazine ‘VOGUE INDIA’ from its branch office at

New Delhi. The first issue of the magazine ‘VOGUE INDIA’ (October 2007) was launched in the Indian market on September 21, 2007. Prior to the launch of the Indian edition of the second Plaintiff’s magazine in 2007, ‘VOGUE’ magazine was imported in India. Details of circulations of the Plaintiff’s publication under the trade mark ‘VOGUE’ in India are given herein below:-

YEAR	SUBSCRIPTIONS	NEWS STANDS
2007	45	575
2006	43	609
2005	33	559
2004	27	287
2003	21	350
2002	5	328
2001	21	270
2000	25	262

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33. That this Hon’ble Court has jurisdiction to entertain and try the present suit in as much as the first Plaintiff through the second Plaintiff carries on its business within the territorial jurisdiction of the Hon’ble Court. The second Plaintiff has its branch office within the jurisdiction of this Hon’ble Court.”

4. The suit was listed for admission before the learned Single Judge on November 13, 2009, on which date the summons were issued to the appellant and an ex-parte interim order was passed restraining the appellant from using the trade mark ‘VOGUE’ as part of its trade name ‘JUST IN VOGUE’ or any other deceptively similar trade mark in relation to its goods and service till the next date of hearing i.e. March 03, 2010.

5. Aggrieved by the order dated November 13, 2009 the appellant filed an appeal under Section 104 of the Code of Civil Procedure, being FAO(OS) No.559/2009, before a Division Bench of this Court. Be it noted

here that one of the grounds raised by the appellant in the said appeal was that this Court had no territorial jurisdiction to try the present suit for the reason the appellant has no shop or retail outlet at Delhi. To substantiate the same, the appellant filed a list of shops/retail outlets operated by it before the Division Bench, a perusal of which list would show that the appellant had a retail outlet in a mall in Gurgaon since December 04, 2008. Vide order dated November 18, 2009 the Division Bench issued notice in said appeal and stayed the operation of the order dated November 13, 2009 passed by the learned Single Judge till the next date of hearing.

6. Aggrieved by the order dated November 18, 2009 passed by the Division Bench the respondents filed a Special Leave Petition under Article 136 of the Constitution of India before the Supreme Court which petition was disposed of vide order dated December 14, 2009 which reads as under:-

“Heard learned counsel for the parties.

With the consent of learned counsel for the parties, we propose to dispose of this matter at this stage.

Leave granted.

This appeal is directed against the impugned judgment and order dated 18.11.2009 of the Division Bench of the High Court of Delhi at New Delhi whereby in an appeal filed by the respondent herein, the Division Bench has stayed the operation of the order dated 13.11.2009 of the learned Single Judge granting injunction in favor of the appellants herein.

Without going into the merits of the case and in view of a recent decision of this Court in the case of Bajaj Auto Limited Vs. TVS Motor Company (2009) 9 SCC 797,

following an earlier decision, in the case of Shree Vardhman Rice & General Mills Vs. Amar Singh Chawalwala (2009) 10 SCC 257, we set aside the interim orders dated 18.11.2009 passed by the Division Bench as well as the order dated 13.11.2009 passed by the learned Single Judge. As observed by this Court in the aforesaid two decisions, the matters relating to trademarks, copyrights and patents should be finally decided very expeditiously by the Trial Court and preferably within four months instead of merely granting or refusing to grant a temporary injunction. There should also be day-to-day hearing in such suits vide proviso (a) to Order XVIII Rule 1(2) CPC.

Accordingly, in the facts of the present case also, we request the learned Single Judge of the High Court to decide afresh the application for injunction within six weeks and the suit itself expeditiously and preferably within a period of four months from the date a copy of this order is produced before it.

The learned Single Judge shall decide the application for injunction and suit uninfluenced by any observations made by the High Court in the impugned order dated 18.11.2009 as also the order dated 13.11.2009 of the learned Single Judge, while deciding the application for temporary injunction.

With the aforesaid observations, the appeal stands disposed of. No order as to costs.” (*Emphasis Supplied*)

7. Thereafter the respondents filed an application under Section 151 CPC for early hearing of the suit and the matter was posted to January 14, 2010 for hearing.

8. On January 12, 2010 the appellant filed two applications, being I.A.Nos.343/3007 and 344/2007, in the suit. I.A.No.343/2007 was an application under Order I Rule 10(2) CPC seeking deletion of the

respondent No.2 from the array of parties on the ground that the respondent No.2 is not a necessary or proper party in the proceedings in view of the fact that the respondent No.2 is not a registered proprietor/user but a mere permitted user of the trade mark 'VOGUE' and the legal position is that a non-registered user of a trade mark is prohibited from filing a suit for infringement of the trade mark in view of the provisions of Section 53 of the Trade Marks Act, 1999. I.A. No.344/2007 was an application under Order VII Rule 10(1) CPC seeking rejection of the plaint on the ground that this Court had no territorial jurisdiction to try the present suit for the reasons: - (i) the respondent No.2 is not a necessary or proper party in the present proceedings and thus required to be deleted from the array of the parties; (ii) the entire operations of the respondent No.1 are carried in United States of America; (iii) the appellant neither carries any business nor effects any sale in Delhi; (iv) there is no averment in the plaint that the appellant carries on its business in Delhi or that a part of cause of action of filing the present suit has arisen in Delhi; (v) the mere assertion in the plaint that the respondent No.2 carries on its business in Delhi does not entitles the respondent No.1 to sue the appellant in Delhi for the reason the respondent No.2 is not the agent of the respondent No.1; (vi) a bare perusal of the disclosures contained in the magazine of the respondent No.1 would disclose that the essential part of business of the respondent No.1 is carried at Mumbai inasmuch as said magazine is printed, published and processed at Mumbai; (vii) the claim made in the plaint that the respondent No.2 sells and distributes the magazine of the respondent No.1 from its branch office at Delhi is false for the reason a perusal of the disclosures contained in the said magazine reveals that said magazine is being distributed by a separate

entity known as 'Living Media India Ltd'; (viii) in view of the law laid down by the Supreme Court in the decision reported as (1994) 4 SCC 225 Morgan Stanley Mutual Fund v. Kartick Das that a corporation is deemed to carry on its business at its registered office only the mere assertion in the plaint that the respondent No.2 carries on its business from its branch office in Delhi is not sufficient to confer territorial jurisdiction upon this Court when there is no assertion in the plaint that a part of cause of action of filing the present suit has arisen in Delhi; and (ix) on two earlier occasions the respondents filed two suits in this Court for infringement of trade mark 'VOGUE' against some other parties, being CS(OS) Nos.187/2008 and 1792/2008. Whereas in CS(OS) No.187/2008 the plaint was returned by this Court for filing the same in a court at Mumbai, in CS(OS) No.1792/2008 while issuing summons to the defendant a Single Judge expressed doubts on the assertion made in the plaint that this Court had the territorial jurisdiction to try the action of infringement of trade mark 'VOGUE' filed by the respondents.

9. On the same date i.e. January 12, 2010 the appellant filed a reply to the application under Order XXXIX Rule 1 and 2 CPC reiterating the averments made by it in the IA Nos.343/2007 and 344/2007. In addition thereto, it was contended by the appellant that:- (i) the appellant is doing the business under the trade name 'JUST IN VOGUE' since the year 2004 whereas as per the respondents they have started doing business in India only in the year 2007; (ii) there are as many as 106 companies using the word 'VOGUE' in their corporate name and 18 applications pending before the Trade Marks Registry seeking registration of trade name containing the word 'VOGUE'; (iii) the respondents have filed no documents to show the

goodwill and reputation purportedly enjoyed by them in India; (iv) the trade name 'JUST IN VOGUE' of the appellant and trade mark 'VOGUE' got registered by the respondents are visually, phonetically and structurally are very dissimilar and therefore there is no question of general public confusing the trade name 'JUST IN VOGUE' of the appellant with the trade mark 'VOGUE' of the respondents; and (v) there is no connection between the businesses/goods of the appellant and respondents which could even remotely mislead/deceive the general public. Together with said reply, the appellant filed the list of stores operated by it which was filed by it in the appeal before the Division Bench.

10. The matter came to be listed before the learned Single Judge on January 14, 2010, on which date the following order was passed:-

“The learned counsels for both parties submit that the arguments in I.A. No.14609/2009 will more or less replicate those that will be made at the final hearing of the suit. It is their suggestion that the suit be finally disposed of. For this purpose they are willing to abide by the following methodology:

(i) Both sides will rely only on the documents filed.

(ii) The defendant shall file its written statement within ten days from today. Replication, if any, be filed within ten days of receipt of the written statement.

(iii) The parties and their representatives shall convene in the High Court Bar Room No.18 for inspection of documents filed by the opposite side, on 10.02.2010 at 3.00 pm.

(iv) The parties shall also bring original documents to court, which, if necessary, would be examined at the time of hearing.

Renotify on 18.02.2010 for hearing.”

(Emphasis Supplied)

11. On February 04, 2010 the appellant filed its written statement essentially reiterating the averments made in the I.A. Nos.343/2007 and 344/2007 as also to the reply to I.A. Nos.14609/2009 filed by the respondents. It would be relevant to note following portion of the written statement filed by the appellant:-

“Preliminary Objections:

1. At the outset, it is most respectfully submitted that the present suit is not maintainable in Delhi, as the Defendant is a Company registered in Mumbai and is carrying on its business activities through a chain of retail outlets spread across 12 cities in India. The Defendant neither carries on its business in Delhi nor effects sale of any of its products in Delhi and therefore, no cause of action has arisen in Delhi. The Plaintiff No.1 also does not carry out any business at Delhi either by itself or through Plaintiff No.2. Admittedly, no cause of action has arisen within the jurisdiction of this Hon’ble Court and therefore clearly the present suit is not maintainable.

2. That the Plaintiff No.1 has approached this Hon’ble Court with unclean hands as it has suppressed from this Hon’ble Court, the judgment of this Hon’ble Court in CS(OS) 2322 of 2007 titled ‘*Advance Magazine Publishing Inc. Vs. Shakeel Ahmed*’, rejecting the specific plea of Plaintiff No.1 that it carries on business at Delhi through the branch office of Plaintiff No.2. The plaint in CS (OS) 2322 of 2007 has been directed to be returned by a detailed judgment. In spite of the aforesaid rejection, the Plaintiff filed another fresh plaint being CS(OS) 187 of 2008 also titled ‘*Advance Magazine Publishing Inc. Vs. Shakeel Ahmed*’ on the same cause of action and against the same Defendant. This Hon’ble Court was once again pleased to direct the return of the

plaint even in the subsequent suit CS(OS) 187 of 2008 also titled '*Advance Magazine Publishing Inc. Vs. Shakeel Ahmed*', for filing in Mumbai Courts. Pertinently, rejection of the plaint in CS(OS) 2322 of 2007 was not disclosed in subsequent suit of CS (OS) 187 of 2008. The Plaintiff thereafter filed a fresh suit titled '*Advance Magazine Publishing Inc. Vs. Shakeel Ahmed*' in Mumbai courts and suppressed the factum of the rejection of the previous plaints in Delhi. The ratio of said judgments is binding on the plaintiffs as regards the issue of territorial jurisdiction in Delhi in reference to Section 134 of the Act and it was duty bound to disclose the aforesaid judgments to this Hon'ble Court. Similarly, doubts as regards the territorial jurisdiction of the Courts in Delhi by invoking Section 134(2) of the Act were also expressed by another Single Judge in CS(OS) 1792 of 2008 titled '*Advance Magazine Publishing Inc. Vs. Kiran Padivaal*'. The present suit has also been filed on identical averments as regards territorial jurisdiction and therefore the ratio of the aforesaid judgments squarely applies to the facts of the case. Suppression of material facts, which are to the personal knowledge of the Plaintiff, is clearly malafide and disentitles the Plaintiff to any relief from this Hon'ble Court and the plaint, deserves to be dismissed.

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6. That the disclosures made in the publication '*VOGUE INDIA*' reveal that the registered office of the Plaintiff No.2 is at Mumbai, the magazine is published at 2nd Floor, Darabshaw House, Ballard Estate, Mumbai, the magazine is printed by Thomson Press India Ltd. on behalf of the Plaintiff No.2 at Mumbai and the magazine is processed by Combart Lithographers having offices at Mumbai. Hence it can rightly be concluded that *essential part* of operations with regard to the Plaintiff's magazine '*VOGUE INDIA*' are carried out in Mumbai. Therefore, merely because the Plaintiff No.2's has its branch office

in Delhi cannot be considered as sufficient ground for invoking the jurisdiction under Section 134 of the Act.

7. The Plaintiffs have falsely contended that Plaintiff No.2 is distributing and selling the magazine 'VOGUE INDIA' from its branch office in Delhi. As per the disclosures in the magazine 'VOGUE INDIA', the magazine is distributed and sold by a separate entity 'Living Media India Ltd.' and not Plaintiff No.2. Moreover, the magazine 'VOGUE INDIA' is not the mark based on which suit has been filed by the Plaintiffs. It is, therefore, evident that these false assertions have been made in the plaint to wrongfully confer jurisdiction on this Hon'ble Court.

8. Without prejudice to the submissions above, assuming that Plaintiff No.2 is a proper party to these proceedings it is an admitted fact that no cause of action has arisen in Delhi. The mere fact that Plaintiff No.2 has a branch office in Delhi does not clothe Courts at Delhi with territorial jurisdiction. It is undisputed that the registered office of Plaintiff No.2 is located in Mumbai. It is trite law as laid down by the Hon'ble Supreme Court in the case of *'Morgan Stanley Mutual Fund Vs. Kartick Das'* reported in (1994) 4 SCC 225 that a corporation such as the Plaintiff No.2 is ordinarily deemed to carry on its business at its 'registered office'. Therefore, the 'registered office' of the Plaintiff No.2 being located at Mumbai, the Plaintiff No.2 cannot be permitted to invoke jurisdiction on this Hon'ble Court on the basis of location of its 'branch' office. No evidence of the operations of Plaintiff No.2 from Delhi office has been filed on record and allegedly it is the operation of the use of a mark 'VOGUE INDIA', which is not the subject matter of the dispute. No essential part of the operation of the business is carried out by Plaintiff No.2 from the Delhi office.

9. To enable Plaintiff No.2 to invoke the provisions of Section 134(2) of the Act and to sue within the territorial

limits of Delhi whereat its branch office is located, it is necessary for the Plaintiff No.2 to aver and establish that either it is registered proprietor or the registered user of the mark 'VOGUE' and that the said mark has been infringed by the Defendant. Admittedly the Plaintiff No.2 is neither the registered proprietor nor the registered user and is not aggrieved by any action of the defendant and hence, in light of the specific bar contained in Section 53 of the Act, the provisions of Section 134(2) of the Act cannot be invoked relying upon the activities of Plaintiff No.2.

Reply on merits:

14. With reference to paragraph 14, as admitted by Plaintiff No.2 it is publishing a magazine under the trade name 'VOGUE INDIA' in Mumbai and therefore the invocation of the jurisdiction of the Courts in Delhi is clearly malafide. It is incorrect and hence denied that the Plaintiff No.2 is distributing and selling the magazine 'VOGUE INDIA' from its branch office at New Delhi. The distribution of the magazine is carried out by one 'Living Media India Ltd.', which is a separate legal entity distinct from the Plaintiffs herein. No documents evidencing alleged distribution of the magazine 'VOGUE INDIA' from its Delhi office have been placed on record. The Plaintiffs have failed to furnish any document in support of its claim of the import of the magazine 'VOGUE' in India prior to its official launch in the Indian market on 21st September 2007. The Plaintiff has, in support of its purported circulation in India, relied upon the circulation figures of its magazine in India as shown in the tabular chart outlined in the paragraph under reply. The contents of the said chart are strongly disputed by the Defendant as the same are unverified and unsubstantiated and therefore cannot be read as proof of the circulation of the magazine 'VOGUE INDIA'. The veracity of the contents of the table is further disputed by the Defendant on account of the non-compliance of the

Plaintiffs in producing the audited details of the names and addresses of the subscribers and the news-stands selling the magazine as detailed in the table despite the issuance of specific notice for the production of the same. The failure of the Plaintiffs to produce the audited details of the subscribers and news-stands, this Hon'ble Court may be pleased to draw an adverse inference with respect to the same. Without prejudice to the above, a bare perusal of the chart demonstrates not only the negligible presence of the magazine 'VOGUE INDIA' but also its very slow and insignificant growth over the years. It is preposterous on the part of the Plaintiffs to claim an enviable and enormous reputation in India on the basis of a paltry 45 subscriptions in the year 2007. Further evident from the chart is the considerably slow growth in the popularity of the magazine which is palpable from the fact that the Plaintiffs have been able to secure, in the year 2007, only 20 additional subscriptions since the year 2000. Therefore, a magazine on its own showing which is able to secure less than 5 subscriptions on an average in one year cannot be said to claim to enjoy reputation, which entitles it to claim monopoly of the commonly used dictionary word 'vogue' to the exclusion of other entities. It would be significant to bring to the attention of this Hon'ble Court, the evasiveness and complete absence of any averment on the part of the Plaintiffs in disclosing the subscriptions and circulation figures of the magazine 'VOGUE INDIA' from the year 2007, in which year the magazine was launched in India. This also would imply and indicate that the 'VOGUE INDIA' magazine does not have a high circulation in India and therefore the said relevant facts have been withheld from the Court. In this regard the Defendant in its notice dated 30th December 2009 has request for furnishing of the audited details of the circulation and print run of the magazine in India since September 2007 till the date of filling of the present suit. However, the Plaintiff has failed to furnish the said information and has willfully

withheld the same despite the passage of over four weeks.

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33. The contents of paragraph 33 of the plaint are incorrect and hence denied. It is incorrect and hence denied that this Hon'ble Court has the jurisdiction to entertain and try the present suit. It is incorrect and hence denied that the Plaintiff No.1, through Plaintiff No.2, carries on business within the territorial jurisdiction of this Hon'ble Court. The contents of the preliminary objections and submissions may kindly be read as an integral part of the reply to the paragraph. No evidence of Plaintiff No.2 carrying on any and what business in Delhi has been placed on record. The Plaintiff No.2 is a company having its registered office in Mumbai.”

(Emphasis Supplied)

12. On February 17, 2010 the respondents filed a replication reiterating the contents of the plaint filed by them. In addition thereto, it was contended by the respondents therein that:- (i) the magazine published by the respondent No.1 under the trade name 'VOGUE INDIA' is freely available within the territorial jurisdiction of this Court; (ii) the fact that the appellant had filed the application for registration of its trade name 'JUST IN VOGUE' in Delhi makes it apparent that the appellant intends to use said trade name within the territorial jurisdiction of this Court; (iii) Living Media India Ltd. publishes the magazine 'VOGUE INDIA' from the office of the respondent No.2 in Delhi; (iv) apart from the fact that the branch office of the respondent No.2 is situated at Delhi the respondent No.2 also works for gain at Delhi' and (v) the fact that the respondent No.1's magazine 'VOGUE INDIA' is freely available within the jurisdiction of

this Court shows that the respondent No.1 is working for gain within the jurisdiction of this Court.

13. It would be relevant to note the following portion of the replication filed by the respondents:-

“Reply to Preliminary Objections

1. The contents of paragraph 1 are denied.....The Plaintiff's magazine under the trademark VOGUE is freely available within the jurisdiction of this Hon'ble Court. It is respectfully submitted that the Defendant has filed an application for registration of its trade mark/label under number 1484311 in Class 35, which application is not restricted to any part of the country including the territorial jurisdiction of this Hon'ble Court. In such circumstance, it is apparent that the Defendant has intention to use the impugned mark within the territorial jurisdiction of this Hon'ble Court. It is therefore respectfully submitted that the Defendant has the intention to carry on the business under the trademark VOGUE in Delhi within the jurisdiction of this Hon'ble Court. It is therefore denied that no cause of action has arisen within the jurisdiction of this Hon'ble Court and that the present suit is maintainable.

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7. It is denied that the Plaintiffs have falsely contended that the second Plaintiff is distributing and selling the magazine VOGUE INDIA from its branch office in Delhi. The distribution by Living Media India Ltd is also done from the Plaintiffs Delhi office. It is denied that the magazine VOGUE INDIA is not the mark based on which the suit has been filed by the Plaintiffs. It is denied that any false averments have been made in the Plaint are wrongfully grant jurisdiction of this Hon'ble Court.

8. It is denied that it is an admitted fact that no cause of action has arisen in Delhi. It is reiterated that the fact that

the second Plaintiff has a branch office in Delhi does confer jurisdiction o this Hon'ble Court under section 134(2) of the Trade Marks Act, 1999. Not only does the second Plaintiff have a branch office in Delhi but is also working for gain in Delhi. For this reason also this Hon'ble Court has the jurisdiction to try the present suit. It is further denied that 'VOGUE INDIA' is not the subject matter of the dispute. it is denied that no essential part of operations of the business is carried out by the second Plaintiff from the Delhi office.

Reply on merit

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2. The contents of paragraph 2 are denied....The argument of the Defendant that the Plaintiffs have no locus standi to file the present suit of infringement in Delhi as the first Plaintiff does not carry business in India and the second Plaintiff is neither the registered proprietor nor registered user of the trade mark 'VOGUE' and therefore the Plaint cannot be filed by the Plaintiffs invoking the provisions of section 134(2) of the Act is of no avail to the Defendant in as much as the first Plaintiff through its licensee namely, the second Plaintiff carries on its business within the jurisdiction of this Hon'ble Court. Further the second Plaintiff has its branch office within the jurisdiction of this Hon'ble Court and carries on a substantial business within the jurisdiction of this Hon'ble Court. The fact that the Plaintiff's magazine under the VOGUE INDIA brand is freely available in Delhi shows that the Plaintiff is working for gain within the jurisdiction of this Hon'ble Court and can therefore invoke the provisions of section 134(2) of the Trade Marks Act, 1999.

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14.The contents of paragraph 14 are denied. It is denied that as the Plaintiff its publishing its 'VOGUE INDIA'

magazine in Mumbai, the invocation by the Plaintiff of the jurisdiction of courts in Delhi is clearly mala fide. It is submitted that the first Plaintiff carries on business within the jurisdiction of the Hon'ble Court through its licensee namely, second Plaintiff. Further, the second Plaintiff has its branch office within the jurisdiction of this Hon'ble Court. Moreover, the cause of action has arising within the jurisdiction of this Hon'ble Court in as much as the application of the Defendant is not limited to any part of the country which includes the territorial limits of this Hon'ble Court. The Defendant has nowhere stated that it has no intentions of carrying on business within the jurisdiction of this Hon'ble Court. The Defendant has nowhere stated that it has no intentions of carrying on business within the jurisdiction of this Hon'ble Court. The distribution of said Magazine is carried out by the branch office of the second Plaintiff herein via Living Media India Ltd. The Plaintiff will place the document evidencing the same, if required....It is denied that a bare perusal of the chart demonstrates not only the negligible presence of the magazine 'VOGUE INDIA' but also its slow and insignificant growth over the years. It is denied that it is preposterous on the part of the Plaintiffs to claim enviable reputation in India with regard 'VOGUE' magazine. It is submitted that there may be a limited sales of Rolls Royce cars in India but the same does not mean that Rolls Royce cars have no reputation in India."

14. On March 02, 2010 the appellant filed an application under Order VI Rule 16 CPC, being I.A. No.2588/2010, for striking out some averments contained in the replication filed by the respondents on the ground that the respondents have taken new pleas in their replication, which pleas are inconsistent with the case set up by the respondents in the plaint filed by them. The averments sought to be struck off by the appellant were:- (i) the magazine published by the respondent No.1 under the trade name 'VOGUE

INDIA' is freely available within the territorial jurisdiction of this Court; (ii) the fact that the appellant had filed the application for registration of its trade name 'JUST IN VOGUE' in Delhi makes it apparent that the appellant intends to use said trade name within the territorial jurisdiction of this Court; and (iii) the fact that the respondent No.1's magazine 'VOGUE INDIA' is freely available within the jurisdiction of this Court shows that the respondent No.1 is working for gain within the jurisdiction of this Court.

15. On the same date i.e. March 02, 2010 the appellant also filed an application under Order XI Rule 12 CPC, being I.A. No.2589/2010, seeking issuance of a direction to the respondents to produce amongst other documents: (i) a copy of the judgment and decree dated September 13, 2008 passed by the Additional District Judge, City Civil Court, Gurgaon in Suit No.1/2007 instituted by the respondent No.1 against M/s.Acme Clothing Pvt. Ltd., and (ii) a copy of the statement of witness No.3 Rohit Dass examined by the defendant M/s.Acme Clothing Pvt. Ltd. in Suit No.1/2007.

16. The matter came to be listed before the learned Single Judge on March 04, 2010, on which date the following order was passed:-

"IA No.2588/2010 (under O.6 R.16 r/w Section 151 CPC by defendant)

This is an application under Order 6 Rule 16 read with Section 151 of the Code of Civil Procedure, 1908. Various contentions have been raised by the defendant/applicant in this application in respect of averments made in the replication which according to it are beyond the scope of the case set up in the plaint. It is in these circumstances that the defendant/applicant seeks striking out of averments made in the replication.

Mr Sethi appearing on behalf of the plaintiffs says that both parties had agreed to disposal of the suit as against the interlocutory application in order to expedite the matter. It is his submission that the objections raised by the defendant/applicant in the captioned application can be dealt with by the Court in the final judgment. It is in this background that the plaintiffs do not wish to file any reply to the captioned application.

Mr Nayyar is agreeable to this methodology.

The application is disposed of leaving it open for the defendant/applicant to raise all such objections which are the subject matter of the present application at the stage of arguments.

IA No.2589/2010 (under O.11 R. 12 CPC by defendant)

This is an application filed by the defendant/application under Order 11 Rule 12 read with Section 151 of the Code of Civil Procedure, 1908. Mr Nayyar, learned Senior counsel says that it would be sufficient for his purpose if the judgment of the City Civil Court at Gurgaon passed in Civil Suit No1/2007 entitled “Advance Magazine Publishers Inc. vs. M/s Acme Clothing Private Limited, Mumbai”, dated 13.09.2008 rendered by Shri Narender Kumar, ADJ, Gurgaon is handed over to the defendant/applicant; and if the plaintiffs were to accede to the exclusion of the statement of DW3 i.e., Mr Rohit Das from the record.

Mr Sandeep Sethi, the learned counsel for the plaintiff submits that he is willing to comply with both the requests made by the defendant/applicant.

It is ordered accordingly. A copy of the aforementioned judgment has been handed over to the counsel for the defendant/applicant in Court, today. In so

far as the statement of Mr Rohit Das i.e., DW3 is concerned, the same shall not form part of the record.

The application is disposed of.

CS (OS) No.2157/2009

With the consent of counsel for the parties, following issues were cast:-

(i) Whether this Court has territorial jurisdiction to entertain and try the present suit? OPD

(ii) Whether Plaintiff No.2 is a proper party or a necessary party? OPD

(iii) Whether the suit by the Plaintiff No.2 is barred under Section 53 of the Trade Marks Act, 1999? OPD

(iv) Whether Plaintiff No.1 is barred under Section 48(2) of the Trade Marks Act, 1999 from claiming benefit of the use of the mark 'Vogue' by Plaintiff No.2? OPD

(v) Whether the Plaint has been properly instituted and verified by a competent and authorized person on behalf of the Plaintiffs? OPD

(vi) Whether the Plaintiffs are guilty of suppression of material facts and have not come to court with clean hands? OPD

(vii) Whether the suit is barred on account of acquiescence, delay and laches? OPD

(viii) Whether the Defendant has infringed the trademark of the Plaintiff No.1 in terms of Section 29(1) and Section 29(2) of the Trade Marks Act, 1999? If so, to what effect? OPP

(ix) Whether the Plaintiff No.1 can claim monopoly over a dictionary word having a descriptive meaning and common usage? OPP

(x) Whether the Plaintiff No.1's trade mark 'Vogue' has attained reputation and commands goodwill in India? If so, to what effect? OPP

(xi) Whether the Defendant's trade name takes unfair advantage or is detrimental to the distinctive character or repute of the Plaintiff No.1's trade mark 'Vogue'? If so, to what effect? OPP

(xii) Whether by the use of the trade name 'Just in Vogue', the Defendant is passing off its services as those of the Plaintiff No.1? OPP

(xiii) Whether the Defendant trade name 'Just in Vogue' is an honest adoption and a prior user in India? OPD

(xiv) Whether the Plaintiffs are entitled to any relief as prayed for? OPP

No other issues are pressed for.

CS (OS) 2157/2009 & IA No 14609/2009 (under O.39 R.1 & 2 CPC)

Part heard.

Renotify on 05.03.2010" (*Emphasis Supplied*)

17. Thereafter the matter was partly heard by the learned Single Judge on March 09, 11, 18 and 19, 2010. On March 23, 2010 the learned Single Judge yet again partly heard the matter and adjourned the matter to April 14, 2010.

18. On April 13, 2010 the respondents filed several documents including the copy of the Form 23AC filed by the company named 'Priority Marketing Pvt. Ltd.' with the Registrar of Companies in the year 2006 and copies of some invoices/challans to show that Priority Marketing Pvt. Ltd. is the holding company of the appellant and that said company i.e. Priority Marketing Pvt. Ltd. is running a shop under the name and style of 'JUST WATCHES' at the premises bearing Municipal No.132 A, DLF Mall, Saket, Delhi.

19. As already noted hereinabove, the matter was listed before the learned Single Judge on April 14, 2010 but said day was declared a holiday and matter came to be listed on the next day i.e. April 15, 2010, on which date the matter was partly heard.

20. On several dates thereafter i.e. April 15, 16 and 22, 2010 the matter was partly heard by the learned Single Judge.

21. On April 27, 2010 the appellant filed an application under Order XIII Rule 8 CPC, being I.A. No.5440/2007, seeking impounding of the license agreement dated February 01, 2007 entered between the respondents on the ground that the same is insufficiently stamped. The respondents filed a reply to the aforesaid application denying therein that the license agreement dated February 01, 2007 is insufficiently stamped. It would be relevant to note the following portion of said reply-

“9. The jurisdiction issue in this matter is not limited to section 134(2) of the Trade Marks Act, 1999. The Plaintiffs have also stated that the Defendant has the intention to use the trademark in Delhi having filed an application for registration of the impugned mark without excluding Delhi from the territory in which the mark is to be used. The cause of action has therefore arisen within the jurisdiction of this Hon'ble Court. The

Defendant has since opened a store in the DLF Mall in Saket. Significantly, the store which has opened during the pendency of this suit does not use the word VOGUE as part of its name in a deliberate attempt to avoid the jurisdiction of this Hon'ble Court. Although the name of the shop is JUST, the bags in which the goods are given use the impugned trademark. The Plaintiffs became aware of this store in the month of April and took photographs of the store and filed them in Court on 13th April, 2010." *(Emphasis Supplied)*

22. On May 11, 2005 the respondents filed some more documents to show that Priority Marketing Pvt. Ltd. is the holding company of the appellant and that said company i.e. Priority Marketing Pvt. Ltd. is running a shop under the name and style of 'JUST WATCHES' at the premises bearing Municipal No.132 A, DLF Mall, Saket, Delhi. In addition thereto, the respondents filed an application under Order VII Rule 14(3) CPC, being I.A. No.6308/2010, seeking permission of the Court to bring on record the documents filed by the respondents on April 13 and May 11, 2010 stating therein that the said documents were not in the possession of the respondents at the time of the filing of the suit and have been procured by the respondents from the records of Registrar of Companies only in the month of April, 2010.

23. On the same date i.e. May 11, 2005 the respondents filed an application under Order VI Rule 17 CPC and Order I Rule 10(2) CPC, being I.A. No.6309/2010, seeking amendment of the plaint filed by them and sought impleadment of company named Priority Marketing Pvt. Ltd. as defendant No.2 in the present suit contending therein:- (i) on or around April 10. 2010 the respondents learnt that the appellant is running a shop at the premises bearing Municipal No.132-A, DLF Mall, Saket under the

name and style of 'JUST WATCHES'; (ii) on April 10, 2010 the representative of the respondents purchased a watch from the aforesaid shop, which watch was packed in a packet whereupon 'JUST IN VOGUE' was printed; (iii) the representative of the respondents was also given a visiting card wherein it was recorded that said shop is being run by a company named Priority Marketing Pvt. Ltd.; (iv) subsequently the respondents conducted an online inspection the records of the Sub-Registrar and came to know that the appellant was earlier known as Priority Marketing One Ltd., the 2 of 3 founding directors of the appellant were also the founding directors of Priority Marketing Pvt. Ltd, the appellant is the subsidiary company of Priority Marketing Pvt. Ltd. and the Chief Executive Officer of the appellant is authorized representative of Priority Marketing Pvt. Ltd. at the General Meetings of the appellant; and (v) the aforesaid facts were not known by the respondents at the time of filing of the suit despite exercise of due diligence. (Be it noted here that said averments were made in the paragraphs 7 to 15 of the application).

24. In addition to above, it was contended by the respondents in the aforesaid application (I.A. No.6309/2010) that:- (i) the appellant is operating a store at Central Mall, Gurgaon; (ii) the respondent No.2 carries on an essential part of publication of respondent No.1's magazine VOGUE INDIA from its office in Delhi; (iii) the persons employed by magazine VOGUE INDIA who are responsible for publication of said magazine are stationed at office of respondent No.2 in Delhi; (iv) the registered office of the exclusive distributor of magazine VOGUE INDIA viz. Living Media Pvt. Ltd. is at Delhi; (v) around eighty to eighty-five thousand copies of magazine VOGUE INDIA were sold in Delhi in the year 2009; (vi) the

international editions of magazines VOGUE are freely available in India including Delhi; and (vii) the subscribers to the magazine VOGUE reside in Delhi. (Be it noted here that said averments were made in the paragraphs 16 to 19 of the application).

25. Before proceeding further, it would be relevant to note paragraph 20 of the I.A. No.6309/2010:-

“20. The said averments are only in furtherance of the averments already made in the plaint. By oversight and bonafide error the aforesaid averments in paras 2 to 16 were not incorporated in the original plaint. The said averments are necessary and material for deciding the question “Whether this Court has territorial jurisdiction to entertain and try the present suit”? Accordingly, the said averments are now sought to be incorporated in the plaint.”
(Emphasis Supplied)

26. The respondents sought to amend paragraphs 12, 14 and 33 of the plaint filed by them in the following terms:-

“12. That the Plaintiffs magazine published under the trade mark ‘VOGUE’ is sold/circulated in around 145 countries around the world, including India and Delhi. There are subscribers to the magazine who reside in Delhi. The magazine under the said trademark has been available/sold in India since at least last two decades and has established enormous and enviable reputation and goodwill in India, among other countries. The trade mark ‘VOGUE’ was first used in India in the year 1939. That the first Plaintiff is internationally well-known and is the registered proprietor of the trade mark ‘VOGUE’ in around 145 countries including India.

13.....

14.That the second Plaintiff is publishing a magazine under the trademark VOGUE INDIA in Mumbai. The

second Plaintiff has a branch office in Delhi at the address 1st Floor, Southern Park, Unit No.15, Plot No.D-2, DDA District Centre, Saket, New Delhi. From its office in New Delhi the second Plaintiff sell its advertisements, has circulation sales and carries on editorial activities. The Associate Advertising Director, the Circulation Sales Manager, a Fashion and Internet Editor of the magazine Vogue India are stationed at the second Plaintiff's said Delhi office. The distribution of the said magazine is done through the second Plaintiff's exclusive/sole distributor Living Media India Ltd which has its registered office at 9K Connaught Circus, New Delhi-110001. Around 80,000 issues of the VOGUE INDIA magazine were sold in Delhi in the calendar year 2009.

xxx xxx

33. That this Hon'ble Court has jurisdiction to entertain and try the present suit for the following reasons:

- the first plaintiff through its wholly owned subsidiary and exclusive licensee the second plaintiff is carrying on business within the jurisdiction of this Hon'ble Court. The second plaintiff has its branch office within the jurisdiction of this Court and its magazines under the trademark VOGUE are freely available within the jurisdiction of this Hon'ble Court.
- The defendant is servicing customers in Delhi through its store named JUST IN VOGUE in the Central Mall, Gurgaon which is a part of the National Capital Region. The cause of action has therefore arisen within the jurisdiction of this Hon'ble Court.
- The defendant is carrying on business at DLF PLACE MALL, Saket within the jurisdiction of this Hon'ble Court. The Defendant is also using bags carrying the trademark VOGUE at its said store and the cause of

action has therefore arisen within the jurisdiction of this Hon'ble Court.”
(*Emphasis Supplied*)

27. In addition thereto, the respondents sought to insert paragraph 29A in the plaint, which paragraph reads as under:-

“29A. That the Plaintiffs learnt that the Defendant were carrying on business at Delhi particularly at shop premises being No.132-A, DLF Mall, Saket, New Delhi. From the said shop watches and other timepieces are being sold. The said shop is being operated under the name and style of “Just Watches” and the said business was being carried on by company known as “Priority Marketing Pvt. Ltd.” which is the holding of Priority One Marketing Pvt. Ltd. (now known as Just Lifestyle”, which is the Defendant herein). A fortiori, the Defendant Company is “held” by the company operating the shop premises above referred at Delhi.

The Defendant is also carrying on business in Gurgaon. The Defendant's store in Gurgaon is situated in the Central Mall. A number of persons staying in Gurgaon work in Delhi and a number of persons staying in Delhi work in Gurgaon. Persons working or staying in Delhi therefore shop at the Defendants Gurgaon store and the services of the Defendant under the JUST IN VOGUE mark are available to customers in Delhi. The Defendant is therefore carrying on business within the jurisdiction of this Court and the cause of action has also arisen within the jurisdiction of this Court.”

28. The matter came to be listed before the learned Single Judge on May 12, 2010, on which date the following order was passed:-

“IA No.5440/2010 (O.13 R.8 CPC by Deft.)

Pleadings are complete.

CS (OS) 2157/2009 & IA Nos.6308/2010 [O. 7 R. 14(3) r/w S. 151 of CPC by Pltf.] & 6309/2010 [O. 6 R. 17 r/w S. 151 of CPC for amendment of plaint and u/O. 1 R. 10(2) of CPC for impleadment of Priority Marketing Pvt. Ltd. as D-2]

By an order dated 14.01.2010 a methodology was agreed to by counsels for both sides for disposal of the entire suit. Since parties could not adhere to the time line, the matter had to be adjourned as is apparent from the record. Issues came to be framed on 04.03.2010 in the suit. Thereafter arguments were heard in the matter on several dates in March, 2010. During the course or arguments of the defendant it was felt necessary that the issue of territorial jurisdiction would have to be decided as a preliminary issue. The learned senior counsel Mr.Sethi, on instructions, agreed to such a methodology being adopted in order to save time of the court. Thereafter arguments were addressed confined solely to territorial jurisdiction. On 22.04.2010 the registry was directed to place on record CS (OS) Nos. 2322/2007 and 187/2008 on the request of the learned counsel for the defendant as a submission was made that the plaintiff herein had to withdraw the said suits on the ground of territorial jurisdiction; an aspect which was not disclosed by the plaintiff in the captioned suit. On 26.04.2010 accommodation was sought on the ground that the plaintiff's counsel was unwell. On that date once again a request was made by the counsel for the defendant for a direction to be issued to the registry for placing before court two other suits: i.e., CS(OS) No. 1792/2008, entitled Advance Magazine vs Kiran Palival; and CS(OS) No. 565/2009 entitled Advance Magazine vs Arvind Ltd. The directions, as requested, were issued. The matter was posted to 28.04.2010. On the said date the defendant moved an application being IA No. 5440/2010 under Order 13 Rule 8 of the Code of Civil Procedure, 1908 (in short 'CPC') for impounding the plaintiff's license deed, which is, a subject matter of the present suit. Notice on

this application was issued on the said date. The matter was posted on 05.05.2010. On the said date, since the reply to IA No. 5440/2010 was not on record, the matter had to adjourned to 12.05.2010.

Today, the plaintiff has moved two applications being: IA No. 6308/2010 under Order 7 Rule 14(3) read with Section 151 of the CPC for bringing on record certain documents which it claims it has discovered only on 13.04.2010; and IA No. 6309/2010 under the provisions of Order 6 Rule 17 read with Section 151 of CPC, for amendment of the plaint and for impleadment of Priority Marketing Pvt. Ltd. as defendant no. 2. Amendments sought in the plaint seek to incorporate averments related to the issue of jurisdiction.

In view of the circumstances, which has arisen now, it appears that the plaintiff's pleadings with regard to its instant action are not complete. I get a distinct impression that the plaintiff is not in any hurry with regard to its pending action. The matter is released from part heard.

Issue notice in IA Nos. 6308/2010 & 6309/2010 to the non-applicants/defendants. Ms.Manmeet Arora accepts notice on behalf of the defendant. Let reply be filed within two weeks. Rejoinder, if any, be filed before the next date.

List before the Jt. Registrar for completion of pleadings on 08.07.2010.” *(Emphasis Supplied)*

29. On July 8, 2010 the appellant filed reply to the I.A. No.6309/2009 inter-alia contending therein that:- (i) in view of proviso appended to Order VI Rule 17 CPC said application cannot be allowed for the reasons the same has been filed by the respondents after the commencement of ‘trial’ in the present suit and the respondents have miserably failed to demonstrate that the amendments sought could not have been raised by them before

commencement of trial in spite of exercise of due diligence; (ii) a bare perusal of averments made in paragraphs 16 to 19 of said application would bring out that said averments were within the knowledge of the respondents at the time of filing of the suit and thus could have been included in the plaint; (iii) by way of amendment of plaint, the respondents have attempted to set up an entirely new case that the appellant through its purported holding company Priority Marketing Pvt. Ltd. is carrying on business in Delhi; (iv) a thorough online inspection of the records of Registrar of Companies would reveal that the appellant ceased to be the subsidiary company of Priority Marketing Pvt. Ltd. in the year 2008, which fact was deliberately suppressed by the appellant. (In support of said contention, the appellant filed a copy of the Form 23AC filed by the company named Priority Marketing Pvt. Ltd. with the Registrar of Companies in the year 2008); (v) the mere fact that the purported holding company of the appellant Priority Marketing Pvt. Ltd. is carrying on business in Delhi does not imply that the appellant is carrying on business in Delhi for the appellant and Priority Marketing Pvt. Ltd. are 2 distinct legal entities; (vi) the mere factum of commonality of names and Directors of the appellant and Priority Marketing Pvt. Ltd. does not imply that the appellant is the subsidiary company of Priority Marketing; (vii) in view of the facts that Priority Marketing Pvt. Ltd. holds a mere 3% equity shares in the appellant and does not exercise any control over the composition of the Board of Directors of the appellant the appellant cannot be considered as a subsidiary company of Priority Marketing Pvt. Ltd. in terms of provisions of Section 4 of the Companies Act, 1956; (viii) the shop 'JUST WATCHES' was opened on February 26, 2010 i.e. subsequent to the filing

of the suit on November 11, 2009 and thus the factum of running of said shop by purported holding company Priority Marketing Pvt. Ltd. would not confer territorial jurisdiction on this Court in view of the settled legal position that the territorial jurisdiction for filing a suit should be determined on the basis of the facts existing on the date of institution of suit and all subsequent and posterior facts should be ignored; (ix) the fact that the appellant is operating a retail store in Gurgaon came to the knowledge of the respondents on November 21, 2009 when the appellant filed paper book in FAO (OS) No.559/2009 but the respondents sought to incorporate said averment in the plaint 5 months thereafter only in May, 2010, which circumstance coupled with the fact that the present application was filed by the respondents at the stage when the final arguments had already commenced in the suit clearly indicates that the amendment of the plaint by the respondents is only a ploy to delay the hearing of the suit; and (x) under the garb of the amendment of the plaint the respondents have deleted some portions of the (original) plaint.

30. It would be relevant to note following portion of the reply to the I.A. No.6309/2009 filed by the appellant:-

“7. That the Plaintiffs are guilty of grossly misrepresenting and suppressing facts with the intention of misleading this Hon’ble Court. The Plaintiffs have sought to introduce, by way of an amendment, an entirely new plea with respect to the Defendant carrying on business, through its purported holding company ‘Priority Marketing Pvt. Ltd.’, at shop premises no. 132-A, DLF Mall, Saket, New Delhi under the name and style of ‘Just Watches’. In support of the aforesaid contention, the Plaintiffs have filed Form 23AC which shows the Defendant as the subsidiary of Priority Marketing Pvt.

Ltd. The said Form 23 AC pertains to the year 2006. The mala fide intention of the Plaintiffs is discernible from the Plaintiffs deliberate suppression of the subsequent company records of Priority Marketing Pvt. Ltd. for the year 2008, which clearly shows that Priority Marketing Pvt. Ltd. does not have any subsidiary company. A copy of Form 23 AC filed by Priority Marketing Pvt. Ltd. in the year 2008 is annexed hereto and marked as **Annexure 'B'**.

8. That the Form 23AC for the year 2006 was purportedly obtained by the Plaintiffs after conducting online inspection of the records of the Defendant and Priority Marketing Pvt. Ltd. from the Sub Registrar of Companies. Such an online inspection would have inevitably also revealed company records of the Defendant and Priority Marketing Pvt. Ltd. for the subsequent years, which would confirm that the Defendant ceased to remain the subsidiary of Priority Marketing Pvt. Ltd. The conduct of the Plaintiffs in moving the present application at a belated stage in the proceedings for amendment to incorporate pleas which are false to the knowledge of the Plaintiffs smacks of mala fide intentions of the Plaintiffs and the same deserves to be dismissed with heavy costs.

9.

10. The mere factum of commonality of names and Directors of the company does not imply that the Defendant is a subsidiary of 'Priority Marketing Pvt. Ltd.' It is stated that Priority Marketing Pvt. Ltd. holds a mere 3% (three) of the equity shares in the Defendant and does not exercise any control over the composition of the Board of Directors of the Defendant. The conditions as stipulated under Section 4 of the Companies Act, 1956 for a company to be considered a subsidiary of another is not fulfilled by the Defendant and, therefore, the

Defendant cannot be regarded as a subsidiary of 'Priority Marketing Pvt. Ltd.'”

31. The respondents filed a rejoinder to the reply filed by the appellant to the I.A. No.6309/2009 reiterating the averments made by them in the I.A. No.6309/2009. In response to the averments contained in the reply of the appellant that the online inspection of the records of Registrar of Companies reveals that the appellant ceased to be subsidiary company of Priority Marketing Pvt. Ltd. in the year 2008 and Priority Marketing Pvt. Ltd. holds a mere 3% equity share in the appellant the respondents stated as under:-

“7.It is denied that the Plaintiff is guilty of misrepresenting and suppressing facts with the intention of misleading this Hon’ble Court. It is denied that the Plaintiffs are attempting to introduce an entirely new plea, that of the Defendant carrying on business in Delhi, and the same ought to have, in fact, been disclosed by the Defendant. It is not denied that the Plaintiffs have filed form 23AC which shows the Defendant as being the subsidiary of 'Priority Marketing Pvt. Ltd., which pertains to the year 2006. The documents referred to by the Defendants, pertaining to the year 2008 were not available on the online records of ROC at the time they were inspected and the 2006 records obtained. It is denied that the malafide intention of the Plaintiffs is palpable from the Plaintiffs deliberate suppression of the subsequently company records of Priority Marketing Pvt. Ltd. for the year 2008 which clearly shows that Priority Marketing Pvt. Ltd. does not have a subsidiary company. It is reiterated that it is completely false for the Defendant to allege that it is not carrying on business within the jurisdiction of this Hon’ble Court.

8. The contents of paragraph 8 of the Defendants application are denied as being false. The same are also

repetitive of the contents of the previous paragraph, the averments made therein are not being repeated for the sake of brevity. However, it is categorically denied that the conduct of the Plaintiffs in moving the present application at a belated stage in the proceedings for amendment to incorporate pleas which are false to the knowledge of the Plaintiffs smacks of the malafide intentions of the Plaintiffs and deserves to be dismissed with heavy costs.

9.

10. The contents of paragraph 10 of the Defendant are false to the knowledge of the Defendant and in any event denied. It is reiterated that the business of JUST watches in Delhi and Just in Vogue in Gurgaon is under the same management.”

32. On August 18, 2011 the learned Single Judge heard arguments in I.A. No.6309/2009 i.e. the application seeking amendment of the plaint and impleadment of Priority Marketing Pvt. Ltd. as defendant No.2 in the suit and reserved the same for judgment.

33. Vide order dated November 18, 2011 the learned Single Judge allowed I.A. No.6309/2009 and impleaded ‘Priority Marketing Pvt. Ltd.’ as defendant No.2 in the suit. In so concluding, it was held by the learned Single Judge that:- (i) the proviso appended to Order VI Rule 17 CPC is no impediment in allowing an application for amendment of pleadings if the application deserves to be allowed on merits, otherwise, the proviso would be in direct conflict to the expression ‘*at any stage*’ occurring in Order VI Rule 17; (ii) it is open to a court including an appellate court to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances where it is shown that:-

(a) the relief claimed originally has by reason of subsequent change of circumstances become inappropriate, or (b) where it has become necessary to take notice of the changed circumstances in order to shorten the litigation, or (c) to do complete justice between the parties; (iii) the principle embodied in proviso appended to Order VI Rule 17 CPC that no amendment should be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial is not applicable in the present case for the parties had waived a 'trial' in the present case as recorded in the order dated January 14, 2010; (iv) by virtue of application in question, the respondents are merely elaborating the facts already stated in the original plaint, incorporating events which happened subsequent to filing of the suit and adding Priority Marketing Pvt. Ltd. as defendant No.2 in the suit; (v) the respondents are entitled to bring the additional facts on record and improve their case by way of amendment of plaint inasmuch as cause of action for filing the suit and nature of suit remain same if the amendment(s) sought by the respondents are allowed; and (vii) the application for amendment of plaint filed by the respondents is required to be allowed for it is settled legal position while adjudicating an application for amendment of pleadings the Court should take notice of the subsequent events if the same leads to shortening of litigation, preserving and safeguarding the rights of the parties and subserving the ends of justice.

34. Aggrieved by the order dated November 18, 2011 the appellant has filed the above captioned appeal under Section 104 CPC read with Order XLIII Rule 1 of CPC.

35. During the hearing of the present appeal, the appellant reiterated the contentions advanced by it in the reply to the I.A. No.6309/2009. In addition thereto, following contentions were advanced by the learned counsel appearing for the appellant:-

A. The allowing of application for amendment of plaint by the learned Single Judge has rendered I.A. No.2588/2010 under Order VI Rule 16 CPC filed by the appellant for striking out some averments made by the respondents in their replication as infructuous. Counsel highlighted that one of the averments made by the respondents in their replication was that the magazine 'VOGUE' is freely available in India, which averment was sought to be struck off by the appellant by filing I.A. No.2588/2010 on the ground that said averment was beyond the scope of the plaint filed by the appellant. Vide order dated March 04, 2010 the learned Single Judge disposed off said application leaving it open for the appellant to raise all such objections which were the subject matter of the said application at the stage of final arguments. Counsel further highlighted that in order to defeat the objections which were the subject matter of I.A. No.2588/2010 the respondents have filed I.A. No.6309/2009 seeking amendment of plaint inasmuch as one of the amendments sought was that the magazine VOGUE is freely available in India.

B. A perusal of I.A. No.6309/2009 filed by the respondents would show that under the garb of amendment of plaint the respondents have in a very subtle manner deleted paragraph 14 of the (original) plaint. Counsel contended that deletion of paragraph 14 of the (original) plaint by the respondents is very significant for the reason said paragraph which was demonstrative of paltry circulation of magazine VOGUE in India between

the years 2000 to 2007 militated against the case set up by the respondents that magazine VOGUE INDIA was very widely circulated in India since last 2 decades. Counsel highlighted that said aspect of the matter was completely lost by the learned Single Judge while passing the impugned order.

C. The allowing of application for amendment of plaint by the learned Single Judge has caused grave and serious prejudice to the appellants inasmuch as same has set at naught the entire proceedings taken place before the learned Single Judge in the past two years.

36. Per contra, learned counsel appearing for the respondents contended that no useful purpose would be served in rejecting I.A. No.6309/2009 filed by the respondents seeking amendment of plaint for the reason the rejection of plaint on the ground of lack of territorial jurisdiction would not preclude the respondents from filing a fresh suit on the same cause of action. Counsel contended that in view of settled legal position that procedural law is intended to facilitate and not to obstruct the course of justice the proper course in the present case would be to permit the respondents to amend the plaint and proceed with the suit.

37. Section 134 of the Trade Marks Act, 1999 reads 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 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."

38. Section 20 of the Code of Civil Procedure, 1908 reads 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 resides, or carries on business, or personally works for gain, as aforesaid, acquiesce in such institution; or

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

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

39. Whether Section 134 of the Trade Marks Act, 1999 oust Section 20 of the Code of Civil Procedure, 1908?

40. The answer to the aforesaid question is no longer res integra. In the decision reported as 132 (2006) DLT 641 (DB) Intas Pharmaceuticals Ltd. v Allergan Inc it was held by a Division Bench of this Court that Section 134 of the Trade Marks Act does not whittle down the provisions of Section 20 of the Code of Civil Procedure but provides an additional forum and a place for filing a suit in case of an infringement of a trademark.

41. In the decision reported as 155 (2008) DLT 164 (DB) Indian Performing Right Society v Sanjay Dalia & Anr. after interpreting provisions of Section 62 of the Copyright Act, 1962 and Section 134 of the Trade Marks Act, 1999 in the light of provisions of Section 20 of the Code of Civil Procedure 1908, it was held by a Division Bench of this Court that in case of a suit for infringement of a trade mark a plaintiff would be deemed to carry on business at a branch office only if cause of action or part thereof has arisen in the place where branch office is situated.

42. In the decision reported as (2006) 9 SCC 41 Dhodha House v. S.K. Maingi it was held by the Supreme Court that an agent is deemed to carry on business of his principal at a particular place when following 3 conditions are satisfied:- (i) 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; (ii) the person acting as agent must be an agent in the strict sense

of the term and (iii) to constitute ‘carrying on business’ at a certain place, the essential part of the business must take place in that place.

43. In the decision reported as (2007) 14 SCC 426 Mohannakumaran Nair v Vijayakumaran Nair while dealing with the issue of jurisdiction of the Court the Supreme Court observed as under:-

“8. The question in regard to the jurisdiction is required to be determined with reference to the date on which the suit is filed and entertained and not with reference to a future date. Sections 15 and 19 regulates the filing of the suit at the places where cause of action has arisen. Section 20 operates subject to the limitation contained in Sections 15 to 19. Place of residence of the defendant being one of the exceptions thereto. Plaintiff is the dominus litis, but he can file a suit only at one or the other places specified in the Code of Civil Procedure and not at any place where he desires.

XXX XXX

11. Ordinarily, the rights and obligations of the parties are to be worked out with reference to the date of institution of the suit. See Jindal Vijayanagar Steel (JSW Steel Ltd.) Vs Jindal Praxair Oxygen Company Ltd. [2006(8)SCALE668] Determination in regard to maintainability of the suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case is made out therefore can be held to have been validly instituted. Discretion, as is well known, cannot be exercised, arbitrarily or capriciously.”

44. Order VI Rule 17 of the Code of Civil Procedure, 1908 as it originally stood enacted reads as under:-

“17. Amendment of pleadings: - The Court may at any stage of the proceedings allow either party to alter or

amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.”

45. It was felt that the provision for amendment of pleadings was one of the significant sources of delay in the judicial process. In the year 1999, as per the recommendations of Law Commission, the provision for amendment of pleadings was altogether deleted by Amendment Act No.46 of 1999. The deletion of the provision led to widespread protests by lawyers and different legal bodies and as a result in the year 2002 the provision was once again introduced, albeit with a rider, by Amendment Act No.22 of 2002. By virtue of said amendment, a proviso was appended to Rule 17, which reads as under:-

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

46. While examining the proviso appended to Order VI Rule 17 CPC in the decision reported as AIR 2005 SC 3353 Salem Advocate Bar Association, Tamil Nadu v Union of India the Supreme Court observed as under:-

“The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now if application is filed after commencement of trial, it has to be shown that in spite of due diligence such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial.”

47. In the decision reported as (2008) 5 SCC 117 Chandra Kanta Bansal v Rajinder Singh Anand the Supreme Court observed as under:-

“10) The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the others case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases.”

48. In the decision reported as Vidyabai & Ors v Padmalatha & Ors (2009) 2 SCC 409 the Supreme Court observed as under:-

“It is couched in mandatory form. The court’s jurisdiction to allow such an application is taken away unless the conditions precedent there are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of trial.”

49. In the decision reported as (2009) 2 SCC 409 Vidyabai & Ors v. Padmalatha & Anr. after noting earlier decisions of the Supreme Court on the point it was held by the Supreme Court that the ‘trial’ is deemed to commence when the issues are settled and the case is set down for recording of evidence.

50. In the decision reported as Chander Kanta's (supra) the Supreme Court interpreted the expression 'due diligence' occurring in proviso appended to Order VI Rule 17 CPC in the following terms:-

“16. The words 'due diligence' has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word 'diligence' means careful and persistent application or effort. 'Diligent' means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), 'diligence' means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. 'Due diligence' means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) 'due diligence', in law, means doing everything reasonable, not everything possible. 'Due diligence' means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial.”

51. In the decision reported as AIR 2007 SC 113 State of A.P. & Ors v Pioneer Builders & Ors the Supreme Court observed as under:-

“Dominant object to allow the amendment in the pleadings liberally is to avoid multiplicity of proceedings. (See L.J. Leach & Co. Ltd. v Jardine Skinner & Co., Ganga Bai v Vijay Kumar and B.K. Narayana Pillai v Parameswaran Pillai) Nevertheless, one distinct cause of action cannot be substituted for another nor the subject-matter of the suit can be changed by means of an amendment. The following passage from the decision of the Privy Council in Ma Shwe Mya v.

Maung Mo Hnaung succinctly summarises the principle which may be kept in mind while dealing with the prayer for amendment of the pleadings.

“All rules of court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, not to change, by means of amendment, the subject-matter of the suit.””

(Emphasis Supplied)

52. In the backdrop of aforesaid legal principles, we proceed to determine whether the learned Single Judge has rightly allowed I.A. No.6309/2009 filed by the respondents for amendment of plaint filed by them.

53. In a nutshell, the amendment(s) sought by the respondents in the plaint filed by them were as follows:-

- (a) respondent No.2 carries on an essential part of publication of respondent No.1's magazine VOGUE INDIA from its office in Delhi;
- (b) persons employed by magazine VOGUE INDIA who are responsible for said magazine are stationed at the office of the respondent No.2 in Delhi;
- (c) registered office of the exclusive distributor of magazine VOGUE INDIA viz. Living Media Pvt. Ltd. is at Delhi;
- (d) magazines VOGUE and VOGUE INDIA are freely available in India including Delhi;
- (e) magazine VOGUE INDIA is widely circulated in Delhi;

- (f) subscribers to the magazine VOGUE reside in Delhi;
- (g) appellant is operating a store at Central Mall, Gurgaon; and
- (h) holding company of the appellant viz. Priority Marketing Pvt. Ltd.. is operating a store at DLF Mall, Saket which is using the trade mark VOGUE.

Amendments (a) to (f):-

54. On November 12, 2009 the respondents filed the present suit alleging the infringement of its registered trade mark VOGUE by the appellant inter-alia contending therein that *'this Court had territorial jurisdiction to try the present suit for the reason the respondent No.1 through the respondent No.2 carries on its business within the territorial jurisdiction of this Court inasmuch as respondent No.2 has its branch office within the jurisdiction of this Court'*. On November 12, 2009 the learned Single Judge issued summons in the suit and passed an ex-parte interim order restraining the appellant from using the trade mark 'VOGUE' as part of its trade name 'JUST IN VOGUE' or any other deceptively similar trade mark in relation to its goods and service, till the next date of hearing.

55. On November 18, 2009 a Division Bench of this Court stayed the operation of the order dated November 13, 2009 passed by the learned Single Judge. On December 14, 2009 the Supreme Court set aside the orders dated November 13 and 18, 2009 filed by the Single Judge and Division Bench respectively and requested the learned Single Judge to decide afresh the application for injunction within six weeks and the suit preferably within a period of four months from the date a copy of this order is produced before it.

56. Thereafter on January 12, 2010 the appellant filed I.A. No.344/2007 under Order VII Rule 10(1) CPC seeking rejection of the plaint on the ground that this Court had no territorial jurisdiction to try the present suit. (See paragraph 8 above). Relevant would it be to state that it was contended by the appellant in the present application that a corporation is deemed to carry on its business at its registered office only and thus the mere assertion in the plaint that the respondent No.2 carries on its business from its branch office in Delhi is not sufficient to confer territorial jurisdiction upon this Court when there is no assertion in the plaint that a part of cause of action of filing the present suit has arisen in Delhi.

57. On January 14, 2010 the parties agreed that instead of deciding the application under Order XXXIX Rule 1 and 2 CPC the learned Single Judge should finally dispose off the suit. It was further agreed by the parties that they would not lead any evidence in the suit and the learned Single Judge shall decide the suit on the basis of the pleadings of the parties and examine the original documents filed by the parties, if necessary, at the time of hearing.

58. On February 04, 2010 the appellant filed its written statement reiterating therein that this Court has no territorial jurisdiction to try the present suit. Significantly, it was highlighted by the appellant in the written statement that paragraph 14 of the plaint which demonstrates paltry circulation of magazine VOGUE in India between the years 2000 to 2007 itself militates against the case set up by the respondents that magazine VOGUE INDIA was very widely circulated in India since last 2 decades.

59. On February 17, 2010 the respondents filed a replication emphasizing therein that this Court has territorial jurisdiction to try the present suit by averring that magazine VOGUE is freely available in Delhi.

60. On March 2, 2010 the appellant filed I.A. No.2588/2010 under Order VI Rule 16 CPC for striking out the averment contained in the replication that the magazine VOGUE is freely available in Delhi. On March 04, 2010 the learned Single Judge disposed of I.A. No.2588/2010 by leaving it open for the appellant to raise all such objections which are the subject matter of the present application at the stage of arguments. On the same date i.e. March 04, 2010 the learned Single Judge settled 14 issues in the suit. One of the issues framed by the learned Single Judge was that whether this Court has territorial jurisdiction to entertain and try the present suit.

61. Thereafter the suit was partly heard by the learned Single Judge on eight dates. Relevant would it be to note that the arguments advanced by the parties centered around the issue whether this Court had territorial jurisdiction to try the present suit. (See the order dated May 12, 2010 passed by the learned Single Judge). However, on May 12, 2010 the learned Single Judge released the matter from part-heard.

62. In the interregnum, on May 11, 2010 the respondents had filed I.A. No.6309/2009 for amendment of plaint. It is most significant to note that the respondents contended in said application that due to oversight and bona fide error they could not incorporate amendments (a) to (f) in the plaint filed by them. What is most significant to note that it is not the case of the respondents that the facts stated in amendments (a) to (f) were not known to them before the filing of the suit or commencement of trial in the suit. (Though it has been stated in said application that paragraphs 2 to 16

could not be incorporated by the respondents in the plaint due to oversight and bona fide error the reference made to ‘paragraphs 2 to 16’ have to be read as ‘paragraphs 16 to 19’ for as per the case of the respondents the facts stated in paragraphs 2 to 15 came to their knowledge only after the filing of the suit).

63. As per proviso appended to Order VI Rule 17 CPC no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

64. As held by the Supreme Court in Vidyabai’s case (supra), a ‘trial’ is deemed to commence when the issues are settled and the case is set down for recording of evidence.

65. Now, the question which arises is that when did the trial commence in the present case.

66. In the instant case, the learned Single Judge settled issues in the present suit on March 04, 2010 and set out the suit for final hearing for the parties had agreed between the parties that they would not lead any evidence in the suit and the learned Single Judge shall decide the suit on the basis of the pleadings of the parties and examine the original documents filed by the parties, if necessary, at the time of hearing. Thus, the trial commenced in the present suit on March 04, 2010.

67. The respondents could have easily incorporated amendments (a) and (f) in the plaint filed by them but they failed to do so due to oversight and bona fide error. It is not the case of the respondents that in spite of exercise of due diligence they could not incorporate amendments (a) to (f) in the plaint filed by them. Such being the factual position, the application for

amendment of plaint filed by the respondents in respect of amendments (a) to (f) could not have been allowed.

Amendment (g)

68. As already noted hereinabove, the fact that the appellant is operating a retail store in Gurgaon came to the knowledge of the respondents on November 21, 2009 when the appellant filed a paper book in FAO (OS) No.559/2009 annexing therein the list of stores operated by the appellant. The trial in the present suit commenced on March 4, 2010. A period of nearly 4 months from the date of acquiring knowledge of said fact and commencement of trial in the suit. No reason whatsoever has been given by the respondents for incorporating the amendment (g) in the plaint filed by them before the commencement of trial in the suit. In that view of the matter, the application for amendment of plaint filed by the respondents in respect of amendments (a) to (f) could not have been allowed.

Amendment (h)

69. With respect to amendment (h), the timing of filing the application for amendment of plaint and nature of amendment sought to be incorporated in the plaint are very crucial.

70. As already noted hereinabove, the respondents have filed the present suit for infringement of its registered trade mark VOGUE by the appellant inter-alia contending therein that in terms of Section 134 of the Trade Marks Act, 1999 this Court had territorial jurisdiction to try the present suit for the reason the respondent No.1 through the respondent No.2 carries on its business within the territorial jurisdiction of this Court inasmuch as respondent No.2 has its branch office within the jurisdiction of this Court. In its written statement the appellant strenuously contended that a

corporation is deemed to carry on its business at its registered office only the mere assertion in the plaint that the respondent No.2 carries on its business from its branch office in Delhi is not sufficient to confer territorial jurisdiction upon this Court when there is no assertion in the plaint that a part of cause of action of filing the present suit has arisen in Delhi.

71. On the basis of pleadings of parties, issues were settled by the learned Single Judge. One of the issues settled by the learned Single Judge was that whether this Court has territorial jurisdiction to try the present suit. After settlement of issues, the learned Single Judge commenced hearing of arguments in the suit. The contention advanced by the appellant that this Court had no territorial jurisdiction to try the present suit was likely to succeed in view of the dictum of law laid down by a Division Bench of this Court in Sanjay Dalia's case (supra) that in case of a suit for infringement of a trade mark a plaintiff would be deemed to carry on business at a branch office only if cause of action or part thereof has arisen in the place where branch office is situated.

72. It was at this stage that the respondents filed an application for amendment of the plaint and seeking incorporation of averment that in terms of Section 20 of the Code of Civil Procedure, 1908 this Court has territorial jurisdiction to try the present suit inasmuch as holding company of the appellant Priority Marketing Pvt. Ltd. is operating a store in Delhi which is using trade mark VOGUE.

73. By means of amendment of plaint, the respondents sought to add a new ground for invocation of territorial jurisdiction of this Court in the plaint filed by them.

74. At this juncture, we note the dictum of law laid down by the Supreme Court in Pioneer Builders's case (supra) that one distinct cause of action cannot be substituted for another nor the subject-matter of the suit can be changed by means of an amendment. Applying the same analogy, it can safely be concluded that it is impermissible for a plaintiff to change the ground for invocation of jurisdiction of a Court by means of an amendment.

75. In that view of the matter, the application for amendment of plaint filed by the respondents in respect of amendment (h) could not have been allowed.

76. The matter can also be looked at from another angle.

77. Before proceeding further, we would like to note the decision of the Supreme Court in Civil Appeal No.2968 of 2012 titled as 'Maria Margadia Sequeria v. Erasmo Jack De Sequeria' decided on March 21, 2012. The facts of the said case were that the appellant No.1 and respondent No.1 were brother and sister. The respondent No.1 had filed a suit under Section 6 of the Specific Relief Act, 1963 against the appellant No.1 seeking grant of a decree of permanent and mandatory injunction in his favor in respect of the suit property in the Court of Civil Judge, Senior Division at Panaji, Goa. In the plaint filed, it was alleged by the respondent No.1 that he remained in the possession of the suit property for several years by virtue of a family arrangement; his sister appellant No.1 had dispossessed him from the suit property without following due process of law and the possession of the suit property should be restored to him. On the other hand, the appellant No.1 contended that she is the rightful owner of the suit property and had given possession of the suit property to her brother

respondent No.1 as a caretaker. The trial court decreed the suit filed by the respondent No.1, which decree was affirmed by the Bench of High Court of Bombay at Goa. Aggrieved by the judgment(s) passed by the trial court and High Court, the appellant approached the Supreme Court by way of filing a special leave petition, which upon leave being granted got converted to a civil appeal. After holding that the pleadings and documents placed on record by the parties establish that the appellant No.1 had a valid title to the suit property and had given possession of the suit property to her brother respondent No.1 as a caretaker; respondent No.1 had not been able to establish any family arrangement by virtue of which the possession of the suit property was given to him; caretaker, watchman or servant can never acquire interest in the property irrespective of their long possession and the courts are not justified in protecting the possession of a caretaker, servant or any person who was allowed to live in the premises for some time either as a friend, relative or caretaker, the Supreme Court allowed the appeal of the appellant No.1.

78. After noting the provisions of Rule 24.2 of the UK Civil Procedure Rules 1998 which prescribe that the court may give summary judgment against a claimant on the whole of the claim or a particular issue if it considers that claimant has no real prospect of succeeding on the claim or issue; the observations made by the US Supreme Court in the decisions reported as 550 U.S. 544, 127 S. Ct. 1955 Bell Atlantic Corporation v William Twombly and 556 U.S. 662, 129 S. Ct. 1937 John D. Ascroft, Former Attorney General v Javaid Iqbal that 'factual allegations must be enough to raise a right to relief above the speculative level'. *The pleadings must contain something more than a statement of facts that merely creates*

a suspicion of a legally cognizable right of action’ and ‘threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as factual allegation....only a complaint that states a plausible claim for relief survives a motion to dismiss’ respectively, the Supreme Court that the Courts should carefully and critically scrutinize and examine the pleadings and the documents filed by the parties at the very threshold of a matter and should not send the matter for trial where the pleadings and documents filed by the parties show that the plaintiff/defendant has no real prospect of succeeding in a matter or defending a claim, as the case may be.

79. The Supreme Court further emphasized that pleadings of the parties should give sufficient details and the matter should not be sent for trial on vague pleadings. The relevant observations made by the Court are being noted herein under:-

“67. In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

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71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

73. Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission.

75. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

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78. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence.

79. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.”

80. In view of decision of Supreme Court in *Margadia*'s case (supra) we closely scrutinize the amendment (h) sought to be incorporated by the respondents in the plaint filed by them. In so doing, we are conscious of the legal position that the Court is precluded from going into the merits of the amendment sought by a party to the suit at the stage of deciding whether an application for amendment is allowed or not.

81. Assuming the amendment (h) sought to be incorporated by the respondents in the plaint filed by them is correct would the fact that the holding company of the appellant Priority Marketing Pvt. Ltd. is operating a store in Delhi which uses the trade mark VOGUE is sufficient to clothe this Court with the territorial jurisdiction to try the present suit.

82. The answer to the aforesaid question is NO. In its application seeking amendment of plaint, the respondents contended that Priority Marketing Pvt. Ltd. is the holding company of the appellant. In the reply

filed to said application the appellant contended that Priority Marketing Pvt. Ltd. ceased to be the holding company of the appellant in the year 2008 and said company holds a mere 3% equity share in the appellant, which contentions were not denied by the respondents in their rejoinder. Furthermore, it is relevant to note that in the reply filed to I.A. No.5440/2007 it was admitted that the store run by Priority Marketing Pvt. Ltd. was opened after the filing of the present suit. In view of the factual position that Priority Marketing Pvt. Ltd. ceased to be the holding company of the appellant before the filing of the present suit and store in question was opened after the filing of the suit and dictum of law laid down by the Supreme Court in Mohannakumaran's case (supra) that the issue of jurisdiction of a Court is required to be determined with reference to the date on which the suit is filed and entertained and not with reference to a future date the amendment (h) would not clothe this Court with the territorial jurisdiction to try the present suit and thus no useful purpose would be served in case the same is incorporated in the plaint filed by the respondents.

83. We are also of opinion that the conduct of the respondents of deleting paragraph 14 of the (original) plaint which was demonstrative of paltry circulation of magazine VOGUE in India between the years 2000 to 2007 and thus militated against the case set up by the respondents that said magazine was widely circulated in India since last two decades is a very strong pointer to the fact that the respondents sought to remove the defects occurring in their plaint by means of amendment of the plaint.

84. In view of above discussion, the impugned order dated November 18, 2011 passed by the learned Single Judge allowing the amendment of

plaint and impleading Priority Marketing Pvt. Ltd. as defendant No.2 in the present suit is set aside.

85. The appeal is accordingly allowed.

86. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JANUARY 09, 2013
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