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

+ **FAO 198/2013 and CM APPL. 6777/2013 (Stay)**

% **14th March, 2014**

SURESH CHAND PURWAR (KARTA) Appellant

Through: **Mr. S.K. Bansal and Mr. Pankaj
Kumar, Advs.**

versus

VIVEK PURWAR & ORS. Respondents

Through: **Mr. Chandra Shekhar Sharma, Adv.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Order 43 Rule 1 (a) CPC against the judgement of the trial court dated 01.02.2013 by which the suit plaint filed by the appellant/plaintiff has been returned under Order 7 Rule 10 CPC for being presented in the Court of correct territorial jurisdiction. I note that the suit plaint has been returned not at the stage of final arguments, but at the initial stage of pleadings and where no evidence is led on behalf of the parties.

2. The subject suit filed by the appellant/plaintiff was a suit claiming rights in the trademark 'HARI' and 'HARISONS' used for seeking

confectionary, spices etc. Relevant claims were of injunction against passing off, infringement, etc. The relevant para in the plaint with respect to courts in Delhi having territorial jurisdiction was para 23 which reads as under:

“This Hon’ble Court has the territorial jurisdiction to try and adjudicate upon the present suit. The defendants are committing the impugned acts within the jurisdiction of this Hon’ble Court by conducting, soliciting, selling and marketing their impugned goods and business under the impugned trade mark/label/trade name in Big Bazar, Spencer in South Delhi, North Delhi besides other parts of the country. The plaintiff is carrying on its said goods and business under the said Trade Mark/label in Delhi. The plaintiff’s trade mark registrations are effected from the Trade Marks Registry, Delhi. The defendants have admitted in their reply to cease and desist notice that their goods under the impugned trade mark/trade name are available and sold in South Delhi, North Delhi etc. The cause of action in whole and/or in part has arisen within the jurisdiction of this Hon’ble Court. Further the defendants have filed application for registration of impugned trade mark on all India basis including Delhi. The plaintiff has tremendous goodwill and reputation in its said trademarks/labels in South Delhi, North Delhi which is being tarnished by defendants impugned activities of the Defendants in Delhi. The plaintiffs said proprietary rights are being prejudicially affected in Delhi due to the defendants impugned activities. This Hon’ble Court, as such, has the jurisdiction to try and adjudicate the present suit by virtue of Section 62 (2) of the Indian Copyright Act 1957 and Section 134 of the Trade Marks Act”.

3. By the impugned judgment the trial court has arrived at a finding on a disputed question of fact by holding that Courts at Delhi do not have territorial jurisdiction because the trial court holds that the goods are not

being sold by defendant at Delhi. This conclusion given by the trial court is a finding of fact only on the basis of pleadings and whatever documents exist on record without the plaintiff being given opportunity to prove his case of the Courts at Delhi having territorial jurisdiction during trial by leading evidence with respect to sale of the goods by the defendants in Delhi. It is also to be noted that trial court has for some inconceivable reason ignored the reply given by the defendants/respondents in reply to the legal notice/seize and desist notice of the plaintiff dated 20.08.2007. The respondents/defendants admitted to sale of the goods in establishments like Big Bazar, Salasar Spencer etc., which are situated in Delhi as per the case of the appellant/plaintiff.

4. The issue in the present case is whether plaint can be returned under Order 7 Rule 10 CPC by deciding a disputed question of fact without allowing parties to lead evidence. Law in this regard is settled by a Division Bench of this Court in the case of *Pfizer Enterprises Sarl Vs. Cipla Ltd. 2009 (39) PTC 358 (Del.) (DB)* which holds that such disputed questions of fact cannot be decided before allowing the parties to lead evidences to support their respective cases. This judgement has been referred to by me in the judgment delivered in the case of *M/s Kapoor Saws Manufacturing Company & Anr. Vs. M/s Crown Saw Blades Manufacturing Co. & Anr.*

in RFA No. 17/2005 decided on 22.05.2012 where identical issue was involved. The relevant paras of the judgment in the case of *M/s Kapoor Saws Manufacturing Company* (supra) read as under:

“1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC), is to the impugned judgment of the trial Court dated 12.10.2004 rejecting the plaint under Order 7 Rule 11 CPC on the ground that the appellants/plaintiffs have made bare and bald assertions in the pleadings which are not sufficient to confer territorial jurisdiction to the civil Courts at Delhi.

2. Counsel for the appellants has drawn my attention to para 23 of the plaint which reads as under:-

“23. This Hon’ble Court has territorial jurisdiction to entertain and try the present suit as the goods of the Plaintiff and the Defendants are also sold in Delhi. The Hon’ble Court has jurisdiction under Section 62(2) of the Copyright Act, 1957 as the Plaintiff has a branch office at New Delhi and its goods are extensively sold in Delhi.”

3. Learned counsel for the appellants argues that at the stage of deciding an application under Order 7 Rule 11 CPC, the contents of the plaint have to be deemed to be correct and it cannot be argued that the plaint contains incorrect facts. It is argued that the scope of application filed under Order 7 Rule 11 CPC is not to pronounce on disputed question of facts and which can be done only after trial, and this issue is now well settled by various judgments of the Supreme Court including a Division Bench judgment of this Court reported as *Pfizer Enterprises Sarl Vs. Cipla Ltd. 2009 (39) PTC 358 (Del.) (DB)*. The relevant observations of the Division Bench in the aforesaid case are contained in paras 12 to 15 and which read as under:-

12. The Preliminary Question which arose in **Dhodha House** was whether the existence of jurisdiction under Copyright

Act, 1957 would also enable the clubbing of the dispute arising from the Trade and Merchandise Act, 1958. The Supreme Court explained that existence of territorial jurisdiction by virtue of one Act would not clothe that very Court with a determination of a dispute under another Act only because of the provisions of Order II of the CPC (The parties in the P.M. Diesel were also one of the Appellants in the **Dhodha House** matter). Secondly, it had been observed that this Court had not adverted to the third contention that had arisen in the matter, viz. whether the Defendant had been selling its products on a commercial scale in Delhi. We think it necessary to at once clarify that in P.M. Diesel averments made in the Plaint have not been admitted in the Written Statement as is the case in the Pfizer Appeal. Our attention has also been drawn to the observations made by their Lordships in Dabur India –vs- K.R. Industries, 2008 (37) PTC 332(SC) where it was reiterated that since the primary ground upon which jurisdiction of the Delhi High Court had been invoked was violation of the Trade and Merchandise Marks Act, 1958 the provisions of Section 62(2) of the Copyright Act, 1957 could not be invoked. This was also the ratio of **Dhodha House**. It was also observed that the Plaintiff in **Dhodha House** was not a resident of Delhi; that he had not been able to establish that it carried on any business at Delhi; for this purpose the question as to whether the Defendant had been selling its produce in Delhi or not was wholly irrelevant. The last of the three observations clarifies the position pertaining to the place where the Plaintiff transacts business. Section 134(2) of the Trade Marks Act, 1999 enables the Plaintiff to institute any suit or proceedings in the District Court having jurisdiction over the territories where it “actually and voluntarily resides or carries business or personally works for gain”. This is also what is postulated by Section 62(2) of the Copyright Act, 1957. It was for this reason that their Lordships clarified that it was wholly irrelevant whether the Defendant was selling its products in the place where the suit had been filed. However, if the territorial jurisdiction is invoked by the Plaintiff on the ground of the cause of action having arisen in the form of

sale of offending goods within the territories of that Court, the question of Defendant's activity would become relevant and the Plaintiffs activity would become irrelevant. If the Plaintiff discloses that the Defendant has violated the Plaintiff's Trademark or Copyright in a particular place, the cause of action would arise therein and the observations in **Laxman Prasad** would clothe that Court with jurisdiction.

13. We approve the approach adopted in Pfizer Products Inc. –vs- Rajesh Chopra, 2006 (32) PTC 301 and in Boston Scientific International B.V. –vs- Metro Hospital, 2007 (136) DLT 278.

14. We are unable to appreciate the argument of learned Counsel for the Defendant which found favour before the learned Single Judge that **Liverpool & London S.P. & I Association Ltd.** –vs- M.V. Sea Success I, (2004) 9 SCC 512 supports the Defendant's case. Their Lordships had succinctly and perspicuously covered the conundrum before us in these words:-

Rejection of plaint

139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. Dealing with the merits of the case their Lordships noted that so far as the existence of a cause of action was concerned the documents filed along with the pleadings should be looked into. This was in addition to the pleadings, in order to explain or support them. Their Lordships did not enunciate that documents are necessary even if facts stand admitted. This is an altogether different situation from the "return" of the Plaint, which is onerous only to the extent that the same Plaint has to be filed in the Court which is competent to entertain it. So far as the rejection of a Plaint is concerned, it is tantamount to a dismissal of the Plaint and, therefore, the CPC justifiably

enumerates the circumstances in which such an order can be passed. It is trite that if a cause of action has not arisen, a suit has to be dismissed. Secondly, if the proper Court Fee has not been paid, and despite the opportunity the Plaintiff remains recalcitrant in making up the deficiency, there is every justification for dismissing the suit. Furthermore, if on a plain reading of the Plaint itself its entertainment appears to be barred by any law, it would be reasonable for it to be dismissed. Because of these implications, there is every reason that a Judge must be fully satisfied before passing an order which would have serious repercussions; therefore, it would be in the fitness of things for the Court to also look at documents which are available on the records before passing an order which virtually dismisses the suit, the only saving being that a fresh suit is not barred.

15. We have already noted the provisions of the CPC which enable documents to be filed at different stages of an adjudication of the plaint. Let us take the case of a plaint which merely asseverates certain facts and does not substantiate it by filing documents which may be available. In case the Plaintiff is desirous of obtaining interim relief, it would be reasonable for the Court not to act only on the pleadings. When the Court is called upon to decide an application under Order XXXIX documents become relevant and, therefore, they are required to be served on the opposite party for fear that on failure the interim order would stand recalled. However, if an ex parte order is not passed and a statement made in the plaint is admitted in the Written Statement, documents or oral evidence would become superfluous. At no point had their Lordships indicated that if documents have not been filed substantiating the averments made in a Plaint, the suit is liable to be dismissed. Myriad problems will arise if documents are to be looked at for the purposes of rejection of a plaint. At what stage of the proceedings must this exercise be carried out? Certainly, it is not possible to rely or take note of documents which are yet to be proved. Therefore, apart from very unlikely event where a document stands admitted by the Defendant at the

earliest stages of the litigation, it would be of little or no use to act upon them. However, if the Court is of the view that the suit is vexatious or has palpably been filed in a Court which does not possess jurisdiction, it is fully empowered to proceed under Order X of the CPC. Rule 1 thereof enables the Court to ascertain from the either parties before it whether it admits allegations of fact made in the Plaint or the Written Statement. Rule 2 thereof also postulates the Court examining any party to the lis with a view to elucidating matters in controversy in the suit or in answer to any material question relating to the suit. Obviously, this course could also be adopted by Courts to decide an issue which requires evidence to be adduced. Of course, the Court will take recourse to this provision only if it has, of its own, come to the conclusion that the litigation is an abuse of the process of Court. Otherwise, the provisions of Order XIV Rule 2 enjoin that Issues both of law and of fact would be decided at the end of suit. The said Rule envisages that if an Issue relating to the jurisdiction of the Court is an Issue of law only, in contradistinction to an Issue both of law and of fact, it may try such an Issue first. Seen from all perspectives, therefore, it would be in very rare cases (such as an admission of fact by the adversary) that a plaint can be returned or rejected, as the case may be. Otherwise, as applies to both the Plaint and the Written Statement, the pleadings at the initial stages must be approached as if they are correct either for rejecting the plaint or decreeing the suit. This is what **Liverpool** holds as it reiterates the established position that pleadings at the initial stages must be taken as a true and correct narration of events."

(emphasis added)

4. The aforesaid paragraphs of the Division Bench judgment of this Court therefore leave no manner of doubt that it is only the averment in the plaint and taking them as correct which has to be considered at the stage of deciding an application under Order 7 Rule 11 CPC. Thus qua passing off issue in the subject suit the Court has jurisdiction in view of the averments in para 23 of the plaint reproduced above and the Courts at Delhi have territorial jurisdiction inasmuch as the

appellants/plaintiffs allege that defendants/respondents are selling the impugned goods in Delhi. So far as the violation of copyright is concerned, it could not be disputed that under Section 62(2) of the Copyright Act, 1957, it is where the plaintiff resides/or carries on business, such Court would have territorial jurisdiction. The appellants/plaintiffs carry on business in Delhi as per the case of the appellants in the plaint and therefore, even qua the cause of action of infringement of copyright, the civil Courts at Delhi have territorial jurisdiction.

5. In view of the above, the appeal is allowed and the impugned judgment dated 12.10.2004 is set aside. It is held that the civil Courts at Delhi would have territorial jurisdiction at this stage of pleadings i.e. nothing contained in this judgment is a final expression of opinion on merits of the issue of territorial jurisdiction and the said issue will be decided after evidence is led by both the parties i.e. at the stage of final arguments. The appeal is allowed and disposed of in terms of the aforesaid observations leaving the parties to bear their own costs. Trial Court record be sent back”.

5. It is, therefore, clear that the impugned order returning the plaint under Order 7 Rule 10 is illegal because jurisdiction questions are decided after evidence is led by both the parties.

6. Learned counsel for respondents/defendants firstly argued in support of the impugned judgment by reference to para 25 (b) of the plaint where the plaintiff has prayed for injunction with respect to immovable property. However, it is noted that the trial court has not returned the plaint on the ground that injunction is being prayed against the immovable properties situated at Allahabad. Also counsel for the appellant states before this Court

that this para of the prayer clause actually is for execution of the decree of injunction against infringement, passing off etc, and will be made after the judgment and decree in the suit and the same for the present is accordingly deleted.

7. Learned counsel for respondent secondly argued that this Court has no jurisdiction when we read Section 134 of the Trade Marks Act, 1999. However, I have really failed at all to appreciate this argument because the provision of Section 134 was amended to give an extension to the provision of Section 20 CPC in trade mark suits and as per which suit originally could only be filed where the cause of action arose but by amending Section 134 an additional right was given where plaintiff has a registered trademark to file a suit where the plaintiff is situated although the case does not fall under Section 20 CPC for territorial jurisdiction. This additional ground given under amended Section 134 for suits be filed even where the goods are not sold has no bearing on the impugned judgment and hence the second argument urged on behalf of respondents/defendants also has no merit and is thus rejected.

8. In view of the above, the appeal is allowed subject to payment of costs of Rs. 30,000/- to be paid to the appellant by the respondents/defendants and which shall be a condition precedent to the

respondents/defendants pursuing their defence in the trial court.

9. Parties to appear before the District and Sessions Judge, Saket Courts, New Delhi on 23.04.2014, and on which date the District and Sessions Judge will mark the suit to a competent Court for disposal in accordance with law. Trial court record be also sent to the District and Sessions Judge, Saket Courts before the date fixed.

10. Since the appeal is allowed and the impugned order is set aside, whatever interim orders were passed in the suit, will stand revived.

VALMIKI J. MEHTA, J

MARCH 14, 2014/cl