* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **CS(OS) No. 2660/2015**

% **3rd September, 2015**

THE FOUNDRY VISIONMONGERS LTD. ..... Plaintiff

Through: Mr. Sudhir Chandra, Sr.Adv. with Mr. Pravin Anand, Mr. Shantanu Saham, Ms. Kruttika Vijay and Mr. Aashish Somasi, Advocates.

versus

SATYANARAYANA REDDY S & ANR. ..... Defendants

Through:

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

CS(OS) No. 2660/2015 & I.A.Nos. 18380/2015 (stay), 18381/2015 (U/o 26 R-9 & 10 CPC & I.A.No. 18383/2015 (for extension of time to comply with the provision of Order 39 Rule 3 CPC)

1. This is a suit filed by the plaintiff company/M/s Foundary Visionmongers Ltd. By the suit, the plaintiff seeks reliefs of permanent injunction etc with respect to the cause of action averred by the plaintiff in the plaint pertaining to infringement by the defendants of the Copyright of

the plaintiff in plaintiff's various software programs with the principal program being 'NUKE'. The software programs of the plaintiff are used with respect to picture film, animation, commercials, and broadcast post-production. As per the suit plaint, the defendants are violating the Copyright of the plaintiff by using the software programs without obtaining the requisite licence from the plaintiff.

2. There are two defendants in the suit and addresses of both the defendants are of Hyderabad. Defendant no.1 is an individual and defendant no.1 is said to be carrying on its business in the name of the defendant no.2. Plaintiff has filed the suit claiming existence of territorial jurisdiction of the courts at Delhi in terms of averments of paras 1 and 6 of the plaint that plaintiff is carrying on business in Delhi because plaintiff has its exclusive reseller (i.e dealer) in Delhi. Paras 1 and 6 of the plaint read as under:-

> "1. The Plaintiff, The Foundry Visionmongers Ltd is a company registered under the laws of England of Wales having its registered office at 5 Golden Square Golden Square London W1F 9HT United Kingdom, The Plaintiff is carrying on business of marketing, selling and supporting services in India through its exclusive reseller ARK Infosolutions Pvt. Ltd. having its registered office located at 4428, Ganesh Bazaar, Cloth market, New Delhi – 110006. Col. J K Sharma (Retd.) is the duly authorized signatory of the Plaintiff and is competent to sign verify and institute the present proceedings. A copy of the Power of Attorney as executed in favour of Col. J K Sharma by the plaintiff has been filed in the present proceedings and may be kindly referred to.

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6. In India, Plaintiff carries on business through its exclusive reseller, ARK Infosolutions Pvt. Ltd (hereinafter ARK Info) having its registered office located at 4428, Ganesh Bazar, Cloth Market, Delhi-110006. ARK Info is the Plaintiffs exclusive reseller in the territory of India for the software program NUKE (including its various editions and versions). ARK Info Provides services of marketing promotion, training on the software programs for the customers, sale of software licenses of the Plaintiff as well as supporting the maintenance services of the Plaintiff. For its services, ARK Info is entitled to a commission on ever sale of software license or sale of maintenance services thereof. ”

3. As per the territorial jurisdiction; para 33 of the plaint, this Court has territorial jurisdiction because of Section 62(2) of the Copyright Act, 1957 and because the plaintiff is carrying on business in Delhi. This para 33 of the plaint pertaining to territorial jurisdiction reads as under:-

“JURISDICTION

33. This Hon’ble court has jurisdiction to entertain and try the present Suit by virtue of Section 62 (2) of the Copyright Act, 1957 as the Plaintiff carries on its business for profit and gains in Delhi through its authorized reseller ARK Infosolutions Pvt. Ltd. who offer the whole range of the plaintiff’s products and services. Amongst the several ways in which the Plaintiff carries on business are the following, though the list is not comprehensive and the Plaintiffs crave leave to rely on additional evidence at a later stage of the proceeding:

i. Through the distributor of Plaintiff which is located at 4428, Ganesh Bazaar, Cloth Market, New Delhi – 110006 to provide marketing, demonstration of the Foundry solutions, technical support and channel sales management.

ii. Through a host of other activities as enumerated in para 6 hereinabove which constitute and contribute in one-way or the other to the Plaintiffs' business thereby clothing this Hon'ble court with the necessary jurisdiction to entertain the present suit in terms of the guidelines laid down in the Supreme Court judgments in Dodha House vs. SK Mangi [2006 (9) SCC 41] and Indian Performing Rights Society Ltd. vs Sanjay Dalia [Civil Appeal No. 10643-44 of 2010]

The Plaintiffs crave leave to refer to and rely upon detailed particulars and evidence in support of these."

4. The issue before this Court is that whether this Court has territorial jurisdiction to try and determine the present suit.

5. Territorial jurisdiction of a court exists in a case such as the present either by virtue of Section 20 of the Code of Civil Procedure, 1908 (CPC) or on account of Section 62 of the Copyright Act. For the sake of convenience these two provisions are reproduced below:

Section 20 of the Code of Civil Procedure, 1908

"**Section 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 a Court within the local limits of whose jurisdiction –

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

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

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

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."

Section 62 of the Copyright Act, 1957

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

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

6. In an ordinary civil suit, territorial jurisdiction of a court arises either because of residence of the defendant within the territorial jurisdiction of the court or because of arising of whole or part of the cause of action within the territorial jurisdiction of the court or on account of the defendant carrying on business at a particular place within the territorial jurisdiction of the court. So far as a corporation or a company is concerned, the

Explanation to Section 20 CPC brings out a deeming provision that when the expression "carrying on business" is found in Section 20 CPC, then such expression of "carrying on business" with respect to a corporation has necessarily to be linked with respect to the carrying on business by the corporation by its principal office or a sole office or a subordinate office and that it is because of existence of any such office that the cause of action arises by the company/corporation carrying on its business through any such office. Putting it in other words, carrying on business by a corporation, in view of Explanation to Section 20 CPC, is not seen *dehors* existence of an office of a corporation but that the carrying on business is inextricably linked to existence of an office whether the office is a principal office or a sole office or a registered office or a subordinate office. This aspect will also become clear from the observations of the Supreme Court in the judgment in the case of ***Dhodha House & Patel Field Marshal Industries Vs. S.K. Maingi & P.M. Diesel Ltd. 2006 (32) PTC 1 (SC)*** and in which judgment the Supreme Court has referred to its earlier judgment in the case of ***Morgan Stanley Mutual Fund Vs. Kartick Das, (1994) 4 SCC 225,*** and which aspect is discussed in detail below.

7. On behalf of the plaintiff, it is strenuously argued that this

Court at this stage of the suit coming up for admission must take the contents of paras 1 and 6 of the plaint as true and once these contents of paras 1 and 6 are taken as true, the plaintiff is clearly carrying on business at Delhi because plaintiff has an exclusive reseller or dealer/distributor in Delhi. Leaned Senior Counsel for the plaintiff in this regard places very strong reliance on paras 48 to 50 of the judgment in the case of ***Dhodha House (supra)*** and these paras read as under:-

> “48. In **Dhodha House** (supra), admittedly the plaintiff-Appellant neither resided at Ghaziabad nor carried on any business at the place of residence of the respondent. In **Patel Field Marshal** (supra), the registered office of the plaintiff-firm was at Rajkot. Ordinarily, the residence of a company would be where registered office is [See **Morgan Stanley Mutual Fund v. Kartick Das, (1994)4SCC225]**.
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> 49. The expression 'carries on business' and the expression 'personally works for gain' connotes two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not event visit that place. The phrase 'carries on business" at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, **a share in the gain or loss *and*** some control there over. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely:-
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>> "(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the **name** of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does

not "carry on business" in Bombay so as to render itself liable to be sued in Bombay.

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

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

[See Mulla on the Code of Civil Procedure (Act V of 1908) - Fifteenth Edition - Volume I, Pages 246-247.]

50. A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where it has a subordinate office. **Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place.**"

(emphasis is of this Court)

8. During the course of arguments, certain paragraphs of the recent judgment of the Supreme Court in the case of ***Indian Performing Rights Society Ltd. Vs. Sanjay Dalia & Anr. 2015 (7) SCALE 574*** were also referred to on behalf of the plaintiff to argue existence of territorial jurisdiction of this Court.

9. The neat issue before this Court is that whether plaintiff which is a company/corporation can be said to be carrying on business in Delhi simply on account of the fact that the plaintiff has an exclusive reseller in Delhi and which exclusive reseller of the plaintiff sells plaintiff's products in India and services the products of the plaintiff which are sold. I may note that there is no dispute that neither whole or even a part of the cause of action has not accrued in Delhi and this is because the infringement of Copyright (and which is the cause of action for filing of the suit), is taking place not at Delhi but at Hyderabad where the defendants are located and are said to be infringing the Copyright works of the plaintiff.

10(i). One thing is clear from the reading of paras 1 and 6 of the plaint alongwith para 33 of the plaint that it is not the case of the plaintiff that the business of the reseller of the plaintiff in India, M/s ARK Infosolutions Pvt. Ltd. is owned by the plaintiff. Putting it in other words, the profit and loss of business of the exclusive reseller, M/s ARK Infosolutions Pvt. Ltd. is not of the plaintiff. Putting it in the words of the Supreme Court as used in para 49 of ***Dhodha House's*** case ***(supra)***, plaintiff has no share in the gain or loss of its exclusive reseller and which is a separate legal entity than the plaintiff and the plaintiff has no ownership interest in the exclusive reseller. The exclusive reseller is only the exclusive agent of the plaintiff and the products of the plaintiff are sold in India through the exclusive reseller. The exclusive reseller, M/s ARK Infosolutions Pvt. Ltd. is also not a subsidiary company of the plaintiff company.

(ii) The question is that whether in such aforesaid facts and circumstances where the plaintiff sells its products in India through an agent being an exclusive reseller whether only on account of existence of such an aspect it is sufficient to hold that the plaintiff carries on business in New Delhi and thus this Court has territorial jurisdiction.

(iii). In my opinion, the answer to the above question has to be clearly in the negative and for which purpose the very paragraphs of the judgment of the ***Dhodha House's*** case ***(supra)*** which are relied upon by the plaintiff need to be referred to because the observations in fact do not support the plaintiff but on the contrary go against the plaintiff.

11(i) A reading of para 49 of the judgment in the case of ***Dhodha House (supra)*** makes it clear that carrying on business can only be when a plaintiff which is a company has an interest in the business which is carried on i.e a share in the gain or loss AND some control thereof. Obviously control of the business is alongwith share in the gain and loss and control is not a control of a principal over an agent and this becomes clear from use of the expression 'and' after 'share in gain or loss' and before the words 'some control there over'.

(ii) This conclusion also becomes clear when we refer to sub-para 1 of para 49 of ***Dhodha House's*** case ***(supra)*** and in which sub-para 1 the circumstances which are identical to this case have been set out. In sub-para 1 of para 49 of ***Dhodha House's*** case ***(supra)*** reference is made to the facts of the case where the firm is in England in the name of A.B. & Co. and which firm employs in Bombay another firm which carries on business in the name of C.D. & Co., for the latter firm to act as the English firm's commission agents in Bombay, and the Supreme Court in such facts held that it cannot be held that the London firm is carrying on business in Bombay so as to render itself liable to be sued in Bombay.

12. Clearly, therefore, existence of a commission agent, i.e the

exclusive reseller of the plaintiff, who acts on behalf of the plaintiff/company which is not registered in India; plaintiff being the registered company in U.K. and it has no registered office in India or even a subordinate office for that matter; it cannot in such facts be said that the plaintiff is carrying on business' in New Delhi. Sub-para 1 of para 49 of ***Dhoda House's*** case ***(supra)*** therefore clearly shows that as per the facts of the present case merely because the plaintiff has an exclusive reseller at Delhi in India, the courts at Delhi would not have territorial jurisdiction.

13. Learned Senior Counsel for the plaintiff argued that when the exclusive reseller in Delhi sells the goods, the exclusive reseller sells the goods on commission and plaintiff receives the sale consideration and hence the courts at Delhi would have territorial jurisdiction, but I cannot agree that this argument confers territorial jurisdiction to Delhi courts, inasmuch as, sub-para 1 of para 49 of ***Dhodha House's*** case ***(supra)*** makes it clear that mere receipt of sale consideration from a commission agent will not mean that business of the commission agent will become business of the foreign company which is not registered in India, once the foreign company does not participate in the profit/loss of the agent/reseller. Also, the argument urged on behalf of the plaintiff that the exclusive reseller provides after sale

services and other related services on behalf of the company and therefore plaintiff company carries on business in India, is an argument only for being noted to be rejected because once again the service business is not the business of the plaintiff company in the sense that plaintiff has any interest in the profit or loss of this business. Once the exclusive reseller is a totally separate legal entity in which the plaintiff company has no ownership interest, therefore in such circumstances, it cannot be said that the business of the exclusive reseller is the business of the plaintiff company and therefore the plaintiff company is allegedly carrying on business in Delhi through the exclusive reseller.

14. I may further note that in sub-para 3 of para 49 of ***Dhodha House's*** case ***(supra)*** it is mentioned that only when a company which is incorporated outside India gets itself registered in India and then does business in that place in India through its agent, in such circumstances, that court would have territorial jurisdiction and to apply which condition, a company which is incorporated outside India has to get itself registered in India. In the present case, there is no case laid out before this Court that the plaintiff company which is a registered corporation in U.K has got itself registered in India. Also as per the facts stated in sub-para 3 of para 49 of

Dhodha House's case ***(supra),*** the acceptance of the insurance proposals and payment of claims was only for and on behalf of the principal and the receipt of insurance proposal and payment of claims was not as per the ownership rights in such actions/business of the agent.

15. In my opinion, any doubt in this regard is removed by reference to para 50 of the judgment in the case of ***Dhodha House (supra)*** and last line of which para 50 makes it absolutely and completely clear that merely because goods of a company are sold at a particular place would not mean that company carries on business at such place. Therefore, once plaintiff has no registered office or principal office or a subordinate office in Delhi, Delhi courts would have no territorial jurisdiction merely because goods of the plaintiff are sold in Delhi through its exclusive reseller and the plaintiff has no ownership right of profit/loss in the business of the exclusive reseller.

16. No doubt, Section 62 of the Copyright Act allows a plaintiff to file a suit where the plaintiff is carrying on business, however, what is carrying on a business has been decided and pronounced upon in ***Dhodha House's*** case ***(supra)*** and therefore even though plaintiff can file a suit where it carries on business in infringement cases under the Copyright Act, however when a plaintiff is a company, carrying on business by a company

can only be where the plaintiff company has an office and it is only through the office being the principal office or the sole office or the registered office or the subordinate office that the company can be said to carry on business ie a company's carrying of business is not seen independently of existence of an office and merely selling of goods by a company without office at the place where the goods are sold will not mean that the company is said to be "carrying on business" simply because of selling of goods.

17. I may at this stage make reference to paras 14, 15, 16 and 19 of the judgment in the case of ***Indian Performing Rights Society Ltd. (supra)*** because these paras in my opinion further make it clear that carrying on business of a company is necessarily with respect to carrying on business only through an office being a principal office or a subordinate office. These paras reproduced below show that wherever the expression "carrying on business" is used, after that expression there is a stroke showing an alternative that when carrying on business of a company is concerned, carrying on business has necessarily to be only through an office of a company. These paras are therefore in accordance with paras 49 & 50 of the judgment in ***Dhodha House's*** case ***(supra)*** which clarifies that a company cannot be said to be carrying on business merely because it sells its goods at

a particular place. These paras read as under:-

> "14. 'Corporation' in the Explanation would mean not only the statutory corporation but companies registered under the Companies Act, as held by this Court in *Patel Roadways Ltd., Bombay v. Prasad Trading Co. etc.* [1991 (4) SCC 270] and *New Moga Transport Co., through its Proprietor v. United India Insurance Co. Ltd. & Ors.* [2004 (4) SCC 677]. <u>The domicile of the company is fixed by the situation of its principal place of business as held in *Jones v. Scottish Accident Insurance Co.* (1886) 17 QBD 421. In the case of companies registered under the Companies Act, the controlling power is, as a fact, generally exercised at the registered office, and that office is therefore not only for the purposes of the Act, but for other purposes, the principal place of business, as held in *Watkins v. Scottish Imperial Insurance Co.* (1889) 23 QBD 285</u>. A company may have subordinate or branch offices in fifty different jurisdictions and it may be sued in any one of such jurisdictions in respect of a cause of action arising there, has been held in *Peoples' Insurance Co. v. Benoy Bhushan* [AIR 1943 Cal. 190]; *Home Insurance Co. v. Jagatjit Sugar Mills Co.* [AIR 1952 Page 13 13 Punj. 142]; and *Prag Oil Mils Depot v. Transport Corpn. of India* [AIR 1978 Ori. 167].
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> 15. Accrual of cause of action is a sine qua non for a suit to be filed. Cause of action is a bundle of facts which is required to be proved to grant relief to the plaintiff. Cause of action not only refers to the infringement but also the material facts on which right is founded. Section 20 of the CPC recognises the territorial jurisdiction of the courts inter alia where the cause of action wholly or in part arises. It has to be decided in each case whether cause of action wholly or in part arises at a particular place. As held by this Court in *Rajasthan High Court Advocates Association v. Union of India & Ors.* [AIR 2001 SC 416]. Thus, a plaintiff can also file a suit where the cause of action wholly or in part arises.
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> 16. On a due and anxious consideration of the provisions contained in section 20 of the CPC, section 62 of the Copyright Act and section 134 of the Trade Marks Act, and the object with which the latter provisions have been enacted, it is clear that if a cause of action has arisen wholly or in part, where the plaintiff is residing <u>**or having its principal office/carries on business**</u> or personally works for gain, the suit can be filed at such place/s.

Plaintiff(s) can also institute a suit at a place where he is residing, carrying on business or personally works for gain *de hors* the fact that the cause of action has not arisen at a place where he/they are residing or any one of them is residing, carries on business or personally works for gain. However, this right to institute suit at such a place has to be read subject to certain restrictions, such as in case plaintiff is residing or carrying on business at a particular place/having its head office and at such place cause of action has also arisen wholly or in part, plaintiff cannot ignore such a place under the guise that he is carrying on business at other far flung places also. The very intendment of the insertion of provision in the Copyright Act and Trade Marks Act is the convenience of the plaintiff. The rule of convenience of the parties has been given a statutory expression in section 20 of the CPC as well. The interpretation of provisions has to be such which prevents the mischief of causing inconvenience to parties.

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19. At the same time, the provisions of section 62 of the Copyright Act and section 134 of the Trade Marks Act have removed the embargo of suing at place of accrual of cause of action wholly or in part, with regard to a place where the plaintiff or any of them ordinarily resides, carries on business or personally works for gain. We agree to the aforesaid extent the impediment imposed under section 20 of the CPC to a plaintiff to institute a suit in a court where the defendant resides or carries on business or where the cause of action wholly or in part arises, has been removed. But the right is subject to the rider in case plaintiff resides or has its principal place of business/carries on business or personally works for gain at a place where cause of action has also arisen, suit should be filed at that place not at other places where plaintiff is having branch offices etc." (emphasis is mine)

18. In view of the above, taking the averments in paras 1 & 6 of the plaint as deemed to be correct, yet this Court would not have territorial jurisdiction to try and determine the present suit. This suit can only be instituted at Hyderabad where the cause of action arises, wholly or in part.

Plaintiff could have filed a suit in Delhi if cause of action may not have arisen wholly or in part in Delhi and there was no infringement in Delhi but that was subject to the condition that plaintiff carries on business through its office at Delhi and which is not the position in the present case.

19. Accordingly, the suit plaint is directed to be returned to the plaintiff for being filed in the court of correct territorial jurisdiction. In case the plaintiff does not receive back the plaint from the Registry of this Court within six weeks, the suit will stand dismissed.

SEPTEMBER 03, 2015 **VALMIKI J. MEHTA, J.**

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