

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 01.03.2017

+ **FAO (OS) No.49/2017 & CM Nos.6951-54/2017**

M/s ALLIED BLENDERS & DISTILLERS PVT. LTD ... Appellant

versus

PRAG DISTILLERY PVT. LTD & ANOTHER ... Respondents

Advocates who appeared in this case:-

For the Appellant : Mr Rajiv Nayyar, Sr Advocate with Mr Praving Anand,
Mr Sanjay Chhabra, Mr Saurabh Seth, Ms Kanak Bose,
Mr Pundreek Dwivedi, Ms Vijay Laxmi & Mr Umar Khan

For the Respondent 1 : Mr Hemant Singh with Ms Mamta Jha, Mr Manish K. Mishra &
Mr Waseem Shauaib Ahmed

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J

1. This appeal is directed against the judgment and / or order dated 06.01.2017 delivered by a learned single Judge of this court in IA No.19059/2015, which was an application filed by the respondent No.1 / defendant No.1 under Order VII Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). By virtue of the impugned

order, the learned single Judge allowed the said application and directed the return of the plaint on the ground that this court did not have territorial jurisdiction to entertain the suit.

2. The suit was filed by the appellant / plaintiff seeking a decree of permanent injunction restraining infringement of the trade mark and for a decree of permanent injunction restraining infringement of the copyright as well as for passing off. The appellant's case is that the respondent No.1, who is, *inter alia*, engaged in the business of bottling and manufacturing of alcoholic beverages, including whisky, is doing so under the trade mark "Smart Choice", which, according to the appellant / plaintiff, is deceptively similar to the plaintiff's trade mark "Officer's Choice". It is further alleged that the label used by the respondent No.1 / defendant No.1 is also substantially similar to the plaintiff's label "Officer's Choice".

3. On behalf of the respondent No.1 / defendant No.1, it was contended in support of the said application that the cause of action, as pleaded by the appellant / plaintiff, if at all, arose in the State of Andhra Pradesh as the alleged sales by the respondent No.1 / defendant No.1 were in the State of Andhra Pradesh and there were no sales in Delhi. It was, therefore, contended that the courts in Delhi had no jurisdiction insofar as the present

suit was concerned. It was also contended that the plea of territorial jurisdiction founded on Section 134(2) of the Trade Marks Act, 1999 was also not tenable because the appellant / plaintiff was not carrying on business within the jurisdiction of this court in the sense contemplated under Section 134(2) in the backdrop of the ratio of the Supreme Court decision in **Indian Performing Rights Society Limited v. Sanjay Dalia and Another: 2015 (10) SCC 161** and a decision of this court in **Ultra Home Construction Pvt Ltd. v. Purushottam Kumar Chaubey and Others: 2016 (65) PTC 459 (Del)(DB)**. It was submitted that a plaintiff could only institute a suit at the place of its subordinate / branch office if a part of the cause of action also arose at that place. It was submitted that no part of the cause of action arose in Delhi as the entire averments in the plaint were directed towards the sales of the respondent No.1 / defendant No.1 in the State of Andhra Pradesh.

4. Before the learned single Judge, the learned counsel appearing on behalf of the appellant / plaintiff agreed that by virtue of the law, as laid down in *Indian Performing Rights Society Limited (supra)* and as explained in *Ultra Home (supra)*, this court would not have any jurisdiction if no part of the cause of action had arisen within its territorial limits.

However, it was contended on behalf of the appellant / plaintiff that the part of the cause of action had indeed arisen in Delhi. It was contended that the respondent No.1 / defendant No.1 was a unit of Tilak Nagar Industries and Tilak Nagar Industries Limited was located in Delhi. It was also submitted that the plaintiff had made an averment in the plaint that it apprehended that the respondent No.1 / defendant No.1 would launch its products in Delhi and there was a reasonable apprehension because the respondent No.1 / defendant No.1, through the Tilak Nagar Industries Limited, had a distribution network in Delhi. It was, therefore, submitted on behalf of the appellant / plaintiff that the plaint clearly disclosed that a part of the cause of action, which was in the nature of a *quia timet* action, had arisen within the territorial limits of this court. Reliance was placed on the Division Bench decision in the case of **Teva Pharmaceutical Industries Limited and Others v. Natco Pharma Limited: 2014 210 DLT 591 (DB)** and the Supreme Court decision in **Exphar SA and Another v. Eupharma Laboratories Limited and Another: 2004 (3) SCC 688**, amongst other decisions. The learned single Judge agreed with the submissions made by the learned counsel for the respondent No.1 / defendant No.1 and held that this court did not have the territorial jurisdiction to entertain the plaint and, therefore, directed its return under Order VII Rule 10 of the Code.

5. On going through the impugned judgment, we find that the learned single Judge was correct in noting the proposition of law set down in *Exphar SA (supra)* and in observing that the question whether this court had the jurisdiction to try the present suit would have to be considered on a demurrer, that is, without looking into the defence pleaded by the defendants. The learned single Judge was also correct in observing in paragraph 14 of the impugned decision that the only question to be considered at this stage (the stage of order VII Rule 10 of the Code) was whether the averments made in the plaint indicated that the present suit was a *quia timet* action and was based on the plaintiff's apprehension of infringement of trade mark / copyright within the territorial limits of this court.

6. In the quest for an answer to the above question, the learned single Judge examined the plaint and, with particular reference to paragraphs 20 to 25 thereof, observed that the appellant / plaintiff was aggrieved by the use "and not the apprehended use" of the impugned mark "Smart Choice" and label by the defendants. The learned single Judge observed, upon a plain reading of the plaint, that the principal grievance articulated by the appellant / plaintiff appears to have been occasioned by the use of a trade

mark and label which is claimed to be deceptively similar to the trade mark and label of the appellant / plaintiff. The learned single Judge observed that there is no averment in the entire plaint from paragraph Nos. 1 to 25 which would indicate that the appellant / plaintiff apprehended the use of the trade mark in question in future and that, on the contrary, the averments articulated the appellant's grievances regarding the use of the trade mark by the respondent No.1 / defendant No.1. The learned single Judge concluded by stating that the plaint did not indicate that it was occasioned by any apprehension of a future launch of the product by the defendants. In arriving at this conclusion, the learned single Judge referred to paragraph 26 of the plaint, which was titled as "Cause of Action". However, in our view, it would be better if not only paragraph 26, but also paragraph 27 of the plaint is set out. They read as under:-

"CAUSE OF ACTION

26. The cause of action arose for the first time around the third week of September, 2013 when the Plaintiff came across the Defendants' product being sold under the impugned mark and label "Smart Choice" in the State of Andhra Pradesh. The Plaintiff has approached this Hon'ble Court at the earliest possible opportunity. The cause of action against the Defendants is continuing from day to day till the filing of the present suit and will continue until the Defendants are restrained by an order of injunction by this Hon'ble Court.

JURISDICTION

27. This Hon'ble Court has the territorial jurisdiction to try and entertain the instant suit by virtue of Section 62 (2) of the Copyright Act, 1957 and Section 134(2) of the Trade Marks Act 1999 as the Plaintiff being the owner of the copyright and the registered proprietor of the trademark in issue has its office located at A-61/5, Ground floor, GT. Kamal Road Industrial Area, Azadpur, Delhi. Moreover, the Plaintiff is also carrying on its business within the territorial limits of this Hon'ble Court in a variety of ways such as (but not limited to) sale of its products under the relevant marks in New Delhi. As the scope and extent of the Defendants' business is not known at present, it is believed that they have a reasonably large scale business around India and it is therefore strongly apprehended that they will launch the impugned product in New Delhi and would be available within the jurisdiction of this Hon'ble Court. It is submitted that the threat that the Defendants will sell and / or offer for sale the impugned product within the jurisdiction of this Hon'ble Court is credible and imminent. Thus, giving rise to a substantial and integral part of the cause of action within the jurisdiction of this Hon'ble Court. Thus, there is a reasonable apprehension that the Defendants have a distribution network in Delhi or are likely to sell their products bearing the impugned mark and label within the jurisdiction of this Hon'ble Court. Thus, this Hon'ble Court has the necessary jurisdiction by virtue of Section 20 of the Code of Civil Procedure, 1908."

(underlining added)

7. On going through the above, it becomes evident that while paragraph 26 does not contain any averment with regard to the apprehension that the product of the defendant would be sold in Delhi, paragraph 27, which is

under the heading “jurisdiction”, clearly indicates that there is a strong apprehension that the respondent No.1 / defendant No.1 would launch the impugned product under the impugned trade mark and label in New Delhi and would be available within the jurisdiction of this court. It is also clearly averred that the apprehension that the defendants would sell and / or offer for sale the impugned product within the jurisdiction of this court was credible and imminent. It was further alleged that this circumstance gave rise to a substantial and integral part of the cause of action within the jurisdiction of this court and that there was a reasonable apprehension that the respondents had a distribution network in Delhi and are likely to sell their product bearing the impugned mark and label within the jurisdiction of this court. It was, therefore, averred that this court had the necessary jurisdiction by virtue of Section 20 of the Code.

8. If an application under Order VII Rule 10 of the Code is to be decided on the assumption that the averments made in the plaint are correct, then, it will have to be assumed that there is a reasonable apprehension that the defendants would sell their product in Delhi bearing the impugned mark and label. There is no dispute with the proposition that a *quia timet* action is based upon an apprehended use and is preventive in nature intended to

prevent an apprehended wrong and an anticipated mischief. If we were, for the time being, to ignore the fact that the respondent No.1 / defendant No.1 was already selling the impugned product under the impugned mark and label in Andhra Pradesh, then the mere fact that the plaint contained an averment that there was credible and imminent apprehension that the infringing product would be launched by the defendants within the territorial jurisdiction of this court, would by itself constitute a cause of action. If this be the case, can it be said that just because the defendants were already selling the product in Andhra Pradesh it would take away part of the cause of action which was preventive of a future conduct on the part of the defendants ? We think not.

9. We are of the view that the learned single Judge fell in error when he took the view that although the appellant / plaintiff had averred that it had an apprehension that the defendants would sell their product in Delhi, the said apprehension was not substantiated by any material which would indicate a reasonable ground for the plaintiff to apprehend the same. We may point out that substantiation of an averment in a plaint by other material would come later. At the stage of filing of the plaint, it is only the

averment that has to be made with regard to a material fact. Substantiation is a part of evidence.

10. Another error, which, in our view, was committed by the learned single Judge, was in considering the case as if it was either with regard to the use of the mark by the defendants in Andhra Pradesh or it was a *quia timet* action vis-à-vis Delhi. Upon reading the plaint, one gets the impression that the suit was filed for the composite injuries which the defendants had allegedly inflicted and threatened to inflict on the plaintiff. The first part was linked with the sales in Andhra Pradesh and the second part was linked with the threat of sales in Delhi. We, therefore, feel that while the learned single Judge was correct in observing that the plaint must be read as a whole, we cannot, at the same time, disregard the averments made in paragraph 27 of the plaint with respect to part of cause of action being the result of a threat of sales in Delhi. Once it is recognized that such a threat can constitute a cause of action by itself, it can also constitute part of a larger cause of action, as in the case at hand.

11. In these circumstances, we are of the view that considering the plaint on a demurrer, it will have to be accepted, for the purposes of considering an application under Order VII Rule 10 of the Code that the averment of the

plaintiff of the imminent and credible threat or apprehension that the defendants would launch the product in Delhi, is correct. If this be the case, then, surely a part of the cause of action has allegedly arisen in Delhi. But, this is only for the purposes of considering whether a plaint should be returned or not.

12. It must be clarified that the considerations with regard to territorial jurisdiction in the context of Order VII Rule 10 of the Code are entirely different from those in an application under Order XXXIX Rules 1 & 2 of the Code or when a finding is to be returned on the issue of territorial jurisdiction. Under Order VII Rule 10 of the Code, only the averments in the plaint are to be seen and that, too, on the assumption that they are correct. While considering an application under Order XXXIX Rules 1 & 2 of the Code, not only the averments in the plaint but also other material including the defendant's reply and written statement are to be seen. For establishing the existence of a *prime facie* case (a condition precedent for an *ad interim* injunction order), the plaintiff would obviously have to demonstrate, albeit at a *prima facie* level, that the apprehension was reasonable and credible. Here, a mere averment in the plaint would not do. And, the assumption that the averments in the plaint are correct would also

not be available. Where the issue of jurisdiction is to be decided at the trial, the standard of proof would be even higher. Therefore, while for the purposes of an examination under Order VII Rule 10 of the Code, the court may 'conclude' that it has territorial jurisdiction, this would not come in the way of the defendant in raising a question as to territorial jurisdiction, both, when the issue of temporary injunction under Order XXXIX Rules 1 & 2 of the Code is being considered and when an issue as to territorial jurisdiction is being decided in the trial of the suit. In other words, while a plaintiff may succeed in demonstrating, for the purposes of Order VII Rule 10 of the Code that this court has territorial jurisdiction and that the plaint ought not to be returned, he may fail in obtaining an order of interim injunction on the ground that the plaintiff's case is itself shaky because the issue of territorial jurisdiction is highly debatable and *prima facie* not tenable. Therefore, the decision of the court in rejecting the objection of the defendant and in refusing the defendant's prayer for return of the plaint under Order VII Rule 10 of the Code, would not come in the way of the defendant raising the question of territorial jurisdiction, both as an objection to the grant of an interim injunction as also at the time of decision of the issue of territorial jurisdiction, if framed, at the trial of the suit.

Conclusion:

13. In view of the above discussion, the impugned judgment and / or order is set aside. IA No.19059/2015 is dismissed. The suit being [CS(OS) 2267/2013] is restored to its original number and it shall be placed before the learned single Judge for further proceedings on 17.03.2017.

The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

March 01, 2017

dutt