

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

% **Date of decision: 28th March, 2017**

+ **CS(OS) No.1891/2015**

RADICO KHAITAN LTD.

..... Plaintiff

Through: Mr. Sudhir Chandra, Sr. Adv. with
Ms. Ishani Chandra, Mr. Sagar
Chandra & Mr. Ankit Rastogi, Advs.

Versus

**NAKSHATRA DISTILLERIES & BREWERIES
LTD. & ANR.**

..... Defendants

Through: Mr. Hemant Singh, Mr. Shashi P.
Ojha & Mr. Madhav, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.13501/2015 (under Order VII Rule 11 of the CPC)

1. The defendants viz. Nakshatra Distilleries & Breweries Ltd. and Waterfield Spirits Pvt. Ltd. in this suit (for injunction to restrain the defendants i) from launching, selling, manufacturing, marketing, offering for sale or in any manner dealing in any alcoholic beverages including but not limited to Gin, Rum and Vodka under the mark "GOA" and "GO4" and / or any other mark which is identical or deceptively similar to plaintiff's trade mark "GOA" amounting to infringement of the registered trade mark Nos.628446 and 629645 in Class 33 in favour of the plaintiff; and, ii) from passing off their goods as that of the plaintiff and for ancillary reliefs), seek rejection of the plaint on the ground of this Court not having territorial jurisdiction to entertain the suit.

2. The application of the plaintiff being IA No.17297/2015 for amendment of the plaint, filed after this application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) is also pending consideration. Though an application for amendment of the plaint even if filed after the filing of an application under Order VII Rule 11 of the CPC has to be considered first but the amendment sought are not relatable to the ground of lack of territorial jurisdiction on which rejection of the plaint is sought. It is plea of the plaintiff in the application for amendment that though at the time of institution of the suit, the defendants had not launched their product bearing the mark “GOA” but have thereafter launched; hence the plaintiff seeks to amend the plaint to claim higher damages. Thus, notwithstanding the pendency of the application for amendment of the plaint, the counsels were heard on this application under Order VII Rule 11 of the CPC.

3. It is the plea of the defendants in the application dated 7th July, 2015 under Order VII Rule 11 of the CPC i) that the suit suffers from mis-joinder of causes of action; ii) that the plaintiff’s relief and claim for passing off is not maintainable on account of this Court not having jurisdiction to try the suit qua passing off since the defendants are neither residing in Delhi nor are carrying on their business within the territorial jurisdiction of this Court; no cause of action has arisen within the territorial jurisdiction of this Court; iii) that the two defendants have their registered office at Mumbai and Pune respectively; iv) that the defendant no.2 is in the business of marketing alcoholic beverages which are manufactured by the defendant no.1, in the State of Maharashtra alone; v) that alcoholic beverages is State Excise product and cannot be sold / marketed unless necessary label approvals are

obtained from the respective State Excise Departments; vi) that the label approvals obtained by the defendants and which are subject matter of the present suit were applied for and obtained with the Maharashtra State Excise Department (MSED) and no approvals have been sought from the Delhi State Excise Department; vii) that after the defendant no.1 was granted label approvals by the MSED, the defendants have been marketing their products under the said labels only in the State of Maharashtra; viii) that the plaintiff has a office at Mumbai and a bottling unit in Aurangabad, Maharashtra; ix) that this Court lacks territorial jurisdiction to entertain the suit under Section 20 of the CPC as the suit does not disclose any cause of action with respect to passing off and also because the cause of action if any has arisen at Solapur / Mumbai where the defendant no.1 resides and is carrying on business and where the plaintiff also is carrying on its business.

4. It is obvious that the application under Order VII Rule 11 of the CPC aforesaid, though dated 7th July, 2015, is in the context of the law as prevalent prior to ***Indian Performing Rights Society Ltd. Vs. Sanjay Dalia*** (2015) 10 SCC 161 which was pronounced on 1st July, 2015.

5. The plaintiff in its reply to the application under Order VII Rule 11 of the CPC has pleaded i) that the registered office of the defendant no.1 is at Solapur and not at Mumbai; ii) that the plaintiff is claiming jurisdiction of this Court by virtue of Section 134(2) of the Trade Marks Act, 1999 and Section 20(c) of the CPC; iii) that a part of the cause of action in the present suit has arisen within the territorial jurisdiction of this Court as the dynamic effects of the defendants actions are being felt by the plaintiff at Delhi and as there is credible and imminent threat that the defendants will also launch the

impugned products nationally including within the territorial jurisdiction of this Court – on such pleas in the plaint, which alone are to be seen at this stage, this Court has territorial jurisdiction; iv) that the plaintiff has no office in Aurangabad; v) that the plaintiff does not have any bottling unit in Aurangabad; vi) that the bottling unit in Aurangabad is of Radico NV Distilleries Maharashtra Ltd. which is a joint venture company and the plaintiff is just a shareholder holding 36% of the shares of Radico NV Distilleries Maharashtra Ltd.; vii) that the plaintiff gets some of its bottling done from Radico NV Distilleries Maharashtra Ltd.; viii) that the plaintiff however admits selling its products all over country including Mumbai as well as Solapur; and, ix) that the Mumbai office of the plaintiff is a subordinate sales / branch office only and the principal place of business / corporate office of the plaintiff is in New Delhi and registered office at Rampur, Uttar Pradesh.

6. The defendants have filed a rejoinder pleading i) that the defendant no.1 applied for label for its alcoholic beverages subject matter of present proceedings only before MSED, Mumbai; the said label was objected to by the plaintiff through its Mumbai office which is evident from the plaintiff's letters dated 23rd February, 2015, 22nd April, 2015 and 29th April, 2015 filed by the plaintiff itself; ii) that the MSED, Mumbai fixed hearings at its Mumbai office and intimated the plaintiff at its Mumbai address through communications dated 25th March, 2015 and 18th April, 2015; iii) that these communications clearly show that the plaintiff was pursuing the proceedings before the MSED, Mumbai through its Mumbai office; iv) that it is difficult to comprehend as to why the plaintiff did not file the present suit at Mumbai

in which jurisdiction it is carrying on its business and where also the alleged cause of action has arisen; v) that the defendants neither have any operation nor intend to do any business under the impugned trade mark at Delhi; hence no cause of action has arisen at Delhi; vi) reliance is placed on ***Indian Performing Rights Society Ltd.*** supra; vii) that it was inadvertently stated that the registered office of the defendant no.1 is at Mumbai, it is at Solapur; viii) that this Court does not have territorial jurisdiction not only qua the relief of passing off but also qua the relief of infringement; ix) that the plaintiff has not explained as to how the so-called “dynamic effects” of the defendants’ actions are being felt by the plaintiff at Delhi; x) that the plaintiff has also not explained as to how there is “credible and imminent threat” that the defendants will also launch the impugned products nationally; and, xi) that alcoholic beverages are a State Excise product which cannot be sold / marketed unless necessary label approvals are obtained from the appropriate State Excise Department.

7. The senior counsel for the plaintiff and the counsel for the defendants were heard on 22nd July, 2016 and 27th July, 2016 and order reserved.

8. Besides the averments aforesaid, it was the contention of the counsel for the defendants i) that this is not a *quia timet* action as there are no particulars of any threat meted out by the defendants to sell at Delhi, within the jurisdiction of this Court; and, ii) as distinct from pharmaceutical products licence to sell which is throughout the country, sale of alcoholic products requires separate licence in each State. Reliance was also placed on ***Ultra Home Construction Pvt. Ltd. Vs. Purushottam Kumar Chaubey*** 2016 (65) PTC 469 (Del) (DB).

9. It was the contention of the senior counsel for the plaintiff i) that at the stage of Order VII Rule 11 of the CPC, only the plaint is to be seen; ii) that Delhi is the principal place of business of the plaintiff; iii) that residence of a company is where its registered office is situated; iv) that the registered office of the plaintiff is at Rampur in Uttar Pradesh and principal office at Delhi; v) that the suit for infringement of trade mark under Section 134(2) of the Trade Marks Act can be filed at the place of principal office; vi) that the cause of action has accrued to the plaintiff at Delhi because the plaintiff intends to sell in Delhi; vii) that the defendants in their written statement have not pleaded that they do not intend to sell at Delhi and saying so orally is irrelevant; viii) Reliance was placed on *Pfizer Products, Inc. Vs. Rajesh Chopra* 2006 (32) PTC 301 (Del.) and *Teva Pharmaceutical Industries Ltd. Vs. Natco Pharma Ltd.* 2014 (59) PTC 124 (Del) (DB); ix) that Maharashtra is not a jurisdiction in itself; x) that it is the particular District Court which will have jurisdiction; xi) that the office of the plaintiff is at Mumbai and there is no evidence of the defendants selling in Mumbai; xii) there is no office of the plaintiff at Aurangabad or in Solapur; xiii) that applying for licence under the excise law at Mumbai or objecting thereto is not a cause of action and does not vest jurisdiction in Mumbai; xiv) reliance was placed on para no.31 of *Dhodha House Vs. S.K. Maingi* (2006) 9 SCC 41 to contend that it is the material cause of action which is relevant; and, xv) that the threat has already been implemented at Maharashtra.

10. I have considered the controversy.

11. Need to analyse *Indian Performing Rights Society Ltd.* supra qua Section 134 of the Trade Marks Act is not felt as the Division Bench of this

Court in *Ultra Home Construction Pvt. Ltd.* supra, after considering the same, has in para no.13 held as under:

“13. It is evident from the above observations that the interpretation given to the expression "carries on business" in the context of a defendant under Section 20 of the Code has also been employed in the context of a plaintiff under the said Sections 134(2) and 62(2). Thus, in addition to the places where suits could be filed under Section 20 of the Code, the plaintiff can also institute a suit under the Trade Marks Act, 1999 and the Copyright Act, 1957, as the case may be, by taking advantage of the provisions of Section 134(2) or Section 62(2), respectively. Both the latter provisions are in *pari materia*. Under these provisions four situations can be contemplated in the context of the plaintiff being a corporation (which includes a company). First of all, is the case where the plaintiff has a sole office. In such a case, even if the cause of action has arisen at a different place, the plaintiff can institute a suit at the place of the sole office. Next is the case where the plaintiff has a principal office at one place and a subordinate or branch office at another place and the cause of action has arisen at the place of the principal office. In such a case, the plaintiff may sue at the place of the principal office but cannot sue at the place of the subordinate office. The third case is where the plaintiff has a principal office at one place and the cause of action has arisen at the place where its subordinate office is located. In this eventuality, the plaintiff would be deemed to carry on business at the place of his subordinate office and not at the place of the principal office. Thus, the plaintiff could sue at the place of the subordinate office and cannot sue (under the scheme of the provisions of Section 134(2) and 62(2)) at the place of the principal office. The fourth case is where the cause of action neither arises at the place of the principal office nor at the place of the subordinate office but at some other place. In this case, the plaintiff would be deemed to carry on

business at the place of its principal office and not at the place of the subordinate office. And, consequently, it could institute a suit at the place of its principal office but not at the place of its subordinate office. All these four cases are set out in the table below for greater clarity:

S.No.	Place of Plaintiff's Principal Office (Sole office in s.no.1)	Place of Plaintiff's Subordinate /Branch Office	Place where cause of action arose	Place where Plaintiff can additionally sue under section 134(2) and section 62(2)
1	A	--	C	A
2	A	B	A	A
3	A	B	B	B
4	A	B	C	A

”

12. The plaintiff herein has admitted having a subordinate office at Mumbai.

13. The question which arises is, whether any cause of action has accrued to the plaintiff against the defendants at Mumbai. If it is so, then the present case would fall in the third of the four categories carved out in ***Ultra Home Construction Pvt. Ltd.*** supra, and in which eventuality, the plaintiff, would be deemed to be carrying on business at the place of its subordinate office and not at the place of its principal office which the plaintiff claims to be at Delhi and the plaintiff would then be able to invoke Section 134 of the Trade Marks Act at Mumbai.

14. The plaintiff along with its application under Order VI Rule 17 of the CPC supra has filed as Annexure-A thereto a photograph of the impugned product. The said photograph shows the product of the defendants with a label on which it is *inter alia* stated that it is “for sale in Maharashtra State

only”. It is thus evident that the defendants are effecting sales in Mumbai and the cause of action for the reliefs as sought in this suit would accrue to the plaintiff at Mumbai and the Courts at Mumbai would thus have jurisdiction to entertain the suit. Once it is so, then the case of the plaintiff would fall in the third category as aforesaid. Even without looking at the application under Order VI Rule 17 of the CPC of the plaintiff, as per averments in the plaint as originally filed also, from the approval from the MSED then applied for and obtained by the defendants and ‘dynamic effects’ whereof were claimed by the plaintiff as being felt at Delhi, it stands admitted that cause of action also accrued at Mumbai where the defendants in pursuance to the said approvals were entitled to sell. It cannot possibly be disputed that if dynamic effect in Delhi of sales in Maharashtra can accrue to the plaintiff cause of action at Delhi and vest the Courts in Delhi with jurisdiction, the cause of action will definitely accrue where the sales are effected i.e. Maharashtra of which effects are felt in Delhi. No merit is found in the contention of senior counsel for the plaintiff that there is no evidence of sales in Mumbai. Once the plaintiff’s own documents and pleadings are of defendants being approved to sell in Maharashtra, which includes Mumbai, in the absence of plaintiff showing anything to the effect that defendant is under the said approvals not entitled to sell in Mumbai, such arguments cannot be raised. Moreover the ‘credible and imminent’ threat if capable of furnishing cause of action, at the time of institution of suit, was indeed at Mumbai than at Delhi.

15. An ancillary issue also arises for consideration whether the subordinate office should be the exact place of cause of action or it is

sufficient if there is subordinate office of the plaintiff in the State in which cause of action has accrued.

16. The said aspect does not appear to have been considered in *Indian Performing Rights Society Ltd.* or in *Ultra Home Construction Pvt. Ltd.* or in subsequent judgment in *RSPL Limited Vs. Mukesh Sharma* 2016 SCC OnLine Del 4285 (DB).

17. Having given consideration to the matter, I am of the view that to read *Indian Performing Rights Society Ltd.* supra and the other judgments as requiring the subordinate office of the plaintiff to be exactly in the same district in which the State may have been divided for the purposes of territorial jurisdiction of the Court would negate the purpose of the judgment. Supreme Court, in *Indian Performing Rights Society Ltd.* supra held that the object of Section 134 of the Trade Marks Act is to enable the plaintiff to institute a suit at a place where he or they resided or carried on business, not to enable them to drag defendant further away from such a place also. It was further held that the right under Section 134 to institute suit at a place where plaintiff is residing, carrying on business is 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.” It was further held “The interpretation of provisions has to be such which prevents mischief of causing inconvenience to parties”. The Supreme Court thus, introduced an element of ‘forum conveniens’ in interpretation of Section 134.

18. Reference to the word “place” in the judgments, in my opinion has to be construed as the “State”. The judiciary of the State is one and the division of the territorial jurisdiction into districts is a matter of administrative convenience and exigency. All the State districts would come under the supervision of the High Court of the State and thus the words “place” has to be read as the “State” within which cause of action has arisen, even if cause of action may have been arisen in any particular district of the State and not in the district or the city where the subordinate office of the plaintiff is situated.

19. Moreover in the present case the plaintiff, though having subordinate office at Mumbai and not at Solapur, admits to carrying on business in the whole of the State of Maharashtra including at Solapur. Section 134 of the Trade Marks Act entitles the plaintiff to institute the suit at a court within whose local limits the plaintiff “actually or voluntarily resides or carries on business.....”. Applying this logic also, the plaintiff cannot be heard to contend that Section 134 cannot be invoked by it at Mumbai and Solapur which are admittedly a more convenient jurisdiction than Delhi for defendants.

20. The contention of course of the senior counsel for the plaintiff is that the cause of action has arisen to the plaintiff at Delhi and thus the plaintiff is in a position to sue at Delhi.

21. The plaintiff claims cause of action to have accrued at Delhi pleading that “dynamic effect” of the defendants actions are being felt by the plaintiff

at Delhi and there is “credible and imminent threat” that the defendants will also launch the products at Delhi.

22. The senior counsel for the plaintiff did not dispute that the defendants, to be able to launch their products at Delhi, will have to obtain approval from the Excise Authorities at Delhi. It is not the case of the plaintiff that the defendants have applied for such approval or taken any other steps for obtaining the said approval in Delhi. I have already recorded the plea in the rejoinder of the defendants, of their not intending to launch the products at Delhi. Though undoubtedly, denial by the defendants cannot oust the cause of action as held by the Division Bench of which I was a member in *Teva Pharmaceutical Industries Ltd.* supra but in the facts of the present case where the defendants have already launched the products by obtaining approvals from the Excise Authorities in the State of Maharashtra and where the defendants, for launching the products in Delhi are required to obtain approvals at Delhi and for obtaining which no steps have been taken, if it was to be held that a plaintiff merely by averring a threat can create jurisdiction, it would be contrary to the settled principle of law that by clever draftsmanship cause of action or jurisdiction cannot be created. Reference in this regard can be made to *Ram Singh Vs. Gram Panchayat Mehal Kalan* (1986) 4 SCC 364 where it was held that where civil court's jurisdiction is barred under certain circumstances, plaintiff cannot be permitted to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances. It is also the settled principle in law that the Court even while considering the application under Order VII Rule 11 of the CPC is to scrutinise the plaint and the documents filed therewith to

see whether the pleas are substantial and material or not or merely a play of words so as to initiate the legal process. The words “dynamic effect” and “credible and imminent threat” sound impressive but are without any particulars and hollow. Such words cannot be permitted to create territorial jurisdiction of the Court. If such words were to be permitted to create territorial jurisdiction, the same would result in the Courts allowing their process to be used as a tool of harassment by permitting a plaintiff to drag a defendant to any Court where the plaintiff may feel that it will have an advantage over the defendant. Moreover, whether a Court has a territorial jurisdiction or not is a question of law and a party to the *lis* cannot be permitted to “create” territorial jurisdiction. When a threatened act cannot be done without following a procedure and that procedure has not even been initiated, the threat cannot be said to be real and imminent so as to vest the Court with the jurisdiction even in a *quia timet* action.

23. The senior counsel for the plaintiff in a short note handed over “on the meaning of the expression cause of action ” referred to ***Oil and Natural Gas Commission Vs. Utpal Kumar Basu*** (1994) 4 SCC 711 holding that reading the advertisement at Calcutta, correspondence from Calcutta would not constitute integral part of cause of action when the contract was awarded from Delhi. Reliance was also placed on ***Om Prakash Srivastava Vs. Union of India*** (2006) 6 SCC 207 holding that cause of action means essential facts without proof of which plaintiff must fail. Following the same also, the plaintiff cannot be heard to say that no cause of action has accrued at Mumbai or Solapur where the defendants are actually selling the allegedly infringing products and not at Delhi where the plaintiff merely perceives

threat of defendants to sell and when the defendants say they have no such intent. The cause of action at Delhi is yet a ghost in comparison to Maharashtra. The Court cannot act on such perception and ghosts. I agree with the counsel for the defendants that the principles applicable to pharmaceutical products cannot be applied.

24. Notice may also be taken of recent judgment of Division Bench in *Allied Blenders & Distillers Pvt. Ltd. Vs. R.K. Distilleries Pvt. Ltd.* 2017 SCC OnLine Del 7224 and *Allied Blenders & Distillers Pvt. Ltd. Vs. Prag Distillery Pvt. Ltd.* 2017 SCC OnLine Del 7225 where it was held that it is not necessarily the actual marketing on launching of the product under the impugned mark, but even a reasonable apprehension of infringement or passing off would be sufficient for constituting a cause of action. The apprehension in that case was held to be reasonable on the averment in the plaint in that case and without noticing whether approval of the Excise Authority had been obtained or not. It being not disputed that without applying for and obtaining approval of the Excise Authorities, the defendants cannot sell in Delhi, there can be no threat to sell in Delhi without such approval having even been applied for and the matter would be squarely covered by *Ram Singh* supra holding averments in the plaint of threat to be nothing but a piece of clever drafting.

25. I thus hold that no part of cause of action has accrued to the plaintiff against the defendants within territorial jurisdiction of this Court.

26. Needless to state that once no cause of action has accrued at Delhi, this Court under Section 20 of the CPC also would not have territorial jurisdiction to entertain the suit for infringement or for passing off.

27. I am also of the view that in the spirit of *Indian Performing Rights Society Ltd.* supra, where sales have already been commenced at place of subordinate office of the plaintiff and there is merely a threat at the place of principal office of plaintiff and the defendant is located at the place of subordinate office, applying the principles of forum conveniens, Section 134 can be invoked at place of subordinate office and not place of principal office of the plaintiff.

28. Thus, neither is the plaintiff found entitled to invoke Section 134 of the Trade Marks Act nor Section 20(c) of the CPC for maintaining the suit at Delhi.

29. The application thus succeeds.

30. The plaint is rejected under Order VII Rule 11 of the CPC holding that the averments made in the plaint do not disclose this Court to be having territorial jurisdiction to entertain the suit.

No costs.

RAJIV SAHAI ENDLAW, J

MARCH 28, 2017

‘gsr’..