

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

% **Date of decision: 18th August, 2017**

+ **CM(M) No.875/2017 and CM No.29231/2017 (for stay)**

B.M.K MARKETING & ORS

..... Petitioners

Through: Mr. Jayant Mehta with Mr. Jaspreet
Singh and Ms. Disha Malhotra, Advs.

Versus

KRBL LIMITED

..... Respondent

Through: Mr. S.K. Bansal, Mr. Vinay Kumar
Shukla, Mr. Ajay Amitabh Suman and
Mr. Kapil Kumar Giri, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

Caveat No.729/2017.

1. The counsel for the Caveator has appeared.
2. The Caveat stands discharged.

CM No.29232/2017 (for exemption).

3. Allowed, subject to just exceptions.
4. The application stands disposed of.

CM(M) No.875/2017 and CM No.29231/2017 (for stay).

5. This petition under Article 227 of the Constitution of India impugns the order (dated 18th May, 2017 in TM No.51/16 of the Court of Additional District Judge-03, Patiala House Courts, New Delhi District) of dismissal of the application under Order VII Rule 10 of the Code of Civil Procedure, 1908 (CPC) filed by the petitioners / defendants for return of the plaint in the suit filed by the respondent / plaintiff for injunction and ancillary reliefs against passing off.

6. I have enquired from the counsel for the petitioners / defendants whether not the order of dismissal of an application under Order VII Rule 10 of the CPC would be revisable under Section 115 of the CPC.

7. The counsel for the petitioners / defendants states that since the jurisdiction of this Court under Section 115 of the CPC and under Article 227 of the Constitution of India is alike, the said question need not come in the way of consideration of this petition. Reference is made to ***Surya Dev Rai Vs. Ram Chander Rai*** (2003) 6 SCC 675.

8. Supreme Court in para 26 of ***Surya Dev Rai*** supra itself has said that the High Court would be justified in refusing to exercise jurisdiction under Article 227 of the Constitution of India with respect to orders remedy whereagainst is provided in the CPC or under some other Statute. To the same effect are i) ***Sadhana Lodh Vs. National Insurance Co. Ltd.*** (2003) 3 SCC 524; ii) ***State Bank of India Vs. Allied Chemical Laboratories*** (2006) 9 SCC 252; iii) ***Bijay Kumar Duggal Vs. Bidya Dhar Dutta*** (2006) 3 SCC 242; iv) ***Ajay Bansal Vs. Anup Mehta*** (2007) 2 SCC 275; and, v) ***Seth Rattan Chand Vs. Pandit Durga Prasad*** (2003) 5 SCC 399.

9. It is thus felt that this Court should not continue to entertain petitions which should have been filed under Section 115 of the CPC but have wrongly been filed under Article 227 of the Constitution of India and which is leading to the bar not following the law as it should.

10. Though I have been rejecting such petitions but on the assurance of the counsel for the petitioners / defendants that he will take care in future, the counsel for the petitioners / defendants has been heard on merits.

11. The respondent / plaintiff, in paras 41 and 43 of the plaint, has pleaded as under with respect to the territorial jurisdiction of the Court at Delhi:-

“41. The Plaintiff also learnt that the Defendants are carrying on its impugned activities under the impugned Trade Mark / Label in a clandestine and surreptitious manner and that too without issuing formal sale bills. The Defendants are not only making the retain sales but is also supplying the impugned goods bearing the impugned Trade Mark / Label to various other dealers / shopkeepers / retailers including in New Delhi area, who are making the clandestine and surreptitious sales thereof to the unscrupulous traders and manufacturers of the counterfeit products of the Plaintiff under the said Trade Mark / Label in the markets of New Delhi area viz. Connaught Place, Gole Market, Bengali Market, Chankyapuri, Mandir Marg etc. In any case the alleged user of the Defendants are illegal and void-ab-initio.

43. That this Hon'ble Court has the territorial jurisdiction to try and adjudicate the present suit. The defendants are making clandestine and surreptitious sales, offering for sale, and are also supplying, purveying, displaying, and soliciting (also through its website www.saffronwala.com), have intention to sell their impugned goods and business under the impugned trade mark / label in New Delhi area viz. Connaught Place, Gole Market, Vasant Kunj, Bengali Market, Naraina, Mandir Margar etc. The defendants are committing the impugned acts of infringement and passing-off in the markets of New Delhi area viz. Connaught Place, Gole Market, Vasant Kunj, Bengali Market, Naraina, Mandir Marg etc. within the jurisdiction of this Hon'ble Court by selling, soliciting, trade, distribution, and marketing networks in relation to the impugned goods under the impugned trademark / label. The plaintiff's above said proprietary rights are

being prejudicially affected or likely to be so affected in New Delhi due to the defendants' impugned activities. The defendants are selling / trading / soliciting, have all the intention to use the impugned trademark / label in the markets of New Delhi viz. Connaught Place, Gole Market, Vasant Kunj, Bengali Market, Naraina, Mandir Marg etc. The impugned products of the defendants are available in New Delhi area. The defendants are committing act of infringement of plaintiff's trademark and copyright and passing-off within the territorial jurisdiction of this Hon'ble Court. The defendants are soliciting and intend to sell their counterfeit goods in New Delhi area and are committing the act of infringement and passing off in New Delhi by making the clandestine and surreptitious sales and distribution of the impugned goods under the impugned Trade Mark / Label. The carrying of business by the defendants in New Delhi (vide abovesaid acts and / or violations) as well as whole or part of cause of action for filing the suit has arisen within the territorial jurisdiction of this Hon'ble Court within the meaning of Section 20 of Code of Civil Procedure, 1908. Besides this, a part of cause of action arose in favour of the plaintiff against the defendants within the territorial jurisdiction of this Hon'ble Court. The plaintiff is having registered office in Delhi and is selling the goods under the said trademark / label INDIA GATE with device of INDIA GATE in New Delhi market viz. Gole Marekt, Khan Market, Bengali Market, Naraina etc. through its authorised distributors National Pure Products and R.S. Distributors. Further, the plaintiff is maintaining its website Portal ecommerce website www.krblrice.in which is interactive in nature and having accessibility within the Jurisdiction of the

Hon'ble Court. The plaintiff has tremendous goodwill and reputation in its said trade mark / label INDIA GATE within device of INDIA GATE within the jurisdiction of this Hon'ble Court on account of voluminous sales, Advertisement and distribution. This Hon'ble Court as such also has a jurisdiction to try and adjudicate the present suit by virtue of Section 62(2) of the Copyright Act."

12. The first contention of the counsel for the petitioners / defendants is that the impugned order suffers from perversity inasmuch as the learned Additional District Judge in para 15 of the impugned order, referring to para 32 of the plaint, has held that the same contains a plea of the petitioners / defendants selling goods in New Delhi area. It is contended that though para 32 is re-produced also in para 14 of the impugned order, but a reading thereof would show that there is not a whisper therein about the petitioners / defendants selling in New Delhi area.

13. The said mistake of the learned Additional District Judge would not lead to setting aside of the order, if otherwise the same is found to be correct.

14. It has thus been enquired from the counsel for the petitioners / defendants as to how, in the light of averments in paras 41 and 43 of the plaint, it can be said that the plaint should be returned at the threshold only.

15. The counsel for the petitioners / defendants has argued that the plaint has to be read meaningfully and the clever drafting by the Advocate for the respondent / plaintiff should not be permitted to create territorial jurisdiction where none exists. It is contended that the petitioners / defendants in the present case are at Srinagar and Telangana and no cause of action has accrued to the respondent / plaintiff against the petitioners / defendants

within the territorial jurisdiction of this Court. It is argued that though the plaint is verified on the basis of documents but the respondent / plaintiff has not placed a single document before the Court to support the pleas contained in paras 41 and 43 supra. On enquiry, whether any of the impugned goods of the petitioners / defendants sell in Delhi, the counsel for the petitioners / defendants states that the petitioners / defendants do not sell their goods in Delhi. Reliance is placed on *Begum Sabiha Sultan Vs. Nawab Mohd. Mansur Ali Khan* (2007) 4 SCC 343.

16. *Begum Sabiha Sultan* supra was a case under Section 16 of the CPC. The reliefs claimed in that suit were of (i) declaration that oral Will allegedly made at Delhi was never made; (ii) declaration that the Sale Deed executed was null and void; (iii) of partition of immovable property situated outside Delhi; and, (iv) of rendition of accounts, injunction etc. the Supreme Court affirmed the judgment of the Single Judge and the Division Bench of this Court returning the plaint, observing that though at the stage of consideration of the application under Order VII Rule 10 of the CPC it is only the plaint which is to be looked into but the plaint has to be read in a meaningful manner to find out the real intention behind the suit. It was further held that reading of the plaint in that case left no manner of doubt that the suit was essentially for the relief of partition and declaration with respect to properties situated outside the territorial jurisdiction of the Courts at Delhi and there was really no need for the relief sought of declaration of the oral Will claimed to have been made at Delhi.

17. I am afraid, the aforesaid judgment cannot have application to the present situation. There is a difference between 'meaningful reading of the plaint, to fathom what is the real claim therein' and 'determining the truth or

falsity of the averments in the plaint'. What the Supreme Court in ***Begum Sabiha Sultan*** did was to see the real relief claimed in the suit and for grant of which the Court at Delhi had no jurisdiction and held that the relief claimed to create jurisdiction of this Court was not material. However the petitioners / defendants in the present case want this Court to do, at the stage of Order VII Rule 10 CPC, without any evidence, is to hold that the averments in paras 41 and 43 of the plaint are not to be believed for the reason of no document in support thereof having been filed. Rather, I have enquired from the counsel for the petitioners / defendants that though the respondent / plaintiff may not have filed any invoices / bills of sale of goods by the petitioners / defendants at Delhi, whether they have filed the report of any investigator. The answer is in the negative.

18. The counsel for the respondent / plaintiff has per contra relied upon ***Allied Blenders & Distillers Pvt. Ltd. Vs. Prag Distillery Pvt. Ltd.*** 2017 III AD (Delhi) 633 (DB) where it has been held in the context of an application under Order VII Rule 10 of the CPC in a suit *inter alia* for passing off, i.e. of the same nature as the suit subject matter of this petition, that once the allegations were found in the plaint, which if proved vested this Court with territorial jurisdiction, the Court could not go into the correctness or falsity thereof. The counsel for the respondent / plaintiff contends that in fact the suit subject matter of ***Allied Blenders & Distillers Pvt. Ltd.*** was a *quia timet* action.

19. The counsel for the respondent / plaintiff in this regard has also referred to para 11 of ***RSPL Limited Vs. Mukesh Sharma*** 232 (2016) DLT 161 (DB).

20. Once the distinction between ‘meaningful reading of the plaint’ and ‘determining the truth and falsity of the averments in the plaint’ is realised, the argument of the petitioners / defendants falls.

21. The counsel for the petitioners / defendants states that his argument is not to the said effect but to the effect that ‘a *prima facie* view’ of the matter should be taken, based on the plaint and the documents.

22. I am afraid I am unable to agree with the said proposition also. Applications under Order VII Rule 10 applications are not to be decided taking a *prima facie* view qua territorial jurisdiction. In fact, the Courts have with respect to framing of preliminary issue qua the aspect of territorial jurisdiction also held that the issue, when a mixed question of law and fact, cannot be ordered to be treated as a preliminary issue. Reference in this regard may be made to **Major S.S. Khanna Vs. Brig. F.J. Dillon** AIR 1964 SCC 497 and **Ramesh B. Desai Vs. Bipin Vadilal Mehta** (2006) 5 SCC 638. Once that is so, the factual disputes which arise as to territorial jurisdiction i.e. whether the averments in paras 41 and 43 are true or not, can be decided only after trial and hence the application under Order VII Rule 10 of the CPC has been rightly dismissed by the learned Additional District Judge.

23. I must however hasten to add that recently in **Kuldeep Singh Pathania Vs. Bikram Singh Jaryal** (2017) 5 SCC 345 Supreme Court has dealt with the relative scope of Order VII Rule 11 vis-a-vis Order XIV Rule 2 of the CPC. It was held i) the whole purpose of trial on preliminary issue is to save time and money; ii) though it is not a mini trial, the Court can and has to look into the entire pleadings and material available on record, to the extent not in dispute; iii) but that is not the situation as far as enquiry under Order VII Rule 11 of the CPC concerned – that is only on institutional defects – the

Court can only see whether the plaint, or rather the pleadings of plaintiff, constitute cause of action – pleadings in the sense, where written statement is filed and if there is a replication thereto, the same can also, in a given case, be looked into to see whether there is any admission on the part of plaintiff; iv) in other words, under Order VII Rule 11, the Court has to take a decision looking at the pleadings of the plaintiff only and not on the rebuttal made by the defendant or any other material produced by the defendant.

24. There is no merit in the petition.

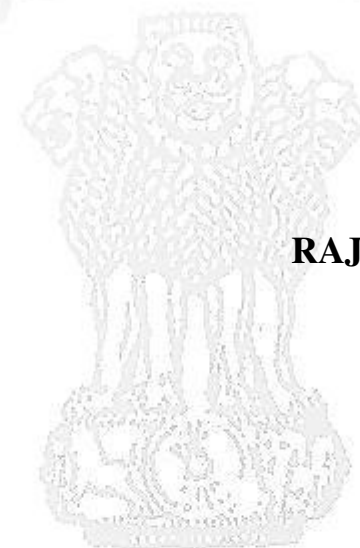
Dismissed.

No costs.

AUGUST 18, 2017

‘pp’..

RAJIV SAHAI ENDLAW, J.



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