

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.10.2018

Date of Decision : 01.11.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

Application No.6799 of 2018

in

C.S.(Comm.Div.)No.468 of 2018

Captain Tractors Pvt. Ltd.,
106, Royal Complex,
Near Bhutkhana Dhebar Road,
Rajkot,
Gujrat-360 002. .. Applicant

Vs.

Ashok Leyland Ltd.,
No.1, Sardar Patel Road,
Guindy,
Chennai-600 032.
rep by Authorised Signatory,
M/s.D.Santhi .. Respondent

This application is filed under Order XIV Rule 8 of the Original Side Rules read with Clause 12 of the Letters Patent seeking to revoke the leave granted by this Court in Application No.5114 of 2018 dated 12.07.2018.

For Applicant : Mr.AR.L.Sundaresan, SC
for Mr.A.K.Balaji

For Respondent : Mr.P.S.Raman, SC
for Mr.Premchandrar and
Mr.N.C.Vishal of Anand and Anand

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ORDER

In the main suit, i.e., C.S. (Comm.Div) No.468 of 2018, there is a sole plaintiff and a lone defendant. Both sole plaintiff and lone defendant are juristic persons. While sole plaintiff is a public limited

company incorporated in India, lone defendant is a private limited company incorporated in India. Parties in the instant application (A.No.6799 of 2018) shall be referred to by their respective ranks in the main suit in this order for the sake of convenience and clarity.

2 Instant application (i.e., A.No.6799 of 2018) has been taken out by sole defendant with a prayer to revoke leave to sue granted in A.No.5114 of 2018 on 12.07.2018. Before this Commercial Division adverts to the instant leave revocation application, a concise precise of facts necessary to appreciate this order has to be noticed and the same is given infra under the caption 'Precise of Facts'.

3 Precise of Facts :

(a) Plaintiff has its registered office at No.1, Sardar Patel Road, Guindy, Chennai-600 032. Plaintiff is engaged in the business of manufacture and sale of commercial and defence vehicles as well as power solutions. According to plaintiff, it is an automotive and transport vehicle group with an international market employing approximately 12,000 personnel and providing a wide spectrum of transportation related products and services.

(b) According to plaintiff, it honestly adopted the mark 'CAPTAIN' (hereinafter referred to as 'suit TM' for convenience and clarity) in the year 2013 for its range of heavy commercial vehicles. It is also plaintiff's case that it subsequently unveiled to the world their tipper model named 'CAPTAIN 2523' on 06.01.2014. It is also plaintiff's case that its new range of commercial vehicles under the suit TM was launched in February, 2014. A screen shot of one of plaintiff's advertisements published in the media in early February 2014 and now given in the plaint is as follows :

(c) Most important aspect to be noticed is, even according to the plaint, the plaintiff does not have trade mark registration for the suit TM. In other words, suit TM is an unregistered mark, as far as plaintiff is concerned (defendant has registration for suit TM and the same will be referred to infra).

(d) While things stood as above, defendant sent a cease and desist notice dated 01.06.2018 (received by plaintiff on 07.06.2018), calling upon plaintiff to cease and desist from using the suit TM. Plaintiff has sent a holding response dated 13.06.2018 and a further detailed response dated 29.06.2018 to the aforesaid cease and desist notice.

(e) Crux and gravamen of the aforesaid cease and desist notice, holding response and detailed response is that defendant has trade mark registration for the suit TM in Classes 7 and 12 of relevant schedule under the Rules under the Trade Marks Act, 1999 (hereinafter referred to as 'TM Act' for brevity). Such registration in favour of defendant qua suit TM in Classes 7 and 12 are for mini tractors, parts thereof and automatic seed drill planter. Plaintiff's contention is that they are not using the suit TM in any of these products and that they are using it only in heavy commercial vehicles and therefore, they are under no obligation to comply with the demand in the cease and desist notice.

(f) As mentioned supra, cease and desist notice issued by the defendant is dated 01.06.2018, interim / holding reply of plaintiff is dated 13.06.2018 and detailed reply of plaintiff is dated 29.06.2018. Thereafter, plaintiff presented the instant main suit, i.e., C.S.(Comm.Div.) No.468 of 2018 in this Court on 10.7.2018 with prayers inter-alia for injunctive reliefs against defendant qua passing off / quia timet regarding suit TM. Other ancillary reliefs for accounts and costs also constitute the prayer in the suit.

(g) Along with proposed plaint, an application in A.No.5114 of 2018 was taken out by plaintiff with a prayer for leave to sue, which, as mentioned supra, was acceded to by this Court by an order dated 12.07.2018 primarily on the ground that plaintiff's place of business confers jurisdiction and there are provisions to this effect in the statute under the Intellectual Property Rights ('IPR' for brevity) regime.

(h) Thereafter, the proposed plaint was assigned the number C.S.(Comm/Div.)No.468 of 2018 and

along with the same, injunction applications (i.e., O.A.Nos.661 and 662 of 2018) were moved with temporary injunction prayers qua passing off and interference with plaintiff's business. Ex parte interim orders were granted by this court on 17.7.2018. To be noted, these interim orders are now operating.

(i) On being served, defendant entered appearance and moved the instant application, i.e., A.No.6799 of 2018 inter-alia under Clause 12 of Letters Patent of the Madras High Court with a prayer to revoke the aforesaid leave granted by this Court on 12.07.2018.

4 Trajectory of the suit and interlocutory applications thus far :

(a) As mentioned supra, the suit was presented on 10.07.2018 and an application with a prayer for leave to sue being A.No.5114 of 2018 was moved along with proposed plaint, the same was ordered on 12.07.2018, after which the suit was assigned number C.S.(Com.Div) No.468 of 2018, along with the suit, interlocutory applications in O.A.Nos.661 and 662 of 2018 for temporary injunction qua passing off and interference with plaintiff's business were moved and ex parte interim orders were granted by this Court on 17.07.2018 which are now operating and the instant revoke leave to sue application was filed by defendant on 27.08.2018.

(b) To be noted, the trajectory of the main suit and interlocutory applications upto this point have already been alluded to and set out (though not chronicled in this sequence) supra under the caption 'Precise of Facts'.

(c) Even prior to filing the instant revocation application on 27.8.2018, defendant has taken out two applications in A.Nos.6800 and 6801 of 2018 on 23.8.2018. While A.No.6800 of 2018 is inter-alia under Order XXXIX Rule 4 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) for vacating the interim orders granted by this Court on 17.07.2018 in O.A.Nos.661 and 662 of 2018, A.No.6801 of 2018 is for return of plaint inter-alia under Order VII Rule 10 CPC.

(d) Post filing of the instant revocation application (on 27.08.2018), plaintiff took out two applications in A.Nos.6797 and 6798 of 2018 (both applications filed on 06.09.2018). While A.No.6797 of 2018 is inter-alia under Order VI Rule 17 CPC for amendment of plaint, A.No.6798 of 2018 is inter-alia under Order VII Rule 14(3) CPC with prayer to file / receive seven additional documents.

(e) The narration of trajectory thus far would reveal that there is a large platter of interlocutory applications in the instant suit. Be that as it may, whenever there is an application for revocation of leave to sue, as it goes to the root of the matter and as it goes to the very existence of the suit on the file of this court, it is a matter of sound first principle to decide the same first before embarking upon the exercise of deciding other applications.

(f) Under the aforesaid circumstances, after hearing both sides for some time, the following proceedings came to be passed on 01.10.2018, which reads as follows :

□This application has been taken out by the sole defendant in the main suit. Sole plaintiff in the main suit is the lone respondent herein.

2.Parties in the instant application are referred to by their respective ranks in the main suit.

3.To be noted, there is an interim order operating in favour of the plaintiff and an application to vacate the same has also been filed.

4.Plaintiff has taken out an application in A.No.6797 of 2018 seeking amendment of plaint and A.No.6798 of 2018 for receiving additional documents.

5.Though amendment of plaint is sought, it is agreed that the instant application for revocation of leave granted on 12.07.2018 vide A.No. 5114 of 2018 should be first heard out and disposed of.

6.Learned counsel for plaintiff undertakes to file counter in this application and complete the pleadings by Friday i.e. 05.10.2018. List this matter on Tuesday i.e. on 09.10.2018.

7.Both sides undertake to argue this application without reference to any other interlocutory applications.

8.It is submitted by learned counsel for plaintiff that even if the prayer in the aforesaid amendment application is acceded to, leave to sue afresh is not necessary and on this basis plaintiff undertakes

to argue the instant application i.e. A.No.6799 of 2018 without reference to any other pending applications.

List this matter on 09.10.2018. □

(g) The aforesaid proceedings are self explanatory. Therefore, the trajectory of the main suit and interlocutory applications therein thus far read in the light of the aforesaid proceedings dated 01.10.2018 would reveal that the instant revocation application in A.No.6799 of 2018 alone falls for consideration now.

(h) Pursuant to the aforesaid proceedings dated 01.10.2018, plaintiff has filed a counter affidavit dated 03.10.2018 (filed on 08.10.2018) in the instant leave revocation application. In other words, pleadings in the instant leave revocation application are complete.

5 With the aforesaid 'Precise of Facts' and 'Trajectory of the suit and interlocutory applications thus far', this Commercial Division now proceeds to discuss the submissions on both sides and debate that emerges from the same under the caption 'Deliberation' infra.

6 Deliberation :

(a) A perusal of the order dated 12.07.2018 reveals that a reference to Section 134 therein is a certain reference to Section 134 of TM Act and not the Copyright Act. Obviously, this is a typographical error.

(b) A perusal of the plaint, particularly, paragraph 47 (besides, paragraphs 46 and 48) reveals that plaintiff has also predicated its plea regarding jurisdiction and cause of action on Section 134 of TM Act. As mentioned supra, as far as plaintiff is concerned, suit TM is not registered. This Commercial Division has also referred to the prayers in the plaint. Prayers in the plaint also pertain to injunctive reliefs qua passing off and other ancillary reliefs. There is no complaint of infringement. This is obviously so, as the suit TM is not registered in favour of plaintiff. In other words, this is a suit complaining of passing off and this is not a statutory suit complaining of infringement under the TM Act. To be noted, complaint of infringement entitles plaintiff to statutory reliefs under TM Act, whereas complaint of passing off entitles plaintiff to common law remedies and not statutory remedies.

(c) In this context, it has become necessary to extract Section 134 of TM Act in its entirety. I do so and the same reads as follows:

□134.Suit for infringement, etc., to be instituted before District Court.--(1) No suit --

(a)for the infringement of a registered trade mark; or

(b)relating to any right in a registered trade mark; or

(c)for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered, shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

(2)For the purpose of clauses (a) and (b) 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 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.

Explanation.--For the purposes of sub-section (2), □person□ includes the registered proprietor and the registered user.□

(d) A careful perusal of Section 134 and sub-sections thereunder would reveal that clauses (a) and (b) of sub-section (1) of section 134 deals with infringement and clause (c) deals with passing off. Sub-section (2) of Section 134 deals with jurisdiction and it is this sub-section that confers jurisdiction on plaintiff depending upon plaintiff's place of business. A careful reading of sub-section (2) of Section 134 reveals that sub-section (2) of Section 134 is available only to clauses (a) and (b) of sub-section (1) of Section 134 or in other words, only for suits complaining of infringement. It

follows as an inevitable and indisputable sequitur that jurisdiction under sub-section (2) of Section 134 is not available for passing off suits covered by clause (c) of sub-section (1) of Section 134. Instant suit not being a suit complaining of infringement of registered trade mark and not being a suit relating to any right in a registered trade mark (as far as plaintiff is concerned), jurisdiction under Section 134 of TM Act is certainly not available. There is no hesitation or doubt in the mind of this Commercial Division in this regard.

(e) This takes us to Section 20 of CPC. As rightly pointed out by plaintiff, in the light of Section 120 CPC, Section 20 CPC is inapplicable to this Commercial Division, i.e., High Court in exercise of its original jurisdiction. I deem it appropriate to extract Section 120 CPC, which reads as follows :
□120.Provisions not applicable to High Court in original civil jurisdiction.--(1)The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, Sections 16, 17 and 20.□

(f) Therefore, one need not examine Section 20 CPC as far as this suit is concerned for examining jurisdiction qua passing off, as Section 20 CPC is not applicable to this Court owing to Section 120 CPC, which has been extracted supra.

(g) Though of incidental relevance only, this Commercial Division deems it appropriate to also refer to Order VII Rule 10 CPC. As mentioned supra, an application in A.No.6801 of 2018 has been taken out by defendant inter-alia under Order VII Rule 10 CPC. Order VII Rule 10 CPC also does not apply to this Chartered High Court in exercise of its ordinary or extraordinary original civil jurisdiction in the light of Order XLIX Rule 3 CPC. However, in the light of prior proceedings of this Commercial Division dated 01.10.2018 extracted supra, it is only incidental as leave revocation application alone has been heard out and it is deemed relevant to leave it at that.

(h) As the jurisdiction under sub-section (2) of Section 134 of TM Act is not available for the instant suit, as it is not pertaining to infringement of a registered trade mark (as far as plaintiff is concerned), the issue of jurisdiction of this Commercial Division under first proviso to Section 7 of 'The Commercial Courts Act, 2015' ('said Act' for brevity) also pales into insignificance as an inevitable and indisputable sequitur.

(i) As jurisdiction under Section 134(2) of TM Act is not available and as Section 20 CPC is inapplicable, it leaves us with Clause 12 of Letters Patent.

(j) Therefore, this Commercial Division shall examine Clause 12 of Letters Patent of the Madras High Court captioned 'Original jurisdiction as to suits' closely. It is deemed relevant to extract Clause 12. It is done so and Clause 12 reads as follows :

□12.Original jurisdiction as to suits.--And We do further ordain that the said High Court of Judicature at Madras, in exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court; or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause at Madras, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees.□

(k) A close and careful perusal of Clause 12 of Letters Patent reveals that it contemplates two categories of suits, which are as follows :

(i)Suits pertaining to immovable properties, i.e., suits for land or property, is one category.

(ii)All other suits, i.e., suits other than those for land or property have been put in one basket and described as suits 'in all other cases'.

(l) In other words, suits pertaining to immovable property are in one category and 'all other cases' are in another category. It is clear as day light that the instant suit is not a suit pertaining to immovable property and therefore, it falls in the second category of 'all other cases'. With regard to all other cases, territorial jurisdiction of this Court and foundation of jurisdiction of this Court in this regard to receive, try and determine suits of this nature, according to clause 12, arises under three situations, which are as follows:

- (i) Where cause of action has wholly arisen within the territorial jurisdiction of this Court.
- (ii) Where cause of action has arisen in part, leave of this Court should have been first obtained.
- (iii) Where defendant at the time of commencement of the suit, dwells, carries on business or personally works for gain within the territorial jurisdiction of this Court.

(m) Of the aforesaid three situations, in the instant case, it is amply clear from the plaint that it is a case where according to plaintiff, cause of action has arisen in part within the territorial jurisdiction of this Court and therefore, leave has been first obtained by taking out the aforesaid A.No.5114 of 2018. In other words, it is not a case where even according to plaintiff cause of action has wholly arisen within the territorial jurisdiction of this Court and it is also not a case where defendant is residing or carrying on business for gain within the territorial jurisdiction of this Court.

(n) Therefore, it narrows down this deliberation to only one aspect of the matter which in my considered opinion can be described as a 'cliffhanger'. That one aspect is whether cause of action in part has arisen within the territorial jurisdiction of this Court.

(o) This takes us to cause of action paragraph in the plaint. Two paragraphs, namely paragraphs 44 and 45 of the plaint have been set out under the caption 'Cause of Action'. I deem it appropriate to extract the same and the same read as follows :

□Cause of Action

44.The cause of action in the present suit first arose on 7th June 2018 when the Plaintiff's group concern, Ashok Leyland Vehicles Limited received a cease and desist notice dated 1st June 2018 and the plaintiff was informed of the same. The cause of action further arose when the plaintiff confirmed on 12th June 2018 from the online records of the Trademark Office that the defendant has no rights in word CAPTAIN word per and their label mark carrying the word CAPTAIN was restricted to □mini tractors and parts thereof□. The cause of action further arose when Ashok Leyland Vehicles Limited's counsel issued an interim reply dated 13th June 2018 to the defendant's lawyer in response to their notice dated 1st June 2018 and subsequently on 29th June when the detailed response to the legal notice dated 01st June 2018 was issued.

45.The cause of action is a continuous one and arises with each act of the defendant attempting to invade in to the rights of the plaintiff and passing off by the Defendant under the impugned mark CAPTAIN for land vehicles and commercial vehicles and shall continue to subsist until the Defendant is restrained by an order of this Hon'ble Court.□

(p) As we are examining the territorial jurisdiction of this Court, I also deem it appropriate to extract three paragraphs in the plaint, namely paragraphs 46, 47 and 48 which have been set out under the caption 'JURISDICTION', which read as follows :

□JURISDICTION

46.The present commercial suit has been filed before the Commercial Division of the Hon'ble Madras High Court under Sec.2(1)(c)(xvii) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 as the present dispute includes but is not limited to the passing off, Qua Timet Action, Groundless threats to interfere with the Plaintiff's bonafide business.

47.This Hon'ble Court has the necessary territorial jurisdiction to entertain and try the present action by virtue of Section 134(1)(c) of the Trade Marks Act, 1999 as the suit is inter alia for passing

off and the Plaintiff, being the proprietor of the trademark 'CAPTAIN', has their registered office within the jurisdiction of this Hon'ble Court and also carries on extensive business within this jurisdiction of this Hon'ble Court through exclusive dealers. The factum of the plaintiff having their registered office within the jurisdiction of this Hon'ble Court and carrying on extensive business in Chennai through exclusive dealers in Chennai and the defendant business conducted through self-owned and third party interactive websites having access from within Chennai gives appropriate jurisdiction. As the present suit has been filed invoking Sec.134(c) of the Trademarks Act, 1999, the same would squarely fall within the ambit of Proviso 1 to Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

48.It is submitted that the Defendant is also carrying on business through the internet and provides platform for enquiry and sale on through self-owned and several third party interactive websites having access from within Chennai wherein the public can place orders for services to be rendered and products to be sold under the impugned trade name 'CAPTAIN' by the defendant. It is submitted that such online transactions with the defendant would be made through various interactive websites by inviting and providing details to place orders and to contact the defendant from across the country including in Chennai. This is likely to mislead the trade and public and customers which leads to passing off by Defendant of their products/services offered under the impugned trade name 'CAPTAIN' as and for that of the Plaintiff for land vehicles and commercial vehicles. Thus considering the bundle of facts like Plaintiff's registered office, business operation in, website accessible from Chennai and other factors including defendants presence in online interactive platforms which are accessible from Chennai in which potential orders and enquiries for services can be obtained from the defendants and receipt of legal notice by the Plaintiff's group concern in Chennai creates substantial cause of action for this Hon'ble Court to have necessary jurisdiction to try and entertain the suit as a result of which the plaintiff is aggrieved and the same creates cause of action thereby conferring jurisdiction on this Hon'ble Court to hear and pass appropriate orders in the present suit.[]

(q) In cases of this nature, where leave has been granted on the proposed plaint, leave is always granted only on the basis of proposed plaint that has been placed before the Court. One has to necessarily look at only the plaint and plaint averments only. In the considered view of this Commercial Division, not only should plaint averments alone be looked into, but it should be looked into with a hood. After obtaining leave by placing the proposed plaint before this Court, plaintiff who is faced with leave revocation application, should not be allowed to improve or improvise its case. After making this position clear, I deem it appropriate to extract two portions of the counter affidavit in the instant leave revocation application. One is contained in sub paragraph (l) of paragraph 4 of the counter affidavit and the other is contained in paragraph 10 of the counter affidavit. Paragraph 4(l) reads as follows :

[]l.Defendant's business in Chennai through TAFE:

Notwithstanding the above, the respondent/plaintiff herein has also come across several news articles and videos published which have confirmed a strategic alliance between the applicant/Defendant and Tractors and Farm Equipment (TAFE) in the year 2012 through which the applicant/defendant would manufacture and supply mini tractors for distribution and sale through TAFE's network across India. TAFE stands for 'Tractors and Farm Equipment Limited' and appears to be located at 77, Nungambakkam High Road, Nungambakkam, Chennai-600 034, India, which is well within the territorial jurisdiction of this Hon'ble Court. A video released by TAFE on their Corporate Channel on Youtube confirming the alliance with the Defendant can be found at <https://www.youtube.com/watch?v=UbBoxXlufIA>., wherein the write up indicates:

[]Tractors and Farm Equipment (TAFE) is in alliance with Captain Tractors to manufacture small tractors that will help small and medium scale farmers. This new range of small tractors will be very

useful for farmers holding less than two acres of land. With their ability to nook into small openings, these tractors will not damage the crops and plants along the ploughing area. A lot of implements can be attached with this model. The tractor is still in the testing stage, and will be launched within a month. TAFE's Sankar Mahadevan, in the interview, explained that the objective for developing this model was to aid small and marginal farmers. He also stressed that the affordable price will help the farmers to easily buy these machines.□

Relevant portion in paragraph 10 of the counter affidavit reads as follows :

□10.... It is once again submitted that the applicant/defendant is resorting to making false statements on oath before this Hon'ble Court by stating that they have no business within the jurisdiction of this Hon'ble Court when their 'CAPTAIN MINI TRACTOR' is being sold by their agent well within the jurisdiction of this Hon'ble Court apart from being available online through their interactive website, their agent's interactive website and through several third party interactive websites of which sufficient evidence has been placed before this Hon'ble Court by the respondent/plaintiff and the same gives sufficient cause of action to invoke the jurisdiction of this Hon'ble Court....□

(r) A joint reading of the two paragraphs (extracted and reproduced supra) in the plaint under the caption 'cause of action' and three paragraphs under the caption 'Jurisdiction' in the light of paragraph 4 and a portion of paragraph 10 of the counter affidavit in the instant application reveal that it is not the case of plaintiff that defendant has actually sold a single product within the territorial jurisdiction of this court with suit TM. To be noted, no bill, invoice or details of purchase have been given in the plaint. It is buttressed and bolstered by a further averment in the counter affidavit also in paragraph 10 which reads as follows :

□10....It is also submitted that it is not necessary for the respondent/plaintiff to purchase a 'CAPTAIN MINI TRACTOR' from the applicant/defendant's agent in Chennai or through their website to establish cause of action. The mere proof of availability of the same is sufficient to confirm the cause of action and to invoke the jurisdiction of this Hon'ble Court.□

(s) With regard to TAFE, there is no averment in the plaint. However, even with regard to TAFE, there is nothing to show that TAFE has sold any product, particularly mini tractors with suit TM. Therefore, to further test the sole cliffhanger point as to whether any part of cause of action however infinitesimally small the same could be has arisen within the territorial jurisdiction of this Court, it is necessary to look at only the website of the defendant, which according to plaintiff is interactive.

(t) Before that, it is necessary to set out that it has been noticed that cause of action is not a term of art in any statute. In other words, cause of action has not been defined either in CPC or in any other statute for that matter. To understand what is cause of action, one has to only look at the judgments and this Commercial Division deems it appropriate to look at Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I reported in (2004) 9 SCC 512 and the relevant paragraph is paragraph 140, which reads as follows :

□140.A cause of action is a bundle of facts which are required to be pleaded and proved for the purpose of obtaining relief claimed in the suit. For the aforementioned purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence.□

(u) Now reverting to whether the site is interactive, plaintiff should be able to establish that interactive website of defendant is such that it targets clients of plaintiff or in other words, there is a clear attempt to poach the client base of plaintiff. To say this, I draw inspiration from Banyan Tree judgment being Banyan Tree Holding (P) Limited Vs. A.Murali Krishna Reddy and another reported

in 2010 (42) PTC 361 (Del)(DB). Relevant paragraph is paragraph 42 which reads as follows :

¶42. This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined. For the ¶effects¶ test to apply, the Plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the Plaintiff's business, goodwill or reputation within the forum state as a result of the Defendant's website being accessed in the forum state would have to be shown. Naturally therefore, this would require the presence of the Plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the Plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore the ¶effects¶ test would have to be applied in conjunction with the ¶sliding scale¶ test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes. ¶

(v) To be noted, Banyan Tree case has been rendered by a Division Bench of Delhi High Court. Precedential value is only that of being persuasive. In other words, it is neither Division Bench of this Court nor has it been rendered by a coordinate Bench, i.e., Single Judge of this Court. However, in the instant case, as the question whether the site is interactive is the sole point on which this entire revocation application hinges and as the same is being perceived / described as cliffhanger point, this Commercial Division has referred to Banyan Tree principle. In other words, it is made clear that Banyan Tree principle has been applied here solely because of the peculiar facts and circumstances of the instant case.

(w) From the narrative supra, it will emerge clearly that the sole defendant placed reliance on Section 20 CPC which is inapplicable to this Court in the light of Section 120 CPC. This takes us to Clause 12 of Letters Patent. In the earlier part of this order, this Commercial Division has alluded to the dynamics and dimensions of Clause 12, i.e., kinds / categories of suits and situations qua territorial jurisdiction with regard to suits other than suits for land. Therefore, it is deemed appropriate to refer to one judgment of Hon'ble Supreme Court which has examined interplay if any between Section 20 CPC and Clause 12 of Letters Patent. This is Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Co. Ltd., reported in (2006) 11 SCC 521. Relevant paragraph is paragraph 50 and the same reads as follows :

¶50. The principles of Section 20 cannot be made applicable to clause 12 of the Letters Patent since CPC itself by Section 120 specifically excludes the applicability of Section 20 CPC to the Chartered High Courts. It is submitted that when CPC itself provides that Section 20 is specifically excluded, the principles of Section 20 cannot be made applicable or be attracted when a corporation is being sued under the Letters Patent. The judgment of this Court in Sarguja Transport case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19] cannot apply for the following reasons:

(i) The principles of CPC were made applicable to writ petitions on the premise that these would not be contrary to the provisions of Article 226.

(ii) If the appellant's argument is accepted it would render Section 120 CPC nugatory and otiose since Section 120 expressly refers to three sections (i.e. Sections 16, 17 and 20) and makes them inapplicable.

(iii) The Letters Patent, is a special charter conferring jurisdiction on the Chartered High Courts. When there is a special enactment such as the Letters Patent, which expressly lays down the criteria on the jurisdiction of the Chartered High Court, it is totally unnecessary and in fact futile to refer to another legislation such as CPC (which is not applicable) to determine the jurisdiction of the Chartered High Court.

(iv) The facts in Sarguja Transport case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19] were entirely different since there was no corresponding legislation which laid down the territorial (sic jurisdiction) of the

Court exercising writ jurisdiction.

Thus the judgment of this Court in *Sarguja Transport case* [(1987) 1 SCC 5 : 1987 SCC (Cri) 19] cannot be applied in the facts of the present case.□

My understanding of aforesaid judicial principle laid down by Supreme Court means that Section 20 CPC and Clause 12 of Letters Patent are not twins or siblings, but are distant cousins, who have to be read in their respective realms.

(x) In the light of the aforesaid obtaining position, as Section 20 CPC and Clause 12 of Letters Patent operate in different realms and in the light of a further obtaining position that Section 20 CPC is not applicable to this Court, suffice to look at Clause 12 and to be more precise, it will suffice to look at whether defendant's site is interactive. The site was demonstrated in the Court and it was argued by learned Senior Counsel for defendant that the site is not interactive. It was argued that it was merely an invitation to offer and not an offer. In this regard, though it was not cited at the Bar, I am of the view that two English judgments are relevant. One is, *Harvey Vs. Facey* [1893] UKPC 1 and the other is, *Pharmaceutical Society of Great Britain Vs. Boots Cash Chemists* [1953] 1 QB 401. To be noted, these English judgments have been widely applied in India by Hon'ble Supreme Court and several High Courts. Broadly and in simple terms, display of goods in a showroom is only an invitation to offer and not an offer. Offer comes in much later only when a customer walks in, interacts with the vendor and gravitates towards buying a product that is being displayed.

(y) To my mind, it is clear that the website of the defendant is akin to a display in the showroom and therefore, can at best only be an invitation to offer and not an offer. I deem it appropriate to refer to these two judgments from this Court's research as they are in my considered view, clinchers qua the cliffhanger.

(z) In an attempt to neutralise this argument, Mr.P.S.Raman, learned Senior Counsel, appearing for plaintiff submitted that the question as to whether the site is interactive has to be decided only in trial. I am unable to accept this argument as we are dealing with a leave revocation application. To be noted, the law is too very well settled that the leave to sue (obviously revocation too) are matters wherein the Court expresses its intention to exercise jurisdiction over the entire suit when it has jurisdiction over a part of the suit. It is not the foundation of jurisdiction. Therefore, to say that whether the court has jurisdiction over a part (to be noted, in this case, an infinitesimally small part) is a matter which has to be decided in trial and the court should post trial express its intention or disinclination to exercise jurisdiction over the remaining part of the suit is begging the question and it tantamounts to putting the cart before the horse. If such a course is adopted, then the dynamics and dimensions of leave to sue and revocation of leave applications will change so drastically that they will not be presuit exercises, but an exercise that is part of this suit itself. This is impermissible as Clause 12 itself clearly lays down that leave has to be 'first obtained'. In other words, it should be obtained prior to the suit. If one were to say that the expression 'first obtained' occurring in Clause 12 means that the Court can examine the issue of leave or revocation of the same in trial, it would tantamount to militating against the very language of Clause 12. Therefore, I am unable to persuade myself to accept the submission made by learned Senior Counsel for plaintiff in this regard.

(aa) A judgment of Delhi High Court authored by Hon'ble Mr. Justice Badar Durrez Ahmed (as the learned Judge then was) in *World Wrestling Entertainment, Inc. Vs. Reshma Collection and others* [MANU/DE/3936/2014] was pressed into service by learned Senior Counsel for plaintiff in an attempt to buttress his submission regarding interactive website. To be noted, in *World Wrestling Entertainment case*, *Banyan Tree case* has been referred to. *World Wrestling Entertainment* is a case where the plaintiff, based in United States of America, filed a suit against an entity in India in Bombay. The case of plaintiff is that the defendant / an entity in India in Bombay has an interactive website by which products (garments in this case) can be purchased in Delhi. On the facts of that case, the Court found that it has in fact an interactive website and sale has actually taken place, in a

forum State, i.e., Delhi. To be noted, cause of action should have actually arisen in the forum State is one of the three principles in *Dhodha House Vs. S.K.Maingi* [MANU/SC/2524/2005]. As that is not the case here, it is clearly distinguishable on facts. One more point of distinction is *Banyan Tree* case turns on interpretation of cause of action, whereas *World Wrestling Entertainment* case turns on interpretation of the expression 'carries on business'.

(ab) *Icon Health and Fitness, Inc. Vs. Sheriff Usman and another* [MANU/DE/2799/2017] was pressed into service by learned Senior Counsel for plaintiff in an attempt to buttress and bolster his submission. In this *Icon Health and Fitness* case authored by a learned Single Judge of the Delhi High Court, though defendants were in United Arab Emirates (UAE), the products were freely available in Amazon which is an online selling platform. There is no pleading or no such factual position in the instant case.

(ac) There is one more aspect of relevance in *Banyan Tree*. A Division Bench of Delhi High Court has held that goods like cars and furnitures are least likely to be ordered / purchased online or an interactive website as these are goods which customers would like to buy after a visit to the showroom, after seeing the product, examining it (may be test drive) and then buy the product. In my considered opinion in the facts of the instant case, I am unable to persuade myself that the buyer would buy a mini tractor in Chennai merely by clicking a button online without even physically seeing the product and without even having an opportunity to operate the product.

(ad) As a last desperate attempt, a screen shot of a website which goes by the name 'Indiamart' was pressed into service to say that there is a reference to one Cibi Enterprises in Koyambedu, Chennai, Tamil Nadu. This is least impressive, as there is no pleadings in this regard in the plaint, in the leave to sue application and in the counter in the instant revocation application. More over, there is no mention about the defendant therein, only Cibi Enterprises finds place. In any event, if a leave to sue application and revocation application are not tested on a proposed plaint on which leave was granted, it will lead to a situation where leave should be 'first obtained' mandate in Clause 12 will get diluted and neutralised. This according to me is impermissible.

(ae) On behalf of the defendant, it was pointed out that the plaintiff does have office in Rajkot in Gujarat. According to defendant, the address is 4th floor, Anmol complex, opposite Nakhtra 5, Hari Nagar, Rajkot, Gujarat 360005. This is not disputed by the plaintiff. All that the plaintiff would say is that it is a Sales office and not Corporate office. I do not want to delve further into this aspect of the matter as I would leave it merely noticing that plaintiff does have an office in Gujarat and therefore, it is not as if the plaintiff is not going to put to inconvenience if they are to file a suit in Gujarat. This is in contradistinction to the kind of inconvenience which the sole defendant will be put to by dragging them to this Court. In other words, the forum convenience principle certainly tilts in favour of defendant in this regard and therefore, tilts in favour of this leave revocation application being acceded to.

(af) As a concluding remark, while parting with this case, I am reminded of the neat and nice language of Oliver Wendall Holmes while writing about jurisdiction.

(ag) Before I set out what Oliver Wendall Holmes said on jurisdiction, as a part of this parting remark, I deem it appropriate to recollect that these very words of Oliver Wendall Holmes were referred to by Hon'ble Mr. Justice Sanjay Kishan Kaul (sitting as a Single Judge of Delhi High Court as His Lordship then was) in *(India Tv) Independent News Service Pvt. Ltd. Vs. India Broadcast Live LLC and others*, [ILR (2007) 2 Del 1231].

□Whatever else or more it may mean, is jurisdiction, in its popular sense of authority to apply the law to the acts of men.□

--Oliver Wendall Holmes

7 Conclusion :

From the narrative supra, a perspective approach to the dimensions and dynamics of this application, i.e., all aspects of this application converges on one focal point and that one focal point is Clause 12 of Letters Patent. From such convergence / focal point, it emanates with clarity that plaintiff has not been able to show, much less demonstrate convincingly even prima facie that any part of cause of action or for that matter even an infinitesimally small part of cause of action has arisen within the territorial jurisdiction of this Court making it inevitable and imperative to accede to the prayer for revocation of leave.

8 Decision :

A.No.6799 of 2018 is allowed and leave granted on 12.07.2018 in A.No.5114 of 2018 stands revoked. Parties are left to bear their respective costs. Consequently, main suit in C.S.No.(Comm.Div.) No.468 of 2018 is dismissed.

01.11.2018

Speaking order

Index : Yes

vvk

M.SUNDAR, J.

vvk

order in

Application No.6799 of 2018

in

C.S.(Comm.Div.)No.468 of 2018

01.11.2018