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

+ CS(COMM) 841/2016 & IAs No.8281/2016 (u/O XXXIX R-1&2 CPC), 4433/2017 (u/O VIII R-1 CPC), 14401/2017 (u/O XI R-1(5) CPC) & 14402/2017 (u/O VI R-17 CPC)

HSIL LIMITED Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Mr. Sahil Garg and Ms. Esha Dutta, Advs.

Versus

ALTRA CERAMIC AND ORS Defendants

Through: Mr. Gagan Gupta, Adv.

AND

+ CS(COMM) 842/2016 & IAs No.8302/2016 (u/O XXXIX R-1&2 CPC), 14399/2017 (u/O VI R-17 CPC) & 14400/2017 (u/O XI R-1(5) CPC)

HSIL LTD Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Mr. Sahil Garg and Ms. Esha Dutta, Advs.

Versus

MARUTI CERAMIC AND ORS Defendants

Through: Mr. Gagan Gupta, Adv.

AND

+ CS(COMM) 844/2016 & IAs No.8315/2016 (u/O XXXIX R-1&2 CPC), 14403/2017 (u/O XI R-1(5) CPC) & 14404/2017 (u/O VI R-17 CPC)

HSIL LIMITED Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Mr. Sahil Garg and Ms. Esha Dutta, Advs.

Versus

SAFFRON CERA AND ORS Defendants

Through: Mr. Gagan Gupta, Adv.

CS(COMM) Nos.841/2016, 842/2016 & 844/2016

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CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

05.04.2018

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1. The counsel for the defendants in each of the suits has contended that in terms of (i) ***HSIL Limited Vs. Marvel Ceramics*** 2017 SCC OnLine Del 6783, appeal whereagainst was dismissed in ***HSIL Limited Vs. Marvel Ceramics*** 2017 SCC OnLine Del 11571 (DB) and SLP(C) No.36323/2017 preferred whereagainst was dismissed on 11th January, 2018; (ii) ***HSIL Ltd. Vs. Imperial Ceramic*** 2018 SCC OnLine Del 7185; and, (iii) order dated 26th February, 2018 in CS(COMM) No.843/2016 titled ***HSIL Ltd. Vs. Mulia Brothers***, the plaint in these three suits is also to be returned to the plaintiff for filing in the Court of appropriate jurisdiction. It is stated that the plaint in these three suits is identical, qua the plea of territorial jurisdiction, to the plaint in the aforesaid cases.

2. The counsel for the plaintiff has argued that there is an essential difference between these three suits and the suits judgments wherein are mentioned herein above. It is contended that while in all the aforesaid suits the defendants therein had filed applications under Order VII Rule 10 of the Code of Civil Procedure, 1908 (CPC) prior to the plaintiff applying under Order VI Rule 17 of CPC, as has been done by the plaintiff in these three suits also, the defendants in these three suits have not filed any applications under Order VII Rule 10 of the CPC. It is argued that what prevailed with this Court in ***HSIL Ltd. Vs. Imperial Ceramic*** supra for not considering the applications under Order VI Rule 17 of the CPC filed by the plaintiff was

the prior filing of the applications by the defendants under Order VII Rule 10 of the CPC and in the absence of any application under Order VII Rule 10 of the CPC by the defendants in these suits, there is no impediment to the application under Order VI Rule 17 of the CPC being considered. It is further argued that though as per ***HSIL Limited Vs. Marvel Ceramics*** supra, on the plaint as existing, this Court does not have territorial jurisdiction but if the amendment as sought by the plaintiff is allowed, then this Court would have territorial jurisdiction to entertain these suits.

3. The counsel for the defendants points out that there was no application under Order VII Rule 10 of the CPC in ***HSIL Ltd. Vs. Mulia Brothers*** also but the counsel for the plaintiff still, on 26th February, 2018, when the said suit was listed, himself stated that ***HSIL Ltd. Vs. Mulia Brothers*** was covered by ***HSIL Ltd. Vs. Imperial Ceramic***. Attention in this regard is invited to paras 1 & 13 of the order dated 26th February, 2018 in ***HSIL Ltd. Vs. Mulia Brothers***.

4. The counsel for the plaintiff though agrees that in ***HSIL Ltd. Vs. Mulia Brothers***, there was no application under Order VII Rule 10 of the CPC but states that he was under a mistaken impression that there was an application under Order VII Rule 10 of the CPC.

5. I may mention that the plaintiff instituted these suits as also the other suits, judgments wherein are mentioned above, invoking the territorial jurisdiction of this Court under Section 134 of the Trade Marks Act, 1999, pleading that the plaintiff is located at Delhi and did not have any branch/subordinate office in Gujarat, where the defendants are located and thus this Court had territorial jurisdiction to entertain the suits. However, in ***CS(COMM) Nos.841/2016, 842/2016 & 844/2016***

HSIL Limited Vs. Marvel Ceramics it was found that the plaintiff itself had filed photocopy of its annual report before this Court and which showed the plaintiff to be having regional office at Ahmedabad. There was no plea in the suits, judgments wherein are mentioned above, as also none shown in the present suits, of any cause of action having accrued to the plaintiff against the defendants at Delhi. The plaintiff, by way of amendment of plaint in these suits as well as other suits judgments wherein are mentioned above, wanted to plead that the defendants are selling their goods under the impugned mark at Delhi.

6. I have enquired from the counsel for the plaintiff as to on what basis the plaintiff in the amendment applications claims the defendants to be selling their goods under the impugned mark at Delhi. It has further been enquired, whether any purchase bill issued from Delhi has been filed.

7. The counsel for the plaintiff states that in some other suits filed by the plaintiff against others, commissions were issued and the Local Commissioners appointed in those suits have reported that the traders at Delhi whose premises they had visited had claimed to be purchasing the goods from the defendants herein.

8. The counsel for the defendants informs that none of the reports of the commission shows any mention of the names of the defendants.

9. The counsel for the plaintiff also agrees but states that there are only twenty manufacturers of the subject products in Gujarat and what was reported by the Commissioners was that the traders in Delhi were sourcing the goods from Gujarat and which would include the defendants as well.

10. I have enquired from the counsel for the plaintiff, whether the orders appointing the Commissioners in the other suits authorised the Commissioners to record evidence as the Commissioners are claimed to have recorded, or to collect evidence, inasmuch as in the absence of the same, the report of the Commissioner beyond the commission issued is not to be considered for any purposes whatsoever.

11. The counsel for the plaintiff states that he does not have the copy of the said orders just now with him and is thus not in a position to state whether the Commissioners were authorised to record the said statements or to report thereon.

12. It appears that the commissions were issued after the controversy qua territorial jurisdiction had already arisen in several suits filed by the plaintiff in this Court against the defendants in Gujarat and thus no credence can be given to such reports of the Commissioners.

13. The counsel for the plaintiff has further argued that the plaintiff, in the plaints in the present suits, has already pleaded having a branch office at Delhi and once is permitted to add the plea of the defendants selling their goods at Delhi and as is sought by way of amendment, notwithstanding the registered office of the plaintiff being at Kolkata, this Court would have territorial jurisdiction under category 3 of the table drawn in para 13 of ***Ultra Home Construction Pvt. Ltd. Vs. Purushottam Kumar Chaubey*** 227 (2016) DLT 320 by the Division Bench to elucidate the position with respect to territorial jurisdiction qua Section 134 of the Trade Marks Act.

14. The fact however remains that as of today, on the basis of pleas in the plaint as existing, the case of the plaintiff does not fall in any of the *CS(COMM) Nos.841/2016, 842/2016 & 844/2016*

categories in the table aforesaid in *Ultra Home Construction Pvt. Ltd.* supra.

15. The counsel for the plaintiff has also referred to *Archie Comic Publications Inc. Vs. Purple Creations Pvt. Ltd.* 172 (2010) DLT 234 which was considered in *HSIL Ltd. Vs. Imperial Ceramic*, to contend that in *Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu* AIR 1966 SC 634 referred to therein, it was held that the objection as to territorial jurisdiction can be waived. It is argued that the defendants in the present case, by non-filing of any application under Order VII Rule 10 of the CPC, have waived the plea objecting to territorial jurisdiction.

16. The pleadings in the suits have been completed and the defendants in their written statement are found to have raised a plea with respect to territorial jurisdiction. It is thus not open to the plaintiff to plead and contend waiver on the part of the defendants.

17. The counsel for the defendants has also pointed out that the present suits were being taken up along with *HSIL Ltd. Vs. Mulia Brothers* and *HSIL Ltd. Vs. Mulia Brothers* but these suits came to be listed on 26th February, 2018 owing to a Contempt Petition having been filed therein. It is thus argued that the defendants herein are identically placed as the defendants in the other suits judgments wherein are mentioned above, plaint wherein has already been ordered to be returned/rejected.

18. Thus, the only question to be considered is the effect, if any of non-filing of the application under Order VII Rule 10 of the CPC in the present suits and whether the same entitles the plaintiff to amend the plaint to at least as per the plaint show that this Court has territorial jurisdiction to avoid

rejection/return of the plaint. Else, it has already been held in ***HSIL Ltd. Vs. Imperial Ceramic*** that once the Court does not have territorial jurisdiction as per the plaint in the suit as originally filed, it does not have the jurisdiction to entertain an application under Order VI Rule 17 of the CPC to take pleas which would vest the plaint with a plea of the Court having territorial jurisdiction.

19. Having considered the matter, I am of the view that this Court cannot be blind to what has transpired before it in ***HSIL Limited Vs. Marvel Ceramics***, in ***HSIL Ltd. Vs. Imperial Ceramic*** and in ***HSIL Ltd. Vs. Mulia Brothers***. A mere non-filing of the application under Order VII Rule 10 of the CPC, when a plea of this Court not having territorial jurisdiction has already been taken in the written statement, cannot, in my opinion, lead to a situation any different from as found in the judgments aforesaid. In fact, if this Court, for non-filing of the application under Order VII Rule 10 of the CPC, when the plea of this Court not having territorial jurisdiction has already been taken in the written statement, were to treat the defendants in these suits differently from the identically placed defendants in the other suits, the same would amount to an arbitrary classification being made without any basis. The Court, at the time of framing of issues, upon said plea being pressed, could have framed the issue of territorial jurisdiction and ordered the same to be heard as a preliminary issue and which would have resulted in the same outcome/fate which the other suits against identically placed defendants, have suffered.

20. This Court in *Kensoft Infotech Ltd. Vs. R.S. Krishnaswami* ILR (2007) Delhi I 308, relying on *Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success* (2004) 9 SCC 512 rejected the contention that a plea in the nature of demurrer that the Court lacks territorial jurisdiction and plaint was liable to be returned to be presented in the Court having jurisdiction to entertain the same cannot be considered when the defendant had not filed any application under Order VII Rule 10 of the CPC. It was held that a plea in the nature of demurrer is on the same footing and is not different from a plea of lack of jurisdiction under Order VII Rule 10 CPC. It was yet further held that a legal question as to jurisdiction is not necessarily to be decided by way of an application under Order VII Rule 10 CPC.

21. I am therefore of the opinion that there is no basis or reason for treating these suits differently.

22. The counsel for the plaintiff at this stage contends that while deciding as aforesaid, observations on the merits of the application under Order VI Rule 17 of the CPC have also come and which would prejudice the plaintiff. It is stated that the plaintiff has taken a decision not to appeal against *HSIL Ltd. Vs. Imperial Ceramic* and to file fresh suits in this Court itself taking pleas which are sought to be taken by way of amendment.

23. Merit is found in the aforesaid contention. It is therefore clarified that the observations hereinabove qua the merits of Order VI Rule 17 applications are for the purposes of the present order alone and will not come in the way of the consideration afresh of the fresh suits, if any filed by the plaintiff.

24. The counsel for the plaintiff also points out that the Division Bench in *HSIL Limited Vs. Marvel Ceramics* has held that the findings recorded by this Bench qua the plaintiff having office at Gujarat, are not final.

25. The same does not require any alteration of the order as dictated above.

26. Accordingly, the complaints in these suits, along with the court fees paid thereon, are also ordered to be returned for filing in the Court of competent jurisdiction.

27. The suits are disposed of.

No costs.

RAJIV SAHAI ENDLAW, J.

APRIL 05, 2018

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