

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.12.2019

PRONOUNCED ON :16.12.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

**Application No.8110 of 2019 in
Civil Suit No.555 of 2019**

M/s.Taranga Technologies
Plot No.59, 4th Line, Syamalnagar,
Guntur 522 006,
Andhra Pradesh

....

Applicant

vs

M/s.Neels Enterprises Pvt. Ltd.,
Represented by its Managing Director,
Mr.A.K.Neelakrishnan,
Basement Floor, No.38/40,
North Boag Road,
T.Nagar, Chennai - 600 017.

....

Respondent

Application filed to revoke the leave to granted on
12.09.2019 in Application No.6646 of 2019 under Clause 12 of the
Letters Patent to the applicant to institute the instant suit;
vacate the exparte ad-interim injunction granted by this Court
vide order dated 23.09.2019.

For Applicant : Mr.Madhan Babu

For Respondent : Mr.AR.L.Sundaresan, Senior Counsel
for Ramesh Ganapathy

ORDER

This application is filed on behalf of the defendant in C.S.No. 555 of 2019 to revoke the leave to sue granted by this Court.

2.The facts relevant to decide this application are under:-

(a) The suit has been filed by the plaintiff seeking relief of infringement of design and passing off;

(b)The plaintiff having its place of business at T.Nagar-Chennai, which falls within the territorial jurisdiction of this Court. Whereas, the defendant carrying on business at Guntur, Andrapradesh, obviously, outside the territorial jurisdiction of this Court;

(c)The Court has granted leave to sue the defendant in Application No.6646 of 2019 on 12/09/2019. The order granting leave reads as below:-

" 5.1 After a perusal of the affidavit filed in support of the Application, this Court found that the plaintiff is carrying on their business in Chennai and the respondent has also applied for a tender for supply and installation of the Manhole Covers all over India including Chennai with BPCL. It is also seen that the entire cause

of action of the suit has arisen at Chennai, which is well within the jurisdiction of this Court."

3.The above order is now sought to be revoked by the defendant in this application for the following reasons:-

(a)The original jurisdiction of the Madras High Court is determined by Clause 12 of the Letters Patent;

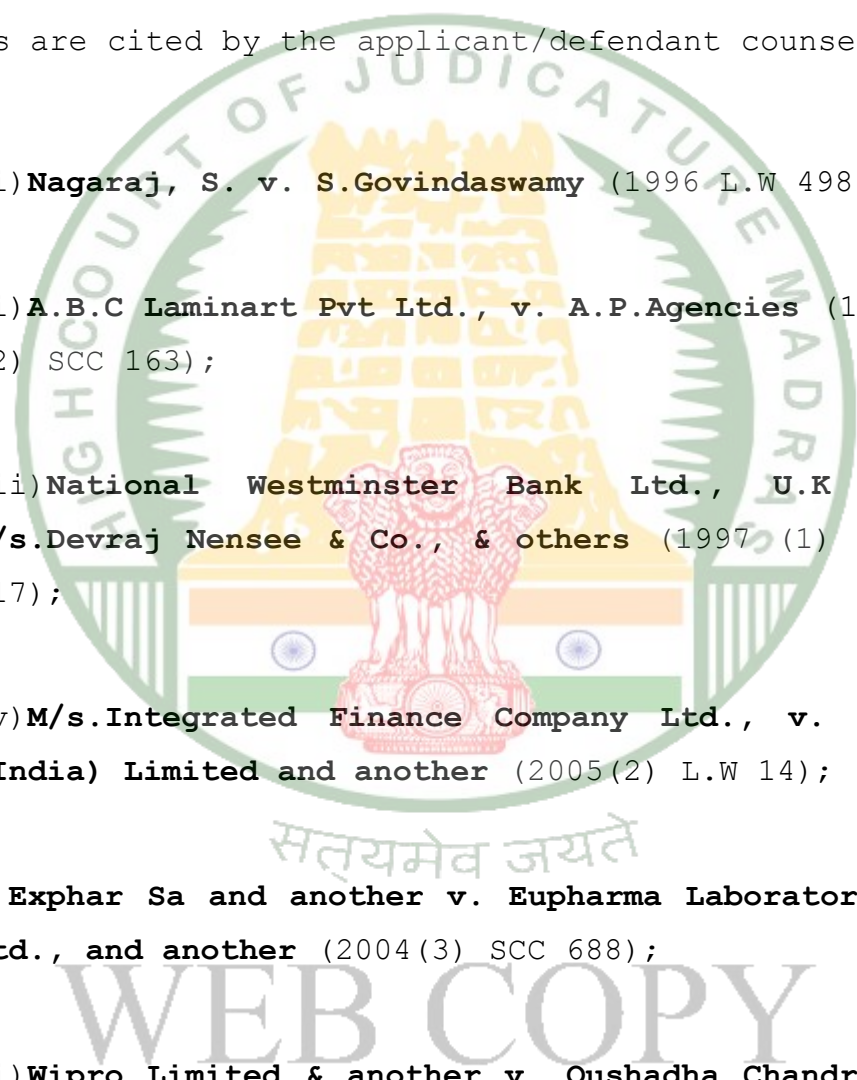
(b)Leave can be granted under Clause 12 of the Letters Patent only based on averments contained in the plaint and not by reference to the averments contained in the affidavit filed in support of the application seeking leave to sue;

(c)Unlike Trade Marks Act and Copyrights Act, the Designs Act, does not confer jurisdiction to the Court where the plaintiff resides or carrying on its business;

(d)Unlike Section 20 of C.P.C., no right is conferred on the plaintiff to institute the suit wherein, the cause of action has arisen in part. Discretion is vested with the Court to either grant leave or refuse leave under clause 12 of the Letters Patent. In this case, no cause of action arisen within the jurisdiction of this Court and

(e)Even assuming that there is sign of part of cause of action within the jurisdiction of this Court, the leave has to be revoked on the ground of forum conveniens/ non-conveniens.

4.In support of the above submissions, the following judgements are cited by the applicant/defendant counsel.

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- "i)**Nagaraj, S. v. S.Govindaswamy** (1996 L.W 498);
- ii)**A.B.C Laminart Pvt Ltd., v. A.P.Agencies** (1989 (2) SCC 163);
- iii)**National Westminster Bank Ltd., U.K v. M/s.Devraj Nensee & Co., & others** (1997 (1) L.W 117);
- iv)**M/s.Integrated Finance Company Ltd., v. TMT (India) Limited and another** (2005(2) L.W 14);
- v)**Expfar Sa and another v. Eupharma Laboratories Ltd., and another** (2004(3) SCC 688);
- vi)**Wipro Limited & another v. Oushadha Chandrika Ayurvedic India (p) Limited and another** (2008(2) L.W 430);
- vii)**T.Ekambaram v. Bhavani Sagari** (2013(2) L.W 647);

viii) **Duro Flex Pvt. Limited v. Duroflex Sitzings System** (2014 (6) CTC 577) and

ix) **Indian Performing Rights Society Ltd., v. Sanjay Dalia** (2015 (1) SCC 161)."

5. In response to the applicant/defendant above contentions, the learned counsel for the respondent/plaintiff would submit that, the suit is filed for infringement of design and for passing off. The respondent/plaintiff carrying on business within the jurisdiction of this Court. The applicant/defendant is passing off its goods imitating the registered design of the plaintiff. The defendant has succeeded in the tender for supply of the Hydraulic Manhole to BPCL to be installed in the petrol bunks at various places including Chennai. Hence, leave was granted after considering the averments in the plaint as well as in the affidavit filed in support of the leave to sue application. The applicant/defendant is trying to supply pirated version of the plaintiff's design to BPCL petrol outlets located within the jurisdiction of this Court. Hence, cause of action falls within the jurisdiction of this Court. Therefore, the leave granted has to sustain.

6. In support of this submission, the learned counsel for the respondent/plaintiff would rely upon the order passed by this Court in **Parle Products Private Limited vs. Surya Food &**

Agro Limited (O.S.A.No.375 of 2007 dated 09.09.2008) and **Maya Appliances vs. Urooj Ahmed** (O.A.Nos.1096 and 1097 of 2008).

7.This Court on hearing the submissions of the learned counsel on both sides and on perusing the relevant provisions of law and judgments relied, affirm the under mentioned prepositions canvassed by the learned counsel for the applicant:-

a)To lay a suit for infringement of registered design, the place of plaintiff residence or business is not a criteria to confer jurisdiction;

b)To lay a suit against the defendant, residing or carrying on business outside the jurisdiction of this Court. Clause 12 of the Letters Patent mandates to obtain grant of leave to sue from the Court. For grant of leave, the plaintiff should satisfy the Court that atleast part cause of action fall within this Court's jurisdiction and

c)Madipakkam where the plaintiff claims to have seen the product supplied by the defendant does not fall within the territorial jurisdiction of this Court.

8.The points of conflict are, (i)whether the plaint averments alone should be taken note ignoring the affidavit

averments; (ii) whether the joinder of cause of action viz., infringement of design and passing off confer jurisdiction to this Court and (iii) In a suit for infringement to what extent principle of forum conveniens apply.

9. The learned counsel for the applicant/defendant would rely upon the Division Bench judgment of this court in **S.Nagaraj -vs- S.Govindasamy and another** (1996 L.W 498) and emphasize that, we have to go only by the plaint averment and not by the averment in the affidavit.

10. Contrarily, the learned counsel for the respondent/plaintiff states that, the pleadings of the plaintiff both in the plaint as well as the affidavit has to be read together. When passing off within the jurisdiction of this Court is alleged, it is the question of fact and law which can be determined only during trial. Hence, the leave granted to sue should not be disturbed.

11. In **S.Nagaraj case** (cited supra), the Division Bench of this Court while observing that the plaint averments alone to be considered for granting/revoking leave, the learned judges have referred the Calcutta High Court Judgment in **Muttra Electric Supply Co. Ltd -vs- Gopal Saran Kulasesathi** reported in AIR 1955

N.O.C. (Cal) 2955, as the reason for the said observation.

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12.For the sake of better appreciation of the facts in that case, the relevant passage in the Nagaraj case (cited supra) is extracted below:-

"9-A. In the present plaint. there is absolutely nothing to confirm to Order Vi Rule (2) C. P. C., as regards the allegation in the effect that there was an agreement if or purchase of Royal Bhutan Lottery ticket at Madras or about the sharing of the prize money, if won. In the additional affidavit filed by the appellant between, it has been stated in para 2 as follows-

"I state that myself and the first defendant came to Madras in April 1980 and we stayed at Anna Nagar West, Madras. 40; in Our relation's house at door No. 33 Jagadambigai St. West Anna Nagar, Madras 40. When we were staying in Madras in the above said relation's house, we entered into an agreement in and by which the first defendant will purchase and sell lottery tickets by the money entrusted by the plaintiff and also the first defendant will put 1/4th of the amount invested by the plaintiff. Accordingly, the plaintiff invested, Rs. 2000 in the business and the first defendant put a sum of Rs. 500 for, the business and as the plaintiff was a carpenter working in P. R. C. Coimbatore, the business was agreed to be done by the first defendant in his petty shop owned by him at Coimbatore."

10. From these averments, Mr.. Srinivasan wants to submit before this Court that the agreement was entered into between the plaintiff and the first defendant at Madras. On a -reading of the above averments, it is too much for us to presume that the parties intended to purchase lottery tickets at Madras and share the prize, if any, between themselves. At best, the above averments, will indicate that the parties wanted to do business by selling lottery tickets. Further, we have to go only by the averments in the plaint and not by the averments in the affidavit. This position it has been made very, clear in. **Muttra Electric Supply Co; Ltd. v. Gopal Saran Kulastesthi (AIR 1955 N.O.C (Cal.) 2955)**, referred to by the learned Advocate General. In this decision, it has been stated that in an application for revocation of leave under Clause 12, the plaint is the most material document on which the decision should rest, although such decision does not rest merely on a criticism of the pleading. The petition and the affidavits in support of and against the revocation of leave are relevant, but must be read subject to the overriding considerations and facts pleaded in the plaint. It is not unusual that in such petition and affidavits the plaintiff and the defendant are prone to overstate their respective cases for and against the leave. and such overstatement should be toned down by reference to the plaint."

13.Thus, in the context of the given facts, when the plaintiff sought to improve his case by additional affidavit containing facts totally alien to the pleadings in the plaint, the Division Bench has rightly held that the Court has to confine to plaint averments. This observation, no doubt, referred by Courts in later judgments, not as a stare decisis but based on facts of the cases under consideration.

14.This Court say so with firm conviction because the Calcutta High Court judgment referred in **Nagaraj case** (cited supra) does not say, affidavit averments should not be considered while deciding application for revoking leave. It only say that, it must be read subject to the overriding considerations and facts pleaded in the plaint. It also cautions and guides that the parties in their affidavit may overstate their respective cases for and against the leave and such overstatement should be toned down by reference to plaint.

15.Therefore, this Court finds no error in considering the affidavit averements and referring it while granting leave. More so, when the affidavit was filed along with the plaint and not as an additional affidavit filed subsequently as in the **Nagaraj case** (cited supra).

16.With the above understanding of law, the pleadings are to be tested, 'whether the leave granted is liable to be revoked'. The pleadings in the plaint regarding jurisdiction reads as below:-

"34.The cause of action arose in Chennai, within the jurisdiction of this Hon'ble Court, in the month of November 2018, when the plaintiff noticed some Manhole Covers which were installed in a BPCL Petrol Bunk in Madipakkam, Chennai, looked identical and highly & deceptively similar to the product of the plaintiff having registration Nos.245523 and 285400, by manufacturing and selling Manhole covers in a specific design. The cause of action also continued in the month of June 2019 when defendant has also applied for a tender for supply & installation of the impugned "Manhole covers" all over India with BPCL. The cause of action for the subject matter is continuous in nature and continues to arise on each day as defendant continues to violate the plaintiff's statutory rights in their registered design. Thus, this suit is not barred by limitation.

35.The plaintiff states that this Hon'ble Court has jurisdiction to hear and decide the matter in accordance with Clause 12 of the Letters Patent Act. It is further submitted that, the present suit is for infringement of registered designs and passing off, is a

commercial disputes Act, as per Section 2(i)(c) (xvii) by virtue of the first proviso to Section 7 of the Commercial Courts Act, 2016 r/w and Section 22 of the Designs Act, 2000, this Hon'ble Court has jurisdiction to entertain the present suit.

36. This Hon'ble High Court has jurisdiction to try this suit as plaintiff is carrying on business in Chennai and having a branch office in T.Nagar, Chennai within the jurisdiction of this Hon'ble Court."

17. Apart from the plaint averments, in the affidavit accompanied with the leave to sue petition, the plaintiff has averred that,

"4. The respondent is engaged in the business of manufacturing, supply & installation connected with the "Manhole covers" which is identically and deceptively similar to the product of the Applicant and infringing the registered design no's. 245523 and 285400 of the Applicant.

5. The Applicant herein has filed the above-mentioned suit before this Hon'ble Court as the Applicant carries on the business in Chennai within the jurisdiction of this Hon'ble Court and the respondent has also applied for a tender for supply & installation of the impugned "Manhole covers" all over India including Chennai with BPCL."

Taken note of these averments, this Court has granted leave on 12/09/2019.

18.In the counter affidavit and common affidavit filed on behalf of the applicant/defendant, the fact that the defendant's participation in the tender invited by BPCL not denied. Neither the defendant has denied that the tender is for supply of Manhole through out India including Chennai. In fact, at paragraph 6 of the common affidavit, the applicant/defendant categorically admits that they are the successful bidders for fabrication and installation of MATC covers for Southern and Northern (NOIDA) region. The applicant/defendant contention is that, the claim of the plaintiff over the design is false and a misrepresentation. Further, it is denial of the plaintiff claim that they conceptualized the subject design and obtained registration in 2012.

19.The contention of the learned counsel for the applicant that Madipakkam does not fall within the jurisdiction of this Court is factually correct. The further contention of the learned counsel that, the place of plaintiff business *per se* will not confer jurisdiction is also legally correct. However, his contention that, 'no cause of action' arisen within the territorial jurisdiction of this Court and hence, leave granted

to be revoked is neither legally nor factually correct.

20. In **A.B.C. Laminart Pvt. Ltd., v. A.P. Agencies** (1989 (2) SCC 163) wherein, it has been held as follows:-

"A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a fight to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

21. The alternate plea placed by the learned counsel for the applicant/defendant is that, even assuming but not admitting

part of cause of action arisen within the jurisdiction of this

Court, even then the leave has to be revoked on the ground forum conveniens.

22.The ideal test for grant / revoke leave has been laid down long back by the Calcutta High Court in **Madanlal Jalan -vs- Madanlal and others** (AIR 1949 Cal.49). This test is scrupulously followed by all the Courts in the country. The relevant portion of the said judgment is worth extracting below:-

"a) that the application lies for revoking the leave granted under Clause 12 of the Letters Patent;

b) that such an application should be made at an early stage of the suit and delay and acquiescence may be a bar to such an application;

c) that if the application depends on difficult questions of law or fact, the Court should not revoke leave on a summary application but should decide the question at the trial;

d) that if the defendant shows clearly that no part of the cause of action arose within jurisdiction, the leave should be revoked as a matter of course;

e) that if only a part of the cause of action arose within jurisdiction, then it is a question of discretion for the Court to give or refuse

leave or where leave has already been granted to revoke or maintain the leave;

g) that in giving or refusing leave or maintaining or revoking leave, the Court will ordinarily take into consideration the balance of convenience and may, if the balance is definitely in favour of the defendant, apply the doctrine of forum conveniens;

h) that the Court may refuse leave or revoke leave on the ground of balance of convenience, although there be no evidence of bad faith or abuse of process on the part of the plaintiff;.....

j) that if the Court is satisfied that the suit has been filed mala fide for the purpose of harassing or oppressing the defendant or might result in injustice, the Court should in all cases readily refuse leave or if leave has already been granted, revoke the leave as a matter of course".

23. On applying the principles as stated above, taking into consideration the balance of convenience, this Court finds having granted leave there is no strong reason to revoke the leave, certainly the balance of convenience is to proceed with the trial of the case in this Court and not otherwise.

24.From the facts of the case, it is not a case to renounce the jurisdiction absolutely. When part of the cause of action arose within jurisdiction of this Court. In such case, as held by the Full Bench of this Court in **Duro Flex Pvt. Limited v. Duroflex Sitzings System** (2014 (6) CTC 577), a decision has to be taken whether it is the appropriate forum for institution of suit. The Full Bench has indicated appropriateness test will be the test to decide the forum. The relevant portion is extracted below:-

"34. It was submitted that there are certain cases where the court can neither assume nor renounce jurisdiction or where it may be said to have a total and absolute jurisdiction. As distinct from this, in cases where only a part of the cause of action arises within the jurisdiction of the High Court, a decision has to be taken whether it is the appropriate forum for institution of such suits. The test as observed in *Horlicks Ltd., and another vs. Heinz India (Pvt.) Ltd*, case cited supra, is appropriateness while deciding the question of forum conveniens. It is really not convenience, but appropriateness or suitability of the forum. The non-applicability of the doctrine of forum conveniens is limited to the consideration of the position under Section 20 of the Code of Civil Procedure and not Letters Patent, which distinction is elucidated in *Madanlal Jalan vs. Madanlal and*

others reported in AIR 1949 Cal. 495. It has also been held that the jurisdiction of the Court under Section 20 of the Code is different from its jurisdiction under Clause-12 of the Letters Patent vide *Food Corporation of India vs. Evdomen Corporation* reported in (1999-2 SCC 446), and thus the same considerations would not apply in the determination of jurisdiction of courts under Section 20 CPC and Clause 12, the plaintiff does not have an absolute right to bring proceedings in the High Court and can only do so with the prior leave of the Court."

25.On applying the principle enunciated in **Madanlal Jalan** case (cited supra) and the test of appropriateness laid by the Full Bench of the Hon'ble High Court of Madras in **Duro Flex Pvt. Limited v. Duroflex Seatings System** case (cited supra), this Court finds that the balance of convenience is equally placed, however having granted leave, convenience is more in favour of the plaintiff.

26.In the result, the application is dismissed.

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Sd./-G.J.J
16.12.2019

//Certified to be true copy//

Dated at Madras this the day of 2019.

JJ 17/12/2019

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