

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

Reserved on: 10.09.2020

Date of Decision : 29.09.2020

+ **TR.P.(C.) 39/2020**

ADVANCE MAGAZINE PUBLISHERS INC Petitioner

Through: Ms.Anuradha Salhotra, Mr.Sumit
Wadhwa, Ms.Saugaat Khurana &
Mr.Mukul Kochhar, Advs.

versus

BOMBAY RAYON FASHIONS LTD & ORS. Respondents

Through: Ms.Mamta Jha, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed seeking transfer of the suit bearing TM No.16/2017 titled *Advance Magazine Publishers INC vs. Bombay Rayon Fashions Ltd.*, from the Court of the learned Additional District Judge-5, (South-East), Saket to the Court of Sh.Sanjay Sharma-II, who is presently posted as the Additional Sessions Judge-3, Central, Tis Hazari Courts.

2. It is the case of the petitioner that the petitioner had filed the above suit seeking permanent injunction, infringement of trademark, passing off and damages against the respondents on 22.03.2017. By an order dated 04.12.2017 passed by the Supreme Court in SLP(C) No.32865/2017, it was directed that the suit be disposed of within a year from the date of the

order. Recording of the evidence in the abovementioned suit was concluded on 17.12.2019.

3. Due to the outbreak of COVID-19 pandemic and the restricted functioning of the Courts, final arguments in the suit could not be addressed. The same commenced on 04.08.2020 and the petitioner concluded its arguments on 14.08.2020.

4. By a Notification dated 26.08.2020 issued by the Delhi High Court, Mr. Sanjay Sharma-II, who was hearing the suit, was transferred from his post of Additional District Judge-5, South-East, Saket as Additional Sessions Judge-3, Central, Tis Hazari Courts with effect from 07.09.2020.

5. The learned Presiding Judge in his order dated 27.08.2020, informed the parties about his transfer, however, at the request of the learned counsels for the parties, continued to hear the arguments in the suit as the suit involved a number of witnesses and voluminous documents and the learned Judge had already expended considerable time in hearing arguments.

6. The suit was thereafter heard by the Presiding Judge on 27.08.2020 and 28.08.2020, and was fixed for further arguments on 08.09.2020, as the learned counsel for the respondents had also submitted that a joint request shall be mentioned before this Court for seeking transfer of the suit to the learned Judge, who as noted above, had been posted as an Additional Sessions Judge, Central, Tis Hazari Courts.

7. The learned counsel for the respondents, who appeared on an advance notice and waived the right to file a reply to the petition, submits that while she has no objection to the transfer of the suit, her only concern is that as the learned Judge is now posted as Additional Sessions Judge, he may not be competent to hear this suit. Placing reliance on the judgments of the Supreme Court in ***Harshad Chiman Lal Modi vs. DLF Universal Ltd. & Anr.***, (2005) 7 SCC 791 and ***Hasham Abbas Sayyad vs. Usman Abbas Sayyad & Ors.***, (2007) 2 SCC 355, she submits that where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, it cannot take up the cause or matter, and any order passed by such Court would be a nullity.

8. She further places reliance on the judgment of this Court in ***Mohd. Zafar vs. State*** MANU/DE/0126/2020, to submit that in a reverse case, where transfer of a criminal appeal was being sought from the Court of the Additional Sessions Judge to the same Presiding Officer who had by then been posted as an Additional District Judge, this Court had refused the transfer on the ground that such transfer will not be in the interest of justice and the arguments, since only heard in part by the Additional District Judge, can be addressed to the incumbent.

9. The learned counsel for the respondents further submits that the Courts at Tis Hazari would otherwise also lack territorial jurisdiction to entertain the suit.

10. On the other hand, the learned counsel for the petitioner has placed reliance on Article 236(a) of the Constitution of India and the judgment of the Supreme Court in ***The State of Maharashtra vs. Labour Law***

Practitioners' Association & Ors. MANU/SC/0121/1998, to submit that the expression 'District Judge' *inter alia* includes the Additional Sessions Judge. She submits that in terms of the judgment of this Court in ***Moolchand Kharaiti Ram Trust & Ors. vs. Rajani Kothari & Ors.*** MANU/DE/3553/2017, a suit under Section 134 of the Trade Marks Act, 1999 is to be heard by a Court of the District Judge, which would include the Additional District Judge. She submits that therefore, mere posting of the learned Judge as an Additional Sessions Judge would not debar such Judge from exercising jurisdiction under Section 134 of the Trade Marks Act, 1999.

11. As far as the territorial jurisdiction of the Court is concerned, the petitioner places reliance on the judgment of this Court in ***Paramount Plastic Industries vs. Corporation Bank*** MANU/DE/2413/2014, to contend that under Section 24 of the Code of Civil Procedure, 1908, the suit can be transferred even to a Court which otherwise has no territorial jurisdiction. She further submits that in the present case, the respondent nos.2 and 3, who are defendant nos. 2 and 3 in the suit, even otherwise, have their place of business at Chandni Chowk, which falls within the jurisdiction of the Tis Hazari Courts. She submits that even the plaint alleges that the offending goods are being sold by the defendants throughout Delhi and therefore, the Court at Tis Hazari would have territorial jurisdiction.

12. Placing reliance on the judgment of the Supreme Court in ***Kulwinder Kaur vs. Kandi Friends Education Trust & Ors.***

MANU/SC/7058/2008, she submits that this would be a fit case where this Court would transfer the suit in the interest of justice.

13. I have considered the submissions made by the learned counsels for the parties.

14. At the outset, this judgment is influenced by the fact that the respondents have otherwise expressed no objection to the transfer of the suit. Their only concern seems to be that the Court to which it is transferred to, is competent to try such suit and any objection to the same must not later be raised by either party. As both the learned counsels have made such submissions, it is but obvious that the parties shall remain bound by such submissions and would not later raise objection to the jurisdiction of the Court but for the objections that have been highlighted by the respondents and recorded hereinabove. It is further clarified that the respondents, if aggrieved of this judgment, must challenge the same at this stage itself, so that the parties do not expend further time and effort in the suit with this issue still hanging fire.

15. As noted hereinabove, the suit in question is one seeking permanent injunction, infringement of trademark, and accounts of profit filed under the Trade Marks Act, 1999.

16. Section 134 of the Trade Marks Act, 1999 provides that such suit has to be instituted in any Court not inferior to a District Court having jurisdiction to try the suit.

17. This Court in *Moolchand (supra)*, has held that the term 'District Court' in the said Section means the Court of the 'District Judge'. Paragraph 16 of the judgment can be usefully quoted for this purpose.

"16. I have invited the attention of the counsels to Section 134 of the Trade Marks Act, 1999 and Section 62 of the Copyright Act, 1957 which provide for the suits thereunder to be instituted in a Court "not inferior to a District Court" and "in the District Court" respectively and to S.Dharmalinga Nayakar vs. D. Balasubramania Ayyar MANU/TN/0262/1936: AIR 1937 MAD 94, Everest Pictures Circuit, Salem v. S. Karuppannan MANU/TN/0261/1982, K.I.George v. C.Chériyan MANU/KE/0004/1986 AIR 1986 Ker 12, Citicorp V. Todi Investors MANU/DE/3357/200g, Sanjay Kumar @ Mallu v. Manoj Kumar Sahu MANU/UP/0375/2008, Ganga Prasad Rawat v. M/s Shivhare Pharmacy, Fatehpur MANU/UP/0914/2012, Reckitt Benckiser Healthcare India Ltd. v. Emami Ltd. MANU/WB/0372/2015 and Guinness World Records Ltd. v. Sababbi Mangal MANU/DE/0397/2016: (2010) 230 DLT 377 holding that the words 'District Court' means the Court of the District Judge and not the Court of the Senior Civil Judge or the Civil Judge, though also generally counted in the District Court."

18. The term 'District Judge' is not defined in the Code of Civil Procedure, 1908 (CPC). Section 18 of the Punjab Courts Act, 1918 provides for 'Classes of Courts'. Section 20 of the Act further provides for appointment of the District Judge, while Section 21 provides for the appointment of Additional District Judges. Section 21A of the Act provides for assignment of functions of the District Judge to the Additional District Judge. The said Sections are quoted hereinunder:

"18. Classes of Courts—Besides the Courts of Small Causes established under the Provincial Small Cause Courts Act, 1887, and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely:

(1) *The Court of the District Judge;*

(2) *Omitted*

(3) *The Court of the Subordinate Judge*

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20. District Judges—The Central Government shall appoint as many person as it thinks necessary to be District Judges, and shall post one such person to each district as District Judge of that district:

Provided that the same person may, if the Central Government thinks fit, be appointed to be District Judge of two or more districts.

21. Additional District Judges—(1) *The State Government in consultation with the High Court, may also appoint Additional District Judge to exercise jurisdiction in one or more Courts of the District Judges.*

(2) *Additional District Judges shall have jurisdiction to deal with and dispose of such cases only as the High Court, by general or special order, may direct them to deal with and dispose of or as the District Judge of the District may make over to them for being dealt with and disposed of:*

Provided that the case pending with the Additional District Judges immediately before the extension of the Punjab Courts (Amendment) Act, 1963 to the Union Territory of Delhi, shall be deemed to be cases so directed to be dealt with or disposed of by the High Court or so made over to them by the District Judge of the District as the case may be.

(3) While dealing with and disposing of the cases referred in sub-section (2) an Additional District Judge shall be deemed to be the Court of the District Judge.

21A. The High Court or the District Judge may assign to an Additional District Judge any of the functions of the District Judge, including the functions of receiving and registering cases and appeals, which but for such assignment of functions could be instituted in the Court of the District Judge and in the discharge of those functions the Additional District Judge shall, notwithstanding anything contained in the Act, exercise the same powers as the District Judge."

19. Section 3 of the CPC gives a hierarchy of Courts and reads as under:

"3. Subordination of Courts.—For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court. "

20. Section 9 of the Code states that the Courts shall have the jurisdiction to try all suits of a civil nature, excepting suits to which their cognizance is either expressly or impliedly barred. Section 9 of the CPC is quoted hereinbelow:

"9. Courts to try all civil suits unless barred.—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

21. Section 9 of the Code of Criminal Procedure, 1973 provides for establishment of Court of Session and appointment of Presiding Judge thereto. Sub-section (1),(2) and (3) of Section 9 are quoted hereinbelow:

“9. Court of Session.-- (1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Session Judges to exercise jurisdiction in a Court of Session. ”

22. The above provisions would show that the Sessions Judge or the Additional Sessions Judge is appointed by the High Court to exercise jurisdiction as is vested in the Court of Sessions Judge by the Code of Criminal Procedure, 1973 (Cr.P.C.). They however, do not get denuded of their powers as the learned District Judge /Additional District Judge. In Delhi, normally their nomenclature is as District and Sessions Judge. They are also freely transferable from one jurisdiction to another, that is, from Civil to Criminal jurisdictions, depending upon the discretion of the High Court.

23. Therefore, merely because a particular Judge has been assigned the work of Additional Sessions Judge under the Cr.P.C., in my opinion, he/she would not lose competence to try the civil suits, where so empowered by the High Court in exercise of its powers under Section 24 of the CPC or by the general order.

24. The judgment of this Court in *Mohd. Zafar (supra)* was on the peculiar facts of the said case and therefore, would have no application.

25. While there can be no dispute to the proposition of law as laid down by the Supreme Court in its judgment in *Harshad Chiman Lal (supra)* and *Hasham Abbas (supra)*, in view of my above observation, the same shall have no application to the facts of the present case, as the learned Judge to whom the suit is transferred would have jurisdiction to try the same.

26. As far as the fear of lack of territorial jurisdiction is concerned, as held by this Court in *Paramount Plastic Industries (supra)* in exercise of powers under Section 24 of the CPC, objection of lack of territorial jurisdiction cannot be a bar to such exercise and the proceedings can be transferred to a Court which does not even enjoy territorial jurisdiction. In this regard, paragraph 11 of the judgment is quoted hereinbelow:

"11. As far as the question of transfer from DRT having territorial jurisdiction to a DRT having no territorial jurisdiction is concerned, Section 17A of the DRT Act, while conferring power on the Chairperson of the DRAT for such transfer, does not impose any condition of the transfer being permissible only to such DRT which would also have territorial jurisdiction or transfer being not permissible to a DRT which does not have territorial jurisdiction. We have thus wondered whether there is any such restriction under the general law of transfer of proceedings from one Court to another. Section 24 of the Code of Civil Procedure, 1908 (CPC) confers power on the High Court as well as District Judge, of transfer of suits, appeals or other proceedings from one Court to another. The same also does not contain any such restriction though Sub-Section (5) thereof clarifies that such power of transfer can also be exercised with respect to a suit or proceeding instituted and pending in a Court which has no jurisdiction to

entertain the same. We find the High Courts of Allahabad (in Kishore Lal Vs. Balkishan MANU/UP/0143/1932: AIR 1932 All 660), Madras (in P.Madhavan Unni Vs. M.Jayapandia Nadar MANU/TN/0309/1973: AIR 1973 Mad 2), Rajasthan (in Maliram Nemichand Jain Vs. Rajasthan Financial Corporation MANU/RH/0060/1974 : AIR 1974 Raj 204), Orissa (in Mulraj Doshi Vs. Gangadhar Singhania MANU/OR/0062/1982: AIR 1982 Ori 191 and in Anima Das v. State of Orissa MANU/OR/0046/2003), Kerala (in Thomas Vs. Sunnichan MANU/KE/0688/2003), Punjab & Haryana (in Deepika Vs. Vinod Bhalla MANU/PH/0429/2004) and Karnataka (in M.V. Rekha Vs. Sri Sathya MANU/KA/1315/2010), all to have held that in exercise of powers of transfer, proceedings can be transferred to a Court which does not even enjoy territorial jurisdiction. It was reasoned that else the very purpose and object of conferring the power to transfer will be nullified and it was held that the words in Section 24 of the CPC "competent to try" (and which we may notice, are missing in Section 17A of the DRT Act) do not refer to territorial jurisdiction. We respectfully concur with the said view. Reference in this regard may also be made to Usha Vs. Palisetty Mohan Rao MANU/SC/0938/2001: (2002) 10 SCC 544 where the opposition to transfer on the ground of the Court to which transfer was being sought having no jurisdiction under the Hindu Marriage Act, 1956 was negated by holding that the powers of transfer are altogether different from the provisions of the Hindu Marriage Act and that if such an opposition were to be accepted then no transfer of any case can be made in as much as the matter would have been filed in a Court having jurisdiction to deal with it and that such an interpretation would stultify the process of law and render nugatory the provisions relating to transfer.

We therefore hold that merely because the Full Bench in Amish Jain (supra) has held that the DRT within whose territorial jurisdiction the secured asset with respect to which action under Section 13(4) of the SARFAESI Act has been initiated would have exclusive territorial jurisdiction to entertain appeal/application under Section 17 of that Act, cannot come in the way of transfer if otherwise permissible of the said appeal/application to another DRT."

27. Even otherwise, a perusal of the plaint filed by the petitioner would show that the defendant nos.2 and 3 are stated to be the authorized distributors of the defendant no.1 company situated at Chandni Chowk, which would fall within the jurisdiction of Tis Hazari District Courts. The cause of action has further been premised on the sale of the offending goods in the entire territory of Delhi. Paragraph 51 of the plaint in this regard is reproduced hereinbelow:

"51. This Hon'ble Court has the territorial jurisdiction to try and entertain the present suit in as much as the Defendants are selling, offering for sale, promoting and advertising the impugned products in Delhi through the third and fourth Defendant. The goods of the Defendants bearing the impugned mark have been purchased from the fourth Defendant that carries on business within the jurisdiction of this Hon'ble Court and therefore the cause of action has arisen in part within the jurisdiction of this Hon'ble Court. Thus, this Hon'ble Court has jurisdiction to entertain and try the present suit by virtue of section 20 of the Code of Civil Procedure."

28. In view thereof, it cannot be said that the Court at Tis Hazari would lack territorial jurisdiction.

29. As held by the Supreme Court in ***Kulwinder Kaur (supra)***, power under Section 24 of the CPC for transfer of the suit is to be exercised by the Court *inter alia* in the interests of justice.

30. In the present case, there is a direction from the Supreme Court for disposal of the suit within a year. The said period has since long expired.

I am informed that the suit contains voluminous records. The learned Judge has already spent considerable judicial time hearing the petitioner and the respondents in part. In fact, at the request of the parties, he had continued hearing the case even after his transfer orders were issued.

31. I am, therefore, of the opinion that this would be a fit case where the discretion vested in the Court under Section 24 of the CPC needs to be exercised to prevent wastage of judicial time and to ensure timely conclusion of the suit which has been expedited pursuant to the orders of the Supreme Court.

32. I, accordingly, direct transfer of suit bearing TM No.16/2017 from the Court of the learned Additional District Judge -5, (South-East), Saket to the Court of Sh.Sanjay Sharma-II who is now posted as the Additional Sessions Judge-3, Central, Tis Hazari Courts.

NAVIN CHAWLA, J

SEPTEMBER 29, 2020
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