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

+ **CRP-IPD 5/2023**

M/S S. S. HOSPITALITY

..... PETITIONER

Through: Mr. Sudarshan Kumar Bansal,
Mr.Nikhil Sonker and Mr.Vaibhav Jairath,
Advs.

versus

M/S SAGAR RATNA RESTAURANTS PVT. LTD

..... RESPONDENT

Through: Mr. Sushant Mahapatra,
Ms.Shruthi Upparpalli and Mr.Rahul
Kumar, Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

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04.05.2023

1. This is a revision petition under Section 115 of the Code of Civil Procedure, 1908 (CPC), assailing order dated 1st March 2023, passed by the learned District Judge (Commercial Court) (“the learned Commercial Court”), whereby an application under Order VII Rule 11 of the CPC, filed by the petitioner as the defendant before the learned Commercial Court, , has been dismissed. Inasmuch as the application, which stands dismissed by the impugned order, contested the maintainability of the suit instituted by the respondent-plaintiff on the ground of territorial jurisdiction, Mr. Bansal, learned Counsel for the petitioner-defendant frankly acknowledges that the application ought to have been filed under Order VII Rule 10, rather than Order VII Rule 11.

2. Nonetheless, as the issue in question is purely one of law, the Court is not inclined to take any serious view of the misstating of the provision under which the application was formally filed.

3. The issue before this Court is whether CS (Comm) 107/2023 (*Sagar Ratna Restaurants Pvt. Ltd. v. S.S. Hospitality*), as instituted by the respondent against the petitioner, was maintainable before the learned Commercial Court at Delhi. Mr. Bansal's contention, which stands rejected by the learned Commercial Court, is that the respondent-plaintiff could not have filed the suit at Delhi, but was required to file the suit at Chandigarh. For this purpose, Mr. Bansal relies on para 14 of the decision of a Division Bench of this Court in *Ultra Home Construction Pvt. Ltd. v. Purushottam Kumar Chaubey*¹, which, to the extent relevant, reads thus:

"14. It is evident from the above observations that the interpretation given to the expression "carries on business" in the context of a defendant under section 20 of the Code has also been employed in the context of a plaintiff under the said sections 134(2) and 62(2). Thus, in addition to the places where suits could be filed under section 20 of the Code, the plaintiff can also institute a suit under the Trade Marks Act, 1999 and the Copyright Act, 1957, as the case may be, by taking advantage of the provisions of section 134(2) or section 62(2), respectively. Both the latter provisions are in *pari materia*. Under these provisions four situations can be contemplated in the context of the plaintiff being a corporation (which includes a company). First of all, is the case where the plaintiff has a sole office. In such a case, even if the cause of action has arisen at a different place, the plaintiff can institute a suit at the place of the sole office. Next is the case where the plaintiff has a principal office at one place And a subordinate or branch office at another place and the cause of action has arisen at the place of the principal office. In such a case, the plaintiff may sue at the place of the principal office but cannot sue at the place of the subordinate office. *The third case is where the plaintiff has a principal office at one place and the cause of action has arisen at the place where its subordinate office is located. In this eventuality,*

¹ (2016) 227 DLT 320 (DB)

the plaintiff would be deemed to carry on business at the place of his subordinate office and not at the place of the principal office. Thus, the plaintiff could sue at the place of the subordinate office and cannot sue (under the scheme of the provisions of section 134(2) and 62(2)) at the place of the principal office. The fourth case is where the cause of action neither arises at the place of the principal office nor at the place of the subordinate office but at some other place. In this case, the plaintiff would be deemed to carry on business at the place of its principal office and not at the place of the subordinate office. And, consequently, it could institute a suit at the place of its principal office but not at the place of its subordinate office.”

(Emphasis supplied)

4. Mr. Bansal’s contention is that the present case falls within the third of the four exigencies envisaged in para 14 of *Ultra Home*¹.

5. It cannot be in dispute that the Division Bench in *Ultra Home*¹ has held, with respect to the third exigency envisaged in para 14, that, if the plaintiff has a principal office at one place and a subordinate office at another, and the cause of action has arisen at the place where the subordinate office is situate, the suit would have to be filed before the competent court having jurisdiction over the subordinate office of the plaintiff, and could not have been filed before the Court having jurisdiction over the principal office. This decision has been rendered in the context of Section 134(2) of the Trade Marks Act, 1999, which entitles a plaintiff, suing for infringement of his trademark, to institute the suit wherever the plaintiff carries on business. To reiterate, the Division Bench has held that, if the entire cause of action has arisen at the place where the subordinate office of the plaintiff is situate, then the plaintiff would, for the purposes of Section 134(2) be deemed to be carrying on business at such place, and not where the principal office of the plaintiff is located.

6. Mr. Bansal's contention is, therefore, that, though the principal office of the defendant was located at Delhi, the entire cause of action in the present case, which was alleged infringement, by the petitioner-defendant, of the registered trademark of the respondent-plaintiff, had arisen at Chandigarh, and, as the respondent-plaintiff had subordinate offices in Chandigarh, the plaint was required to be instituted at Chandigarh, and could not have been instituted at Delhi.

7. Mr. Mahapatra, learned Counsel for the respondent-plaintiff submits, *per contra*, that the respondent-plaintiff does not have any subordinate office in Chandigarh. Ergo, he submits, the third exigency envisaged in para 14 of *Ultra Home¹* would not apply in the present case.

8. The dispute, thus, narrows down to whether the respondent-plaintiff does, or does not, have a subordinate office/offices at Chandigarh. If it does, then Mr. Bansal is correct, and, applying para 14 of *Ultra Home¹*, the suit ought to have been instituted at Chandigarh and could not have been instituted at Delhi. If, on the other hand, the respondent-plaintiff does not have a subordinate office at Chandigarh, then Mr. Mahapatra is correct and the learned Commercial Court was justified in holding the suit to have been validly instituted in Delhi.

9. Mr. Bansal's assertion that the respondent has subordinate offices at Chandigarh is predicated on the fact that two outlets of Akash Restaurants and Foods Pvt. Ltd., situated at Sector 17 and at Elante Mall, Chandigarh, are operating as franchisees of the

respondent-plaintiff. His contention is that a franchisee is also a subordinate office, for the purposes of para 14 of the decision in *Ultra Home*¹.

10. In support of his contention, Mr. Bansal has relied on (i) Section 65(47) of the Finance Act, 2005, (ii) paras 50, 56 and 57 of the judgment of a Division Bench of this Court in *Delhi International Airport Pvt. Ltd. v. UOI*² (hereinafter “DIAL”), (iii) para 13 of the judgment of the Supreme Court in *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*³, (iv) para 27 of the judgment of the High Court of Madras in *Fatima Tile Works v. Sudarsan Trading Co. Ltd.*⁴ and certain passages from McCarthy On Trademarks and Unfair Competition, Third Edition, Volume 2.

11. Mr. Mahapatra submits, *per contra*, that there is a fundamental difference between a subordinate office and a franchisee. He submits that, in order for an office to be treated as a subordinate office of a principal office, the principal office must exercise considerable managerial control over the subordinate office and the essential part of the business of the principal office must be conducted at the subordinate office. He submits that a franchisee cannot, by any stretch of imagination, be regarded as a subordinate office of the franchisor.

12. Having heard Mr. Bansal and Mr. Mahapatra and applied myself to the issue in controversy, I confess that I am unable to agree with the view espoused by Mr. Bansal.

² (2017) 238 DLT 328 (DB)

³ (1995) 5 SCC 545

⁴ AIR 1992 Mad 12

13. A franchisee, in my considered opinion, cannot be regarded as a “subordinate office”. The expression “subordinate office” is not really a term of law. It has obviously been used by the Division Bench in *Ultra Home*¹ in the manner in which it is normally understood.

14. Holding that the word “subordinate”, without any other qualifying epithet, did not mean anything more than “administratively subordinate”, the Supreme Court, in *R.G. Jacob v. Republic of India*⁵, in the context of Section 165⁶ of the Indian Penal Code, 1860 (which was subsequently repealed and replaced by Section 31 of the Prevention of Corruption Act, 1988), held that an Assistant Collector of Imports in the office of the Joint Chief Controller of Imports and Exports was a subordinate of the latter and that, therefore, if he accepted a bribe, Section 165 applied to him, even if the bribe was not accepted in connection with any proceeding pending before the Joint Chief Controller. In *Govt of A.P. v. N. Ramanaiah*⁷, it was held, in the context of Article 311(1) of the Constitution of India, that a “subordinate” was one lower in rank.

15. A subordinate must be in a position of subordination. Disobedience, by a subordinate, of the direction of the superior, must amount to insubordination. That, etymologically, is the plain manner

⁵ AIR 1963 SC 550

⁶ “165. Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant. – Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate from any person whom he knows to have been or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

⁷ (2009) 7 SCC 165

in which the expression “subordinate” has to be understood. Administrative and managerial subordination is, therefore, the *sine qua non* for an office to be regarded as a “subordinate office”.

16. Thus, a subordinate office is essentially an office which is in the nature of a branch, or another office of the principal office, over which the principal office exercises control. There is substance in Mr. Mahapatra’s contention that commonality of managerial control is one of the well understood indicia of a subordinate office.

17. A franchisee, on the other hand, is a creature of the franchise agreement, which is an entirely separate contract between the principal office and the franchisee. The franchisee has no obligation, towards the franchisor, in excess of that which the franchise agreement envisages. Nor does the franchisor exercise any administrative or managerial control, over the franchisee, beyond the franchise agreement. There can obviously be no franchise agreement between a principal office and a subordinate office. The subordinate office, therefore, is merely an offshoot of the principal office, over which overall managerial control of the principal office is exercised. As against this, a franchisee is an entirely different corporate entity, which enters into a bilateral franchise agreement with the franchisor, envisaging reciprocal rights and obligations. The agreement is in the nature of a licence whereby the franchisor licenses, to the franchisee, the right which is covered by the franchise agreement. In the context of trademarks, the franchisee is granted the license by the franchisor to use the trademark of the franchisor, for commercial consideration. The franchise agreement is governed by its own distinct covenants, based on mutual acceptance and understanding between the franchisor

and the franchisee. It cannot, therefore, be said that a franchisee, either legally or in common parlance, is a subordinate office of the franchisor.

18. Even in the present case, the entity which was granted the franchise to run the outlets at Sector 17 and at Elante Mall at Chandigarh, by the defendant-petitioner, was M/s Akash Restaurants and Foods Pvt. Ltd. Clearly, the franchisee is a separately incorporated private limited company. There was no relationship of subordination, between the respondent-plaintiff and Akash Restaurants and Foods Pvt. Ltd. Each incorporated company is a separate and distinct corporate entity, and there can be no question of one being a subordinate office of another.

19. The statutory provisions, commentaries and judgments on which Mr. Bansal relies cannot, in my opinion, further the case that he seeks to plead.

20. Section 65(47) of the Finance Act is a mere definition clause. This Court has noticed, time and again, that definition clauses are cited in support of stands taken by one party or the other. A definition clause in a statute has no independent existence of its own. It merely defines expressions which are to be found elsewhere in the statute. Reliance on a definition clause, without parallel reliance on the provision in which that clause finds place is, therefore, a completely unreal way of reading a statute. It goes against the very ethos of a definition clause.

21. That apart, Clause (47) of Section 65 of the Finance Act defines

a “franchise” as an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

22. I am unable to understand how, on the basis of Section 65(47) of the Finance Act, Mr. Bansal is seeking to contend that a franchisee is a subordinate office of the franchisor. Mr. Bansal placed considerable emphasis on the words “granted representational right”. The very import of the granting of representational right to a franchisee, he submits, implies that the franchisee is a representative of the franchisor and is, therefore, its subordinate office.

23. The submission is merely required to be noted to be rejected. Grant of a representational right has nothing to do with an office being a subordinate or a principal office. In fact, the grant of representational right would militate against the plea that the representative is a subordinate office. If the franchisee were a subordinate office of the franchisor, there would be no need to grant any representational right. The very principle of a franchise is the existence of an entity which, though, being otherwise unrelated to the franchisor, is, by a contract between the franchisor and the franchisee, given the right to represent the franchisor. That itself indicates that the franchisee is not a subordinate office of the franchisor.

24. The paragraphs from *DIAL*², on which Mr. Bansal relies, read thus:

“50. Section 65(47) of the Finance Act, 1994 reads as under:

“franchise” means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not ipso facto bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a “representational right”.

57. The term “representational right” would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.”

25. It is well settled that propositions in judgments are not to be treated as akin to the theorems of Euclid, and are required to be understood in the backdrop of the controversy which is before the Court. The issue before the Division Bench of this Court was with respect to chargeability of service tax, on an entity which claimed to be the franchisee. It was in this backdrop that the Division Bench of this Court entered the observations in paras 56 to 58 of *DIAL*², on which Mr. Bansal places reliance.

26. That apart, even if they were to be read *de hors* the issue in controversy in the decision, I do not see how paras 56 to 58 of *DIAL*²

can come to the aid of Mr. Bansal. The Division Bench has, in the said paragraphs, explained the principle of a representational right. A holistic reading of these passages indicates that what was essentially intended to be conveyed by the Division Bench, therein, was that, for the purposes of interaction with the public, a person interacting would regard the franchisee as representing the franchisor. These observations, to repeat, were in the context of a service tax dispute and can be of little assistance in the present case.

27. Para 13 of *Gujarat Bottling*³ deals with the conditions governing permissible licensing of use of a trademark. The passage may be reproduced thus:

“13. Apart from the said provisions relating to registered users, it is permissible for the registered proprietor of a trade mark to permit a person to use his registered trade mark. Such licensing of trade mark is governed by common law and is permissible provided (i) the licensing does not result in causing confusion or deception among the public; (ii) it does not destroy the distinctiveness of the trade mark, that is to say, the trade mark, before the public eye, continues to distinguish the goods connected with the proprietor of the mark from those connected with others; and (iii) a connection in the course of trade consistent with the definition of trade mark continues to exist between the goods and the proprietor of the mark. (See: P. Narayanan — Law of Trade Marks and Passing-Off, 4th Edn., paragraph 20.16, p. 335.) It would thus appear that use of a registered trade mark can be permitted to a registered user in accordance with provisions of the Act and for that purpose the registered proprietor has to enter into an agreement with the proposed registered user. The use of the trade mark can also be permitted de hors the provisions of the Act by grant of licence by the registered proprietor to the proposed user. Such a licence is governed by common law.”

28. Mr. Bansal’s contention is that, if conditions (i), (ii) and (iii) as envisaged in para 13 of the decision in *Gujarat Bottling*³ are cumulatively satisfied by a licensee, the licensee would *ipso facto* become a subordinate office of the licensor. I regret my inability to

accept the contention as urged. All that is said in para 13 of *Gujarat Bottling*³ is that, for licensing of the right to use a trademark to be in accordance with law, that licensing should not result in confusion or deception among the public or destroy the distinctiveness of the trademark, and that a connection in the course of trade consistent with the definition of the trademark would continue to exist between the trademark and its proprietor. These observations cannot, in any manner of speaking, enlighten on whether the licensee can be treated as a subordinate office of the licensor.

29. Paras 26 and 27 of the decision of the High Court of Madras in *Fatima Tile Works*⁴ read as under:

“26. The successor Act in India of 1958 (the present Act) also adopts a similar wording in section 2(1)(v)(ii) as follows:

“‘trade mark’ means in relation to the other provisions of this Act a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark whether with or without any indication of the identity of that person and includes a certification trade mark registered as such under the provisions of Chapter VIII.

Thus, under the present definition of a trade mark under our Act of 1958, the question of—

- (i) Who manufactures the goods;
- (ii) Whether the proprietor of the mark owns the goods;

are not relevant.

27. All that is required under the present definition of a trade mark is to show that the mark indicates a connection in the course of trade between the proprietor of the mark and the goods. Thus, it has been said that this connection is established if the proprietor of the mark associates himself with the goods in the course of their

production and preparation for the market. In *Aristoc Ltd. v. Rysta Ltd.*⁸, in the House of Lords, Lord Macmillan and Lord Simonds held as follows (at page 50 of All ER):

“The definition of trade mark in the Act of 1938 differs in some respects from that in the earlier Act. The substantial change—and the only one that affects the present question—is the introduction of the words: ‘... a connection in the course of trade between the goods and some person having the right... to use the mark... The mark no longer indicates that goods are the goods of the proprietor of the mark by virtue of one of the enumerated facts. It indicates only ‘a connection in the course of trade’ between the goods and the user of the mark. It is right perhaps to assume that the new words are wider than the old...

The test is then whether the applicant for the mark can be said to trade in the goods, and this test is clearly not satisfied by one who merely renders some service in respect of them after they have reached the public.”

30. I may merely state that the afore-extracted passages from *Fatima Tile Works*⁴ too, do not, directly or indirectly, indicate that a franchisee, who is franchised the right to use a trademark, would be a subordinate office of the franchisor.

31. Finally, advertent to the passages from McCarthy On Trademarks, on which Mr. Bansal relies, the treatise, in the said passages, was dealing with whether a licensee, whose sales of goods under a registered mark was controlled, could be treated as a “related company”. In fact, the said passages, if anything, go to militate against the contention that Mr. Bansal so assiduously advocates. For this purpose, the following passage, which Mr. Bansal himself cited, may be reproduced to advantage:

“Thus, “related” is not limited to control of a company in general. It simply refers to control over the “nature and quality of the goods

⁸ (1945) 1 All ER 34

and services in connection with which the mark is used. Two firms can be “related” in the trademark sense so long as they form the parties of a licensing relationship. There is no need that the firms have any common ownership whatsoever.”

32. McCarthy, in the afore-extracted passage, has clearly held that, for parties to be related in the trademark sense, “there is no need that the firms have any common ownership whatsoever”. This distinction itself underscores the difference between a franchisor and a franchisee, and a principal office and a subordinate office. In the case of a principal office and a subordinate office, commonality of ownership and managerial control is necessary whereas, between a franchisor and a franchisee, no such relationship exists.

33. The submission of Mr. Bansal that, as the plaintiff-respondent had two franchisees in Chandigarh, it had to be deemed to be having its subordinate offices there, cannot, therefore be accepted. There is no material to indicate that the defendant has any subordinate office in Chandigarh.

34. It is well settled, while exercising revisional jurisdiction under Section 115 of the CPC, the revisional court does not substitute its subjective decision for the decision of the Court below and that, if the interpretation placed by the Court below on the applicable statutory provision is plausible, the revisional court would not interfere. I do not see any implausibility in the decision of the learned Commercial Court in holding that the suit instituted by the respondent-defendant against the petitioner-plaintiff at Delhi was maintainable.

35. That being so, under Section 134(2) of the Trade Marks Act, the

defendant, having its principal office in Delhi, was entitled to institute the suit here.

36. Accordingly, for the aforesaid reasons, this revision petition is devoid of merit and is dismissed *in limine*.

C.HARI SHANKAR, J

MAY 4, 2023



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