



O.S.A.Nos.242 and 243 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.05.2024

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

AND

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

O.S.A. Nos.242 and 243 of 2023 and
C.M.P. Nos.28580, 28581, 28582, 28583 and 28585 of 2023

Reckitt Benckiser (India) Private Limited,
Rep. by its authorised signatory Manoj Singh Bisht
The Executive Centre,
Level 3B, DLF Centre, Sansad Marg,
Connaught Place, New Delhi-110 001.
Having its registered office at
DLF Cyber Park
6th and 7th Floor (Tower C), 405 B,
Udyog Vihar Phase III,
Sector-20, Gurugram-122 016.

.. Appellant

Vs.

1.The Advertising Standards Council of India,
A-402, Floor No.4, Aurus Chambers,
S.S.Amrutwar Marg, Behind Mahindra Towers,
Worli, Mumbai-400 013.

2.Godrej Consumer Products Ltd.
Godrej One, 4th Floor,
Piroshanagar, Eastern Express Highway,
Vikhroli (East), Mumbai-400 079.

..Respondents



O.S.A.Nos.242 and 243 of 2023

Common Prayer: Original Side Appeals filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of Letters Patent praying to set side the order of this Court dated 16.11.2023 made in O.A.Nos.563 and 564 of 2023 in C.S.No.110 of 2023.

For Appellant : Mr.Chandar Lal
in both appeals Senior Advocate
for Mr.A.B.Rajasekaran

For Respondents : Ms.Avni Singh (for R1)
in both Appeals Mr.P.S.Raman
Senior Advocate
for Mr.M.S.Barath (for R2)

COMMON JUDGMENT

MOHAMMED SHAFFIQ, J.

These Original Side Appeals have been filed challenging the order of the learned Judge insofar as it rejects the applications filed by the appellant herein praying for interim injunction restraining the 1st respondent / defendant from creating impediments in the broadcasting of the advertisement of the appellant / plaintiff which is the subject matter of the suit and from entertaining or adjudicating upon the complaints against the advertisement of the appellant / plaintiff on the premise that the suit has been filed without any cause of action and jurisdiction.



WEB 2. BRIEF FACTS:

a) About the parties to the proceeding:

2.1. Reckitt Benckiser (India) Private Limited viz., the appellant herein, is an internationally renowned corporation and through its subsidiaries and affiliate companies operate in several countries around the world. The business comprises of manufacture and sales of various consumer and health care products including antiseptic liquid, toilet care products, surface care products, pharmaceuticals, insecticides and food products which bear trademarks. Some of them being DETTOL, HARPIC, VEET, MORTEIN and CHERRY BLOSSOM. The appellant is involved in the manufacture of mosquito repellents and Rat Kill products for over 150 years.

2.2. Advertisement Standard Council of India (hereinafter referred to as “ASCI”) viz., the 1st respondent herein is a Company registered under Section 25 of the Companies Act, 1956, having its permanent office in Mumbai. It is stated that it is a not-for-profit company founded in the year 1985 as a “voluntary self-regulation body for the advertising industry”. It is further stated that ASCI has been in existence for more than 35 years and has been monitoring, administering and promoting the standards of advertising practices

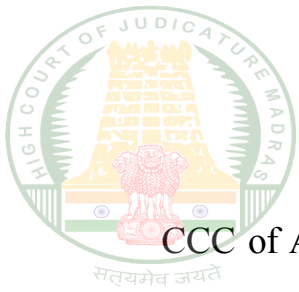


in India. It scrutinizes advertisements in all mediums including Digital Space

such as Television, YouTube etc.

2.3. It is stated that the main constituents of the advertising industry viz., advertisers, advertising agencies, media and allied / ancillary trades and professions associated with advertising came together to establish ASCI. ASCI has created a Code for Self-regulation of Advertising Content in India (hereinafter referred to as “ASCI Code”) based on global best practices and is universal in appeal and application. Its object is to promote high standards of advertising practice in India and to protect consumer interest in respect of truthfulness and honesty of representations and claims made through advertisements. It may be relevant to note that the advertising code of self-regulatory bodies takes varying forms in different countries, but its underlying ethos remains the same; that an advertisement should be legal, honest and truthful and ought to follow generally accepted norms and standards of public decency.

2.4. ASCI provides a machinery through an independent body which is known as the Consumer Complaints Council ("CCC") which examines complaints received against advertisements in terms of the ASCI Code. The

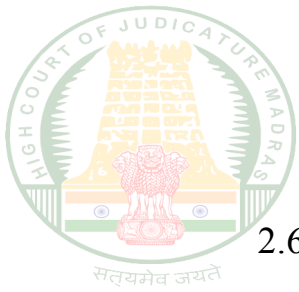


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CCC of ASCI comprises a majority of members from the civil society who are members of repute and eminence and represent diverse groups such as consumers, youth activists, lawyers, educationists, consultants, journalists, doctors etc. While the ASCI Code lays down guidelines which ought to be followed in the creation, publication, broadcast etc., of advertisements, the CCC receives and examines complaints against advertisements and makes recommendations in tune with the ASCI Code. The 1st Respondent herein seeks to ensure that advertisements conform to the ASCI Code. The Fast Track Complaints Procedure (hereinafter referred to as “FTCP”) is a mechanism adopted by the 1st respondent for handling complaints / objections against advertisements involving members of the 1st respondent i.e., where both the complainant and the advertisers are members of ASCI. The FTCP claims to address such issues on a Fast Track basis.

2.5. In 2006, the Central Government incorporated the ASCI Code in Rule 7(9) of the Cable Television Networks Rules, 1994, vide notification dated 02.08.2006.



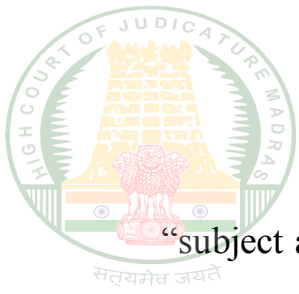
2.6. The 2nd Respondent, Godrej is a competitor to the appellant herein and manufacturer of the Good Knight range of mosquito repellent/insecticides (which uses Transfluthrin 1.6% w/w).

b) Facts leading to the complaint before the 1st Respondent:

2.7. It was submitted by the appellant that most of the manufacturers of Mosquito repellent insecticides in India use a chemical formulation with an active ingredient - Transfluthrin 1.6% w/w. The appellant with a view to provide a better product to the consumers, launched a new formulation for its MORTEIN branded product containing the active ingredient, Metofluthrin 0.32% w/w in January 2023.

2.8. It was further submitted that the appellant is the first company in India to have launched a product using this new formulation. It is stated that presently, only the appellant is offering products with this formulation in India. It is claimed that the said formula performs better than the Transfluthrin formulation.

2.9. It was submitted that in order to convey the effectiveness of its product, the appellant launched advertisements (hereinafter referred to as



“subject advertisements”) in respect of the said product on 20th March 2023, a Television Commercial (TVC) in multiple languages (including Tamil) across India on multiple platforms including Television and Digital Media such as YouTube, Instagram etc., apart from Print Media. The advertisement made the following claims:

(i) “India’s Fastest and Most Powerful Formula” with disclaimer – “As tested against the leading competitor refills in Mortein device on Culex quinquefasciatus mosquitoes”.

(ii) “2 Hrs Extra Protection” with a disclaimer – “extra 2 hours protection against Aedes aegypti and Anopheles stephensi mosquitoes after use of the product in high mode for 60 minutes under standard lab test conditions.”

(iii) A creative tagline at the end of the subject advertisement which is to be associated with the brand “Mortein” viz., “More Smart and Safe”.

c) About complaint and proceedings before ASCI:

2.10. The 2nd Respondent filed a FTCP complaint before ASCI, against the subject advertisement launched by the appellant. The main objection of the 2nd Respondent in its Complaint before ASCI, was a comparative part of the subject advertisement which was being aired across various TV Channels and Digital Media such as YouTube and Instagram etc.



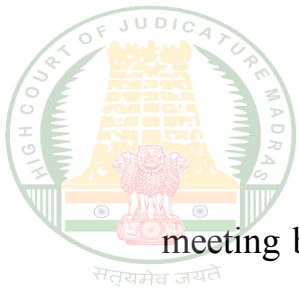
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2.11. The subject advertisement compares Mortein with a “Leading Competitor”. It was claimed by the 2nd Respondent that the product used as a comparison in the subject advertisement refers to its product Good Knight. During the pendency of the proceedings before ASCI, the Appellant unilaterally removed the part of the subject advertisement complained of i.e., comparison of the appellant's product with the product of a Leading Competitor (which is recorded in ASCI's order dated 13.06.2023).

2.12. The allegations in the complaint were as follows:

- (i) The claim that the MORTEIN product has India’s Fastest and Most Powerful Formula is misleading and violative of the ASCI Code;
- (ii) The claim that the MORTEIN product provides 100% protection even after switch-off is misleading and violative of the ASCI Code;
- (iii) The claim that MORTEIN is “More Safe” is misleading and violative of the ASCI Code.

2.13. Upon receipt of the complaint, the appellant sent its reply to ASCI on 31.05.2023. Thereafter, the 1st Respondent obtained a Technical Opinion. The draft opinion was forwarded to the appellant. This was followed by a

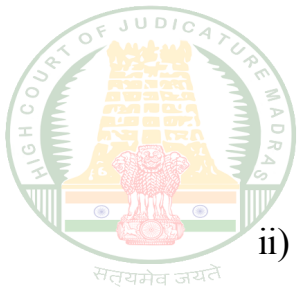


meeting between the appellant's representative, expert and ASCI to discuss the draft expert opinion. Another meeting was held between FTCP of the 1st Respondent, the appellant as well as the 2nd Respondent. The appellant and the 2nd respondent were permitted to submit their grounds of challenge and response.

2.14. The Fast Track Complaints Panel of the 1st respondent passed the following order dated 13.06.2023, wherein the complaint was upheld:

i) With regard to the claim - “*India's Fastest and Most Powerful Formula***” it was found after deliberation that the superiority claim of “India's Fastest” was inadequately substantiated. The relevant portion of the order is extracted hereunder:

*“The claim of “most powerful formula” is not substantiated as there is no noticeable distinction for the consumer to conclude that the product is powerful. According to the consumer perspective, it should be indicated how much the product is utilised in the given amount of time. The claim “India's Fastest and Most Powerful Formula**”, is misleading by exaggeration and is likely to lead to widespread disappointment in the minds of consumers. The said claim contravened Chapter I, Clause 1.1, 1.4 and 1.5 of the ASCI Code.”*



ii) With regard to the claim - “100% Protection even after Switch Off” it

was observed as under:

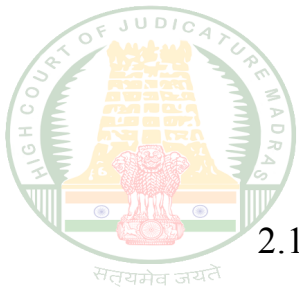
“The FTC panel considered this comparative visual to be misleading by exaggeration and is likely to lead to widespread disappointment in the minds of consumers, and hence contravened Chapter I, Clause 1.4 and 1.5 of the ASCI Code.”

iii) With regard to the claim - “More Smart and Safe” the FTC panel discussed that usage of less active is not a consumer perceptible quantity and as such the claim of “more smart” is not substantiated. As regards “more safe” it was observed by FTC panel as under:

“..... that if the act says that an advertiser cannot use the word 'safe' on the packaging then it is incorrect to use the term 'safe' in an advertisement unless it is qualified to mention when used as directed”

Thereafter, it was concluded as under:

“The claims “More Smart”, “More Safe” being superiority claims were not substantiated with comparative data. The claims are misleading by exaggeration and are likely to lead to widespread disappointment in the minds of consumers. The said claims contravened Chapter I, Clause 1.1, 1.4 and 1.5 of the ASCI Code.”



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2.15. While upholding the complaint, ASCI also requested the appellant to withdraw the claims across all media. The relevant portion of the order is extracted hereunder:

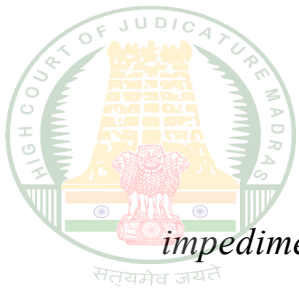
“We therefore request you to withdraw the claims as objected to across all media, including, but not limited to YouTube, Print, TVC, digital media, etc. Kindly inform all Media by 15th June, 2023 to stop the release of the said Ads, and ensure its implementation by 22nd June, 2023. May we have your assurance of compliance by 22nd June, 2023.

ASCI has introduced an “Independent Review Process” (IRP), as a mechanism for advertisers / complainants who are not satisfied with the recommendations of the CCC / FTCP, to seek a fresh view in the matter. You may, therefore, in case you are not satisfied with the above recommendation of the FTCP, submit the matter for Review by the CCC-R/IRP within 10 business days i.e. by 27th June 2023.”

d) Suit Proceedings :

2.16. Aggrieved by the above order of the 1st Respondent, the appellant filed a suit in C.S. No.110 of 2023 before this Court with the following prayers viz.,

i) To restrain the 1st Defendant / 1st Respondent by their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instruction from creating



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impediments in the broadcasting of the advertisement of the appellant which

is the subject matter of the suit and to restrain the 1st Respondent herein from entertaining or adjudicating any complaints against the subject advertisement of the Appellant.

ii) To declare that the advertisement of the plaintiff is fair and truthful and does not violate any advertising laws or Code and the plaintiff / appellant herein is entitled to broadcast the advertisement throughout the country.

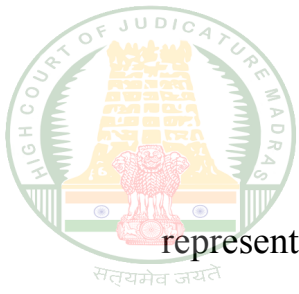
iii) A decree of mandatory injunction directing the 1st Respondent herein to remove the impugned order dated 13.06.2023 from its website.

2.17. An application for leave to sue was also filed and the same was ordered on 22.06.2023, after finding that a part of cause of action arises within the jurisdiction of this Court.

2.18. The appellant filed applications in O.A.Nos. 563 and 564 of 2023 in C.S. No.110 of 2023 with the following prayers:

(i) O.A.No.563 of 2023 :

Interim injunction, restraining the 1st Respondent / 1st defendant, their management, members, affiliates, directors, servants, officers, employees,



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representatives, agents and all other persons claiming under them or acting in

concert with them or on their behalf or acting on their instructions from creating

impediments in the broadcasting of the advertisement forming subject matter in

the suit of the applicant / plaintiff, pending disposal of the suit;

(ii) O.A.No.564 of 2023 :

Interim injunction restraining the 1st Respondent / 1st defendant, their management, members, affiliates, directors, servants, officers, employees, representatives, agents and all other persons claiming under them or acting in concert with them or on their behalf or acting on their instructions from entertaining or adjudicating upon the complaints against the advertisement of the applicant / plaintiff filed as documents 4 and 5 of the documents filed with the plaint pending disposal of the suit.

e) Order of the learned Judge in the Original Applications:

2.19. The above applications were rejected by the learned Judge on the following premise viz.,

i) The suit has been filed without any cause of action inasmuch as the order of ASCI is only recommendatory in nature and not binding either on the appellant or the broadcasting media including Print Media, TVC and Digital Media such as YouTube, Instagram etc.



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ii) That there is no jurisdiction for this Court to entertain the suit itself and it was suggested / observed by the learned Judge that it is open to the respondent to file an application for rejection of plaint on the ground that this Court has no jurisdiction to entertain the suit or that the suit is filed without any cause of action.

iii) The appellant has a remedy by way of review, thus if aggrieved by the order of the 1st Respondent, the appellant ought to avail the remedy by way of review provided under the 1st Respondent / ASCI Code.

iv) The order of injunction prayed for by the appellant if granted would result in indirectly stopping the action by the statutory authorities on the basis of ASCI's order.

v) Further intervention by this Court would result in opening up flood gates.

2.20. Aggrieved by the above order of the learned Judge, the present appeals are filed.

f) Case of the Appellant:

2.21. Mr.Chandar Lal, learned Senior Advocate made the following



submissions on behalf of the appellant:

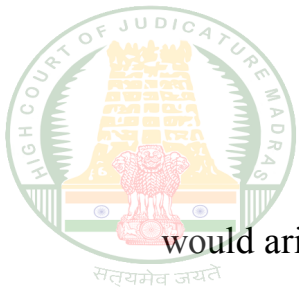
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i) That remedy by way of review under the Code formulated by the 1st Respondent / ASCI, a self-regulatory body would not bar a suit. More so, review under ASCI Code comes with onerous condition rendering the remedy illusory.

ii) The 1st Respondent's ASCI Code has no legal sanctity. Assuming ASCI Code has legal sanctity, it would be violative of Section 28 of the Contract Act, which provides that any contract in restraint of legal proceedings would be void.

iii) That the right to commercial advertisement is a fundamental right and thus any restriction by way of a regulation must be reasonable and must be imposed by “law”. However, ASCI admittedly a Company constituted under Section 25 of the Companies Act which is a self-regulatory body cannot pass orders nor frame a Code which impairs / abridges fundamental rights guaranteed under the Constitution for it would not qualify as “law” for the purposes of Article 19(2) of the Constitution of India. Thus, the regulation / restriction of advertisement in terms of ASCI Code is void for it would not pass the muster of “reasonable restriction” by “law” under Article 19(2) of Constitution of India.

iv) The order of the learned Judge is wholly erroneous insofar as it finds that the order of ASCI is only recommendatory and that cause of action, if any,



would arise only if the statutory authorities act on such recommendation.

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v) The learned Judge failed to see that the petitioner has been granted leave to sue and no application has been filed to revoke the said leave. In an application filed by the appellant to pass an order of interim injunction, restraining the 1st Respondent / 1st defendant, it is not open to the Court to hold that the suit is barred for want of jurisdiction.

vi) The learned Judge ought to have seen that the fundamental right to advertise by broadcasting / relaying / telecasting commercial advertisements exist throughout territory of India and the action of the 1st Respondent in communicating the decision of its Fast Track Committee to the appellant on 13th June 2023 whereby the Appellant was requested to withdraw its advertisement by 15th June 2023 and ensure implementation of the impugned order by 22nd June 2023 infringes / impairs the appellant's fundamental right. ASCI also threatened the appellant that any non-compliance of the order would lead to reporting such non-compliance to the concerned Government authorities, which also infringes the appellant's right to broadcast the subject advertisement in Tamil and across Tamil Nadu targeting customers/residents of Tamil Nadu. Thus, cause of action or a part thereof arises within the State of Tamil Nadu.

vii) The learned Judge ought to have seen that even in respect of a



complaint of infringement of fundamental right, a suit would lie and is maintainable.

viii) The order of the learned Judge suffers from error apparent insofar it finds that the Delhi High Court has rejected a similar suit filed by the appellant on the ground of “*Forum Shopping*”, whereas the Division Bench of the Delhi High Court in-fact held that the suit filed by the appellant is maintainable.

g) Case of the 1st Respondent :

2.22. Ms.Avni Singh, learned counsel for the 1st Respondent made the following submissions:

i) That the order of the learned Single Judge does not warrant any interference inasmuch as the order of ASCI is only recommendatory in nature and therefore does not affect the appellant in any manner. The appellant can have a legitimate grievance only if the statutory authorities act on such recommendations and pass orders against the advertisements of the appellant until then the appellant cannot have any grievance. Thus, there is no cause of action.

ii) The suit itself cannot be maintained against the order of the 1st Respondent passed at Mumbai on the basis of a complaint at Mumbai with the office of the 2nd Respondent at Mumbai. Further, the office of the appellant is at

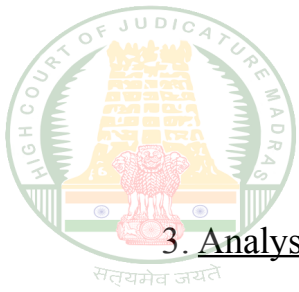


Delhi. That the appropriate court would be the High Court of Bombay. Merely

because the advertisement is broadcast / relayed / telecast in Chennai / Tamil Nadu or in Tamil language, one cannot invoke the jurisdiction of this Court to challenge the order of the 1st Respondent passed at Mumbai.

h) Case of the 2nd Respondent:

2.23. Mr. P. S. Raman, the learned Senior Advocate for the 2nd Respondent would submit that the suit itself is not maintainable in the Madras High Court. This is classic case of forum shopping, if one takes notice of the fact that the suits were earlier filed by the appellant against the orders of the 1st respondent before the High Courts of Bombay and Delhi. That there is no specific / special reason for filing the present suit before this Court instead of filing it before the Bombay High Court, where both the respondents are situated and the impugned orders has been passed. The appellants having chosen to participate in proceedings under ASCI Code cannot maintain the present suit in violation of the Code. In any view, the orders of ASCI are only recommendatory and does not give rise to any cause of action.



3. Analysis:

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3.1. We shall proceed to examine the order of the learned Single Judge rejecting the interim application vide order dated 16.11.2023 in O.A.Nos.563 and 564 of 2023. We shall divide the analysis of the Order of the learned judge into 4 PARTS viz.,

- (i) PART - I – Misdirection in looking to availability of remedy under Code to decide maintainability of Suit:
- (ii) PART - II – Errors in finding that the suit is without cause of action:
- (iii) PART III – Errors in finding that the suit is without jurisdiction:
- (iv) PART IV - Failure to examine jurisdiction in the context of subject matters involving Internet:

4. PART - I – Misdirection in looking to availability of remedy under Code to decide maintainability of Suit:

a) Suit is barred - In view of availability of a remedy by way of a review under the Code:

4.1. Before proceeding to examine the correctness or otherwise of the order of the learned Judge insofar as it finds that the suit is barred in view of availability of remedy under the Code, it is necessary to find if the order of the 1st Respondent is only traceable to ASCI Code and not the Cable Television



Networks (Regulation) Act, 1995 or its Rules. The above aspect may assume significance in examining the plea of ouster of jurisdiction of Civil Court. Since if the order of the 1st Respondent is made under the Cable Television Networks (Regulation) Act or its Rules, statutory redressal mechanism is available under Rule 16 to Rule 20 of the Cable Television Networks Rules, 1994. In that event, the complexion of the impact of Section 9 of CPC and its applicability would change and the enquiry would extend to find if there is an implied bar to a suit.

4.2. On the other hand, if the order of the 1st Respondent is traceable to ASCI Code framed to self-regulate advertisements across all media by the 1st Respondent. In that event though the Code may provide for a redressal mechanism, question of ouster of civil jurisdiction would not arise. This is in the view of the fact that Civil Courts would have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision. The Code framed by the 1st Respondent does not have any statutory force, which would be clear if we only notice that the 1st Respondent is a Company registered under Section 25 of the Companies Act and at best a self-regulatory body.

4.3. It may be relevant to note that Cable Television, Radio etc., are



commonly understood as part of Mass Media. Cable Television Network Act and its Rules, would apply only to Cable Television Network and would not cover programmes or content on other media such as You Tube, Instagram or OTT, which falls within the definition of “Digital Media” under the Information Technology (Intermediary Guidelines and Digital Media Ethics) Rules, 2021¹ and also commonly known as “Digital Media”.

4.4. It may be relevant to note that the Apex Court in W.P.(C) No.387 of 2000² found that there is a redressal mechanism for airing grievance with regard to Television Programmes including advertisements while referring to the Cable Television Networks (Regulation) Act and its Rules while recording concerns expressed over the need to coalesce the mechanism within the framework of Article 19 of the Constitution of India. The above judgment of the Hon'ble Supreme Court dealt only with the redressal mechanism under the Cable Television Network Act / Rules and did not cover other Digital Space such as YouTube, Instagram etc. It is important to note that there was consensus amongst the parties to the appeal that there is no law governing advertisements on Digital Space such as YouTube, Instagram etc. It thus appears that the remedy that may be available against slander of goods in Digital Space / Media

¹ Rule 2(1)(i), Information Technology (Intermediary Guidelines and Digital Media Ethics) Rules, 2021

² Common Cause (A.REGD. SOCIETY) v. Union of India & others, (2018) 13 SCC 440



presently may only be in tort.

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4.5. Against this background, a reading of the complaint of the 2nd Respondent and the order of the 1st Respondent thereon would show that both the complaint and the order deals with the subject advertisement and its broadcast not just in Cable Television Network, instead the order of the 1st Respondent covers the complaint against the subject advertisements across all Media including YouTube, Television, Instagram and Print Media and the order is made issuing directions with regard to the subject advertisements across Digital Media such as YouTube, Instagram etc., apart from Television and Print Media. The order is a composite order which covers not only broadcast of subject advertisement in Cable Television but also its broadcast across all media including You Tube, Television, Instagram and Print Media which would show that the order is traceable to the ASCI Code and not the Cable Television Networks (Regulation) Act / Rules. As a matter of fact, there was consensus amongst the parties to the appeal that the order of the 1st Respondent is traceable to ASCI Code and not Cable Television Networks (Regulation) Act /Rules.

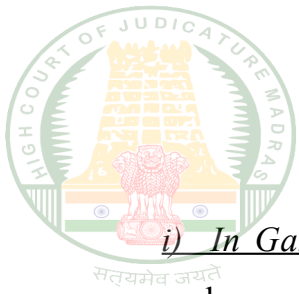
4.6. Viewed in the above background the order of the learned Judge



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insofar as it had rejected the interim application filed by the appellant on the premise of availability of remedy by way of review under the ASCI Code is grossly misconceived. The order of the learned Judge fails to note that Section 9 of the Civil Procedure Code confers jurisdiction on Civil Courts to try all suits of civil nature except those which are expressly barred by any other law³. The jurisdiction of the Court to try suits of Civil nature is very expansive. Section 9 of the CPC is an enforcement of the fundamental principle of law laid down in the maxim *ubi jus ibi remedium*⁴. It is settled principle that a statute excluding jurisdiction of a Civil Court should be strictly construed. There is a presumption that Civil Court has jurisdiction to try a suit, an ouster of Civil Court's jurisdiction is not to be readily inferred⁵. The burden to establish ouster of Civil Court's jurisdiction is on the person making such claim. Access to Civil Court is a valuable right vested in every entity. There is an inherent right in every person to bring a suit of civil in nature unless barred by statute expressly or by necessary implication. In this regard, it may be relevant to refer to the following judgments:

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- 3 *S.V.Moradhwaj, A 1960 SC 796; Ram Swarup v. Shikarchand, A 1966 SC 893, Musamia v. Rabari, A 1969 SC 439; Dwarka Prasad Agarwala v. Ramesh Chandra Agarwala, AIR 2003 SC 2696; Horil v. Keshav, 2012 (2) ICC (SC) 11; AIR 2012 SC 1262; 2012 AIR SCW 1307; AIR 2012 SC (Civil) 815; 2012 (5) SCC 525; Fatima Joao v. Village Panchayat of Mercas, AIR 2000 Bom 444 (452); 2000 (3) Mah LJ 624; World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., AIR 2014 SC 968.*
- 4 *Dhruv Green Field Ltd. v. Hukam Singh, (2002) 6 SCC 416 (419,420)*
- 5 *Rajasthan SRTC v. Bal Mukund Bairwa (2), (2009) 4 SCC 299 (308); 2009 AIR SCW 2566; N.Padmamma v. S.Ramakrishna Reddy, (2008) 15 SCC 517; AIR 2008 SCC 2834; Sulochana v. Rajinder Singh, (2008) 15 SCC 538; AIR 2008 SC 2611.*



i) In Ganga Bai v. Vijay Kumar [(1974) 2 SCC 393] this Court had observed as under:

“15. ... There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.”

(emphasis supplied)

ii) Abdul Gafur v. State of Uttarakhand, reported in (2008) 10 SCC 97 :

“16. Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.”

(emphasis supplied)

4.7. Keeping the above principles in mind, the order of the learned Judge



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insofar as it finds that in view of availability of remedy by way of review under the ASCI Code, the suit cannot be entertained is untenable. It overlooks the fact that ASCI is a self-regulatory body and its Code does not have any statutory force and thus inference of a bar to file a suit in view of a remedy by way of review available under the Code is to read exclusion of the jurisdiction of a Civil Court even in the absence of a statutory exclusion either expressly or by necessary implication which is impermissible.

b) ASCI Code – If construed to bar jurisdiction of Civil Court – Would attract wrath of Section 28 of Contract Act:

4.8. The 1st respondent i.e., ASCI is a Company registered under Section 25 of the Companies Act. The Memorandum of Association (in short “MOA”) is in the nature of contract. In this regard, it may be useful to refer to the following judgment:

B.L. Shankarappa v. Federation of Karnataka Chambers of Commerce & Industry, 2022 SCC OnLine Kar 1585

“5. The FKCCI as already mentioned above, falls in section 8 of the 2013 Act which corresponds to Section 25 of the erstwhile Companies Act, 1956. The relation between a company of this kind and its members is essentially contractual in nature; since MOA/AOA have a binding effect on the



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company and its members.”

(emphasis supplied)

4.9. If so, any attempt to rely upon the “MOA” of ASCI to which the appellant is a member to suggest that the suit by the appellant cannot be maintained would attract the wrath of Section 28 of the Contract Act, which provides that any agreement in restraint of legal proceeding is void. This statutory declaration is premised on the principle that no one can exclude himself from the protection of Court by contract.

4.10. Importantly, to avail remedy by way of review, ASCI imposes a condition that the advertiser (Appellant herein) must undertake that it 'accepts' and shall 'comply' with the decision in review [CCCR Clause 3 (v) & IRP Clause 5 (v) of the ASCI Complaints Procedure]. Therefore, if an advertiser opts for a review under ASCI's complaints procedure, it bars its remedy to approach Civil Court.

4.11. The above conditions relating to review in the Code in our view falls foul of Section 28 of the Contract Act, for the party availing remedy of



review is barred from approaching the Civil Court. In this regard, it may be

useful to refer to the following judgments:

i) BSNL v. Motorola India (P) Ltd., reported in (2009) 2 SCC 337 :

“34. The appellants contended that they have the unilateral right to determine the liquidated damages under Clause 16.2 and that the quantum of liquidated damages decided by the appellants, even if it is exorbitant, would be final and cannot be challenged. We find the contention of the respondent that if the said contention of the appellants is supported, it would mean that a party would be held liable to damages of whatever amount the other party demands without recourse to a remedy, to be relevant and should be given due importance. Such a contention by the appellants would be in violation of Section 28 and Section 74 of the Contract Act.

.....

38. The provision under Clause 16.2 that quantification of the liquidated damages shall be final and cannot be challenged by the supplier Motorola is clearly in restraint of the legal proceedings under Section 28 of the Contract Act. So the provision to this effect has to be held bad.”

(emphasis supplied)

ii) A.B.C. Laminart (P) Ltd. v. A.P. Agencies, reported in (1989) 2 SCC 163:

“8. The next question is whether clause 11 is valid, and if so, what would be its effect? As clause 11 formed part of the agreement it would be valid only if the parties could have validly agreed to it. It is common knowledge that the law of contract only prescribes certain



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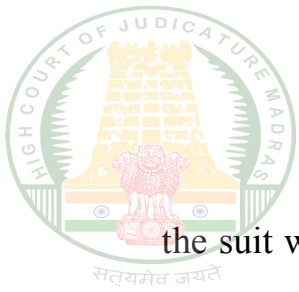
limiting principles within which parties are free to make their own contracts. An agreement enforceable at law is a contract. An agreement which purports to oust the jurisdiction of the court absolutely is contrary to public policy and hence void. Each of the citizens has the right to have his legal position determined by the ordinary tribunal except, of course, in a contract (a) when there is an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction to which disputes in respect of the contract shall be subject. “It has long been established”, say Cheshire and Fifoot, “that a contract which purports to destroy the right of one or both of the parties to submit questions of law to the courts is contrary to public policy and is void pro tanto.”

(emphasis supplied)

iii) Balaji Coke Industry (P) Ltd. v. Maa Bhagwati Coke Gujarat (P) Ltd., (2009) 9 SCC 403:

*“27. The said question once again arose in A.B.C. Laminart (P) Ltd. [(1989) 2 SCC 163] , wherein following the decision in Hakam Singh [(1971) 1 SCC 286 : AIR 1971 SC 740] , but relying on the maxim *ex dolo malo non oritur actio*, this Court held that by an agreement which absolutely ousted the jurisdiction of a court having the jurisdiction to decide the matter, would be unlawful and void, being contrary to public policy under Section 28 of the Contract Act.”*

4.12. Having found that the remedy by way of review under the Code, which the learned Judge has set out as a reason to doubt the maintainability of



the suit while rejecting the original applications would fall foul of Section 28 of

the Contract Act, we are unable to agree with the above reasoning of the learned Judge.

5. PART - II – Errors in finding that the suit is without cause of action:

a) Order of ASCI – Recommendatory - No cause of action:

5.1. The learned Judge has found that the suit is without cause of action primarily on the premise that the impugned order of the 1st Respondent is only recommendatory and it is up to the appellant herein to either comply with the order/recommendations or refuse. Similarly, the order of the 1st respondent is not binding on the statutory authorities / bodies who would decide independently, on the recommendations made by the 1st Respondent thus the impugned order of the 1st Respondent does not give rise to any cause of action.

5.2. The above finding of the learned Judge is misplaced inasmuch as the impugned order of ASCI requires the appellant to withdraw the claims as objected across all media including Television and Digital Media such as YouTube, Instagram etc., apart from Print Media. The above finding of the learned Judge is contrary to the orders of the High Court of Delhi and Bombay wherein the order of the 1st Respondent ASCI has been found to give rise to a



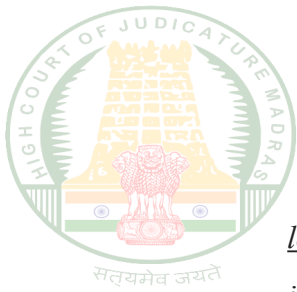
cause of action. We shall refer to some of the orders wherein the appellant itself

was a party, in this regard:

“(i) In Reckitt Benckiser (India) Pvt. Ltd. vs. Advertising Standards Council of India [Decision dated 07.05.2014 in CS (OS) 1339/2014], the Hon'ble Delhi High Court, agreed with the submissions of the Plaintiff therein and passed an order of interim injunction against the order of ASCI. Relevant portion of the said decision are extracted below:

4. Mr.Lall submits that the order which has been passed is without any application of mind. Principles of natural justice were not followed and it is at the behest of a competitor. He further submits that the advertisement is not misleading as all Dettol products provide protection from at least 100 germs including their soap which is a cosmetic item and the plaintiff has been cautious enough not to contrive the provisions of the Drugs and Cosmetics Act which only permits a person to advertise that a product has germ killing properties in the case of a drug and not in the case of a cosmetic product. He submits that the remedy provided by the defendant is not equally efficacious remedy as a review is provided subject to undertaking that the advertisement would be withdrawn. He submits that he has supporting material available to show that there is no misstatement of facts in the advertisement. Reliance is placed on a decision rendered in the case of Century Plyboards (India) Limited v. Advertising Standards Council of India, a decision of the Bombay High Court reported in 2000 (1) Bom.CR 136...

6. Heard learned counsel for the plaintiff, perused the plaint, applications and the documents on record. Taking into consideration the submissions made I am satisfied that it is a fit case for grant of an ex parte injunction failing which the plaintiff would suffer irreparable



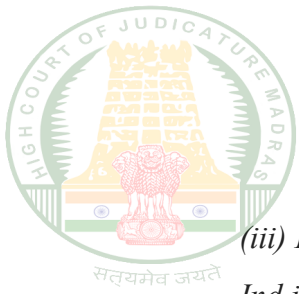
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loss. Accordingly, till the next date of hearing operation of the impugned communication dated 28.04.2014 shall remain stayed."

(ii) In *Reckitt Benckiser (India) Pvt. Ltd. vs. Advertising Standards Council of India* [Decision dated 23.04.2015 in CS (OS) 1074/2015], the Hon'ble Delhi High Court, agreed with the submissions of the Plaintiff therein and passed an order of interim injunction against the order of ASCI. Relevant portion of the said decision are extracted below:

"Mr. Lall further submits that the impugned order is in violation of principles of natural justice inasmuch as facts in the complaint and expert evidence has been believed without giving any opportunity of cross examination of either the complainant or the expert witness. He states that neither the name of the complainant nor the expert's report was shared with the plaintiff. Mr. Lall submits that the defendant being a private authority has no power or jurisdiction to pass injunction orders. In support of his submission, he relies upon decision in Century Plyboards (India) Limited v. Advertising Standards Council of India.....

Mr. Lal lastly submits that the complainant in the present case does not satisfy the test of restrictions as envisaged under Article 19(2) of the Constitution and violates Article 19(1)(a) of the Constitution. Keeping in view the aforesaid, this Court is of the view that a prima facie case is made out in favour of the plaintiff and the balance of convenience is also in its favour. Further, interim injunction order is not granted. Consequently, till next date of hearing, the impugned communication dated 7th April, 2015 issued by the defendant-ASCI to the plaintiff are stayed. This order has also been confirmed during the pendency of the said suit.



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(iii) In *Reckitt Benckiser (India) Pvt. Ltd. vs. Advertising Standards Council of India* [Decision dated 24.04.2015 in CS (OS) 1118/2015], the Hon'ble Delhi High Court, agreed with the submissions of the Plaintiff therein and passed an order of interim injunction against the order of ASCI. Relevant portion of the said decision are extracted below:

"10. Hence prima facie, in my opinion it is not possible to contend that the impugned order would only be advisory in nature.

11. As far as the report of the expert committee is concerned, in my view, having passed the order to restrain the plaintiff, prima facie it was for the defendant to have ensured fairness and supply the material available before making any order.....

14. In my view the plaintiff has made out a prima facie case in its favour. Balance of convenience is also in favour of the plaintiff. The defendant is restrained by an ex parte ad interim injunction from taking any further steps regarding the impugned order dated 07.04.2015 and the said order shall not be given any effect to whatsoever till further orders."

This order has also been confirmed during the pendency of the said suit."

(emphasis supplied)

5.3. The above orders would show that the High Courts of Delhi and Bombay have proceeded to treat similar orders of ASCI as giving rise to cause of action. We see no reason to take a different view.

b) Imminent threat – gives rise to cause of action – not to wait until translated into actual injury :

5.4. The learned Judge has proceeded on the basis that the impugned



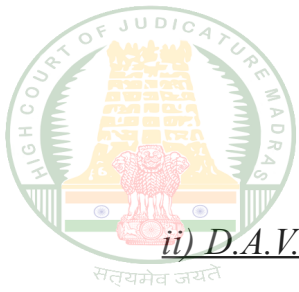
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order is recommendatory in nature and no cause of action would arise unless the statutory authorities / bodies act on such recommendation. In other words, the learned Judge proceeds on the premise that the impugned order is only in the realm of a threat and unless the threat translates into an adverse order no cause of action would arise. The above reasoning of the learned Judge is contrary to the settled principle that one could approach the Court even against a threat of infringement of its right. A`fortiori in the present case as the injury complained of involves invasion of fundamental right. The threat in the present case is real and unequivocal and not fanciful or imaginary. This would be evident and clear if one takes judicial notice of the fact that ASCI recommendations have been acted upon and implemented by the statutory authorities invariably in the past. It is also settled that where there is an imminent threat of the right being infringed, Courts would entertain the suit and would not wait till the injury takes place or threat is translated into injury. In this regard, it may be useful to refer to the following judgments:

i) Roop Chand v. State of Punjab, reported in AIR 1963 SC 1503:

“22. It may be that just now the right has not been affected and there is only a threat that it will be affected. But we think that the threat is sufficiently serious and the petitioner is not bound to wait till his right has actually been affected more particularly as it is not disputed that it would inevitably be affected.”

(emphasis supplied)



ii) D.A.V. College v. State of Punjab, reported in (1971) 2 SCC 261:

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“5. A preliminary objection has been urged on behalf of the respondents that in a petition under Article 32, only where it is shown that there is a violation of fundamental right that the validity of the legislation or of the legislative competence can be raised and determined, but in these cases as there is no violation of Articles 14, 26, 29 and 30 of the Constitution the petitioners ought not be allowed to challenge the vires of the Act on the ground of the competence of the Legislature to enact the impugned law. This question has been dealt with fully in the batch of petitions in which we have just pronounced judgment, where we had also considered the contentions of the learned Advocate-General of Punjab and Shri Tarkunde, the learned Counsel for Respondent 2 in this behalf and hence we do not propose again to reiterate the reasons in support of the conclusion that a petition under Article 32 in which petitioners make out a prima facie case that their fundamental rights are either threatened or violated will be entertained by this Court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place.”

(emphasis supplied)

c) Finding of ASCI order being recommendatory not giving rise to cause of action - To file a review if aggrieved - Mutually Destructive:

5.5. While, on the reasoning of the order of the learned Judge that the order of ASCI being merely recommendatory and thus there cannot be any



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cause of action the learned Judge proceeds to observe that the appellant if aggrieved by the order of the 1st Respondent can seek redressal by availing the remedy by way of a review under the Code. The above findings/observations are contradictory and mutually destructive. For if the impugned order of the 1st Respondent does not cause any grievance nor pose any threat or invasion or impairment of any right, the question of seeking redressal would not arise. The very fact that the Code provides for a remedy by way of a review which has also been relied upon by the learned Judge as a reason for rejecting the interim application on the ground of availability of alternate remedy would reveal that the impugned order has been treated both by the Code and the learned Judge as one which causes grievance requiring redressal. However, as found supra, the mechanism of redressal under the Code in the form of review is cumbersome and imposes conditions which are vulnerable to challenge as falling foul of Section 28 of the Contract Act.

5.6. Viewed in this background, we are unable to agree with the finding of the learned Judge that the order of the 1st respondent does not give rise to cause of action but would arise only consequent to the action of the statutory bodies / authorities on the basis of the impugned order of the 1st Respondent. There is no room for any doubt in our mind that the impugned order imposes

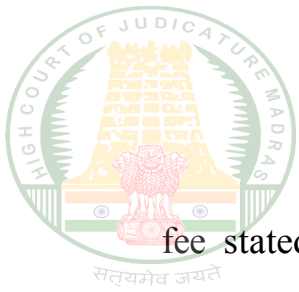


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threat of infringement of the appellant's right to advertise which threat is real and imminent and inflicts adverse civil consequences. Thus, the order of the learned Judge finding that there is no cause of action until action is taken by the statutory authority / bodies on their recommendations of the 1st Respondent cannot be sustained and is wholly misconceived/ misplaced.

d) Impugned Order – Results in adverse civil consequences:

5.7. The impugned order also results in adverse civil consequences. This would be clear if we bear in mind that though the impugned order states it to be a “request” to withdraw the advertisements, however, it is in effect a “direction” to withdraw the advertisement within the time frame set out in the impugned order. This would be clear since failure to comply with the above request as stated in the impugned order would result in the 1st Respondent forwarding the recommendations to the concerned statutory bodies / authorities. Resultantly, if aggrieved by the order of the 1st Respondent, as stated supra, the appellant would have to either withdraw the advertisement and make a new advertisement which would result in monetary loss since huge sums of money would have been invested in making the advertisement (or) the appellant may choose to file a review. As seen above review comes with a set of onerous conditions including suspension of the advertisement apart from payment of a



fee stated by the appellant to be exorbitant which would result in material

deprivation and most importantly review comes with a condition that the party

filing review ought to accept the order in review. It is trite law that “civil

consequences” would take within its fold infraction of property, personal rights,

civil liberties, material deprivations and non-pecuniary damages. In this regard,

it may be relevant to refer to the following decisions of the Hon'ble Supreme

Court:

i) D.K. Yadav v. J.M.A. Industries Ltd., reported in (1993) 3 SCC 259:

“1. In *Mohinder Singh Gill v. Chief Election Commissioner* [(1978) 1 SCC 405 : (1978) 2 SCR 272, 308-F] the Constitution Bench held that ‘civil consequences’ covers infraction of not merely property or personal right but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th edn., page 1487 defined civil rights are such as belong to every citizen of the state or country ... they include ... rights capable of being enforced or redressed in a civil action... .”

ii) SBI v. Rajesh Agarwal, reported in (2023) 6 SCC 1:

“46. There is a consistent pattern of judicial thought that civil consequences entail infractions not merely of property or



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personal rights, but also of civil liberties, material deprivations, and non-pecuniary damages.”

5.8. Applying the same, we are of the considered view that the impugned order of ASCI entails civil consequences thereby giving rise to cause of action. We say so since whether the appellant chooses either of the two courses viz., withdraw the advertisement or file a review against the impugned order it would have serious implications of its business prospects, more importantly, there is an invasion of the fundamental right to advertise albeit even by way of suspension and possibly temporarily. Thus to say the impugned proceeding of ASCI does not give rise to a cause of action is untenable.

e) Distinction between no cause of action – vis-a-vis does not disclose cause of action -Lost Sight of :

5.9. The impugned order of the learned Judge proceeds to reject the original applications on the premise that the suit is filed “*without any cause of action*” after fairly detailed analysis of the facts. The following portions of the impugned order are extracted hereunder:

*“41. The rightful course open to the affected parties is to file
Review in accordance with the procedure established under ASCI*



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regulation or to challenge the orders of Regulatory Authority in case they pass any orders against the applicant. The applicant can not evade to seek remedy without subjecting himself under due procedure. This suit has been filed without any cause of action and the jurisdiction and hence the applicant is not eligible to get any interim orders for injunction as claimed by him. As the applicant has failed to establish the essential grounds to get the relief sought by him, these applications are liable to be dismissed.

In the result, the applications in O.A.Nos.563 and 564 of 2023 are dismissed with cost. In view of the reasons stated for dismissing these applications, the questions on the fairness of the findings and recommendations of the first respondent are left open to be dealt during the Independent Review Process, if the applicant chooses to participate in the same, by way of filing appropriate proceedings within a period of ten (10) days from the date of receipt of a copy of this order. It is also open to the respondents to file applications for rejecting the plaint on the grounds that this Court has got no jurisdiction to entertain the suit or that the suit has been filed without any cause of action.”

(emphasis supplied)

5.10. On a reading of the impugned order, it is evident the learned Judge has proceeded to examine whether there is any cause of action to file a suit. It is trite law that at this stage the enquiry ought to be whether the plaint discloses a cause of action and not whether there is cause of action for that is essentially a



matter for trial. The above distinction is lost sight of by the learned Judge thereby vitiating the impugned order. In this regard, it may be relevant to refer to the following judgments, though rendered in the context of considering applications to reject the Complaint under Order VII Rule 11, may still have relevance in the present context. This would be clear if one bears in mind that the learned Judge has even after leave is granted and in the absence of any application to revoke has rendered a finding that the suit is filed “*without any cause of action*”, while proceeding to observe / suggest that the respondent should file an application for rejection of complaint under Order VII Rule 11 CPC. We shall refer to the following extracts in the judgments of the Hon'ble Supreme Court and this Court which bring out the distinction between suit filed without cause of action and that filed without disclosing cause of action:

i) State of Orissa v. Klockner and Co., reported in (1996) 8 SCC 377:

“25. Now coming to Special Leave Petition (C) No. 19846 of 1995, this petition is filed against the judgment and order of the High Court of Orissa at Cuttack in First Appeal No. 14 of 1995 dated 12-5-1995. By the order under appeal, the High Court has reversed the order of the learned Subordinate Judge, Bhubaneswar dated 26-3-1994, by which the learned Subordinate Judge accepting an application filed under Order 7 Rule 11 CPC, rejected the complaint in Title Suit No. 231 of 1992 filed by the first respondent in special leave



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petition. The learned Single Judge of the High Court while reversing the order of the learned Subordinate Judge observed as follows:

“In the present case on a fair reading of the petition filed by Defendant 1 under Order 7 Rule 11 of CPC it is clear that the case of the applicant is that the plaintiff has no cause of action to file the suit. It is not specifically pleaded by the applicant that the plaint does not disclose any cause of action. The learned trial Judge has also not recorded any specific finding to this effect. From the discussions in the order it appears that the learned trial Judge has not maintained the distinction between the plea that there was no cause of action for the suit and the plea that the plaint does not disclose a cause of action. For the limited purpose of determining the question whether the suit is to be wiped out under Order 7 Rule 11(1) or not the averments in the plaint are only to be looked into.

(emphasis supplied)

ii)Urooj Ahmed v. Preethi Kitchen Appliances Private Limited, 2013 SCC OnLine Mad 2969:

“5. There is no difficulty in appreciating the position of law that an application under Order VII Rule 11 of C.P.C., would govern a case of non disclosure of a cause of action. However it does not govern a defective cause of action. A question as to whether a plaint discloses a cause of action is a question of fact which has to be governed on the basis of the claims made therein in entirety. The Court has to take the averments as true and then apply its mind as to whether a plaint discloses a cause of action or not.”



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iii) Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express, reported in (2006) 3 SCC 100:

“12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct.

(emphasis supplied)

iv). Jageshwari Devi v. Shatrughan Ram, reported in (2007) 15 SCC 52:

“We have heard learned counsel for the parties. We have perused the order of the trial Court and of the High Court. We have also perused the plaint filed by the respondent herein. The main ground on which rejection of the plaint was sought was that the plaint does not disclose a cause of action which is a ground specified under Order 7 Rule 11(a) CPC. The trial court on consideration of the averments in the plaint held, and in our view rightly, that it could not be held that the plaint does not disclose a cause of action. It is relevant to state that there is a difference between the non-disclosure.



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of a cause of action and defective cause of action; while the former comes within the scope of Order 7 Rule 11, the latter is to be decided during trial of the suit. The contention raised on behalf of the appellant that the cause of action disclosed is vague and incomplete, is not a ground for rejection of the plaint, under Order 7 Rule 11 of CPC, no exception can be taken to the order.”

(emphasis supplied)

5.11. From the above discussion it is clear that the order of the learned judge insofar as it finds that the suit is “without any cause of action” instead of enquiring whether there is a disclosure of cause of action, suffers from misdirection in law. The impugned order having been made on the basis of a gross misdirection in law and contrary to settled legal principles is unsustainable.

6. PART - III – Errors in finding that the suit is without jurisdiction:

6.1. The learned judge has while rejecting the application for interim injunction found that the suit is without jurisdiction. On a close reading of the order of the learned Judge, we find that the order only finds that the suit is without jurisdiction we are unable to discern any reasons in support thereof. Considering the submissions on both sides and material on record, we are unable to concur with the finding of the order of the learned Judge that the suit



is without jurisdiction for the following reasons:

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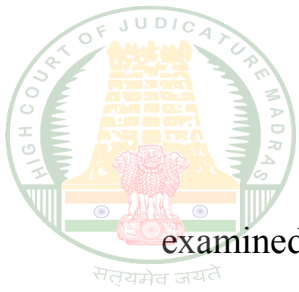
a) Leave to sue - Granted - Failure to file application to revoke:

6.2. It is relevant to note that the learned Judge of this Court had granted the appellant leave to sue vide order dated 22.06.2023. The relevant portion of the order is extracted hereunder:

“Considering the averments made in the affidavit filed in support of the application & taking into consideration the fact that the order passed by the first respondent / defendant has effect through out the territory of India which would affect the interest of the plaintiff even within the jurisdiction of this Court and so a part of cause of action arises jurisdiction of this Court, leave is granted as prayed for.”

(emphasis supplied)

6.3. The respondents herein are aware and conscious of the fact that the learned Judge has granted leave to sue under Clause 12 of the Letters Patent Act. If the respondents were aggrieved by the above grant of leave to sue the normal course that is open to them, is to file an application to revoke the leave granted which the respondents have not chosen to do yet. In the absence of an application to revoke the leave granted, the learned Judge ought not to have



examined the question of maintainability of the suit on the ground of lack of jurisdiction and cause of action, more so, in the applications for interim injunction filed by the appellant. In this regard, it may be useful to refer to the following judgments:

(i) The Calcutta High Court in *Madanlal Jalan Vs. Madanlal*, AIR 1949 Cal 495 has summarised the position of law based on the practice of other Chartered High Courts including that of this High Court. In paragraph No.25, it has summarised as follows:

“25. On a consideration of the legal principles established by the judicial decisions mentioned above it seems to me that balance of convenience is a material consideration in the exercise of discretion under cl. 12. From these judicial authorities the following propositions may, I think, be enunciated: (a) that an application lies for revoking leave granted under cl. 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



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granted to revoke or maintain the leave; (f) that assignment is a very important part of the cause of action in a suit by the assignee; (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; (i) that if the cause of action is founded on an assignment within jurisdiction of a negotiable instrument, the Court will, in recognition of the principle of negotiability, insist on a far greater degree of balance of convenience in favour of the Defendant and will more readily give or maintain leave than in other cases of assignment; (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.”

(emphasis supplied)

(ii) The above judgment of the Calcutta High Court was relied upon by a Division Bench of this Court in *Sulphur Mills Ltd. v. Dayal Fertilizers Pvt. Ltd* and others reported in 2021 (3) CTC 178 and held as under:

“43. While granting leave under Clause 12 of the Letters Patent, the question of testing the cause of action qua burden of proof does not arise. It is a subject matter of trial after the defendants file



their written statement and issues are framed.

44. A plain reading of Clause-12 of the Letters Patent shows that where a part of the cause of action has arisen within the jurisdiction of this Court, a leave is to be obtained under Clause 12 of Letters Patent. This was also the view of this Court in “Wipro Limited and Others Vs. Oushadha Chandrika Ayurvedic India (P) Limited and Others, 2008 SCC OnLine Mad 172”.

45. Leave has to be first obtained where a part of cause of action arises within jurisdiction of High Court as also in cases where the defendant do not reside or carry on business within jurisdiction of High Court. This was the view in “Parameswari Veluchamy and two others Vs. T.R.Jayaraman and seven others, 2002 (1) CTC 134”.

46. The Court have also ruled that the issue of jurisdictional dispute requiring evidence must be decided along with the other issues in the suit only at the time of trial.

47. While revoking leave already granted, the Court is essentially reviewing its exparte decision granting leave to sue the defendants. Review is permissible only under Section 114 of the CPC read with Order 47 of CPC. However, the scope of review is very limited. It is perhaps for this reason, applications are filed under Clause 12 of Letter Patent and it has become the practice of the Court to entertain such application even though Clause 12 does not contemplate the revocation of leave.”

(emphasis supplied)

(iii) Amrutanjan Limited v. Ashwin Fine Chemicals and Pharmaceuticals, reported in (1990) SCC OnLine Mad 394



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“19. Besides, I may advert to one other inherent laches on the part of the defendants' case relating to this issue; that is, before entertaining the suit in this Court, it appears that the plaintiffs had filed an application seeking leave to file the suit in this Court, upon which leave was granted to the plaintiffs, but the defendants, after they came to know of the event of the filing of the suit, though a remedy was available to them to have the leave revoked, do not appear to have taken any steps if really they were aggrieved by a wrong entertainment of the suit in this Court. It is incumbent on the part of the defendants. that they should have taken necessary steps to revoke the leave to sue-granted already in favour of the plaintiffs and this fact also fortifies. the claim of the plaintiffs to have the suit tried in this Court.”

(emphasis supplied)

(iv) The Hon'ble Supreme Court in the case of *Chittaranjan Mukherji v. Barhoo Mahto*, reported in 1950 SCC OnLine SC 14, while considering a case wherein there was delay in filing the Application for Revocation of Leave to Sue by the defendant found that the defendant therein having acquiesced with the proceedings cannot turn back / resale. The relevant portion of the Hon'ble Supreme Court Judgment is extracted hereunder:

“11.....We hold that, having regard to the delay in filing the application for revocation and the respondent's conduct in relation to the proceedings in the suit, the leave originally granted should not be revoked.

.....



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13. The above proceeding would not have gone on and the appellant would not have had to incur the incidental expenses if the application for revocation had been filed and all proceedings stayed soon after the respondent entered appearance on 11th March.

.....

14. It is thus clear that the respondent has not only acquiesced in the steps taken by the appellant to carry forward the progress of the suit incurring considerable expenses but, in the language of Clough, J., “made use of the existence of the suit” to obtain such interlocutory reliefs as he thought would be to his own advantage, at the hands of the Court which he now claims should not try the suit.

15. We are of opinion, in agreement with Clough, J., that the proceedings in the suit have been allowed to reach a stage where it would result in grave injustice if the Court were to hold that the “forum conveniens” was Bihar and not Calcutta and revoke the leave on that ground.”

6.4. The above discussion would show that once a leave to sue is granted by this Court, if the defendant is aggrieved by such leave it is open to the party aggrieved by the grant of leave to file an application to revoke the leave, we are informed that the respondents herein have not chosen to do so yet. Importantly, Courts look to and expects the party aggrieved by the grant of leave to approach the Court with an application to revoke the leave at the earliest, else Courts have understood the parties as having acquiesced and have refrained from interfering or re-visiting the order granting leave. In the present case, the



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Leave to Sue was granted on 22.06.2023. Order in the original applications was passed on 16.11.2023. The present original side application was heard on 13.02.2024. However, the Respondents had not filed any application to revoke the leave granted. The learned Judge has not addressed the impact/ relevance of the leave granted and the absence of any application to revoke, instead observes /suggests that an application to reject the plaint under Order VII Rule 11 ought to be taken. Failure to consider the above aspect which is relevant vitiates the order of the learned Judge.

b) Misreading of the Delhi High Court judgment – Finding of “Forum Shopping”:

6.5. The learned Judge had found that the appellant is in the habit of “Forum Shopping”. After recording that the appellant had filed similar suits before the High Courts of Delhi and Bombay, the learned Judge proceeds to find that the Delhi High Court rejected the suit on the point of jurisdiction after finding that the appellant was involved in Forum Shopping and was frowned upon. The following portion of the order of the learned Single Judge is relevant and extracted hereunder:

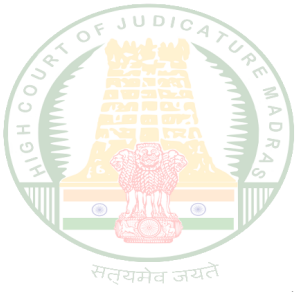
“21. So, inviting a cause of action from any viewer base, in my opinion is extraneous to the issues involved in this suit. All that is involved in this case is only an action taken by the first respondent on a complaint given by the second respondent. The action taken by the first respondent



has resulted in the impugned recommendations. Both the actions had been taken place at Mumbai and not at Chennai. Even those proceedings which has been filed by the applicant before the Delhi High Court was rejected on the point of jurisdiction, by holding that the cause of action has arisen elsewhere. In fact the High Court of Delhi came down heavily on the applicant who was the plaintiff in that proceedings in FAO(OS)No.11 of 2017 and observed that the applicant has opted to do forum shopping by filing proceedings before the High Court of Delhi without invoking the jurisdictional courts at Bombay. Now also the applicant has not chosen to file the proceedings before the jurisdictional courts at Bombay, but at Chennai. The attitude of the applicant choosing Chennai, next to Delhi would only add reasons to the submissions of the respondents that the applicant/plaintiff is in the habit of doing forum shopping.

(emphasis supplied)

6.6. The above order of the learned Judge insofar as it finds that the Delhi High Court had come down heavily on the appellant for filing a suit before the Delhi High Court instead of the Bombay High Court suffers from error apparent on the face of record. The learned Judge had grossly misread / misunderstood the order passed by the Division Bench of the Delhi High Court. Contrary to what was found by the learned Judge, the Delhi High Court had rejected the plea of the respondents and had found that the suit by the appellant was instead maintainable. The following finding of the learned Judge of the Delhi High Court in CS(OS) No.456 of 2016 would make the position clear:



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"2. The counsel for the defendant/applicant seeks return/rejection of the plaint on two grounds; firstly, that as per averments in paras 95 to 97 of the plaint the courts all over India would have territorial jurisdiction to entertain the suit and if the plaintiff is held to have cause of action all over India it would vest a power in the plaintiff to choose the court before which to institute the suit thereby allowing forum shopping and which has been held to be in abuse of the process of the court.

3. In my view the plaint cannot be returned/rejected on the ground of this court not having territorial jurisdiction unless the defendant/applicant is able to establish de hors the evidence that no part of the cause of action has accrued within the jurisdiction of this court so as to vest with this court with territorial jurisdiction over the subject matter of the suit. Merely because cause of action may arise within the territorial jurisdiction of several courts would not mean that in accordance with the provision of the Code of Civil Procedure, 1908 (CPC) each of the said courts would not be competent to entertain the suit.

.....

4. The counsel for the defendant/applicant then contends that the material cause of action has not accrued to the plaintiff within the territorial jurisdiction of this Court.

5. The same again according to me does not constitute a ground for return/rejection of the plaint as long as there is cause of action within the territorial jurisdiction of this Court, howsoever miniscule it may be, this Court cannot refuse to entertain the suit.



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6. The counsel for the defendant/applicant has not made out a case that no cause of action accrued within the jurisdiction of this Court.

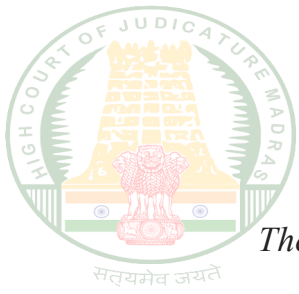
7. Thus there is no merit in the said ground for rejection of the plaint."

(emphasis supplied)

6.7. The order of the learned single Judge was affirmed in appeal by the Division Bench of the Delhi High Court in FAO (OS) 11 of 2017. The relevant portions of the order of the Division Bench are extracted hereunder:

"8. So far as the first objection that the drafting of the plaint would have enabled forum shopping is concerned, by an order passed on 7th October, 2016, the Hon'ble Judge was of the view that the plaint could not be returned/rejected on this plea unless the defendant was able to establish, de hors the evidence, that no part of the cause of action had accrued within the jurisdiction of this court so as to vest it with territorial jurisdiction over the subject matter of the suit.

9. The Hon'ble Judge was also of the view that merely because, from the averments laid in the plaint, it could be said that cause of action may arise within the territorial jurisdiction of several courts, would not mean that, in accordance with the provisions of the Code of Civil Procedure, 1908, each of the said courts would not be competent to entertain the suit. There is no reason to fault this finding of the Hon'ble Judge in as much as the Code of Civil Procedure itself anticipates the fact that in a given situation, several courts may have jurisdiction and enables the plaintiff to opt for a court of its choice.



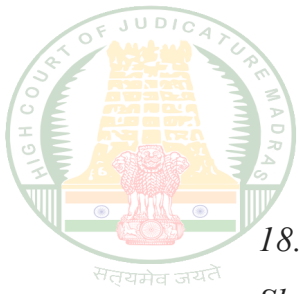
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The objection of the appellant in I.A.No.12660/2016 that the averments in the plaint would enable forum shopping and that the plaint deserves to be rejected for this reason has therefore, been rightly rejected as it is not sustainable in law.

... 16. The plaintiff had clearly stated in para 95 of the plaint that the Delhi High Court has territorial jurisdiction to try and entertain the proceedings inasmuch as "a part of cause of action has arisen in Delhi as the advertisement which has been directed to be modified/withdrawn by the defendant was being telecast throughout the country including Delhi and has been viewed by various persons in Delhi, within the jurisdiction of this court". This is followed by the averment in para 96 wherein the plaintiff had disclosed that the appellant has a pan-India presence through its website (www.ascionline.org) which is an interactive website and that people located anywhere in India can file their complaints utilizing this website. The respondent has reiterated that part of the cause of action has arisen in Delhi for the reason that its advertisement which has been exhibited on national television including Delhi would be prohibited.

17. In these circumstances, the observations of the Hon'ble Judge that though the appellant was the only advisor and not the broadcaster, yet the order dated 24th August, 2016 (the advisory of the appellant to the respondent) has also been sent to the broadcaster resulting in reasonable apprehension of the plaintiff, that the broadcaster may refuse to carry the advertisement of the plaintiff, was prima facie well founded.

.....



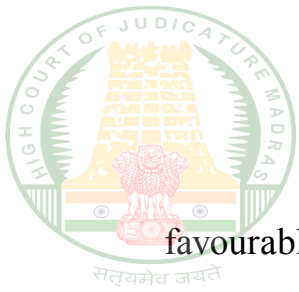
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18. In the above circumstances, we are unable to agree with Mr. Raj Shekhar Rao, ld. counsel for the appellant that the plaintiff/respondent has not made out a case that part of a cause of action has arisen within the jurisdiction of this court. The findings of the Hon'ble Judge that the suit of the respondent at Delhi is maintainable, therefore, cannot be faulted on any legally tenable grounds. We therefore, find no merit in these appeals which are hereby dismissed."

6.8. The order of the learned judge suffers from error apparent and thus stands vitiated.

c) Lack of Jurisdiction vis-a-vis Forum Shopping – Mutually destructive:

6.9. Apart from the fact that the learned Judge had misread the order of the Delhi High Court, the learned Judge had erred in finding that the suit is not maintainable on the ground of lack of jurisdiction, while at the same time finding that the appellant was involved in “*Forum Shopping*”. The above finding is mutually destructive. We say so, for if the suit is not maintainable on the ground of jurisdiction question of Forum Shopping would not arise. This would be clear if we keep in mind that “*Forum Shopping*” does not mean absence or lack of jurisdiction but the practice of choosing the Court in which to bring an action from among those Courts that could properly exercise jurisdiction based on determination of which Court is likely to provide the most



favourable outcome as held by the Hon'ble Supreme Court in the case of *Vijay*

WEB COPY *Kumar Ghai vs. State of W.B., reported in (2022) 7 SCC 124*, the relevant

portion of the judgment reads as under:

“11. Predominantly, the Indian Judiciary has time and again reiterated that forum shopping takes several hues and shades but the concept of “forum shopping” has not been rendered an exclusive definition in any Indian statute. Forum shopping as per Merriam-Webster Dictionary is:

“The practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on determination of which court is likely to provide the most favourable outcome.”

(emphasis supplied)

6.10. Having said that it is equally important to bear in mind that when law permits a person the choice of multiple Courts / Forums, the discretion is with the litigant and merely because a particular Court amongst different Courts having jurisdiction is chosen by a litigant that by itself would not render the conduct of the litigant fall within the mischief of Forum Shopping. In this regard, it may be relevant to refer to the following judgment of the Division Bench of this Court wherein it was held as under:

Brooke Bond India Limited v. Balaji Tea (India) Pvt. Ltd., reported in 1992. SCC OnLine Mad 357:

“16. We have no reasons to think that if the law permits a person to institute a suit at a forum of his choice and that person exercises his discretion and chooses a particular court for action he abuses the process of the Court. Learned single judge has noticed and rightly



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said that S. 62 of the Copyright Act permits a deviation from the general law. But then, that gives a discretion to the litigant to decide the forum. It is his choice and not, the choice, of the court. No exception can be taken if his discretion is not to the linking of the court. Learned single judge has in this behalf said at quite a few places in his judgment that the Court may not in such cases be in a position to dismiss the suit as not maintainable or as one filed in a court without jurisdiction, yet has said, 'but the Court will certainly refuse to grant relief to him'. We are recording our disagreement. No judge can afford to deny a relief if in law and in equity such relief is available to a party, evidently not for the reason that he does not like the choice of the forum and the action in Court by a litigant. Since we have taken the view that the copyright action emerges from the same bundle of facts from which the trade mark and passing off actions emerge and the copyright action is maintainable in this Court (learned single judge has also so found), we are of opinion that it will not serve the ends of justice if leave is refused for joinder of causes of action falling under the Copyright Act and the Trade and Merchandise Marks Act."

(emphasis supplied)

7. PART IV - Failure to examine jurisdiction in the context of subject matters involving Internet:

7.1. As stated supra, the learned Judge has while finding that the suit is without jurisdiction has not assigned any reasons in support thereof. Before us it was contended by the learned counsel for the Respondents that the finding of



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the learned Judge that the suit is without jurisdiction does not warrant any

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interference inasmuch as the order of the 1st Respondent was passed at Mumbai on the basis of a complaint lodged at Mumbai and the 2nd Respondent is also at Mumbai and thus this Court would have no jurisdiction. The counsel for the Respondents would submit that the appellant's attempt to submit that a cause of action or a part thereof has arisen within the State of Tamil Nadu by stating that its right to broadcast commercial advertisement in the State of Tamil Nadu is also infringed, ought to be rejected inasmuch as the above submission would result in a single order falling within the jurisdiction of several Courts which could give rise to plurality / multiple Courts examining the same cause a situation/consequence which according to the learned counsel for the respondents ought to be avoided.

7.2. On the other hand, the learned Senior Advocate appearing for the appellant would submit that the fundamental right viz., right to commercial advertisements exist throughout the territory of India. As a matter of fact, the subject advertisement is admittedly relayed / broadcast in several languages including Tamil which would show that the residents of Tamil Nadu are also its potential customers and intentionally targeted by the appellant. Thus, part of cause of action arises in Tamil Nadu and this Court would have jurisdiction. The



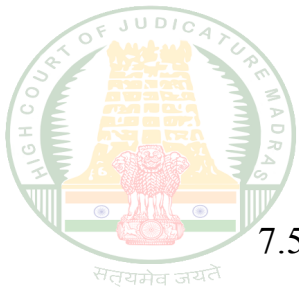
order of the learned Judge insofar as it finds that the suit is without jurisdiction

is untenable.

7.3. We shall proceed to examine the finding of the learned Judge that the suit is without jurisdiction, keeping in view the submissions put forth by either side.

7.4. Chartered High Courts governed by the Letters Patent is conferred with discretion to grant leave to sue to the plaintiff under Clause 12 of the Letters Patent, if the cause of action as a whole or part arises within the local limits of the Ordinary Original Jurisdiction of the said High Court. It may be relevant to refer to Clause 12 of the Letters Patent Act which reads as under :

“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 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 property the sued for does not exceed hundred rupees.”



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7.5. A reading of the above Clause would suggest that Clause 12 of the Letters Patent of the Madras High Court provides for two categories of suits, viz., (i) suits pertaining to immovable properties i.e., suits for land or other immovable property, and (ii) all other suits i.e., suits other than those for lands or other immovable properties. Three situations may arise for maintaining a suit under Clause 12 of Letters Patent in respect of the second category of the suits i.e., suits other than those for land or other immovable property viz., (a) where cause of action has wholly arisen within the territorial jurisdiction of this Court, (b) where cause of action has arisen in part, leave of this Court should have been first obtained, and (c) where defendant at the time commencement of the suit dwells / carries on business or personally works for gain within the territorial jurisdiction of this Court. From the above discussion (a) and (c) may have no application to the facts of the present case, we are left with (b) and thus have to examine if part of cause of action arises within the Ordinary Original Jurisdiction of this Court.

7.6. It is the case of the appellant that the impugned order of the 1st Respondent affects the appellant's right to broadcast/ relay the subject advertisement in Tamil language thereby giving rise to a cause of action or part thereof in the State of Tamil Nadu.



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7.7. Before proceeding further, it may be relevant to note the scope of the expression “cause of action”. The expression “cause of action” has come up for consideration on numerous occasions before the Apex Court as well as this Court and it has been consistently held that it is a bundle of facts which the plaintiff must prove in support of its right to the judgment. The elements of a cause of action is the existence of a right and a breach thereof. In this regard, it may be relevant to refer to the following judgments :

i) Y. Abraham Ajith v. Inspector of Police, reported in (2004) 8 SCC 100 :

“14. It is settled law that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

15. The expression “cause of action” has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously, the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of



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evidence, which is necessary to prove such fact, comprises in “cause of action”.

.....

18. In Halsbury's Laws of England (4th Edn.) it has been stated as follows:

“Cause of action’ has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”

(ii) Alchemist Ltd. v. State Bank of Sikkim, reported in (2007) 11 SCC 335

“37. From the aforesaid discussion and keeping in view the ratio laid down in a catena of decisions by this Court, it is clear that for the purpose of deciding whether facts averred by the appellant-petitioner would or would not constitute a part of cause of action, one has to consider whether such fact constitutes a material, essential, or integral part of the cause of action. It is no doubt true that even if a small fraction of the cause of action arises within the jurisdiction of the court, the court would have territorial jurisdiction to entertain the suit/petition. Nevertheless it must be a “part of cause of action”, nothing less than that.”

7.8.Now having examined the traditional views on cause of action it



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should be borne in mind that the subject advertisement is broadcast in multiple platforms/ media including Television (Multi Media), Digital Media such as YouTube, Instagram etc. The learned judge had observed / doubted if the suit against infringement of fundamental right is maintainable. We find this contrary to settled position that a Civil Court would have jurisdiction to try all suits of civil nature including cases where the complaint is infringement of a fundamental right.⁶

7.9. Before proceeding to examine the order of the learned Judge insofar as it finds that the suit is without jurisdiction it may be relevant to give a broad overview of the complexities that may arise in view of the fact that the subject advertisement is broadcast in multiple platforms and media including multimedia (Television), Digital Media such as YouTube, Instagram, OTT etc., using Internet.

7.10. With the advent of Internet and Digital Space / Media involving Internet fixing territorial jurisdiction of Courts has become complex. In a world where commerce is increasingly dependent on Digital Space using Internet, traditional geographic and territorial borders are disappearing, leaving in its

⁶ K.P.V Shaik Mohammed Rowther & Co.(P) Ltd. v. Shipping Corporation of India, (1988) SCC OnLine Mad 563 at para 125 ; Rajasthan SRTC v. Mohar Singh, (2008) 5 SCC 542.



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wake important and complex questions. Digital Space using Internet is different from the "real world", it is virtual world without boundaries. This lack of defined, territorial borders has resulted in throwing up legal challenges which are unprecedented. The conventional ideas of territorial jurisdiction, in the case of property both movable and immovable which have physical presence and resultantly defined rather identified situs on the basis or in relation to which Courts assumed jurisdiction may require a revisit in the wake of the technological development in particular the advent of Internet. Add to it, the complexity in the present case where the injury that is complained of is infringement of a fundamental right viz., right to advertise which itself is incorporeal/intangible and exist throughout the territory of India in view of the Constitutional guarantee. This in turn gives rise to cause of action wherever the right is infringed or impaired. Jurisdictional problems come to the forefront of a conflict when a legal dispute occurs in a space without well defined borders. If a legal conflict occurs resulting from information or content found on the Digital Space in particular Digital Space using Internet, where will the conflict be resolved and which Court will have jurisdiction are issues which Courts are grappling with. Courts are faced with the task of exploring, evolving and trying to coalesce the traditional principles relating to fixing the jurisdiction of Courts



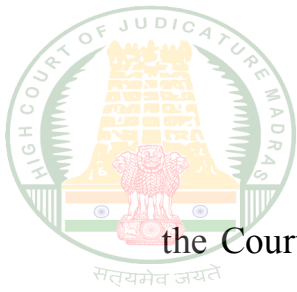
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on the basis of the place where cause of action arises wholly or in part and
WEB applying the same to issues involving Digital Space using Internet.

7.11. While on the exercise of fixing jurisdiction of Court in the present case involving complaint of infringement of fundamental right to advertise across various Media including those using Internet, it may do well to remind ourselves that we cannot let our mind be bogged down by traditional concepts/notions on cause of action as it existed when Clause 12 of Letters Patent was introduced on the basis of which Courts assumed jurisdiction. Instead attempt must be made to embrace scientific development keeping in mind that legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity⁷.

7.12. Disputes of the present nature has engaged the attention of Courts outside and within India. As a matter of fact to resolve the issue of territorial jurisdiction in matters involving Digital Space / Internet / Cyber Space / Multimedia / Social Media, Courts in India have applied the test laid down by

⁷ *Senior Electric Inspector v. Laxminarayan Chopra*, AIR 1962 SC 159.



the Courts in the United States, United Kingdom where the disputes involving
Cyber/ Digital Space has come up for consideration more frequently, some of
the tests being:

- 1) Purposeful Availment Test
- 2) Zippo or Sliding Scale Test
- 3) The Effects Test.

7.13. A Division Bench of the Delhi High Court in the case of *Banyan Tree Holding (P) Limited v. A.Murali Krishna Reddy and another* reported in 2009 SCC OnLine Del 3780, while dealing with an action for passing off using Internet had applied the above tests, apparently inspired by its application by the Courts in America. The peculiar feature that was noticed by the Delhi High Court in that case was that neither the plaintiff nor the defendant therein were located within the territorial jurisdiction of the Delhi High Court. The plaintiff therein was a company having its registered office at Singapore while Defendant Nos.1 and 2 were at Hyderabad, 1st Defendant being the promoter and the 2nd Defendant being the company.

7.14. The plaintiff claimed that it adopted and used the word mark “Banyan Tree” and also “Banyan Tree Device” since 1994. That on account of



extensive and continuous use it had acquired a secondary meaning and become highly distinctive. The “Word and Device Mark” has come to be associated with the plaintiff and its sister concern. The plaintiff therein was found to use website www.banyantree.com and www.banyantreespa.com since 1996. The said websites are accessible in India. The plaintiff does not hold a registration for the said mark nor device in India, its application was found to be pending. Since 2002, it was found that the plaintiff has been operating 15 Spas across India in collaboration with the Oberoi Group. Whiles, the plaintiff got to learn sometime in October 2007, that the defendants therein had initiated work on a project under the name “Banyan Tree retreat” and that the word and device mark adopted was stated to be deceptively similar to that of the plaintiff.

7.15. It was against the above factual background that action for passing off was instituted before the Delhi High Court on the premise that the defendants therein had presence in Delhi through their website <http://www.makprojects.com/banyantree.htm> which is accessible in Delhi and the services were also being offered to its customers in Delhi. It was submitted that because of the ubiquity, universality and utility of the Internet and the World Wide Web the cause of action had arisen within the jurisdiction of the



Delhi High Court. The above matter when it came up for consideration before the learned single Judge of the Delhi High Court, it was referred to a Division Bench, to determine the jurisdiction of Courts in suits involving internet related disputes. The Test of Purposeful Availment, Zippo Sliding Scale Test and Effects Test were examined and applied by the Division Bench.

7.16. We shall now broadly examine these tests and its relevance in the Indian Context of fixing jurisdiction of Courts. We must utter a word of caution before proceeding further, the suit was filed before the Delhi High Court on the basis of a complaint by the plaintiff that the defendant through a positive act had infringed the plaintiff's trademark and thereby caused injury. The present case is the converse. The plaintiff's complaint is the difficulty in asserting / exercising its fundamental right to commercial advertisement consequent to the impugned proceedings of the 1st Respondent.

1) Purposeful Availment Test:

7.17. This is one of the earliest test which has been applied by the U.S. Supreme Court starting with the judgment in *International Shoe Company vs. Washington (1945)* and applied subsequently in a number of decisions. The Delhi High Court while applying the above test to the facts of the above case found that the plaintiff had to show that the defendant has sufficient “minimum



contacts” in the Forum State. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise “purposefully availed”, of the privilege of conducting activities in the forum State. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notions of fair play and substantial justice⁸. The above test would require a party claiming injury to show that he had sufficient “minimum contracts” in the forum state purposefully directed towards residents of the forum State.

7.18. “Purposeful Availment” would not result from “random” or “fortuitous” contacts in the Forum State. It requires the party to show that such contacts before the Forum Court created a substantial connection with the Forum State. The party approaching the Court must have engaged in “significant activities” within the forum state or have created “continuing obligations” between himself and residents of the forum state⁹.

2) Zippo or Sliding Scale Test :

7.19. While applying the Zippo Test to the facts of the case before it, the Delhi High Court noted that a three pronged test has emerged for determining

⁸ International Shoe Co. v. Washington 326 U.S.340 (1945)

⁹ Burger King Corp v. Rudzewicz 471 U.S.462 (1985)



whether the exercise of jurisdiction over a non-resident defendant is appropriate:

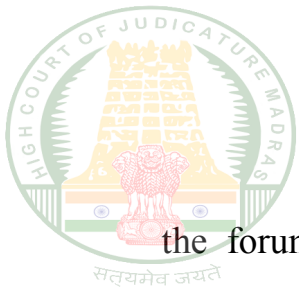
WEB (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable."¹⁰.

7.20. It was observed that there have been difficulties experienced in the application of the Zippo Sliding Scale Test in terms of which the assertion of a court's jurisdiction depended upon the “level of interactivity and commercial nature of the exchange of information” as a result of the use of the website. It was found that the Courts have been finding it problematic in determining the degree of interactivity that should suffice for jurisdiction to be attracted.

3) Effects Test:

7.21. The difficulty experienced with the application of the Zippo Sliding Scale Test, paved the way for the application of the “Effects Test”. It was noticed that Courts have moved from a 'subjective territoriality' test that a court will regulate an activity only if it is shown having originated in its territory exemplified by the decision in *Louis Feraud Int'l SARL v. Viewfinder Inc* 406 F Supp 2d 274 (SDNY 2005)] to an 'objective territoriality' or 'effects' test in which

¹⁰ Zippo Mfg. Co. v. Zippo Dot Com, Inc., 9521 F.Supp. 1119 (W.D.Pa.1997)

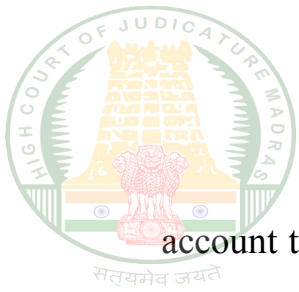


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the forum court will exercise jurisdiction if it is shown that effects of the complaint are felt in the forum State. In other words, it must have resulted in some harm or injury to the Plaintiff within the territory of the forum state. Since some effect of a website is bound to be felt in several jurisdictions given the nature of the internet, Courts have adopted a 'tighter' version of the 'effects' test, which is “*intentional targeting*”. Reference was then made to Thomas Schultz illuminative piece "*Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*" *EJIL* 2008 19 (779) which points out that the dynamics of jurisdiction is reasonableness and fairness. Schultz concludes that both the subjective territoriality and objective territoriality or the 'effects' test, if construed too broadly, are bound to produce results that are unfair and unreasonable. According to Schultz, a middle path had to be chosen between the too narrow ('subjective territoriality') and too broad ('effects') jurisdictional bases for better managing trans-border issues. This middle path was 'targeting'. Schultz defines targeting to mean "in essence that the activity must be intended to have effects within the territory of the state asserting jurisdiction."¹¹

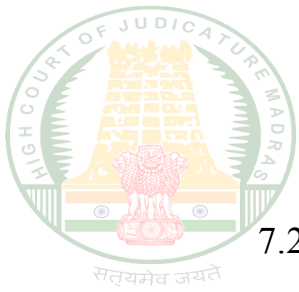
7.22. From the above discussion, we are of the view that taking into

11 *Calder v. Jones*, 465 U.S.783 (1984); *Remick v. Manfredy*, 238 F.3d 248 (2001); *Noonan v. Winston Comp.*, 135 F.3d 85, 91(1998); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002)



account the facts of the present case, the test that are applicable are “Purposeful
WEB Availment test” and the “Effects Test”.

7.23. Before applying the above tests to the present case, it may do well to remind ourselves that right to commercial advertisement is part of the fundamental right guaranteed under Article 19 (1) (a) of the Constitution as held by the Hon'ble Supreme Court in *Tata Press reported in (1995) 5 SCC 139*. It may also be necessary to understand the role of advertisements in today's commercial world. Advertising has a significant impact on all aspects of business operations. It increases revenue streams and consumer bases while boosting sales. Advertisements not only entice consumers, but they also furnish essential product details, enabling well-informed choices. They introduce innovations, capturing market interest and enabling adaptability to rivals' activities. In addition to increasing staff morale and organizational cohesion, advertising builds long-lasting consumer relationships that promote brand loyalty and repeat business. It sets companies apart from the competition by creating unique brand identities that engender customer trust and loyalty. Advertising is, at its core, the modern commerce that connects sales, innovation, rivalry, and customer involvement to achieve long-term success.



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7.24. Keeping in mind the role of advertisements in today's commercial world, “Purposeful Availment Test” would require the appellant to purposefully direct its activities in the State of Tamil Nadu or otherwise “purposefully avail” of the privilege of conducting activities in the State of Tamil Nadu. The said fundamental right to advertise exist and can be exercised throughout the territory of India. The subject advertisement is in “Tamil language” and is broadcast in multimedia including Television and Digital Space including Youtube, which customers in Tamil Nadu have access to. The decision to make a Tamil version of the advertisement involves investment of additional monies and a result of commercial decision prompted by a conscious attempt to reach out to the customer base in Tamilnadu. In view thereof there is no doubt in our mind that the appellant has “*purposefully directed its activities*” in the State of Tamil Nadu.

7.25. If “*Effects Test*” is applied it would require the appellant to demonstrate that it was “*intentional targeting*” customers in Tamil nadu. In other words, it must be shown that the appellant had in exercise of its right performed any act directed towards the customers/ residents of a particular State and the effects of the act are felt in a particular State or directed to a particular State. While examining the Effects Test keeping in mind the highly invasive role of advertisement in today's commercial world, we find that the very fact that the



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subject advertisement also has a Tamil version would reveal that there was intentionally targeting by the appellant of its potential customers in Tamil Nadu and its effect is felt in TamilNadu.

7.26.The impugned order which requires / directs the appellant to withdraw the subject advertisement concededly also includes the Tamil version of the said advertisement telecast in TV channels in Tamil Nadu and to which customers / viewers in Tamil Nadu has access to, through YouTube and other Digital Media in Tamil Nadu. The impugned order thereby infringes the appellant's constitutional right to advertise also in the State of Tamil Nadu. Thus, part of cause of action does arise in Tamil Nadu.

7.27. It may be relevant to note that prior to the present suit the appellant had filed similar petitions in High Court of Bombay and thereafter at High Court of Delhi. Before the High Court of Delhi an objection was raised that the appellant was involved in Forum Shopping. The High Court of Delhi while rejecting the above contention on Jurisdiction held that a part of cause of action does arise in Delhi. The relevant portion of the said order of the Division Bench of the Delhi High Court in FAO (OS) No.11 of 2017 is extracted hereunder:

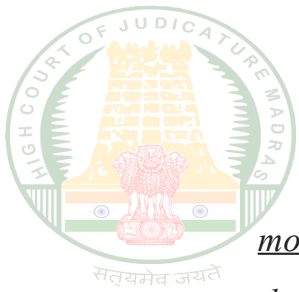


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"8. So far as the first objection that the drafting of the plaint would have enabled forum shopping is concerned, by an order passed on 7th October, 2016, the Hon'ble Judge was of the view that the plaint could not be returned/rejected on this plea unless the defendant was able to establish, de hors the evidence, that no part of the cause of action had accrued within the jurisdiction of this court so as to vest it with territorial jurisdiction over the subject matter of the suit.

9. The Hon'ble Judge was also of the view that merely because, from the averments laid in the plaint, it could be said that cause of action may arise within the territorial jurisdiction of several courts, would not mean that, in accordance with the provisions of the Code of Civil Procedure, 1908, each of the said courts would not be competent to entertain the suit. There is no reason to fault this finding of the Hon'ble Judge in as much as the Code of Civil Procedure itself anticipates the fact that in a given situation, several courts may have jurisdiction and enables the plaintiff to opt for a court of its choice. The objection of the appellant in I.A.No.12660/2016 that the averments in the plaint would enable forum shopping and that the plaint deserves to be rejected for this reason has therefore, been rightly rejected as it is not sustainable in law.

... 16. The plaintiff had clearly stated in para 95 of the plaint that the Delhi High Court has territorial jurisdiction to try and entertain the proceedings inasmuch as "a part of cause of action has arisen in Delhi as the advertisement which has been directed to be

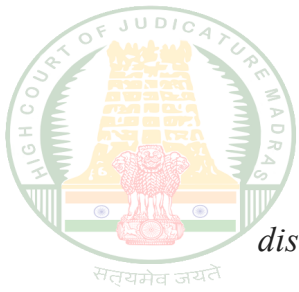


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modified/withdrawn by the defendant was being telecast throughout the country cou including Delhi and has been viewed by various persons in Delhi, within the jurisdiction of this court". This is followed by the averment in para 96 wherein the plaintiff had disclosed that the appellant has a pan-India presence through its website (www.ascionline.org) which is an interactive website and that people located anywhere in India can file their complaints utilizing this website. The respondent has reiterated that part of the cause of action has arisen in Delhi for the reason that its advertisement which has been exhibited on national television including Delhi would be prohibited.

17. In these circumstances, the observations of the Hon'ble Judge that though the appellant was the only advisor and not the broadcaster, yet the order dated 24th August, 2016 (the advisory of the appellant to the respondent) has also been sent to the broadcaster resulting in reasonable apprehension of the plaintiff, that the broadcaster may refuse to carry the advertisement of the plaintiff, was *prima facie* well founded.

18. In the above circumstances, we are unable to agree with Mr. Raj Shekhar Rao, ld. counsel for the appellant that the plaintiff/respondent has not made out a case that part of a cause of action has arisen within the jurisdiction of this court. The findings of the Hon'ble Judge that the suit of the respondent at Delhi is maintainable, therefore, cannot be faulted on any legally tenable grounds. We therefore, find no merit in these appeals which are hereby



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dismissed."

(emphasis supplied)

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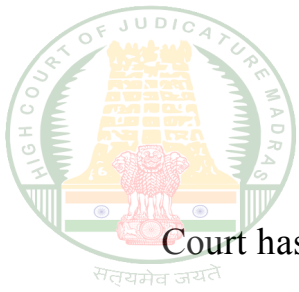
7.28. It is clear that under similar circumstance the Delhi High Court had found that part of cause of action arose within territory of Delhi while asserting/assuming jurisdiction. The above reasoning of the Delhi High Court would apply with equal force to the facts of the present case. Cause of action does arise if not wholly, certainly in part within the State of Tamil Nadu.

8. Observation of the learned single Judge – To file an application under Order 7 Rule XI to reject the plaint:

8.1. The learned Judge while finding the plaint is without cause of action and jurisdiction has proceeded to observe that the appellant may file an application under Order 7 Rule XI. The following portion of the order is relevant and is extracted hereunder:

“41. It is also open to the Respondents to file applications for rejecting the plaint on the ground that this Court has got no jurisdiction to entertain the suit or that the suit has been filed without any cause of action.”

8.2. The above observation of the learned Judge cannot be sustained in view of the above discussion. In any view, it overlooks the position that the



Court has *suo motu* powers to reject the plaint and an application under Order 7

WEB Rule XI may not be necessary in all circumstances. In this regard, it may be

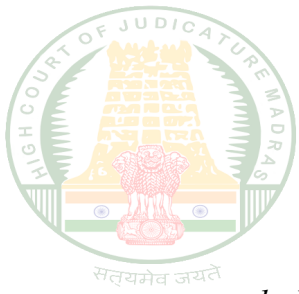
relevant to refer to judgment of the Hon'ble Supreme Court in the case of *Patil*

Automation (P) Ltd. v. Rakheja Engineers (P) Ltd., (2022) 10 SCC 1 :

“94.3. Order 7 Rule 11 does not provide that the court is to discharge its duty of rejecting the plaint only on an application. Order 7 Rule 11 is, in fact, silent about any such requirement. Since summon is to be issued in a duly instituted suit, in a case where the plaint is barred under Order 7 Rule 11(d), the stage begins at that time when the court can reject the plaint under Order 7 Rule 11. No doubt it would take a clear case where the court is satisfied. The Court has to hear the plaintiff before it invokes its power besides giving reasons under Order 7 Rule 12. In a clear case, where on allegations in the suit, it is found that the suit is barred by any law, as would be the case, where the plaintiff in a suit under the Act does not plead circumstances to take his case out of the requirement of Section 12-A, the plaint should be rejected without issuing summons. Undoubtedly, on issuing summons it will be always open to the defendant to make an application as well under Order 7 Rule 11. In other words, the power under Order 7 Rule 11 is available to the court to be exercised suo motu.

.....

113. Having regard to all these circumstances, we would dispose of the matters in the following manner:



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113.1. We declare that Section 12-A of the Act is mandatory and hold that any suit instituted violating the mandate of Section 12-A must be visited with rejection of the plaint under Order 7 Rule 11. This power can be exercised even suo motu by the court as explained earlier in the judgment. We, however, make this declaration effective from 20-8-2022 so that stakeholders concerned become sufficiently informed."

(emphasis supplied)

8.3. From the above discussion, we are of the considered view that the order of the learned Judge insofar as it finds that the suit is without cause of action and jurisdiction is without merit and cannot be sustained for the reasons stated above.

9. Forum Conveniens :

9.1. Having found that the impugned order does give rise to cause of action and such cause of action if not wholly certainly in part arises within the territory of Tamil Nadu by virtue of the subject advertisements in Tamil being broadcast in Multimedia including television and in Digital Space including Youtube, Instagram viewed / accessed by the customers / consumers of mosquito repellants in Tamil Nadu. However, that by itself may not be



conclusive for even in cases where the Courts have jurisdiction on the basis of

the cause of action having arisen in part within its territorial jurisdiction, if issues on jurisdiction is raised by the defendant, Courts would then apply the principle of Forum Conveniens and exercise its discretion to decide whether to exercise its jurisdiction or to refrain/refuse. In this regard, it may be useful to refer to the following Judgments:

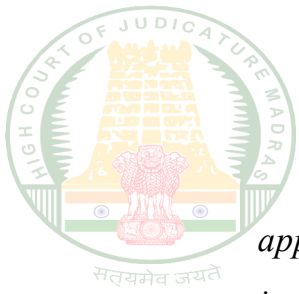
i) *Kusum Ingots & Alloys Ltd. v. Union of India*, reported in (2004) 6. SCC 254:

“30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.”

(ii) A Full Bench of the Madras High Court in *Sanjos Jewellers v. Syndicate Bank*, reported in 2007 SCC OnLine Mad 751 after referring to the decision of the Supreme Court in *Kusum Ingots* held as under :

“Forum conveniens

30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In



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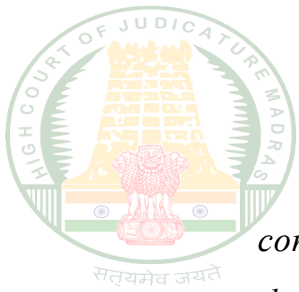
appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the Doctrine of forum conveniens. [See Bhagat Singh Bugga v. Dewan Jagbir Sawhney, AIR 1941 Cal 670 : ILR (1941) 1 Cal 490; Madanlal Jalan v. Madanlal, 1945 (49) CWN 357 : AIR 1949 Cal 495; Bharat Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd., 1997 CWN 122; S.S. Jain & Co. v. Union of India, 1994 (1) CHN 445, and New Horizons Ltd. v. Union of India, AIR 1994 Del 126.

The above paragraph No. 30 was relied on by the Division Bench to come to the conclusion that this High Court had no jurisdiction. But on a reading of Paragraph No. 30, it is clear that what the Supreme Court said was that the fact that small part of cause of action arose within the jurisdiction of one Court may not be a determinative factor. This means that even if it had the territorial jurisdiction the particular High Court may refuse to exercise its jurisdiction under Article 226 of the Constitution of India in view of the Doctrine of forum conveniens. It is impossible to construe Paragraph No. 30 of Kusum Ingots case as excluding the jurisdiction of the Court where only a small part of cause of action arose. All that it means is that if the forum that is chosen is not a convenient one then the High Court may refuse to exercise its jurisdiction not because it does not have jurisdiction but because it chooses not to exercise its discretion.”_

(emphasis supplied)

iii) Shanti Devi v. Union of India, reported in (2020) 10 SCC 766:

“28. From the facts of the present case, we are of the



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considered opinion that part of the cause of action has arisen within the territorial jurisdiction of the Patna High Court. We, thus, are of the view that the view of the learned Single Judge as well as the Division Bench holding the writ petition not maintainable on the ground of lack of territorial jurisdiction was completely erroneous and has caused immense hardship to the petitioner.

29. Another submission which has been advanced by the learned counsel for Respondents 1 to 3 is that the writ petition was rightly dismissed on the principle of forum non conveniens. Forum non conveniens has been defined by P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edn. in the following words:

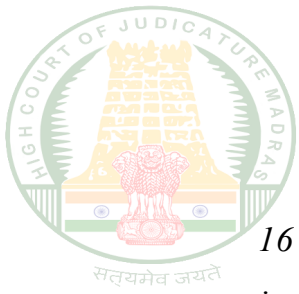
“Forum non conveniens.—The principle that a case should be heard in a court of the place where parties, witnesses, and evidence are primarily located.”

30. Black's Law Dictionary defines forum conveniens in the following words:

“Forum conveniens.—The court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses.”

iv) Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corpn., reported in (2009) 8 SCC 646 :

“136. The plaintiff furthermore is the dominus litus. He may institute a suit having regard to the provisions contained in Sections

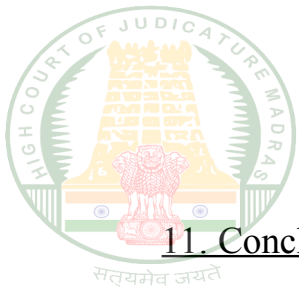


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16 to 20 of the Code of Civil Procedure in any civil court within whose jurisdiction inter alia a cause of action arises. If the jurisdiction of the civil court is not barred or if he having regard to common law principle is entitled to maintain an action in two different forums, he may choose one of them.”

9.2. Thus applying the doctrine of forum conveniens, while finding that this Court has jurisdiction inasmuch as part of cause of action arises within the State of Tamil Nadu, it may be necessary to bear in mind that it is a matter of discretion of the Court to either entertain or refuse to entertain a particular matter where only a part of the cause of action arises depending on the facts of each case.

10. Before we conclude, it is made clear that the appellant has challenged the order of the 1st Respondent *inter-alia* on the ground of violation of principles of natural justice, we have not examined the same. We have confined our enquiry as to whether the order of the learned Judge insofar as it finds the suit is without jurisdiction and cause of action has merit, which we had found to be grossly erroneous and unsustainable.



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11. Conclusion:

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11.1. In the light of the above discussion, we are of the view that the impugned order of the 1st Respondent does give rise to cause of action and a part of the same arises within the State of Tamil Nadu.

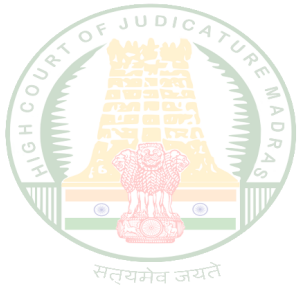
11.2. In view thereof, the order of the learned Judge insofar as it finds that the suit is without jurisdiction and cause of action, is set aside and the matter is remanded to the learned Judge, who shall consider the applications in O.A.Nos.563 and 564 of 2023, on merits and in accordance with law. We leave it open to the parties to raise all contentions that may be available to them, before the learned Judge.

Both these Original Side Appeals stand disposed of on the above terms.
No costs. Consequently, connected miscellaneous petitions are closed.

[R.M.D.,J.] [M.S.Q.,J.]

17.05.2024

Speaking (or) Non Speaking Order
Index: Yes/No
Neutral Citation: Yes/No
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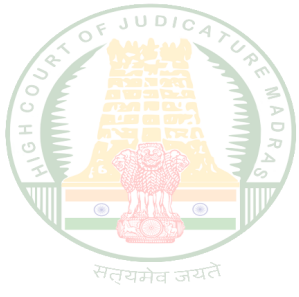
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The Advertising Standards Council of India,
A-402, Floor No.4, Aarus Chambers,
S.S.Amrutwar Marg, Behind Mahindra Towers,
Worli, Mumbai-400 013.

R.MAHADEVAN, J.
AND
MOHAMMED SHAFFIQ, J.

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