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

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Date of Decision : 15.04.2024+ **RFA(COMM) 88/2024, CM Nos.15109/2024, 15110/2024, 15112/2024, 15113/2024, 15114/2024 & 15116/2024**JABIR HUSSAIN TRADING AS
M/S HAKEEM HOTEL

..... Appellant

Through: Mr. Shravan Bansal & Ms. Shakshi
Agarwal, Advs.

Versus

ALI ASGAR TRADING AS
M/S. HAKEEM RESTAURANT

..... Respondent

Through: Mr. Keshav V.H. & Mr. Mohinder
Kumar Kukreja, Advs.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MS. JUSTICE TARA VITASTA GANJU****VIBHU BAKHRU, J. (Oral)**

1. The appellant has filed the present appeal impugning an order dated 09.11.2023 (hereafter the *impugned order*) passed by the learned Commercial Court in CS(COMM) No.831/2023 captioned *Jabir Hussain Trading as M/s Hakeem Hotel v. Ali Asgar Trading as M/s Hakeem Restaurant*. By the impugned order, the learned Commercial Court had returned the plaint on the ground that the Court did not have the territorial jurisdiction to entertain the suit. The appellant had filed the aforementioned suit seeking permanent injunction restraining the respondent from infringing its trademark and passing off. The appellant claims to be the proprietor of the registered trademarks, the details of which are as under:



“Trademark	Application Date	Application No.	Class	Use Details	Status
	20.10.2014	2831551	43	1.4.1971	Registered (Rectification Filed)
	23.10.2018	3980920	30	1.4.1971	Registered (Rectification Filed)
	23.10.2018	3980919	29	1.4.1971	Registered (Rectification Filed)”

2. It is the appellant’s case that the respondent is infringing and passing off the said trademarks. The appellant claims that it had learnt that respondent is planning, marketing, and networking to operate a physical restaurant / franchisee in North West Delhi and for the aforesaid purposes it is actively networking in Pitampura, Shalimar Bagh, Sultanpuri, Khera Kalan, Khera Khurd, North West Rohini and North Rohini.

3. The respondent had opened a restaurant in Bhopal, Madhya Pradesh by the name of “HAKEEM RESTAURANT”. The appellant claims that the respondent had adopted the trademark “HAKEEM RESTAURANT” keeping in view the immense goodwill garnered by the appellant.

4. The appellant also claims that any customer could book a table at the respondent’s restaurant by using the interactive site from Delhi. It also claims that other food delivery service providers are also accepting orders for delivery of cooked food from the respondent’s restaurant.



5. The learned Commercial Court examined the case whether the interactive sites for booking a table or delivery of cooked food could give rise to cause of action in respect of a restaurant operated in the city of Hyderabad and held that the same was covered by the decision of this Court in *Impresario Entertainment & Hospitality Pvt. Ltd. v. S&D Hospitality: Neutral Citation 2023:DHC:3919*. Accordingly, the learned Commercial Court returned the appellant's plaint.

6. It is settled law that the question whether a plaint is required to be returned at the threshold stage has to be examined on a demurrer, that is accepting all averments made in the plaint to be correct. In *Exphar SA & Anr. v. Eupharma Laboratories Ltd. & Anr.: (2004) 3 SCC 688*, the Supreme Court had observed as under

“9. Besides, when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. However, the Division Bench examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry on business within the jurisdiction of the Delhi High Court...”

7. The aforesaid principle has been consistently followed. In *M/s RSPL Ltd. v. Mukesh Sharma & Anr.:2016 SCC OnLine Del 4285*, the Court reiterated the standard that the question whether a plaint, is required to be returned under Order VII Rule 10 of the Code of Civil Procedure, 1908



(hereafter *the CPC*) is to be examined on the basis of the plaint and the documents filed by the plaintiff and without considering the defence raised by the defendant.

8. It is relevant to refer to the plaint filed by the appellant bearing the aforesaid principle in mind. Paragraphs 34 and 35 of the said plaint are relevant and are set out below:

“34. That the cause of action for the present suit first arose in September, 2023 when the Plaintiff came to know about the existence of the Defendant’s restaurant under the impugned marks. The cause of action is a continuous one and continues to subsist till such time the Defendant is restrained by an order of injunction passed by this Hon’ble Court from using the marks HAKEEM/HAKEEM RESTAURANT any other mark which is deceptively and confusingly similar to the Plaintiff’s marks HAKEEM



HOTEL, HAKEEM FOODS and .

35. That the cause of action is arising within the territorial jurisdiction of this Hon’ble Court in as much as the Defendant is offering its goods / services through various third party e-commerce website/portals/apps viz. Zomato, Swiggy, etc. which is well within the territorial jurisdiction of this Hon’ble Court. The Defendant is listed at Zomato as under:...”

9. It is material to note that the appellant has specifically pleaded that it has learnt that the respondent is “*further planning, marketing and networking to operate a physical restaurant / franchisee in North West Delhi and has been actively networking in the areas falling within North West Rohini and North Rohini*” (that is, within the territorial jurisdiction of



the learned Commercial Court).

10. The learned counsel appearing for the respondent submitted that the averments are mischievous and *mala fide*. He submitted that the appellant is claiming to be successor-in-interest of “Sh. Akhtar Hussain” which is not correct. He submits that his father’s name was “Hakeemuddin” and he was running a tea stall in the name of “Hakeem Tea Stall” since 1971 in Bhopal, Madhya Pradesh. The same tea stall was thereafter named “HAKEEM FOODS”. He submits that appellant’s entire case that his predecessor-in-interest Sh. Akhtar Hussain had started a small tea shop by the name of “HAKEEM FOODS” is incorrect.

11. It is also the respondent’s case that the trademarks referred to by the appellant are not registered in its favour. The said trademarks are under objections and the registrations have not been granted.

12. Mr. Bansal, learned counsel appearing for the appellant strongly disputes the same. He states that the trademarks referred to in paragraph 16 of the plaint and as set out above are trademarks registered in favour of the appellant. He submits that rectification applications have been filed, which are pending but as on date, the trademarks claimed by the appellant are registered in the appellant’s favour.

13. As stated above, the defence proposed to be raised by the respondent cannot be looked into at the threshold stage for returning the plaint on account of lack of territorial jurisdiction. The question whether a plaint is required to be returned under Order VII Rule 10 of the CPC is required to be examined solely on the basis of the averments made in the plaint and the documents filed by the plaintiff.



14. In *M/s. Allied Blenders & Distillers Pvt. Ltd. v. Prag Distillery Pvt. Ltd. & Anr.*: 2017 SCC OnLine Del 7225, a Coordinate Bench of this Court considered an appeal against an order returning the plaint. The plaintiff had averred that the respondent had already launched its product in the state of Andhra Pradesh. Thus, the cause of action in that regard had already arisen. The plaint spanned over twenty-seven paragraphs. There were no averments in the main pleadings, which would indicate that any cause of action had arisen in the territorial jurisdiction of this Court. However, in the paragraph setting out the cause of action, the plaintiff had expressed an apprehension that the defendant would launch the product in Delhi. In the given facts the Court observed as under:

“11. We are of the view that the learned single Judge fell in error when he took the view that although the appellant/plaintiff had averred that it had an apprehension that the defendants would sell their product in Delhi, the said apprehension was not substantiated by any material which would indicate a reasonable ground for the plaintiff to apprehend the same. We may point out that substantiation of an averment in a plaint by other material would come later. At the stage of filing of the plaint, it is only the averment that has to be made with regard to a material fact. Substantiation is a part of evidence.

12. Another error, which, in our view, was committed by the learned single Judge, was in considering the case as if it was either with regard to the use of the mark by the defendants in Andhra Pradesh or it was a *quia timet* action vis-à-vis Delhi. Upon reading the plaint, one gets the impression that the suit was filed for the composite injuries which the defendants had allegedly inflicted and threatened to inflict on the plaintiff. The first part was linked with the sales in Andhra Pradesh and the second part was linked with the threat of sales in Delhi. We, therefore, feel that while the learned single Judge was correct in observing that the plaint must be read as a whole, we cannot, at the same time, disregard the averments made in paragraph 27 of the plaint with respect to part of cause of action being the result of a threat of sales in Delhi. Once it is recognized that such a threat can constitute a cause of



action by itself, it can also constitute part of a larger cause of action, as in the case at hand.

13. In these circumstances, we are of the view that considering the plaint on a demurrer, it will have to be accepted, for the purposes of considering an application under Order VII Rule 10 of the Code that the averment of the plaintiff of the imminent and credible threat or apprehension that the defendants would launch the product in Delhi, is correct. If this be the case, then, surely a part of the cause of action has allegedly arisen in Delhi. But, this is only for the purposes of considering whether a plaint should be returned or not.”

15. In our view, the said decision squarely covers the controversy involved in the present case. The appellant’s action is also a *quia timet* action inasmuch as the appellant seeks to prevent the respondent from infringing its trade marks within the territorial jurisdiction of the learned Commercial Court.

16. The averments made in paragraph 35 of the plaint clearly express the appellant’s apprehension that the respondent would open a restaurant on a franchise basis within the territorial jurisdiction of the learned Commercial Court.

17. In view of the above, the impugned order is liable to be set aside.

18. Before concluding, it is also relevant to mention that for the purpose of Order VII Rule 10 of the CPC, only the averments made in the plaint are required to be examined. The consideration application for interim relief under Order XXXIX Rules 1 and 2 of the CPC or an application under Order XIII A of the CPC is not confined to the averments made in the plaint alone.

19. In view of the above, the appeal is allowed. Pending applications



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stand disposed of. The impugned order is set aside. It is clarified that all rights and contentions of the parties are reserved. The suit is restored before the learned Commercial Court.

20. The appellant shall appear before the learned Commercial Court on 06.05.2024 for further proceedings.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

APRIL 15, 2024

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Click here to check corrigendum, if any