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

Reserved on: 17.03.2021
Pronounced on: 30.04.2021

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+ CS(COMM) 327/2020

MACHINENFABRIK RIETER AG & ANR. Plaintiffs
Through Ms.Shwetasree Majumder and
Ms.Vasundhara Majithia, Advs.

Versus

**TEX TECH INDUSTRIES (INDIA)
PRIVATE LIMITED & ANR.** Defendants
Through Mr.Saikrishna Rajgopala,
Mr.Aniruddh Bhatia, Mr.Avijit Kumar, Mr.Kapil
Sankhla, Ms.Meghna Sankhla, Mr.Rishabh
Goswami and Mr.Wishwa Pratap, Advs. for D-1 &
D-2.

**CORAM:
HON'BLE MR. JUSTICE JAYANT NATH**

JAYANT NATH, J.

I.A. 9741/2020

1. This suit is filed by the plaintiff seeking a decree of permanent injunction restraining the defendants from using the registered trade mark RIETER or any similar mark amounting to infringement. Similar relief of injunction is also sought regarding infringement of the plaintiff's registered Patent No. IN 324406. Other reliefs are also sought.

2. This is an application filed by defendant No.1 under Order 7 Rule 10 CPC praying to return the plaint to be filed in the court of appropriate

territorial jurisdiction. It is pleaded in the application that the present suit has been filed by the plaintiffs for alleged infringement of trademark, patent infringement, passing off, rendition of accounts etc. Defendant No. 1, it is stated, is a private limited company having its registered office in Coimbatore, Tamil Nadu. Defendant No. 2 is a resident of Chandigarh. The plaintiffs have their registered office in Maharashtra. It is stated that the plaintiffs in an attempt to unduly harass the defendants have filed the present case before this court having no territorial jurisdiction over the present dispute. It is stated that under Section 20 CPC read with Section 134 of the Trade Marks Act, the plaintiffs can institute a case at a place where either of the parties are having their principal place of business i.e. head office or a branch office. In the present case, neither of the parties have their head office or branch office or even principal place of business within the territorial jurisdiction of this court. None of the parties are residents of Delhi or have offices or place of business within the territorial jurisdiction of Delhi.

3. It is stated that even if the averments made in the plaint are taken on their face value, the case set up by the plaintiffs is that their investigator visited the premises of defendant No. 1 at Coimbatore and placed an order for the impugned articles via email. Hence, the plaintiffs have orchestrated a one-time trap purchase to harass and prejudice the defendants and have filed the present case before this court which lacks territorial jurisdiction. The plaintiffs sought to get the impugned articles delivered at the residence of their constituted attorney-Mr.Vishal Vig which cannot be deemed to be an accrual of a cause of action within the territorial limits of this court. Hence, the present application.

4. I have heard learned counsel for the parties.
5. Learned counsel for the defendants relies upon the judgment of the Division Bench of this court in the case of *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr., 2009 SCC OnLine Del. 3780* and judgment of a Coordinate Bench of this court in the case of *Indovax Pvt. Ltd. vs. Merck Animal Health and Ors., 2017 SCC OnLine Del. 9393* to plead that a solitary trap transaction as done in the present case does not confer territorial jurisdiction on this court.
6. Learned counsel for the plaintiffs, however, strongly urges that as per the averments made in the plaint and the documents filed by the plaintiffs, defendant No. 2 is an agent of defendant No. 1 for the northern territories of the country including Delhi. Goods in question were purchased in Delhi. Further, the goods were delivered in Delhi by the said defendant No. 2 acting as an agent of defendant No. 1. It is stated that Section 20 CPC is clearly applicable to the facts of the present case. It is urged that the judgment of the Division Bench of this court in the case of *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr.(supra)* pertains to a case of online transactions. It is stated that the present transaction is an off-line transaction and the aforesaid judgment does not apply to the facts of this case.
7. Order 7 Rule 10 CPC reads as follows:-

“10. Return of plaint.— (1) Subject to the provisions of Rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Explanation.— For the removal of doubts, it is hereby declared that a court of appeal or revision may direct, after

setting aside the decree passed in a suit, the return of the plaint under this sub-rule.

(2) Procedure on returning plaint.— On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.”

8. The settled legal position is that while considering an application under Order 7 Rule 10 CPC, only averments made in the plaint and the documents filed along with the plaint need to be seen. In this context reference may be made to the judgment of the Division Bench of this court in the case of *M/s. RSPL Ltd. vs. Mukesh Sharma & Anr.*, (2016) 232 DLT 161 where the court held as follows:-

“11. It must be stated that it is a settled proposition of law that the objection to territorial jurisdiction in an application under Order 7 Rule 10 CPC is by way of a demurrer. This means that the objection to territorial jurisdiction has to be construed after taking all the averments in the plaint to be correct. In *Exphar SA v. Eupharma Laboratories Limited* : (2004) 3 SCC 688, the Supreme Court observed that 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 procedure, are true. The Supreme Court further observed that the objection as to jurisdiction in order to succeed must demonstrate that granted those facts, the Court does not have jurisdiction as a matter of law. It is also a settled proposition of law that while considering a plaint from the standpoint of Order 7 Rule 10 CPC, it is only the plaint and the documents filed along with it, that need to be seen. The written statement is not to be looked into at all.”

9. Reference may also be had to a judgment of a Coordinate Bench of this court in the case of *Boston Scientific International B.V. vs. Metro*

Hospital, (2007)136 DLT 278 where the court held as follows:-

“6. Having obtained unconditional leave to defend the suit, the defendant has filed the present application under Order 7 Rule 10 for return of the plaint on the ground of lack of territorial jurisdiction. Now, on the one hand we have an order of this Court granting unconditional leave to defend on the ground that a ‘triable issue’ arises qua the plea of territorial jurisdiction and, on the other, we have the present application wherein the defendant seeks return of plaint without the issue being tried. This, to me, seems a somewhat incongruous situation. A ‘triable issue’ means that the same requires to be decided after leading of evidence. Whereas, the parameters of disposing of an application under Order 7 Rule 10, CPC, at the initial stage without going into evidence, requires the Court to only look at the averments contained in the plaint.”

10. Hence, this court has only to look at the averments made in the plaint and the accompanying documents to adjudicate the present application filed under Order 7 Rule 10 CPC. A perusal of the plaint shows that it is averred that the plaintiffs instructed their investigator to ascertain the scope and extent of defendant No.1’s activities. Pursuant to initial investigation, the plaintiffs’ investigator placed an order with defendant No. 1 via an email dated 26.12.2019. A performa invoice was issued on 27.12.2019. Thereafter, an email was received from a representative of defendant No. 2 who informed the investigator that defendant No. 2 is a supplier of spare parts manufactured by defendant No. 1. The plaintiffs made the payment and samples were despatched by defendant No. 1 on 29.01.2020 and the same were received by the plaintiff’s investigator on 31.01.2020 in Delhi. Two such separate orders were also received by the plaintiffs’ investigator. It is also stated that the Business Development Manager of defendant No. 1 informed the investigator that one Mr.Arora of defendant No.2 was their

selling agent in North India. It is stated that the products so received from defendant No. 1 infringe the plaintiffs' patent. The plaintiffs have also filed documents including invoices showing delivery of goods in Delhi.

11. The question would come: Whether these facts, at this stage, warrant rejection of the plaint on the ground of lack of territorial jurisdiction of this court? Reference in this context may be had to the judgment relied upon by the learned counsel for the defendants in the case of *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr.*(*supra*). That was a case in which the plaintiff stated that the defendants have advertised their products on their website. According to the plaintiff therein, the defendants solicit their business through use of the impugned mark "BANYAN TREE RETREAT" and the "Banyan" device mark in Delhi. It was alleged in that case that the defendants had presence in Delhi through their website which was accessible in Delhi. It was further stated that the website was not a passive website. It not only provided contact information but also sought feedback and inputs from its customers through an interactive web-page. Further the plaintiff stated that the services of the defendants were being offered to the customers in Delhi because of the ubiquity, universality and utility of the features of the internet and the World Wide Web and hence, the cause of action had arisen within the jurisdiction of this court. Hence, in the referral order, the learned Single Judge referred the following questions to the Division Bench:-

"1. Whether this court can entertain the present suit, having regard to the averments and documents, in the context of special provisions in to the Trademark and Copyrights Act, which do not provide for exercise of jurisdiction based on internet or web-presence of such alleged infringers, even while making explicit

departure from the general law as to territorial jurisdiction;

2. Whether the court can entertain the present suit, in the absence of a long arm statute, having regard to the existing state of law, particularly Section 20, CPC, and the impact, if, any of the Information Technology Act, 2009 on it;

3. Applicable standards for entertaining a suit, based on use of a trademark by a Defendant, on its website, or infringement or passing off of the plaintiff's trademark, in such website and the relevant criteria to entertain such suits;

4. Applicable standards and criteria where the plaintiff relies exclusively on "trap orders" or transactions, in relation to passing off, or trademark infringement cases, as constituting "use" or cause of action, as the case may be."

12. The Division Bench held as follows:-

"38. Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. At the outset, this court does not subscribe to the view that the mere accessibility of the Defendants' website in Delhi would enable this Court to exercise jurisdiction. A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction. This court is therefore unable to agree with the proposition laid down in *Casio*. The said decision cannot be held to be good law and to that extent is overruled.

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Question (iii) Is it permissible for the Plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?

46. It may be recalled that the Plaintiff has to show that a part of the cause of action in a suit for passing off or infringement has arisen within the jurisdiction of the forum court. Relevant to this, it would have to be shown by the Plaintiff that the Defendant “availed” of the jurisdiction of the forum court by commercially transacting with a viewer located in the forum state through the internet. The question is whether this transaction can be a trap transaction that is engineered by the Plaintiff itself, particularly when it is not otherwise shown that the Defendant intended to specifically target customers in the forum state.

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57. Reverting to the present case, the position that emerges from the above judicial decisions is that while in trade mark and infringement cases, trap orders or trap transactions may be used as evidence, the fairness of such transactions is a relevant factor to be considered. Other relevant factors would be the nature of goods or services offered for purchase on the internet. If they require the customer to further physically verify their quality then the mere purchase of such goods through a trap transaction may not be treated as being sufficient evidence of infringement. The facts of each case will determine whether the trap transaction is a fair one and has resulted in a purchase on the internet of goods or services. A lone trap transaction will not be sufficient evidence of infringement or passing off. For the purposes of establishing that a part of the cause of action arose within the jurisdiction of the court, the Plaintiff would have to show that the Defendant has purposefully availed of the jurisdiction of the forum court by entering into a commercial transaction with an internet user located within the jurisdiction of the forum court. This cannot possibly be a solitary trap transaction since that would not be an instance of “purposeful” availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the Plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown to be obtained using fair means. The Plaintiff seeking to establish jurisdiction on the basis of such trap

transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test. Question (iii) is answered accordingly.

Summary

58. We summarise our findings on the questions referred for our opinion as under:

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Question (iii): Is it permissible for the Plaintiff to establish such prima facie case through “trap orders” or “trap transactions”?

Answer: The commercial transaction entered into by the Defendant with an internet user located within the jurisdiction of the forum court cannot possibly be a solitary trap transaction since that would not be an instance of “purposeful” availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the Plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The Plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test.”

13. In my opinion the above judgment of the Division Bench does not have application to the facts of this case. That was a case in which territorial jurisdiction was claimed by the plaintiff based on the defendants alleged presence in Delhi through their website which was accessible in Delhi. It was contended that the website is not a passive website since inputs from customers through interactive web-page were being taken. The court was

dealing with the issue of territorial jurisdiction of this court on account of the defendants hosting a website which was accessible in Delhi. It was in those facts that the Division Bench had come to the aforementioned conclusions. The present case is a case of offline transaction.

14. Reference may also be had to the judgment of the Coordinate Bench of this court in the case of *Indovax Pvt. Ltd. vs. Merck Animal Health and Ors.,(supra)* where the court held as follows:-

“23.The averment shows that the jurisdiction of the Court is claimed on the ground that the medicine of the defendants is available for purchase in Delhi. In case of Glen Raven Mills (supra) relied upon by the plaintiff, this Court, in para 10, held that the cause of action in case of passing off has arisen only when it is proved that the defendant is selling its goods under the impugned trademark within its jurisdiction. The relevant paragraphs are reproduced hereunder:—

“10.In a suit for passing off or injunction Or account of infringement of trade mark, the cause of action partly or wholly can arise in a given jurisdiction only if it is the defendant who is proved to have directly made sale of goods under the impugned trade mark, within that jurisdiction, not loan individual customer but to a distributor, wholesaler or retailer and that such a sale is on a commercial scale. In the instance case there was no evidence to show any transaction of sale of goods under the impugned trade mark, made by the defendant at the place where the suit for passing off and in-junction was instituted and so the court at that place had no jurisdiction to entertain the suit.

11. In order that the Court at a particular place should have jurisdiction to try a passing off action, it is necessary to show that the defendants were responsible for sending out to that district, goods which were liable to

deceive intending purchasers into believing that they were goods manufactured by the plaintiffs. It would, of course, not be sufficient if such goods were supplied by the defendants to individual purchaser for use, as in such a case, the probability of any members of the public being deceived would be slight. It is necessary to show that the supply has been on a commercial scale to persons who are likely to offer the goods in question for sale.

(emphasis supplied)

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25. So even if the plaintiff relies on a trap transaction it is required to show that the defendants are indulging into commercial sale of its product. The question what constitute a commercial transaction or sale is dealt with by Madras High Court in *Smithkline French Laboratories Limited v. Indoco Remedies Ltd.*, 2001 (21) PTC 672 (Mad), wherein it held:—

“6. Per contra, learned counsel for the respondent stated that only if the goods have been sold through a stockist or distributor or dealer of the respondent, then alone it can be construed as a commercial sale on the part of the respondent, so as to give jurisdiction to the court. Nowhere in the plaint it is stated that such a commercial sale is carried on in the City of Madras by the respondent. Perusal of the cause of action paragraph also indicates that no such averment is there to show that the respondent had authorised the stockist or distributor or dealer in the City of Chennai. Hence, it is stated that the sale of the product by any other unauthorised person would not confer any jurisdiction in this court. I am of the view that there is some force in the contention raised by the learned counsel for the respondent.”

(emphasis supplied)

26. In *Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Ltd. v. Mohan Meakin Breweries Limited*, 1981 (1) PTC 74 (P&H), the Court while dealing with

the question of jurisdiction in cases of passing off has held as under:—

“9. In a case of present nature, the cause of action partly or wholly can arise in a given jurisdiction only if it is the defendant who is proved to have directly made sale of the goods under the impugned trade mark (within the jurisdiction of a given Court) not to an individual consumer but to a distributor or a wholesaler or a retailer and that such a sale should be at a commercial scale. If this much is not insisted upon, then the defendant can be dragged into litigation in any part of the country by only adducing flimsy kind of evidence that has been adduced in the present case by a company which has its head office of Solan in Himachal Pradesh where the defendant too have their head office and where it was convenient to the plaintiff to prosecute the suit and to the defendant to defend the suit. A big firm like Mohan Meakin Breweries Limited has its ramification all over the country and it is easy for it to have dragged this public corporation into litigation even at a far off place like Kanya Kumari if the only evidence necessary to give jurisdiction to that Court was of purchasing of a few bottles by any agent of Mohan Meakin Limited from someone locally there.

(emphasis supplied)”

15. Hence, the court was of the view that cause of action partly arises in a given jurisdiction only if it is proved that the defendant has directly made sale of goods under the impugned trademark not to an individual consumer but to a distributor or to a wholesaler or to a retailer and such sale should be at a commercial scale. In the case of a trap transaction, the plaintiff is required to show that the defendant is indulging in commercial sales to persons.

16. The facts of the present case are different. In this case, the order was

placed on the defendants in Coimbatore from Delhi. The goods were delivered in Delhi. As is evident from the documents filed with the plaint, the defendant sent a quotation on 23.03.2020 to Delhi; it delivered the goods in Delhi as seen by the invoice/delivery note dated 05.08.2020.

17. The Supreme court in the case of *A.B.C. Laminart Pvt. Ltd. & Anr. Vs. A.p. Agencies, Salem, (1989) 2 SCC 163* on Section 20 CPC held as follows:-

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

13. Under Section 20(c) of the Code of Civil Procedure subject to the limitation stated theretofore, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part arises. It may be remembered that earlier Section 7 of Act 7 of 1888 added Explanation III as under:

Explanation III.—In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely:

- (1) the place where the contract was made;
- (2) the place where the contract was to be performed or

performance thereof completed;

(3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”

18. In the present case, the goods were delivered in Delhi. As per the plaint, the contract was completed in Delhi as the defendant supplied the goods in Delhi and also raised an invoice/delivery note at Delhi. Further, the transactions relied upon by the plaintiffs as elaborated in the plaint and the accompanying documents do show that sale of goods are taking place in Delhi As to whether these transactions are bona fide transactions or not etc., are issues that can be decided only after parties lead their evidence.

19. At this stage, only the plaint and accompanying documents are to be seen. It is not possible to reach at a conclusion that no cause of action has arisen within the territorial jurisdiction of this court on a mere reading of the plaint and the accompanying documents. As noted it is only after the parties have led their evidence that any final conclusion can be made.

20. There is clearly no merit in the present application and the same is dismissed.

JAYANT NATH, J.

APRIL 30, 2021/rb