
Govardhan Motels and Restaurants Vs I. Subramanyam and Another

IA No. 4650 of 2007 in CS (OS) No. 496 of 2007

Court: Delhi High Court

Date of Decision: July 23, 2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Section 15, 20, 21#Copyright Act, 1957 â€” Section 62(2)#Trade Marks Act, 1999 â€” Section 134

Citation: (2008) 36 PTC 513

Hon'ble Judges: Vipin Sanghi, J

Bench: Single Bench

Advocate: S.K. Bansal and Pankaj Kumar, for the Appellant; Jayant Bhushan and Rama Arora, for the Respondent

Final Decision: Dismissed


Judgement

Vipin Sanghi, J.



By this order, I propose to dispose of the aforesaid application filed by the defendant no. 2 under Sections 20 and 21 of


the CPC and Section 134 of the Trade Marks Act, challenging the territorial jurisdiction of this court to entertain the present suit against the


defendants.

2. The plaintiff has filed the present suit alleging infringement of trade mark and copyright by the defendants in its mark  which is

used by the plaintiff in relation to its business of running vegetarian restaurants. It is stated that since 1999 the plaintiff has adopted and is using the

trade mark  by itself along with the stylised letter "G". It is claimed that the word/mark  per se and stylised

form in which the letter "G" is adopted, separately as well as collectively are the essential and distinguishing feature of the mark .

The plaintiff also claims copyright in the manner of depiction on the said mark . This mark is used by the plaintiff on its displays,

invoices, stationery, napkins, cutlery, crockery both disposable and otherwise, food packaging, wrappers, sign boards, publicity material, dresses

of its work men, staff and waiters, etc. The plaintiff's application for registration of trade mark are pending under application no. 973139 in class

30 dated 27th November, 2000 in relation to foods for human consumption and under application no. 01532478 in class 42 dated 20th February,

2007 in relation to services for providing of food and drink, restaurant, fast food and catering services with the user claimed by the plaintiff as of

12.12.1999. The plaintiff has expanded its business which started in Adhchini to Kashmiri Gate in North Delhi. The plaintiff given its sales figures

for the past few years as being over Rs. 60 lacs per annum.

3. Defendant no. 1 is an ex employee of the plaintiff. It is alleged that the defendant nos. 1 & 2 have now started a similar trade and business and

they have opened a restaurant with the name "Govardhan". The defendants, it is claimed, were well aware of the use of the mark

"Govardhan" by the plaintiff, particularly since the defendant is an ex-employee, and it is claimed that the defendants have adopted the said

mark only with a view to encash on the plaintiff's reputation and the goodwill.

4. The suit came up before the Court on 16th March, 2007 when summons in the suit were issued and the Court passed an ad interim ex parte

order of injunction against the defendants restraining them from using the trade name/trade mark "Govardhan" in relation to their business of

running vegetarian restaurant.

5. The defendants, it appears, were served sometime before the middle of April, 2007 and have filed the present application on 17th April, 2007

to state that this Court has no territorial jurisdiction to entertain the present suit. However, despite the passage of more than 30 days from the date

of service of the summons, they have failed to file their written statement.

6. The defendants contend that the defendant no. 2 is admittedly situated in Gurgaon which is in the State of Haryana and is outside the territorial

jurisdiction of this Court. Defendant no. 2 is stated to be owned and controlled by one Mr. Jitender Dhir, Sole proprietor of defendant no. 2. Mr.

Jitender Dhir is also residing in Gurgaon. Consequently, defendant no. 2 is neither residing nor working for gain or carrying on business within the

territorial jurisdiction of this Court. Defendant no. 1 is stated to be only an employee of defendant no. 2 and it is stated that the plaintiffs have imp

led defendant no. 1 malafide only to mislead this Court. It is claimed that the address of defendant no. 1 as stated in the plaint is also incorrect.

Defendant no. 1, it is alleged, to the knowledge of the plaintiff, had left the premises mentioned in the plaint and is residing in Gurgaon. It is also

contended that in any event, the plaintiff had not sought the leave of the Court to sue defendant No. 2, in terms of Section 20(b) of the CPC. It is

stated that the plaintiff in order to create jurisdiction of this Court has resorted to Section 62(2) of the Copyright Act which, in fact, is not attracted

in the instant case.

7. According to the defendants, a perusal of Para 32 of the plaint itself shows that by no stretch of imagination, any part of the cause of action

could be said to have arisen in favor of the plaintiff and against the defendants within the territorial jurisdiction of this Court. In support of his

arguments, learned Counsel for the defendant no. 2 placed reliance on the decision of the Hon^{ble} supreme Court in Dhodha House Vs. S.K.

Maingi, .

8. On the other hand, counsel for the plaintiff submits that apart from the fact that the plaintiff has invoked Section 62(2) of the Copyright Act since

there is infringement of the copyright of the plaintiff in the artistic and stylised manner of depiction of its aforesaid mark, this Court, even otherwise

has the territorial jurisdiction to try the suit since a part of the cause of action has arisen within the jurisdiction of this Court, and accordingly the

present suit is covered by Clause (c) of Section 20 CPC. The plaintiff refers to the averments made in Para 34 of the plaint in this regard and

submits that the issue of territorial jurisdiction in the present case is an issue which can be decided only by leading evidence. He submits that for

purposes of deciding the present application, the averments made in the plaint would have to be accepted as true and correct. The defendants have

not filed any written statements till date despite the expiry of the statutory period of 30 days, and, Therefore, the averments made in the plaint are

deemed to be admitted by the defendant at least, for the purposes of deciding this application.

9. Counsel for the plaintiff also placed reliance on Dhodha House (supra) and two other decisions of this Court in Intas Pharmaceuticals Limited

Vs. Allergan Inc., . and s.Oliver Bernd Freier GmbH and Co. KG. Vs. Karni Enterprises and Another,

10. Having considered that the averments in the plaint, the rival contentions of the parties, and having examined the case law relied upon by them, I

am of the view that the issue of territorial jurisdiction cannot be decided by me in this case finally and in a summary way and the same can only be

determined after a full fledged trial.

11. The plaintiff is right in contending that if it is to be determined whether this Court has no territorial jurisdiction at this stage, the Court must only

look at the averments in the plaint and decide the issue on that basis.

12. First and foremost, I find that defendant no. 1 is stated to be residing in Delhi. The allegations and counter allegations with regard to his place

of residence at the time of filing of this suit can only be determined at the trial. There is no material placed on record by the defendants to support

their claim that defendant No. 1 was, at the time of filing of the suit, not residing in Delhi.

13. The expression "cause of action" has received judicial interpretation from time to time. In Read v. Brown (1889) 22 QBD 128 : 58 LJ QB

120 Lord Esher M.R. accepted the earlier definition given in Cook v. Gill (1873) LR. 8 CP 107 : 42 LJ CP 98 as -

every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not

comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

14. Fry L.J. agreed and said, "Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of

action."

The Privy Council in AIR 1949 78 (Privy Council) , apart from noticing the aforesaid decision also notices its earlier judgment in Mt. Chand Kour

v. Partab Singh (1887) 15 I.A. 156 : 16 Cal.98. wherein Lord Watson who delivered the judgment of the Board observed as follows:

Now the cause of action has no relation whatever to the defense which may be set up by the defendant, nor does it depend upon the character of

the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or, in other words, to the matter upon

which the plaintiff, asks the Court to arrive at a conclusion in his favor.

15. Paragraph 34 of the plaint contains the plaintiff's averments with regard to the territorial jurisdiction of this court and the material part thereof

reads as follows:

This Hon'ble Court has the territorial jurisdiction to try and adjudicate the present suit. The defendant no. 1 resides in Delhi at 140-G, 1st Floor,

Gautam Nagar, New Delhi and works for gain at Delhi.... Both defendants no. 1 & 2 individually or in unison are soliciting customers, clients and

trade of the plaintiff in Delhi. The defendants are carrying on, promoting and soliciting trade under the impugned GOVERDHAN trade mark/trade

name in Delhi inter-alia by circulating trade & promotional material, packed foods etc. and through the word of mouth in Delhi there under. The

defendants are catering to customers/clients based and residing in Delhi. Numerous residents of Delhi are availing of the impugned goods &

business of the defendants.... The plaintiff's said goods & business under its said trade mark/trade name and the goodwill and reputation thereof is

being adversely effected in Delhi due to the defendants impugned activities. The defendants impugned acts of passing off and violation and

infringement of copyright are taking place in Delhi. The cause of action in whole and/or in part has arisen within the jurisdiction of this Hon'ble

Court...in Delhi from its aforesaid two restaurants, which are its nerve center and from where the plaintiff has been controlling and carrying on each

and every aspect of its said goods & business under its said trade mark/trade name, respectively in Adchini and Kashmiri Gate in Delhi. This

Hon'ble Court, in addition, also has the jurisdiction to try and adjudicate the present suit by virtue of Section 62(2) of the copyright Act.

16. From the aforesaid it is evident that it is, inter-alia, claimed by the plaintiff that the defendants are soliciting customers, clients and trade of the

plaintiff in Delhi. It is claimed that they are promoting and soliciting business under the impugned trademark/trade name in Delhi by circulating trade

and promotional material, packed food and by word of mouth in Delhi. It is claimed that the defendants are catering to customer residing in Delhi.

The plaintiff also claims adverse effects on, inter-alia, its reputation in Delhi. The aforesaid actions, to my mind, constitute a part of the cause of

action which the plaintiff claims have arisen in its favor.

17. Even if one were to ignore the other averments made by the plaintiff, which, according to him, constitute a part of the cause of action, at least

the averments culled out in the previous paragraph would in my view, constitute a part of the cause of action since the plaintiff would have to prove

the aforesaid conduct and actions of the defendants to support its claim for injunction and damages on the ground that it causes prejudice to the

business of the plaintiff. The averment of the plaintiff that the defendants are soliciting the prospective customers of the plaintiff also finds support

from the report of the Local Commissioner appointed by this court which shows that the defendant is distributing its food packets by providing

home delivery to its customers. The argument of the defendants that the free home delivery service is restricted within a radius of 5 Kms, cannot be

taken to mean that it does not deliver its food packets beyond the limit of 5 Kms free or otherwise for a charge. Moreover, these averments would

have to be tested at the trial of the suit. As aforesaid, the averments made in the plaint have to be assumed to correct, if the issue of jurisdiction is

to be decided by this court at this preliminary stage.

18. A Division Bench of this court in *Intas Pharmaceuticals Ltd.* (supra), considered, inter-alia, the decision of the Hon'ble Supreme Court in

Dhodha House (Supra). The Division Bench in this decision rejected the contention that Section 134 of the Trademarks Act overrides the

provision of Section 15 of the CPC and that it impliedly repeals Section 20 of the CPC. The court further held that Section 134 of the Trademarks

Act, 1999 does not whittle down the provision of Section 20 of the CPC, but it only provides an additional forum and place for filing the suit in the

case of infringement of a registered trademark. In paragraph 16, the court recorded that the Respondent/ plaintiff was founding its arguments in

support of the territorial jurisdiction of the court on Section 20 of the CPC and not on Section 134 of the Trademarks Act, 1999. Paragraph 17 to

19 of the said decision are relevant to this case and are reproduced herein:

17. When the aforesaid provision is examined in the light of the facts of the present case, it is crystal clear that in fact, the provisions of Section

20(a) and 20(b) will not be applicable to the facts of the present case. Therefore, the only provisions which could be attracted in the present case

are the provisions of Section 20(c) of the CPC. The said provision enable a plaintiff to file a suit in all such places where the cause of action arises

either wholly or in part. In the present case, the specific plea of the respondent/plaintiff herein is that this court has the territorial jurisdiction to try

and entertain the suit as the defendant is selling the offending products in Delhi, which statement is also admitted by the appellant/defendant in its

written statement. In view of the aforesaid position, the learned Single Judge rightly held that this court will have the territorial jurisdiction to try and

entertain the present suit.

18. We find no reason to take a different view particularly also in the light of the decision of the Supreme Court in Dhodha House (Supra). In the

said decision, the Supreme Court has categorically stated that for the purpose of deciding the case in Dhodha House (Supra), the question as to

whether the defendant had been selling its products in Delhi or not was wholly irrelevant. One of the grounds on which the Division Bench of this

court in P.M. Diesels Ltd. v. Patel Field Marshal Industries (supra) held that the Delhi Court has territorial jurisdiction as the defendant was selling

the goods under the impugned trademark at Delhi and thus the plaintiff's right thereof had been violated at Delhi. In the said decision, the Division

Bench of this Court, however, did not advert to the said contention raised therein saying that the question as to whether the defendant has been

selling its products on a commercial scale at Delhi was a question of fact and was required to be properly determined in the case only after

evidence was led by the parties. It is in that context that the Supreme Court has held that the question as to whether the defendant had been selling

its products in Delhi is wholly irrelevant.

19. In this view of the matter, the ratio of the decision of the Supreme Court in Dhodha House (supra) is not at all applicable to the facts and

circumstances of the present case, to the aforesaid extent, as it had no occasion to deal with the issue regarding selling of the goods by the

defendant in Delhi due to part of the cause of action had arisen within the territorial jurisdiction of this court. Two decisions rendered by the Single

Judges of this court and the present impugned order passed by another learned Single Judge have held that since the offending goods are being

sold by the appellant-defendant at a particular place, it shall definitely give jurisdiction to the court of such a place, which is also what was held in

Jawahar Engineering Company (supra). It is necessary to mention at this stage that in view of the decision rendered in Dhodha House (supra), the

Supreme Court held that the decision in Jawahar Engineering Company (supra) will not be applicable to the facts of the case before it. Since the

application for registration of trademark in the cases before it had not been made within the territory of Delhi, the Supreme Court in the case of

Dhodha House (supra) found and held that the decision in the case of Jawahar Engineering Company (supra) would be inapplicable to the facts of

the said case before it. In the said case, the Division Bench of this court also held that such Court will have jurisdiction where the trade mark is

sought to be sold and if such trade mark is being sought for sale in Delhi amongst other places, Delhi shall also have jurisdiction to entertain such a

suit.

19. In view of the aforesaid I do not consider it necessary to separately deal with the decision of the Hon"ble Supreme Court in Dhodha House

(Supra) since it has been exhaustively considered and dealt with by the Hon"ble Division Bench of this court. On the same line is the decision of

this court in Karni Enterprises and Anr. (Supra).

20. Since the issue, is being decided at this stage, without even a written statement being filed by the defendants, the averments made in the plaint

are assumed to be correct and Therefore, the aforesaid decisions squarely apply to the facts of this case. Accordingly, the present application is

dismissed.

21. The defendants are granted 30 days time to file their written statement/reply. In case the same is filed, the plaintiff may file its replication/rejoinder within two weeks thereafter. The parties should also file their respective original documents within four weeks.

22. List the matter before Joint Registrar for admission and denial of the documents on 31.08.2007 and before this court for framing of issues and

hearing on pending applications on 13.09.2007.