

(2009) 08 DEL CK 0354

Delhi High Court

Case No: CS (OS) 1806 of 2008 and IAs 10448 and 15833/08 and 2296/09

Khosla Machines Pvt. Ltd.

APPELLANT

Vs

Mr. Deepak Verma T/A B.M.
Packaging

RESPONDENT

Date of Decision: Aug. 4, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2(2), Order 7 Rule 10, 20
- Evidence Act, 1872 - Section 115

Citation: (2009) 163 DLT 788 : (2009) ILR Delhi 677 Supp : (2009) 41 PTC 661 : (2010) 7 RCR(Civil) 2855

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: Chander M. Lal, Dushyant Mahant and Kripa Pandit, for the Appellant; R.K. Kapoor and Mansi Dhiman, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S. Muralidhar, J.

IA Nos. 15833/08 & 2296/09

1. These two applications are by the defendants. IA No. 15833 of 2008 filed by the defendant under Order XIV Rule 2(2) CPC seeks a direction that the preliminary issue concerning the territorial jurisdiction of this Court should be decided first. The ground urged in the application in IA No. 2296 of 2009 under Order VII Rule 10 CPC is also similar. The prayer here is that the plaint should be directed to be returned for presentation in the proper court.

2. The facts leading to the filing of these applications are that the aforementioned suit was filed by the plaintiff alleging infringement of the plaintiffs copyrights in industrial drawings including but not restricted to eight different brands of Auto

Banding Machines. According to the plaintiff the defendant joined it in the year 1992 as an employee and was made part of the research and development team. During his employment the defendant acquired complete knowledge regarding development, designing, functioning and selling of the machines. It is claimed that the defendant also had information of the trade secrets of the plaintiff.

3. According to the plaintiff, the defendant abruptly quit employment in the year 2003. Subsequently the plaintiff learnt that during employment the defendant was clandestinely involved in building machines similar to the machines of the plaintiff. The defendant had timed his leaving in such a manner that by the time he resigned, the machine infringing the design of the plaintiff was ready.

4. The plaintiff claims that the defendant failed to sell his machines and confessed to his guilt before the Managing Director of the plaintiff company. He stated that he merely want to prove his ability by producing the machine and it was never his intention to harm the interests of the plaintiff company. He expressed his desire to continue in the employment of the plaintiff company stating that he was under a huge financial burden because of the development costs of the variant made by him.

5. The plaintiff has in para 16 of the plaint stated that the defendant agreed to sign a "non-disclosure of confidentiality and a non-compete Agreement". This agreement provided that the ownership, title and interest and all other rights vesting in any confidential information disclosed to the defendant which he might have develop in future would singularly vest with the plaintiff company. By means of the said agreement, the defendant agreed not to involve himself directly or indirectly during his employment and for a further period of ten years after his employment, in competition with the plaintiff or in the business substantially similar to that of the plaintiff.

6. It is stated that the defendant was thereafter awarded a position in top management of the plaintiff company which made him privy to all of plaintiffs" industrial designs etc. However, in June 2006 the defendant again resigned from the plaintiff company. It is claimed that the plaintiff recently came to know that the defendant had developed another machine by copying the design scheme of the plaintiff and using reverse engineering of the plaintiffs machines by misusing the confidential information pertaining to the plaintiff. In paras 21 and 22, it is stated as under:

21. The plaintiff was further shocked and taken aback when they learned that the Defendant has been approaching the plaintiffs customers under the name of M/s B.M. Packaging and is offering the infringing machine to them at a much lower price. The Defendants can afford to undercut the plaintiff because he has made no investments whatsoever in the research and development of his offending machine and has therefore no manufacturing costs to recover. The Defendants have simply

copied the drawings of the plaintiff and reverse engineered the plaintiffs machines.

22. The plaintiffs suspicions were further confirmed when they became aware of the fact that Defendant has approached the plaintiffs customer M/s Fena (P) Limited having its registered office at A-237, Okhla Industrial Area, Phase I, New Delhi-110030, India. The Defendant not only approached the said customer but has now also confirmed a purchase order for delivery of its machine. This clearly reiterates the Defendant's dishonest intentions.

7. In para 32 in claiming that this Court has territorial jurisdiction, the plaintiff has averred as under:

32. As mentioned above the Defendant is offering for sale the offending goods in Delhi. The defendant has obtained a purchase order with M/s Fena (P) Ltd. having its registered office at A-237, Okhla Industrial Area, Phase-I, New Delhi. The Defendant further intends to sell and offer for sale its machine in Delhi, within the jurisdiction of this Hon"ble Court. This Hon"ble Court thus has the territorial jurisdiction to try and entertain the present suit.

8. The present suit has been filed for a decree of permanent injunction to restrain the defendant from infringing the plaintiffs copyright and other incidental reliefs.

9. In the written statement filed by the defendant, a preliminary objection has been taken to the maintainability of the suit. It is pointed out that the purchase order placed on record by the plaintiff pertains to the Surajpur Unit in Uttar Pradesh (U.P.) of one Fena Pvt. Ltd. The said purchase order states that delivery and billing is to be effected at Surajpur which does not fall within the jurisdiction of the Delhi court. Fena Pvt. Ltd. is in any event not even a party to the suit. Both defendants are at Mohali and the plaintiff is in Chandigarh.

10. Pointing out to the two documents placed/referred by the plaintiff, namely, the Non Compete Agreement as well as the Agreement to Sell, both contain a Clause which states that dispute, if any, between the plaintiff and defendant will be subject to the exclusive jurisdiction of the courts in Chandigarh. It is accordingly submitted that the present suit ought to have been filed in Chandigarh. Moreover the plaintiff had already filed a suit for recovery against the defendant before the court of the Additional Civil Judge, Senior Division, Mohali on 31st January 2007.

11. Notwithstanding the above contentions, it is also pleaded by the defendant that the agreement to sell dated and Non Compete Agreement both dated 19th November 2003 lack proper attestation and execution not having been signed by any witness. It is alleged that the case of the plaintiff is based on forged and manipulated documents.

12. It is on the basis of the above preliminary objections raised in the written statement that both the present applications have been filed by the defendant.

13. The submissions of Mr. C.M. Lal, the learned Counsel for the plaintiff and Mr. R.K. Kapoor, the learned Counsel for the defendant have been heard.

14. Mr. C.M. Lal, the learned Counsel for the plaintiff submits that the suit is not based exclusively on the two documents, viz., the Non Compete Agreement and the agreement to sell. He submits that while it is not denied that both these documents contain a Clause conferring exclusive jurisdiction on the courts in Chandigarh, a violation of copyright gives rise to an independent cause of action in common law and therefore the present suit is maintainable in Delhi. He refers to the judgment of the Supreme Court in [A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem,](#) and submits that the ouster Clause cannot be used as a means to defeat the ends of justice and that as long as a part of the cause of action arose within the jurisdiction of the Court in Delhi in terms of Section 20(c) of the CPC, the suit would be maintainable. Relying upon the judgments of this Court in L.G. Corporation v. Intermarket Electroplasters (P) Ltd. 2006 (32) PTC 429 (Del.); [Pfizer Products Inc. Vs. Rajesh Chopra and Others,](#) and the Madras High Court in Base International Holdings N.V. Hockenrode 6 v. Pallava Hotels Corporation Ltd. 1999 (19) PTC 252, it is submitted that the purchase order for supply of equipment by the defendant to Fena Pvt. Ltd. having its office in Delhi shows that the jurisdiction of the courts in Delhi was attracted. It is submitted that notwithstanding the fact that the machine was supplied from Mohali and delivered at Surajpur as long as Fena Pvt. Ltd. has its registered office in Delhi, the payment ought to have been made in Delhi and therefore this Court has jurisdiction to try the suit. Reference is also made to the decisions in [Ajanta Enterprisers Vs. Hoechst Pharmaceutical Ltd. and Others,](#) and [The Rajasthan Golden Transport Co. P. Ltd. Vs. The United India Fire and General Insurance Co. Ltd. and Another,](#) .

15. Mr. Lal submitted that the defendant cannot be allowed to approbate or reprobate. While doubting the genuineness of the two documents in the written statement, the defendant cannot be permitted at the same time to rely upon the Clauses in those documents that confer exclusive jurisdiction on the courts in Chandigarh. According to him, the plaintiff cannot be estopped from invoking the jurisdiction of this Court, since the parties were not ad idem about the genuineness of the aforementioned documents. He relied upon the provisions of Section 115 of the Evidence Act, 1872.

16. Mr. R.K. Kapoor, the learned Counsel for the defendant on the other hand points out that it is the plaintiff which itself has placed on record the two documents and cannot now be heard to say that the ouster Clause contained in those documents should not apply. If the plaintiff has based its case on the said documents, this Court cannot ignore those documents to find jurisdiction when none exists. He further submits that since the plaintiff has itself sued the defendant in Chandigarh for recovery of monies it would not be open to the plaintiff to come to this Court for another dispute involving the same parties when the plaintiff fully knew that it is

only the courts at Chandigarh which have the jurisdiction. He points out that notwithstanding the defendant's averments made in the written statement, the question of jurisdiction has to be decided with reference to the averments in the plaint.

17. Having considered the submissions of the Counsel for the parties, it appears to this Court that the defendant will succeed in these applications. The question of jurisdiction has to be decided on the facts and circumstances of every case. In *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem*, the Supreme Court in para 21 explained the position concerning the ouster Clause as under (SCC @ p.175-76):

From the foregoing decisions it can be reasonably deduced that where such an ouster Clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the Clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of *ad idem* can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster Clause when words like "alone", "only", "exclusive" and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "*expressio unius est exclusio alterius*" - expression of one is the exclusion of another - may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

18. In the instant case, the agreement to sell as well as the Non Compete Agreement both dated 19th November 2003 contain an identical Clause which reads as under:

That both the parties irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts in Chandigarh.

19. What is significant is that an undertaking was given by the defendant not to design or develop a similar prototype/machine as was "an essential and fundamental condition of this agreement" and formed the basis of the present suit. Mr. Lal tried to impress upon the court that even irrespective of such an agreement to sell containing a negative covenant, the plaintiff would still be able to sue the defendant for violation of copyright. In a given case such a contention could be accepted. However, in the present case, the plaintiff has itself placed these documents on record and has come to the court claiming violation of the agreements by the defendant. The plaintiff cannot be heard to say that the court should now ignore the said two documents in determining whether the court has jurisdiction to try the suit.

20. The next contention of Mr. Lal is that a part of the cause of action arose within the jurisdiction of this court and therefore in terms of Section 20(c) CPC this Court has jurisdiction to entertain the suit. It requires to be noticed that the only averment

in this regard is that the defendant has received a purchase order from Fena Pvt. Ltd., which has its office in Delhi. It is not in dispute that the allegedly offending machine made in Mohali to be delivered at Surajpur (UP). Mr. Lal states that this Court should not go by the place from where the machine is dispatched or even the place where it is delivered, it should only go by the address of the company which purchased the machine from the defendant.

21. There are two difficulties in the way of the plaintiff. The first is that by accepting the above plea of the plaintiff, this Court would be turning a blind eye to the two documents which have been included by the plaintiff in the list of documents being relied upon by it. Both these documents contain clauses, which have been inserted obviously at the instance of the plaintiff itself, conferring on the exclusive jurisdiction on the courts in Chandigarh. In light of the law explained by the Supreme Court in *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem*, the wording of the ouster Clause is unambiguous particularly when it uses words like "exclusive". In those circumstances, no option is left to the court to still assert its jurisdiction. Once an ouster Clause is clear that it is only the court in Chandigarh that will have the jurisdiction, it is not possible to ignore such a Clause and still say that since a part of the cause of action has arisen within the territorial jurisdiction of this court, this suit should be entertained. This is what distinguishes the judgments of this Court in *L.G. Corporation v. Intermarket Electroplasters (P) Ltd.*, *Pfizer Products, Inc. v. Rajesh Chopra* and of the Madras High Court in *Base International Holdings N.V. Hockenrode 6 v. Pallava Hotels Corporation Ltd.* in their application to the present case. Those cases seem to find jurisdiction on the basis that either a sale or a threatened sale was to take place within the jurisdiction of this Court. None of those decisions were rendered in cases where there was an ouster Clause which conferred exclusive jurisdiction on some other court.

22. As regards the plea of estoppel, this Court is unable to appreciate how the plaintiff can seek to take advantage of the defendant's averments in its written statement. The submission of Mr. Lal was that unless the defendant admitted the genuineness of the two documents which contained the ouster clause, the ouster Clause cannot be used to estop the plaintiff from approaching the court. In the first place, this Court does not have to look into the written statement to see whether the suit is maintainable. At this stage this Court has to determine whether on the basis of the averments in the plaint, this Court has jurisdiction or not. The plaint has to be examined along with the documents for that purpose. It is incumbent on the plaintiff to satisfy the court that it has jurisdiction to entertain the suit. In the considered view of this Court, the question of estoppel does not arise. It is the plaintiff that maintains that its case on the basis of the two documents which are part of its reliance. As long as these documents remain on the record, it is not possible for this Court to ignore them. Therefore, it is not possible to accept the plea of the plaintiff that this Court has territorial jurisdiction to entertain the suit.

23. In view of the above determination, it is not necessary to examine in great detail whether the purchase order which envisages a delivery from Mohali or delivery at Surajpur can attract the jurisdiction of this court, only for the reason the company purchasing the equipment has an office in Delhi.

24. This Court accordingly finds that the defendant has been able to make out a case for a direction that the plaint should be returned to be presented before the proper court.

25. IA No. 15833 of 2008 under Order XIV Rule 2(2) CPC is accordingly allowed and other IA 2296 of 09 is disposed of.

CS(OS) No. 1806/2008 & IA 10448/2008

26. In view of the above order, the plaint is directed to be returned for presentation in the court in which it is supposed to be instituted.

27. This application does not survive and is disposed of as such.