

(2017) 01 DEL CK 0102

In the Delhi High Court

Case No : CS(OS) No. 2267 of 2013 and IA Nos. 18638 of 2013, 24280 of 2015

M/s. Allied Blenders And Distillers Pvt. Ltd.

APPELLANT

Vs

Prag Distillery Pvt. Ltd.

RESPONDENT

Date of Decision : 06-01-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10

Citation : (2017) 69 PTC 609

Hon'ble Judges : Mr. Vibhu Bakhru, J.

Bench : Single Bench

Advocate : Mr. Rajiv Nayar, Senior Advocate with Mr. Shrawan Chopra, Mr. Sanjay S. Chhabra, Mr. Saurabh Seth and Mr. Kanak Bose, Advocates, for the Plaintiff; Mr. Hemant Singh, Advocate with Ms. Mamta Jha, Mr. Manish K. Mishra and Mr. Waseem Shuaib Ahmed, Advocates, for the Defendant No. 1

Final Decision : Allowed

Judgement

Vibhu Bakhru, J.—IA No. 19059/2015 (U/O VII Rule 10 CPC read with Section 151 CPC) This is an application filed on behalf of defendant no.1 under Order 7, Rule 10 of the Code of Civil Procedure, 1908, inter alia, praying that the plaint be returned.

2. The plaintiff is a company incorporated under the Companies Act, 1956 and is, inter alia, engaged in the business of manufacturing and marketing alcoholic beverages, including Indian Made Foreign Liquor (hereafter "IMFL"). The plaintiff has averred in the plaint that it sells alcoholic beverages under various distinctive trademarks and labels including "Officer's Choice".

3. The plaintiff has further claimed that its trademark and label "Officer's Choice" have acquired an enviable reputation and goodwill and is one of the highest selling brands. The plaintiff claims that it has incurred extensive expenditure to promote and publicize its product under the mark "Officer's Choice" which has now become a well-known trademark. The plaintiff is the registered proprietor of the trademark "Officer's Choice" in various classes and details of the same have

been provided in paragraph 6 of the plaint.

4. Defendant no.1 is a company registered under the Companies Act, 1956 and has its registered office in the State of Maharashtra. The plaintiff also claims that defendant no.1 holds a sub-lease from defendant no.2 which has its registered office in the State of Andhra Pradesh. The plaintiff states that defendant no.1 is, inter alia, engaged in the business of bottling and manufacturing alcoholic beverages, including whisky under a trademark "Smart Choice" which the plaintiff claims, is deceptively and confusingly similar to the plaintiff's trademark "Officer's Choice". It is further alleged that the label used by defendant no. 1 is also substantially similar to plaintiff's label "Officer's Choice".

5. On the basis of the averments made in the plaint, the plaintiff has, inter alia, prayed for a decree of permanent injunction restraining infringement of trademark and for a decree of permanent injunction restraining infringement of copyright as well as passing off.

6. The applicant (defendant no.1) claims that no part of the cause of action to file the present plaint has arisen within the territorial jurisdiction of this Court. It has premised the present application on the aforesaid assertion claiming that the plaint is liable to be returned.

7. Mr. Hemant Singh, learned counsel appearing on behalf of the applicant (defendant no. 1) drew the attention of this Court to the various averments made in the plaint and submitted that since the cause of action as pleaded by the plaintiff has arisen in the State of Andhra Pradesh, this Court would have no jurisdiction to try the present suit. He further drew the attention of this Court to paragraph 27 of the plaint and contended that the plaintiff had pleaded that this Court had the jurisdiction to decide the suit on the basis that the plaintiff's office was located in Delhi and that the plaintiff was also carrying on its business within the jurisdiction of this Court in a variety of ways including by selling its products under the relevant trademarks. He submitted that the plaintiff also has a zonal office in Andhra Pradesh and since the cause of action had arisen in the State of Andhra Pradesh where the plaintiff also carries on its business, the Courts at Andhra Pradesh and not this Court would have the jurisdiction to try the present suit.

8. He referred to the decision of the Supreme Court in *Indian Performing Rights Society Limited v. Sanjay Dalia and Another*: (2015) 10 SCC 161 and the decision of a Division Bench of this Court in *Ultra Home Construction Pvt. Ltd. v. Purushottam Kumar Chaubey & Ors.*: 2016 (65) PTC 469 (Del) (DB) in support of his contention that the Courts, where the cause of action arises, would have the jurisdiction to try the suit if the plaintiff also had a subordinate/branch office at the said place; and the Courts having jurisdiction over the place where the plaintiff's principal office was situated would not have the jurisdiction to try the suit if the cause of action had arisen in another place and the plaintiff also had an office at the said place.

9. Mr. Rajiv Nayar, learned Senior Advocate appearing for the plaintiff/ non-applicant did not dispute that by virtue of the law as laid down by the Supreme Court in *Indian Performing Rights Society Limited (supra)*, this Court would not have any jurisdiction if no part of cause of action had arisen within the territorial limits of this Court. He, however, contended that in the present case, the cause of action had arisen in Delhi since it was pleaded that defendant no.1 was a unit of Tilaknagar Industries Ltd. and Tilaknagar Industries Ltd. were located in Delhi. He also submitted that the plaintiff had also averred that it strongly apprehended that defendant no. 1 could launch their products in Delhi and there was a reasonable apprehension that defendant no.1 had a distribution network in Delhi. Thus, the plaint disclosed that a part of the cause of action had arisen within the territorial limits of Delhi. He submitted that the present plaint was in the nature of quia timet action where the cause of action included an apprehension of injury within the territorial jurisdiction of this Court and therefore, this Court would have the jurisdiction to decide the suit. He further submitted that the question of jurisdiction was a mixed question of fact and law which would be determined at the stage of trial. He strongly relied on the decision of the Division Bench of this Court in *Teva Pharmaceutical Industries Ltd. and Ors. v. Natco Pharma Ltd.:* (2014) 210 DLT 591 (DB) and the decision of a Coordinate Bench of this Court in *M/s. Allied Blenders & Distillers Pvt. Ltd. v. Shree Nath Heritage Liquor Pvt. Ltd.:* 2014 (59) PTC 42 (Del).

10. Mr. Nayar also relied upon the decision of the Supreme Court in *Exphar SA and Another v. Eupharma Laboratories Ltd. and Another:* (2004) 3 SCC 688 and the decision of a Coordinate Bench of this Court in *Pfizer Products, Inc. v. Rajesh Chopra & Ors.:* 2003 (32) PTC 301 (Del.) in support of his contention that the objection as to the jurisdiction must be considered on the basis of the averments made in the plaint alone. Reasoning and Conclusion

11. It is trite law that an objection under Order 7, Rule 10 CPC as to the territorial jurisdiction of a Court at the pre-trial stage, is to be considered only on the basis of the averments made in the plaint and the material produced by the plaintiff without looking into the written statement filed by the defendant. In *Exphar SA and Another (supra)*, the Supreme Court had 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 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."

12. In view of the above, at this stage, the question whether this Court has the jurisdiction to try the present suit would have to be considered on demurrer; without looking into the defence pleaded by the defendants.

13. As stated earlier, Mr. Nayar did not contest the position that this Court would

not have jurisdiction to entertain the present suit only on the basis that the plaintiff's office was situated in Delhi or that the plaintiff carried on its business in Delhi. He fairly conceded that in view of the decision of the Supreme Court in Indian Performing Rights Society Limited (supra) as followed by this Court in Ultra Home Construction (supra), merely because the plaintiff had an office in Delhi would not confer the jurisdiction on this Court to try the suit if the cause of action had not arisen within the territorial limits of this Court. He had, however, submitted that the present suit was a quia timet action and the plaintiff apprehended that defendant no. 1 would launch its product in Delhi and thus, this Court would have the jurisdiction to try the suit.

14. In view of the above, the only question to be considered at this stage is whether the averments made in the plaint indicate that the present suit is a quia timet action and is based on the plaintiff's apprehension of infringement of trademark/copyright within the territorial limits of this Court.

15. In order to address the above controversy, it is necessary to examine the averments made in the plaint in some detail.

16. In paragraph one of the plaint, the plaintiff has averred that its registered office is located at the address in Mumbai and that its sales office is located within the seat of Delhi. It is also averred that the plaintiff carries on extensive business activities in Delhi as well as in other States of India. The plaintiff has described its activities in paragraph nos. 2 to 5 of its plaint. The plaintiff has described its registered trademarks as well as trade label in the plaint. The plaintiff has further provided the history of the use of the trademark and trade label "Officer's Choice" and has made averments relating to plaintiff's title and use of the trademarks.

17. In paragraph 18 of the plaint, the plaintiff has described defendant no.1 to be a company having its registered office at P.O. Tilaknagar, Tal. Shrirampur, Dist. Ahmednagar, Shrirampur, Maharashtra. It is also averred that defendant no.1 holds a sub-lease from defendant no.2, which has its registered office at 34, Satamrai Village, Gaganpahad Mandal, Andhra Pradesh. In paragraph 18 of the plaint, the plaintiff has specifically pleaded as under:-

".....It is believed that the Defendant No. 1 is engaged in the business of blending, bottling, manufacturing, producing and selling alcoholic beverages, including whisky under the mark "Smart Choice" (hereinafter referred to as the "impugned mark")?.."

18. The plaintiff has averred that the impugned mark "Smart Choice" is deceptively and confusingly similar to plaintiff's registered trademark "Officer's Choice" and further the Label "Smart Choice" is also a substantial reproduction of the plaintiff's "Officer's Choice" label.

19. In paragraph 20 of the plaint, the plaintiff has stated that it became aware of the defendant's infringing activities in September, 2013 when it came across

defendant's whisky being sold in the State of Andhra Pradesh. The plaintiff had further claimed that use by defendants of the label and trade dress and use of the prefix "Smart" to the suffix "Choice" is indicative of the malafide intent of the defendants. The averments made in paragraph 22 of the plaint are to the effect that defendants had substantially reproduced the very nuance of the plaintiff's label and had slavishly reproduced plaintiff's original, unique and distinctive artistic work for the inferior products.

20. A plain reading of the averments made in paragraph nos. 20 to 25 indicate that the plaintiff is aggrieved by the use - and not the apprehended use - of the impugned mark (Smart Choice) and label by the defendants. The relevant averments indicating the same are set out below:-

"20. The Plaintiff first became aware of the Defendants infringing activities in September, 2013 when the Plaintiffs representatives came across the Defendants' "Smart Choice" whisky product being sold in the state of Andhra Pradesh. The Plaintiff was shocked to learn that the impugned mark was strikingly similar to its proprietary trademark "Officer's Choice" and the impugned label with its red, white and gold colour combination, gold border and the word "Smart Choice" written in stylized gold font with a red shadow had a colour scheme/pattern which was a slavish imitation of the Plaintiff's label. The Defendants' product is therefore, an infringement of the Plaintiff's proprietary rights in its trademark and copyright vesting in the artistic work in the label. A bare perusal of the Defendants' product evidences an intention to pass off its products as being associated with and/or emanating from the Plaintiff. The Defendants have slavishly imitated and reproduced the overall get up, layout, color scheme and arrangement of features as the Plaintiff's label. Further, use by the Defendants' of the impugned mark and label reflects an intention to confuse unwary customers and to encash upon the goodwill and reputation enjoyed by the Plaintiff's product. The impugned "Smart Choice" label is reproduced below:

21. The adoption and use by the Defendants of a label/trade dress that is a rip-off of the Plaintiff's original and unique label/trade dress is blatant, brazen and unauthorized. It is clear that the impugned label/artistic work is a copy of the Plaintiff's label/artistic work and the degree and extent of similarity dismisses the likelihood of it being a mere coincidence. Further, it is apparent that the Plaintiff's proprietary trademark "Officer's Choice" has inspired the Defendant to come up with the impugned mark for identical products. The Defendant's aim is to pass off its product as a variant of the Plaintiff's product or as one having a connection or association with the Plaintiff's well-known whisky products. The Plaintiff has used the mark "Officer's Choice" extensively, continuously and uninterruptedly for over 20 years and the Defendants' use of the prefix "Smart" to the suffix "Choice" in the impugned mark is a dead give-away as to the intent and malafide of the Defendants.

22. The Defendants have substantially reproduced the very nuance of the Plaintiff's label and have no reasons whatsoever to adopt the same. The Plaintiff

is the prior user, adopter and registered proprietor of the said label that was specifically commissioned by it for its own whisky products. The Defendants have expended no time, money or effort to design their own label and have chosen to slavishly reproduce the Plaintiff's original, unique and distinct artistic work for their inferior products. Further, use of a deceptively similar trademark amounts to confusing the consuming public into believing that the Defendants' goods originate from the Plaintiff's repertoire or are in some way associated with or a variant of the Plaintiff's well-known "Officer's Choice" products. This is a clear case of initial interest confusion as the relevant public would take a second look at the Defendants' infringing product solely on account of its deceptive similarity to the Plaintiff's label and trademark. This reflects deceit and malafide on part of the Defendants.

23. The dishonesty on part of the Defendant is further evident from the fact that the impugned mark and label are being used with respect to identical goods i.e. whisky that are sold through the same trade channels. The sale and distribution of the Defendants' whisky products bearing the impugned mark and label would result in tremendous harm and prejudice to the Plaintiff's business, rights and interests. The impugned label has been dishonestly copied by the Defendants such that a consumer of ordinary intelligence and imperfect recollection is likely to believe that the Defendants' products are emanating from and/or connected to the Plaintiff's line of products.

24. Further, the unauthorized use of the impugned mark and label by the Defendants whether for sale and distribution in India or for export and distribution abroad is an act of blatant infringement of the Plaintiff's statutory rights and also a violation of its common law rights. The Defendants obviously intend to misrepresent and pass off their products as those of the Plaintiff in a way so as to make undeserved profits by riding on the coattails of the Plaintiff and thereby, causing incalculable damage and losses to the Plaintiff's business reputation both in India and abroad. It is submitted that the Plaintiff's "Officer's Choice" trademark has acquired international reputation and goodwill and the same qualifies as a famous and well-known trademark as envisaged in Section 11 of the Trade Mark Act, 1999. The Plaintiff reserves its right to seek damages against the Defendants in the event proceedings in the present suit necessitate the same. The Plaintiff further craves leave to amend the pleadings in this regard.

25. The use of the impugned trademark and label by the Defendants also amounts to false trade description as defined under the provisions of the Trade Marks Act, 1999, in as much as it induces the consumers and members of the trade to falsely believe that:-

- a) the Defendants have a nexus or affiliation with the Plaintiff; or
- b) the Defendants have been granted a license to use the said label in relation to an identical class of products;
- c) the business of the Defendants have been endorsed by the Plaintiff; or

d) the Plaintiff has released a variant of its whisky "Officer's Choice" in the market under the name "Smart Choice".

As such the Defendants have no justification or explanation whatsoever for their unauthorized use and adoption of the impugned label and mark for identical products. The intended illegal trade activities of the Defendants are likely to cause harm and injury to the business, goodwill and reputation of the Plaintiff."

(emphasis supplied)

21. A plain reading of the aforesaid plaint clearly indicates that the principal grievance articulated by the plaintiff in its plaint which has occasioned the filing of the present suit, is use of a trademark and label which is claimed to be a deceptively similar trademark and label of the plaintiff. There is no averment in the entire plaint from paragraphs nos. 1 to 25 which would indicate that the plaintiff apprehended the use of the trade mark in question in future; on the contrary the averments articulate the plaintiff's grievance regarding the use of the trademark by the defendant. The reading of the plaint does not indicate that it is occasioned by any apprehension of a future launch of the products by defendants. This is amply clear from paragraph no. 26 of the plaint which describes the cause of action for filing the plaint. The same is set out below:-

"Cause of Action

26. The cause of action arose for the first time around the third week of September, 2013 when the Plaintiff came across the Defendants' product being sold under the impugned mark and label "Smart Choice" in the State of Andhra Pradesh. The Plaintiff has approached this Hon'ble Court at the earliest possible opportunity. The cause of action against the Defendants is continuing from day to day till the filing of the present suit and will continue until the Defendants are restrained by an order of injunction by this Hon'ble Court."

22. However, in paragraph 27 of the plaint - which is the paragraph regarding the jurisdiction - the plaintiff has averred that it has reasonable apprehension that the defendants have a distribution network in Delhi or are likely to sell the products bearing the impugned mark and label within the jurisdiction of this Court and therefore, this Court would have the necessary jurisdiction by virtue of Section 20 of CPC.

23. Although, it has been averred that the plaintiff has an apprehension that defendants would sell their products within the territories of Delhi, the said apprehension is not substantiated by any material which would indicate a reasonable ground for the plaintiff to apprehend the same.

24. Be that as it may, the principal question to be addressed that still remains is whether the averments made in paragraph 27 of the plaint have the effect of establishing the plaint to be a quia timet action.

25. It is well settled that the plaint must be read as a whole. A plain reading of

the plaint from paragraph 1 to paragraph 26, which sets out the averments indicating the plaintiff's claim as well as its grievance - the cause of action - clearly indicate that the suit is based on the present use of the trademark/label "Smart Choice" by defendant no.1 and not on any apprehended use of the said trademark. The expression "quia timet" is a Latin expression meaning "because he fears". The Black's Law Dictionary, Eighth Edition, defines the same as "a legal doctrine that allows a person to seek equitable relief from future probable harm to a specific right or interest". It further defines "quia timet injunction" as "an injunction granted to prevent an action that has been threatened but has not yet violated the plaintiff's rights".

26. The Corpus Juris Secundum, Volume 30A, 2007 Edition, explains the concept of "quia timet " in equity as under:

"Preventive relief; quia timet.

A class of cases whose jurisdiction depends chiefly or altogether on the necessity for relief obtainable only in equity, is that of "bills quia timet," whose objective it is to prevent anticipated mischiefs which could not after their occurrence be adequately redressed. Bills quia timet lie where a person has reasonable fears of being subjected to future inconvenience by reason of the neglect, inadvertence, or culpability of another. They are writs of prevention to accomplish the ends of precautionary justice and they are designed to prevent wrongs rather than to redress them when done.

While equity will not interfere for the purpose of declaring rights to prevent a possible controversy which has not yet arisen, or where no actual danger to the plaintiff's rights is shown, it will interfere to prevent a multiplicity of suits, or to protect the subject matter of a controversy where there is actual danger that it may be so dealt with as to prejudice the plaintiff's rights."

27. In *Kuldip Singh v. Subhash Chander Jain & Ors.*: (2000) 4 SCC 50, the Supreme Court had explained the "quia timet action" as under:-

"6. A quia timet action is a bill in equity. It is an action preventive in nature and a specie of precautionary justice intended to prevent apprehended wrong or anticipated mischief and not to undo a wrong or mischief when it has already been done. In such an action the Court, if convinced, may interfere by appointment of receiver or by directing security to be furnished or by issuing an injunction or any other remedial process."

28. As stated above, the cause of action in the present case - even as described by the plaintiff in paragraph no. 26 of its plaint - is not of any apprehended injury by future action but essentially stems from the use of the trademark/label "Smart Choice" by the defendant in praesenti. It is alleged that defendant no.1 is using the trademark in Andhra Pradesh, which was discovered by the plaintiff in 2013; and this is the cause of action for the plaint as pleaded by the plaintiff.

29. A mere bald statement at the end of the plaint which has no foundation in

the entire plaint cannot be accepted as indicating the cause of action; the averments made in the plaint must, ex-facie, disclose the cause of action. Thus, the contention that part of cause of action has arisen within the territories of this Court since the plaintiff has made a bald statement that it apprehends that defendant would launch its product in Delhi, cannot be accepted.

30. In the case of Teva Pharmaceutical Industries (supra), the Division Bench had held that once the plaintiff had pleaded the apprehension of sale/marketing in Delhi, the Courts in Delhi would have to entertain the suit and the same could not be ousted by the defendant making a statement not to do any such act in Delhi. However, in that case, the plaint was based on the plaintiff's apprehension of an emanating launch of the drug Glatiramer Acetate for the treatment of multiple sclerosis. The Court specifically noted that the plaint contained pleadings to the effect that the news article was published on 17.01.2012 reporting that the defendants would work with Mylan Pharmaceuticals Inc. (MPI) to launch Glatiramer Acetate for the treatment of multiple sclerosis and the plaintiffs on making enquiries had learnt that MPI had signed an agreement with the defendant therein relating to development and marketing of Glatiramer Acetate in the United States. Thus, the pleadings clearly indicated that the plaintiff therein had filed the suit apprehending an injury and its cause of action included an apprehended injury by manufacture and sale of MPI's proposed Glatiramer Acetate. The substantial cause of action appears to have been based on acts that were imminent and which were pleaded with sufficient particulars. This is plainly clear from the reading of the judgement of the Single Judge (See: Teva Pharmaceutical Industries Limited v. NATCO Pharma Limited: (2014) 212 DLT 312). It is, in this context, the Division Bench had noted that the jurisdiction of this Court would not be ousted. It is relevant to note that the decision of the Single Bench in that case was based on the defendant's statement that they would not do any such act as apprehended, in Delhi. The Division Bench had held that the statement of defendant could not be considered at that stage and had proceeded on the basis that question as to jurisdiction would have to be ascertained on the basis of the averments made in the plaint. In the present case, the plaint read as a whole does not disclose it to be predicated on an apprehended infringement in future.

31. The reliance placed on behalf of the plaintiff on the decision in the case of M/s. Allied Blenders & Distillers (supra) is also misplaced as in that case, the Court had noted the stand of the defendant that it was not opposing the territorial jurisdiction of this Court except to show malafides of the plaintiff and in view of the aforesaid stand, the Court had specifically noted that it was not considering the objection to territorial jurisdiction of the Court for the relief claimed of injunction and passing off, thus, the issue as to territorial jurisdiction, was not agitated in that case. In the aforesaid circumstances, this Court is of the view that the plaint is liable to be returned.

32. In view of the above, the present application is allowed. The plaint is,

accordingly, liable to be returned.

33. List on 13.02.2017.