
(2013) 07 DEL CK 0072
In the Delhi High Court
Case No : FAO 480 of 2011

Pioneer Products

APPELLANT

Vs

Alberto Culver International Inc.

RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, 20, 9

Trade Marks Act, 1999 — Section 134, 134(2), 135, 28, 29

Citation : (2013) 5 AD 734 : (2013) 201 DLT 467 : (2013) 171 PLR 9 : (2013) 55 PTC 343

Hon'ble Judges : Veena Birbal, J

Bench : Single Bench

Advocate : Suhail Dutt, Mr. N.K. Kantawala, Mr. Praver Sharma, Mr. Satyender Chahar and Mr. Ritesh Mehra, for the Appellant; S.K. Bansal and Mr. Vikas Khera, for the Respondent

Final Decision : Disposed Off

Judgement

Veena Birbal, J.—Present appeal has been preferred by the appellant against the order dated 1st October, 2011 passed by the learned Additional District Judge, New Delhi whereby application of the respondent under Order 39 Rule 1 & 2 CPC was allowed and the interim order dated 9th September, 2009 has been confirmed. Appellant herein is defendant no. 1 before the learned trial court. Respondent herein is plaintiff before the learned trial court. The respondent/plaintiff has filed a suit u/s 134 and 135 of the Trade Marks Act, 1999 (hereinafter referred to as the Act) against appellant/defendant no. 1 and one R.P. General Stores i.e. defendant no. 2 before the trial court for the relief of permanent injunction restraining the appellant/defendant no. 1 from using in any manner including by way of manufacturing, sale trade etc. of the impugned marks VOV, VO5 or similar or identical marks in relation to cosmetics, toiletries and personal care products such as hair sprays, shampoos, personal deodorants, hair tonic, etc. Prayer is also made for damages and/or rendition of accounts.

Along with the aforesaid suit an application under Order 39 Rules 1 and 2 was also filed praying for the grant of ad interim injunction during the pendency of the suit restraining the appellant/defendant no. 1 from manufacturing, selling, offering for sale, advertising in India and exporting their products under the Trade Mark VOV which is phonetically similar to the respondent's/plaintiffs Trade Mark VO5 in relation to aforesaid products.

The respondent/plaintiff is engaged in the business of manufacture and distribution of wide range of cosmetic products such as hair sprays, shampoos, deodorants, hair and scalp conditioners, hair oil, hair tonic, and other allied products etc. It is alleged that in the year 1955, respondent/plaintiff through its predecessors adopted and started using the Trade Marks VO5 and V05 along with letters "ALBERTO". With the passage of time, respondent/plaintiff also started using the Trade Mark VO in the course of trade in respect of its goods. The Trade Mark VO, VO5 is an essential, material and distinguishing feature of the said Trade Mark Label. As per respondent/plaintiff, it has acquired worldwide reputation. The respondent's/plaintiffs Trade Mark ALBERTO VO5, VO5 Label and V05 are duly registered in India under the Trade Marks Act, 1999. The dates of registration are given in the plaint. It is alleged that in view of registration of its Trade Mark, respondent/plaintiff has exclusive rights thereto within the meaning of the aforesaid Act. The art works involved in the aforesaid Trade Mark/Label are original artistic work and the respondent/plaintiff holds copy right therein. It is alleged that art work involved in the respondent/plaintiffs Trade Mark/Label VO5 along with the word ALBERTO is duly registered under the Indian Copyright Act, 1957. It is alleged that respondent/plaintiff has already built up a globally valuable trade under the aforesaid Trade Mark/Label and has conducted handsome business thereunder running into billions of dollars worldwide. The respondent/plaintiff has spent millions of dollars in advertising its products. It is alleged that respondent's goods are known, recognized, demanded, sold and traded world over with reference to the said Trade Mark/Label. It is alleged that respondent's/plaintiffs goods under the aforesaid Trade mark/Label are available in Delhi including New Delhi and other parts of the country through its authorized importer and distributor M/s. J.L. Morison (India) Ltd., "Crystal", 79, Annie Besant Road, Worli, Mumbai-400018 also at 404, Rohit House 3 Tolstoy Marg, New Delhi-1100001.

2. It is alleged that the respondent/plaintiff is a global leader in the aforesaid goods and business. M/s. Alberto Culver Company is the predecessor-in-title of the respondent/plaintiff. The said predecessor has assigned all rights, titles and interests in the aforesaid trade marks/copyrights along with the goodwill to the respondent/plaintiff, vide a Deed of Assignment dated 14.04.2006. It is alleged that respondent/plaintiff is one of the Group Companies of M/s. Alberto Culver Company.

3. The respondent/plaintiff has alleged that appellant/defendant No. 1 has adopted an identical/deceptively similar trade mark VOV (which is a colourable

imitation of the respondent's/plaintiffs mark since "5" is written in Roman numerals "V") in relation to the same/similar goods being cosmetics including nail polish, lipstick, eye liner, compact, liquid kumkum and other beauty products etc. It is alleged that appellant/defendant no. 1 had filed an application for registration of trade mark VOV which was abandoned. The defendant no. 2 i.e. R.P. General Stores is the dealer/distributor of the appellant/defendant no. 1 in Delhi including the markets of South Delhi. The trade mark VOV being used by the appellant/defendant no. 1 in relation to their goods and business is identical with and deceptively similar to respondent's/plaintiffs said "VO, VO5 and VO5 with ALBERTO" trade marks in each and every respect including phonetically, structurally, conceptually and in its essential features. It is alleged that appellant/defendant no. 1 by their impugned adoption and use of the trade mark VOV amounts to violating respondent's/plaintiffs trade mark and amounts to passing off their goods as that of respondent/plaintiff.

4. The case of the appellant/defendant no. 1 is that respondent/plaintiff has wrongly invoked the territorial jurisdiction to entertain and try the present suit against appellant/defendant no. 1. There is no cause of action in favour of respondent/plaintiff against appellant/defendant no. 1. That the respondent/plaintiff has never used nor advertised the mark ALBERTO VO5 or VO5 in India at any point of time. It is alleged that appellant/defendant no. 1 is carrying on its lawful business as manufacturer and merchant of cosmetics under the mark V O V (label) in a specific artistic way and the three letters V O V written within rectangles is altogether different and distinct from that of the mark ALBERTO VO5 of respondent/plaintiff. The appellant/defendant no. 1 honestly and bona fide adopted the mark V O V for kumkum only in the year 1987 and in the year 2002 added more cosmetic products under the mark VOV and has used the same openly and continuously. It is also alleged that there is no document on record to show that user/reputation of the mark ALBERTO VO5 in India. Respondent/plaintiff from time to time made statements before the Registrar of Trade Marks that the impugned mark is "proposed to be used". It is stated that even in the matter of latest application no. 1349772; filed by respondent/plaintiff on 8.4.2005 for the mark ALBERTO VO5 in India, the user shown is "proposed to be used" which is clear indicator of the fact that even in 2005, respondent no. 1/plaintiff had an intention to use the mark ALBERTO VO5 whereas appellant/defendant no. 1 is using the mark V O V since 1987 for kumkum and since 2002 for other cosmetics. It is also stated that conduct of respondent/plaintiff shows that respondent/plaintiff is interested only to harass the appellant/defendant no. 1 in one way or the other. It is stated that respondent/plaintiff has filed number of cases, the details of those are given in reply dated 12.8.2011 of appellant/defendant. It is alleged that the same shows conduct of respondent/plaintiff. It is also alleged that respondent no. 1/plaintiff has never used or advertised the mark ALBERTO VO5 in India at any point of time. It is further alleged that respondent/plaintiff has filed a copy of the alleged distribution agreement dated 09.02.2009 with J.L. Morison (India) Ltd. to show that J.L. Morison (India) is an

exclusive distributor in Delhi. It is alleged that apart from the copy of agreement dated 9.2.2009, no other documents have been filed to prove that the alleged distributor is an "exclusive distributor" or has at any point of time distributed the goods of respondent no. 1/plaintiff under the mark ALBERTO VO5 in Delhi or within the jurisdiction of this court. It is their further stand that the goods of respondent no. 1/plaintiff under the mark ALBERTO VO5 have never been sold in any part of India or within the jurisdiction of this court. It is further alleged that J.L. Morison (India) Limited is not an exclusive distributor of the respondent's/plaintiffs goods under the mark "ALBERTO VO5". It is alleged that the so called distributor has never distributed the goods of the respondent's/plaintiffs in India under the mark ALBERTO VO5 at any time. It is alleged that as per respondent/plaintiff the distributorship was applied only on 09.02.2009 whereas appellant/defendant is using the mark V O V for kumkum in 1987 and in 2002 for other cosmetic products. It is further alleged that labels/packaging/artworks of appellant/defendant no. 1 for the mark V O V are different from that of the labels/packaging/artworks of respondent/plaintiff impugned mark ALBERTO VO5 which is altogether different and distinct from the mark V O V of appellant/defendant no. 1.

5. Vide impugned order dated 1st October, 2011, the learned trial court has allowed the application of the respondent/plaintiff under Order 39 Rule 1 and 2 CPC and has confirmed the order dated 9th September, 2010 thereby allowing the application under Order 39 Rule 1 and 2 CPC.

6. At this stage, it may be necessary to refer to the history of litigation between the parties to the present case.

7. Respondent/plaintiff had earlier filed CS(OS) no. 672/2004 on the original side of this court. In that case, appellant/defendant herein was made the sole defendant. After pleadings were completed, issues were framed. One of the issues framed, relates to the territorial jurisdiction of this court.

8. The learned Single Judge of this court vide order dated 27th August, 2010 treated the issue relating to territorial jurisdiction as a preliminary issue and held that this court has no jurisdiction to try the suit and ordered that suit be returned to the respondent/plaintiff to be filed before the Principal Civil Judge at Thane with the following observation:-

8.In Dhodha House case, the Supreme Court held that the mere fact that the goods are available in a particular place-in that instance in Delhi or that they were sold in different area, would not itself mean that the plaintiff carried on any business in Delhi. This Court is bound by that ruling. The materials on record, particularly the pleadings, nowhere point to the plaintiff having any office in Delhi or even averring that it appointed a distributor whose office are located within the jurisdiction of the Court nor is there any averment whosoever vague disclosing that the plaintiff has any business either substantially or otherwise in the form of turn over from Delhi or for that matter in India. In these

circumstances, this Court is satisfied that the suit so far as the infringement is concerned based upon the application of Section-134, is not maintainable.

9. So far as question as to whether any part of the cause of action has arisen in the jurisdiction of this Court is concerned, the documents available in the form of about 557 pages filed along with the list of documents would reveal that there is no material establishing that the defendant sold their products within the jurisdiction of this Court or anywhere in Delhi. No doubt, the plaintiff has a right to adduce the evidence in the trial to establish the defendant's presence, but the Court is conscious of the fact that after issues were framed, parties were provided with the opportunity to produce further or additional documents. It was not pointed out that such additional documents were ever filed all this while after the issues were framed more than 41/2 years ago. In any event, no such application for producing additional documents to establish the defendant's presence within the territorial limits of this Court's jurisdiction was ever moved. It is also settled that once issues are struck and the parties are required to lead evidence, there is no question of the Court entertaining the application for adducing further documentary evidence during the trial.

10. Having regard to this, it is apparent that the Court now has to consider the effect of the two documents placed on the record by the defendant. While the defendant's arguments that the Court's enquiry is to be confined to while considering the plea about jurisdiction or the lack of it in the averments in the suit and the list of documents filed along with it as correct, at the same time, the Court cannot be oblivious of the materials which are on the record particularly after admission/denial. The defendant here has placed two invoices on the record. At best, they only indicate that some goods were dispatched to Delhi. That by itself is sufficient, in the opinion of the Court, to hold that the defendant is either trading in Delhi or cause of action of such nature is occurred, occasioning the plaintiff to file the present suit. The two transactions at best would amount to a flash in the pan, which, in no way, establish that the dispute can be entertained as is sought to be urged by the plaintiff. In *Sector Twenty-one owners Welfare Association (STOWA) Vs. Air Force Naval Housing Board*, it was held that trivial or insignificant part of the cause of action arising at a particular place would not be enough to confer jurisdiction.

11. This Court is not persuaded to take a view different from that taken in *Alberto's case (supra)* where the plaint was returned. In the circumstances, the suit is returned to the plaintiff to be filed before the Principal Civil Judge at Thane. Parties are directed to be present before the Principal Civil Judge, Thane, on 25th October, 2010.

9. The order dated 27th August, 2010 passed by the learned Single Judge attained finality as no recourse was taken by the respondent/plaintiff against the said order. During the period CS(OS) 672/2004 on the Original side of this court, there was no interim order operating between the parties.

10. On 09.09.2010 the respondent/plaintiff instead of filing the returned plaint at the Courts at Thane, preferred a fresh suit against appellant/defendant No. 1 at the District Court at Saket Courts Complex. This time the respondent/plaintiff claimed that the court has territorial jurisdiction to try the suit in view of agreement dated 09.02.2009 whereby one J.L. Morison (India) Ltd. (hereinafter J.L. Morison) has been appointed as agents and distributors in India for their products marketed under the trade mark VO5 and that J.L. Morison has their regional distributorship at 404, Rohit House, 3 Tolstoy Marg, New Delhi. In addition, the defendant No. 2 i.e. R.P. General Stores was made a party to the case. Here it may be mentioned that defendant No. 2 was the same entity to whom the appellant/defendant No. 1 had supplied the goods in pursuance of the two invoices which were relied by the plaintiff in CS(OS) No. 672/2004 for contending that the courts at Delhi has the territorial jurisdiction to try the suit.

11. The learned Additional District Judge to whom the suit was assigned granted ex parte stay to the respondent/plaintiff. After completion of pleadings the learned Additional District Judge vide order dated 28th May, 2011, in view of the fact that the office of the regional distributorship of J.L. Morison was at New Delhi district and not in South Delhi District returned the plaint for being presented before the court of competent jurisdiction and the interim order dated 9.9.2010 was ordered to be continued for a period of five days.

12. The respondent/plaintiff presented the plaint returned by the court at Saket to the court of Additional District Judge-I, Patiala House Courts, New Delhi on 1st June, 2011. On the aforesaid dated the learned Additional District Judge, New Delhi, issued notice to appellant/defendant no. 1 and extended the interim order dated 9th September, 2010. The appellant/defendant preferred an appeal against the order dated 1st June, 2011 before this court which was registered as FAO 344/2011. The learned Single Judge of this court has disposed of the said appeal vide order dated 8th August, 2011. The relevant paras of the order dated 8th August, 2011 reads as under:-

3. I agree with the contentions of the learned counsel for the appellant that there is no question of extension of stay as has been done by the impugned order because after the plaint was returned by the order dated 9.9.2010 by the ADJ, at Saket Courts, Delhi, filing of the suit in a competent Court, there was a fresh filing of the suit and therefore whether or not injunction ought to have been granted should have been considered afresh keeping in mind the requirements of Order 39 Rule 1 and 2 CPC. Also, the application of the respondent/plaintiff for seeking extension of injunction is also misconceived for selfsame reason. If the trial Court was inclined to grant an ex parte injunction de novo, the trial Court ought to have discussed the triple factors, prima facie case, balance of convenience and irreparable loss and which are not found in the impugned order. The order is completely a non-speaking order.

4. Accordingly, though the impugned order, in view of what is stated above, is liable to set aside, however, if one does not go on technicalities, it can also be

said that the impugned order seeks to grant an ex parte injunction in a fresh suit. However, the ex parte injunction would suffer from the infirmities of not being a speaking order and not considering the necessary ingredients for grant of the injunction and more so on grant of an ex-parte injunction, the requirement of Order 39 Rule 3 CPC had to be directed to be complied with and which has not been done.

5. Accordingly, while accepting the appeal and setting aside the impugned order, I direct that the matter be taken up by the trial Court on 17th August, 2011 and on which date the respondent/plaintiff will file an application under Order 39 Rules 1 and 2 CPC for grant of interim orders. I may hasten to clarify that though the impugned order is being set aside, interim order passed by the trial Court on 1.6.2011 is being continued only and only upto 17.8.2011 and when the trial Court will examine the issue with respect to entitlement of the respondent/plaintiff to an injunction uninfluenced by the fact that interim injunction is continued till 17.8.2011 and after ensuring that requirements of law for grant of an interim order in terms of Order 39 CPC are complied with. The trial Court will hear both the parties and pass a speaking order as to the entitlement or disentitlement of grant of interim orders.

With the aforesaid observations the appeal and application are disposed of.

13. Thereupon respondent/plaintiff filed fresh application under Order 39 Rule 1 and 2 of CPC. The arguments were heard on the said application. Vide order dated 01.10.2011, impugned in this appeal, the learned ADJ confirmed the stay granted earlier on 09.09.2010.

14. On the territorial jurisdiction, Learned senior counsel Mr. Suhail Dutt appearing for the appellant/defendant no. 1 has contended that the respondent/plaintiff has wrongly invoked the jurisdiction as per section 134(2) of the Act as respondent/plaintiff does not carry any business in Delhi either directly or through any exclusive dealer/distributor. It is contended that respondent/plaintiff has no sale in Delhi or even in India. It is contended that not even a single document is produced which shows any use or advertisement of trade mark ALBERTO VO5 by respondent/plaintiff in India. It is contended that as per respondent/plaintiff it has appointed authorized importer/distributor in India on 9.2.2009 but has failed to produce a single document to prove sales, if any, done by it in India either prior or even after its appointment. It is contended that jurisdiction or cause of action paras of the plaint does not say that J.L. Morrison Ltd. is the respondent/plaintiff's "Exclusive Distributor", the plaint only says "Distributor". Learned Senior Counsel has also contended that the plaint of first suit was returned by this court in CS(OS) No. 672/2002 vide order dated 27.8.2010 by holding that Delhi Courts lack territorial jurisdiction to entertain and try the suit. In the said order, specific finding was given by the learned Single Judge of this court that two invoices of defendant no. 2 placed on record were insufficient to hold that respondent/plaintiff was either trading in Delhi or cause of action had occurred at Delhi. It is contended that the said order was not

assailed by respondent/plaintiff, as such, suit is barred by res judicata. It is further contended that plaint of second suit being Suit No. 1389/2010 vide order dated 28.5.2011 by the learned ADJ, Saket, was returned to be presented before the court of competent jurisdiction. In that case, it was observed that court at Delhi lacks jurisdiction.

15. On merits, learned senior counsel has contended that marks of both the parties are visually and phonetically different and customers of respondent/plaintiffs are different. It is contended that the respondent's/plaintiffs products are not available in India. It is contended that in case the same are made available the same would be purchased by elite and literate society as the products of respondent/plaintiff are costly. It is further contended that the customers of products of both the parties are literate who can easily distinguish between the two in terms of the mark, their packaging, their use etc. It is contended that there is huge price variation of products of both the parties. It is further contended that products of both the parties are entirely different in use and their application. The appellant/defendant no. 1's products are nail polish, compact powder, kumkum, mascara, lip gloss etc and respondent/plaintiff only produces hair related products i.e., shampoo and conditioners. It is contended that respondent/plaintiff uses the word ALBERTO as a prefix to VO5 whereas appellant/defendant no. 1 uses the single word V O V i.e., WOW which suggest great pleasure and amazement. It is contended that in the earlier suit i.e. CS(OS) 672/2004 filed by respondent/plaintiff, no injunction in its favour was granted by this court and the said suit remained pending for 6 years. On return of the plaint, respondent/plaintiff filed a fresh suit at District Court at Saket Court Complex and obtained an ex parte order dated 9.9.2010 and later on the said plaint was also returned and thereafter injunction was granted vide impugned order dated 1st October, 2011 by the Id. ADJ, Patiala House Courts. In these circumstances, balance of convenience was also in favour of appellant/defendant no. 1 and the learned trial court has not considered the same. It is contended that appellant/defendant no. 1 has documentary evidence to prima facie show use of the mark trade VOV for the past 25 years whereas there is no prima facie case in favour of respondent/plaintiff. It is contended that in the facts and circumstances of the case, the appellant/defendant no. 1 would suffer an irreparable loss and injury if the impugned order is not set aside.

16. Learned counsel for the respondent/plaintiff has contended that respondent/plaintiff is a registered proprietor of trade mark VO5 in India, accordingly, the respondent/plaintiff is entitled for the remedy of infringement. It is contended that for the purpose of territorial jurisdiction, the respondent/plaintiff is entitled to special benefit of section 134(2) of the Act wherein respondent/plaintiff is provided with additional forum for filing suit in case of infringement of its trade mark at a place where respondent/plaintiff resides and carries on its business. It is further contended that respondent/plaintiff has also pleaded jurisdiction of this court on account of appellant's/defendant no. 1's activities of selling its products in New Delhi area clandestinely and surreptitiously, under the provisions of

section 20 of CPC. It is contended that M/s. J.L. Morison India Ltd. was appointed on 9.2.2009 as exclusive distributor of VO5 products in India and M/s. J.L. Morison India Ltd. has its office at Mumbai and also at Tolstoy Mark, New Delhi which is within the jurisdiction of this court, as such, courts at Delhi has jurisdiction to try the present suit. It is contended that respondent/plaintiff has Indian trade mark registrations for the mark "ALBERTO VO5" (word mark) under No. 196213B in Class 3 dated 30.5.1960; ALBERTO "VO5" label under No. 1349772 in Class 3 dated 8.4.2005; VO5 (word mark) under No. 788766 in Class 3 dated 23.1.1998; VO5 logo under No. 788768 in Class 3 dated 23.1.1998. It is contended that respondent/plaintiff has exclusive rights to use the trade mark VO5 under Sections 28 and 29 of the Act, 1999. It is contended that appellant/defendant no. 1 in its trade mark application filed in the Trade Marks Office No. 1263141 in Class 3 has claimed use of its trade mark V O V from 31st December, 2002 in relation to cosmetic preparations whereas in the present appeal, appellant/defendant no. 1 is trying to claim use of the trade mark from 1986. It is contended that no document in this regard has been filed. It is contended that respondent/plaintiff has trade mark registration for ALBERTO VO5 since 1960 and VO5 from the year 1998 and respondent/plaintiff has claimed use of the mark internationally since 1955. It is contended that appellant/defendant no. 1 has not been able to establish continuous use of the mark prior to respondent/plaintiff's registration. It is contended that respondent/plaintiff is also entitled to the benefit of trans border use and reputation of the mark. It is further contended that the learned ADJ after considering the facts and circumstances of the case has exercised discretion by granting injunction in favour of respondent/plaintiff. It is contended that there is nothing on record to show that discretion has been exercised arbitrarily or capriciously, as such, the appellate court would not interfere with the exercise of discretion of the court of first instance and substitutes its own unless discretion has been exercised arbitrarily or capriciously.

17. In order to succeed in his application, the respondent/plaintiff was required to establish that it has a good prima facie case. Such inquiry would have necessarily required the examination of question as to whether the courts at Delhi have the territorial jurisdiction to try this suit. The respondent/plaintiff may have averred in the plaint that Courts at Delhi have jurisdiction to try this suit but the issue that would arise is as to whether the respondent/plaintiff has succeeded in prima facie showing that the courts at Delhi have such jurisdiction. The courts at Delhi have the jurisdiction to try the suit either u/s 134 of the Trade Marks Act, 1999 or u/s 20 of CPC. Apart from relying on the two documents which relate to the transaction between the two defendants and which were held to be not sufficient to vest the courts at Delhi with the territorial jurisdiction in CS(OS) No. 672/2004, the respondent/plaintiff has relied upon its dealership agreement with J.L. Morison which is having its regional distribution at 404, Rohit House, 3 Tolstoy Marg, New Delhi. The plaintiff also relies on the fact that the defendant No. 2 is residing and carrying on business at Delhi.

18. The respondent/plaintiff itself is neither registered at Delhi nor has its office

at Delhi. It is otherwise not the case of the respondent/plaintiff that it is personally working for gain at Delhi. Thus, to that extent the position in the suit and the earlier suit remains the same.

19. In the case of Dhodha House Vs. S.K. Maingi, , the Supreme Court has held that the expression "carries on business" and the expression, "personally works for gain" connote two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase "carries on business" at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control there over. The expression is much wider than what the expression in normal parlance connotes, because of ambit of a civil action within the meaning of Section 9 of the Code. But it is, inter alia, necessary that the agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one who pays him. In the case in hand, there is no allegation in the plaint that agent is an exclusive agent of the respondent/plaintiff. From the documents placed on record it would appear that J.L. Morison is doing the business for other persons also. It is not shown at this stage that the respondent/plaintiff is having an interest in the business or at the place of business of J.L. Morison at Delhi, or a voice in what is done, or a share in the gain or loss and some control there over. Not even a single document has been placed on record to show, sales if any, done by it in Delhi or India after the appointment of J.L. Morison as its distributor. Thus, u/s 134 of the Trade Marks Act, 1999 is of no assistance to the respondent/plaintiff. To my mind, in the facts of this case, fact that the defendant No. 2 is doing business at Delhi is also of no significance inasmuch as the two documents relating to the transaction between the two i.e. appellant/defendant no. 1 and defendant no. 2 were held to be not sufficient to vest the courts at Delhi with territorial jurisdiction. After having chosen to continue the earlier suit without making the defendant No. 2 a party to the said suit the plaintiff cannot now agitate the same issue on the basis of same documents by making defendant No. 2 a party to the suit. Every violation of a trade mark or act of passing of may be a fresh cause of action. That however, cannot mean the respondent/plaintiff is at liberty to rely on those very transactions, which were the subject matter of the earlier suit between the parties and which were specifically gone into by the court. Thus, Section 20 CPC is also not going to help the respondent/plaintiff at this stage.

20. In the circumstances, it appears to this court that respondent/plaintiff has failed to prima facie show that the courts at Delhi have territorial jurisdiction to try the suit for reason of his Dealership Agreement with J.L. Morison or on account of having made defendant No. 2 party to the suit.

21. In view of above discussion, I do not find it appropriate to deal with other

contentions of the parties as the same pertains to merits of the case. Accordingly, the other contentions and case law referred to by the parties have not been discussed herewith.

22. Accordingly, the appeal is allowed and the impugned order stands set aside. The trial court shall now proceed in accordance with law for which the parties shall appear before the learned Trial Judge on 16.7.2013.

23. The appeal stands disposed of. Nothing contained in this order shall be treated as expression of opinion on the merits of the case.