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

Reserved on: 27th March, 2017
Pronounced on: 11th April, 2017

+ IA No. 18137/2014 (u/O VII R.10 CPC) in CS (OS)
2213/2014

FEDERAL EXPRESS CORPORATION Plaintiff

Through: Mr. J.V. Abhay & Mr. Ronil
Goger, Advs.

Versus

FEDEX SECURITIES LTD. & ORS. Defendants

Through: Mr. Sanjeev Sindhvani, Sr.
Adv. with Ms. Arzu Chimni,
Adv.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

1. The civil suit in the course of proceedings arising whereof the defendants have come up with the prayer for return of the plaint by application (IA No. 18137/2014) invoking Rule 10 of Order VII of the Code of Civil Procedure, 1908 (CPC), on the ground of want of territorial jurisdiction, was instituted in July, 2014 by Federal Express Corporation (the plaintiff), a company incorporated under the laws of State of Delaware, United States of America (USA), its principal registered office being located in Memphis, Tennessee (USA). Three defendants have been impleaded as parties they being Fedex Securities Ltd. (first defendant), Fedex Stock Broking

Ltd. (second defendant) and Fedex Finance Pvt. Ltd. (third defendant), each of the said companies being incorporated under the Companies Act their respective registered offices concededly being located in Mumbai (State of Maharashtra).

2. The plaintiff company claims to be the world's largest express transportation company popularly known as FEDEX, it providing transportation, e-commerce and business services under the trademark – name FEDEX worldwide, having forayed into the Indian market in 1984, statedly in the wake of acquisition of Gelco Express International (“Gelco”) and through its global service participant- licensee Blue Dart for express delivery of packages in this country, prior to entering into the Indian market independently in 1997 by its regional (or branch) office, also carrying on business in Delhi, it being its principal hub.

3. In the plaint, the first defendant is described as a company engaged in providing financial services catering to various Indian corporates in matters such as management of initial public offering of equity, structuring and issue – both public offer and private placement – of debt instruments, assisting in listing of securities in recognized stock exchanges in India, resource planning and securitization of debts/receivables. The second and third defendants are described in the plaint as group or associate companies of the first defendant, the second defendant being a sub-broker engaged in stock broking activities while the third defendant being a non-banking finance company engaged in extending term and working capital or short term finance, investments etc. using, *inter alia*,

websites with domain names as www.mca.gov.in, www.fedsec.in and www.fedexindia.in.

4. In the suit, the plaintiff makes the following prayers:-

“(a). Pass and pronounce a decree of permanent injunction against infringement of plaintiff’s registered FEDEX trade mark (s) by restraining defendants, their directors, promoters, shareholders, officers, managers, assigns, successors-in-interest, licensees, franchisees, subsidiary/associate/group companies, sister concerns, representatives, servants, distributors, agents, family members, employees etc. and/or any person or entity acting for them from using plaintiff’s trade mark FEDEX or any other word(s) deceptively similar thereto singularly or in conjunction with any other words or monogram/logo, as a trade mark, service mark, corporate name, trade name, trading style, domain name, website address, electronic mail identity or in any other manner whatsoever, on or in relation to or any services/business including advertising, business papers, etc.

(b). Pass and pronounce a decree of permanent injunction against defendants, their directors, promoters, shareholders, officers, managers, assigns, successors-in-interest, licensees, franchisees, subsidiary/associate/group companies, sister concerns, representatives, servants, distributors, agents, family members, employees etc., and/or any person or entity acting for them from passing off their services/business as or for the services/business of plaintiff by restraining them from using plaintiff’s FEDEX trade mark(s) name or any other word (s) deceptively similar thereto singularly or in conjunction with any other words or monogram/logo, as a trade mark, service mark, corporate name, trade name, trading style, domain name, website address, electronic mail identity or in any other manner whatsoever; on or in relation to or any

services/business including advertising, business papers, etc.

(c) Pass and pronounce a decree directing defendants and/or their directors, representatives, officers, etc. to apply to the Registrar of Companies for deletion of the trade mark/name FEDEX from each of their corporate names;

(d) Pass and pronounce a decree of permanent injunction restraining defendants, their directors, promoters, shareholders, officers, managers, assigns, successors-in-interest, licensees, franchisees, subsidiary/associate/group companies, sister concerns, representatives, servants, distributors, agents, family members, employees etc. and/or any person or entity acting for them from applying for and/or obtaining registration from any competent body or Government authority for FEDEX or any other word(s) deceptively similar thereto singularly or in conjunction with any other words or monogram/logo in respect of any trade mark, trade/corporate name, domain name or copyright registration or any other manner whatsoever and/or for the purposes of using the same as a trade mark, service mark, trading style, corporate name, name of a business entity such as a firm or a partnership, website/domain and/or email address and the like;

(e) Pass and pronounce a decree directing defendants and/or their directors, representatives, officers, etc. to forthwith surrender or cancel the domain name fedsec.in and/or any other domain name consisting of and/or containing FEDEX and/or any other word deceptively thereto;

(f) Pass and pronounce a decree directing defendants and/or their directors, representatives, officers, etc. to deliver up to plaintiff for the purpose of destruction/erasure all infringing materials including but not limited to catalogues, pamphlets, brochures, billboards, stationery, business cards, bill books, vouchers, letterheads, signage, reprographic material, labels or any other material bearing the trade

mark/name FEDEX used and/or any other mark deceptively similar thereto used in respect of advertising, selling or marketing defendant's services/business;

(g) Pass a preliminary decree for rendition of account directing defendants to produce before this Hon'ble Court or any person nominated/designated/appointed by this Hon'ble Court all accounts in general and invoices and sales figures/revenues in particular;

(h) Pass and pronounce a final money decree in favour of plaintiff for payment of damages in the sum of INR 2,00,00, 000/- (Rupees Two Crores only) or any such higher sum as may be determined/ascertained pursuant to the rendition of accounts;

(i) Pass and pronounce an order for costs of the proceedings: and

(j) Pass and pronounce any further or other order or directions, as this Hon'ble Court may deem fit or appropriate in the facts and circumstances of the case in favour of the plaintiff and against defendants.

5. The cause of action is pleaded in (para 56 of) the plaint as under:-

“56. Plaintiff first became aware of the domain name/website address www.fedex.india.in being used by defendants on or around October 26, 2011 and brought this cause of action to them by addressing notice to them. The cause of action further arose when counsel for plaintiff directed the legal notice dated March 19, 2012 and reminder letter dated April 9, 2012 to defendants, calling upon them to give up the trade mark/name FEDEX and thereafter on February 1, 2013, when defendants refused to comply with the requisitions of plaintiff. It is humbly submitted that the cause of action is a continuous and recurring one and will continue to subsist and arise afresh on day-to-day basis till such time defendants cease all use of the trade mark/name FEDEX and/or are restrained by this Hon'ble Court”.

6. Since the issue being considered here concerns the territorial jurisdiction, the pleadings of the plaintiff in (para 57 and 58 of) the plaint on the subject need to be extracted as under:-

“57. It is submitted that this Hon’ble Court has the jurisdiction to entertain and try the present suit inasmuch as defendants claim to assist large and medium-sized Indian corporates in project planning, financial structuring, sourcing of debt from banks/financial institutions, arranging working capital assistance and private placement of debt instruments such as debentures, assisting in listing of securities in recognized stock exchanges in India. Defendants offer and advertise their services all over India including in Delhi through their website www.fedsec.in. Therefore, the cause of action has arisen within the territorial jurisdiction of this Hon’ble Court. As per the documents publicly accessible and issued to the public at large inter alia on defendants’ website www.fedsec.in and www.sebi.gov.in of the Securities and Exchange Board of India, defendants are acting as the manager/merchant bankers to and/or market intermediaries for various entities/companies and servicing clients in Delhi, and thus carrying on business and personally working for gain in Delhi. Further, according to defendants’ letter dated February 1, 2013, defendants have been appearing in prominent national dailies in their capacity as merchant bankers. Further, offers made by defendants to public in the capacity of merchant bankers or manager of offer for their clients have been published inter alia in Delhi edition of national dailies with wide circulation such as Business Standard in August 2012. Documents evincing such averments/statements of defendants’ services being propagated in Delhi have been filed as documents with the plaint. The right of plaintiff to exclusively use the trade mark/name FEDEX is inter alia infringed by such advertisements/activities in Delhi, and therefore, this

Hon'ble Court has the jurisdiction to entertain and try the present suit.

58. In addition to the above, it is further submitted that plaintiff has branch and other officers and various centers, stations and locations all over Delhi for provision of its services under the trade mark/name FEDEX; widely promotes the said services and caters to customers in Delhi; and thus carries on business and personally works for gain in Delhi. Plaintiff's FEDEX trade marks, which are the subject matter of the suit, are also registered and have their situs in Delhi. Further, the plaintiff's services are widely availed of by customers in Delhi and transactions made through its website www.fedex.com. It is thus submitted that this Hon'ble Court has the jurisdiction to entertain and try the present suit".

7. The defendants have put in contest to the suit by a joint written statement submitted on 20th August, 2014 raising a number of defences; some of which have been urged for seeking rejection of plaint by another application (IA No. 181378/2014) invoking Rule 11 of Order VII CPC. Since the defendants have chosen to first press the application (IA No.18137/2014) for return of the plaint on the ground of lack of territorial jurisdiction, the relevant pleadings in that regard, as appearing in (para 2.1) (under the heading of preliminary objections) set out in the written statement only need to be noted here (the replies in corresponding paras 56 to 58 referring to such preliminary submissions):-

"2.1 The plaintiff has additionally claimed passing off and has sought to invoke the territorial jurisdiction of this Hon'ble Court on the basis that the defendants offer and advertise their services through their website www.fedsec.in. It is further claimed that the cause of

action has arisen within the territorial jurisdiction of this Hon'ble Court as the documents publically accessible and issued to public at large on the defendants website show that they are acting as the manager/merchant bankers to various entities/companies in Delhi. It is settled law that a mere posting of an advertisement by the defendant depicting its mark on a passive website which does not enable the defendant to enter into any commercial transaction with the viewer in the forum state cannot satisfy the requirement of giving rise to a cause of action in the forum state. Even an interactive website, which is not shown to be specifically targeted at viewers in the forum state for commercial transactions, will not result in the Court of the forum state having jurisdiction.

It is respectfully submitted that none of the defendants carries on business within the jurisdiction of this Hon'ble Court nor has any cause of action or part thereof arisen within the jurisdiction. The plaintiff has deliberately and willfully filed the suit before this Hon'ble Court in order to harass the defendants and put them to great inconvenience and disadvantage. In fact, the plaintiff is indulging in forum shopping, which cannot be allowed under any circumstances in law."

8. The plaintiff has filed a large number of documents with the plaint and defendants refer particularly to document appearing at page 810 (in Vol. IV) of the said documents it indicating the principal place of business of the plaintiff Corporation (USA being its country of incorporation) in India, as registered with the Registrar of Companies in India to be Boomerang, Unit No. 801, Wings A & B1, 8th Floor, Chandivali Farm Road, Andheri East Mumbai, Maharashtra -400072, India.

9. By their application (IA No. 18137/2014) seeking return of the plaint, the defendants submit that none of them carry on business in Delhi nor any cause of action or part thereof has arisen within the jurisdiction of this Court. The defendants submit that mere posting of advertisements depicting their market on passive website would not enable them (the defendants) to enter into any commercial transaction with any viewer here and even if there were an interactive website, the Court in the forum State would not have jurisdiction till it is shown that the defendants specifically targeting viewers located here. Needless to add the application is resisted by the plaintiff reiterating the case made out in the plaint.

10. The plaintiffs rely on *Exfar SA and Ors. vs. Eupharma Laboratories & Ors.* (2004) 3 SCC 688 and *Pfizer Enterprises Sarl v. Cipla Ltd.* 2008 Indlaw Del 1428 (Del.) (DB) to submit that for adjudication on the question of territorial jurisdiction, the averments in the plaint are to be assumed to be correct in entirety, the plaint to be accepted as true, on demurrer. The plaintiff refers to *Anant Construction (P) Ltd. v. Ram Niwas* (1994) 31 DRJ 205 also to submit that the pleadings in written statement, particularly if they are bald denials cannot be given credence at this stage. Reliance is placed on *Govardhan Motels & Restaurants. I. Subramanyam & Anr.* 2008 (36) PTC 513 (Del) to argue that if the defendants are alleged to be soliciting customers or trade in Delhi permitting their business here, catering to customers who are local residents, the cause of action has to be entertained by the local courts. Reference is made to *Rajendran Chingaravelu v. Additional Commissioner of*

Income Tax & Ors. (2010) 1 SCC 810 and Intas Pharmaceuticals Ltd. vs. Allergan Inc. 2006 (32) PTC 272 (Del) (DB) to submit that the court would have territorial jurisdiction even if a part of the cause of action has arisen within its domain.

11. Ordinarily, the question of jurisdiction is to be considered in the light of provision contained in Section 20 CPC which reads as under:-

“Section 20 – Other suits to be instituted where defendants reside or cause of action arises - Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Explanation – A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

12. The plaintiffs in the present case also seek to rely on Section 134 of the Trademarks Act, 1999 which reads as under:-

“134. Suit for infringement, etc., to be instituted before District Court.— (1) No suit—

(a) for the infringement of a registered trade mark; or
(b) relating to any right in a registered trade mark; or
(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered,

shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—For the purposes of sub-section (2), "person" includes the registered proprietor and the registered user."

13. It may be added here that the Copyrights Act, 1957 contains a provision governing the issue of jurisdiction in Section 62 which is *pari materia* similar to Section 134 of Trademarks Act, 1999. The question as to interpretation of Section 134 (2) of the Trademarks Act, 1999 and Section 62 of the Copyrights Act, 1957 with regard to the place where a suit can be instituted were considered by the Supreme Court in the judgment reported as *Indian Performing Rights Society Ltd. v. Sanjay Dalia (2015) 10 SCC 161*. This Court had the occasion to apply the law laid down in *Sanjay Dalia (Supra)*

in another decision dated 20th December, 2016 in the context of similar application for return of the plaint in CS (OS) 3694/2014 *Piruz Khambatta & Anr. Vs. Rajmohan Rupaji Modi & Ors.* (2016 SCC Online Del 6494) and had extracted (in para 23) the following prime holdings in *Sanjay Dalia* (supra) :-

“12. ...In our opinion, the expression “notwithstanding anything contained in the Code of Civil Procedure” does not oust the applicability of the provisions of section 20 of the Code of Civil Procedure and it is clear that additional remedy has been provided to the plaintiff so as to file a suit where he is residing or carrying on business etc., as the case may be....”

“13....The intendment of the Explanation to section 20 of the Code of Civil Procedure is that once the corporation has a subordinate office in the place where the cause of action arises wholly or in part, it cannot be heard to say that it cannot be sued there because it did not carry on business at that place. The linking of the place with the cause of action in the Explanation where subordinate office of the corporation is situated is reflective of the intention of the Legislature and such a place has to be the place of the filing of the suit and not the principal place of business. Ordinarily the suit has to be filed at the place where there is principal place of business of the corporation.”

“16. On a due and anxious consideration of the provisions contained in section 20 of the CPC, section 62 of the Copyright Act and section 134 of the Trade Marks Act, and the object with which the latter provisions have been enacted, it is clear that if a cause of action has arisen wholly or in part, where the plaintiff is residing or having its principal office/carries on business or personally works for gain, the suit can be filed at such place/s. Plaintiff(s) can also institute a suit at a place where he is residing,

carrying on business or personally works for gain de hors the fact that the cause of action has not arisen at a place where he/they are residing or any one of them is residing, carries on business or personally works for gain. However, this right to institute suit at such a place has to be read subject to certain restrictions, such as in case plaintiff is residing or carrying on business at a particular place/having its head office and at such place cause of action has also arisen wholly or in part, plaintiff cannot ignore such a place under the guise that he is carrying on business at other far flung places also. The very intendment of the insertion of provision in the Copyright Act and Trade Marks Act is the convenience of the plaintiff. The rule of convenience of the parties has been given a statutory expression in section 20 of the CPC as well. The interpretation of provisions has to be such which prevents the mischief of causing inconvenience to parties.”

“17.... Where the Corporation is having ordinary residence/principal place of business and cause of action has also arisen at that place, it has to institute a suit at the said place and not at other places. The provisions of section 62 of the Copyright Act and section 134 of the Trade Marks Act never intended to operate in the field where the plaintiff is having its principal place of business at a particular place and the cause of action has also arisen at that place so as to enable it to file a suit at a distant place where its subordinate office is situated though at such place no cause of action has arisen....”

“18. In our opinion, in a case where cause of action has arisen at a place where the plaintiff is residing or where there are more than one such persons, any of them actually or voluntarily resides or carries on business or personally works for gain would oust the jurisdiction of other place where the cause of action has not arisen though at such a place, by virtue of

having subordinate office, the plaintiff instituting a suit or other proceedings might be carrying on business or personally works for gain.”

“19. ... the impediment imposed under section 20 of the CPC to a plaintiff to institute a suit in a court where the defendant resides or carries on business or where the cause of action wholly or in part arises, has been removed. But the right is subject to the rider in case plaintiff resides or has its principal place of business/carries on business or personally works for gain at a place where cause of action has also arisen, suit should be filed at that place not at other places where plaintiff is having branch offices etc.”

21. ... Section 134(2) of the Trade Marks Act is applicable to clauses (a) and (b) of section 134(1) of the Trade Marks Act. Thus, a procedure to institute suit with respect to section 134(1)(c) in respect of “passing off” continues to be governed by section 20 of CPC.”

(emphasis supplied)

14. The law laid down in *Sanjay Dalia* (supra) was summarized in (paras 26 and 27 of) order in *Piruz Khambatta* (supra) thus:-

“26. From the above it is clear that the question of “cause of action” continues to have a co-relation with the issue of territorial jurisdiction. If the cause of action has arisen, wholly or in part, in passing off actions under the Trade Marks Act, the place of institution of the suit for appropriate relief continues to be regulated by the provisions of Section 20 CPC which includes the place where the cause of action, wholly or in part, arises. For infringement suits, by virtue of Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, the plaintiff may bring the case in terms of Section 20 (a) and (b) of CPC at the place where the defendant actually and voluntarily resides or carries on business or personally works for gain which, in the context of a

company, or corporation, is the place where it has its sole or principal office in India.

27. Section 134 of the Trade Marks Act and Section 62 of Copyright Act only add to the remedy permitting the plaintiff to bring an action at a place other than that of the defendant. Since the objective of these provisions is to sub-serve the convenience of the plaintiff, if the cause of action has arisen, wholly or in part, at the same place where the plaintiff resides or carries on business, having its head office, it is not permissible for it to ignore such a place on the pretext that it carries on business at other places as well. In such factual background, it is incumbent that the plaintiff institutes the suit at the place of its ordinary residence, or principal place of business, which is also the place where the cause of action has arisen and “not at other places”. In fact, the jurisdiction of the courts at other places (i.e., the places where the plaintiff may have subordinate/branch office so as to be carrying on business or personally working for gain there) stands “ousted”.

(emphasis supplied)

15. As noted earlier, plaintiff is a corporation incorporated in USA. Whilst it may possibly have some branch office in Delhi, as already noted, the documents filed by the plaintiff show that its principal place of business in India is in Mumbai (State of Maharashtra). Since the plaintiff also relies on Section 20 CPC to contend that cause of action has arisen in Delhi, the moot question begs for consideration and answer is as to whether a case to such effect has been properly set out for invoking the jurisdiction of this Court under Section 20 (c) CPC in which context, as indeed for purposes of Section 134 of the Trademarks Act, 1999, the fact that

the principal place of office of the plaintiff is in Mumbai would remain germane.

16. This Court had the occasion to examine similar issues concerning territorial jurisdiction claimed on the basis of Section 20 (c) CPC on identical prayer for return of plaint under Rule 10 of Order VII CPC in the decision dated 16th February, 2017 in CS (Comm) 1576/2016 *AIA Engineering Ltd. vs. Bharat Heavy Electricals Ltd.* (2017 SCC Online Delhi 7003). The judgments of the Supreme Court in cases reported as *Patel Roadways Limited Bombay vs. Prasad Trading Company* (1991) 4 SCC 270 and *South East Asia Shipping Company Limited vs. Nav Bharat Enterprises Pvt. Ltd.*, (1996) 3 SCR 405 and decisions of the division benches of this Court reported as *Gupta Sanitary Stores vs. Union of India & Anr.*, AIR 1985 Delhi 122 and *Sector Twenty One Owners Welfare Association vs. Air Force Naval Housing Board*, 65 (1997) DLT 81, besides one of a learned single judge of this Court in *Sri Ganesh Research Institute vs. Union of India & Ors.*, 115 (2004) DLT 410 were examined and (in para 37) it was noted thus:-

“37. In South East Asia Shipping Company Limited (supra) the Supreme Court held that an act of defendant is essential to constitute cause of action. The case had been instituted in Delhi against facts wherein the contractual obligation had to be performed at Bombay, the execution of Bank guarantee thereunder executed at Delhi being found not sufficient to confer jurisdiction on Delhi Court. The court did not accept the submissions of plaintiff about jurisdiction of court having been invoked only on account of fact of execution of Bank guarantee and observed thus:-

“..... It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if transverse, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise.....”

(emphasis supplied)

17. And (in para 40) in *AIA Engineering (supra)*, it was held as under:-

*“40. Having regard to the past precedents, particularly the decision of the Supreme Court in *Patel Roadways Limited Bombay (supra)*, the view taken by the learned single judge in *Sri Ganesh Research Institute (supra)* commends itself to be adopted and followed. By virtue of the explanation appended to Section 20 CPC, the defendant company would be deemed to be carrying on business at a place where cause of action arises if it has a subordinate office there even if the principal office were situated elsewhere. For showing cause of action to have arisen at a particular place, the plaintiff must plead and prove some act done by the defendant necessary for accrual of such cause of action.*

(emphasis supplied)

18. Since the plaintiff also relies on pleadings about it being engaged in business in Delhi, the meaning and import of the expression “carries on business” or “personally works for gain”, as

used both in Section 20 CPC and Section 134 of the Trademarks Act, 1999 is relevant. In this context, the views of the Supreme Court in the decision reported as *Dodha House & Patel Field Marshal Institute vs. S.K. Maingi & P.M. Diesel Ltd.* 2006 (32) PTC 1 (as appearing in para 49) to the following effect are relevant:-

“49. The expression 'carries on business' and the expression 'personally works for gain' connotes 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 thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely :-

"(1) 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 that pays him. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does not "carry on business" in

Bombay so as to render itself liable to be sued in Bombay.

(2) The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an "agent" within the meaning of this condition.

(3) To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the mufassil cannot be said to "carry on business" in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance Co. had a branch office was held not maintainable. Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company

through incorporated outside India gets itself registered in India and does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India."

[See Mulla on the Code of Civil Procedure (Act V of 1908) - Fifteenth Edition - Volume I, Pages 246-247.] ""

(emphasis supplied)

19. In (para 42 of) the decision of this Court in *AIA Engineering Ltd.*(supra), BHEL and NTPC being the prime defendants, this Court had further observed, thus:-

"42. One is conscious of the settled law that the doctrine of forum convenience would not strictly apply to ordinary civil litigation governed by the Code of Civil Procedure. But then, as the settled law guides, insignificant or trivial part of the cause of action – which the plaintiff impliedly argued to be emanating from the fact of service of legal notice on principal office of BHEL located in Delhi – cannot be the decisive factor on the question of jurisdiction. As noted in the context of facts concerning the case at hand, the contract documents, as culled out from the tender notice, clearly show that for purpose of adjudication upon dispute arising out of the NTPC-Tender, the jurisdiction of the Courts in Vindhyachal and Unchahar had been specifically provided for. Similar clauses exist in the context of the BHEL-Tender wherein the jurisdiction is intended to be vested in the courts at Hyderabad in the State of Telangana".

(emphasis supplied)

20. The above view expressed by this Court in *AIA Engineering* (supra) is fortified by a decision of a bench of three Hon'ble Judges of the Supreme Court in case reported as *Dashrath Rupsingh*

Rathod vs. State of Maharashtra & Anr. (2014) 9 SCC 129 wherein it was observed:-

“12. We shall take a short digression in terms of brief discussion of the approach preferred by this Court in the context of Section 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as, ‘CPC’), which inter alia, enjoins that a suit must be instituted in a court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides, or carries on business, or personally works for gain, or where the cause of action wholly or in part arises. The Explanation to that Section is important; it prescribes that a corporation shall be deemed to carry on business at its sole or principal office, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. Since this provision primarily keeps the Defendant in perspective, the corporation spoken of in the Explanation, obviously refers to the Defendant. A plain reading of Section 20 of the CPC arguably allows the Plaintiff a multitude of choices in regard to where it may institute its lis, suit or action. Corporations and partnership firms, and even sole proprietorship concerns, could well be transacting business simultaneously in several cities. If sub-sections (a) and (b) of Section 20 are to be interpreted disjunctively from sub-section (c), as the use of the word ‘or’ appears to permit the Plaintiff to file the suit at any of the places where the cause of action may have arisen regardless of whether the Defendant has even a subordinate office at that place. However, if the Defendants’ location is to form the fulcrum of jurisdiction, and it has an office also at the place where the cause of action has occurred, it has been held that the Plaintiff is precluded from instituting the suit anywhere else. Obviously, this is also because every other place would constitute a forum non conveniens. This Court has harmonised the various hues of the conundrum of the place of suing in several cases and has gone to the extent

of laying down that it should be courts endeavour to locate the place where the cause of action has substantially arisen and reject others where it may have incidentally arisen. Patel Roadways Limited, Bombay v. Prasad Trading Company, (1991) 4 SCC 270 prescribes that if the Defendant-corporation has a subordinate office in the place where the cause of action arises, litigation must be instituted at that place alone, regardless of the amplitude of options postulated in Section 20 of the CPC. We need not dilate on this point beyond making a reference to ONGC v. Utpal Kumar Basu (1994) 4 SCC 711 and South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. (1996) 3 SCC 443”.

(emphasis supplied)

21. When this Court observed in afore-quoted part of the decision in *AIA Engineering Ltd.*(supra) that the doctrine of *forum convenience* would not strictly apply to ordinary civil litigation governed by the Code of Civil Procedure, it felt bound by the decision in *Horlicks Limited vs. Henz India Private Limited, 164 (2009) DLT 539 (DB)*. Though it was argued in the matter at hand with relevance of *Dashrath Rupsingh Rathod* (supra) that the doctrine of *forum non-conveniens* may be applied even to civil suits, it only need to be noted that the Supreme Court had referred to the said principle only to find justification for the explanation appended to Section 20 CPC, the location of the defendant at a particular place where the cause of action also has arisen rendering the plaintiff “precluded from instituting the suit anywhere else”.

22. Be that as it may, the view taken in *AIA Engineering Ltd.*(supra) that “insignificant or trivial part” of the cause of action

cannot be the decisive factor on the question of jurisdiction is strengthened by the view of the Supreme Court in *Dashrath Rupsingh Rathod* (supra) that the jurisdiction cannot be invoked at a place where cause of action has “*incidentally arisen*”.

23. The plaintiff also alleges cause of action to have arisen in Delhi because the defendants offer and advertise their services all over India, including in Delhi, through their websites referred to earlier as also by advertisements published in newspapers or having wide circulation including in Delhi. In a decision of a division bench of this Court reported as *Banyan Tree Holding (P) Ltd. Vs. A. Murali Krishna Reddy & Anr.* 2010 (42) PTC 361 (Del.) (DB), the factual background was more or less similar. It was an action for passing off where neither the plaintiff nor the defendants were located within the territorial jurisdiction of this Court. It appears the defendants had advertised their project, which was at the root of the cause of the action pleaded, through their website which could be accessed through the internet anywhere including in Delhi. The learned single judge had referred certain questions of law for opinion to be rendered thereupon by the larger bench. The division bench re-framed the questions and answered them thus:-

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

Question (i): For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the Defendants lends

jurisdiction to such Court where such suit is filed ("the forum court")?

Answer: For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the Plaintiff would have to show that the Defendant "purposefully availed" itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state.

Question (ii): In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?

Answer: For the purposes of [Section 20 \(c\) CPC](#), in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant the Plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive", was specifically targeted at viewers in the forum state for commercial transactions. The Plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state resulting in an injury or harm to the Plaintiff within the forum state.

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

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

(emphasis supplied)

24. It may also be advantageous to extract the following views of this Court in (para 42 of) the decision in *Banyan Tree Holding (P) Ltd.* (supra) :

"42. This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined. For the "effects" test to apply, the Plaintiff must necessarily plead and show prima facie that the specific targeting of the forum state by the Defendant resulted in an injury or harm to the Plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the Plaintiff's business, goodwill or

reputation within the forum state as a result of the Defendant's website being accessed in the forum state would have to be shown. Naturally therefore, this would require the presence of the Plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the Plaintiff it would have to be shown that viewers in the forum state were specifically targeted. Therefore the "effects" test would have to be applied in conjunction with the "sliding scale" test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes

(emphasis supplied)

25. Having regard to the averments in the plaint, it is clear that the defendants invoke jurisdiction of this Court primarily on three grounds (i) that the defendants advertise their offer all over India including in Delhi through their website www.fedsec.in; (ii) that the defendants are acting as the manager/merchant bankers to and/or market intermediaries for various entities/companies and servicing clients in Delhi and thus carrying on business and working for gain in Delhi; and (iii) that the defendants have been appearing in prominent national dailies in their capacity as merchant bankers; offers made by the defendants to public in the capacity of merchant bankers or manager of offer for their clients have been published *inter alia* in Delhi edition of national dailies with wide circulation such as Business Standard in August, 2012.

26. The last two mentioned averments are sought to be substantiated by documents (appearing at pages 959-1019 of Vol. V) of plaintiff's documents. A perusal of the said documents,

however, shows that they pertain only to the first defendant and not to the other two, the place of target companies being in Mumbai, documents in the nature of public announcements to equity shareholders listing the address of the first defendant in Mumbai, the article in Business Standard making no reference whatsoever to Delhi, it even otherwise having no nexus with the defendants, having been sourced from Bombay Stock Exchange (BSE). As regards the first mentioned averment concerning the advertisement of service on website, as pointed out by the defendants, there is no averment that the websites are specifically targeting customers in Delhi or that the website is an interactive one from which it would be or has been possible to conclude commercial transactions.

27. It is well settled that for adjudication on the question of territorial jurisdiction in the context of prayer for rejection or return of the plaint, the pleadings in the plaint are to be assumed to be correct and for this purpose, the defences taken in the written statement are not to be looked into and further that even if part of cause of action is shown to have arisen within the jurisdiction of the forum court, the case is bound to be entertained by it. The pleadings in the case at hand, however, fail to make out a case that would fall within the jurisdiction of this court. The averments made by the plaintiff, based primarily on the material referred to above, do not show that the defendants are working for gain in Delhi. The advertisements published of the offers made by them to the public at large in the capacity of merchant bankers or merchant intermediaries have come with clear declarations of their location in

Mumbai, which is the place where they have their registered offices. The reference to the website whereby commercial transactions are statedly offered do not pass the muster of *Banyan Tree Holding P. Ltd.* (supra), also because there is not even a single illustration given of any such commercial transaction having been entered into by the defendants with any user of their website within the territorial jurisdiction of this court.

28. While this court concludes that the pleadings in the plaint do not make out a case of cause of action having arisen, even in part, in Delhi, it must be added that the plaintiff is also the guilty of suppression of relevant and material facts. As noted earlier, the pleadings in the plaint are silent as to the fact, but one of the documents filed in the voluminous material submitted in support reveals, that the registered office of the plaintiff corporation in India is located in Mumbai. The plaintiff could not expect the court to go through the voluminous documents to find out the facts, particularly such facts as deserve to be mentioned upfront in clear terms in the plaint. [See *order dated 13.01.2010 in FAO (OS) 28/2010, Aero Club Vs. Timberland*]. For invoking the jurisdiction of the court in Delhi under Section 134 of the Trademarks Act, 1999, it was incumbent upon the plaintiff to plead and show that it actually and voluntarily resides or carries on business or personally work for gain within its territorial limits. This obviously could have been shown with reference to the location of the registered office of the plaintiff in Delhi. The fact that the registered office of the plaintiff is in Mumbai, omission to make a pleading in this regard in the

plaint appears to be deliberate. Needless to add, such conduct would disentitle the plaintiff to equitable relief from the court. [Section 41(i) of Specific Reliefs Act, 1963].

29. Be that as it may, it is clear from the above that the plaint has been wrongly presented in this court. Since the defendants are located in Mumbai, the High Court of Judicature at Bombay would have been the appropriate court of jurisdiction, as was conceded at the hearing on 27.03.2017 when it was submitted that in the event of application under Order VII Rule 10 CPC (IA 18137/2014) being allowed, the plaintiff would seek appropriate direction in terms of order VII Rule 10A CPC, opting to present the plaint for further proceedings in the High Court of Judicature at Bombay.

30. For the foregoing reasons, the application for return of plaint (under Order VII Rule 10 CPC) is allowed. The plaint of the suit at hand stands returned. On the oral application made, the plaintiff is granted the liberty to have the plaint returned in terms of Order VII Rule 10A CPC for it to be presented before the High Court of Judicature at Bombay (in the State of Maharashtra) on 01.05.2017. The Registry shall take necessary steps accordingly.

31. The suit and the applications filed therewith, as presented before this court, stand disposed of in above terms.

(R.K. GAUBA)
JUDGE

APRIL 11, 2017
nk/yg