

Brooke Bond India Limited vs Balaji Tea (India) Pvt. Ltd. on 25 November, 1992

Equivalent citations: (1993)2MLJ132

JUDGMENT

Mishra, J.

1. The appellant's application for an interim injunction restraining the defendant/ respondent from committing any infringement of its copyright in the artistic work filed as document Nos. 1 and 2 along with the plaint till the disposal of the suit, its application for an injunction restraining the defendant from infringing its trade mark Nos. 301187 and 250152 in Clause 30 filed as document Nos. 3 and 4 till the disposal of the suit; its application for an injunction restraining the defendant from passing off its goods as that of the plaintiff/appellant using the impugned label; and its application under Clause 14 of the Letters Patent for leave to combine the causes of action for infringement of trade mark and for passing off along with the suit for infringement of copyright have been dismissed by common order by a learned single Judge of this Court. The appellant herein has invoked Clause 15 of the Letters Patent and preferred these appeals.

2. Since the learned single Judge has found that the plaintiffs/appellant's application under Clause 14 of the Letters Patent for leave to combine the causes of action for infringement of trade mark and for passing off along with the suit for infringement of copyright should not be ordered, he has for that reason also held that this Court has no jurisdiction to entertain the suit with reference to infringement of trade mark and passing off. In the application for injunction restraining the defendant from committing any infringement of the copyright learned Judge has said that prima facie no infringement of copyright has been made out.

3. The plaintiff has claimed that its business established in the year 1912 as manufacturers, marketers and exporters of tea and other consumer goods on a large scale with an annual sales turnover of about Rs. 400 crores has gained very valuable reputation and goodwill especially in the tea trade, one of the popular brands of tea selling with the banner "Super Dust Tea" since 1968 in various sizes and packets. The marketing of tea with the banner "Super Dust Tea" was/is being done under four registered trade marks and two other trade marks for which applications have been filed for registration. The essential features of the series of trade marks are the unique colour combination of green background, the words "Super Dust Tea" in white and the floral get-up in different shades of red and pink in all the packings with slight variation in the get-up designed to suit the sizes of the packet carrying different quantities of tea. In January, 1987 the plaintiff introduced a yellow circle in which the words "Super Dust Tea" are printed in red and green. Since three months prior to the filing of the suit, the plaintiff noticed in markets in the region of Nagpur and Visakapatnam tea packets marketed by the defendant in cartons having the substantial features

of the plaintiffs cartons. The defendant's carton, according to the plaintiff, is deceptively similar to the plaintiffs carton and reproduces substantially all the essential features of the plaintiffs artistic work, The plaintiffs "Super Dust" in red and "Tea" in green (learned single Judge has also noticed), as alleged by the plaintiff, are reproduced by the defendant's "Super Star" in red and "Tea" in green and just as the plaintiffs banner is encircled in a yellow circle, the defendant's banner is surrounded by a yellow star of similar dimension. Below the banner, the plaintiffs flowers in different shades of red with green leaves are copied by the defendant. The plaintiffs yellow piping on the left hand top with the word "New" in red is reproduced by the defendant with the similar piping containing in red letter "Fresh Assam Tea". The plaintiffs colour scheme of green background and employing yellow, pink and green for its artistic work have been copied. Above all, the concept of flowers and leaves associated with tea, has been captured by the defendant. The defendant has adopted the impugned label with the sole view of drawing upon the immense reputation and goodwill acquired by the plaintiff in respect of its tea sold in packets containing its wrapper used since 1968. The sale of tea packet with the impugned label has given rise simultaneously to three causes of action-infringement of plaintiffs registered trade mark, passing off and infringement of the plaintiff's copyright.

4. The plaintiff has got one of its main branch office at Madras, according to-it, accounting for nearly 35% of the sales turnover in India. Along with the suit, it filed the abovementioned four applications. After notice, the defendant appeared with its return to all the applications. In the applications for interim injunction in the copyright suit, trade mark, passing off and for leave to combine the cause of action the learned single Judge has summarised the defendant's plea as follows:

This Court has no jurisdiction since the defendant company is situated and carrying on business at Raipur. The defendant has riot sold even a single packet within the jurisdiction of this Court and the defendant's sales are mostly confined to Madhya Pradesh only. Even the allegation in paragraph 11 of the plaint that the plaintiff has been noticing in markets in the regions of Nagpur and Visakhapatnam, tea packets marketed by the defendants would disentitle it to file the suit in this Court. It is not as if the plaintiff has no branch office in the places where the defendant's products are said to have been seen being sold or that there are no courts in the said places. It is also false to state that the products were seen in the market at Visakhapatnam. The defendant has applied for registration of its trade mark to the Trade Marks Registry at Bombay on 8th January, 1988 and the number of the application is 483987. The product in question is an excisable commodity. For moving any quantity of the product, even samples from the factory of the defendant excise records will have to be maintained under the relevant rules and such records maintained by the defendant would show that the sales of the defendant's products are confined to Madhya Pradesh and Orissa and that nothing has been sold to any person within the jurisdiction of this Court. No notice was issued by the plaintiff prior to the institution of the suit to the defendant. A few sample bills are filed along with the counter affidavit to prove that the sales are confined to Madhya Pradesh. The defendant has been carrying on business of manufacturing and selling Balaji Super Star Tea from 1.4.1988. The photo copy of the first cash bill dated 1.4.1988 is filed along with the counter affidavit and referred as Annexure A. Even before commencing the sale, the

defendant conceived the mark in question on 6.2.1988 and the invoice for the labels printed is filed as Annexure B. The sales turnover of the defendant's products are furnished in Annexure C. The defendant has been openly advertising its trade marks in various newspapers and magazines, photo copies of which are filed as Annexure D. The marks of the defendant are totally dissimilar and there has not been a single instance of confusion from 1.4.1988 till date. The colour scheme adopted by the defendant is common to tea trade and the same colour scheme is being used by various tea manufacturers. Any purchaser, literate or illiterate, would only ask for Brook Bond Tea and there cannot be any confusion between the plaintiffs product and the defendant's product in any view of the matter. The plaintiff has no exclusive registration for "Super Dust" or "Tea". It would be a great injustice that the plaintiff should drag the defendant all the way from Madhya Pradesh to this Court solely on the ground that the plaintiff has a branch office at Madras. On the ground of balance of convenience, the plaint should be returned. The action has been initiated with ulterior motives and it is a sheer abuse of process of Court. Hence, the applications are not maintainable in law and should be dismissed.

On the question, whether this Court has jurisdiction to entertain the suit, the learned single Judge has said, it is very easily answerable:

There is no doubt that this Court has got jurisdiction to entertain this suit in view of the provision of S.62(2) of the Copyright Act. The plaintiff has made an allegation in the plaint that its copyright has been infringed by the defendant and a prayer for injunction restraining the defendant from committing such infringement is made in the plaint. Hence, the suit is one falling under Chapter XII of the Copyright Act, 1957. Section 62(1) of the Act provides that every suit arising under the said Chapter in respect of the infringement of copyright shall be instituted in the District Court having jurisdiction. Sub-clause (2) of Section 62 of the Act explains that for the purpose of Sub-section (1), a 'District Court having jurisdiction' shall include a District Court within the local limits of whose jurisdiction at the time of the institution of the suit, the person instituting the suit actually and voluntarily resides or carries on business or personally works for gain. It is not in dispute that the plaintiff carries on business within the jurisdiction of this Court at the time of the institution of this suit. In so far as the City of Madras is concerned, this Court is the 'District Court having jurisdiction' within the meaning of Section 52(1) of the Act. Vide: *The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern*. Hence, the question is answered in favour of the plaintiff.

In answer to the second question, whether leave should be granted to combine the three causes of action, however, the learned single Judge has said:

When a person comes to Court claiming relief on the allegation of infringement of copyright, it is essential for him to set out in the plaint the details relating to the ownership of the copyright. Particularly when the plaintiff is not an individual but a

corporate body it should be stated clearly as to who is the author of the artistic work in which copyright is claimed and as to how the plaintiff claims to be the owner of the same. This is not a case in which the plaintiff had registered its work under the Copyright Act. I do not for a moment say that registration under Copyright Act confers any right of ownership. But, the registration would be prima facie evidence of the claim made by the plaintiff on a particular date. It must be possible for the plaintiff in the course of the trial to let in evidence on those aspects, but, at this interlocutory stage, the court has to take note of the absence of any pleading with regard to the same.

And proceed thereafter to say on Clause 14 of the Letters Patent as follows:

The clause only enables the court to call on the defendant to show cause why the several causes of action should not be joined together in one suit. The language is quite significant. It uses the terms "It shall be lawful for the said High Court". That shows that it is not a mandatory provision and it is only directory in nature. It is entirely in the discretion of the Court to permit the joinder of several causes of action in one suit depending on the facts and circumstances of each case. The cause of action in respect of which this Court has jurisdiction is the alleged infringement of copyright. It is by virtue of Section 62(2) of the Copy-right Act, this Court gets jurisdiction to entertain the suit. Sub-section (2) of Section 62 of the Act makes a departure from the normal law that a suit should be instituted at the place where the defendant resides or carries on business or personally works for gain. The language of Sub-section (2) is also significant. The sub-section only includes a Court within whose jurisdiction the plaintiff resides or carries on business etc. It is very clear that the plaintiff is given a choice of forum and he can institute the suit either in the District Court of the place where the defendant resides or carries on business according to the general law or at the place where he himself resides Or carries on business. The section does not say that a suit for an infringement of copyright shall be instituted only in the court within whose jurisdiction the plaintiff resides or carries on business. The district court in whose jurisdiction the alleged cause of action has arisen, that is to say where the defendant has committed an infringement, has also jurisdiction to entertain the suit. It is in that context, the question whether leave should be granted to the plaintiff to combine the three causes of action, two of which admittedly have not arisen within the jurisdiction of this Court, has to be considered. The judicial discretion vested in the court under Clause 14 of the Letters Patent has to be exercised with care and caution. The circumstances which are relevant to be considered in exercising the discretion are, whether the plaintiff is in such a situation, financially or otherwise, that it will be very difficult for him to institute the suit at the place where the cause of action has arisen or where the defendant resides or carries on business and whether the defendant will find it so difficult as to contest the action effectively. In a way the balance of convenience, has to be considered by the Court. If the plaintiff satisfies the Court that it will be very difficult for him on account of some reason or other to approach the court within whose jurisdiction the cause of action

has arisen or the defendant resides or carries on business, the Court will be inclined in such cases to grant leave to combine the causes of action. If in a given case, the court finds that there is no explanation or justification for the plaintiffs making a departure from the general law and invoking the special provision under Section 62(2) of the Copyright Act, the Court shall refuse to permit the plaintiff to combine the causes of action. There is no dispute in this case that the plaintiff is having branches all over India and there will be no difficulty whatever for the plaintiff to institute a suit in Visakhapatnam or Nagpur where the plaintiff is alleged to have noticed in the market the sale of defendant's tea packets oral Raipur where the defendant is having its office...The averment in the plaint is to the effect that the plaintiff has a right to approach this Court by virtue of Section 62(2) of the Copyright Act. No doubt it may be so. But on the facts and circumstances of this case, the use of the process of this Court will amount to abuse or misuse of the same. Admittedly, the defendant is a small trader having started business recently. To drag him all the way from Raipur to Madras would in effect deprive him of an opportunity to have a fair trial as he may not be in a position to defend the action effectively, particularly in a case where the averments found in the plaint do not contain the required particulars for making out the only cause of action which is said to have arisen within the jurisdiction of this Court. It will be a travesty of justice to permit the plaintiff to combine two other causes of action which have admittedly arisen elsewhere.

5. We do not think it necessary to go further into the various aspects of the case that the learned single Judge has discussed in his judgment and we shall presently see as to what may be necessary for attracting Clause 14 of the Letters Patent and when. It is conceded when the suit in one part for the relief as to the copyright is maintainable exercising jurisdiction to amalgamate such causes of action that are closely allied and associated with the trade and business of the plaintiff and defendant in which trade and business the copyright is involved, the court should avoid multiplicity of the suit, and order joinder of causes of action. But, before we say anything further in this behalf, we may extract the relevant provisions of the Copyright Act. Section 14 of the Copyright Act, 1957, gives the meaning of copy right as the exclusive right by virtue of and subject to the provisions of the Act:

(a) in the case of a literary, dramatic or musical work, to do and authorise the doing of any of the following Acts, namely:

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to perform the work in public;

(iv) produce, reproduce, perform or publish any translation of the work;

(v) make any cinematograph film or a record in respect of the work;

(vi) to communicate the work by broadcast or to communicate to the public by a loudspeaker or any other similar instrument the broadcast of the work;

(vii) to make any adaptation of the work; (viii) to do in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (vi);

(b) in the case of an artistic work, to do or authorise the doing of any of the following acts, namely;

(i) to reproduce the work in any material form;

(ii) to publish the work;

(iii) to include the work in any cinematograph film;

(iv) to make any adaptation of the work;

(v) to do in relation to an adaptation of work any of the acts specified in relation to the work in clauses (i) to (iii);

(c) in the case of a cinematograph film to do or authorise the doing of any of the following acts, namely,

(i) to make a copy of the film;

(ii) to cause the film, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public,

(iii) to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track;

(iv) to communicate the film by broadcast;

(d) In the case of a record to do so or authorise the doing of any of the following acts by utilising the record namely:

(i) to make any other record embodying the same recording;

(ii) to cause the recording embodied in the record to be heard in public;

(iii) to communicate the recording embodied in the record by broadcast.

With a clarification that the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a substantial part thereof, the copyright, which is the creature of the Copyright Act, can be found in works that are enumerated in Section 13 thereof, which says:

...that is to say (a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) records, but shall not subsist in any work other than a work to which the provisions of Section 40 or Section 41 apply, unless, in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead, at that date, was at the time of his death, a citizen of India; in the case of an unpublished work other than an architectural work of art, the author is at the date of the making of the work a citizen of India or domiciled in India; and in the case of an architectural work of art, the work is located in India. There is an explanation also, which says: "In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

(3) Copyright shall not subsist-

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any record made in respect of a literary, dramatic or musical work, if in making the record, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made.

(5) In the case of an architectural work of art, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

The word 'exclusive' in the definition of copyright in Section 14 vindicates that the owner of the copyright alone has the sole right and further he has the right to exclude all others from reproducing his work without his permission. If anybody else does any of the acts mentioned in Section 14 without the authority of the owner of the copyright, the owner of the copyright can maintain an action for infringement of his copyright against the wrong doer. This exclusive right is intended to prevent the appropriation of an author's labour, skill and capital by another. Who the owner is, however, has to be understood first with reference to the definition of first owner of copyright, as engrafted in Section 17 of the Act, and in such other provisions, wherein the owner of the copyright in existing work or the prospective owner of the copyright in a future work, is defined as well as provisions which provide that the owner may assign to any person the copyright either wholly or

partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof.

In such assignments, one may find the transfer of a particular right, leaving nothing in the assignor of that particular right or bestowing on the assignee the whole of the legal interest in the right assigned. It is perhaps for the reasons of the transfers of copyrights, the reasons of relinquishment of the copyright by the author in certain cases and like reasons that a whole scheme of licensing besides assignment of the copyright has been recognised in the Act and dealing with civil remedies, a definition in Section 54 has been introduced, which reads as follows:

For the purposes of this chapter, unless the context otherwise requires, the expression 'owner of copyright' shall include-

- a. an exclusive licensee;
- b. in the case of an anonymous or pseudonymous literary, dramatic musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise established to the satisfaction of the Copyright Board by that author or his legal representatives.

When copyright is infringed has been dealt with in Section 51 of the Act, which says, Copyright in a work shall be deemed to be infringed--

a. When any person, without a licence granted by the owner of the copyright or the Registrar of copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act-

(i) does anything, the exclusive right to do which is by this act conferred upon the owner of the copyright/or

(ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for believing that such performance would be an infringement of copyright, or

(b) when any person-

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or,

(iv) imports into India, any infringing copies of the work:

Provided that nothing in Sub-clause (iv) shall apply to the import of two copies of any work, other than a cinematograph film or record, for the private and domestic use of the importer. Explanation: For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an 'infringing copy'.

These provisions do show that when the author of the work is known, he is the owner and has got the exclusive right. If the author has assigned to someone or has given a licence, that someone is the owner. However, if no such person is known and the work is anonymous or pseudonymous, the ownership has to be found in the publisher of the work until the identity of the author or the identity of any of the authors in the case of joint authorship, is disclosed publicly by the author and the publisher or is otherwise established to the satisfaction of the Copyright Board or by that author or his legal representatives. Civil remedies for infringement of copyright are remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for infringement of a right (see Section 55 of the Copyright Act, 1957). When a person come to Court claiming relief on the allegation of infringement of copyright and he is the author, or the owner of the copyright, he says so and alleges the particular right and its violation. In paragraph 8 of the plaint, the plaintiff has said:

The plaintiffs have, spent considerable amounts extending to crores of rupees by way of publicity expenses for popularising their Trade Marks under which 'Super Dust Tea', is sold. The plaintiffs have carried out the publicity all over India through Television, Cinema slides, hand bills, newspapers and magazine advertisements. The plaintiffs have also carried out direct publicity in the rural areas through propaganda vans and local cinema projections, at fairs, melas and festivals. Last year they spent about Rs. 1.6 crores on publicity and advertisement.

In paragraph 9, the plaintiff has said:

The essential features of the above artistic creation is as hereunder:

Brooke Bond

(i) The words 'Super Dust Tea' written in red and green letters in a distinctive manner in yellow circular background.

- (ii) Green background of the entire label.
- (iii) A distinctive colour combination of green, white, pink, red, etc.
- (iv) Floral get-up consisting of two Roses one Red and another Pink with stems and few other flowers in a row.

According to the plaint, the unique colour combination of green background, the words 'Super Dust Tea' in white and the floral get-up in different shades of red and pink are the associated trade marks, four registered and two unregistered with slight variations in the get-up have a singular unique distinctive identity, in conception, colour scheme, lettering of the words and the floral get-up and in January, 1987, it introduced an yellow circle in which the words 'Super Dust Tea' are printed in red and green. It has left no manner of doubt in the plaint that it is the publisher of the work, and in the absence of any identity of the authors disclosed or established, the definition in Section 54(b) of the Copyright Act, is attracted upon which the above rule of presumption should be invoked. It is indeed not at all essential for a publisher, in view of the above, to set out in the plaint the details relating to the ownership of the copyright. It is not possible for the said reason, to agree with the observations of the learned single Judge that particularly when the plaintiff is not an individual, but a corporate body, it should be stated clearly as to who is the author of the artistic work in which copyright is claimed and as to how the plaintiff claims to be the owner of the same. If in such a case, the presumption is not available, as we have found, there shall be no case where, in the absence of the identity of the author established or known, any civil remedy for infringement of copyright can be made available to a person, who had the privilege of publishing any anonymous or pseudonymous work.

6. Learned single Judge has held that the plaintiff /appellant's suit alleging infringement of copyright is maintainable in this Court. He has referred to Section 62(1) of the Copyright Act and Sub-section (2) thereof which explains that for the purpose of Sub-section (1), a "District Court having jurisdiction" shall include a District Court within the local limits of whose jurisdiction at the time of the institution of the suit, the person instituting the suit actually and voluntarily resides or carries on business or personally works for gain, and said, It is not in dispute that the plaintiff carries on business within the jurisdiction of this Court at the time of the institution of this suit and in so far as the City of Madras is concerned, this Court is the "District Court having jurisdiction" within the meaning of Section 62(1) of the Act.

He is not in error in coming to the said conclusion. This aspect of the law has been fully expounded in a judgment of this Court in the case of *The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern*. He has, however, said as we have noticed above on Clause 14 of the Letters Patent that it enables the Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and proceeded to say once again with reference to Section 62(2) of the Copyright Act that this makes a departure from the normal law that a suit should be instituted at the place where the defendant resides or carries on business or personally works for gain, and The sub-section only includes a Court within whose jurisdiction the plaintiff resides or carries on business etc. It is very clear that the plaintiff is given a choice of forum and he can

institute the suit either in the District Court of the place where the defendant resides or carries on business according to the general law or at the place where he himself resides or carries on business. The section does not say that a suit for an infringement of copyright shall be instituted only in the Court within whose jurisdiction the plaintiff resides or carries on business. The District Court in whose jurisdiction the alleged cause of action has arisen, that is to say, where the defendant has committed an infringement, has also jurisdiction to entertain the suit.

Having said as above, learned single Judge has posed the question whether leave should be granted to the plaintiff to combine the three causes, of action two of which admittedly have not arisen within the jurisdiction of this Court and said, The Judicial discretion vested in the Court under Clause 14 of the Letters Patent has to be exercised with care and caution. The circumstances which are relevant to be considered in exercising the discretion are, whether the plaintiff is in such a situation, financially or otherwise, that it will be very difficult for him to institute the suit at the place where the cause of action has arisen or where the defendant resides or carries on business and whether the defendant will find it so difficult as to contest the action effectively; in a way the balance of convenience has to be considered by the Court.

He has concluded on the facts of the case that "defendant/respondent is a small trader having started business recently. To drag him all the way from Raipur to Madras would in effect deprive him of an opportunity to have a fair trial as he may not be in a position to defend the action effectively". He has once again reiterated:

Particularly in a case where the averments found in the plaint do not contain the required particulars for making out the only cause of action which is said to have arisen within the jurisdiction of this Court, it will be a travesty of justice to permit the plaintiff to combine two other causes of action which have admittedly arisen elsewhere.

7. If we may say so with respect, the particulars that learned single Judge wanted in the plaint are facts that according to the learned single Judge would show who the owner of the copyright is, viz., who is the author of a work. According to him, 'there is no whisper in the plaint that the author of the artistic work in question was in the employment of the plaintiff at the time when the work was made or that the work was made in the course of the author's employment under a contract of service or apprenticeship with the plaintiff. These averments, according to the learned Judge, not only affected the first question whether the Court has jurisdiction to entertain the suit but also the second whether leave should be granted to combine the three causes of action in that suit.

8. There has not been much contest before us of the type, it appears that caused a deflection of the main issues at the stage of deciding whether the plaintiff should be granted relief to combine such causes of action which, otherwise, required institution of any suit elsewhere, but not in this Court. Clause 14 of the Letters Patent reads as follows:

And we do further ordain that where plaintiff has several causes of action against defendant, such causes of action not being for land or other immovable property, and

the said High Court shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as the said High Court shall deem fit.

It is conceded and the learned single Judge has also found that the copyright action in this Court is maintainable and there is no defect in the suit in this behalf. We have found that it was only because the court's attention was not drawn to the definition of the expression 'owner of copyright' in Section 54 of the Copyright Act, Court proceeded on the footing that it was necessary that particulars as to who is the author who has claimed the copyright and how the copyright has been transferred to the plaintiff, are essential. Once it is found that copyright suit is maintainable why the plaintiff decided to sue in this Court can hardly be a question to bother any person. Plaintiff has filed the suit in a proper court. The suit has no defect. The suit shall proceed and the defendant in the suit thus shall have to contest and finally take the judgment of the Court in the copyright action. If other issues for which separate action can be taken but this Court shall be competent to go into them only if they are causes of action which should be joined with the copyright action, how could it be that for copyright action parties should be in this Court, but for other actions they should be forced to go to courts at other places. What is lawful for a court is always just and proper. How could one argue that it is lawful for the court to call upon the defendant to show cause why several causes of action should not be joined together in one suit and to make such order for trial of the same, but it is unjust if such a lawful order is passed? Learned single Judge has precisely said so when he has said, "Clause 14 of the Letters Patent enables the Court to join several causes of action but before ordering for such Joinder of causes of action the Court shall examine the issue of convenience."

9. In granting leave to sue on a cause of action only partly arising within the jurisdiction of the court the principle of balance of convenience is no doubt applied. The principle of balance of convenience which is an expansion of the doctrine in forum convenient has been considered in a judgment of this Court in *Seshatri Row v. Nawab Askur Jung Aftaldowlah Mushral Mulk* I.L.R. 30 Mad. 438. It has been observed in the said judgment:

Having regard to the wording of Article 12 it is clear that the fact that the cause of action arises in part within the local limits is not conclusive, and that, notwithstanding that the cause of action arises in part within the local limits, the court may decline to give leave to sue.

As regards the law of this country, so far as we are aware it has never been held that the question of convenience is not a question which may be taken into consideration in dealing with applications under Clause 12 and we are certainly not prepared to hold that this question should be excluded from consideration.

This view has been reiterated in several judgments of the courts having original jurisdiction and in a recent judgment of this Court in the case of Tuticorin Alkali Chemicals and Fertilizers Limited v. Cochin Silicate and Glass Industries , it is said:

But then, in considering the balance of convenience, the court is required to see the plaint and the facts stated therein. The court has to necessarily see the entire bundle of facts and then to determine the question of convenience. Stating, though with respect to grant of interlocutory injunctions, in Halsbury's Laws of England, Third Edition, Vol.21 at pages 364 and 365, the balance of convenience is stated as follows:

Where any doubt exists as to the plaintiffs right, or/his right is not disputed, but its violation is denied , the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff.

We do not say that in considering the balance of convenience as to the forum for instituting a suit, it would be necessary (like the principles of injunction) to see the ultimate injury that a party may suffer but we do find support to our view and we state in no uncertain terms that in deciding whether to refuse leave or not, it would be necessary to see on facts and not, on assumptions, who shall suffer-the plaintiff or the defendant-if the leave is granted or refused, as the case may be.

10. A learned single Judge of the Bombay High Court had before him a composite suit like the one in the instant case, in the case of Burroughs Wellcome (India) Limited v. G.K. Sharma, etc, (1989)¹ P.L.R. 60. He has noticed the argument of the parties on Clause 14 of the Letters Patent of the Bombay High Court which is similar to Clause 14 of this Court and has said, Shri Mehta submits that the principle underlined by Clause 14 of the Letters Patent is to avoid multiplicity of litigation. The submission is correct and deserves acceptance. The infringement of trade mark and passing-off and the cause of action pertaining to the infringement of copyright arise out of the action of defendant in selling medicinal preparations and though different causes of action arise, all these causes relate to the same action. As Bombay High Court has jurisdiction to entertain the Suit in respect of cause of action relating to infringement of copyright cause of action in respect of infringement of trade mark and passing off should be permitted to be joined in the suit. In these circumstances, in my judgment this is a fit case to grant leave under Clause 14 of the Letters Patent.

We are in respectful agreement with the above view. The underlying purpose is to avoid multiplicity of the suits. If the facts in totality are in a bundle giving cause as to infringement of copyright for which action on the Original Side of this Court is valid, other causes of action at other forums no doubt in the same bundle should not be separated; to give rise to multiplicity of proceedings. We fail

to understand how learned single Judge has found it helpful to a weak defendant pitched against a strong plaintiff by the order that he, has made that copyright suit shall proceed on the Original Side of this Court and the infringement of trade mark rights or passing off action would go to other forums. Will the defendant be able to save any expenses by coming to the court at Madras in the copyright suit and going to other parts of the country to meet the actions for the alleged infringement of trade mark rights and passing off?

11. We have no reasons to think that if the law permits a person to institute a suit at a forum of his choice and that person exercises his discretion and chooses a particular court for action he abuses the process of the Court. Learned single Judge has noticed and rightly said that S.62 of the Copyright Act permits a deviation from the general law. But then, that gives a discretion to the litigant to decide the forum. It is his choice and not the choice of the court. No exception can be taken if his discretion is not to the liking of the court. Learned single Judge has in this behalf said at quite a few places in his judgment that the court may not in such cases be in a position to dismiss the suit as not maintainable or is one filed in a court without jurisdiction yet has said, 'but the court will certainly refuse to grant relief to him'. We are recording our disagreement. No Judge can afford to deny a relief if in law and in equity such relief is available to a party, evidently not for the reason that he does not like the choice of the forum and the action in court by a litigant. Since we have taken the view that the copyright action emerges from the same bundle of facts from which the trade mark and passing off actions emerge and the copyright action is maintainable in this Court (learned single Judge has also so found), we are of opinion that it will not serve the ends of justice if leave is refused for joinder of causes of action falling under the Copyright Act and the Trade and Merchandise Marks Act.

12. We have been, however, spared of going into the question whether there should be interim relief or injunction granted in the instant cases for, an affidavit has been filed on behalf of the defendant stating that 'at present the respondent-company is not using the label as found in the plaint document No. 3' and further 'the respondent undertakes to inform this Hon'ble Court and the appellant if for any reason they propose to use the said label for their tea business'. The undertaking, in our opinion, is more than enough for the present for the plaintiff.

13. For the reasons and conclusions aforementioned O.S.A. No. 279 of 1989 is allowed. Consequently Application No. 505 of 1989 in C.S. No. 79 of 1989 is allowed. The suit shall proceed for all the causes of action aforementioned and shall be disposed of in accordance with law.

O.S.A. No. 278 of 1989 is disposed of in terms of the undertaking aforementioned.

On the facts of this case, there will be no order as to costs in both the appeals.