

Archie Comic Publications Inc vs Purple Creations Pvt Ltd. And Ors. on 10 September, 2010

Author: Mukta Gupta

Bench: Vikramajit Sen, Mukta Gupta

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (OS) No. 260/2008

% Reserved on: 9th July, 2010

Decided on: 10th September, 2010

Archie Comic Publications Inc
(A company organized and existing under the laws of
State of New York, USA) having its office at
325, Fayette Avenue,
Mamaroneck,
New York 10543,
United States of America

C/o Mr. Sudhir D. Ahuja,
Having his office at:
53, Syed Amir Ali Avenue,
Calcutta-700 019.

..... Appellant
Through: Mr. C.M. Lall, Mr. Jyotideep Kaur,
Ms. Ekta Sarin and Mr. Subhash
Bhutoria, Advocates.

versus

1. Purple Creations Pvt Ltd.
B-123, Ghatkopar Industrial Estate,
L.B.S. Marg, Agra Road,
Ghatkopar (West), Mumbai-400 086.
2. Nagji Kheraj Vira,
Director,
Purple Creations Pvt. Ltd.
B-123, Ghatkopar Industrial Estate,
L.B.S. Marg, Agra Road,
Ghatkopar (West), Mumbai-400 086.
3. Pankaj Nagji Vira,
Director,
Purple Creations Pvt. Ltd.

8, Ramnik Villa, Uday Cinema Lane,
5th Road, Ghatkopar (West),
Mumbai-400 086.

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4. Dipak Nagji Vira,
Director,
Purple Creations Pvt. Ltd.
8, Ramnik Villa, Uday Cinema Lane,
5th Road, Ghatkopar (West),
Mumbai-400 086.

..... Respondents

Through: Mr. Sanjeev Sachdeva and Mr. Preet
Pal Singh, Advocates.

Coram:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MS. JUSTICE MUKTA GUPTA

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|---|-----|
| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

MUKTA GUPTA, J.

1. By way of the present appeal the Appellant lays a challenge to the order dated 20th April, 2008 whereby the application of the Appellant being I.A. No. 5271/2006 in CS (OS) No. 1420/2005 under Order 6 Rule 17 CPC for amendment of the plaint was dismissed and the application of the Respondents herein being I.A. No. 238/2006 under Order 7 Rule 11 CPC was allowed, thereby returning the plaint of the Appellant for the purposes of filing before the competent Court.

2. The Appellant had instituted a suit inter alia for permanent injunction, infringement of trademark, damages, against the Respondents claiming to be engaged in the field of printed matter, paper articles, newspapers, periodicals, books, comic magazines, cartoons strips, story books, films and a myriad of licensed products including: glassware, lipstick, vanity sets, nailtips, body mist, clothing items such as T-shirts, polo shirts, night-shirts and in particular clothing for children, beach towels, hats etc. According to the Appellant they are the proprietor of Archie Comic Publication Inc. and own the "ARCHIE" trademark with its variations like "ARCHIE", "ARCHIE S", "LITTLE ARCHIE", "THE ARCHIES" "THE NEW ARCHIES", "ARCHIE COMICS" etc. It is claimed by the Appellant that since they are using the said trademark "ARCHIE" since 1942, by virtue of its long, continuous and extensive use consumers all over the world, including those in India associate the trade mark "ARCHIE" with that of the Appellant.

3. The Appellant had applied for registration of "ARCHIE and Heads" on 17th October, 1989 in Class 16 and it is claimed that they have been extensively using this mark in India since 1979. According to the Appellant they came to know that the Respondents have started using their trademark for the first time in June, 2004 when they came across an advertisement for the trademark "ARCHIES and device", "PURPLE ARCHIE" and "ARCHIES" in Class 25, which was published in the trademark journals. The Respondents are allegedly involved in the business of manufacturing and selling kids wear under the said trademark.

4. The issue that arises for determination in the present appeal is whether this Court has jurisdiction to entertain the suit filed by the Appellant. For the purpose of jurisdiction the averments in the plaint are set out in paragraph 32, which are reproduced as under: -

"32. That this Hon ble Court has the jurisdiction to entertain, try and determine the present suit as a part of the cause of action arose within the territorial jurisdiction of this Hon ble Court. The Defendant s mark has been advertised in the Trade Marks Journal which was circulated in Delhi, within the jurisdiction of this Hon ble Court. Therefore, this Hon ble Court has the jurisdiction to entertain, try and decide the present suit under Section 134 (2) of the Trade Marks Act, 1999 as the plaintiff is carrying on its business in Delhi at least since 1979."

5. Narration of relevant facts for the determination of the issues are that the Appellant is a company organized and existing under the laws of State of New York having its office at New York, USA. The Appellant has been impleaded through C/o Mr. Sudhir D. Ahuja, having his office at 53, Syed Amir Ali Avenue, Calcutta. It is stated in the plaint that Mr. Sudhir D. Ahuja is a constituted power of attorney holder of the Appellant and has been duly authorized to verify and affix his signatures on the plaint and sign or execute vakalatnama, affirm affidavits and all other papers and undertake all acts necessary for the prosecution of the above suit on its behalf. In the plaint it is nowhere averred that the Appellant is having its office anywhere in India. Thus, from the pleadings it is evident that the Appellant has no place of work in India.

6. It is rather the case of the Appellant that in 1966 "ARCHIE COMICS" were imported into India and an invoice issued by the Appellant to Variety Book Depot, New Delhi dated 8th May, 1979 with copies of the comic book covers including the earlier issues are annexed. Thus, the basis of claim that it is carrying on its business in Delhi at least since 1979, is that its books are being imported into India.

7. In the light of these averments the Respondents moved an application under Order 7 Rule 11 being IA No.238/2006 in CS (OS) No.1420/2005 for rejection of the plaint urging that the Court of Delhi had no jurisdiction, as neither the Appellant carries on his work or personally works for gain at Delhi nor the Respondents reside or carry on business nor any cause of action has arisen in Delhi. After filing its reply to IA No.238/2008, the Appellant filed an application under Order 6 Rule 17 being IA No.5271/2006 for amendment of the pleadings stating that after the filing of the suit, it has also come to know that the Respondents have got a distributor who is operating within the jurisdiction of the Delhi High Court and had been purchasing ARCHIES products from the

Respondents/their predecessor. The application also states that the Appellant has also come to know that the Respondents had advertised their products under the trademark ARCHIES in newspapers including Mid-Day, Delhi Edition, and they are also operating their website, namely, www.purplearchies.com which can be accessed from anywhere in India including Delhi and are thus, infringing the trademark of the Appellant.

8. In response to the application of the Appellant under Order 6 Rule 17 Respondents filed their reply denying that on the date of filing of the suit or at any time thereafter the Respondents have distributors in Delhi or that they advertised their products under the trademark "ARCHIE" in newspapers including Mid Day, Delhi edition. It is stated that even as per the settled law advertising alone by the defendant does not give a right to the plaintiff to invoke the jurisdiction of this Court. It is also denied that the Respondents are operating any website which can be accessed from Delhi. It is further contended that on the pleadings of the Appellant this Court did not have the territorial jurisdiction to entertain and try the present suit and in any case by way of the amendment jurisdiction to try the suit cannot be vested in this Court.

9. Learned counsel for the Appellant in support of his contention relies upon Section 134 of the Trade Marks Act, 1999 stating that since the Appellant actually and voluntarily carries on business at Delhi, it is entitled to institute a suit ventilating his grievance of violation of copyright at Delhi. Reliance is placed on Liverpool and London S.P. and I Asson. Ltd. v. M.V. Sea Success I and Anr., 2004 (9) SCC 512, Wasudhir Foundation v. C. Lal and Sons, 45 (1991) DLT 556, Rajesh Kumar Aggarwal and others vs. Mr. K.K. Modi and others, 1999 VI AD (Delhi), 188 and The Singer Company Limited and another v. Chetan Machine Tools and others, 159 (2009) DLT 135.

10. The issue whether Section 62 of the Copyright Act and Section 134 of the Trade Marks Act oust Section 20 of the CPC is no more res integra. This Court in Indian Performing Right Society Ltd. v. Sanjay Dalia and another, 2009 II AD (DELHI) 13 (authored by one of us Vikramajit Sen, J) held as under: -

"3. We have carefully cogitated upon the contentions articulated before us on behalf of the litigating adversaries. Intas Pharmaceuticals Ltd. -vs- Allergan Inc., 132(2006) DLT 641(DB) lays down an important principle of law in that it interprets Section 134 of the Trade Marks Act as not whittling down the provisions of Section 20 of the CPC but providing an additional forum and a place for filing a suit in case of an infringement of a trademark. The Division Bench presided over by Dr. Mukundakam Sharma, J. (as his Lordship then was) has also opined that the words "notwithstanding anything contained in the CPC" are indicative of the position that Section 134 of the Trade Marks Act has to be read conjointly with and in addition to the provisions of Section 20 of the CPC. To those observations we may add that it is only in the event of a conflict between the provisions of Section 20 of the CPC and those of Section 134 of the Trade Marks Act that the latter would prevail. The effort of the Court must be, so far as is possible, not to curtail the role that can be played by either of the provisions acting conjointly or simultaneously. This Court in Intas had predicated its decision on the opinion of the Supreme Court in Dhodha House -vs-

S.K. Maingi, (2006) 9 SCC 41 in which it has been enunciated that Section 62(2) of the Copyright Act provides an additional forum to enable the holder of a copyright to file a suit at the place of his residence, thereby insulating him from the tedium or vexatiousness of taking the fight to the doorstep of the violating Defendant. The Trade and Merchandise Marks Act, 1958 did not contain a provision akin to Section 134(2) of the Trade Marks Act, 1999 enabling the Plaintiff to enjoy the convenience of filing a suit at the place where he resides or carries on business etc. The extant provisions are indeed salutary in purpose and effect, since otherwise the legal remedy available for a breach of copyright or an infringement of trademark often remains illusory. It appears to us that the Court would be acquiescing in an assault on a general principle of law prevalent at least in all common law systems if it were to allow a lis to continue at a place where neither has the cause of action arisen nor has the Defendant have a residence or place of business. This legal principle attempts to obviate the use of litigation as a device of harassment calculated to force an adversary into succumbing into a settlement for fear of fighting a lis at an inconvenient venue. Having made this observation, we see no impediment in extrapolating this impeccable reason onto an interpretation of Section 62(2) of the Copyright Act and Section 134(2) of the Trade Marks Act, (which are verbatim to each other), by requiring the Plaintiff to file a suit at the place where it has its principal or subordinate place of business if the cause of action has arisen there. Alternatively, the Plaintiff may take recourse to the provisions of Section 20 of the CPC.

7. We have perused the Parliamentary Debates relating to the amendments carried out to the law of copyright and trademark. One of the Objections that was raised was that the new jurisdictional dispensation would favour multinational corporations as they would be able to initiate litigation according to their choice and secondly that a poor holder of a trademark will be at a disadvantage. In the context of the first Objection it was clarified that the new provisions would be to the advantage of the petty trader incidentally doing his trade on the basis of a registered trademark, and that if this purpose was not achieved, an amendment would be brought in. If the interpretation of Section 62 which we intend to impart, (which would also apply to Section 134 of the Trade Marks Act) is accepted, both these apprehensions would be addressed and resolved. Plainly, if the cause of action has arisen at a particular place where the plaintiff has its principal or subordinate office, and it is restricted to filing a case in that place alone, the Defendant would not be put to any unfair disadvantage. The intendement of Section 62 of the Copyright Act and Section 134 of the Trade Marks Act is to enable the Plaintiff to initiate litigation at a forum convenient to it. It is not intended to allow the plaintiff to choose a territorial forum which is not convenient to either of the parties, as is demonstrated by the case in hand. Bill No. XV of 1955 sought to "amend and consolidate the law relating to copyright". The Parliamentary Committee was of the opinion that "many authors are deterred from instituting infringement proceedings because the court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new

sub-clause (2) accordingly provides that infringement proceedings may be instituted in the district court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business, etc." This is a manifestation, in reverse, of what we have assessed as a general principle of law, viz., that the intendment behind prescribing the place of suing is to ensure that litigation should be as best possible not a weapon of harassment. Since experience had exposed the reality that if a plaintiff in an action for infringement of copyright or trademark may not be able to enjoy the fruits thereof if he was compelled to file at the transgression's place of business, the amendment was brought about. It could not have been the intention of Parliament to enable the Plaintiff to choose the place of suing on the basis of what would be the inconvenience to the Defendant.

8. The learned Single Judge is unassailably correct in opining that "the plaintiff would be deemed to carry on business at a branch office only if a cause of action has arisen in Delhi". In doing so he has extracted and infused the rationale of the CPC into Section 62 of the Copyright Act. As we have already recorded above, it is the uncontrovered case of the parties that the cause of action has not arisen in Delhi. The neat question is whether a court of law is proscribed from introducing the aspect of cause of action merely because it has not been prescribed in the legislation. Alternatively, in the absence of an Explanation as is to be found in Section 20 of the CPC can the pragmatic and equitable principles not be injected into the relevant Section. It is beyond cavil that the concept of cause of action is inseparably intertwined in each and every litigation. Without it the lis would be liable for rejection under Order VII Rule 11 of the CPC. The cause of action, therefore, permeates every sinew of the suit and all procedural provisions, which are but handmaidens of justice.

10. So far as Section 20 is concerned, the Explanation is clarificatory in nature. The problem that is presented is that Section 62 of the Copyright Act does not have any similar Explanation. Strictly speaking, an Explanation found in one statute cannot be read into another statute. The CPC, however, constitutes a grundnorm, the ethos and essence of which percolates through all other statutes. If any doubt persists in the context of the provisions of Copyright Act or the Trade Marks Act, we would not hesitate to dispel them with the aid of this Explanation found in the CPC. In *Harshad S. Mehta vs. State of Maharashtra*, 2001 VII AD (S.C.) 137=AIR 2001 SC 3774 it has been held that if two Acts are similar an external aid of statutory interpretation contained in one and omitted in another can be read into the latter. This course has also been favoured in *Shri Narakesari Prakashan Ltd. vs. Employees State Insurance Corporation*, AIR 1984 SC 1916.

11. The intention of the legislature is evident, inter alia, in the non-obstante clause pertaining to the CPC. The word "notwithstanding" in ordinary parlance means „in spite of or despite. (See Concise Oxford Dictionary as well as Black's Law Dictionary). This word does not indicate that the CPC has no role to play. In the

factual matrix before us the word „notwithstanding“ connotes that in addition to Section 20 of the CPC, by virtue of Section 62(2) of the Copyright Act, the plaintiff is free to choose a forum convenient to it, that is, wherever it actually and voluntarily resides or carries on business or personally works for gain, provided the cause of action arises there. This is in contradistinction to that of the defendant as prescribed by Section 20 of the CPC. It is difficult for us to conceive of a situation where the ameliorative advantage bestowed on the plaintiff by virtue of Section 62 of the Trade Marks Act or Section 134 of the Trademarks Act could be frustrated if this interpretation is given effect to. Let us assume that the cause of action has arisen in Kanyakumari. It is axiomatic that in the case of a violation of a trademark or copyright the Defendant would have some presence, that is, actual and voluntary residence, or carrying on of business or working for gain, in Kanyakumari. If the Plaintiff also carries on business etc. in Kanyakumari there would be no justifiable reason not to bring the suit only at Kanyakumari. Assuming, however, that the Plaintiff does not carry on business in Kanyakumari but in Delhi or in Bombay or Calcutta, he would face the disadvantage of having to file his suit at a hostile or inconvenient place. Section 62 would then enure to his benefit and enabling it to file the action in any of the three cities. However, if the Plaintiff were to be free to choose from any of the places where he is carrying on business etc. with no correlation to the cause of action, the consequence would be that his choice would create for the Defendant the very disadvantage which the legislation has sought to alleviate for the Plaintiff. In that event, no useful purpose would be served for the plaintiff except for additional harassment to the Defendant. This could never have been the intention or purpose of Parliament and if this pragmatic and commonsense interpretation is not imparted to the Section, the comment of Hon'ble Minister, Mr. Murosoli Maran that an amendment would be brought in would become imperative. Since the cause of action is an integral, inseparable and inevitable part of any litigation, by reading it into Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, the law is made meaningful and expedient. This is the bounden duty of any Court which is called upon to interpret a provision of law.

12. We have already mentioned the landmark and oft-quoted judgment of the Supreme Court in Patel Roadways and Oil and Natural Gas Commission. We must also refer to a more comparatively recent decision in Kusum Ingots and Alloys Limited vs. Union of India, (2004) 6 SCC 254 where it has been enunciated that if only a small part of the cause of action has arisen within the territorial jurisdiction of a particular High Court, it is not bound to entertain the petition. It would be sufficiently empowered to refer the petition to the court where substantially the cause of action has arisen as it would be more convenient to adjudicate the matter in that court. Although it was Section 20 of the CPC which was in focus in all those cases, it is the legal rationale behind it that had compelled the court to render a purposive interpretation thereto. This approach is exactly what is called for even where the Court is to interpret other statutes such as the Copyright Act and the Trade Marks Act."

11. Thus, the facts of the present case are required to be tested in light of the settled law that the Plaintiff can file a suit in terms of Section 134 of the Trademarks Act, 1999 at the place where he "carries on business or personally works for gain". The Appellant in this case does not have any registered office in India much less in Delhi. The sole averment for carrying on business in Delhi is that one bookshop, that is, Variety Book Stores has been importing books, comics etc. from the Appellant and retailing at their store in Delhi and in this regard one invoice of the year 1979 is filed. Even by way of application for amendment under Order 6 Rule 17 CPC what is sought to be introduced is, "The Plaintiff is also carrying on its business at least since 1979 and the Plaintiff has its sole distributor i.e. Variety Book Depot, Connaught Circus, New Delhi who is exclusively selling Archie Comics on behalf of the Plaintiff within the territory of this Hon ble Court and who has also been importing books from the Plaintiff in a substantial way." It is contended that this Hon ble Court has the jurisdiction to entertain, try and decide the suit under Section 134 (2) of the Trademarks Act, 1999 as the Plaintiff is carrying on its business in Delhi at least since 1979.

The Hon ble Supreme Court in Dhodha House vs. S.K. Maingi, 2006 (9) SCC 41 held:-

"40. 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.]

41. A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where it has a subordinate office. Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place.

45. The plaintiff was not a resident of Delhi. It has not been able to establish that it carries on any business at Delhi. For our purpose, the question as to whether the defendant had been selling its produce in Delhi or not is wholly irrelevant. It is possible that the goods manufactured by the plaintiff are available in the market of Delhi or they are sold in Delhi but that by itself would not mean that the plaintiff carries on any business in Delhi."

As is evident, Variety Book Store is not the special agent of the Appellant. The Appellant has no control over the working of Variety Book Store. Thus, in view of the legal position, enunciated above, it cannot be said that the Plaintiff carries on business or was personally working at Delhi thus, vesting a jurisdiction in this Court to entertain the plaint.

12. The next ground urged by the Appellant to invoke the jurisdiction of this Court is that the defendant's mark has been advertised in the Trademark Journal which was circulated, within the

jurisdiction of this Court.

The issue whether publication of the proposed registration of trademark at Delhi or even of the advertisement in a newspaper in Delhi vests jurisdiction in the Court at Delhi to try the suit has also been set at rest by the Hon ble Supreme Court in *Dhodha House* (supra) enunciating as under:

"An advertisement by itself in a journal or a paper would not confer jurisdiction upon a court, as would be evident from the following observations of this Court in *Oil and Natural Gas Commission v. Utpal Kumar Basu and Ors.* (1994) 4 SCC 711:

„Therefore, broadly speaking, NICCO claims that a part of the cause of action arose within the jurisdiction of the Calcutta High Court because it became aware of the advertisement in Calcutta, it submitted its bid or tender from Calcutta and made representations demanding justice from Calcutta on learning about the rejection of its offer. The advertisement itself mentioned that the tenders should be submitted to EIL at New Delhi; that those would be scrutinized at New Delhi and that a final decision whether or not to award the contract to the tenderer would be taken at New Delhi. Of course, the execution of the contract work was to be carried out at Hazira in Gujarat. Therefore, merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not, in our opinion, constitute facts forming an integral part of the cause of action.

So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of the cause of action.... "

Thus, this contention of the Appellant also deserves to be rejected.

13. Another issue which arose for determination before the learned Single Judge was whether a Court which does not have territorial jurisdiction on the basis of the averments made in the plaint as originally filed, can entertain an application for amendment of the plaint, which if allowed would bring the case within the jurisdiction of such Court? The learned Single Judge vide the impugned order held that the question of jurisdiction has to be determined on the basis of the averments made in the plaint as originally filed and in the absence of the territorial jurisdiction to entertain the plaint, it had no jurisdiction to entertain the application under Order 6 Rule 17, CPC for amendment of the plaint.

14. Learned counsel for the Appellant relies on *Wasudhir Foundation v. C. Lal & Sons* 45 (1991) DLT 556 where after advertng to a Division Bench judgment in *Gaganmal Ramchand v. HSBC* AIR 1950 Bombay 345 it was held that the Court may allow an Application for amendment of the plaint to prevent the plaint from being rejected though an Application for rejection of the same is pending. The reasoning of the learned Single Judge in support of his view is encapsulated in the following paragraph of the judgment:

"This is the righteous path and, if this be so is it not necessary, in the ends of justice, to extend the beneficial legal principles ensconced in Order 6 rule 17 more so, when one hardly discerns anything in Order 7 rule 11 which may lead one to take the view that it takes away the power of the court to allow amendments of places hurdles in performance of its duty? After all what is the effect of Order 7 rule 11? It is, if I understand correctly, that the plaintiff would not be precluded from filing a fresh suit in respect of the same cause of action. If he so desires see Order 7 Rule 13. If such be the effect, why not permit the amendment of the plaint so as to remove the defect and prevent the operation of the Rule? Why make him first invite the rejection of the plaint, then allow him to file a fresh suit at the expense of delay and heavy costs? Why not straightaway allow him to amend the plaint, remove the defect and permit him, thereby, to proceed with the same suit? Why this rigmarole? After all, procedural law is intended to facilitate and not to obstruct the course of justice."

A similar view was taken by another Ld. Single Judge of this Court in Hari Bhagwan Sharma and Ors. v. Badri Bhagat Jhandewalan Temple Society and Ors., 27 (1985) DLT 68.

15. We have given our anxious consideration to the two views expressed. It is well settled that for any adjudicatory authority to act, Jurisdictional Fact is a sine qua non for the same. A jurisdictional fact is one on the existence or non-existence of which depends the vesting of jurisdiction in a Court, Tribunal or an authority. In Black's Legal Dictionary it is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case.

16. In this regard it would be relevant to note Section 134 of the Trademarks Act, 1999 which postulates that a suit can be instituted by the Plaintiff within the local limits of whose jurisdiction at the time of institution of suit or other proceedings, the person instituting the suit or proceedings actually and voluntarily resides or carries on business or personally works for gain. Thus, the section clearly envisages that at the time of institution of the suit, the Appellant should have been carrying on business at Delhi, which unfortunately is not the factual situation in the present case.

17. Further the jurisdiction of a Court may be classified into i) Territorial or Local jurisdiction, ii) Pecuniary Jurisdiction and iii) Jurisdiction over the subject matter. It is clearly laid down in Sec. 21, CPC that so far as Objection to lack of territorial and pecuniary jurisdiction is concerned, the same has to be taken at the earliest and cannot be allowed to be taken at a subsequent stage. However, jurisdiction as to subject matter is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the Suit, the order passed would be a nullity. Neither consent nor waiver or acquiescence can confer jurisdiction upon a Court otherwise incompetent to try the Suit. However, the validity of a decree/judgment cannot be challenged on the ground of lack of territorial jurisdiction in execution proceedings and the judgment debtor is estopped from taking such an Objection unless prejudice is caused on merits. The Hon'ble Supreme Court in Hira Lal Patni vs. Sri Kali Nath, AIR 1962 SC 199, held:

"It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case.

Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like S. 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through court, the defendant deprived himself of the right to question the authority of the court to refer the matter to arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award."

18. It may be noted that earlier under the Code of Civil Procedure Section 21 provided for objections to jurisdiction to be taken at the earliest possible opportunity only with regard to the place of suing. By the Code of Civil Procedure Amendment Act, 1976, Section 21 was renumbered as 21(1) and sub-sections (2) and (3) were brought in, by virtue thereof an objection as to the competence of the Court with reference to the pecuniary limits of its jurisdiction were to be taken in the Court of first instance at the earliest possible opportunity. This was in line with the interpretation of the Hon ble Supreme Court in *Kiran Singh vs. Chaman Paswan and others*, AIR 1954 SC 340 even prior to the amendment, in view of Sec. 11 of the Suits Valuation Act. It was held:

7. "With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction.

The policy underlying sections 21 and 99, C.P.C. and section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under section 11 of the Suits Valuation Act."

19. In *Bahrein Petroleum Co. Ltd. vs. P.J. Pappu and Anr.* AIR 1966 SC 634, it was held:

"Counsel for the plaintiff-respondent submitted that it was open to the defendants to waive this objection, and if they did so, they could not subsequently take the objection. This submission is well founded. As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. But S. 21 of the Code provides an exception, and a defect as to the place of suing, that is to say, the local venue for suits cognizable by the Courts under

the Code may be waived under this section. The waiver under S. 21 is limited to objection in the appellate and revisional Courts. But S. 21 is the statutory recognition of the principle that the defect as to the place of suing under Ss. 15 to 20 may be waived. Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it."

20. The Hon ble Supreme Court in Subhash Mahadevasa Habib vs Nemasa Ambasa Dharmadas (Dead) by LR's & Ors, (2007) 13 SCC 650 reiterated these principles and held:

"Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied."

21. In Singer Company Ltd. (Supra), one of us (Vikramajit Sen, J.) relying on Wasudhir Foundation (Supra) held that procedural laws are intended to facilitate and not to obstruct the course of substantial justice. It was observed that in Ganesh Trading Co. vs. Moji Ram (1978) 2 SCR 614, the Hon ble Supreme Court held that the defective pleadings are generally curable if the cause of action sought to be brought out was not ab initio completely absent. The application under Order 6 Rule 17, CPC was allowed to cure defective pleadings so as to constitute a cause of action as the documents filed alongwith the plaint thereby forming the part of plaint showed jurisdictional facts.

22. Applying the principle of doctrine of relation back as laid down by the Hon ble Supreme Court in Siddhalingamma and another vs. Mamta Shenoy, 2001 (8) SCC 561 and Sampat Kumar vs. Ayyakannu and another, AIR 2002 SCC 3369 that once an amendment is allowed unless it is expressly excluded by the Court, a Plaint or petition would be deemed to have been filed as it appears after the amendment, in our view if a plaint is completely bereft of any pleading which are the „jurisdictional facts , the civil court in that case will not have the jurisdiction to proceed in that suit or even to allow an application seeking amendment under Order 6 Rule 12 CPC. Thus a completely unconscionable plaint which does not reveal any fact which confers a jurisdiction on a civil court to act may not vest the jurisdiction with the Civil Court to even allow an amendment of the same. But if it is a case of unclear or ambiguous pleadings, the same may be allowed to be amended to clarify the already pleaded facts till the same does not give rise to addition of a new cause of action or pleading new facts.

23. In the light of these decisions, it is evident that though the issue of territorial jurisdiction does not strike at the root of the proceedings, however, consent cannot confer territorial jurisdiction on a Court which has none. The Court, however, if no objection thereto is taken at the appropriate time, in view of the fact that the proceedings have attained finality will not set aside the decree, unless prejudice is caused on merits.

In our view, if the plaint discloses some facts, which may however, be incomplete to vest territorial jurisdiction in the Court, the Court would entertain an Application for amendment of the pleadings.

This is more so, as such an amendment would not set up a new case. However, if no facts are disclosed qua territorial jurisdiction then the defect cannot be even cured by amendment and in such a case an Application for amendment cannot be entertained.

24. Indubitably, at this stage the Respondent's response cannot be looked into. However, on merits in the present case, as discussed above, even taking the pleadings and documents annexed thereto by way of amendment, this Court has no territorial jurisdiction to entertain the plaint.

25 For the reasons stated above the present Appeal is dismissed. No order as to costs.

(MUKTA GUPTA) JUDGE (VIKRAMAJIT SEN) JUDGE SEPTEMBER 10, 2010 vn