

Conzerv Systems P Ltd vs T.K. Babu And Others on 20 August, 2008

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ IA.No. 848/2006 in CS(OS) 1567/2005

% Date of decision : 20.08.2008

CONZERV SYSTEMS P LTDPlaintiff
Through: Ms Pratibha M Singh with Ms Bitika
Sharma and Mr Sudeep Chatterjee,
Advocates.

Versus

T.K. BABU AND OTHERS Defendants
Through: Mr Sudhir Chandra, Sr Advocate with
Mr Dayankrishnanand and Mr Gautam
Narayan, Advocate.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1.

Whether reporters of Local papers may
be allowed to see the judgment? YES

2. To be referred to the reporter or not? YES

3. Whether the judgment should be reported
in the Digest? YES

RAJIV SAHAI ENDLAW, J

1. The defendants have applied under Order 7 Rule 11(d) of the CPC for rejection of the plaint stating that this court does not have the territorial jurisdiction to entertain the same and the institution of

the suit in this court is an abuse of process and to harass the defendants.

2. The plaintiffs have instituted the suit (i) for the reliefs of permanent injunction restraining the defendants from using the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 1 of 15 trademark ELECON, True RMS Logo and VAF or any other deceptively similar trade mark in relation to Digital Panel Meters, Multi Function Load Managers, Electrical/Electronic meters or any cognate or allied product so as to result in an infringement of the plaintiff's registered trade mark and passing off of the plaintiff's marks ENERCON, True RMS Logo and VAF; (ii) a decree for permanent injunction for restraining the defendants from using the Elecon leaflets, brochures, circuit diagrams, software etc or any other material of the plaintiff; (iii) for restraining the defendants from using the confidential information gathered by them from the plaintiff; (iv) for restraining the defendants from inducing breach of contracts between the plaintiff and its suppliers/vendors and employees; and (v) for the relief of damages, rendition of accounts, delivery etc.

3. The plaintiff has, in the plaint, averred that the defendants No 1, 3 and 5 were in the employment of the plaintiff and have started the defendants No 2 and 4 companies. The plaintiff has in para 17 of the plaint stated its various rights which have been infringed and violated by the defendants and which include violation of registered trademark, violation of copyright and the common law rights, misuse of material of the plaintiff, rights of the plaintiff in design processes and procedures, rights of the plaintiff in model numbers and breach of the confidentiality agreement of the defendants with the plaintiff. The plaintiff has further in the plaint stated that in some of the confidentiality agreements of the plaintiff with its employees, there exists a IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 2 of 15 negative covenant that the said employee will not engage in any competing activities and there is also an undertaking not to disclose any of the confidential information.

4. Since the dispute is whether from a reading of the plaint itself it can be said that this court has no territorial jurisdiction to entertain the suit, it must be noted that the plaintiff in the memo of parties has given its address as that of Bangalore and at B-10A, South Extension Part II, II Floor, New Delhi; the address of all the defendants given in the memo of parties is of Bangalore.

5. The plaintiff has in para 50 of the plaint with respect to territorial jurisdiction stated as under :

"This Hon'ble Court has the jurisdiction to try and entertain the present suit, as the plaintiff's trademark ENERCON is a registered trademark. This is a composite suit for infringement of trademark, infringement of copyright, passing off etc. The plaintiff carries on business for profit and gain in New Delhi. The defendants are offering for sale their products in Delhi through their website and also through their dealers in Delhi. Thus, the cause of action arose within the jurisdiction of this Hon'ble Court. Both under the Trade Marks Act, 1999 & under the Copyright Act, 1957 this Hon'ble Court has the jurisdiction to try and entertain the present suit."

6. The defendants have filed the written statement and in which while objecting to the territorial jurisdiction of this court they have stated (i) that the registered office of the plaintiff is at Bangalore;

(ii) all the defendants are resident of and work for gain at Bangalore; (iii) that no part of cause of action had accrued within the jurisdiction of this court; (iv) that the "Delhi office of the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 3 of 15 plaintiff is only a branch office and the location of the branch office cannot confer jurisdiction on this Hon'ble Court"; (v) that even assuming without conceding that in view of the provisions of the Copyright Act and the Trademark Act, the present suit insofar as it pertains to the allegation of infringement of trademark and copyright is maintainable in Delhi, the suit insofar as it pertains to passing of, breach of contract, breach of confidential information, damages/rendition of accounts is not maintainable in this court inasmuch as neither any part of the cause of action accrued within the jurisdiction of this court nor any of the defendants reside within the jurisdiction of this court; (vi) that the defendant No.1 was not made to sign any confidentiality agreement when he joined the plaintiff but was subsequently coerced at the threat of losing his job to sign the said agreement - the said agreement contains an arbitration clause requiring any dispute arising out of the agreement to be referred to arbitration, the venue of which would be at Bangalore and thus, the present suit pertaining to breach of confidentiality clause is not maintainable.

7. The plaintiff was permitted to file a replication in which it reiterated the territorial jurisdiction of this court for the reason that it carries on its business in Delhi and sells its products in Delhi and the mark ENERCON is registered in favour of the plaintiff; that the plaintiff has copyright in all the circuit diagrams; that the defendants advertised their products in Delhi through their website; that the defendants had also appointed their dealer for the products who was in Delhi. The plaintiff filed the said IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 4 of 15 dealership agreement alongwith its documents.

8. Needless to add that the defendants had no opportunity to reply to the additional points with respect to the jurisdiction made in the replication. The defendants, however, in the application under Order 7 Rule 11(d) of the CPC stated that (i) the plaintiff does not have any manufacturing establishment within the jurisdiction of the court and the plaintiff only has a place at B-10A, South Extension, Part II, Second Floor which is a residential colony where from orders for its products are booked by it. It is stated that no business is carried on by the plaintiff in Delhi; (ii) that they are not selling or advertising their products for sale in Delhi; their website not being a e-Commercial website cannot be used for the purpose of placing orders/transacting any business; (iii) that the defendant No.2 had initially appointed a dealer in Delhi for the purpose of selling its products, namely, one M/s Konark Marketing, however, the same was terminated by them when the defendants came to know that the said dealer was also acting on behalf of other companies including the plaintiff and no business was transacted through the said dealer.

9. The law on the subject has been well thrashed out in the judgment of the Single Judge of this Court in Dabur India Limited v K.R. Industries 2006 (33) PTC 107 (Del), in the Judgment of the Division Bench in appeal reported in 2006 (33) PTC 348 (Del) and of the Apex Court in 2008(37) PTC 332 SC. In the said case also rejection of the plaint on the ground of lack of IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 5 of 15 territorial jurisdiction was in issue. In the judgment of the Hon'ble Single Judge, in para 3, the relevant averment in the plaint has been reproduced as under:

"para 18: This Hon'ble Court has jurisdiction to entertain and try the present suit by virtue of the provisions of the Section 62(2) of the Copyright Act, 1957 as the plaintiff carries on its business activities in Delhi. The defendant is also selling its goods in Delhi i.e. within the territorial jurisdiction of this Hon'ble Court."

The Hon'ble Single Judge also noted that in that case also (as in this case) there was no dispute that for the relief of infringement of copyright this court will have jurisdiction inasmuch as the plaintiff in that case had its office in Delhi and was carrying on business at Delhi. The Hon'ble Single Judge, however, in para 7 of the judgment noted that the plaintiff in that case could not point out any sale by the defendant of its products in Delhi. Applying *Dhodha House and Patel Field Marshal Industries v S.K. Maingi & P.M. Diesel Ltd* 2006 (32) PTC 1 (SC) the Hon'ble Single Judge held that the cause of action for infringement of registered trademark and copyright, over which this court had territorial jurisdiction, could not be combined with the cause of action for passing off and ordered the plaint to be returned. The Division Bench in appeal also noted that in that case there was no documentary evidence to show that the defendants in the case were selling goods in Delhi. The Division Bench while upholding the order of the Hon'ble Single Judge modified it to the extent that IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 6 of 15 the plaintiff in that case was left free to sue in Delhi with respect to relief of infringement of copyright.

The Apex Court also noted the finding of the Division Bench that there was no documentary evidence to show that the defendant was selling goods in Delhi and dismissed the appeal.

10. In the present case also, as aforesaid, the defendants have not disputed that this court would have territorial jurisdiction insofar as the relief of infringement of registered trademark and copyright is claimed by the plaintiff. The objection is to the territorial jurisdiction of this court for the other reliefs of passing off breach of contract, breach of agreement. The matter being at the stage of adjudication of Order 7 Rule 11, it is only the plaint which is to be looked at and nothing else.

11. The plaint in this case, if seen, invokes jurisdiction of the courts at Delhi for the other reliefs, for the reason of the defendants carrying on business at Delhi. But so was the averment in *Dabur India Limited*. Notwithstanding the said averment, in *Dabur India Limited* it was held that the courts at Delhi would have no jurisdiction to entertain the suit for the relief of passing off. It was held so in that case because the Single Judge held that the plaintiff had not been able to point out any sale by the defendants of its product in Delhi and the Division Bench finding that the plaintiff had not placed a single document to show that the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 7 of 15 defendants were carrying on business at Delhi. Can the same be said to be the position in this case also? I find in the negative.

12. Though the defendants have denied carrying on business in Delhi but, as aforesaid, in the application under Order 7 Rule 11(d) CPC, upon the plaintiff in the replication referring to the agreement with a distributor entered into by the defendants in Delhi, the defendants were forced to admit the execution of the said agreement with M/s Konark Marketing, New Delhi; though stated that the same had been terminated and no business had been carried on thereunder. The plaintiff has filed a copy of the said agreement before the court. Of course, the said copy is purported to be

signed by the defendant No.1 only and does not have the signature of the dealer; the same being a photocopy was not subject to admission/denial. However, the date of the said agreement is 9th June, 2005 i.e., of prior to the institution of the present suit. Thus, there is in this case an admission of the defendant of having entered into an agreement with a distributor at New Delhi and copy of such agreement has been filed, all unlike as in Dabur India Ltd.

13. It is settled position in law that at the stage of Order 7 Rule 11 CPC the plaint and the plaint alone is to be looked into. From a bare look of the plaint in the present case, it cannot be said that the same does not disclose this Court to be having territorial jurisdiction. The Senior Counsel for the defendants has also not argued that even if the defendants were to be carrying on business IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 8 of 15 at Delhi, this court would still not have jurisdiction over the reliefs to which objection has been taken (there being admission with respect to the relief qua infringement of registered trademark and copyright). The senior counsel for the defendants on the contrary sought to draw support from *Nedungadi Bank Ltd. v Central Bank of India Ltd.* AIR 1961 Kerala 50 to urge that even if the defendants were carrying on business within the jurisdiction of the court but if no cause of action accrued within the jurisdiction of that court, that court would still not have territorial jurisdiction over the dispute. Arguments were also addressed that the office of the plaintiff at Delhi was in a residential locality wherefrom no business activity could be carried on. Support was also sought to be drawn from the explanation to Section 20 of the CPC.

14. As far as the jurisdiction for the relief of infringement of registered trademark and copyright is concerned, not only Dabur India Limited but also Justice A.P. Shah (as his Lordship then was) speaking for the Division Bench in *Wipro Limited v Oushadha Chandrika Ayurvedic India Pvt Limited* AIR 2008 Madras 165 has held that after the radical change introduced by Section 134 of the Trademark Act and Section 62 of the Copyright Act, insistence on satisfaction of the requirements of Section 20 of the CPC to invoke jurisdiction was misplaced. Thus, this court has the jurisdiction to entertain the suit insofar as with respect to infringement of registered trademark and copyright. At this stage the question also arises that when the court admittedly has jurisdiction to entertain the plaint in part or vis-à-vis some of the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 9 of 15 reliefs, can the provisions of Order 7 Rule 11 CPC for rejection of the plaint, which can only be in whole, be invoked. Should in such cases, the courts reject the plaint in part, and call upon the plaintiff to amend the plaint or reject the application under Order 7 Rule 11 and leave the question of jurisdiction to be decided at the time of final decision of the suit. The purpose of Order 7 Rule 11 CPC is to nip an action, which the court is of the definite opinion is ultimately to doom, in the bud. However, when so cannot be said with respect to the entire claim, should Order 7 Rule 11 be permitted to be invoked. However, I am, at this stage, not entering into this controversy feeling bound by the judgments in *Dabur India Limited* as well as *Dodha House* though I respectfully state that the said question was not gone into in either of the said cases.

15. The counsel for the plaintiff has also relied upon *Laxman Prasad v Prodigy Electronics Ltd & Anr* 2008(37) PTC 209 (SC) which was also a suit in relation to trademark/copyright against an ex employee. In that case the address of the defendant was of Gaziabad outside Delhi. However, the Apex Court held that the suit could be instituted in Delhi as part of the cause of action had accrued within the territorial jurisdiction of Delhi owing to the defendant having used the trademark/trade

name in Delhi and because in the plaint it was specifically alleged by the plaintiff company that the defendant committed breach of terms and conditions of agreements at Delhi and the said averments were held sufficient to entitle the plaintiff to institute the suit in Delhi, notwithstanding the agreement being executed between the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 10 of 15 parties outside Delhi and notwithstanding the defendants being resident outside Delhi. The Apex court emphasised that since the cause of action had arisen within the local limits of Delhi as averred in the plaint by the plaintiff, the question has to be considered on the basis of such averment and the institution of the suit at Delhi was held in order.

16. Applying the aforesaid law, since the plaint in the present case also avers of the defendants carrying on business at Delhi, it cannot be said that the plaint does not disclose any territorial jurisdiction of this court vis-à-vis the reliefs claimed besides the reliefs of infringement of registered trade mark and copyright. This is more so in the face of the admission of the defendant of having entered into an agreement with a dealer/distributor in Delhi for sale of products in Delhi. The termination pleaded by the defendant of the said agreement is a matter of evidence. The plaintiff by entering into the agreement with a dealer at Delhi for sale of its products at Delhi, would cause passing off and breach of contract at Delhi, conferring jurisdiction on this court. The denial by the defendant of the said averments is of no avail at this stage and it cannot be said that the plaint and the documents filed do not disclose this court to be having territorial jurisdiction. This aspect distinguishes the present case from Dabur India Limited. I may also record that the Senior Counsel of the plaintiff was quick to point out that the Apex Court in Laxman Prasad was guided by the principles of, justice being brought as near as possible to every man's hearthstone and of the IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 11 of 15 defendant not being put to the trouble and expense of travelling a long distance in order to defend himself and urged that situation was converse in the present case; the defendants are at Bangalore and will have to travel long distance in order to defend themselves. Once it is found that the defendants had given cause of action to the plaintiff within the jurisdiction of this court, the said principles cannot bar the jurisdiction of this court, at least at the stage of Order 7 Rule 11 of the CPC. We cannot also forget the legislative change in Section 134 of the Trademark Act and Section 62 of the Copy Right Act which, in any case, compel the infringer to travel to the place of business of the plaintiff.

17. Not only is there an admission as aforesaid of the defendants having appointed a dealer/distributor at Delhi, it is also the admitted position that the defendants are at least advertising their goods on their website which can be seen from Delhi. The question whether it is an interactive website or not or whether it amounts to sale/ offering for sale in Delhi is a matter of evidence and cannot be adjudicated at this stage. The views expressed in Casio India Co Limited v Ashita Tele Systems Pvt Limited 2003 (27) PTC 265 (Del) relied upon by the counsel for the plaintiff were also at the interim stage. The territorial jurisdiction of the court is to be tested vis-à-vis the said fact also and the plaint cannot be thrown out for this reason also. In the present day when more and more people are preferring to shop from their living rooms/office via Internet which knows no boundaries, the question of website being interactive or not having any relevance is also to IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 12 of 15 be tested. After knowing of the product through website, whether the sale is affected through website or via contact particulars on website may not be so relevant. All these questions are outside the domain of Order 7 Rule 11 CPC.

18. The counsel for the plaintiff has also drawn attention to Pfizer Products, INC v Rajesh Chopra & Others 127 (2006) DLT 783 to urge that a threat that the offending goods could be sold at a particular place would definitely give jurisdiction to the court in such a place. In the present case as aforesaid not only was there a threat but in fact an agreement was entered into which is claimed to have been terminated. The plaintiff cannot be non-suited on the statement of the defendant of having terminated the agreement and cannot be compelled to keep a continuous watch.

19. There is yet another aspect of the agreement between the plaintiff and the defendant No.1 stated to be containing a clause for exclusive jurisdiction of the courts at Bangalore. The plaintiff has filed the original of the said agreement and the defendants at the time of admission/denial of documents have made an endorsement "content denied signature admit" on the same. Clause 7 of the said agreement is as under:

"That any dispute arising out of or in relation to this agreement shall be referred for arbitration to a person to be nominated by the company, whose decision shall be final and binding upon all the parties hereto and such reference shall be deemed to be a submission to arbitration under the Arbitration and Conciliation Act. The venue of arbitration shall be at Bangalore."

The court in Bangalore shall have exclusive jurisdiction to the exclusion of all other courts." IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 13 of 15

20. It is the plea of the defendants that they were coerced into entering the agreement. In my view, the defendants who have denied the contents of the agreement and who claim to have been coerced into entering the agreement cannot be permitted to at the same time rely upon one clause of the agreement, at least not at the stage of Order 7 Rule 11 CPC. The same would amount to permitting the party to blow hot and cold and to reprobate and approbate. Moreover, the aforesaid clause is a clause of arbitration. The defendants did not opt to enforce arbitration. Upon the defendants submitting to the jurisdiction of the court, the agreement of arbitration became otiose. The aforesaid clause, prima facie, does not represent an agreement vesting exclusive jurisdiction in the courts in Bangalore over disputes between the parties. The parties had agreed to arbitration and to the jurisdiction of the courts at Bangalore over the said arbitration proceedings. However, once the arbitration was given a go by, at this stage, it cannot be said that owing to the said clause, the plaint can be rejected.

21. I may also refer to the Division Bench judgment of this court in Intas Pharmaceuticals Ltd v Allergan Inc 2006 (32) PTC 272. In that case also there was an averment in the plaint that the offending product was sold by the defendant in and around Delhi within the jurisdiction of this court. The Division Bench held that the said averment in the plaint attracted Section 20 of the CPC, vesting jurisdiction in courts at Delhi to entertain the suit. IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 14 of 15

22. I therefore, do not find any merit in the application. The same is dismissed, however, without any order as to costs. It is further clarified that whatever has been said therein is for the purpose of

decision of Order 7 Rule 11 of the CPC and will not come in the way of any decision on any issue as to territorial jurisdiction if pressed by the defendants.

RAJIV SAHAI ENDLAW (JUDGE) August 20, 2008 M IA.No. 848/2006 in CS(OS) 1567/2005 Page no. 15 of 15