

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ FAO(OS)356/2008 & CM No.11752/2008
PFIZER ENTERPRISES SARLAppellant through
! Mr. Saikrishan Rajgopal with
Mr. Sidharth Chopra and
Mr. Saurabh Srivastava,
Advs.
-versus-
\$ CIPLA LTD. ...Respondent through
^ Mr. Ajay Sahni with
Ms. Vrinda Bajaj, Advs.

WITH

FAO(OS)428/2008 & CM No.14785/2008

P.M. DIESELS LTD.Appellant through
Mr. Valmiki Mehta, Sr. Adv.
with Mr. R.K. Aggarwal,
Mr. Natwar Rai & Mr. Amit
Gaurav Singh, Advs.

-versus-

PATEL FIELD MARSHAL INDUSTRIES...Respondent
through
Mr. Shailen Bhatia with
Ms. Ekta Nayal Saini, Advs.

% Date of Decision : October 24, 2008

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE S.L. BHAYANA

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

VIKRAMAJIT SEN, J.

JUDGMENT

1. In the Pfizer Appeal the Plaintiffs have assailed the Order dated 16.7.2008 of the learned Single Judge holding that the High Court of Delhi lacks territorial jurisdiction. The impugned Order returns the Plaintiff for filing in the appropriate court. The dispute centres upon the averments made in the Plaintiff and the response thereto contained in the Written Statement.

2. P.M. Diesels litigation has remarkable annals. For the present purposes the relevant pleadings are found in paragraph 30 of the Plaintiff wherein it has, *inter alia*, been asserted that "the goods of the parties bearing the impugned trade marks are also sold in the Union Territory of Delhi". The interim injunction had been declined on 10.3.1998 principally for the reason that the Plaintiff/Appellant had failed to establish the territorial jurisdiction of the courts in Delhi. In the Appeal the Division Bench set aside the Order and the lis was carried further to the Supreme Court. Their Lordships noted that one of the three contentions raised was that the Defendants were selling the offending goods in Delhi, and that the Delhi High Court did not advert to it. Indeed, the Supreme Court remanded the matter to the Delhi High Court for it to answer this aspect of the dispute opining that questions of fact "required to be properly

determined in case evidence is led by the parties". Eventually, the Defendant filed the application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) for dismissal of the Suit which was allowed but after treating it under Order VII Rule 10 (return of the Plaintiff). It is this Order dated 20.8.2008 which has been assailed before us.

3. The respective pleadings in the Pfizer Enterprises action relevant for the present purposes are produced in juxtaposition:-

Plaint	Written Statement
17. This Hon'ble Court has necessary jurisdiction to entertain and try the present Suit, by virtue of Section 134(1) of the Trade Marks Act, 1999 as the Plaintiffs' products including DALACIN C, are available for sale & distribution within the jurisdiction of this Hon'ble Court. Further, the	17. That the contents of para 17 of the plaint are wrong and emphatically denied and the plaintiffs are put to strict proof of their said averments. It is submitted that this Hon'ble Court has no territorial jurisdiction to entertain and try the present suit in as much as none of the plaintiffs are the 'registered proprietor' of the aforementioned trade marks in terms of Section 2(1)(v) of the Trade Marks Act, 1999 and the present suit for an alleged infringement is liable to be dismissed on this account alone. Even an alleged action of passing off is not maintainable in as much as the trade marks, get-up, placement, design, prices, packaging, etc. of the two competing products is completely different and one can by no stretch of imagination be confused/passed

<p>Defendants' products under the impugned mark are available for sale in Delhi and therefore, the cause of action has also arisen within the jurisdiction of this Hon'ble Court.</p>	<p>off as the other particularly in view of the fact that both the medicines are scheduled drugs and there is neither any possibility nor even any remote probability of one being mistaken for the other. From the array of parties as disclosed in the plaint it is clear that the both the plaintiff and the defendant carry on their business in Mumbai and therefore this Hon'ble Court would have no territorial jurisdiction to entertain and try the present suit. Reply to the preceding paragraph may be read as a reply to this paragraph also.</p>
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4. It would be of advantage to recall Order VI Rule 2 of the CPC which mandates that the evidence by which the material facts are to be proved ought not to be pleaded. Rule 4 prescribes that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms contained in Appendix-I, particulars shall be stated in the pleading. Order VII Rule 1 of the CPC spells out the particulars that should be contained in the Plaintiff and *inter alia* requires that facts showing that the Court has jurisdiction must be contained therein. Rule 10 contemplates the return of the Plaintiff

at any stage of the suit if the Court is of the opinion that it should be presented in some other Court.

5. Order VIII of the CPC places substantially similar obligations on the Defendant. Rule 2 thereof specifically states that the Defendant must raise by his pleadings all matters which show the suit not to be maintainable. It further requires to be pleaded all grounds of defence as, if not raised, would be likely to take the plaintiff by surprise, or would raise issues of fact not arising out of the Plaintiff. Rule 3 clarifies that it would not be sufficient for a Defendant in his Written Statement to deny generally the grounds alleged by the Plaintiff; the Defendant must deal specifically with each allegation of fact and of which he does not admit the truth. Rule 4 prescribes that where a Defendant denies an allegation of fact in the Plaintiff, he must not do so evasively, but must answer the point of substance. An illustration is contained in the Rule itself which is poignant to the point before us. It is that if it is alleged by the Plaintiff that the Defendant had received a certain sum of money, it shall not be sufficient for the Defendant to deny that he received that particular amount, but the Defendant must deny that he received that sum or any part thereof, or else set out how much he received. The Defendant must categorically refute the averments in the Plaintiff on the strength of which territorial

jurisdiction is claimed. Rule 5 further goes on to state that every allegation of fact in the Plaintiff, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the Defendant, shall be taken to be admitted. Indeed, the CPC takes pains to stipulate that the assertions in the Plaintiff must be categorical and unambiguously answered. If the Defendant fails to effectively respond to the pleadings in the Plaintiff and instead sets out extraneous reasons why the Court does not possess jurisdiction, the non traversed pleadings will be deemed to be correct.

6. By an amendment introduced with effect from 1.7.2002 Rule 14 of Order VII requires, where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, that he shall enter such documents in a list, and shall produce it in Court when the Plaintiff is presented by him and shall, at the same time deliver the document and copies thereof, to be filed with the Plaintiff. Order XXXIX of the CPC makes the existence of documents critical at the pre-trial stages of the suit, inasmuch as it mandates service of documents on which the Plaintiff relies on the opposite party. That, however, will be relevant to the aspect of whether the applicant has succeeded in making out a case for the issuance of an injunction, ex parte or after hearing the adversaries.

7. Returning to the pleadings in the case in hand, it is worthwhile to underscore that the Plaintiff states that 'DALACIN C' is "available for sale and distribution within the jurisdiction of this Court. Further, the Defendant's products under the impugned mark are available for sale in Delhi". In response to these categorical pleadings, no doubt the Defendant has commenced his response by generally stating that contents of the corresponding paragraph of the Plaintiff are wrong and emphatically denied, and that this Court has no territorial jurisdiction to entertain and to try the Suit. However, this objection has been predicated on three grounds – firstly that none of the Plaintiffs are the registered proprietors of the trade mark; secondly that the claim of passing off is not maintainable since the trademark, getup, placement etc. are completely different and both the medicines are scheduled drugs and there is no possibility of a customer being mistaken; lastly and most importantly that both the Plaintiffs and the Defendant carry on business in Mumbai and, therefore, Courts in Delhi have no territorial jurisdiction. There is not even a whisper with regard to the Plaintiff's assertion that 'DALACIN C' is available for sale and distribution in Delhi and that the Defendant's offending products are also available for sale in Delhi. As has been graphically stated by the Apex Court, the cause of action

constitutes a bundle of facts any of which, and not collectively all of which, may constitute the cause of action necessary for filing of a lis in a particular Court.

8. In *Trade Connection -vs- International Building Products(P) Ltd.*, 2002 III AD (Delhi) 344, a learned Single Judge of this Court had transformed a failure to reply to paragraphs in the Plaintiff into unequivocal admissions of fact. In *H.S.E.B. -vs-Ram Nath*, (2004) 5 SCC 793 their Lordships noted that there was no denial to the categoric averments to the effect that electrical wires were loose and were drooping and touching the roof of houses and, therefore, a deemed admission must be drawn against the Defendant. In *Ram Singh -vs- Col. Ram Singh*, 1985 (Supp.) SCC 611 the Supreme Court again applied Order VIII Rule 5 of the CPC in concluding that the Respondent must be deemed to have admitted that two persons named in the Petition were the relatives of the Respondent because of his failure to specifically deny this assertion. ***Badat and Co. -vs-East India Trading Co.***, AIR 1964 SC 538 is extremely important. After briefly considering the provisions of Orders VII and VIII of the CPC and specifically Rules 3 to 5 thereof, it was observed as follows -"These three Rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its

non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary." Without advert to ***Badat and Co.*** a Three-Judge Bench in *Biswanath Prasad -vs- Dwarka Prasad*, AIR 1974 SC 117 opined that an admission by a party is substantive evidence in respect of which it is not a necessary requirement that the statement containing the admission would not be put to the concerned party because it is evidence *pro prio vigore*. In *Nagindas Ramdas -vs- Dalpatram Iccharam*, AIR 1974 SC 471 a Coordinate Bench had observed that – "admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the trial as evidence are by themselves not conclusive. They can be shown to be wrong".

9. The significance attached to an admission in pleadings is also evident from the string of precedents dealing with the amendments of pleadings calculated to withdraw or nullify or dilute an admission. Justice Yogeshwar Dayal, his Lordship as then was, held in *Neera Graver -vs- Narinder Jaggi*, 21 (1982) DLT 33 that since the tenant had not denied the specific averment in the eviction petition to the effect that the premises were for residential purposes, this position must be treated to have been admitted by the tenant. An admission to plead, by way of an amendment, that the premises were let out for both residential and commercial purposes, was rejected as it would tantamount to withdrawing an admission already made. To the same effect the Supreme Court had in *Sangramsinh P. Gaekwad -vs- Shantadevi P. Gaekwad*, AIR 2005 SC 809 held that an admission made by the petitioner in a petition under Sections 397/398 could not be permitted to be withdrawn through the device of an amendment. After analysing the above-mentioned case, their Lordships opined in paragraph 29 that “judicial admissions by themselves can be made the foundations of the rights of the parties”.

10. In this analysis, there is no alternative but to conclude that the Defendant Cipla Ltd. must be deemed to have admitted that the Plaintiffs’ products, including “DALACIN C” are

available for sale and distribution in Delhi and furthermore that the Defendant's products under the impugned mark are also available for sale in Delhi. As categorically pleaded in the Plaintiff itself, the cause of action has, therefore, undeniably arisen in Delhi. Documents become unnecessary. Even in the absence of an admission facts can be proved by means of Parol and/or documentary evidence. The Division Bench in ***Intas Pharmaceuticals Ltd. -vs- Allergan Inc.***, AIR 2007 Delhi 108 opined that Section 134 of the Trade Marks Act does not override Section 20 of the CPC; rather it provides an additional forum and place for filing the suit. Keeping in view the fact that Defendant in that case had been selling the offending products in Delhi, the Division Bench upheld the view of the learned Single Judge holding that courts in Delhi possessed territorial jurisdiction to entertain the suit. The Division Bench analysed and applied ***Dhodha House -vs- S.K. Maingi***, (2006) 9 SCC 41 and thereupon concludes firstly that since the Plaintiff had pleaded in the plaint that the Defendant was selling the offending product in Delhi, Delhi Courts possessed territorial jurisdiction; secondly that Section 20(c) of the CPC makes available, in addition to Section 134 of the Trade Marks Act, another forum of adjudication. We are in entire agreement with the views expressed by our Coordinate Bench. These apply on

all fours to the case in hand since the Defendant Cipla Ltd. before us must be deemed to have admitted that the Plaintiffs' products are available for sale in Delhi and that their products are also available for sale in Delhi. No further evidence, oral or documentary, has to be produced by the Plaintiff to substantiate these facts.

11. The exposition of law to be found in *Exphar SA -vs- Eupharma Laboratories Ltd.*, 2004 (28) PTC 251(SC) is apposite. Even if a deemed admission is not drawn against the Defendant, the averments made in the Plaintiff must, in interlocutory proceedings, be treated as true. The Supreme Court has observed that when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. Unlike the case in hand, the Defendant before the Supreme Court had denied the assertion that the Plaintiffs goods were not sold in Delhi. *A fortiori*, when relevant pleadings are not denied, the Court would be falling in error in not accepting as correct the factual version expressed in the Plaintiff. A similar enunciation of the law is to be found in ***Laxman Prasad -vs- Prodigy Electronics Ltd.***

2008 (37)PTC 209 (SC) : (2008) 1 SCC 618. A reading of **Laxman Prasad** will unquestionably disclose that the **Intas** opinion now has the imprimatur of the Supreme Court. Learned counsel for the Appellants has elaborately quoted from **Dhodha House** but in our view this case does not help the resolution of the conundrum before us.

12. The Preliminary Question which arose in **Dhodha House** was whether the existence of jurisdiction under Copyright Act, 1957 would also enable the clubbing of the dispute arising from the Trade and Merchandise Act, 1958. The Supreme Court explained that existence of territorial jurisdiction by virtue of one Act would not clothe that very Court with a determination of a dispute under another Act only because of the provisions of Order II of the CPC (The parties in the P.M. Diesel were also one of the Appellants in the **Dhodha House** matter). Secondly, it had been observed that this Court had not adverted to the third contention that had arisen in the matter, viz. whether the Defendant had been selling its products on a commercial scale in Delhi. We think it necessary to at once clarify that in P.M. Diesel averments made in the Plaintiff have not been admitted in the Written Statement as is the case in the Pfizer Appeal. Our attention has also been drawn to the observations made by their Lordships in *Dabur India -vs- K.R. Industries*, 2008 (37) PTC

332(SC) where it was reiterated that since the primary ground upon which jurisdiction of the Delhi High Court had been invoked was violation of the Trade and Merchandise Marks Act, 1958 the provisions of Section 62(2) of the Copyright Act, 1957 could not be invoked. This was also the ratio of **Dhodha House**. It was also observed that the Plaintiff in **Dhodha House** was not a resident of Delhi; that he had not been able to establish that it carried on any business at Delhi; for this purpose the question as to whether the Defendant had been selling its produce in Delhi or not was wholly irrelevant. The last of the three observations clarifies the position pertaining to the place where the Plaintiff transacts business. Section 134(2) of the Trade Marks Act, 1999 enables the Plaintiff to institute any suit or proceedings in the District Court having jurisdiction over the territories where it "actually and voluntarily resides or carries business or personally works for gain". This is also what is postulated by Section 62(2) of the Copyright Act, 1957. It was for this reason that their Lordships clarified that it was wholly irrelevant whether the Defendant was selling its products in the place where the suit had been filed. However, if the territorial jurisdiction is invoked by the Plaintiff on the ground of the cause of action having arisen in the form of sale of offending goods within the territories of that Court, the question of Defendant's

activity would become relevant and the Plaintiffs activity would become irrelevant. If the Plaintiff discloses that the Defendant has violated the Plaintiff's Trademark or Copyright in a particular place, the cause of action would arise therein and the observations in **Laxman Prasad** would clothe that Court with jurisdiction.

13. We approve the approach adopted in *Pfizer Products Inc. – vs- Rajesh Chopra*, 2006 (32) PTC 301 and in *Boston Scientific International B.V. –vs- Metro Hospital*, 2007 (136) DLT 278.

14. We are unable to appreciate the argument of learned Counsel for the Defendant which found favour before the learned Single Judge that **Liverpool & London S.P. & I Association Ltd. –vs- M.V. Sea Success I**, (2004) 9 SCC 512 supports the Defendant's case. Their Lordships had succinctly and perspicuously covered the conundrum before us in these words:-

Rejection of plaintiff

139. Whether a plaintiff discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaintiff itself. For the said purpose the averments made in the plaintiff in their entirety must be held to be correct. The test is as to whether if the averments made in the plaintiff are taken to be correct in their entirety, a decree would be passed.

Dealing with the merits of the case their Lordships noted that so far as the existence of a cause of action was concerned the documents filed along with the pleadings should be looked into. This was in addition to the pleadings, in order to explain or support them. Their Lordships did not enunciate that documents are necessary even if facts stand admitted. This is an altogether different situation from the “return” of the Plaintiff, which is onerous only to the extent that the same Plaintiff has to be filed in the Court which is competent to entertain it. So far as the rejection of a Plaintiff is concerned, it is tantamount to a dismissal of the Plaintiff and, therefore, the CPC justifiably enumerates the circumstances in which such an order can be passed. It is trite that if a cause of action has not arisen, a suit has to be dismissed. Secondly, if the proper Court Fee has not been paid, and despite the opportunity the Plaintiff remains recalcitrant in making up the deficiency, there is every justification for dismissing the suit. Furthermore, if on a plain reading of the Plaintiff itself its entertainment appears to be barred by any law, it would be reasonable for it to be dismissed. Because of these implications, there is every reason that a Judge must be fully satisfied before passing an order which would have serious repercussions; therefore, it would be in the fitness of things for the Court to also look at documents which are available on the

records before passing an order which virtually dismisses the suit, the only saving being that a fresh suit is not barred.

15. We have already noted the provisions of the CPC which enable documents to be filed at different stages of an adjudication of the plaint. Let us take the case of a plaint which merely asseverates certain facts and does not substantiate it by filing documents which may be available. In case the Plaintiff is desirous of obtaining interim relief, it would be reasonable for the Court not to act only on the pleadings. When the Court is called upon to decide an application under Order XXXIX documents become relevant and, therefore, they are required to be served on the opposite party for fear that on failure the interim order would stand recalled. However, if an *ex parte* order is not passed and a statement made in the plaint is admitted in the Written Statement, documents or oral evidence would become superfluous. At no point had their Lordships indicated that if documents have not been filed substantiating the averments made in a Plaintiff, the suit is liable to be dismissed. Myriad problems will arise if documents are to be looked at for the purposes of rejection of a plaint. At what stage of the proceedings must this exercise be carried out? Certainly, it is not possible to rely or take note of documents which are yet to be proved. Therefore, apart from very unlikely event where a

document stands admitted by the Defendant at the earliest stages of the litigation, it would be of little or no use to act upon them. However, if the Court is of the view that the suit is vexatious or has palpably been filed in a Court which does not possess jurisdiction, it is fully empowered to proceed under Order X of the CPC. Rule 1 thereof enables the Court to ascertain from the either parties before it whether it admits allegations of fact made in the Plaintiff or the Written Statement. Rule 2 thereof also postulates the Court examining any party to the lis with a view to elucidating matters in controversy in the suit or in answer to any material question relating to the suit. Obviously, this course could also be adopted by Courts to decide an issue which requires evidence to be adduced. Of course, the Court will take recourse to this provision only if it has, of its own, come to the conclusion that the litigation is an abuse of the process of Court. Otherwise, the provisions of Order XIV Rule 2 enjoin that Issues both of law and of fact would be decided at the end of suit. The said Rule envisages that if an Issue relating to the jurisdiction of the Court is an Issue of law only, in contradistinction to an Issue both of law and of fact, it may try such an Issue first. Seen from all perspectives, therefore, it would be in very rare cases (such as an admission of fact by the adversary) that a plaintiff can be returned or rejected, as the case

may be. Otherwise, as applies to both the Plaintiff and the Written Statement, the pleadings at the initial stages must be approached as if they are correct either for rejecting the plaintiff or decreeing the suit. This is what **Liverpool** holds as it reiterates the established position that pleadings at the initial stages must be taken as a true and correct narration of events.

16. For the manifold reasons mentioned above, FAO(OS) 356/2008 is accepted. Since the Defendant has not specifically traversed the pleadings pertaining to the territorial jurisdiction of this Court, the position is that the Plaintiffs would not be required to lead any evidence on this aspect of the case. That being so, it is beyond cavil that the Plaintiff ought not to have been returned. The distinction between the return of a Plaintiff to facilitate its filing in a Court possessing territorial jurisdiction and the rejection of a Plaintiff on the ground that a cause of action has not been made out, is extremely poignant and important.

17. So far as FAO(OS) 428/2008 (P.M. Diesels) is concerned, the position is very clear, as their Lordships have remanded the matter to this Court to decide the third contention raised therein, namely, whether the Defendant was selling the offending goods in Delhi, which could be decided only after evidence has been brought on record. Additional to this undebatable position, since P.M. Diesels had pleaded that the

Defendant was selling offending goods in Delhi, the Court had perforce to proceed at the present stage of the lis on the assumption that the averment to this effect was verily true. Therefore, the Plaintiff could not have been returned. This Appeal is also allowed. However, we take note of the statement pleaded in the Appeal to the effect that before the Learned Single Judge, the learned Senior Advocate for the Plaintiff/Appellant had "offered that he had no objection if the present suit along with the pending applications and the injunction granted by this Hon'ble Court, is transferred to the Court at Rajkot and proceedings start at Rajkot from the stage as at present before this Hon'ble Court" (paragraph 22). In view of the submission we return the Plaintiff along with all the other pleadings to the Plaintiff for filing in the Courts in Rajkot. Certified copies of the entire Paper-Book be retained and dispatched to Record Room.

18. We set aside the impugned Order but there shall be no order as to costs.

(VIKRAMAJIT SEN)
JUDGE

October 24, 2008
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(S. L. BHAYANA)
JUDGE