

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

CIMA No. 211/2009, COS 2/09 and connected CMPs.
M/s Escorts Construction v. M/s Gautam Engineering
Equipment Ltd and anr

Coram:

Hon'ble Mr Justice Sunil Hali, Judge

Appearing counsel:

For the petitioner(s) : M/s SK Bansal and Keshav
Thakur, Advs.

For the respondent(s) : M/s Sunil Sethi, Sr. Adv., and
Pranav Kohli, Adv.

Whether approved for : **Yes**
reporting in Digest/
Journal/Media.

Lack of territorial jurisdiction in entertaining a suit filed at Jammu, by the appellant-plaintiff (here-in-after referred to as the appellant), is the subject matter of controversy in the present appeal and the civil suit filed by the appellant.

Two suits were filed by the appellant before the learned Additional District Judge, Jammu, seeking injunction against the defendant-respondents (here-in-after referred to as the defendants), for copying its industrial drawings as also violating the Patent and design granted to the appellant. In one of the suit, the learned trial court, while dealing with an application under Order 39 Rules 1 and 2 CPC, read with Section 151, vide order impugned dt. 6th of May'09, after hearing the parties both on maintainability of the suit as well as for grant of temporary injunction, held that it has no

territorial jurisdiction to entertain the suit. It was further held that no cause of action either wholly or in part has arisen in favour of the appellant within the jurisdiction of the court nor the plaint discloses any cause of action against the defendant No.2, having taken place in Jammu. It is this order, which is the subject matter of challenge in the CIMA, referred to above.

So far as the connected suit is concerned, this court while deciding the petition CTA 8/09 along with connected CMP, under Section 24 of the Civil Procedure Code, filed by the appellant, vide order dt. 20th of March'09, has directed the transfer of the said suit along with the application for ad-interim injunction and that's how the present suit along with the above CIMA, is before this court.

For the purposes of determination of issue, the appeal is taken up for narrating the facts and controversy involved.

The appellant is a Company registered and incorporated under the provisions of the Companies Act, 1956, having its registered office at New Delhi. The Research and Development Wing of the Company has developed two pick and carry cranes namely Hydra-12 and Hydra-14 (here-in-after called the products). It has also developed major components used in these products. The said components are stated to be new and novel. The said industrial drawings are said to be artistic in nature. The appellant is the owner and proprietor of artistic work involved in the said industrial drawings and

holds the copyrights of the said industrial drawings and the same are protected under the provisions of the Copyright Act, 1957.

It is important to note that the said products are registered under the Patents Act, 1970 and Design Act, 2000. The appellant is making commercial use of the said industrial drawings in the regular course of its business by converting these two dimensional industrial drawings into three dimensional finished products i.e. Hydra-12 and Hydra-14 cranes.

The case of the appellant is that he being the sole proprietor of the industrial drawings of the said products has the absolute right to sell these products in the market and no one can be permitted to use the same or infringe copies thereof either in two dimension or three dimensional form or to make any product on the basis of the said industrial drawings of the appellant without his leave and licence. It is contended that the defendant No.2 has launched its cranes in the market w.e.f. second week of Dec'08, and has appointed defendant No.1 as its agent/dealer, for selling the said cranes. It is stated that the said impugned product launched by the defendant No.2 is exactly same and similar to that of appellant's product including the industrial drawings in each and every aspect i.e. shape, measurement and artistic features. It is contended that since the defendants are not the author and owner of impugned drawings of the impugned product, as such, they are infringing the copies of the products of the appellant company. The defendants are making the impugned product by

copying the industrial drawings of the appellant and are offering the same for sale to the public by violating, infringing and passing off the appellant's copyrights in the said industrial drawings and the impugned product, as a result of which, the appellant is suffering a lot of loss in business and good-will and his statutory rights in copying the industrial drawings are infringed by the defendants.

It is further contended that the defendant No.1 is working for gains at Jammu and sells the impugned product at Jammu, on behalf of defendant No.2, as such, the cause of action has accrued at Jammu. It is stated that as the appellant is selling its product in Jammu through M/s Evergreen Engineering, Gangyal, Jammu, therefore, this court has the territorial jurisdiction to entertain the suit.

The stand of the defendants is that this court has no jurisdiction to try and entertain the suit. It is stated that the defendant No.1 has not sold the impugned product within the territorial jurisdiction of this court as alleged by the appellant. More-over, the defendant No.2 has no registered branch office at Jammu. It is contended that in the plaint, there is no proof of any advertisement or sale of impugned product by either of the defendants within the territorial jurisdiction of this court. It is further contended that protection under Section 62(2) of the Copyright Act, is not available to the appellant as he has placed nothing on the record to show that M/s Evergreen Engineering Company is the sole agent/dealer of the appellant and has made the sale of hydra 12 and hydra 14 cranes at Jammu.

The above stand taken is in addition to the other pleas taken by the defendants in their written statement regarding the merit of the suit. But since the court is only concerned with the issue of jurisdiction, the other issues need not to be discussed.

In dismissing the application under Order 39 Rules 1 and 2 read with Section 151 CPC, and the suit, the court below has relied upon the following facts:-

a/ that the averments of the appellant in para 16 of the suit that he is not aware about the constitution of defendant No.1, in itself is sufficient to draw a conclusion that the said defendant is not a dealer or agent of defendant No.2;

b/ that the contention of the appellant that the defendants are carrying on the business for gains at Jammu, as stated in the plaint is not supported by any documentary evidence.

I have heard learned counsel for the parties and perused the record.

This matter was initially heard and reserved for orders on 2nd of Sept'09, but subsequently, on an application being filed by the appellant, in order to clarify certain issues, the matter was re-heard.

The sole issue involved in the present appeal as also the suit is as to whether this court lacks territorial

jurisdiction to entertain the suit filed by the appellant. In order to examine this issue, it is necessary to have a glance over the controversy raised by the appellant against the defendants.

The case set out by the appellant is:

- 1/ that the product along with its components has been developed on the basis of industrial drawings which were prepared by the appellant-Company's Research and Development Wing;
- 2/ that the said drawings are protected under the provisions of the Copy Right Act, 1957, along with the components developed on the basis of these drawings;
- 3/ that the appellant's Research & development wing created a new technology i.e. "an improved boom to be used in crane" in the year 1997, for which patent was duly granted on 6th of Jan'09, which is still subsisting;
- 4/ that the appellant being the owner of the said patent has the exclusive right to use, work, employ and sell the said patent including its product and process and no one can be permitted to use this patent except the consent of the appellant;
- 5/ that the defendant No.2 has without the leave and licence of the appellant made the impugned crane which is similar to the patented crane of the appellant and the said defendant through defendant No.1 is using and selling the said impugned cranes and doing the business

for profit at Jammu;

6/ that the photographs published by the defendants, of the impugned products in their brochure, show that the said products are same and similar to that of the product of the appellant, based upon the industrial drawings for which the copy right is with the appellant.

In essence, it is contended that the defendants have borrowed/copied the industrial drawings of the product of the appellant and have manufactured the impugned product and are selling the same in the market, resulting in huge loss to the appellant-company.

Section 51 of the Copyright Act, 1957, deals with the cases where the copyright has been infringed. It contemplates that if any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under the said Act or in contravention of the conditions of a licence so granted or of any condition imposed by the competent authority under this Act, does anything, the exclusive right of which is conferred upon the owner of the copyright by the said Act, he is stated to have violated the provisions of the said Act. It further envisages that if any person makes for sale or hire or sells or lets for hire, or by way of trade displays or offers for sale or hire or distributes either for the purpose of trade to such an extent that it prejudices the owner of the copyright, he is stated to have committed the violation of the Copyright Act.

While examining the contention of the appellant as

raised in the plaint, it is revealed that he has laid factual basis indicating that the industrial drawings for the product are registered in his name and the same stand violated by the defendants by using the said industrial drawings for the purpose of making the impugned product. The defendants, even though, have denied that they have violated any of the provisions' of the Copyright, this is an issue for trial and the parties in this regard are required to prove by evidence their rival contentions.

What is emphasized here is that the material facts as disclosed in the plaint do reveal a cause of action for the appellant to file the present case.

The second question that arises in this case is as to whether the defendants have done some act in order to impel the appellant to file the present suit.

The cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. It means that every fact, which if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. I am fortified in this view by a judgment of the Apex Court in the case reported as *South East Asia Shipping Co. Ltd v. Nav Bharat Enterprises Pvt Ltd and others*, (1996) 3 SCC 443. What has been observed in this regard

by the Apex Court in para 3 of the above judgment, may be noticed as under:-

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

According to the appellant, the defendants have, after copying the design and industrial drawing of the product of the appellant, put the same on the impugned product and launched the same in the market for sale. It has been specifically pleaded that the impugned product is being sold at Jammu by the defendant No.1 on behalf of defendant No.2. This would constitute an act done by the defendants which has given rise to a cause of action to the appellant to claim relief against the defendant.

While examining the pleadings in the present case, it be noticed that the facts disclosed by the appellant reveal that there is violation of copyright of the appellant by the defendants.

For the purposes of determining the jurisdiction of this court to entertain the suit, the provisions of Section

20 CPC are applicable in the present case. The said Section contemplates that every suit shall be instituted in a court within the local limits of whose jurisdiction where the cause of action wholly or in part arises. In the present case, it is contended by the appellant that part of cause of action has arisen in Jammu, as the defendant No. 1, who is the agent/dealer of defendant No.2, sells the impugned product of the said defendant at Jammu. The said contention of the appellant is repelled by the defendants by stating that no such sales are offered by the defendant No.1 at Jammu, nor the same has been advertised in any newspaper, magazine or any publication issued in this behalf in Jammu, and thus, there is no cause of action against the defendants arisen in favour of the appellant. It has further been stated that the defendant No.2 has no branch office registered within the territorial jurisdiction of this court.

It may, however, be noted that the defendant No.2 has not denied in clear terms that defendant No.1 is not his agent. What has been stated is that the defendant No. 1, has no relation with the impugned product. The allegation against the defendants by the appellant is that after copying the industrial drawings as also the patent and design registered in his name, the impugned product is being sold by the defendants at Jammu. This contention is being denied by the defendants in their written statement. Whether the impugned product is being sold by the defendants at Jammu or not, would depend upon the quality of evidence led by the parties at the time of trial. It cannot be presumed at this stage that what is contended by the appellant is not factually correct. The

contention of the defendants is that in view of the lack of documentary evidence on behalf of the appellant, it cannot be said that the impugned product is being sold at Jammu. This, in my opinion, cannot become the basis for rejecting the claim of appellant on the plea of jurisdiction. What the court is required to see is as to whether the facts revealed in the plaint do constitute a ground under law to entertain the suit on account of the fact that part of cause of action has accrued at Jammu. Denial of this averment simpliciter by the defendants in their written statement cannot become a ground for its rejection.

The other aspect of the matter is that while dealing with the question of jurisdiction, the averments contained in the plaint alone are to be looked into. The law does not permit the court to go into the defense taken in the written statement by the defendants in this behalf. In case, there is denial in the written statement to the fact of giving rise to a cause of action, this becomes a question of fact and not purely a question of law to be proved during the course of trial. Reference in this regard can be made to a judgment of the Apex Court reported as *Mayar (H.K.) Ltd v. Owner & Parties, Vessel M.V. Fortune Express*, (2006) 3 SCC 100, wherein it has been held as under:-

“From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint

cannot be rejected by the court exercising the powers under Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

Similar view has been taken by the Delhi High Court in the case reported as Dashmesh Mechanical Works v. Hari Singh and anr, 2010(42) PTC 288 (Del), and in State Trading Corporation of India Ltd v. Government of the Peoples Republic of Bangladesh, 63(1996) Delhi Law Times, 971. What has been observed in para 10 by a Division Bench of Delhi High Court in the case of State Trading Corporation (supra), may be noticed as under:-

"It is well settled that prima facie the jurisdiction has

to be determined from the averments made in the plaint. If the jurisdictional facts are disputed, the Court shall frame an issue thereon and having tried the issue may ultimately form an opinion either in favour of or against having territorial jurisdiction to try the suit. If the Court may form an opinion against the plaintiff the plaint shall be ordered to be returned for presentation to proper Court. However, by the time disputed jurisdictional facts come to be tried and determined the Court is not powerless to entertain a prayer for grant of interim relief for by the time the issue relating to jurisdiction may come to be tried and decided, the plaintiff may have suffered irreparably;...his suit may have been rendered infructuous. Thus, the jurisdiction to grant an interim relief is there, though the jurisdictional competence of the Court to try a suit may itself be under challenge. The Court while hearing a prayer for the grant of ad interim injunction would certainly apply its mind to jurisdictional facts-whether prima facie it appears to have jurisdiction to try the suit or not. However, formation of such an opinion would be prima facie only because the issue is yet to be tried. Formation of such a prima facie opinion is an obligation cast on the Court so as to guard itself against likely misuse of its jurisdiction amounting to the abuse of process of the court. Having formed such a prima facie opinion the Court may arrive at a finding that the territorial jurisdiction appears to vest in it or it is likely to have jurisdiction to try the suit and there is a likelihood of the plaintiff being able to substantiate all such averments on the basis whereof it proposes to invoke the territorial jurisdiction of a Court then the Court shall have the jurisdiction to pass interlocutory orders and granting

interim relief so as to protect the interest of the parties.”

It may also be noted that even threat or intention of the defendants to sell the impugned product would constitute a cause for filing the suit by the appellant. Even if there is no actual sale but the fact is that the defendants are likely to sale the impugned product within the territorial jurisdiction of this court as is apparent from the pleadings of the parties and this would, as indicated above, give rise to a cause of action in favour of the appellant.

The learned trial court while dealing with the issue, fell into an error by stating that the appellant has not supported its contention by documentary evidence to show that the sale has been effected at Jammu. It was only required to confine itself to the averments made in the plaint.

The second contention raised by the appellant that in addition to Section 20, he also has the right to invoke Section 62 (2) of the Copyright Act, 1957. The said Section reads as under:-

“62(2).Jurisdiction of court over matters arising under this Chapter.(2) For the purpose of sub section(1), a “District court having jurisdiction” shall notwithstanding anything contained in the Code of Civil Procedure, 1908(5 of 1908), or any other law for time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other

proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.”

A perusal of the above Section shows that suit can be instituted at a place where the person instituting the suit or proceeding actually resides or carries on business or personally works for gain. The appellant in this regard was required to detail in his plaint that he was residing or pursuing its business or working for gain within the territorial jurisdiction of this court. His contention is that he has appointed M/s Evergreen Engineering Company as its sole agent to effect the sale of its product in Jammu. The plaint, however, does not disclose that the aforesaid Company is the sole agent of the appellant and sells its product in Jammu. Unless there are pleadings to that extent that the said agent or dealer is the exclusive and sole agent of the appellant, it cannot be said that the provisions of Section 62 of the Copyright Act are applicable. The intent and purpose of the said Section is to show that either the plaintiff is himself dealing with the business or having a sole agent for the purpose to deal with the product exclusively. A person who may be dealing with any other business and is also selling the product of the appellant, cannot be said to be its sole agent. Therefore, as indicated above, in absence of pleadings to that effect, the plea of the appellant regarding protection under Section 62 of the aforementioned Act, cannot be allowed.

For the reasons mentioned above, the contention of the defendants regarding not entertaining the suit on the

ground of lack of territorial jurisdiction is rejected. The appeal is allowed, order impugned dt. 6th of May'09, is set aside. The objection raised by the respondent-defendants in the suit in hand regarding the territorial jurisdiction of this court is also rejected. The trial court is directed to proceed in the matter in respect of the suit against which appeal was filed.

The parties to appear before the trial court on 15th of Sept'10.

In the suit in hand, the plaintiff has categorically stated that the defendants are doing business in Jammu, which has been denied by them. As such, in view of order passed in CIMA, this contention is not well founded and is rejected.

COS no. 2/2009 to come up for further proceedings on 15th of Sept'10.

(Sunil Hali)
Judge

Jammu
Dt. 26.8.10
SS Khalsa/