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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(COMM) 1082/2016 & IAs No.9787/2016 (under Order XXXIX Rules 1&2 CPC), 14190/2016 (under Order XXXIX Rule 2A CPC), 15316/2016 (under Order I Rule 10 CPC), 15317/2016 (under Order VII Rule 10 CPC), 15318/2016 (under Order VII Rule 11 CPC), 917/2017 (under Order XXXIX Rule 4 CPC), 13696/2017 (under Section 151 CPC), 14013/2017 (under Order VI, Rule 17 CPC) & 14088/2017 (under Order XI Rule 1(5) CPC)

HSIL LIMITED ..... Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Ms. Esha Dutta & Mr. Sahil Garg, Advs.

Versus

IMPERIAL CERAMIC AND ANR ..... Defendants

Through: Ms. Meera Kaura Patel & Ms. Lata Singh, Advs.

AND

\+ CS(COMM) 1087/2016 & IAs No.9818/2016 (under Order XXXIX Rules 1&2 CPC), 15291/2016 (under Order VII Rule 10 CPC), 15292/2016 (under Order VII Rule 11 CPC) , 914/2017, 13692/2017 (under Section 151 CPC), 14014/2017 (under Order XI Rule 1(5) & 14015/2017 (under Order VI Rule 17 CPC)

HSIL LIMITED ..... Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Ms. Esha Dutta & Mr. Sahil Garg, Advs.

Versus

GUJRAT CERAMIC INDUSTRIES ..... Defendant

Through: Ms. Meera Kaura Patel & Ms. Lata Singh, Advs.

AND

+ CS(COMM) 1088/2016 & IAs No.9822/2016 (under Order XXXIX Rules 1&2), 15293/2016 (under Order VII Rule 10 CPC), 15294/2016 (under Order VII Rule 11 CPC), 915/2017 (under Order XXXIX Rule 4 CPC), 13694/2017 (under Section 151 CPC), 14011/2017 (under Order VI Rule 17 CPC) & 14018/2017 (under Order XI Rule 1(5) CPC).

HSIL LIMITED ..... Plaintiff

Through: Mr. Manav Gupta, Ms. Prabhsahay Kaur, Ms. Esha Dutta & Mr. Sahil Garg, Advs.

Versus

MAX CERAMIC INDUSTRIES AND ANR ..... Defendants

Through: Ms. Meera Kaura Patel & Ms. Lata Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

O R D E R

% 13.02.2018

1. The plaintiff has instituted all these suits for permanent injunction restraining the defendant/s in each of the suits from using the trade mark 'HINDUSTAN VITREOUS' or 'H VITREOUS' or any other mark that is deceptively similar to the trade mark of the plaintiff on its products or which infringes the trade mark of the plaintiff and from thereby passing off their goods as that of the plaintiff and for ancillary reliefs of delivery and costs.

2. Each of the suits was entertained and vide *ex parte* ad interim orders therein the defendant/s in all the three suits were restrained as sought and a commission issued to visit the premises of the defendants and to seize the infringing goods.

3. The counsel for plaintiff on enquiry states that the plaint in all the three suits is identical. This Court, for the purpose of this order, has referred to the plaint and the applications in CS (Comm.) No.1082/2016.

4. It is not in dispute that the defendant/s in each of the suits are situated at Thangadh in Gujarat.

5. It is also not in dispute that the plaintiff, besides these three suits had also instituted CS (Comm.) No.1382/2016 against another set of defendants, also situated at Thangadh in Gujarat and the plaint in CS (Comm.) No.1382/2016 was also identical to the plaint in the present three suits and similar *ex parte* ad interim orders were issued in CS (Comm.) No.1382/2016 as well.

6. The defendants in CS (Comm.) No.1382/2016 filed application under Order VII Rules 10&11 of the Code of Civil Procedure, 1908 (CPC) for return/rejection of the plaint for the reason of not disclosing this Court to be having territorial jurisdiction to entertain the suit and which applications came to be adjudicated vide judgment reported as ***HSIL Limited Vs. Marvel Ceramics*** 2017 SCC OnLine Del 6783 and the applications were allowed and the plaint ordered to be returned/rejected; rather than stating herein the reasons which prevailed with this Court in ***Marvel Ceramics*** supra, it is deemed appropriate to set out hereinbelow the relevant paragraphs of the order dated 30th January, 2017 supra as under:-

> *"5. Return/rejection of the plaint on the ground of lack of territorial jurisdiction is sought contending (i) that the territorial jurisdiction of this Court, in para 35 of the plaint has been invoked, referring to Section 134 of the Trade Marks Act, 1999*

and not on the basis of any cause of action having accrued within the jurisdiction of the Court; (ii) that the plea of the plaintiff is also of allegedly infringing goods being sold outside Delhi; (iii) the plaintiff has expressly pleaded in para 35 of the plaint that the plaintiff does not have a branch/subordinate office in Gujarat where the defendants are located; (iv) however the plaintiff itself, at page 429 of its documents, in the document titled 'Corporate Information' has shown having a 'Regional Office' at Ahmedabad; (v) attention is also drawn to page 429 listing EVOK Stores, whereunder also mention is made of Gujarat Zodiac Square, S.G. Highway, Bodakd, Ahmedabad; (vi) the plaintiff has thus, in para 35 of the plaint falsely pleaded not having any branch/subordinate office in Gujarat where the defendants are located; (vii) that even otherwise, the plaintiff admittedly has its registered office at Kolkata; (viii) that the Division Bench of this Court in para 14 of ***Ultra Home Construction Pvt. Ltd. Vs. Purushottam Kumar Chaubey*** *(2016) 227 DLT 320 has held that where the cause of action has accrued neither at the place of principal office nor at the place of subordinate office but at some other place, the plaintiff can be deemed to carry on business at the place of its principal office and not at the place of its subordinate office; and, (ix) thus the plaintiff herein, even if has a subordinate office at Delhi, though the same is also disputed, cannot invoke Section 134 at Delhi and can at best invoke the same at Kolkata.*

6. The counsel for the plaintiff has in response contended, (i) that though the plaintiff at page 429 supra has shown regional office at Ahmedabad but thereunder has not given any address and has given only a telephone number and an e-mail address which are just 'helpline numbers' and otherwise the plaintiff has no office at Ahmedabad or in Gujarat; (ii) the plaintiff has already filed an application under Order VII Rule 14 of the CPC in CS(COMM) No.1082/2016 titled ***HSIL Vs. Imperial Ceramic****, CS(COMM) No.1087/2016 titled* ***HSIL Vs. Gujarat Ceramic Industries*** *and CS(COMM) No.1088/2016* ***HSIL Vs. Max Ceramic Industries*** *which were also filed along with this suit, to place on record clarification issued in November, 2016 on the website of the plaintiff in this regard; (iii) thus the plea in the*

plaint, of the plaintiff not having a branch / subordinate office in Gujarat is correct; and, (iv) that EVOK Stores are Home Stores and are of a different entity than the plaintiff and are not Stores of the plaintiff.

7. With respect to the contention of the defendants / applicants qua para 14 of ***Ultra Home Construction Pvt. Ltd.*** *supra, attention is drawn by counsel for plaintiff to page 799 of the documents, being a copy of the order dated 8th July, 2016 in FAO(OS)(COMM) No.35/2016 titled* ***HSIL Ltd. Vs. Oracle Ceramic****, where the Division Bench has inter alia held as under:-*

> *"3. With respect to the impugned order dated May 11, 2016, having heard learned counsel for the parties we find that the law culled out by the learned Single Judge with respect to the decision of the Supreme Court reported as AIR 2015 SC 3479* ***Indian Performing Rights Society Ltd. Vs. Sanjay Dalia****.*
>
> *4. As per said decision if plaintiff has no presence in the territory where the offending activity is carried on, remedy of territorial jurisdiction with reference of Section 134 of the Trade Marks Act, 1999 can be availed of. Though there is no positive view of a negative fact in the plaint, but there is no admission that the plaintiff i.e. the appellant has presence in Rajkot (Gujarat), where the alleged offending activity is being carried on.*
>
> *5. Accordingly, we set aside the impugned order dated May 11, 2016. We declare that the three suits, the plaints where of have been directed to be returned, shall continue in Delhi for the reason as pleaded in the plaint, there would be territorial jurisdiction in this Court. Of course, if the defendants plead and can prima-facie show that the plaintiff has presence in Rajkot, of the kind contemplated by law, plea of lack of territorial jurisdiction can be raised."*

On the basis of the aforesaid order it is contended that it is of a date subsequent to ***Ultra Home Construction Pvt. Ltd.*** *supra and has held that the plaintiff can sue at Delhi if has a subordinate office at Delhi.*

8. I have considered the aforesaid contentions.

9. The document at page 429 of the plaintiff's own documents appears to be photocopy of a page out of Annual Report of the plaintiff. The counsel for the plaintiff however controverts and draws attention to the index of the documents wherein at serial no.10, against the pages 124 to 430, the description given of the document is "Copy of various advertising brochures of the Plaintiff Company" and states that page 429 is not part of Annual Report of plaintiff but is a part of an advertising brochure of the plaintiff. However there does not appear to be any merit in the said contention. The document at page 429 from its preceding two pages which are a 'Proxy Form' and 'Attendance Slip', is clearly a part of the Annual Report of the plaintiff. Even otherwise it, defies logic as to why in an advertising brochure, 'Corporate Information' would be given. A further flipping of pages shows page 429 to be a part of the Annual Report of the plaintiff for the year 2014-15 commencing from page 242.

10. The counsel for the plaintiff also, after studying his file agrees that the statement earlier made of page 429 supra being from the advertising brochure and the description in the list of documents of the said document as advertising brochure, is erroneous and the document is indeed the Annual Report. The counsel for the plaintiff is however not carrying the original thereof with him.

11. Once it is not in dispute that page 429 supra is indeed a part of the Annual Report of the plaintiff for the year 2014-15, then the plaintiff which on enquiry is informed to be a public listed company, cannot to its shareholders and to the public at large represent that it has a regional office and a retail outlet at Ahmedabad and in the Court take a stand that it has no branch / subordinate office or retail outlet at Ahmedabad, contending the

said regional office to be not a brick and mortar office but only a telephone number and e-mail address and the retail outlet to be of some other entity. The plaintiff, in such an event, would be guilty of violation of several guidelines of Securities and Exchange Board of India (SEBI), Stock Exchange Listing Requirements and best practices advised for the public listed companies. Moreover the plaintiff, in the plaint, while making a unequivocal statement of not having a branch / subordinate office in Gujarat, did not so clarify and which may have resulted in the suit being not even entertained and has given this explanation now only when defendants / applicants have drawn attention to page 429. The plaintiff, by following such practice, is also not found to have approached the Court with clean hands and has disentitled itself to any discretionary relief.

12. The second of the aforesaid contentions of the counsel for the plaintiff, on the basis of the order dated 8th July, 2016 supra of the Division Bench, is also not found to have any merit. The Division Bench therein has not considered the question, whether Section 134 can be invoked at the place of the subordinate office if no cause of action has accrued therein, as has been considered in detail in ***Ultra Home Construction Pvt. Ltd.*** *In fact* ***Ultra Home Construction Pvt. Ltd.****, which was pronounced on 20th January, 2016, is also not found to have been considered in the order dated 8th July, 2016. The Division Bench in order dated 8th July, 2016 cannot thus be said to have held contrary to* ***Ultra Home Construction Pvt. Ltd.*** *as indeed it could not have. It may also be noted that what is not for consideration before the Court cannot constitute the ratio of the order of the Court. It has been held in* ***Union of India Vs. Dhanwanti Devi*** *(1996) 6 SCC 44,* ***Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd.*** *(2003) 2 SCC 111,* ***Kalyan Chandra Sarkar Vs. Rajesh Ranjan*** *(2005) 2 SCC 42,* ***Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate*** *(2005) 2 SCC 489 and* ***Inderpreet Singh Kahlon Vs. State of Punjab*** *(2006) 11 SCC 356 that a judgment is a precedent on what falls for adjudication and not what can be logically deduced or inferred therefrom. The Division Bench, in order dated 8th July, 2016, was not considering whether Section 134 can be invoked at the place of plaintiff's subordinate office if cause of*

action has not accrued there, as ***Ultra Home Construction Pvt. Ltd.*** *has done in detail. A judgment will constitute binding precedent in law, when an issue is raised, the statute and binding precedent cited, case thoroughly debated and properly considered by Court and then finding recorded. Where, an earlier judgment binding on the Bench which has enunciated a principle of law is not considered, such a decision will be per incuriam, binding parties thereto alone and will not constitute a binding precedent to be followed. Reference in this regard may be made to* ***Draupadi Devi Vs. Union of India*** *(2004) 11 SCC 425 and* ***S. Nagaraj Vs. B.R. Vasudeva Murthy*** *(2010) 3 SCC 353. Thus, even if it be held that the Division Bench in order dated 8th July, 2016 has found the plaintiff entitled to invoke Section 134 against the defendant not situated within the jurisdiction of this Court and against whom no cause of action had accrued to the plaintiff within the jurisdiction of this Court, for the reason of the plaintiff having a subordinate office within the jurisdiction of this Court, the same would only be res judicata for the purposes of the suit in which it was so decided and would not be a binding precedent to be followed in other cases filed by the plaintiff. Moreover, the Division Bench in the order dated 8th July, 2016 has not decided the issue of territorial jurisdiction finally and left it to be decided after the stage of filing of the written statement.*

13. The counsel for the plaintiff at this stage draws attention to page 794 being the order dated 25th May, 2016 in the same appeal which was disposed of on 8th July, 2016 to contend that the Division Bench while issuing notice thereof considered the said aspect. It is further contended that the order of the Single Bench which was for consideration before the Division Bench was purely based on ***Ultra Home Construction Pvt. Ltd.****.*

14. The same would in my view not make any difference. The final order dated 8th July, 2016, by which the appeal was disposed of, cannot as aforesaid be said to be laying down any law contrary to ***Ultra Home Construction Pvt. Ltd.*** *for it to be even said that there is any conflict in the order dated 8th July, 2016 and the judgment in* ***Ultra Home Construction Pvt. Ltd.***

15. The counsel for the applicants/defendants in this regard draws attention to ***M/s. Allied Blenders & Distillers Pvt. Ltd. Vs. R.K. Distilleries Pvt. Ltd.*** *2016 SCC OnLine Del 4097 but need to refer whereto which is a dicta of a Single Judge of this Court is not felt.*

16. The counsel for the plaintiff at this stage insists on reading out paras 1 to 4 of the order dated 25th May, 2016 but which only record the contentions of the counsel for the appellant before the Division Bench and after recording which notice was issued. The same is an ex parte order and merely because notice of the appeal was issued does not allow the counsel for the plaintiff to rely on his own contentions recorded therein and to cite the same as precedent. As far as the final order dated 8th July, 2016 is concerned, I have already re-produced the relevant part thereof hereinabove and which cannot be read as laying anything contrary to what has been held in ***Ultra Home Construction Pvt. Ltd.***

17. The request of the counsel for the plaintiff at this stage, to refer the matter to the Division Bench owing to a conflict between the order dated 8th July, 2016 supra and ***Ultra Home Construction Pvt. Ltd.*** *cannot be accepted. I may notice that a Single Judge of this Court in* ***RSPL Ltd. Vs. Mukesh Sharma*** *229 (2016) DLT 651 expressed reservations qua the view taken in* ***Ultra Home Construction Pvt. Ltd.*** *though observing the same to be binding on the Single Judge. The same Division Bench which had pronounced* ***Ultra Home Construction Pvt. Ltd.****, in appeal in* ***RSPL Ltd. Vs. Mukesh Sharma*** *MANU/DE/1862/2016, in rather strong words, deprecated such expression of views by the Single Judge.*

18. The counsel for the plaintiff has not controverted that as per para 14 of ***Ultra Home Construction Pvt. Ltd.,*** *and the relevant part whereof is re-produced hereinbelow,*

> *"The fourth case is where the cause of action neither arises at the place of the principal office nor at the place of the subordinate office but at some other place. In this case, the plaintiff would be deemed to carry on business at the place of its principal office*

and not at the place of the subordinate office. And, consequently, it could institute a suit at the place of its principal office but not at the place of its subordinate office."

this Court does not have territorial jurisdiction. Thus, irrespective of whether the plaintiff has a regional office in Gujarat or not, this Court as per the dicta in ***Ultra Home Construction Pvt. Ltd.*** *and on the averments in the plaint does not have jurisdiction to entertain the suit and the applications have to succeed.*

19. The applications are thus allowed.

20. The plaint is returned/rejected."

7. The plaintiff herein and who was the plaintiff in ***Marvel Ceramics*** also, preferred FAO(OS) (Comm.) No.45/2017 against the order of return/rejection of the plaint and which appeal was dismissed vide judgment reported as ***HSIL Ltd. Vs. Marvel Ceramics*** 2017 SCC OnLine Del 11571 (DB).

8. The counsel for the defendant/s has today in Court handed over order dated 11th January, 2018 of the Supreme Court of dismissal of SLP (C) No.36323/2017 preferred by the plaintiff against the judgment of the Division Bench. Thus, as far as ***Marvel Ceramics*** supra is concerned, the order of return/rejection of plaint has attained finality.

9. The defendant/s in these suits, represented through the same counsel who was the counsel for the defendants in ***Marvel Ceramics*** supra also, had about the same time as in ***Marvel Ceramics***, filed applications under Order VII Rules 10&11 of the CPC in these suit as well for return/rejection of the plaint in these suits as well for the reason of not

disclosing this Court to be having territorial jurisdiction to entertain these suits as well. However the plaintiff having suffered an order of return/rejection of the plaint in ***Marvel Ceramics***, has filed applications for amendment of the plaint in these suits, to amend paras 35 and 36 of the plaint, which as existing are as under:-

> *"35. The cause of action for the present suit arose for the first time in January, 2016 when the Plaintiff received information about the illegal acts of the Defendants. The sale of the offending and infringing product is a continuous one and thus the cause of action is a continuous one and continues to subsist on each day that the infringing products are sold, until an order of injunction as prayed for is passed by this Hon'ble Court."*
>
> *36. This Hon'ble court has the jurisdiction to try and entertain the present suit in terms of Section 134 of the Trade Marks Act, 1999 as the Plaintiffs is located at Delhi. The Plaintiff does not have a branch/subordinate office in Gujarat, where the Defendants are located. Thus, this Hon'ble Court has jurisdiction to try and entertain the present suit."*

to as under:-

> *"35. The cause of action for the present suit arose for the first time in January 2016 when the Plaintiff received information about the illegal acts of the Defendants. The cause of a further arose on 31.10.2017 and 14.11.2017 when the Plaintiff came to know that all the infringing goods found in Delhi are being manufactured in Thangadh, Gujarat by different manufactures. The sale of the offending and infringing product is a continuous one and thus the cause of action is a continuous one and will continue to subsist on each day that the infringing products are sold, until*

an order of injunction as prayed for is passed by this Hon'ble Court."

"36. This Hon'ble Court has jurisdiction to try and entertain the present Suit in terms of Section 134 of the Trademarks Act, 1999, as the Plaintiffs is located at Delhi. The Plaintiff does not have a branch/subordinate office in Gujarat, where the Defendants are located. This Hon'ble Court has jurisdiction to try and entertain the resent Suit in terms of Section 20 CPC as there is a strong apprehension that the Defendants have been selling the impugned products within Delhi. It is submitted that the apprehension that the Defendants are selling/offering for sale the impugned products within the jurisdiction of this Hon'ble Court is redible and imminent. Thus, this Hon'ble Court has jurisdiction to try and entertain the present Suit."

10. Needless to state that the applications for amendment are opposed by the counsel for the defendants. It was *inter alia* the contention of the counsel for the defendants on 19th December, 2017 that since on the averments in the plaint as existing this Court had no territorial jurisdiction also to entertain the suit as held in ***Marvel Ceramics*** supra, this Court did not have jurisdiction also to consider the application for amendment of the plaint and which amendment would in turn vest territorial jurisdiction on this Court. Reliance in this regard was placed by the counsel for the defendants on ***Archie Comic Publications Inc. Vs. Purple Creations Pvt. Ltd.*** 172 (2010) DLT 234 and ***Just Lifestyle Pvt. Ltd. Vs. Advance Magazine Publishers Inc.*** (2013) 198 DLT 306 (DB). However on the request of the counsel for the plaintiff on 19th December, 2017, hearing was adjourned to today.

11. The counsels have been heard.

12. The counsel for the defendants today, besides the judgments aforesaid cited on 19th December, 2017, has also referred to ***Pandit Rudranath Mishir Vs. Pandit Sheo Shankar Missir*** AIR 1983 Patna 53 DB and ***Mst. Zohra Khatoon Vs. Janab Mohammad Jane Alam*** AIR 1978 Calcutta 133 (DB).

13. The Division Bench of the Calcutta High Court in ***Mst. Zohra Khatoon*** supra held that granting an amendment postulates an authority of the Court to entertain the suit and making an order for amendment therein; but where the Court inherently lacks jurisdiction to entertain the suit, it cannot make any order for amendment to bring the suit within its jurisdiction; in that case, the court will be exercising jurisdiction which it has not. Reliance was placed on earlier judgment of Madras, Nagpur, Assam and Allahabad High Courts. The Division Bench of the High Court of Patna in ***Pandit Rudranath Mishir*** supra also held to the same effect and further held that in such a case, the Court is bound to return the plaint to be presented to the proper Court in which the suit ought to have been instituted and after the plaint is returned for presentation to the proper Court, the plaintiff can amend the plaint and represent it to the same Court. Reliance was also placed on earlier judgments of the Calcutta High Court.

14. The Division Bench of this Court in ***Archie Comic Publications Inc.*** supra held that if a plaint is completely bereft of any pleading which are the jurisdictional facts, the Court will not have jurisdiction to proceed in that suit or even to allow an application seeking amendment; thus, a

completely unconscionable plaint which does not reveal any fact which confers a jurisdiction on a Court may not vest the jurisdiction with the Court to even allow an amendment of the same. It was however further held that if it is a case of unclear or ambiguous pleading, the same may be allowed to be amended to clarify the earlier pleaded facts till the same does not give rise to addition of a new cause of action or pleading new facts. In ***Just Lifestyle Pvt. Ltd.*** supra also, amendment of the plaint *inter alia* to vest the Courts at Delhi with territorial jurisdiction was refused *inter alia* holding that the issue of jurisdiction of the Court, as per ***Mohannakumaran Nair Vs. Vijayakumaran Nair*** (2007) 14 SCC 426, is required to be determined with reference to the date on which the suit is filed and entertained and not with reference to a future date and that the amendment sought would not clothe the Court with territorial jurisdiction to try the suit; the counsel for the plaintiff is however right in his contention that other reasons for denying the amendment were also stated.

15. I have however enquired from the counsel for the defendants, whether not it is the settled principle of law that an application for amendment of the plaint, even if filed after an application under Order VII Rule 11 of CPC for rejection of the plaint, has to be decided first, even if makes the application under Order VII Rule 11 of CPC infructuous, as held by me in ***Anita Kumari Gupta Vs. Ved Bhushan*** 2014 (143) DRJ 576 (DB).

16. The counsel for the plaintiff also though post-commencement of dictation has in this regard referred to ***Wasudhir Foundation Vs. C. Lal &***

Sons (1991) 45 DLT 556 and ***Hari Bhagwan Sharma Vs. Badri Bhagat Jhandewalan Temple Society*** (1985) 87 DLT 68.

17. The counsel for the defendants though agrees but states that a contrary view was taken in ***Patasibai Vs. Ratanlal*** (1990) 2 SCC 42.

18. I am unable to agree. Supreme Court in ***Patasibai*** supra is not found to have laid down any precedent in this context and is found to have merely observed that the amendment was clearly an afterthought for the obvious purpose of averting the inevitable consequence of rejection of the plaint on the ground that it did not disclose any cause of action or raise any triable issue.

19. I have however wondered whether an application under Order VII Rule 11 of the CPC on the ground of the plaint not disclosing a cause of action or suffering from some other technical defect viz. of valuation, court fee paid or the claim therein being barred by any law, can be equated with an application under Order VII Rule 10 of the CPC on the ground of the Court not having territorial jurisdiction. This becomes important because of the consistent view of the High Courts mentioned above including of this Court that when the Court lacks territorial jurisdiction, it cannot even entertain an application for amendment of the plaint and which amendment would vest territorial jurisdiction in the Court. Reference may also be made to ***Hans Raj Kalra Vs. Kishan Lal Kalra*** ILR (1976) II Delhi 745 and ***Anil Goel Vs. Sardari Lal*** (1998) 75 DLT 641 though in the context of pecuniary jurisdiction.

20. Having considered the matter, I am of the opinion that the judgments holding that application for amendment of plaint, even if filed

to defeat the pending application under Order VII Rule 11 of the CPC, has to be heard first, will not extend to a case where averments contained in the plaint as existing does not disclose the Court to be having territorial jurisdiction and amendment is sought to incorporate the pleas to disclose the Court to be having territorial jurisdiction. I have reached the said conclusion relying on the dicta of the Supreme Court in ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd.*** (2005) 7 SCC 791 holding that a Court has no jurisdiction over a dispute in which it cannot give an effective judgment and even an agreement between the parties vesting jurisdiction in the Court which it otherwise does not have, is void as being against public policy. It was further held that where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, it cannot take up the cause or the matter and an order passed by a Court having no jurisdiction is a nullity. It was yet further held that neither waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. It was yet further held that where a Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing and a decree passed by a Court having no jurisdiction, is *non est* and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings; a decree passed by a Court, without jurisdiction is a *coram non judice*.

21. Thus, if the plaint in these suits as it exists, does not disclose this Court to be having territorial jurisdiction, then the only option for this Court is to return/reject the plaint and this Court would not have jurisdiction to even consider the application of the plaintiff for amendment

of the plaint and which amendment, if allowed, would disclose the plaint as having the necessary averments for this Court to have jurisdiction to entertain the suit.

22. The counsel for the plaintiff has contended that the plaintiff, even after return/rejection of the plaint, would be entitled to sue the defendants afresh in this Court only by making the averments in the fresh plaint to be filed, averments which are sought to be made by way of amendment in these pending suits. It is argued that once it is so, this Court should not, on account of technicality, compel the plaintiff to follow the said procedure. It is yet further argued that compelling the plaintiff to follow the said procedure would also result in undue advantage to the defendants and prejudice to the plaintiff. It is stated that the Commissioners appointed in the suits have seized the infringing goods and if the plaint is returned/rejected, the defendant/s would be entitled to remove the seals from the seized goods and appropriate the same and by the time the plaintiff files fresh suits, the defendant/s may arrange their affairs in a manner so as to not be caught.

23. Though undoubtedly so but once the law is found to be as aforesaid, I cannot, in the name of "technicalities being not allowed to come in the way of justice" violate the law or decide contrary to law. Moreover, the plaintiff itself is to blame for the position in which it is today. The plaintiff cannot have any premium on its own fault and negligence if any in pleading the requisite facts. It cannot also be lost sight that the plaintiff having its principal/registered office in West Bengal has invoked the jurisdiction of this Court instead of suing the defendants at the place where the defendants are carrying on their business, obviously with an

intent to have an unfair advantage over the defendants. Judicial notice can be taken of the fact that it is always inconvenient to persons/entities as the defendant/s to fight a litigation at a far off place, where they have no base and the cost and inconvenience in defending the litigation itself becomes a reason for such defendant/s to concede to the claim of the plaintiff, even if they have an arguable defence thereto.

24. The counsel for the plaintiff then contends that the process of splitting up of the plaintiff company into three companies with their principal/registered office at Delhi is underway and likely to be completed soon. It is suggested that if the hearing is adjourned, the plaintiff by that time will complete the arrangement already underway and then the plaintiff would also be entitled to invoke Section 134 of the Trade Marks Act, 1999.

25. Not only is this no justification for so waiting but once it has been held that the amendment sought to the plaint cannot be entertained, unless this Court is found to have territorial jurisdiction, so awaiting would also not serve any purpose.

26. As far as the question, whether the averments contained in the plaint in these suits disclose this Court to be having territorial jurisdiction is concerned, as aforesaid, it is not in dispute that the plaint in these suits are in identical language to the plaint in ***Marvel Ceramics*** supra and the order of return/rejection of the plaint in which case, for the reason of the averments in the plaint not disclosing this Court to be having territorial jurisdiction, has already attained finality, as aforesaid. Once it is so, this Court cannot, on the same pleas, take a different view than taken in

Marvel Ceramics supra. The principle of parity also applies. The Courts cannot be seen as forming different opinions in different suits on the same facts.

27. The counsel for the plaintiff then reiterates the arguments which were raised by him also in ***Marvel Ceramics*** supra. It is contended that the plaintiff is carrying on business at Delhi and is not carrying on business at Gujarat and the documents on the basis of which I have in ***Marvel Ceramics*** supra held the plaintiff to be carrying on business did not reflect the correct state of affairs and have since been rectified and the requisite changes have also been made on the website of the plaintiff.

28. Having already dealt with the said pleas in ***Marvel Ceramics*** supra, need to detail the same or to deal therewith again, is not felt. As per the existing plaint and documents, this Court does not have territorial jurisdiction.

29. The counsel for the defendants, at this stage, states that the plaintiff, in the plaint has not even pleaded carrying on business at Delhi and has merely pleaded being located at Delhi. It is argued that the requirement of Section 134 of the Trade Marks Act is not of being located at a place but of either actually or voluntarily residing or carrying on business or personally working for gain therein.

30. Merit is found in the aforesaid contention also. Para 36 of the plaint already reproduced hereinabove merely states that the plaintiff is located at Delhi and does not have a branch/subordinate office in Gujarat where the defendants are located. As far as the statement that the plaintiff does not have a branch/subordinate office in Gujarat where the defendants are

located is concerned, it was in ***Marvel Ceramics*** supra found to be false. The plaintiff nowhere in the plaint has pleaded carrying on business at Delhi. I have in ***Radico Khaitan Ltd. Vs. Nakshatra Distilleries & Breweries Ltd.*** (2017) 241 DLT 48 also held that ***Indian Performing Rights Society Ltd. Vs. Sanjay Dalia*** (2015) 10 SCC 161 cannot be read as requiring the subordinate office of the plaintiff to be exactly in the same district in which the State may have been divided for the purpose of territorial jurisdiction of the Courts and that the reference to the word "place" therein has to be construed as the State and that even if the cause of action may have arisen in any particular district of the State and not in the district or city where the subordinate office of the plaintiff is situated, the plaintiff would be required to institute the suit at the place where the defendant is carrying on business.

31. The counsel for the plaintiff has also contended that though the plaintiff at the time of institution of the suits did not know but has now learnt that the plaintiff is accepting orders from Delhi and is supplying goods at Delhi.

32. The aforesaid argument is of no avail, inasmuch as there are no such averments in the plaint as existing and if at all there is any merit in the said contention, the plaintiff in the subsequent suit/s, if any instituted within this Court, would be entitled to take the said pleas.

33. Axiomatically, the applications of the plaintiff for amendment of the plaint are dismissed and the applications of the defendant/s for return/rejection of the plaint are allowed.

34. The plaint in all the suits is returned/rejected.

35. I refrain from imposing costs on the plaintiff.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 13, 2018
'pp/bs'