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

+ **CS(COMM) 25/2021**

Reserved on : 07.05.2021

Date of decision : 05.07.2021

V GUARD INDUSTRIES LTD. Plaintiff

Through: Mr. Sachin Gupta & Mr. Pratyush Rao, Advocates

Versus

SUKAN RAJ JAIN & ANR. Defendants

Through: Mr. Sushant Singh, Mr. Kunal Khanna,
Mr. Sivaraman Vaidyanathan, Advocates for Defendant No. 1

CORAM:

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)**

JUDGMENT

MANOJ KUMAR OHRI, J.

I.A. 3044/2021 (Under Order VII Rule 10 CPC by Defendant No. 1)

1. By way of present application filed under Order VII Rule 10 CPC read with Section 151 CPC, Defendant No. 1 has objected to the competence of this Court to entertain the present suit for want of territorial jurisdiction and has consequently prayed for return of the Plaint.

2. The present suit has been filed by the Plaintiff inter-alia, seeking relief of permanent injunction to restrain the Defendants from infringement and passing off of its trade mark and design. Additionally, Plaintiff has prayed for rendition of accounts from the Defendants.

3. The Plaintiff claims to be in the business of manufacturing, distribution and marketing/selling of electrical goods which it sells under the registered trade mark 'V-GUARD' and/or its formative variants. It is averred that while Defendant No. 1 is the sole proprietor of the firm M/s N-Guard Electronic Industries having its registered office in Bengaluru, Karnataka, Defendant No. 2 provides web designing services to Defendant No. 1.

4. This Court, vide order dated 18.01.2021, had restrained the Defendants by way of an *ex-parte ad-interim* injunction order from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in offending products i.e., machines, electronic, electrical parts and fittings etc. under the impugned mark 'N-GUARD'/domain name 'www.nguard.in' or any other mark/trade name/trade dress/domain name which are similar to plaintiff's registered trade mark 'V-GUARD'.

5. The Defendant No. 1 (hereinafter referred to as 'Defendant') has questioned the territorial jurisdiction of this Court on the ground that no part of cause of action has arisen within the jurisdiction of this Court. The objections to the jurisdiction are pleaded in the captioned Interim Application as well as in the written statement filed by the Defendant factually denying the averments made in the Plaint. It is inter-alia contended by the Defendant that:

- (a) Defendant is not carrying on business at New Delhi,
- (b) In the plaint, Plaintiff has admitted that while its registered office is in Kerala, Defendant's registered office is in Karnataka;
- (c) Defendant's website is not interactive and that no products can be purchased from its website,

(d) the sale relied upon by the Plaintiff in the plaint was neither made by the Defendant nor by his authorised agent. According to the Defendant, it does not sell its products in Delhi and that the vendor from whom the alleged offending product was purchased has no association with the Defendant,

(e) a one-off self-generated sale by the Plaintiff from an unrelated vendor on a third party marketplace website amazon.in, is not adequate to attract the jurisdiction of this Court.

6. Learned counsel for the Defendant, in support of his submissions, has relied upon the decisions in Patel Roadways Limited, Bombay v. Prasad Trading Company reported as **(1991) 4 SCC 270**, Dhodha House v. S.K. Maingi reported as **(2006) 9 SCC 41**, Indian Performing Right Society Ltd. v. Sanjay Dalia and Anr. reported as **2008 SCC OnLine Del 1238** (hereinafter referred to as IPRS (Delhi), Indian Performing Rights Society Limited v. Sanjay Dalia and Anr. reported as **(2015) 10 SCC 161** (hereinafter referred to as IPRS (SC), Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy & Anr. reported as **2009 SCC OnLine Del 3780 (DB)**.

7. Per contra, Plaintiff has invoked Section 20 CPC to claim jurisdiction of this Court. To summarise, as per the averments made in the plaint, Plaintiff is seeking to attract jurisdiction of this Court based on following assertions:

(a) Defendant is carrying on its business in Delhi and is selling its products in Delhi,

- (b) Defendant's website is interactive and it can be accessed at Delhi to purchase its goods;
- (c) the availability of Defendant's products on third party marketplace websites like Amazon, Flipkart and Indiamart which can be accessed within the territorial jurisdiction of this Court,
- (d) Defendant's offending product was purchased by the Plaintiff's representative at Delhi via www.amazon.in and the same was delivered in Delhi,
- (e) Defendant is believed to have substantial customers in Delhi and, lastly,
- (f) Plaintiff has a network of distributors and retailers in twenty-nine states across the country, its products are sold in Delhi and that it also has its supply office in Delhi.

8. By pleading the aforesaid points of contact with this Court, the Plaintiff's case essentially is that cause of action has arisen in Delhi and hence this Court is competent to entertain the present suit.

9. Learned counsel for the Plaintiff has relied on the decisions in M/s RSPL Limited v. Mukesh Sharma & Anr. reported as **2016 SCC OnLine Del 4285 (DB)**, World Wrestling Entertainment, Inc v. M/s Reshma Collection & Ors. reported as **2014 SCC OnLine Del 2031 (DB)**, Marico Limited v. Mukesh Kumar & Ors. reported as **253 (2018) DLT 8**, Millennium & Copthorne International Limited v. Aryans Plaza Services Private Limited & Ors. reported as **2018 SCC OnLine Del 8260** and Burger King Corporation v. Techchand Shewakramani & Ors. reported as **2018 SCC OnLine Del 10881**.

10. I have heard learned counsels for the parties at length and looked at their respective written submissions and judgments relied upon by them.

11. Territorial jurisdiction of Courts in the matters of infringement and passing off of trade mark has been a vexed legal issue. I have the benefit of earlier judicial pronouncements rendered by various Courts, from time to time, to discuss and decide the question of territorial jurisdiction in the facts of the present case.

12. Since the Defendant has invited an order by this Court under Order VII Rule 10 CPC, it will be apt to observe that, the Court's enquiry is restricted to the averments made in the plaint, for, at this stage, nothing but the plaint and the documents relied upon by the plaintiff have to be scoured to look for ingredients that *prima facie* establish the territorial jurisdiction of this Court. In other words, the pleadings in the written statement, the documents filed by the defendant or the factual averments made in the application under Order VII Rule 10 CPC are out of bound for the Court, and are of no consequence at this stage. Reference in this regard is made to the following extract from the judgment of the Supreme Court in D. Ramachandran v. R.V. Janakiraman and Others reported as (1999) 3 SCC 267:

"...It is well settled that in all cases of preliminary objection, the test is to see whether any of the reliefs prayed for could be granted to the appellant if the averments made in the petition are proved to be true. For the purpose of considering a preliminary objection, the averments in the petition should be assumed to be true and the court has to find out whether those averments disclose a cause of action or a triable issue as such. The court cannot probe into the facts on the basis of the controversy raised in the counter."

13. Again, in Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and Another reported as (2004) 9 SCC 512 the Supreme Court reiterated the test in following words:

“139. Whether a plaint 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 plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in its entirety, a decree would be passed.”

14. To the same extent are the observations of a Division Bench of this Court in M/s RSPL Limited (Supra) wherein, it was held that the averments made in the plaint are to be read on a demurrer while deciding an application under Order VII Rule 10 CPC. It was held as follows:

“11. It must be stated that it is a settled proposition of law that the objection to territorial jurisdiction in an application under Order 7 Rule 10 CPC is by way of a demurrer. This means that the objection to territorial jurisdiction has to be construed after taking all the averments in the plaint to be correct. In Expchar SA v. Eupharma Laboratories Limited : (2004) 3 SCC 688, the Supreme Court 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 procedure, are true. The Supreme Court further observed that the objection as to jurisdiction in order to succeed must demonstrate that granted those facts, the Court does not have jurisdiction as a matter of law. It is also a settled proposition of law that while considering a plaint from the standpoint of Order 7 Rule 10 CPC, it is only the plaint and the documents filed along with it, that need to be seen. The written statement is not to be looked into at all.”

15. This being the mandate, the plaint and the documents filed by the plaintiff have to be read at their face value, at this stage, on a demurrer against the defendant, who has questioned the jurisdiction of the Court, treating all the averments as true and correct, to form a *prima facie* opinion on the jurisdiction of the Court.

16. In the present case, besides making aforementioned averments in the plaint, the Plaintiff has also filed screenshots of the Defendant's own website as well as of third party marketplace websites like Amazon, Flipkart and Indiamart to show that the Defendant's products are available for sale and delivery in Delhi. To substantiate his plea that the Defendant's products are freely available on third party websites, a copy of the sale invoice dated 28.10.2020 has been placed on the record whereby the Plaintiff's representative had purchased the Defendant's offending product under the sale description "N-Guard 500V|B07SSB1SRD (01-WRJO-VPXR)" through amazon.in from 'M/s Sreedevi Electronics and Mobiles' based at Bengaluru, Karnataka.

17. On 18.01.2021, after hearing learned counsel for Plaintiff, this court passed an *ex-parte ad-interim* injunction order subsequent to which, the Plaintiff preferred an application under Order XXXIX Rule 2A CPC and filed certain additional documents along with it. Besides three sale invoices dated 24.02.2021 and 11.03.2021, evidencing sale of offending products to allege contempt of Court by the Defendant, the Plaintiff also placed on record screenshots of third party marketplace websites i.e., Indiamart, Flipkart, Shopclues and Snapdeal showing availability of the Defendant's offending products on their universally accessible websites (on the latter three websites, the product was shown to be either sold out or currently

unavailable). In all such screenshots, the Defendant's mark in question is prominently displayed. In the screenshot relating to website of Indiamart (at pages 23 and 24 of the application), besides the mark, the name and contact details of the Defendant are also conspicuously displayed. In fact, the Defendant is shown as a verified supplier. Similarly, on the screenshot relating to website of Shopclues (at page 28 of the application), the Defendant is shown as the seller of the offending product. It is worthwhile to note that the Plaintiff has averred in the plaint that the Defendant has been selling its products on third party marketplace websites.

18. Although the aforementioned additional documents are not filed along with the plaint, however, the Courts have expanded the scope of enquiry to include all such documents filed by the plaintiff prior to the hearing on an application under Order VII Rule 11 CPC. Since the same principles apply to adjudication under Order VII Rule 10 CPC, the documents filed by the plaintiff with its application under Order XXXIX Rule 2A CPC, are within the reach of the Court for its determination. Reference in this aspect is made to the decision in ABN-AMRO Bank v. The Punjab Urban Planning and Development Authority reported as **AIR 2000 P&H 44**, wherein, Swatanter Kumar, J. (as his Lordship then was) held as follows:

“7. It is a settled rule of law that the plea of rejection of plaint is founded on the "PLEA OF DEMURRER". A person raising such plea in law has to take the facts as stated by the opponent as correct. Despite tentative admission of such correctness, the plaint does not disclose a complete or even partial cause of action or the relief claimed is barred by law and thus, the plaint is liable to be rejected within the provisions of Order 7 Rule 11 of the Code of Civil Procedure. Plain language of this rule shows that for determination of an application under this provision, the Court has to look into the plaint. This concept has been extended by judicial pronouncement of various Courts

so as to take within its ambit even the documents filed by the plaintiff along with plaint or subsequent thereto but prior to the hearing of such application. It would be more so where the documents have been referred to in the plaint itself. But the defence raised by the defendants in his written statement or the documents filed along therewith certainly falls beyond the zone of consideration, where an application for rejection of a plaint is being considered by the Court. The language of the rule does not admit any scope for doubt that the written statement filed by the defendant cannot be referred or relied upon by the applicants for decision of such application. Whether the plaint discloses any cause of action or not, is a question founded on the basic cause of action pleaded by the plaintiff in his plaint. It must thus necessarily be construed that language of Rule 1 is circumscribed by the limitation of reading the plaint at best with its supporting documents...”

(emphasis added)

19. The decision in ABN-AMRO Bank (Supra) was also followed by a Division Bench of this Court in Hari Gokal Jewellers v. Satish Kapur reported as **2006 SCC OnLine Del 482** (Special Leave to Appeal (Civil) No(s).15482/2006 filed against the decision was dismissed on 25.09.2006) and Rajiv Kumar (Deaf and Dumb) v. M/s Kewal Cargo Carriers (P) Ltd. reported as **2006 SCC OnLine Del 496**.

20. Curiously, in the present case, neither the Plaintiff nor the Defendant has its principal offices in Delhi. While the Plaintiff's registered office is in Kerala, the Defendant's principal office is in Karnataka. However, the Plaintiff has chosen the Court at New Delhi to pursue a legal action against the Defendant to protect its intellectual property rights in its registered trademarks by making following averments in the plaint relating to “Cause of Action” (para 26) and “Jurisdiction” (para 27):

Cause of Action

“26. The cause of action for institution of the present suit arose in the last week of October 2020, when the Plaintiff came across the impugned products being listed on the Defendants’ interactive website namely www.nguard.in. It is pertinent to note that the Defendants have also published and uploaded images of the products bearing the impugned mark on the aforementioned website. Upon conducting further enquiries, the Plaintiff came to know that the products bearing the impugned mark are also available on third party e-commerce websites like Amazon, Flipkart, etc. The said cause of action is a continuous one and continues to subsist till the Defendants are restrained by an order of injunction passed by this Hon’ble Court.

Jurisdiction

27. This Hon’ble Court has the jurisdiction to entertain and try the present suit under Section 20 of Code of Civil Procedure since the Defendants’ are carrying on their business and selling their products under the impugned mark at Delhi. The Defendants have also listed its products under the impugned mark on its interactive website namely www.nguard.in, from which an order can be placed all over India including Delhi. Moreover, the Defendants’ products bearing the impugned mark are listed and available for sale on third party e-commerce websites such as www.amazon.in and www.flipkart.com which is accessible from Delhi. Through the said websites the Defendants can be contacted. The Plaintiff representative placed an order on www.amazon.in and Defendants’ product under the impugned mark was delivered within the jurisdiction of this Hon’ble Court. It is believed that the Defendants already have substantial customers in Delhi, within the jurisdiction of this Hon’ble Court. The Plaintiff has its office at Delhi and is also selling its products at Delhi.”

21. The issue whether availability of defendant’s products on its own interactive website or on third party marketplace websites, which can be accessed and used by a customer in the forum state to purchase the defendant’s products, would result in accrual of cause of action in the forum state has been dealt with by Courts in number of cases.

22. In Banyan Tree Holding (P) Limited (Supra), a Division Bench of this Court answered the questions by observing as follows:

“58. We summarise our findings on the questions referred for our opinion as under:

Question (i): *For the purposes of a passing off action, or an infringement action where the Plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the Defendants lends jurisdiction to such Court where such suit is filed ("the forum court")*

Answer: *For the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the Plaintiff would have to show that the Defendant “purposefully availed” itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the Defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the **specific targeting** of the forum state by the Defendant resulted in an injury or harm to the plaintiff within the forum state.*

Question (ii): *In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?*

Answer: *For the purposes of Section 20 (c) CPC, in order to show that some part of the cause of action has arisen in the forum state by the use of the internet by the Defendant the Plaintiff will have to show prima facie that the said website, whether euphemistically termed as "passive plus" or "interactive" was specifically targeted at viewers in the forum state for commercial transactions. The Plaintiff would have to plead this and produce material to prima facie show that some commercial transaction using the website was entered into by the Defendant with a user of its website within the forum state resulting in an injury or harm to the Plaintiff within the forum state*

Question (iii): *Is it permissible for the Plaintiff to establish such prima facie case through "trap orders" or "trap transactions"?*

Answer: *The commercial transaction entered into by the Defendant with an internet user located within the jurisdiction of the forum court cannot possibly be a solitary trap transaction since that would not be an instance of "purposeful" availment by the Defendant. It would have to be a real commercial transaction that the Defendant has with someone not set up by the Plaintiff itself. If the only evidence is in the form of a series of trap transactions, they have to be shown as having been obtained using fair means. The Plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the plaint, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test."*

(emphasis added)

23. Later, another Division Bench of this Court in World Wrestling Entertainment, Inc (Supra), dealt with the jurisdictional issues arising because of internet based reach of the offending products. The Court acknowledged the existence of virtual shops in the virtual world on the internet and equated the same with the physical shops in the physical world. The following is the relevant instructive extract from the judgment:

"21. ...Because of the advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence. The availability of transactions through the website at a particular place is virtually the same thing as a seller having shops in that place in the physical world. Let us assume for the sake of argument that the appellant/plaintiff had a shop in Delhi from where it sold its various goods and services. In that case, it could not be denied that the plaintiff carried on business in Delhi. This is apart from the fact that the appellant/plaintiff may also have been regarded as having voluntarily resided in Delhi. When the shop in the 'physical sense' is replaced by the 'virtual' shop because of the

advancement of technology, in our view, it cannot be said that the appellant/plaintiff would not carry on business in Delhi”

24. In Burger King Corporation (Supra), a Coordinate Bench of this Court held that it is not merely conclusion of sale via website within the jurisdiction of a Court that will confer jurisdiction on a Court at such place. The infringement or passing off action can be by “use of a mark” in the form of advertisements and promotions of the offending products and can invite legal action wherever such offending products are advertised for sale. It was held that as per the definition of “Use” of mark in Section 2(2)(c) of the Trade Marks Act, “Use” is not confined to an act of sale and thus conclusion of sale is not necessary to maintain an action for infringement. Following extract from the said judgment is instructive to read:

“19. What constitutes cause of action in the context of a suit alleging violation of rights in a trade mark, would therefore be the question. In a case involving trade mark infringement, infringement happens when a person "uses in the course of trade" any mark without the owner's consent. Thus, use of a mark is the cause of action in an infringement as also in a passing off action. If use takes place in a territory where the suit is filed, that Court has the jurisdiction to entertain the suit. When there is use of a mark, there is a cause of action to sue, where the use takes place....

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21. Thus, jurisdiction of a Court in a trade mark action, could be invoked where there is use upon or in relation to goods. The phrase 'in relation to' has been interpreted to include advertising, promotion, publicity, etc. Thus, in addition to actual sale of goods and providing services, if a person advertises his or her business under the mark in a territory, promotes his or her business under the mark in a territory or for example invites franchisee queries from a particular territory, sources goods from a particular territory, manufactures goods in a particular territory, assembles goods in a particular territory, undertakes

printing of packaging in a particular territory, exports goods from a particular territory, it would constitute 'use of a mark'.

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23. Thus, when Section 20 of the CPC provides that a suit could be filed in any place where the cause of action arises, in a suit involving rights in a trademark, cause of action arises in each and every place where there is any form of use of the said mark. Principles which apply to infringement, actions to determine 'use' would equally apply to passing off actions.

(emphasis added)

25. In Millennium & Cophorne International Limited (Supra), Court held that the test to be applied in an action for infringement and passing off is about the place where the injury has been caused to the plaintiff. The place where the deception has been caused to customers by the offending product of the defendant shall certainly have jurisdiction. Court emphasised on the causation of injury at a particular place to pin jurisdiction on a given place. It was held as follows:

*“24. In continuation of what was held by the Division Bench in **World Wrestling Entertainment, Inc.**, I may state that the mode of booking/reserving rooms and other facilities particularly of dining therein, in hotels/resorts/spas, has changed over the years with maximum number of bookings/reservations being made through such third party websites, so much so that the rates available on the third party websites are also found to be considerably lower than the rates offered through traditional mode of agents or offices in major cities. Judicial notice can be taken of the fact that much of the volume of businesses of hotels is now through such third party websites, in comparison to the business through direct bookings and/or through travel agents. Thus, if the Courts at Delhi will have jurisdiction over subject matter of suit owing to defendants having interactive website accessible at Delhi and enabling defendants situated outside Delhi to carry on business at Delhi, I see no reason to hold that it will not be so where the defendants, instead of hosting its own interactive website, avails the service of third party websites to*

carry on business at Delhi. There is no rationale for carving out such a distinction....

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29. It will thus be seen that all that a plaintiff in a suit for infringement of trade mark or for passing off and for ancillary reliefs including of compensation with respect thereto is required to plead and show to invoke the jurisdiction of any Court, is that wrong was done to it within the local limits of the jurisdiction of that Court and wherein the cause of action would axiomatically accrue to the plaintiff and/or that the cause of action, in whole or in part accrued within the jurisdiction of that Court. In view of the codified law of India, conferring territorial jurisdiction on a Court where wrong is done to plaintiff or where even a part of cause of action arises and it being indisputable that cause of action arises in a Court within whose jurisdiction confusion or deception essential for an infringement or passing off suit takes place or injury caused to the plaintiff and the plaintiff is also entitled under Section 19 supra to sue where wrong is done, all that the plaintiff is required to plead is these ingredients, howsoever miniscule they may be. Once the plaintiff has pleaded so, in my respectful opinion, there is no need to further test territorial jurisdiction applying the principles evolved by the US Courts in the context of their 'Due Process' clause.

30. Section 134(2) of the Trade Marks Act further entitles a suit to be instituted, besides in the aforesaid Courts, also in Courts within the local limits of whose jurisdiction the plaintiff at the time of institution of the suit actually and voluntarily resides or carries on business or personally works for gain. Thus a suit as prescribed in Section 134(1) of the Act is permitted to be instituted, at the option of the plaintiff, besides in the Court where the wrong has been done or the cause of action has accrued or where the defendant resides or carries on business, also in the Courts where the plaintiff resides or carries on business, notwithstanding no wrong having been done or cause of action having been accrued in that Court and even where the defendant may not be the resident of or carrying on business within the jurisdiction of that Court.

31. The plaintiff in the present case as aforesaid has invoked the territorial jurisdiction of this Court by pleading that the defendants sell their services under the impugned mark all over

India including defendants from Delhi. It is further pleaded that the plaintiff's services are also widely availed by the customers in Delhi. Axiomatically, the wrong is pleaded as having been caused to the plaintiff at Delhi and cause of action is pleaded to have accrued at Delhi”.

(emphasis added)

26. The decision in World Wrestling Entertainment, Inc (Supra) was later followed in Icon Health and Fitness, Inc. v. Sheriff Usman and Anr. reported as **2017 SCC OnLine Del 10481** wherein it was held that defendants' offer to sell their products through app stores and e-commerce portals amount to their carrying on business or working for gain in the forum state.

27. In Marico Limited (Supra), Court came to the conclusion that availability of defendant's products on Indiamart website *prima facie* satisfy the test of 'purposeful availment'. It was held:

“67. The plaintiff has further asserted in its plaint that the defendants are indulging in online sale of the impugned product in Delhi through another website 'Indiamart'. Printouts of the 'Indiamart' website showing the defendants products range have been filed. A perusal of the 'Indiamart' website prima facie shows that it is an interactive website inasmuch as it permits the viewers to ask for price and specifically states "before dispatching the product, they are firmly tested and checked by the team of quality controllers". Accordingly, in the present case the "purposeful availment" as well as "sliding scale" and "effects" tests as stipulated in Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr., 2010 (42) PTC 361 (Del) are satisfied.”

28. Defendant's reliance on Banyan Tree Holding (P) Limited (Supra), to contend that a solitary self-engineered sale cannot be relied upon by the Plaintiff in order to create a cause of action in Delhi, is not entirely correct. In the captioned case, Court forbade only trap sales that are contrived by

adopting unfair means only for the purposes of creating a cause of action. Self-generated sales by plaintiff cannot per se be labelled as 'trap sales', within the meaning of the aforesaid decision, if the defendant is otherwise found to be targeting its products at a place where the sale is made. During the course of arguments, learned counsel for the Defendant conceded that the sale in question was not a 'trap sale' but a solitary sale.

29. It is an undisputed position in law that the plaintiff must plead about the interactive nature of websites and specific targeting of customers in the forum state, with an onus cast upon him to provide some material in support of such pleading at the threshold.

30. From the facts pleaded in the Pleat and the documents produced by the Plaintiff, it is *prima facie* established that the Defendant's offending products are not only freely sold on amazon.in, but are also available for sale to customers in Delhi on other third party marketplace websites e.g., Amazon, Flipkart, Snapdeal, Indiamart and Shopclues, which are universally accessible, including to customers in Delhi. In fact, on the latter two websites, the Defendant himself is shown as the seller. In these facts, whether the sale in question is a trap sale or not, and whether any unfair means were adopted would be a matter of evidence and trial.

31 Therefore, Defendant's contention that the suit being predicated on alleged trap sale/solitary sale disqualifies the Plaintiff from availing of jurisdiction of this court as no cause of action has arisen, does not help the Defendant's cause. The facts pleaded not only satisfy the test of 'purposeful availment' in terms of Banyan Tree Holding (P) Limited (Supra), but also satisfy the test of 'use' of trade mark in question by the Defendant to sell/promote its products in Delhi as laid down in Burger King Corporation

(Supra) as well as the ‘injury’ test laid down in Millennium & Cophorne International Limited (Supra).

32. Thus, from the exposition of law referred above, when applied to the facts of the present case, it can be *prima facie* concluded that cause of action has arisen within the jurisdiction of this court.

33. Another contention raised by learned counsel for the Defendant, is that the Plaintiff has specifically invoked the territorial jurisdiction of this Court under Section 20 CPC however, in the plaint, it has been admitted that the Defendant has its principal office in Karnataka. It is argued that in the absence of Defendant’s principal office, or for that matter, any office in Delhi, the jurisdiction of this Court is not made out under Section 20 CPC.

34. The aforesaid contention raised on behalf of the Defendant is facile in view of the settled position of law. The Supreme Court in IPRS (SC) has settled the debate on choice of forums available to a plaintiff to file an action against infringement and passing off. It has been declared that by virtue of Section 134 of the Trade Marks Act, additional jurisdictions have been made available to plaintiff, over and above the jurisdictions available under Section 20 CPC. The Supreme Court, after considering its earlier decisions including Patel Roadways Limited, Bombay (Supra) and Dhodha House (Supra), held as follows:

“18. On a due and anxious consideration of the provisions contained in Section 20 of the Code of Civil Procedure, Section 62 of the Copyright Act and Section 134 of the Trade Marks Act, and the object with which the latter provisions have been enacted, it is clear that if a cause of action has arisen wholly or in part, where the Plaintiff is residing or having its principal office/carries on business or personally works for gain, the suit can be filed at such place/s. Plaintiff (s) can also institute a suit at a place where he is residing, carrying on business or

personally works for gain de hors the fact that the cause of action has not arisen at a place where he/they are residing or any one of them is residing, carries on business or personally works for gain. However, this right to institute suit at such a place has to be read subject to certain restrictions, such as in case Plaintiff is residing or carrying on business at a particular place/having its head office and at such place cause of action has also arisen wholly or in part, Plaintiff cannot ignore such a place under the guise that he is carrying on business at other far flung places also. The very intendment of the insertion of provision in the Copyright Act and Trade Marks Act is the convenience of the Plaintiff. The rule of convenience of the parties has been given a statutory expression in Section 20 of the Code of Civil Procedure as well. The interpretation of provisions has to be such which prevents the mischief of causing inconvenience to parties.

19. The intendment of the aforesaid provisions inserted in the Copyright Act and the Trade Marks Act is to provide a forum to the Plaintiff where he is residing, carrying on business or personally works for gain. The object is to ensure that the Plaintiff is not deterred from instituting infringement proceedings "because the court in which proceedings are to be instituted is at a considerable distance from the place of their ordinary residence..."

35. The decision in IPRS (SC) was later followed by a Division Bench of this Court in Ultra Home Construction Pvt. Ltd. v. Purushottam Kumar Chaubey & Ors. reported as **2016 SCC OnLine Del 376**, wherein it was held as under:

"14. It is evident from the above observations that the interpretation given to the expression "carries on business" in the context of a defendant under section 20 of the Code has also been employed in the context of a plaintiff under the said sections 134(2) and 62(2). Thus, in addition to the places where suits could be filed under section 20 of the Code, the plaintiff can also institute a suit under the Trade Marks Act, 1999 and the Copyright Act, 1957, as the case may be, by taking advantage of the provisions of section 134(2) or section 62(2),

respectively. Both the latter provisions are in pari materia. Under these provisions four situations can be contemplated in the context of the plaintiff being a corporation (which includes a company). First of all, is the case where the plaintiff has a sole office. In such a case, even if the cause of action has arisen at a different place, the plaintiff can institute a suit at the place of the sole office. Next is the case where the plaintiff has a principal office at one place and a subordinate or branch office at another place and the cause of action has arisen at the place of the principal office. In such a case, the plaintiff may sue at the place of the principal office but cannot sue at the place of the subordinate office. The third case is where the plaintiff has a principal office at one place and the cause of action has arisen at the place where its subordinate office is located. In this eventuality, the plaintiff would be deemed to carry on business at the place of his subordinate office and not at the place of the principal office. Thus, the plaintiff could sue at the place of the subordinate office and cannot sue (under the scheme of the provisions of section 134(2) and 62(2)) at the place of the principal office. 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. All these four cases are set out in the table below for greater clarity:

S.No.	Place of Plaintiff's Principal Office (Sole office in s.no.1)	Place of Plaintiff's Subordinate /Branch Office	Place where cause of action arose	Place where Plaintiff can additionally sue under section 134(2) and section 62(2)
1	A	--	C	A
2	A	B	A	A
3	A	B	B	B
4	A	B	C	A

36. If under Section 20 CPC, jurisdiction of the Court is attracted by virtue of location of the defendant's place of business or from where the defendant is carrying on its business or working for gain, under Section 134 of the Trade Marks Act, it is the plaintiff's office location or from where he is carrying on business, is a material factor. However, in IPRS (SC) (Supra), the occurrence of cause of action has been read into Section 134 of the Trade Marks Act, as a determining factor, even though not spelt out in the language, on the lines of Section 20 CPC. Therefore, if some part of cause of action has arisen at a place where the plaintiff has its branch/subordinate office, Courts at that place will have jurisdiction to entertain a suit against infringement and passing off. In other words, the occurrence of cause of action or any part thereof, at a place, is held to be a determining factor, both under Section 20 CPC, and Section 134 of the Trade Marks Act, to attract jurisdiction of the court at such place.

37. Applying the ratio laid down in IPRS (SC) and Ultra Home Construction Pvt. Ltd. (Supra) to the facts of the present case, it is seen that the Plaintiff has pleaded that it has its "supply" office in Delhi. Coupled with the fact that the Plaintiff has demonstrably purchased Defendant's offending product at Delhi from amazon.in and that the Defendant's products are also available on other third party marketplace websites where in some of which the Defendant himself is the seller, and that such websites are accessible in Delhi, this Court is of the view that, it is sufficient to *prima facie* conclude that in terms of the 'third situation' set out in Ultra Home Construction Pvt. Ltd. (Supra), Courts in Delhi are available to the Plaintiff, under Section 20(c) CPC, to bring an action against infringement and passing off, even if the Defendant does not have an office in Delhi.

38. Since the filing of suit in this Court is also predicated on the presence of Plaintiff's subordinate (supply) office in Delhi and the sale of Defendant's products in Delhi, speaking *prima facie*, and save Defendant's contentions, which will be established after trial, the Plaintiff is qualified both under Section 20(c) CPC and Section 134 of the Trade Marks Act and, to approach this Court.

39. Learned counsel for the Defendant has referred to several other judgments in support of the application however, in view of the aforesaid discussion, I do not see the need to discuss each of them in detail as they are distinguishable on facts.

40. As of now, the aforementioned pleadings are sufficient for the Court to proceed with the suit. No case for return of plaint under Order VII Rule 10 CPC is made out.

41. Needless to say, the observations made hereinabove are only *prima facie* and shall not prejudice the contentions of either of the parties in the trial.

CS(COMM) 25/2021, I.A. 803/2021 (Under Order XXXIX Rules 1 & 2 CPC),
I.A. 3043/2021 (Under Order XXXIX Rule 4 CPC by Defendant No. 1)
and
I.A. 3046/2021 (Under Section 124 of Trade Marks Act by Defendant No. 1)

List before the Roster Bench on 22nd July, 2021.

(MANOJ KUMAR OHRI)
JUDGE

JULY 05, 2021/p'm