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CROSS-EXAMINATION

Forum Shopping

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ABSTRACT

Litigants have time and again faced critique and reprimand of judges and academicians for practicing 'forum shopping'. Recent High Court rulings have contributed significantly to the progress of jurisprudence on this point. This Cross-Examination analysis is an attempt to evaluate judiciary's recent take on the practice of forum shopping.

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INTRODUCTION:

Forum Shopping, the practice of litigants of approaching those courts that they deem are most likely to provide a favorable order or judgment, has been growing over last few years. For example, many plaintiffs have filed their suits before the Delhi High Court, claiming jurisdiction based on trap orders or even a mere possibility of infringement occurring in Delhi. The Delhi High Court is known to be proactive in terms of protecting intellectual property rights (“IPRs”) and for its efficient and speedy disposal of such litigations. Hence, it has become a preferred forum for IP litigants.

While a litigant’s proclivity towards a favorable forum is understandable, acquiescence of such a practice may lead to a misuse of the processes of courts. When practiced in excess, courts often choose to take steps to curb forum shopping. Staying heedful of the swarm of litigants on its doorsteps, the High Court of Delhi (“**Court**”) has recently, in a two judgments, signaled its displeasure and disinterest in dealing with alien matters.

The first judgment related to a matter filed by Microsoft Corporation alleging that the defendants were using, at their offices, pirated/illegally-copied software of the plaintiffs, despite the fact that none of the defendants had a place of business in Delhi. The Court directed the plaintiffs to furnish a security of 200,000 INR per suit, as a precondition to proceed with the matter. This amount was to be paid to the defendants in each matter if the proceedings were found to be of a speculative nature. The Court acknowledged that staying mindful of the section 62 of the Copyright Act, 1957 and the unsettled interpretation of the same, the Court was bound to permit the plaintiff to proceed with the matter, but only on the pre-condition of the security being deposited.

The second case related to the infringement of trademarks. The question of the exercise of jurisdiction by the Court on the basis of a website simply being accessible in Delhi was referred to the Division Bench of the Court by a single judge. Since neither the plaintiff nor any of the defendants had any presence in Delhi, the question was raised whether the Court had any jurisdiction to entertain the suit only on the ground that the website could be accessed in Delhi. The Division bench surveyed judgments from various common law jurisdictions like USA, Canada, U.K. etc. in order to evaluate various tests used to ascertain jurisdiction where a website was accessible the world over, including in the forum state. The Division bench of the Court emphasized on the requirement of the defendant’s website being used for commercial activities within the precincts of the forum, and hurled the matter back to the single judge for its decision on facts. The Court specifically noted that a mere passive website or even an interactive website which was not used for commercial activity by the defendant was not enough for the Court to exercise jurisdiction in a passing off matter.

In both of the above rulings, the Court has attempted to curb the spreading practice of forum shopping. Despite a long arm statute was available in *Microsoft’s case*, which prompted the Court to allow the plaintiff to proceed before it, but only after requiring a security deposit as a pre-condition to hearing the matter. Whereas in the second matter, the Court outright rejected the Plaintiff’s suit on the grounds of jurisdiction.

In this ‘Cross Examination’, we provide an in-depth analysis of the facts and rulings of both cases and offer our insights on avoiding the trap of forum shopping.

FORUM SHOPPING AND LONG ARM STATUTES:

Forum shopping refers to the practice of litigants of approaching courts that they deem are most likely to provide a favorable order or judgment. Choice of forum for adjudication of a matter is not *per se* illegal if the law allows the parties to choose from the available forums to adjudicate upon their matters.

Forum shopping offers several benefits:

- Greater potential for a favorable order or judgment based on the court's precedents
- Tap into the special expertise of the forum, when the matter is highly technical or complex.
- Capitalize the efficiency of the forum in dealing with such matters.
- Geographically advantageous to plaintiffs where defendant is not present in India

However, when a party seeks out a jurisdiction simply to gain a juridical advantage rather than a real and substantial connection of the matter to the jurisdiction, such a practice is ordinarily condemned.¹

When forum shopping becomes rampant and overburdens a forum with loosely connected or unconnected matters, the court would take steps to discourage it leading to several problems:

- Delay in obtaining justice for the Plaintiff as the lawsuit would have to be re-filed in a more appropriate jurisdiction. Cases that require quick resolution would be severely hampered by such delays.
- The Plaintiff may face reprimand from the court for unnecessarily overburdening the court.

In India, generally, for a court to exercise jurisdiction under section 20 of the Code of Civil Procedure, 1908 (“CPC”) the defendants should either (a) reside or carry on business or personally work for gains within the territorial jurisdiction of the forum; or (b) the cause of action should wholly or in part arise in the territorial jurisdiction of the court. However, in certain cases, the plaintiff avails of the benefits of a statute which gives a forum the jurisdiction to try matters concerning defendants based and operating outside the forum's territorial jurisdiction. Such statutes are called 'long arm statutes' since they allow a forum to exercise jurisdiction by virtue of the plaintiff's presence in the forum, where the defendants are not residents of the forum.

THE CROSS EXAMINATION ANALYSIS:

We shall now examine two recent rulings where the Court considered the issue of forum shopping. In the first case, a long arm statute was available to the cause of the plaintiff and hence the Court permitted the matter to proceed before it, although the Court did not refrain from expressing displeasure over the practice of forum hiring by the financially affluent. In the other case, no such long arm statute was relevant to the cause of the plaintiff in the forum Court and consequently the Court ruled that there must be a real and substantial nexus of the matter with the forum.

1. *Microsoft Corporation & Ors. v. Dhiren Gopal & Ors.*²

The Case:

The matter was brought before the Court under its original civil jurisdiction, alleging use of pirated

¹ *Horlicks Ltd. and Anr. v. Heinz India (Pvt.) Limited*, FAO (OS) No. 86 of 2009

² I.A. Nos. 13867 of 2009 and 13868 of 2009 in C.S. (OS) No. 2027 of 2009

software and praying for an *ex parte* interim injunction under Order 39 Rules 1 and 2 Civil Procedure Code, 1908 to restrain the defendants from using pirated software of the plaintiff. In addition to it an application under Order 26 Rules 9 and 10 CPC seeking appointment of a Local Commissioner to seize defendant's computers etc. and investigate on their premises was also moved before the Court.

Court's Analysis:

The Court observed that none of the four defendants had places of business in Delhi, yet the suit was filed in the capital, on basis of section 62 (2) of the Copyright Act, 1957. While the section 20 of CPC prescribes the place of residence or business of the defendants as the appropriate place of filling a suit, the section 62 of the Copyright Act, 1957 allows an action to be initiated in the place where the plaintiff resides, carries on business or personally works for gain.

The Court analyzed precedents in this regard and concluded that the law on appropriate forum under section 62 of the Copyright Act, 1957 is not settled and that this anomaly has led to widespread misuse of the provisions of law and has resulted in plaintiffs selecting courts of their choice on the basis of their money power. Pointing at the menace of valuing suits at arbitrary amounts, to take benefit of original civil jurisdictions of certain High Courts, the Court suggested that the Legislature should consider amending the section 62 of the Copyright Act, 1957 in order to curb the practice of selecting forums convenient to oneself, and being prejudicial to the other party and to also ensure that High Courts do not deal with such matters directly. It was further mentioned that the plaintiff had preferred Delhi as a place for filling the suit, in spite of it having a place of business common with that of some of the defendants.

In terms of the evidentiary aspects of the matter, the Court also mentioned that the orders of sealing and seizure were being misused by the plaintiffs to blackmail the defendants. The belongings of the defendants are ordered to be seized or sealed by a local commissioner and these belongings are then sealed till the disposal of the case. The Court opined that in all such cases it would be appropriate to pass a direction for the preparation of mirror images of the hard-disks and get such mirror images sealed on the spot so that the plaintiffs are not able to use the database and so that the sealed mirror images are produced in the Court and inspected in the Court by experts of the plaintiffs to find out if there was any infringement.

The Ruling:

However, accepting that it was bound by section 62 of the Copyright Act and that the plaintiff could not be prohibited from proceeding with the matter in Delhi, the Court directed the plaintiffs to deposit a security of 200,000 INR per suit which would be paid to the defendants if the matter was found to be merely a speculative one. The Court finally held that the investigations in the matter must be done by local commissioners, which would be appointed for each of the cities where the defendants have presence, separately. The sending of notices to the defendants and the appointment of a local commissioner was made subject to the plaintiff depositing the above mentioned security in each matter.

Analysis:

The above ruling is likely to have an impact on the suits filed under section 62 of the Copyright Act, 1957, where the forum selected by the plaintiff in a matter is not convenient to the defendants for the

reason of it being alien to their presence. The security amount being made a precondition to the suit shows the intention of the Court to discourage plaintiffs from proceeding with forums inconvenient to defendants.

2. *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr.*³

The Division Bench of the Court in a recent ruling dealt with the question of ascertaining jurisdiction of a forum where a suit for passing off or alternatively trademark infringement by a universally accessible website, was initiated. Neither the defendant, nor the plaintiff had any presence in Delhi, the place where the matter was perused. Interpreting section 20 (c) of the Civil Procedure Code, 1908 (“**CPC**”), the Court laid down basic principles for ascertaining the jurisdiction of a court, where the website is accessible from all over the globe, including from the place where the forum was situated.

The Case:

The plaintiff had maintained websites named ‘www.banyantree.com’ and ‘www.banayanreespa.com’ since 1996 and claimed that the use of the word mark ‘Banyan Tree’ and the banyan tree device had acquired a secondary meaning through its long term use. They, therefore, claimed that the defendant’s use of the same amounted to passing off. Since the plaintiff had no registered trademark in the word phrase or its device and it was an action of passing off. As in case of the Copyright Act, 1957, under section 134(2) of the Trademarks Act, 1999, action for infringement can be filed where the plaintiff resides, works for gain or carries on business. But passing off action can does not get the benefit of this provision. In such cases the governing provision of law was section 20 (c) of the CPC, which allows the jurisdiction of a matter to be filed with a court within the territorial precincts of which the cause of action of the matter arose or the defendant resides, works for gain or carries on business. In this regard the Court concerned itself with the factors which would grant it the jurisdiction over the defendant. The Court framed the following questions for this purpose:

1. 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?
2. 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?
3. Whether it is permissible for the plaintiff to establish such *prima facie* case through "trap orders" or "trap transactions" i.e. a transaction engineered by the Plaintiff itself, particularly when it is not otherwise shown that the defendant intended to specifically target customers in the forum state)?

Court’s Analysis:

The instant case went into a survey of the position of law as prevails in various common law jurisdictions. The Court referred to various judgments from the USA, the UK, Canada and other

³ CS (OS) No. 894/2008

countries where the question of exercising jurisdiction over a matter due to a cause of action arising through a website was concerned. The Court did not decide the matter on facts but held that a mere passive website, accessible from a territory would not grant courts in that jurisdiction to take cognizance of the matter.

The Court surveyed case laws of many common law jurisdictions, relevant to the question of ascertaining jurisdiction and held that the mere fact that the mere access to the defendants website in Delhi would not enable the Court to exercise jurisdiction. A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction and the same was a well accepted position in common law jurisdictions. The Court analyzed the law in various countries as follows:

USA:

The Court visited various judgments of US courts and discussed various tests which were held as relevant in ascertaining the jurisdiction of a forum, as discussed below:

a. 'Purposeful Availment' test –

The U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 340 (1945) discussed a two-part test for determining jurisdiction of the forum court over a defendant not residing or carrying on business within its jurisdiction. It was held that in such instance the plaintiff had to show that:

1. The defendant has sufficient "minimum contacts" in the forum state. In other words, the defendant must have purposefully directed its activities towards the forum state or otherwise "purposefully availed" of the privilege of conducting activities in the forum state.
2. Further, the forum court had to be satisfied that exercising jurisdiction would comport with the traditional notions of fair play and substantial justice.

b. The 'Zippo' sliding scale test –

The "sliding scale" test for determining the level of interactivity of the website, for the purposes of ascertaining jurisdiction of the forum state, was laid down in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* 952 F.Supp.1119 (W.D.Pa.1997). The Zippo court then noted that "a three pronged test" has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant is appropriate:

1. The defendant must have sufficient "minimum contacts" with the forum state,
2. The claim asserted against the defendant must arise out of those contacts, and
3. The exercise of jurisdiction must be reasonable.

The court in Zippo classified websites as (i) passive, (ii) interactive and (iii) integral to the defendants business. On facts it was found that the Defendants website was an interactive one. Accordingly, it was held that the court had jurisdiction to try the suit. The Zippo courts observation that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet" has been compared by that court to a "sliding scale".

The Zippo court's observation that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet" has been compared by that court to a "sliding scale". The Court however noted that there had been difficulties experienced in later cases, in the application of the Zippo sliding

scale test in terms of which the assertion of a court's jurisdiction depended upon the "level of interactivity and commercial nature of the exchange of information" as a result of the use of the website. This led to the application of a new test, called the 'effects test'.

c. The 'Effects' test

The "effects" test was first evolved in *Calder v. Jones*, 465 U.S. 783 (1984), where the consideration for establishing jurisdiction is that the harm or injury from the whereabouts of the defendants must be felt in the forum state. It appears that the effects test is from the perspective of the plaintiff since the harm or injury is the basis of the plaintiff feeling aggrieved from the action of the defendant.

The Court finally observed that in later decisions the US courts had started applying the Zippo sliding scale test, the effects test and the "purposeful availment" test in conjunction to each other in order to conclude jurisdiction.

Finally, the Court summarized the position in the US, in order to establish the jurisdiction of the forum court, even when a long arm statute exists, the plaintiff would have to show that the defendant "purposefully availed" of jurisdiction of the forum state by "specifically targeting" customers within the forum state. A mere hosting of an interactive web-page without any commercial activity being shown as having been conducted within the forum state, would not enable the forum court to assume jurisdiction. Also, if one were to apply the "effects" test, it would have to be shown that the Defendant specifically directed its activities towards the forum state and intended to produce the injurious effects on the Plaintiff within the forum state.

CANADA:

Referring to various cases from Canada, the Court observed that Canadian courts emphasize on the 'real and substantial connection' of the matter with the forum for ascertaining jurisdiction. For instance in *Muscutt v. Courcelles*, (2002) 213 DLR (4th) 577, the court took the following eight factors into account while determining whether it had jurisdiction: (1) The connection between the forum and the plaintiffs claim; (2) The connection between the forum and the defendant; (3) Unfairness to the defendant in assuming jurisdiction; (4) Unfairness to the Plaintiff in not assuming jurisdiction; (5) Involvement of other parties to the suit; (6) The courts willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) Whether the case is interprovincial or international in nature; (8) Comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Therefore, Canadian courts too emphasized on the matter being connected to the place where the suit was instituted and were not in a practice of granting leaves to appear without fulfillment of this requirement. This test too is akin to the tests prevalent in US and do not suggest grant of jurisdiction to a forum merely because of a website being accessible from there.

UNITED KINGDOM:

The Court referred to the case of *Flowers Inc v. Phone Names* (2002) FSR 12 CA, where It was held that the mere fact that websites could be accessed anywhere in the world did not mean, for trade mark purposes, that the law should regard them as being used everywhere in the world. The same judgment was kept intact by the appellate courts also. Therefore the position in UK was quite clear, that the jurisdiction of a forum cannot be based solely on the fact of mere access to a website in such jurisdiction.

Application of Common Law:

The Court referred to prior judgments of Indian courts in relation to jurisdiction concluded on the basis of a website.

The first was the case of *Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited*, 2003 (27) FTC 265 (Del), where the access to an interactive website was considered as sufficient reason for the court to assume jurisdiction.

In another decision *India TV Independent News Service Pvt. Limited v. India Broadcast Live LLC And Ors.*, 2007 (35) FTC 177 (Del.), the court referred to the "purposeful availment test" and then noticed that India did not have a long arm statute which dealt with the jurisdiction as regards non-resident Defendants. Therefore, it had to be examined whether the Defendants activities "have a sufficient connection with the forum state (India); whether the cause of action arises out of the Defendants activities within the forum and whether the exercise of jurisdiction would be reasonable."

The Court in the present matter held that for the purposes of a passing off action or an action for infringement where the plaintiff is not carrying on business within the jurisdiction of the forum court, and where there is no long arm statute, the plaintiff would have to show that the defendant purposefully availed itself of the jurisdiction of the forum court, and it would not be sufficient that the website of the defendant was interactive in nature. In answer to the first question the Court laid down the following broad guidelines:

1. While the defendant may in his defense show how he avoided the forum state, the initial burden is on the Plaintiff to show that the defendant purposefully availed of the jurisdiction of the forum court.
2. For the "effects" test to apply, the plaintiff must necessarily plead and show *prima facie* that the specific targeting of the forum state by the defendant resulted in an injury or harm to the plaintiffs business, goodwill or reputation within the forum state as a result of the defendant's website being accessed in the forum state. Naturally, therefore, this would require the presence of the plaintiff in the forum state and not merely the possibility of such presence in the future. Secondly, to show that an injurious effect has been felt by the plaintiff it would have to be shown that viewers in the forum state were specifically targeted.

To this extent the Court expressly overruled the case of *Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited*, 2003 (27) FTC 265 (Del), where access to a passive website was found to give cause of action enough to institute a suit.

As regard the second question the Court held that 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 was specifically targeted at viewers in the forum state for commercial transactions. The same would be required to be substantiated by material submitted by the plaintiff.

In response to the third question regarding admissibility of "trap transactions", the Court held that 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.

Further, the purpose of an injunction issued by the court is to prohibit an ongoing practice, not a rare or an isolated event. 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, unambiguous and supported with material, to *prima facie* show that the trap transactions relied upon satisfy the above test.

Finally, the Division bench referred the matter back to the single judge for him to decide the matter on facts.

The Ruling:

The ruling of the Court can be summarized in the following words:

1. A mere passive website accessible in territory of the forum is not sufficient to grant jurisdiction to a Court in absence of a long-arm statute.
2. The courts would look for the satisfaction of the 'purposeful availment' test to ascertain the degree of commercial activity of the defendant in the forum.
3. Trap transactions could be *per se* used as evidence against the defendants but not in isolation to evidence of subsisting commercial activity in the forum.

CONCLUSIONS:

As seen in these judgments, section 20 (c) of the Code of Civil Procedure, 1908 may not be available to litigants, when the forum courts feel that the matter is not closely connected to the forum. In matters where the cause of action is not enough to attract a long arm statutes, these two judgments may incline the courts to insist on a real and substantial connection of a matter with a forum for it to exercise jurisdiction. The same appears to be in public interest as it would avoid overcrowding of a forum merely because it is considered to be beneficial to a party.

The scope of *Banyan Tree Holding (P) Limited's* case has been expanded by a recent application of the same in the case of *M/s Presteege Property Developers and others v. M/s Prestige Estates Projects Pvt. Ltd.*⁴ In this matter the Karnataka High Court, *inter alia*, concluded that in both the suits in appeal before it, the defendants were not operating in Bangalore and hence had no commercial activity targeted in Bangalore. The court held that there was no pleading to the effect that the defendant had operated in Bangalore and hence the test of concluding commercial transactions in forum were not satisfied and therefore courts in Bangalore lack jurisdiction in the suits. The Karnataka High Court had already negated the application of the long arm statute to the case of the plaintiff.

The following may be considered by plaintiffs while filing suits at jurisdictions where the defendant does not have presence, to avoid getting trapped under the garb of forum shopping:

1. The plaintiff should attempt to justify a court's intervention under a long-arm statute.
2. In absence of a long arm statute, the plaintiff should emphasize on the connection of the matter or the defendants activities with the forum. It is advisable that the plaintiff should attempt to fulfill the considerations of the 'purposeful availment' test in the forum.
3. The plaintiff should *per se* establish a real and substantial connection of the matter with the forum, besides establishing cause of action under law.

⁴ Miscellaneous First Appeal Nos. 4954 and 13696/2006 and (CPC) M.F.A. No. 4954/2006

4. Plaintiffs should avoid contesting unconnected matters at alien jurisdictions to avoid filing frivolous claims or wasting court's time which could prejudice the plaintiff's interests.

Clearly, the above cases establish that plaintiffs invoking jurisdiction of courts under the jurisdiction clause under CPC, are required to satisfy the test of commercial activity carried on by the defendant in the forum and would need to show that it directed its activities to enter into commercial transactions with parties in the forum. The same test is increasingly gaining significance in matters where no long arm statute is available and litigants are required to stay mindful of it.

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