

World Wrestling Entertainment, Inc. vs M/S Reshma Collection & Ors on 15 October, 2014

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Bench: Badar Durrez Ahmed, Vibhu Bakhru

THE HIGH COURT OF DELHI AT NEW DELHI
% Judgment delivered on: 15.10.2014
+ FAO(OS) 506/2013 & CM Nos. 17627/2013, 18606/2013
WORLD WRESTLING ENTERTAINMENT, INC. ... Appellant
versus
M/S RESHMA COLLECTION & ORS ... Respondents

Advocates who appeared in this case:
For the Appellant : Mr Praveen Anand with Ms Vaishali Mittal,
Mr Gurpreet Singh Kahlon and Ms D. Neha Reddy
For the Respondent : None

CORAM: -
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J

1. This appeal is directed against the order dated 04.10.2013 passed by a learned Single Judge of this Court in CS(OS) 1801/2013, whereby the plaint filed by the appellant/plaintiff was directed to be returned to the appellant/ plaintiff under Order 7 Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC'), to be presented before a court of competent jurisdiction.

2. The suit had been filed by the appellant/ plaintiff seeking permanent injunction based on alleged infringement of its copyright, infringement of its trademarks, passing off, dilution, rendition of accounts, damages and delivery up etc. It is an admitted position that the appellant/ plaintiff is a company incorporated under the laws of the State of Delaware, United States of America and that all the defendants reside in Mumbai and do not carry on business within the jurisdiction of this Court. The appellant/ plaintiff claimed that this Court has jurisdiction to entertain the said suit on account of the provisions of Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. The specific plea with regard to jurisdiction was made in paragraph 32 of the plaint which reads as under:-

¶32. It is submitted that this Hon'ble Court has territorial jurisdiction to entertain and try the present suit under Section 134 (2) of the Trade Marks Act, 1999 and

Section 62 (2) of the Copyright Act, 1957 on account of the fact the Plaintiff carries on business within the territorial limits of this Hon'ble court as briefly summarized below:

- i. The Plaintiff's programmes, consisting of its various characters including John Cena, Undertaker, Triple H, Randy Orton and Batista are broadcast at Delhi, within the territorial limits of this Hon'ble Court;
- ii. The Plaintiffs products, such as its merchandising goods and books, are available within the territorial limits of this Hon'ble Court;
- iii. The Plaintiffs goods and services are sold to consumers in Delhi through its websites which can be accessed and operated from all over the country, including from Delhi. (underlining added)

3. The appellant/plaintiff is, inter alia, engaged in the development, production and marketing of television programming, pay-per-view programming, live events and the licensing and sale of branded consumer products featuring its well known World Wrestling Entertainment (WWE) brand. The WWE scratch logo and World Wrestling Entertainment are registered trademarks of the appellant/plaintiff worldwide including India. The appellant/plaintiff is also the owner of the copyright of the pictorial representations of World Wrestling Entertainment and WWE Wrestlers and the WWE scratch logo as they appear on various publicity materials and promotional merchandise of the appellant/ plaintiff. The appellant/ plaintiff also has trademark registrations in respect of various WWE talent names and talent slogans such as JOHN CENA, BATISTA, UNDERTAKER, TRIPLE H, RANDY ORTON etc.

4. The appellant/ plaintiff offers a variety of memorabilia including, but not limited to, apparel, posters, calendars, fact books, sunglasses, water bottles, key-rings, DVD's etc. It has more than 200 licensees distributing its products in 86 countries, including India. It has been averred by the appellant/ plaintiff that it licenses out its well known trademarks and the images/characters to different parties for use on merchandise in a wide range of products.

5. It is the allegation of the appellant/ plaintiff that the defendants, who are stationed at Mumbai, are engaged in the business of manufacture and sale of various forms of garments and apparel, such as T-shirts, wrist bands, caps and other counterfeit goods and garments bearing the reproductions of the plaintiff's talents. According to the appellant/ plaintiff, the defendants, are infringing the appellant/plaintiff's registered trademarks. It is alleged that the apparels sold by the defendants bear the images of WWE talents and, representations of the well known WWE characters are displayed prominently on the defendant's products.

6. The learned Single Judge, by virtue of the impugned order, has, without issuing summons in the said suit, directed the return of the plaint to the appellant/ plaintiff by holding that the Delhi High Court would have no territorial jurisdiction insofar as the said suit was concerned. The learned Single Judge rejected the pleas raised on behalf of the appellant/ plaintiff that this Court had

territorial jurisdiction to entertain the suit by virtue of the provisions of Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. While doing so, the learned Single Judge placed reliance on the decision of the Supreme Court in the case of *Dhodha House v. S.K. Maingi*: 2006 (9) SCC 41 as also on a decision of a Division Bench of this Court in *Archie Comic Publications, Inc. v. Purple Creations Pvt. Ltd. & Others*: 172 DLT 234 (DB).

7. Before the learned Single Judge, it had been contended on behalf of the appellant/ plaintiff that the decisions of the Supreme Court in *Dhodha House* (supra) and this Court in *Archie Comic* (supra) were not applicable inasmuch as they did not take into account the new media of web-based business models where transactions are conducted over the internet. The learned counsel for the appellant/ plaintiff had placed reliance on *Yahoo Inc. v. Akash Arora*: 1999 (19) PTC 201; *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy and Another*: 2010 (42) PTC 361 (Del); and *Wipro Limited and Another v. Oushadha Chandrika Ayurvedic India (P) Limited and Others*: 2008 (37) PTC 269 (MAD) (DB). It was also contended on behalf of the appellant/ plaintiff before the learned Single Judge that the question of territorial jurisdiction was a mixed question of law and fact and, therefore, the same ought to be adjudicated at the final stage of the suit and not at the preliminary stage of admission. All these pleas were rejected by the learned Single Judge by placing reliance on the decision in the case of *Dhodha House* (supra) which had interpreted the expression 'carries on business' appearing in both, Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. The learned Single Judge observed that the sum and substance of the criteria laid down in *Dhodha House* (supra) was that an essential part of the plaintiff's business, coupled with an element of control exercised by the plaintiff, must exist in such a place where the plaintiff claims to be carrying on business either on its own or through an exclusive agent. The learned Single Judge also observed that merely because of the e-commerce models, which have become prevalent, and because of the use of the internet as a medium for doing business, the tests, which apply for determination of issues, such as, when and where the contract is made or whether the vendor carries on business at the place where the merchandise may be sold, or service may be offered, would not change and would be the same as applicable to communications over the telephone and fax. For this, the learned Single Judge made a reference to the Supreme Court decision in *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*: AIR 1966 SC

543.

8. With regard to the reliance placed by the appellant/ plaintiff on the decision in *Banyan Tree* (supra), the learned Single Judge observed that the same was misplaced inasmuch as, according to him, in *Banyan Tree* (supra) the question related to the website of a defendant and not that of plaintiff as in the present case. At this juncture itself we may point out that the decision in *Banyan Tree* (supra) would not be applicable here just because the questions there pertained to a defendant's website but, because

(a) it specifically dealt with a case where it was admitted that the plaintiff did not carry on business within the jurisdiction of the Court, (b) it was concerned only with the provisions of Section 20(c) CPC, and (c) it was a case of passing off. In *Banyan Tree* (supra) the Division Bench did not examine the meaning and scope of the expression 'carries on business' as appearing in Section 134(2) and

62(2) of the Trademarks Act, 1999 and the Copyright Act, 1957, respectively. That case was decided on the basis of the plea of 'cause of action' and not on the basis of the expression 'carries on business', which is the case here.

9. The learned Single Judge also held that whenever the legislature thought it necessary, it amended the laws to make provision for the 'new media'. He observed that while enacting the Information Technology Act, 2000 and amending other statutes, Parliament had consciously not amended the Trademarks Act, 1999 or the Copyright Act, 1957 or the Code of Civil Procedure, 1908 for expressly bringing in the concepts with regard to 'new media'. Consequently, it was observed by the learned Single Judge that the 'new media' did not change the basic concepts or legal principles which applied to trade and commerce and they continued to remain the same as applicable to the 'old media' i.e., telephone and fax.

10. For all the above reasons, the learned Single Judge rejected the plea of the appellant/ plaintiff that the Delhi High Court would have territorial jurisdiction to entertain the suit. Being aggrieved by the said decision, the appellant/ plaintiff is in appeal before us.

11. Before we proceed any further, it would be necessary to set out the provisions of Section 134 of the Trademarks Act, 1999 and Section 62 of the Copyright Act, 1957. They are as under:-

134. Suit for infringement, etc., to be instituted before district Court.- (1) No suit -

(a) for the infringement of a registered trade mark, or

(b) relating to any right in a registered trade mark, or

(c) for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered.

shall be instituted in any court inferior to a District Court having jurisdiction to try the suit.

(2) For the purpose of clauses (a) and (b) of sub-section (1), a District Court having jurisdiction shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or where there are more than one such person any of them, actually and voluntarily resides or carries on business or personally works for gain.

Explanation.-- For the purpose of sub-section (2), 'person' includes the registered proprietor and the registered user. 62. Jurisdiction of court over matters arising under this Chapter:- (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the direct court having jurisdiction. (2) For the purpose of sub-section (1), a District court having

jurisdiction shall, notwithstanding anything contained in the Code of Civil Procedure, 1908(5 of 1908), or any other law for the time being in force include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceedings, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

12. The provisions of Section 134 (2) of the Trademarks Act, 1999 and of Section 62(2) of the Copyright Act, 1957 are material. Both the provisions are virtually identical. They are both non-obstante provisions inasmuch as it is clearly stated therein that they are notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force. Furthermore, the word 'include' is used in both the provisions so as to include a District Court within the local limits of whose jurisdiction, at the time of institution of the suit or other proceeding, the person instituting the suit or proceeding, or where there are more than one such person, any of them, actually and voluntarily resides or 'carries on business' or personally works for gain. Insofar as the present case is concerned, it is not claimed by the appellant/ plaintiff that it resides or personally works for gain in Delhi. It has, as pointed out above, taken the plea that it 'carries on business' in Delhi because, according to it, its programmes are broadcast in Delhi; its merchandise and books are available for sale in Delhi; and its goods and services are sold to customers in Delhi through its website which can be accessed in Delhi over the internet.

13. Therefore, the entire case turns on the meaning to be given to the expression 'carries on business' as appearing in the above two provisions. In *Dhodha House* (supra), the Supreme Court, inter alia, considered the meaning of the expression 'carries on business'. The following extracts from the said decision would be relevant:-

¶46. The expression 'carries on business' and the expression 'personally works for gain' connote two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase 'carries on business' at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely, (1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to 'carry on business' in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does not 'carry on business' in Bombay so as to render itself liable to be sued in Bombay.

(2) The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an agent within the meaning of this condition.

(3) To constitute carrying on business at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the mofussil cannot be said to carry on business in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance Co. had a branch office was held not maintainable.

Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company through incorporated outside India gets itself registered in India and does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India. [See Mulla on the Code of Civil Procedure, 15th Edn., Vol.I, pp 246-47.]

47. A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where it has a subordinate office. Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place. xxxx xxxx xxxx xxxx xxxx ¶51. The plaintiff was not a resident of Delhi. It has not been able to establish that it carries on any business at Delhi. For our purpose, the question as to whether the defendant had been selling its produce in Delhi or not is wholly irrelevant (sic). It is possible that the goods manufactured by the plaintiff are available in the market of Delhi or they are sold in Delhi but that by itself would not mean that the plaintiff carries on any business in Delhi.

14. From the above extracts, it is evident that when we say that a person carries on business at a place we mean that the person has an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control at that place. There is no doubt that a person may carry on business at a place not necessarily by himself but through an agent or a manager or through a servant. But, as pointed out in Dhodha House (supra), three conditions have to be fulfilled: (i) the

agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not as a general agent who does business for any one that pays him; (ii) the person acting as agent, must be an agent in the strict sense of the term and a manager of a Joint Hindu Family cannot be regarded as an agent within the meaning of this condition; and (iii) to constitute carrying on business at a certain place, the essential part of the business must be performed at that place. An illustration of which is given in the above extract itself where a Bombay firm has a branch office at Amritsar, where orders are received, subject to confirmation by the head office at Bombay, and where money is paid and disbursed. Such a firm is said to be carrying on business at Amritsar and is liable to be sued at Amritsar.

15. Mr Praveen Anand, the learned counsel appearing on behalf of the appellant/ plaintiff, submitted before us, after placing reliance on *Expnar SA and Another v. Eupharma Laboratories Limited and Another*: AIR 2004 SCC 1682 that the use of the word 'include' in Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957 make the provisions broader than Section 20 of the CPC. There is no dispute with this proposition. There is also no dispute with the proposition of the learned counsel for the appellant that the expression 'carries on business' is not confined to the head office, but can also include a branch office. This proposition is based on a decision of the Madras High Court in *Wipro Limited* (supra). But, this proposition is of no use to the appellant/ plaintiff inasmuch as it is not the case of the appellant/ plaintiff that it has any office within the territorial limits of this Court, what to speak of a branch office.

16. Faced with this eventuality, Mr Anand submitted that, in fact, there is no need to have any office at all at a particular place for establishing the fact that a person carries on business at that place. He placed reliance, once again, on *Wipro Limited* (supra), wherein it was observed that the plain meaning of the expression 'carries on business' only conveys that wherever there is a business activity - be it the principal place or branch or branches - the party concerned is said to carry on business at such places. In fact, we may point out that Mr Anand need not have laboured on this point at all because in *Dhodha House* (supra) itself, the Supreme Court had clearly observed that for the purpose of carrying on business, the presence of the person concerned at a particular place was not at all necessary and that such business could be carried on at that place through an agent or a manager or through a servant. Mr Anand also submitted that while considering the question of territorial jurisdiction at the threshold stage and particularly while considering the question of return of a plaint under Order 7 Rule 10 CPC, only the averments made in the plaint ought to be seen and, if, on a demurrer, a case for territorial jurisdiction has been made out, the plaint ought not to be returned. In our view, there is no quarrel with this proposition either.

17. The main issue before us is one of considering as to whether on the basis of the averments made in the plaint, the appellant/ plaintiff carries on business in Delhi. It is nowhere pleaded in the plaint that the appellant/ plaintiff, has an agent or a manager or a servant, through whom the appellant/ plaintiff carries on business in Delhi. As pointed out above, it is also not the appellant/ plaintiff's case that it has an office in Delhi. The question then arises as to whether the third condition specified in *Dhodha House* (supra) is satisfied or not. If we recall, in *Dhodha House* (supra), the Supreme Court had observed that the expression 'carries on business', as appearing in the above two provisions, is much wider than what the expression in normal parlance connotes because of the

ambit of a civil action within the meaning of Section 9 of the CPC. The Supreme Court, however, cautioned that although the expression has a very wide meaning, it is necessary that the three conditions specified in the said decision should be satisfied.

18. Insofar as the first two conditions are concerned, they relate to agents. Inasmuch as it is an admitted position that the appellant/ plaintiff has no agent in Delhi, those two conditions are clearly not fulfilled. However, it is the appellant/ plaintiff's case that it carries on business in Delhi directly inasmuch as its goods and services are sold to consumers in Delhi through its website which is accessed in Delhi. It is on this basis that the learned counsel for the appellant/ plaintiff submitted that the decision in *Dhodha House* (supra) as also in *Archie Comic* (supra) would really not be applicable in the present case as in those decisions web-based business models, which have been referred to as the 'new media', were not considered. The question which then arises is whether the introduction and spread of e-commerce and business over the internet impacts the meaning of the expression 'carries on business' at a certain place. The learned Single Judge, as we have pointed out above, felt that the introduction of the new business models of doing business over the internet was not any different from the old model of doing business over the telephone or fax. He had placed reliance on the Supreme Court decision in the case of *Bhagwan Goverdhandas Kedia* (supra).

19. Considering the fact that in *Dhodha House* (supra), the third condition stipulated that to constitute 'carrying on business' at a certain place, the essential part of the business must take place there, it would be necessary to examine this aspect in the backdrop of business over the internet. When a transaction takes place over the internet, where is the contract concluded? This is the question which needs to be answered. In other words, at which place does the essential part of the business transaction take place? The example of the Bombay firm having a branch office at Amritsar, where orders were received, subject to confirmation by the head office at Bombay and where money was paid and disbursed, needs to be examined in the context of internet transactions. In that example, it was noted that the Bombay firm could be said to be carrying on business at Amritsar and was liable to be sued at Amritsar. In the present case, the plaintiff/ appellant is incorporated in USA. It has a website. We do not know as to where that website is hosted. The server would, in all likelihood, be in USA. It has not been pleaded that the website of the appellant/ plaintiff is hosted on a server in Delhi. Therefore, it can be safely presumed that the web server is not located in Delhi. However, if a customer in Delhi wishes to purchase an article, which is available on the website of the appellant/ plaintiff, the purchaser in Delhi accesses the said website on his or her computer in Delhi. The said purchaser places the order for the said article from his computer in Delhi. The payment is made either through a credit/ debit card or through a cash card from Delhi and ultimately the goods are delivered to the customer in Delhi. In the nature of such transactions, the question arises as to which is the place where the essential part of the business occurs?

20. We may recall that the learned Single Judge had referred to the Supreme Court decision in *Bhagwan Goverdhandas Kedia* (supra), wherein transactions over the telephone and telegraph had been considered. It would be instructive to examine that decision of the Supreme Court. The facts before the Supreme Court in *Bhagwan Goverdhandas Kedia* (supra) were that the plaintiff therein had commenced an action in the City Civil Court at Ahmedabad against the defendant for a decree

of Rs 31,150/- on the plea that the defendants had failed to supply cotton seed cake, which they had agreed to supply under an oral contract entered into on 22.07.1959, which had been negotiated between the parties through a long distance conversation over the telephone. The question arose as to whether the City Civil Court at Ahmedabad had jurisdiction to entertain the said suit. The offer to purchase cotton seed cake had emanated from the plaintiff and that offer had been accepted by the defendant. The City Civil Court held that as the contract was concluded over the telephone, the place where the acceptance of the offer is intimated to the offeror is the place where the contract is made, and, therefore, the City Civil Court at Ahmedabad would have jurisdiction to try the suit. The matter travelled up to the Supreme Court, which, by a majority decision, upheld the conclusion of the City Civil Court at Ahmedabad by holding that :-

□The trial Court was therefore right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the Civil City Court, Ahmedabad, where acceptance was Communicated by telephone to the plaintiffs. In doing so, the Supreme Court considered the relevant provisions of the Indian Contract Act, 1872 as also the common law of England. The Supreme Court also undertook to compare contracts concluded over the post and telegraph on the one hand and contracts concluded over the telephone on the other. The Supreme Court noted that acceptance and intimation of acceptance of an offer are both necessary to result in a binding contract. The Supreme Court held that in the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. The Supreme Court further noted that when parties are in the presence of each other, the method of communication will depend upon the nature of the offer and the circumstances in which it is made and that when an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod or other act which indubitably intimates acceptance, may suffice. Furthermore, if the offeror receives no such intimation, even if the offeree has resolved to accept the offer, a contract may not result. The Supreme Court further observed as under:-

□But on this rule is engrafted an exception based on ground of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post..... xxxx xxxx xxxx xxxx xxxx xxxx □...The exception has long been recognised in the United Kingdom and in other countries where the law of contracts is based on the common law of England. Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror: see Baroda Oil Cakes Traders case ILR (1954) Bom 1137: (AIR) 1954 Bom 451, and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or

usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram.

(underlining added)

21. From the above, it is clear that the general rule is that the contract is complete when the offeror receives intimation that the offeree has accepted his offer. An exception to this has been carved out in respect of contracts negotiated by postal communications or telegrams. The exception being that the bargain in such cases (post or telegram) would be struck and the contract would be complete when the acceptance of the offeree is put into a course of transmission by him by posting a letter or dispatching a telegram. The Supreme Court then held as under:-

□o. It is true that the Post and Telegraphs Department has general control over communication by telephone and especially long distance telephone, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, Letters or messages cannot be transmitted. In the case of a conversation by telephone, once a connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other: They are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously, and communication does not depend upon an external agency. (underlining added) It is obvious that the Supreme Court distinguished the case of a contract negotiated over the telephone from that of contracts through letters or through telegrams. Whereas in the latter, there was an intervention of an external agency, which took time to deliver the acceptance of the offer by the offeree to the offeror, in the former, the communication of the acceptance was instantaneous once the communication link had been established. The Supreme Court, by virtue of its majority decision, went on to hold as under:-

□4. Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the

exception to the rule imposed on grounds of commercial expediency is in-applicable. (underlining added)

22. It is interesting to note that the Supreme Court had observed that the draftsman of the Indian Contract Act could not have envisaged use of the telephone as a means of personal conversation between parties separated in space and could not have intended to make any rule in that behalf. This applies with greater vigour insofar as commerce and business over the internet is concerned. Just as in the case of telephone conversation, there is instantaneous communication, so, too, in the case of business over the internet. Therefore, the rule that applies to contracts concluded over the telephone would apply with equal vigour to contracts concluded over the internet. In other words, contracts would be completed at the place where the acceptance is communicated. In the case before the Supreme Court, the offer had emanated from the plaintiff, who was situated in Ahmedabad. The acceptance of the offer was by the defendants, who were to make the supply of cotton seed cakes to the plaintiff therein. The acceptance, since it was over the telephone, was instantaneously communicated via that technology to the plaintiff at Ahmedabad. The Supreme Court held that the cause of action would arise within the jurisdiction of the City Civil Court at Ahmedabad, where the acceptance was communicated by telephone to the plaintiff.

23. Let us now apply these principles to the type of transaction over the internet, which we have explained above. The website of the appellant/ plaintiff refers to various goods and services. It is not an offer but an invitation to an offer, just as a menu in a restaurant. The invitation, if accepted by a customer in Delhi, becomes an offer made by the customer in Delhi for purchasing the goods advertised on the website of the appellant/ plaintiff.

When, through the mode of the software and the browser, the transaction is confirmed and payment is made to the appellant/ plaintiff through its website, the appellant / plaintiff accepts the offer of the customer at Delhi. Since the transaction between the two takes place instantaneously, the acceptance by the appellant/ plaintiff is instantaneously communicated to its customer through the internet at Delhi. Therefore, in such a case, part of the cause of action would arise in Delhi.

21. But, we are not concerned with the question of cause of action between the appellant/ plaintiff and its customers in Delhi because the defendants are not such customers and they are, in any event, all residents of Mumbai. What we are examining is whether the third condition specified in *Dhodha House* (supra) is satisfied or not. In other words, if the contracts and/ or transactions entered into between the appellant/ plaintiff on the one hand and its customers are being concluded in Delhi, can it not be said that the essential part of the business of the appellant/ plaintiff, insofar as its transactions with customers in Delhi are concerned, takes place in Delhi? The offers are made by customers at Delhi. The offers are subject to confirmation/ acceptance of the appellant/ plaintiff through its website. The money would emanate or be paid from Delhi. Can it not then be considered that the appellant/ plaintiff is, to a certain extent, carrying on business at Delhi? In our view, it

would be so. 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.

22. Therefore, in our view, although the learned Single Judge had made a correct reference to the decision of the Supreme Court in the case of Bhagwan Goverdhandas Kedia (supra), the full ramifications of that decision were not perceived by him. When the two decisions of the Supreme Court in Bhagwan Goverdhandas Kedia (supra) and Dhodha House (supra) are considered in the manner indicated above, it would appear that, on the averments made by the appellant/ plaintiff in the plaint, the Delhi High court would, on a demurrer, have jurisdiction to entertain the suit inasmuch as the appellant/ plaintiff would be regarded as carrying on business in Delhi within the meaning of the expression under Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957. Consequently, the learned Single Judge ought not to have returned the plaint under Order 7 Rule 10 CPC. As a result, the impugned order is set aside and the suit is restored to its original number and the same be placed before the Roster Bench for further steps therein on 28.10.2014, in the first instance. This, however, would not preclude the defendants from raising the plea of jurisdiction on facts which, if raised, could be considered by the court based on the evidence and upon the law explained above. The appeal is allowed, as above.

BADAR DURREZ AHMED, J VIBHU BAKHRU, J OCTOBER 15, 2014 SR