

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

% Reserved on: 9th November, 2017
Decided on: 3rd January, 2018

+ **CS(COMM) 111/2017**

**IMPRESARIO ENTERTAINMENT &
HOSPITALITY PVT. LTD.**

..... Plaintiff

Represented by: Mr. Chander M. Lall, Sr.
Advocate with Ms. Shikha
Sachdeva, Mr. Prabhat Kalia
and Mr. Rupin Bahl,
Advocates.

versus

S & D HOSPITALITY

..... Defendant

Represented by: Mr. Hemant Daswani and Ms.
Monika Mahalawat, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

**I.A. Nos. 1950/2017 (under Order XXXIX Rule 1 and 2 CPC) and
3139/2017 (under Order VII Rule 10 CPC)**

1. Plaintiff in the present suit inter alia seeks permanent injunction against the defendant, its directors, principals, proprietor, agents, distributors, etc. from manufacturing, selling, marketing, advertising and/or offering its services and/or in any other manner using and/or allowing third parties to use the impugned trademarks 'SOCIAL' and 'STONE WATER' or any other trademarks or names similar to the plaintiff's trademarks 'SOCIAL' and 'STONE WATER' either as trade mark or part of trade mark, trade name, corporate name, domain name or in any other manner to pass off its trade mark as and for the trademarks of the plaintiff and from intimating the manner of serving the beverages and food items in its

‘SOCIAL’ outlets the containers, receptacles, crockery, etc. and from passing off their goods and services as those of plaintiff in any manner. Further directions are prayed to the defendant to withdraw its applications bearing Nos. 3345382, 3348188 and 3076228 in Class 43 for ‘SOCIAL MONKEY’, ‘SOCIAL MONKEY’S’ and ‘STONE WATERS KITCHEN & LOUNGE’

2. Plaintiff is a company incorporated under Companies Act, 1956, having its registered office in Mumbai and is carrying on its business in Delhi from 12, Hauz Khas Village, New Delhi-110016 and a restaurant under the name and style of ‘SOCIAL’. Plaintiff is engaged in providing restaurant services and operating/managing coffee shops. Some of the well-known restaurants and coffee shops run by the plaintiff include Smoke House Deli, Stone Water Grill, Salt Water Café, Le Kebabiere, The Tasting Room and Prithvi Café. Plaintiff commenced its business in the year 2001 and in the year 2012 plaintiff adopted the trade mark ‘SOCIAL’ with respect to cafes.

3. It is claimed that plaintiff coined the unique concept of prefixing and/or suffixing the trade mark ‘SOCIAL’ with the particular area of the city in which the cafes were located and coined the trade marks HAUZ KHAS SOCIAL, CHURCH STREET SOCIAL, DEF COL SOCIAL, TODI MILL SOCIAL, SOCIAL CHATT. KHAR SOCIAL, PALLADIUM SOCIAL, COLABA SOCIAL, WHITEFIELD SOCIAL, ODEON SOCIAL, NEHRU PLACE SOCIAL, KORAMANGALA SOCIAL, CYBER HUB SOCIAL, VERSOVA SOCIAL, etc. The interior of the ‘SOCIAL’ cafes and bars of the plaintiff have been designed to give a rugged and bare feel to its visitors with brick walls and bare bulbs hanging down from the ceiling along with

simple wooden and leather furniture, with each outlet having a distinct theme.

4. At present, plaintiff has set up and is managing and operating sixteen 'SOCIAL' cafes/restaurants in various places in India i.e. four in Delhi, one in Gurugram, eight in Mumbai and three in Bengaluru. Plaintiff is the registered proprietor of the trade mark 'SOCIAL' and its variants in various classes such as Class 9, 30, 33, 42 and 43 and the first registration relates back to May, 2014.

5. It is the case of the plaintiff that it is known for its unique manner of serving the beverages. Plaintiff is the registered proprietor of the beverage trade mark which relates to the unique style of serving under Class 33.

6. Plaintiff adopted the trade mark 'STONE WATER GRILL' in the year 2007 for one of its restaurant located by the river in Koregaon Park in Pune. Plaintiff got the trade mark 'STONE WATER GRILL' under Classes 30, 42 and 43 in November, 2007.

7. In January 2017, plaintiff came to know that the defendant was operating two restaurants using the trade mark 'SOCIAL MONKEY' in Hyderabad. It is the claim of the plaintiff that the defendant has emphasized on the word SOCIAL and copied the concept of the plaintiff of prefixing/suffixing the trade mark 'SOCIAL' with another word being 'MONKEY' in this case. Further, plaintiff has a popular beverage by the name 'A GAME OF SLING' and the defendant has named a beverage as 'HYDERABAD SLING' which is identical and/or deceptively similar to the plaintiff's beverage.

8. Despite the plaintiff having issued a cease and desist notice dated 10th March, 2017 to the defendant no response has been received and the

defendant is continuing the infringement of the plaintiff's registered trademark 'SOCIAL' and 'SOCIAL WATER'. The plaintiff sought ex-parte ad-interim order by filing I.A. No. 1950/2017 under Order XXXIX Rule 1 and 2 CPC wherein notice was issued and on a notice being issued the defendant filed I.A. No. 3139/2017 under Order VII Rule 10 CPC challenging the territorial jurisdiction of this Court to entertain the present suit. Arguments were heard in both the applications and orders reserved. After this Court reserved the orders an application being I.A. No. 13804/2017 under Section 89 read with Section 151 CPC was filed as the plaintiff was desirous of negotiating a settlement and the matter was referred to Delhi High Court Mediation and Conciliation Centre, report whereof has been received that the mediation has ended as a non-starter.

9. Before deciding I.A. No. 1950/2017 under Order XXXIX Rule 1 and 2 CPC this Court is required to first decide I.A. No. 3139/2017 under Order VII Rule 10 CPC.

10. According to the defendant this Court has no territorial jurisdiction to entertain the present suit for the reason the defendant neither has his registered office within the jurisdiction of this Court nor carries on any business within the jurisdiction of this Court. Further the plaintiff's registered office is in Mumbai which is also outside the territorial jurisdiction of this Court. As neither the cause of action arose in the territorial jurisdiction of this Court nor the defendant works for gain or profit within the territorial jurisdiction of this Court nor is the plaintiff having its registered office, the plaint is liable to be returned. According to the defendant the plaintiff has not even pleaded as to how despite Mumbai being the registered office of the plaintiff, its principal office is at Delhi. The case

of the plaintiff is that due to the presence of the defendant on the website such as Zomato and Dine-Out, the defendant would invite the customers of the plaintiff to visit its outlet in Hyderabad is misconceived. It is stated that mere booking or placing an order through internet is insufficient to say that any transaction took place since the contract formation is not at the place of booking or ordering the product or service. Mere existence of a website without proof of 'the effect' does not clothe this Court with territorial jurisdiction to entertain the present suit. By posting false and fabricated trap reviews, plaintiff is trying to stifle the defendant and create false cause of action. Contention of plaintiff that the defendant is expanding pan India based on the application cannot be entertained for the reason mere filing of a trademark application does not provide the plaintiff with any cause of action to file the suit. Plaintiff's quia timet action is bereft of any necessary ingredients as there is no eminent danger, nature of the business of the plaintiff and defendant being such that no party can open a restaurant in any city overnight without necessary licenses. Thus present suit is liable to be rejected. The plaintiff prima facie having not shown the purposeful availment test, this Court having no territorial jurisdiction to entertain the suit is liable to return the plaint to be filed in the court of competent jurisdiction.

11. Learned counsel for the defendant places reliance on the decisions reported as 2017 (71) PTC 241 Del Shri Nath Heritage Liquor Pvt. Ltd. & Ors. vs. Octaga Green Power & Suger Co. Ltd. & Ors., 2016 SCC Online Del 4285 RSPL vs. Mukesh Sharma, 2015 (10) SCC 161 Indian Performing Rights Society Limited vs. Sanjay Dalia & Anr., 227 (2016) DLT 320 Ultra Home Construction Pvt. Ltd. vs. Purushottam Kumar Chaubey,

Manu/DE/3072/2009 *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy, Dhoda House vs. S.K. Maingi, World Wrestling Entertainment Inc. vs. Reshma Collection & Ors.*, FAO (OS) 506/2013, and 2000 (4) SCC 50 *Kuldip Singh vs. Subhash Chander Jain.*

12. Responding to the contention of learned counsel for the defendant, learned counsel for plaintiff contends that the plaintiff's principal office for franchising and licensing of all its brands is in Delhi. The plaintiff does not have any office or branch in Hyderabad and carries on its business in Delhi through its office in Hauz Khas Village with 250 employees and through its various outlets. The defendant, to promote its business throughout India, has entered into a contract with Zomato.com which is a company having its office in Delhi. Zomato and Dine-Out are interactive restaurant guides through which reservations can be made at the outlets of the defendants from Delhi and the defendant can be contacted. The defendant intends to expand its operation pan India as is admitted by the defendant in its LinkedIn profile. The present suit is maintainable before this Court as per the decision of the Division Bench of this Court in 227 (2016) DLT 320 *Ultra Home Construction vs. Purushottam Kumar Chaubey.*

13. Learned counsel for the plaintiff places reliance on the decisions reported as *Indian Performing Rights Society* (supra), *World Wrestling Entertainment* (supra), Manu/DE/3072/2009 *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr.*, 24 (1983) DLT 129 *Jawahar Engineering Co. & Ors. vs. Javahar Engineer Pvt. Ltd.*, AIR 1998 Delhi 225, *P.M. Diesels Ltd. vs. M/s Patel Field Marshal*, AIR 2006 SC 730 *Dhodha House vs. S.K. Maingi, Teva Pharmaceutical Industries vs. Natco Pharma Ltd.* FAO (OS) 144/2014 decided on 30th May, 2014, *M/s Allied*

Blenders & Distillers Pvt. Ltd. vs. Prag Distillery Pvt. Ltd. & Anr., FAO (OS) 49/2017, 1965 SCR 737 *Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories*, AIR 1970 SC 1649 *Ruston and Hornby Ltd. Ltd. vs. Zamindara Engineering Co.*, AIR 2002 SC 275 *Laxmikant V. Patel vs. Chetanbhat Shah & Anr.*, AIR 1963 SC 449 *Amritdhara Pharmacy vs. Satyadeo Gupta*, 2004 (12) SCC 624 *Milmet Oftho Industries & Ors. vs. Allegran Inc.*, 15 (1970) DLT 269 *Century Traders vs. Roshan Lal Duggar Co.*, AIR 1960 SC 142 *Corn Products Refining Co. vs. Shangrila Food Products Ltd., Pearl Retail Solutions Pvt. Ltd. vs. Pearl Education Society*, 2008 (38) PTC 49 Del. *Pankaj Goel vs. Dabur India Ltd.*, 2009 (39) PTC 149 (Del.) *Ford Motor Company of Canada Limited and Anr. vs. Food Service Centre*, 2002 (24) PTC 355 (Del.) *Info Edge (India) Pvt. Ltd. & Anr. vs. Shailesh Gupta & Anr.*, 1999 PTC (19) 201 *Yahoo, Inc. vs. Akash Arora*, 2007 (34) PTC 370 *Ishi Khosia vs. Anil Aggarwal & Anr.*, 1997 PTC (17) (DB) *Metropol India (P) Ltd. vs. Praveen Industries India (Regd.)*, 1996 (16) PTC 709 (Del.) *Polson Ltd. vs. Polson Dairy Ltd.*, 1999 (19) PTC 294 (Del.) *Alfred Dunhill Ltd. vs. Kartar Singh Makkar & Ors.* and 2004 (3) SCC 90 *Midas Hygiene Industries P. Ltd. & Anr. vs. Sudhir Bhatia & Ors.*

14. In *Ultra Home Construction* (Supra) this Court noting Section 20 of the Code of Civil Procedure, 1908, 134 of the Trademarks Act, 1999 and Section 62 of the Copyright Act, 1957 and following the decision of the Supreme Court in *Sanjay Dalia* (supra) held:

13. 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:”

15. The only ground for the cause of action to have arisen in Delhi pleaded in the plaint is that because of the website Zomato.com and Dine-

Out the customers can book the defendant's restaurant at Delhi as well. Thus it is the case of plaintiff that the cause of action having arisen in Delhi and the plaintiff's office even if assuming supporting office or branch office being in Delhi this Court would have territorial jurisdiction to try the suit. In World Wrestling Entertainment Inc. (supra) this Court held:

“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.”

16. In the present case at best only reservation for dining at the defendant's restaurant at Hyderabad can be made at Delhi. The transaction by acceptance of offer takes place only when the person making the reservation goes to Hyderabad and eats at the Restaurant of the defendant. Merely by reserving a table in the defendant's restaurant at Hyderabad, the contract does not get concluded.

17. In Banyan Tree Holding (P) Ltd. (supra) the Division Bench of this Court answering a reference on the question of territorial jurisdiction of the Court on account of the defendant hosting a website which is accessible in

Delhi reframed the questions and considering the law laid down in different jurisdiction in the world answered the reference as under:

7. *Having considered the submissions of Mr. Praveen Anand, learned Counsel for the plaintiff, we consider it appropriate to reframe the questions referred to us for our opinion as under:*

(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")?*

(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?*

(iii) *Is it permissible for the plaintiff to establish such prima facie case through "trap orders" or "trap transactions."*

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Question (i): Jurisdiction of a forum court in suits involving internet related disputes

The law in the U.S.A.

Purposeful availment as a test

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38. *Having surveyed the law as it has developed in different jurisdictions, this Court is of the view that the essential principles developed as part of the common law can be adopted without difficulty by our courts in determining whether the forum court has jurisdiction where the alleged breach is related to an activity on the internet. At the outset, this Court does not subscribe to the view that the mere accessibility of the Defendants website in Delhi would enable this 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. This Court is therefore unable to agree with the proposition laid down in Casio. The said decision cannot be held to be good law and to that extent is overruled.*

39. *India TV appears to be somewhat closer to the development of law in this regard since the decision in Casio. In India TV, the learned single Judge impliedly doubted the correctness of the decision in Casio. The learned single Judge in India TV acknowledged that a mere accessibility of website may not be sufficient to attract jurisdiction of the forum court. This, in the considered view of this Court, is the correct position in law.*

40. *There was no occasion for this Court even in India TV to examine the finer aspects of the question of jurisdiction based on the nature of the website, the intention of the host of the website to specifically target viewers outside its jurisdiction, and the effect of hosting such website on audiences outside such state. It appears to this Court 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. It is not enough merely to show that the website hosted by the Defendant is an interactive one. It would have to be 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.

41. This Court is not able to accept the submission of the learned Counsel for the plaintiff that the test of "purposeful availment" must be replaced by the test of "purposeful avoidance". While the Defendant may in his defence show how he avoided the forum state, the initial burden is on the plaintiff to show that the Defendant "purposefully availed" itself of the jurisdiction of the forum court. The issue of incorporating filters to block access to the website by viewers located outside the forum state will have to be considered while deciding if the Defendant had "purposefully avoided" the forum state. However, that question will arise only if the plaintiff has been able to show that the website of the Defendant is interactive and permits commercial transactions to be concluded by the Defendant with a user of the website.

42. This Court holds that jurisdiction of the forum court does not get attracted merely on the basis of interactivity of the website which is accessible in the forum state. The degree of the interactivity apart, the nature of the activity permissible and whether it results in a commercial transaction has to be examined. 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 plaintiff within the forum state. For the purposes of a passing off or an infringement action (where the plaintiff is not located within the jurisdiction of the court), the injurious effect on the plaintiffs business, goodwill or reputation within the forum state as a result of the Defendants website being accessed in the forum state would have to be shown. 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. Therefore the "effects" test would have to be applied

in conjunction with the "sliding scale" test to determine if the forum court has jurisdiction to try a suit concerning internet based disputes.

43. The question No. (i) is accordingly answered.

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?

44. This brings us to the question as to the extent of burden of proof on the plaintiff to prima facie show that the Defendant has purposefully availed of the jurisdiction of this Court. In the present case, it is argued that by enabling customers to go on the website and get a copy of its brochure and make enquiries, the Defendant must be held to have purposefully availed of the jurisdiction of this Court. The question that arises is for the purposes of Section 20(c) CPC, in such circumstances, is what is the extent of the burden on the plaintiff to show prima facie that a part of the cause of action arose within the jurisdiction of the forum court.

45. This Court holds that in order to prima facie establish that the Defendant purposefully availed of the jurisdiction of this Court, the plaintiff would have to show that the Defendant engaged in some commercial activity in the forum State by targeting its website specifically at customers within that State. This is consistent with the law laid down in Cybersell and reiterated later in Toys R Us. It is also consistent with the application of the "tighter" version of the "effects" test which is "targeting". In any action for passing off or infringement, it would have to be shown that the Defendant by using its mark intended to pass off its goods as that of the plaintiffs. A mere hosting of a website which can be accessible from anyone from within the jurisdiction of the court is not sufficient for this purpose. Also a mere posting of an advertisement by the

Defendant depicting its mark on a passive website which does not enable the Defendant to enter into any commercial transaction with the viewer in the forum state cannot satisfy the requirement of giving rise to a cause of action in the forum state. Even an interactive website, which is not shown to be specifically targeted at viewers in the forum state for commercial transactions, will not result in the court of the forum state having jurisdiction. In sum, 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 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 No. (ii) is answered accordingly.

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

46. It may be recalled that the plaintiff has to show that a part of the cause of action in a suit for passing off or infringement has arisen within the jurisdiction of the forum court. Relevant to this, it would have to be shown by the plaintiff that the Defendant "availed" of the jurisdiction of the forum court by commercially transacting with a viewer located in the forum state through the internet. The question is whether this transaction can be a 'trap transaction' that is engineered by the plaintiff itself, particularly when it is not otherwise shown that the Defendant intended to specifically target customers in the forum state.

47. Courts in foreign jurisdictions have underlined the need for fairness and certainty while accepting evidence in the form of trap orders. In *California Fig Syrup & RP SD12I IL1IL7LI CRr'sIL' MI Company Ltd.* (1897) 14 RPC 564 (Court of Appeal, UK), the plaintiffs trade name was "California Syrup of Figs" and the Defendants trade name was "American Syrup of Figs". The plaintiffs sought trap orders for "California American Syrup", thereby creating ambiguity as to the name under which the defendant was selling its own syrup of figs product. *Carr & Sons v. Crisp & Co Ltd.* (1902) 19 RPC 497 (High Court of Justice, Chancery Division) was another case where there was ambiguity as to what was actually said at the time of the trap purchase, coupled with difficulties of subsequent recall. The Court observed that it would be wise on the part of the person setting the trap to send a written order in order to avoid ambiguity.

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57. Reverting to the present case, the position that emerges from the above judicial decisions is that while in trade mark and infringement cases, trap orders or trap transactions may be used as evidence, the fairness of such transactions is a relevant factor to be considered. Other relevant factors would be the nature of goods or services offered for purchase on the internet. If they require the customer to further physically verify their quality then the mere purchase of such goods through a trap transaction may not be treated as being sufficient evidence of infringement. The facts of each case will determine whether the trap transaction is a fair one and has resulted in a purchase on the internet of goods or services. A lone trap transaction will not be sufficient evidence of infringement or passing off. For the purposes of establishing that a part of the cause of action arose within the jurisdiction of the court, the plaintiff would have to show that the Defendant has purposefully availed of the jurisdiction of the

forum court by entering into a commercial transaction with an internet user located within the jurisdiction of the forum court. This 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 to be obtained using fair means. The plaintiff seeking to establish jurisdiction on the basis of such trap transactions would have to aver unambiguously in the pleadings, and also place along with it supporting material, to prima facie show that the trap transactions relied upon satisfy the above test. Question (iii) is answered accordingly."

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 3 SAGSR efAll) DIDileE' 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."

18. Before analyzing the facts of the present case on the basis of the judgments noted above, it would be appropriate to note paragraphs dealing with territorial jurisdiction as under:

“61. This Hon’ble Court has the territorial jurisdiction to entertain the present suit on account of the fact that a part of the cause of action has arisen in Delhi. In this regard, it is submitted that the Defendant advertises and promotes its services on www.Zomato.com an interactive restaurant guide service through which reservations can be made from Delhi at the outlets of the Defendant and/or the Defendant can be contacted. This is done against a charge. Resultantly, through Zomato.com the Defendant is able to target customers in Delhi. In fact, from the reviews set out in paragraph 33 above, which are posted on Zomato.com it is apparent that the Defendant has successfully targeted parties in Delhi to its outlet, making them believe that the same is a part of the Plaintiff’s ‘SOCIAL’ outlets. It is submitted that since the Plaintiff does not have a ‘SOCIAL’ outlet or a ‘STONE WATER GRILL’ in Hyderabad, a large part of the Defendant’s clientele would be customers who are aware of Plaintiff’s outlets in particular the ‘SOCIAL’ outlets in other locations such as those in Delhi. Hence, it is to be presumed that through websites such as Zomato, Facebook and Dine Out, the Defendant is able to target customers inter alia in Delhi and invite them to visit the Defendant’s outlet in Hyderabad and also reserve a table at the Defendant’s outlets in Hyderabad from Delhi. It may not be out of place to mention that on Zomato, DineOut and Facebook, there are pictures of the Defendant’s outlet, the infringing beverage and food products served in the restaurant and indeed the menu card bearing the SOCIAL and STONE WATER brand of the Plaintiff. Even the phone number of the Defendant is displayed on the Zomato and DineOut website with an invitation to users to book a table with the Defendants. Additionally, Zomato has a telephone number listed on its website which is indicative that it has a base in Delhi, within the jurisdiction of this Hon’ble Court. A screenshot of the Zomato display is reproduced

below. A screen shot of the website Dineout has been reproduced in paragraphs 32 and 42 hereinabove.

For business enquiries, please call your nearest Zomato office:







62. Further as mentioned hereinabove through the medium of the internet the Defendant is able to extend his reach to invite consumers inter alia in Delhi to visit its outlet, while conveying an impression that the same is one of the SOCIAL outlets and/or STONE WATER GRILL outlet of the Plaintiff. This not only causes confusion to customers in Delhi and damage to the Plaintiff but also gives rise to the cause of action having arisen in Delhi.

63. Additionally, as mentioned hereinabove the Defendant has applied for the registration of the trade marks 'SOCIAL MONKEY' and 'STONE WATERS KITCHEN & LOUNGE' before the Trade Marks Registry on an all India basis, which is further indicative of the Defendant's intention to expand its operations on an all India basis, including Delhi.

64. Further, the Plaintiff carries on business in Delhi inter alia through its office at the address 12, Hauz Khas Village, New Delhi 110016 where the Plaintiff has a SOCIAL cafe and an office housing about two hundred and fifty personnel. The entire pan India franchise and licensing business and the non-food supply chain management of the Plaintiff for all its

outlets is carried out from this office of the Plaintiff. The principal officer of the Plaintiff who conducts the negotiations with respect to the franchise business and negotiates the licensing terms also resides in Delhi and works out of the above office. Additionally, the Plaintiff carries on business in Delhi through its wholly owned 'SOCIAL' branded outlets at the following addresses:

Name of the outlet	Address
	9-A & 12, Hauz Khas Village, New Delhi-110016
	28A, Defence Colony Market, New Delhi, Delhi 110024
	23, First Floor, Odeon Building, Radial Road 5, D Block, Connaught Place, New Delhi, Delhi 110001
	R-1, Upper Ground Floor, Epicuria Food Mall, Nehru Place Metro Station, St Nagar East Of Kailash Road, Nehru Place, New Delhi, Delhi 110019

Additionally, the Plaintiff also carries on business in Delhi through the operations of its other outlets being SMOKE HOUSE DELI and MOCHA, which are located at multiple locations in Delhi.

19. Thus even if the defendant has been able to attract customers from other jurisdiction including by way of Zomato and Dine-Out, the services of the defendant cannot be availed unless the customers go to Hyderabad. Through Zomato and Dine Out the customers will only be able to invite a customer and reserve a table at the restaurant of the defendant at Hyderabad. The commercial transaction would take place only on the customer availing the services of the defendant at Hyderabad. Claim of the plaintiff is that at least one customer through the website booked the table at defendant's restaurant from Delhi believing that it was a restaurant of the plaintiff. On the basis of a solitary transaction, through internet plaintiff cannot claim that cause of action having arisen at Delhi this Court will have territorial jurisdiction to entertain the suit. Facts pleaded in the plaint do not pass the tests laid down by the Division Bench of this Court in Banyan Tree Holding (P) Ltd. (supra).

20. In view of the discussion aforesaid since this Court has no territorial jurisdiction to entertain the suit, the same is returned to be filed in the Court of competent jurisdiction. I.A. No. 3139/2017 is disposed of. I.A. No.1950/2017 is thus not to be decided by this Court.

(MUKTA GUPTA)
JUDGE

JANUARY 03, 2018
'vn'