

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

+ **CS(OS) NO.887/2004 & IA No.7672/2010**

Date of Decision : 05.08.2010

MR.VIJAY KUMAR BHANDARI & ORS. Plaintiffs

Through: Mr. A.Srekumar, Advocate

Versus

MEENU CHABRA & ANR. Defendants

Through: Proxy counsel for the defendant.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J. (oral)

1. This is a suit for permanent injunction restraining the defendants from infringing the trade mark of the plaintiffs and for alleged action of passing off, violation of copyright, damages, rendition of accounts and delivery up.
2. The plaintiff had claimed the following reliefs, in the plaint:-

“a. An order of permanent injunction restraining the defendants, their servants and agents,

representatives, dealers and all others acting for and on their behalf from manufacturing, selling, offering for sale or otherwise directly or indirectly dealing with auto spare parts bearing the mark MK or MAK or any other mark deceptively similar to the plaintiff no.1's trademark MK amounting to an infringement of the registered trademarks:

b. An order of permanent injunction restraining the unauthorized copying of the plaintiff's product packaging amounting to an infringement of the plaintiffs' copyright therein;

c. An order of permanent injunction restraining the defendants, their servants and agents, representatives, dealers and all others acting for and on their behalf from manufacturing, selling, offering for sale or otherwise directly or indirectly dealing with auto spare parts bearing the mark MK, MAK, MAKAI or any other mark deceptively similar to the plaintiffs' trademarks MK, MX, MAX, MKAI or using a packaging similar to the plaintiffs' packaging amounting to passing off;

d. An order of permanent injunction restraining the defendants, their servants and agents, representatives, dealers and all others acting for and on their behalf from using MK or MAK or any other mark deceptively similar to the plaintiffs' trademarks MK, MX and MAX as part of the trading style amounting to passing off;

e. An order for delivery up of all infringing products and their destruction therein.

f. An order for damages to the tune of Rs.25,00,000/- for loss of sale and reputation payable to plaintiff."

3. The allegations which were made in the plaint, after giving detailed and verbose averments, were to the effect that they were having the interest in the registration of the trademark

MK, MX, MAK, MKAI which were being used by them in a distinctive packaging form for various auto parts. It was alleged that the defendant no.2 along with his wife/defendant no.1 were infringing and passing off the products manufactured by them under deceptively similar marks and passing off the products as that of the plaintiff.

4. On 18.8.2004, the very first date, an ex parte ad interim stay was granted in favour of the plaintiff restraining the defendants from directly or indirectly infringing, selling, offering for sale spare parts/motor parts under the trade name MK, MAK, MKAI. Similarly, they were also prevented from using the packaging material similar to that of the plaintiff.
5. After completion of pleadings, issues were framed on 30.8.2005 and the plaintiff was given two week's time to file list of witnesses and affidavits by way of evidence within four weeks. On 23.11.2005, this Court had observed that affidavits by way of evidence were not filed and consequently, last opportunity was given. Despite the last opportunity having been given, no affidavits have been filed till date. On the contrary, the plaintiff with a view to delay the disposal of the case on merits filed applications and the case got embroiled

in disposal of the applications. Simultaneously, the plaintiff started taking adjournments for exploring the possibility of a settlement with the defendants. More than 1½ years was spent on the purported settlement which was never struck with the defendant.

6. The matter was taken up by this Court on 17.5.2010 when it was noted that a perusal of the previous order sheets shows that more than ten opportunities were granted to the parties to arrive at a settlement but despite this, no settlement has been arrived at and accordingly, one final opportunity was given to the plaintiff to file affidavits by way of evidence subject to payment of cost of Rs.50,000/- with the Delhi High Court Legal Aid and Advise Committee within two weeks. An application was filed for reduction/waiving of the cost which was taken up on 1.6.2010. It was urged by learned counsel for the plaintiff that he is in financial difficulty and he will be unable to bear the cost imposed on him. It was contended that in case cost is not reduced, the plaintiff will not be able to prosecute the matter further and he will have to withdraw. The Court showed the indulgence and reduced the cost from Rs.50,000/- to Rs.25,000/- with the condition that affidavits by way of evidence shall be filed within a week on 1.6.2010.

7. On 5.8.2010, when the matter came up after two months, neither cost of Rs.25,000/- was deposited nor affidavits by way of evidence had been filed. Further time for filing the affidavits by way of evidence as well as for deposit of cost of Rs.25,000/- was made. It was also contended that Mr.Anand, Advocate was out of country and therefore, the proxy counsel was not able to obtain instructions.
8. I have considered the submission made by the proxy counsel. However, I find it unable to accede to the request of the proxy counsel for further adjournments.
9. Issues have been framed almost five years back. Despite sufficient opportunities having been given, affidavits by way of evidence had not been filed. In order to avoid production of evidence, time for settlement was obtained. After spending 1½ years for settlement without any result, another opportunity was given for filing affidavit by way of evidence at request, which was not availed. It seems that the plaintiff is not interested in prosecuting the case diligently or is taking for granted the time that has been given. It is because of undue latitude given to the plaintiffs that cases remain on board for years together with the result the genuine cases suffer. The evidence of the plaintiff is closed under Order 17 Rule 3 CPC

and the Court proceeds to pronounce the judgment dismissing the suit for the simple reason that there is not even an iota of evidence placed on record in support of any of the issues which were framed on 30.8.2005.

10. It may also be noted that under Section 35(B) CPC, payment of cost is a condition precedent before the case can proceed further and accordingly, the case could have been dismissed for non prosecution on account of lack of deposit of cost of Rs.25,000/- by the plaintiff. However, without resorting to that provision, the suit of the plaintiff is dismissed for lack of evidence in support of its case.
11. File be consigned to the Record Room.
12. Parties to bear their own costs.

V.K. SHALI, J.

AUGUST 05, 2010
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