

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

+ **CS(OS) NO.2431/2007**

Date of Decision : 07.01.2011

INDOFILL ORGANIC INDUSTRIES LTD. Plaintiff

Through: Mr. Sudhir Chandra,
Sr.Adv. with Mr.P.Bahadur,
Advocate.

Versus

MR.AMAR VAKIL & ORS. Defendants

Through: Nemo.

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.

1. This judgment shall dispose of the suit for permanent injunction, mandatory injunction and damages for infringement and /or passing off, under the Trademarks Act, 1999 against the defendants.
2. Briefly stated the facts of the case, as alleged in the plaint are that the plaintiff is a company by the name of INDOFILL ORGANIC INDUSTRIES LTD. which is duly incorporated under the provisions of The Companies Act, 1956 having its registered office at Dr. Annie Besant Road, Mumbai-400030 and branch office at 6-FF, Stutee Building, Bank Street, Karol Bagh, New Delhi-05. The present suit has been filed through

Mr.Mehmood M.Abdi, Chief Manager-Legal who is duly authorized to sign, verify and institute the suit.

3. The plaintiff is purported to be carrying on business of manufacturing, buying, selling, importing, exporting and generally dealing with agricultural chemicals and specialty and performance chemicals. It is alleged that they have a website by the name of 'indofil.com'. It is stated that on 22.11.1982 INDOFIL obtained its first trademark registration for "Indofil" in India under all classes specified, i.e. 1 to 42 (Ex.PW1/3) (colly) to Ex.PW1/5 (colly)). The turnover of the plaintiff company during the financial year 2006-07 was stated to be around ₹403/- crores (Ex.PW1/11) out of which the export business was approximately of ₹78 crores (Ex.PW1/12). The net expenditure towards the advertising and publicity was alleged to be to the tune of ₹5.60 crores (Ex.PW1/9). The various advertisements, reports, newspaper articles, in relation to indofil are exhibited as Ex.PW1/18(colly). The website which is operated and duly registered with the Network Solutions LLC on 31.10.2000 is exhibited as Ex.PW1/13 and Ex.PW1/14.
4. It is alleged that the plaintiff's company, sometime in month of January, 2006 came across the existence of another domain name registered as '**Indofil.com**' which was completely defunct. The domain name 'Indofil.com' was

registered in July, 1998 in the name of defendant no.1 with defendant no.3 Ex.PW1/19.

5. On discovery of this fact, the plaintiff company was apprehending that serious damage and prejudice will be caused to the business and interest by this defunct website which was alleged to be belonging to a cyber squatter. This necessitated the plaintiff company taking a recourse to the mechanism under the Uniform Domain Name Dispute Resolution Policy of the WIPO by filing a complaint against the defendant no.1 on 26.6.2006 praying for transfer of the domain name 'indofil.com' from defendant no.1 to itself that is Ex.PW1/15 (colly). The defendant no.1 is stated to have filed its response to the said complaint of the plaintiff before the WIPO Centre on 18.7.2006. The defence which is purported to have been taken by defendant no.1 was that indofil was a short form of 'industries of illinois'.
6. Defendant no.2 herein was a non-profit Organization and incorporated on 12.10.2004, for the purpose of promoting Illinois base business. It was admitted by them that the domain name adopted by them was defunct as it was being redesigned and funding for the same was awaited Ex.PW1/16 (colly). On the basis of this complaint and reply, WIPO Centre is stated to have given its decision vide its Administrative Panel decision dated 14.8.2006, wherein it was accepted that the domain name of defendant no.1 was identical to the

plaintiff's trademark but rejected the complaint of the plaintiff (Ex.PW1/17).

7. After the rejection of the complaint of the plaintiff, the defendants have alleged to have altered the contents on the disputed website from 'temporarily unavailable' to something new like:-

'We regret to inform that INDOFIL is experiencing financial difficulties. While we await funding from external sources, your orders and/or deliveries may be delayed or cancelled'.

8. On the basis of this information being logged in on the opening of the website, it was alleged by the plaintiff that it was completely contrary to the stand which defendants had taken before the WIPO Centre. It was alleged by the plaintiff that the change in the stance of the defendant gave an impression that it was a website of manufacturing/trading company which is like that of the plaintiff which was allegedly in extreme financial distress and therefore, unable to make these commitments. It is alleged that no connection whatsoever was disclosed between the website of defendant no.2 Ex.PW/1/18 (colly) with that of the plaintiff.
9. The plaintiff had taken the plea that since the defendant is not a manufacturing or trading concern and has changed the contents of its website, the only irresistible conclusion which can be drawn is that this was malicious and was created with an ulterior motive to attribute as if the impugned website

belonged to the plaintiff and consequently, cause loss and damage to the plaintiff. It is alleged that since the plaintiff came to know about the alternative malicious content of the website, it had issued a formal caution notice on its own website Ex.PW1/20 to forewarn the defendants and all other concerned persons, however, in the meantime, it started receiving queries from various dealers across the country including dealers from Delhi who used to visit the said disputed site (Ex.PW1/21) regarding the financial health of the plaintiff company. It is alleged that this constrained them to file the present suit against the defendant.

10. The case of the plaintiff is that the present suit has been filed by the plaintiff against the defendants in this background and in terms of para 4(k) of the Uniform Domain Name Dispute Resolution Policy, which reads as under:-

“4(k) Availability of Court proceedings. *The mandatory administrative proceeding requirements set forth in paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded....*

11. The plaintiff was granted an ex parte ad interim injunction on 8.2.2008 and 29.2.2008, against the defendants prohibiting them from using the domain name which they were purportedly using and which was offending and violating the rights in respect of the website of the plaintiff.

12. It is alleged that the plaintiff had also complied with the provisions of Order 39 Rule 3 CPC in terms of the directions passed by the Court and also served copy of the notice on the defendant both by post and courier but despite this, neither the defendant no.1 nor defendant no.3 appeared while as the service report of defendant no.2 was that of refusal. It is alleged that since the defendants had failed to appear despite service or file their response/written statement to the suit of the plaintiff, accordingly, the Court proceeded against all three of them ex parte vide order dated 5.8.2008.
13. It is now in this background that the plaintiff is alleging that the defendant on account of the alleged, constant user of the website belonging to the plaintiff by using a deceptively similar name is causing immeasurable damage to the reputation and business of the plaintiff and it has accordingly prayed for grant of decree restraining the defendants from using the said domain name of the plaintiffs and transfer of the same to the plaintiff.
14. The plaintiff has also claimed interest @20% and damages which have been quantified by him at ₹58 lacs.
15. The plaintiff in support of its case has filed an affidavit by way of evidence of Mr.Mehmood M.Abdi by whom the plaint has been signed, verified and instituted. In addition to this, the affidavit of one Mr.S.V.Shah has also been filed on record to identify with regard to the signatures and the documents

Ex.PW1/13 to Ex.PW1/20 which have been proved by the plaintiff.

16. I have heard the learned senior counsel for the plaintiff and gone through the evidence.
17. Mr.Chandra, the learned senior counsel for the plaintiff has also referred to the following authorities:- **Times Internet Ltd. Vs. Belize Domain Whois Service Ltd. & Ors.** MANU/DE/2963/2010, **Pfizer Products Inc. Vs. Mr.Altamash Khan & Ors.** Manu/DE/2007/1825, **Beiersdorf A.G. Vs. Ajay Sukhwani & Anr.** 156(2009) DLT 83, and **Tata Sons Ltd. Vs. Ghassan Yacoub & Ors.** Manu/DE/1150/2004.
18. The testimony of both Mr.Mehmood M.Abdi as well as the supporting evidence of Mr.Shah fully supports the case of the plaintiff as set up in the plaint. Various documents have been duly proved in accordance with law which have been given the exhibit marks and have been referred to hereinabove while giving the facts. Since the defendants have been set ex parte, both these witnesses have not been cross examined and consequently their testimony goes completely unchallenged. There is absolutely no reason to doubt the credibility of both these witnesses. There is an extreme preponderance of probability in favour of the plaintiff to establish that the defendant is using the website by the name of 'indofil.com' which is also website of the plaintiff and

thereby causing damage to the reputation and goodwill of the plaintiff by surreptitiously adopting the said website.

19. I accordingly feel that there is no impediment in passing an ex parte decree in favour of the plaintiff and against the defendants in terms of the prayer clause made by him.
20. The learned senior counsel for the plaintiff has referred to the judgments of this Court in case titled **Super Cassettes Industries Ltd. Vs. Mr.Whang Zhi Zhu Ce Yong Hu & Ors.** Manu/DE/2000/2008 in CS(OS) No.769/2004 decided on 11.12.2008, which clearly supports the case of the plaintiff.
21. I accordingly, decree the suit in terms of the prayer clause restraining the defendants from using the domain name indofil by way of following manner:-

- (i) “By way of a decree of permanent and mandatory injunction direct defendant nos. 1, 2 and 3 to forthwith remove the website operated under the disputed domain name “indofil.com’, as well as the contents of the said website.
- (ii) By way of a decree of permanent and mandatory injunction restraining defendant no.1, defendant no. 2 and its Directors, employees, office bearers, agents and representatives from, in any manner, operating website under the dispute domain name – “indofil.com” or any other website having the domain name “indofil” in any combination whatsoever.
- (iii) By way of a decree of permanent and mandatory injunction defendant no. 1, defendant no. 2 and its Directors, employees, office bearers, agents and representatives from selling, transferring, alienating, assigning or in any other manner creating third party rights with regard to its website under the disputed domain name “indofil.com”.

- (iv) By way of a decree of permanent and mandatory injunction restraining defendant no. 3 from permitting the defendant no. 1 and defendant no. 2 from operating, selling, transferring, alienating, creating third party rights or in any other manner dealing with the website under the disputed domain name "indofil.com", which is registered with the defendant no. 3.
- (v) By way of a decree of permanent and mandatory injunction restraining defendant no. 3 from registering any domain name having the word "indofil" in any combination whatsoever, in favour of any person or organization, other than the plaintiff herein.
- (vi) By way of a decree of permanent and mandatory injunction directing the defendant no. 3 to transfer the disputed domain name, "indofil.com", from defendant no. 1 to the plaintiff company, on its regular terms, conditions and charges.
- (vii) Grant damages of Rs.20,00,000/- along with pendente lite and future interest @9% per annum till receipt of money, against the defendant nos. 1 and 2 and in favour of the plaintiff company, for causing financial loss to the Indofil Chemicals Company, unit of plaintiff company on account of the contents on the disputed website i.e. "indofil.com". The interest which has been claimed by the plaintiff is at the rate of 18% which is admittedly at a very high rate. The normal rate of interest on the FD's even for the fairly long tenure is @ 7 to 8% or so. Therefore, I feel the interest of justice would be met in case interest @ 9% is granted, both pendente lite as well as future interest.
- (viii) Pass such further and other orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

22. Decree sheet be drawn accordingly.

23. File be consigned to the Record Room.

V.K. SHALI, J.

**JANUARY 07, 2011
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