

.* HIGH COURT OF DELHI: NEW DELHI

Order passed on 05.03.2012

CS(OS) No. 646 of 2005

Hindustan Lever Ltd. & Anr. Plaintiffs

Through: Ms. Saukshmya, Adv.

Versus

Satish Kumar Defendant

Through: Defendant is *ex-parte*.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. The present suit has been filed for permanent injunction restraining the infringement of trademarks, copyright, passing of, mense profits, damages and delivery up, etc. against the defendant alleging that he is engaged in counterfeiting of fast moving consumer goods (hereinafter referred to as the FMCG) such as shampoos and creams bearing the marks of the plaintiffs.

2. Plaintiff No.1, i.e. Hindustan Unilever Limited's (formerly known as Hindustan Lever Limited) brands are used in India for a variety of goods including SUNILK, CLINIC PLUS for shampoos; FAIR & LOVELY, PONDS/PONDS DREAM FLOWER, LAKME, ELLE 18, VASELINE, REXONA, AVIANCE and DENIM for cosmetics and toiletries. The details of the relevant registrations for the purpose of this Suit are as indicated below:

MARK	REGN. NO.	CLASS	DATE	GOODS
SUNSILK (word)	144805	3	16/8/50	Bleaching preparations and other substances for laundry use; cleaning; polishing; scouring and abrasive preparations; soaps; perfumery; essential oils; cosmetics; hair lotions; dentifrice
SUNSILK (stylized)	320384	3	17/11/76	Soaps, laundry preparations, cleaning, polishing, scouring, perfumery, essential oils, cosmetics (non-medicated); toilet preparations (non-medicated) and dentrifices.
SUNSILK Beauty	379261	3	5/8/81	Bleaching preparations

Shampoo (label)				and other substances for laundry use; cleaning; polishing; scouring and abrasive preparations; soaps; perfumery; essential oils; cosmetics; hair lotions; dentifrice
CLINIC (word)	349206 B	3	16/5/79	Shampoos for hair
CLINIC & plus device label	349207 B	3	16/5/79	Shampoos for hair
ALL CLEAR CLINIC	608815B	3	7/10/93	Shampoos etc.
PONDS Cold Cream for cleansing	96631	3	25/5/44	Cold Cream
POND's	436380	3	11/4/85	Mascara, eye brow pencil, eye make up and dentrifice
POND'S Dream Flower	422028	3	17/5/84	Perfumery including colognes and soaps

The plaintiffs state that the aforesaid all the registrations are subsisting and valid. The copies of certificates for use in legal proceedings issued by the Registrar of Trade Marks relating to the said marks are also on record.

3. Plaintiff No.1, further states that it is responsible for the product formulation (including testing, research and strategy) as well as for packaging, labeling and advertising, promotion and pricing. All the sub-contractors and agents involved in the manufacturing and marketing of its products are directly or indirectly under its control and supervision so that there is a constant interaction between consumer feedback through such agents and plaintiff No.1.

4. It is stated that Plaintiff No.2 i.e. P & G is a subsidiary of Procter & Gamble Company of USA, which was incorporated in the year 1890. It owns 65% stake in the Indian Company and has been engaged in the business as manufacturers and merchants, inter alia, of perfumery, cosmetics, toilet preparations and goods, essential oils, anti-perspirants, dentrifice. Plaintiff No.2 is licensed by its parent company under Trade Mark License Agreement dated 14.03.2000 to use the trademarks owned by the latter in India. These include well-known brands such as ARIEL, TIDE, HEAD & SHOULDERS, PANTENE PRO-V, REJOICE, WHISPER etc. P&G markets several leading brands including the VICKS range of cough and cold medicines.

5. It is also averred in the plaint that the trademarks HEAD & SHOULDERS and PANTENE among others are very well known and have been registered in over 120 countries, inter alia, in international

class 3 in the name of Procter & Gamble, USA or in favour of other local companies of the Procter & Gamble Group of Companies. The details of the relevant registrations for the trademarks owned in India by Procter & Gamble Company, USA are as indicated below:

<u>Mark</u>	<u>Regn. No.</u>	<u>Class</u>	<u>Date</u>	<u>Goods</u>
Head & Shoulders	231938	3	26.10.1965	Shampoos
Head & Shoulders	231939	5	26.10.1965	Pharmaceutical preparations in the nature of shampoos
Pantene	126219	3		
Pantene & Device	184838	3	29.04.1958	Non-medicated toilet preparations, hair lotions and cosmetics
Ariel	260804	3	25.11.1969	Washing preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps and detergents for laundry and household use

The aforesaid registrations are all subsisting and are conclusively valid. Copies of certificates for use in legal proceedings

issued by the Registrar of Trade Marks relating to the said marks are filed herewith.

6. It is further stated that the products of plaintiff No.2, such as ARIEL, HEAD & SHOULDERS and PANTENE are also sold in different forms of packaging including bottles, sachets, tubes, etc. in different sizes and these bear distinctive features of labeling including logos, graphics, colour combinations, stylized scripts and overall arrangement of features. The said product packaging, of which the artwork is designed on commission by the respective advertising agencies of plaintiff Nos.1 & 2, constitutes an original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957 of which, plaintiff No.2 is the exclusive copyright owner.

7. The plaintiffs have been using their trademarks mentioned herein above on an extensive scale. The plaintiffs have also widely advertised the trademarks for their goods and built up the reputation and goodwill of the said marks on account of their marketing efforts and investment.

DEFENDANT'S ACTIVITIES

8. As per the plaintiffs, the defendant is a counterfeiter of various FMCG brands and is engaged in manufacturing and selling spurious personal care products. The defendant carries on its business from the shop and godown premises at 2879/4, 2nd and 3rd Floor, New Market, Sadar Bazar, Delhi 1100 06.

9. The plaintiffs had jointly and independently conducted criminal raids with the assistance of the police at the premises of the defendant, on several dates. The details regarding the said raids are given below:

- i) On 26th December 2001 police raids conducted at the premises of the defendant pursuant to FIR No.438/01 led to seizure of large quantities of counterfeit **Fair & Lovely, Sunsilk and Clinic/Clinic Plus/Clinic All Clear, Ponds, Ponds Dreamflower, Lux and Close Up** products.
- ii) On 7th June 2002, police raids were conducted at the premises of the defendant pursuant to FIR No. 164/02.
- iii) On 31st January 2003, police raids conducted at the premises of the defendant pursuant to DD No.65-B led to seizure of counterfeit **Fair & Lovely, Elle 18 and Lakme** products.
- iv) On 29th May 2003, police raids conducted at the premises of the defendant led to seizure of counterfeit **Lakme, Sunsilk and Clinic Plus** products of HLL and **Ariel** products of P&G.
- v) On 4th December 2003, police raids conducted at the premises of the defendant pursuant to FIR No .423/03 led to seizure of counterfeit **Lakme and Clinic Plus** products.
- vi) On 8th July 2004, police raids conducted at the premises of the defendant pursuant to FIR No.290/04 led to seizure of counterfeit **Fair & Lovely, Lakme, Elle 18, Clinic Plus/Clinic All Clear, Sunsilk, Ponds, Ponds Dreamflower and Vaseline** products of HLL and **Head & Shoulders and Rejoice** products of P&G. The defendant was kept in judicial custody for 45 days pursuant to this raid. Photocopies of the relevant seizure memos are on record.

10. It is also stated that the product packaging in which the counterfeit goods were recovered from the defendant is a complete reproduction of the artwork in the plaintiffs packaging, but, done in poor quality of printing and sealing. In some instances, the defendant had used the discarded bottles/containers of the products of the plaintiffs. Thus, the defendant is in violation of plaintiffs' copyright in their artistic labels/packaging.

11. A perusal of the products of the defendant reveals that they carry legends such as: "M.L.No. DNH/C/11. Mktd. by Lie. User **Hindustan Lever Ltd.**, 165/166, Backbay Reclamation, Mumbai 400 020" on counterfeit Clinic Plus in blue packs and "M.L.No. DNH/C/14" with similar credits on counterfeit Sunsilk shampoo in pink packs, or "Mfd. by **Hindustan Lever Ltd.** Dag No.21 of 122 F.S.Grant, Mouza ... M.L.No.C-3M/2-001. Regd. Office: Mumbai-400 020 HLL 2002. IMITATION OF LABEL GRAPHICS IS A PUNISHABLE OFFENCE" on counterfeit Clinic Plus in silver packs. The counterfeit ARIEL sachet packs of the defendant bears the legend: "made in India by Procter & Gamble Home Products Ltd., Mumbai 400 099".

12. According to the plaintiffs, despite police raids, the defendant refused to give up the unlawful activities. Therefore, the plaintiffs had to seek an order of injunction by this Court. Vide order dated 11.05.2005, this Court allowed the application of the plaintiffs under Order XXXIX and the defendant was served but, since the defendant did not put in appearance he was proceeded ex-parte vide order dated 07.07.2005 and the interim injunction dated 11.05.2005 was confirmed.

13. Thereafter, the plaintiffs filed evidence by way of affidavits of Shri Rajinder Singh, law officer of plaintiff No.1 and of Shri V.K. Khaneja, the authorized representative of plaintiff No.2 alongwith various documents. A transcript of all search and seizure memos pertaining to the defendant was also filed.

14. Shri Rajinder Singh, in his affidavit, Ex. PW-1/A, proved the following documents:

- (i) **Ex.PW-1/1-** Letter of authority in his favour to depose his affidavit.
- (ii) **Ex.PW-1/2-** Copy of the Power of Attorney dated 03.05.2000, in favour of Ms. Preetika Singh, Regional Legal Manager and constituted attorney of plaintiff No.1.
- (iii) **Ex.PW-1/3 (A-G)-** Certificates for use in legal proceedings issued by the Registrar of Trade Marks relating to the trademarks of plaintiff No.1.
- (iv) **Ex.PW-1/4 (A-H)-**The specimen of products of plaintiff No.1 under the trademarks Sunsilk, Clinic Plus, Fair & Lovely, Ponds, Lakme, Elle 18, Lux, Close Up.
- (v) **Ex.PW-1/5(A-C)-** The annual reports of plaintiff No.1.
- (vi) **Ex.PW-1/6-** The certified copy of a relevant seizure memo.

15. Shri V.K. Khaneja, in his affidavit, Ex. PW-2/A proved the following documents:

- (i) **Ex.PW-2/1-** Certified copy of the Board of Resolution of plaintiff No.2 in his favour to depose his affidavit.
- (ii) **Ex.PW-2/2-** Copy of the Power of Attorney dated 06.09.2004, in favour of Mr. Ashok Chhabra, Director and constituted attorney of plaintiff No.2.
- (iii) **Ex.PW-2/3-** Photocopy of fresh Certificate of Incorporation of the Company.
- (iv) **Ex.PW-2/4 –** Copy of Trademark License Agreement dated 14.03.2000 between Procter & Gamble USA and plaintiff No.2 to use the trademarks owned by plaintiff No.2 in India.
- (v) **Ex.PW-2/5-** A list of plaintiff's trademarks.
- (vi) **Ex.PW-2/6-** Photocopies of extracts of a book titled 'TMOA Centenary 1886-1996', which refers to the long use of trademark ARIEL.
- (vii) **Ex.PW-2/7-** Certified copy of the certificate for use in legal proceedings issued by the Registrar of Trade Marks pertaining to registration No.231938 in class 3.
- (viii) **Ex.PW-2/8-** Certified copy of the certificate for use in legal proceedings issued by the Registrar of Trade Marks pertaining to registration No.260804 in class 3.
- (ix) **Ex.PW-2/9-** The certified copy of a relevant seizure memo.

- (x) **Ex.PW-2/10-** The certified copy of a transcript relevant seizure memo.
- (xi) **Ex.PW-2/11-** The specimen of a news article reporting the raids conducted by the plaintiffs.
- (xii) **Ex.PW-2/12-** The specimen of a news article reporting the raids conducted by the plaintiffs.
- (xiii) **Ex.PW-2/13-** Sample of defendant's product packaging of Head & Shoulders.
- (xiv) **Ex.PW-2/14-** Sample of defendant's product packaging of Ariel.
- (xv) **Ex.PW-2/15-** Sample of defendant's product packaging of Rejoice.
- (xvi) **Ex.PW-2/16-** Copies of undertaking given by the third parties to discontinue to use the trade marks of the plaintiffs.

16. Thereafter, the plaintiffs placed on record, the affidavit of Shri B.K. Anand, a practicing Chartered Accountant who in his affidavit has stated that the plaintiffs should be give damages to the tune of Rs.1 Crore.

17. I have heard the learned counsel for the plaintiffs and have also gone through the affidavits in *ex parte* evidence as well as the documents placed on the record. In their evidence, the plaintiffs have proved the facts stated in the plaint and also exhibited the relevant documents in support of their case. As no cross-examination of the plaintiffs' witnesses was carried out, therefore, the evidence filed by

the plaintiffs has gone unrebutted. Therefore, the averments made by the plaintiffs are accepted as correct deposition.

18. Considering these facts and circumstances, the plaintiffs are entitled to a decree of permanent injunction.

19. Accordingly, a decree of permanent injunction is passed in favour of the plaintiffs and against the defendant in terms of para 36 (i), (ii) and (iii) of the plaint.

20. As regards the prayer for cost, rendition of accounts and damages which includes loss of business, reputation and goodwill in the market, since, the above claimed amount is based on the assessments made by the plaintiffs, I am of the view that a sum of Rs. 10 lac can be reasonably awarded to the plaintiffs as punitive damages in view of the judgment passed in the case titled as *Time Incorporated vs. Lokesh Srivastava*, 2005(30)PTC 3(Del.), wherein, this Court expressly recognized a third type of damages as punitive damages, apart from compensatory and nominal damages. The Court has made some relevant observations discussion on the aspect of punitive damages. It was observed:-

“The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities...”

“This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so

that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.”

21. One of the reasons for granting relief of punitive damages is that despite of service of summons/notice, the defendant had chosen not to appear before the court. It shows that the defendant is aware of the illegal activities otherwise, he ought to have attended the proceedings and give justification for the said illegal acts. Since, the defendant has maintained silence, therefore, the guilt of the defendant speaks for itself and the court, under these circumstances, feels that in order to avoid future infringement, relief of punitive damages is to be granted in favour of the plaintiff.

22. Another reason for granting punitive damages is that despite of raids by the police from time to time at the premises of the defendant, whereby, huge amounts of counterfeiting products were recovered, the defendant still continued to counterfeit the products of the plaintiffs. It shows that the defendant has no respect for any law or any fear and his only motive is to sell sub-standard products to public at large which are used by them in day to day life. The defendant did not understand the serious repercussions of such duplicate material. This court is of the concerned view that such tendency deserves to be taken serious notice of and counterfeiting has to be curbed by passing appropriate orders of punitive damages including imposition of exemplary costs, so that the defendant in

future, should not enjoy the benefit of counterfeiting of well known trade marks/trade dress in future.

23. Decree be drawn accordingly by the Registry.
24. The plaintiffs are also entitled for costs.
25. The suit and the pending application stands disposed of.

MANMOHAN SINGH, J.

MARCH 05, 2012