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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 2252/2009

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Judgment dated 31.01.2012

PEPSICO, INC & ORS.

..... Plaintiff

Through: Ms.Bitika Sharma, Advocate

versus

M/S.MADHUSRI INDUSTRIES

..... Defendant

Through

CORAM:**HON'BLE MR. JUSTICE G.S.SISTANI****G.S.SISTANI, J (ORAL)**

1. Plaintiff has filed the present suit for permanent injunction, restraining violation and infringement of rights in the trademark/ logo/ label AQUAFINA, damages/ rendition of accounts, delivery up etc. against the defendant.
2. While issuing summons in the suit and notice in the application for stay on 30.11.2009 this court had restrained the defendants, their principal officers, agents, servants, assigns etc. from manufacturing packaged drinking water under the trademark/ label AQUAFINA, or any other mark or label which is deceptively or confusingly similar to the plaintiffs' trademark AQUAFINA, till the next date of hearing; and the Local Commissioner was also appointed.
3. The defendants were proceeded *ex parte* by an order dated 25.03.2011. Plaintiff has filed the affidavit by way of evidence of Mr.Vinod Kaushal, Director (Legal) in the plaintiff no.2 company and is the authorized

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By:AMULYA

signatory. The affidavit by way of evidence has been exhibited as Ex.PW-1/A. The witness has deposed on the lines of the plaint. PW-1 has deposed that the plaintiff No.1 - PepsiCo, Inc. is a corporation existing under the laws of North Carolina, United States of America having its principal office is at 700, Anderson Hill Road, Purchase New York, USA; plaintiff No. 2 - PepsiCo India Holdings Limited, is a fully owned subsidiary of plaintiff No. 1; and plaintiff No. 3, Pepsi Foods (Pvt.) Limited, is a company existing under Indian laws and is also a subsidiary of plaintiff No. 1. He has deposed that plaintiff No. 2 is duly authorized to take all actions to protect various trademarks of plaintiff No.1 and copy of the letter dated 07.08.2006 issued by plaintiff No.1 in favour of plaintiff No. 2 is exhibited as Ex.PW-1/1.

4. PW-1 has also deposed that he is duly authorized to depose and file the present affidavit, certified true copy of the Board Resolution executed by plaintiff No.2 dated 04.08.2011 and by plaintiff No.3 dated 13.09.2011 in his favour are exhibited as Ex.PW-1/2 and Ex.PW-1/3, respectively. Mr.Kaushal has also deposed that the plaint has been duly signed by Mr.V.R. Shankar on behalf of plaintiff Nos.2 and 3 and he identifies signatures of Mr.V.R. Shankar.
5. Mr.Vinod Kaushal, has also deposed that the plaintiffs are the world's renowned manufacturer and seller of beverages under the trademark PEPSI, MIRINDA, 7UP, MOUNTAIN DEW, etc. It is also deposed that the plaintiffs through their various divisions all over the world are also the largest manufacturer and seller of snack foods; and one of the leading businesses of the plaintiffs is the manufacture and sale of packaged drinking water under the trademark AQUAFINA.
6. It is also deposed that the present case relates to the trademark AQUAFINA and the illegal adoption and use by the defendant of an

identical trademark AQUAFINA for bottled drinking water; and the original AQUAFINA product label of the plaintiffs' and defendant's having already been filed and are exhibited as Ex.PW-1/4 and Ex.PW-1/5 respectively.

7. PW-1 has deposed that the mark AQUAFINA is a unique word coined and adopted by the plaintiffs and has been exclusively used by plaintiffs since 1994; and in fact AQUAFINA drinking water is the brand with the highest market share among bottled drinking water in the United States of America.
8. It is further deposed that the word AQUAFINA has no obvious meaning and is an invented word and is entitled to the highest degree of protection. It is also deposed that AQUAFINA product was launched in India as early as 1999. The AQUAFINA product is manufactured with a special reverse osmosis ultra purification system. In India, the bottling plant has been set up at Roha in Raigarh district of Maharashtra with an investment of over Rs.5 crores. Apart from the plant at Roha, the plaintiffs have also spent over Rs.50 crores in the setting up of 17 manufacturing plants for manufacturing AQUAFINA packaged drinking water in India; and the water purification system adopted by the plaintiffs for AQUAFINA ensures the purity and quality of the said product. It is also deposed that since its launch, the plaintiffs have promoted the AQUAFINA brand with various tag lines like "AQUAFINA the purest part of you", "AQUAFINA -- pure water from PEPSI" etc., which have established an inseparable connection between AQUAFINA and the plaintiffs.
9. As per PW-1 due to the aggressive advertising and promotional campaigns which have been launched by the plaintiffs, the trade mark of the plaintiff, AQUAFINA has gained enormous recognition and popularity in a short period of time and is today considered as one of the

premium brands for bottled drinking water. Due to various safeguards which have been adopted by the plaintiffs to maintain the quality of water, the product under the mark/logo/label AQUAFINA has been able to capture a substantial market share in India due to its quality, purity and freshness; and the AQUAFINA brand has become extremely well known and a mere mention of the brand immediately connects the plaintiffs and their businesses.

10. This witness has also deposed that plaintiffs have applied to register the AQUAFINA trade mark, label and logo design in numerous countries. The list of countries where the mark has proceeded with registration includes, but is not limited to: ALGERIA, ARGENTINA, ARMENIA, AUSTRALIA, AUSTRIA, BAHRAIN, BELARUS, BENELUX, BRAZIL, BULGARIA, CANADA, CHILE, CHINA (People's Republic of), COLOMBIA, COSTA RICA, CYPRUS, CZECH REPUBLIC, EGYPT, ESTONIA, ETHIOPIA, EUROPEAN UNION, FINLAND, GERMANY, GREECE, HONDURAS, HONG KONG, HUNGARY, JAPAN, JORDAN, KAZAKHISTAN, KUWAIT, LATVIA, LEBANON, LITHUANIA, MACAO, MALAYSIA, MOROCCO, NEW ZEALAND, NIGERIA, OMAN, PAKISTAN, PANAMA, PHILIPPINES, PERU, POLAND, PORTUGAL, QATAR, ROMANIA, RUSSIAN FEDERATION SAUDI ARABIA, SINGAPORE, SLOVAK REPUBLIC, SOUTH AFRICA, SOUTH KOREA, TAIWAN, THAILAND, TURKEY, UKRAINE, UAE, VENEZUELA, VIETNAM, YEMEN. The online printouts of some of the registration certificates and current status of the mark from the respective online database of the Trade Marks Offices are collectively exhibited as Ex.-PW-1/6; and a list of world registrations of plaintiff No 1 for AQUAFINA has already been filed with the plaint and is exhibited as Ex.PW-1/7.

11. Mr.Vinod Kaushal, has deposed that AQUAFINA, in the unique writing style and the font and label, is a registered trade mark of plaintiffs in India, details of the registration are given below:

REGN NO.	DATE	CLASS	MARK
774285	29.4.1997	32	AQUAFINA
1129381	28.8.2002	32	AQUAFINA Logo/Label Design (in Color)
1308951	15.09.2004	32	AQUAFINA NOVEAU Label (In Colour)

Copy of the Legal Proceeding Certificates of registration No. 774285 and 1129381 for AQUAFINA label are exhibited as Ex.PW-1/8 and Ex.PW-1/9, respectively. The printout from the Indian Trademark Registry website (www.ipindia.nic.in) depicting the trademark registration of the mark AQUAFINA NOVEAU (label mark) in favour of plaintiff No.1 alongwith Trademark Journal extract are collected exhibited as Ex.PW-1/10.

12. PW-1 has also submitted that in India, the AQUAFINA label is a registered mark under the Trade Marks Act, 1999; the plaintiffs are the exclusive owners and proprietors of the said label; and the use of a deceptively similar label by the defendant constitutes infringement of the plaintiff's rights in the AQUAFINA label.
13. This witness has also deposed that the AQUAFINA label used for packaged drinking water is extremely distinctive and is identified with the plaintiffs; and the logo of the product under the mark features AQUAFINA written in a stylized font, in white, with the first and last letters being taller and more elongated than the other letters and is

extremely unique. The said label has a blue color background with the distinctive artistic device wedged between the two “As” of the word AQUAFINA; and the said label was created for and on behalf of the plaintiffs. The plaintiffs use this label globally; and under Section 17 of the Copyright Act, 1957 all rights in the label are owned by the plaintiffs. The said label is distinctive and is an original artistic work under Section 2 (c) of the Copyright Act and is entitled to the highest degree of protection.

14. This witness has also deposed that the AQUAFINA Label design is registered as a copyright in the United States Copyright Office under Registration No. VA-1-099-341; and this registration is fully applicable, enforceable and protectable in India by virtue of it being a signatory to the Berne Convention and being a WTO country. Copy of the US copyright registration certificate is exhibited as Ex.PW-1/11. It is next deposed that in India, the plaintiffs’ AQUAFINA product is sold in two forms viz., bottled form and bulk form. The popularity of the product AQUAFINA is evident from the growing sales of the said product. Total Gross Revenue from sales of bottled AQUAFINA manufactured by the plaintiffs for the cases sold to retail outlets are as follows:-

YEAR	Raw MM Cases	Value (In Crores)
2002	4.7 MM	56
2003	7.2 MM	81
2004	7.6 MM	85
2005	10.6 MM	123
2006	12.3 MM	153

15. It is also deposed that plaintiffs have spent enormous amount on advertising of AQUAFINA packaged water in India. The advertising

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budgets for the last few years are as under:

Year	Amount (Lakhs)
2005	155
2006	167
2007	319
2008	874
2009	410
2010	453

16. This witness has also deposed that the sales and advertising figures are only for India and do not include global sales and advertising expenditure which run into billions of dollars. In fact, worldwide, AQUAFINA is the eighth largest beverage brand in the PepsiCo portfolio and has estimated worldwide retail sales of over 2.5 billion dollars (U.S.). The original publicity material are exhibited as Ex. PW-1/12. The internet printouts of online articles/press releases for mark/label AQUAFINA are exhibited as Ex. PW-1/13.
17. Mr.Kaushal has also deposed that the trade mark AQUAFINA as well as the label AQUAFINA of plaintiffs have been regularly protected against any act of infringement and third party use, details of which is given below:

S.No.	Suit Number and Title	Impugned Mark/label	Favourable Order
1	Suit No. 941 of 2007 - PepsiCo Inc. Vs. Rajendra Gilda & Anr.	AQUAFINE	Ex-parte interim injunction dated 22.05.2007
2.	Suit No. 940 of 2007 - PepsiCo Inc. Vs. Annamar Aqua Products	AQUA'SAFINE	Ex-parte interim injunction dated 22.05.2007
3.	Suit No. 2250/2009	AQUAFINE	Ex-parte interim

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4.	PepsiCo Inc. Vs. Pure Water Beverages & Ors. Suit No. 2251/2009 – PepsiCo Inc. Vs. A.T.P. Industries	AQUAINSTA	injunction granted Ex-parte interim injunction granted
5.	Suit No. 2252/2009 – PepsiCo Inc. Vs. Madhusri Industries.	AQUAFENA	Ex-parte interim injunction granted
6.	Suit No. 260/2011 PepsiCo Vs. Balaji Enterprises	AQUADROP	Ex-parte interim injunction granted
7.	Suit No. 259/2011 PepsiCo Vs. Attharva Aqua	ATTIHARVA AQUA	Ex-parte interim injunction granted.
8.	Suit No. 1516/2011 PepsiCo Vs. KVM Beverages & AQUAA Firm & Anr	ARUNAQUA	Ex-parte interim injunction granted
9.	Suit No. 1517/2011 PepsiCo Vs. Devi Aqua Industries	AQUADHARA	Ex-parte interim injunction granted
10.	Suit No. 1518/2011 PepsiCo Vs. Sri Siva Ganga Industries	AQUAAFINE	Ex-parte interim injunction granted

Copies of the orders in above-mentioned matters are collectively exhibited as Ex.PW-1/14.

18. PW-1 has also deposed that the mark AQUAFINA is a “well-known mark” as the same has been protected by the Hon’ble High Court of Delhi as stated above within the meaning of Section 11 (8) of Trade Marks Act, 1999; and due to extensive use and advertising, the same is exclusively associated with the plaintiffs. The stated brand of the plaintiffs is

marketed and sold all over the country through a vast business network and is therefore to be considered as a “well-known mark” under sections 11 (6) and 11 (7) of Trade Marks Act, 1999. The mark AQUAFINA is inherently distinctive and is also a well-known mark entitled to the highest level of protection. The use of the said mark or any other deceptively similar mark to that of the plaintiffs’ by any other party in respect of any class of goods whatsoever, without the permission or authorization of the plaintiffs, constitutes passing off of such goods or business as that of the plaintiffs or that is connected with the plaintiffs.

19. PW-1 has deposed that the defendant is apparently engaged in the sale of purified water under the mark/label AQUAFINA. The exact constitution of the defendant is unknown to the plaintiffs. It is deposed that the adoption of the mark/label AQUAFINA by the defendant is completely illegal and unlawful; the said mark has been adopted for packaged purified water itself establishes that the defendant’s intention is to encash upon the reputation and goodwill of the plaintiffs’ mark; and the use of the mark/label AQUAFINA in relation to packaged purified water is a dishonest attempt by the defendant to misuse the reputation of the AQUAFINA mark/label.
20. This witness has also deposed that the manner in which the defendant has written the word AQUAFINA with the beginning and the ending letter in a slightly bigger font than the other letters is exactly identical to AQUAFINA written on the plaintiffs’ label. This alone establishes that the defendant has deliberately adopted the plaintiffs’ mark/label so as to confuse the customers and to mislead them to believe that the defendant’s product is connected with the plaintiffs or originates from the plaintiffs. It is also deposed that the defendant has used the same get-up and colour combination for their Label, i.e., the colours blue with white printing,

orange, etc., which further affirms that the intention of the defendant is completely malafide. The overall getup and look of the plaintiffs' product has been imitated by the defendant. The defendant has adopted the similar trademark, similar label, identical layout, arrangement & colour combination as also overall appearance.

21. PW-1 has also deposed that copying is so blatant that even the registered globe device of plaintiffs has been identically displayed by the defendant on the impugned label with word PWD written in the similar manner as the mark PEPSI is written by the plaintiffs, which clearly establishes the misrepresentation by the defendant.
22. PW-1 has also deposed that the defendant has purposely adopted the name AQUAFENA, which is deceptively similar and phonetically identical to the plaintiffs' registered mark AQUAFINA. The plaintiffs have been using the said mark globally since 1994 and in India since 1999. The defendant has purposely adopted a deceptively similar mark/name to cause confusion among the customers. It is deposed that the AQUAFINA mark is a registered trademark and the plaintiffs are entitled to exclusive use of the same.
23. This witness has also deposed that the defendant has gone to the extent of imitating the font and style in which AQUAFINA is used on the plaintiffs' product. The defendant has imitated the unique way in which the plaintiffs write AQUAFINA, the first and last letter being taller than the rest of the letters; and even the font used is the same.
24. Mr. Vinod Kaushal has also deposed that plaintiff No. 1 is the registered owner of the said label; and the defendant has adopted a deceptively similar label with the same colour combination of blue, white & orange used in the plaintiffs' product. The exact same blue colour in the background with the white lettering and orange/red at places shows the

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malafide intention of the defendant. The defendant has also imitated the orange coloured circular device in the plaintiffs' product, and positioned it in an identical manner as the circular picture in the plaintiffs' products so as to give its product an identical look. PW-1 has also detailed similarities between the products of the plaintiff and the defendant, which is reproduced below:

TABLE OF SIMILARITIES BETWEEN THE PRODUCTS

Basis	Plaintiff's product	Defendant's Product
Brand name	AQUAFINA	AQUAFENA
The font and colour of brand names on label	Palatino font used written in white	Identical font in white
Style of writing the brand names	First and last letters bigger than rest and written in elongated form	First and last letters bigger than rest and written in identical elongated form
Label	Blue background	Identical Blue background
Colour used in label	Blue, white and orange	Blue, white and orange
'Packaged Drinking Water'	Written just below the brand name	Written just below the brand name
Circular device	Circular Orange Device in the centre	Similar semi circular orange device in the centre
Globe Device	Circular device with red, white and blue colour with PEPSI written adjacently on its right side	Similar circular device with red, white and blue colour with PWD written adjacently on its right side
Bottle	bottle with spirals	bottle with spirals, same size

25. PW-1 has deposed that the violations by the defendants result in:

- Infringement and Passing off and violation of the rights in the registered trade mark/logo/label of AQUAFINA;
- Infringement of copyright in the artistic works comprised in the writing style of AQUAFINA, colour combination, layout, get-up of the label;
- Dilution through tarnishment and blurring.

26. This witness has also deposed that plaintiffs are the registered owners of the mark/label AQUAFINA. The plaintiffs have the exclusive right to use the said label. The use of the impugned label constitutes infringement of a registered trademark under section 29 of the Trade Marks Act, 1999. The use of the word AQUAFINA coupled with an identical label by the defendant is bound to lead to confusion and deception. It is a misrepresentation in the course of trade to consumers that the defendant's product originates from the plaintiffs. The same is completely unlawful and impinges upon the rights of the plaintiffs. The mark AQUAFINA is a unique distinctive word written in a distinct style adopted by the plaintiffs. The adoption of a similar mark and label or any other similar mark by any party is not accidental or co-incidental but is a deliberate attempt to benefit monetarily by illegally using the same. The defendant is infringing the copyright of the plaintiffs vesting in the AQUAFINA label. It is deposed that the defendant cannot be allowed to misuse the plaintiffs' mark/label in this manner.

27. This witness has also deposed that the plaintiffs' product AQUAFINA is extremely well known in India and is commonly used in most public places like hotels, restaurants, convention centers and is also available in the open market. The use of the mark AQUAFINA in the impugned label is in violation of the plaintiffs' statutory as well as common law rights.

Moreover, the impugned label can also be harmful to the public in as much as innocent consumers may be forced to buy the said water under a mistaken impression that it is the product of the plaintiffs.

28. It is also deposed that the use of the mark AQUAFINA for packaged water for drinking purposes would in fact result in dilution of the plaintiffs' mark; and the consumers are bound to be confused that the defendant's AQUAFINA water originates from the plaintiffs and it is connected with the plaintiffs. The consumers may also presume that the impugned product has the same quality standards as that of the plaintiffs' product AQUAFINA, causing tarnishment to plaintiffs' AQUAFINA brand when these expectations are not satisfied; such use of the mark AQUAFINA by the defendant is nothing but a misrepresentation in the course of trade to customers/prospective customers that their product is the plaintiffs' product and such conduct is calculated to injure the goodwill and reputation of the plaintiffs; and the same is completely dishonest, illegal and unlawful.
29. This witness has also deposed that the defendant due to malafide adoption and subsequent conduct is liable to pay penal damages, as the defendant once appeared before this Hon'ble Court on 13th April 2010 and prayed for two weeks time to file written statement and reply, however, thereafter, none appeared on behalf of the defendant and the defendant was proceeded ex-parte vide order dated 25th March 2011. It is also deposed that the defendant first of all adopted and in fact used the deceptively similar mark to that of the plaintiffs' registered trademark and thereafter, on being injuncted, deliberately chose to be absent from this Hon'ble Court. The defendant, prior to the injunction order was freely and openly selling the impugned product and have made undue gains; and such a use has caused loss to the plaintiffs both by way of monetary loss

as well as by way of dilution of their brand, hence, it is a fit case for the grant of pecuniary damages to the plaintiffs in this matter from the defendant. The witness has also deposed that the defendant is liable to pay damages to the plaintiffs for encashing the goodwill of the plaintiffs and passing off the defendant's goods as that of the plaintiffs.

30. Counsel for the plaintiff submits that plaintiff had filed a case against the M/s.Pure Water Beverages & Ors. for permanent injunction restraining the violation and infringement of rights in the trademarks/logo/label of the same mark 'AQUAFINA', wherein on an application filed by the defendant under Order 39 Rule 4 CPC for vacation of stay, the Court dismissed the application and confirmed the stay granted by the Court. {See Pepsico, Inc. & Ors. Vs. M/s.Pure Water Beverages & Ors. /IA.No.15434/2009 in CS(OS) 2250/2009/ decided on 03.06.2011/}.
31. I have heard counsel for the plaintiff and perused the plaint and the accompanying documents and the evidence led by the plaintiff. The evidence of the plaintiff remained unrebutted. In this case at the stage of filing of the suit, interim orders were granted and Local Commissioner was also appointed to seize the goods in question. The goods were taken possession of and then released on superdari to the defendant.
32. Having considered the evidence filed by the plaintiffs, the plaintiffs have been able to establish that they are one of the world's renowned manufacturers and sellers of beverages and also the largest manufacturer and seller of snack foods and packed drinking water under the Trade-mark 'AQUAFINA'. The evidence also shows that the mark 'AQUAFINA' is a unique word coined and adopted by the plaintiffs and has been extensively used by the plaintiffs since the year 1994. The word has no meaning and is thus an invented word, and entitled to the highest degree of protection and the mark is completely distinctive of the plaintiff's and

their products. The plaintiffs have also filed a list of world's registration for the mark 'AQUAFINA', Ex. PW-1/7. The plaintiffs have also established that the mark 'AQUAFINA' in its unique writing style, font and label is a registered Trade-mark of the plaintiffs, as per the registrations, Ex. PW-1/8 and PW-1/9. Having regard to the fact that the 'AQUAFINA' label used for packaging drinking water is extremely distinctive and is identified with the plaintiffs' and being an original artistic work under Section 2 (c) of the Copyright Act, is thus entitled to the highest degree of protection. The plaintiffs have also been able to establish that the act of the defendants has resulted in infringement and passing off and violation of rights in the registered trade-mark/ logo/ label of 'AQUAFINA'; infringement of copyright in the artistic work comprised in the writing style of 'AQUAFINA', colour combination, lay out and get-up of the label. The act of the defendant has also resulted in dilution through tarnishment and blurring.

33. The aforesaid facts and circumstances show that the plaintiff has the exclusive right to use the trademark 'AQUAFINA' as also the label in question. The defendant is attempting to encash the goodwill of the plaintiff by passing off its goods as that of the plaintiff. This not only causes loss of profits to the plaintiff, but results in inferior products made available to the public at large who are deceived by the conduct of the defendant. The plaintiff has established that the plaintiff is the proprietor of the registered trade mark 'AQUAFINA' and the label.
34. In view of the above, the plaintiff is entitled to a decree of permanent injunction against the defendant from using the infringing mark/ label in terms of prayers (a) to (d) of paragraph 31 of the plaint.

35. Counsel for the plaintiff also prays for damages for loss of reputation and business as also the cost of the present proceedings. It is trite to say that the defendant has deliberately stayed away from the present proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place. However, the infringement of the trademark of the plaintiff is not in dispute. The attention of this Court has been drawn to a number of judgments in this behalf where dealing with similar situations, damages have been awarded.
36. In the case of *M/s L.T. Overseas Ltd. v. M/s Guruji Trading Co. and Anr.* [CS (OS) No. 2711/1999] decided on 07.09.2005 this court had granted Rs.3 lakhs damages to the plaintiff. In the case of *Relaxo Rubber Limited and Anr. v. Selection Footwear and Anr.*, 1999 PTC 578, the defendant did not file the written statement after taking time for the same and a decree was passed under Order VIII Rule 10 of the Code of Civil Procedure, 1908. Against the claim of tentative damages of Rs.5 lakhs, Rs.3 lakhs was awarded as damages. In another case of *Hindustan Machines v. Royal Electrical Applies*, 1999 PTC (19) 685, a sum of Rs.3 lakhs was awarded.
37. In the case of *Time Incorporated v. Lokesh Srivastava and Anr.*, 2005 (30) PTC 3 (Del) where apart from compensatory damages of Rs.5 lakhs, punitive damages have also been awarded. It would be useful to reproduce paras 7 and 8 of the said judgment, which are as under :-

“7. Coming to the claim of Rs.5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. 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. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade marks, 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. In Mathias v. Accor Economi Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give

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proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which can be safely awarded. Had it been higher even this court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not fleecy and quantum thereof should depend upon the flagrancy of infringement.”

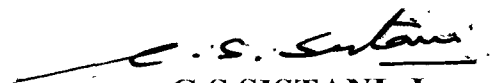
38. Learned counsel for the plaintiff prays that the damages be awarded for the loss of reputation and business as also the cost of the present proceedings. I am in agreement with the aforesaid submission of learned counsel for the plaintiff that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where the defendant who appears in Court and submits its account books would be liable for damages, while a party which chooses to stay away from court proceedings would escape the liability on account failure of the availability of account books. A party who chooses to not participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiff. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in Time Incorporated's case (supra) that punitive damages are founded on the philosophy of corrective justice. That was the case where the publishers of Time Magazine had come to Court and one of the factors which weighed while awarding punitive damages was that the readers had been sufferers

of the infringement of the mark of the plaintiff. The only difference is that in the present case it is the consumer of the products of the plaintiff, who have suffered, as a consequence of the infringement of the mark of the plaintiff by the defendant.

39. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 30.11.2009 is confirmed and the suit is decreed in favour of the plaintiff and against the defendant with costs. Plaintiff is also entitled to the damages to the tune of Rs.5.0 lacs.

JANUARY 31, 2012

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G.S.SISTANI, J

- Taxator