

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

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DATE OF DECISION: 1ST MAY, 2017

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CS(OS) No.2356/1998

TOSIBA APPLIANCES CO. PVT. LTD.

..... Plaintiff

Through: Mr. Preet Pal Singh with Ms. Priyam
Mehta, Advs.

Versus

KABUSHIKI KAISHA TOSHIBA & ORS.

..... Defendants

Through: Mr. A.J. Bhambhani, Sr. Adv. with Mr.
Siddharth Yadav, Adv. for D-2 to 4.
Mr. Sudhir Chandra, Sr. Adv. with
Mr. Nischal Anand and Mr. Aman
Taneja, Advs. for D-5.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit for recovery of Rs.1 crore, jointly and severally from defendant no.1 Kabushiki Kaisha Toshiba, defendant no.2 Hathway Investments Ltd., being the owner of Outlook Magazine, defendant no.3 Deepak Shourie, President & Publisher of Outlook Magazine, defendant no.4 Vinod Mehta, Editor-in-Chief of Outlook Magazine and defendant no.5 Parveen Anand, Advocate, on account of compensation for defamation, pleading i) that the plaintiff has been continuously and regularly manufacturing and selling domestic appliances under the brand name "TOSIBA" since the year 1975 and currently has an annual sales turnover of approximately Rs.15 crores; ii) that the trade mark of the plaintiff "TOSIBA" has also been registered with the Trade Mark

Registry; iii) that there are a number of cases pending in various Courts between the plaintiff and the defendant no.1 Kabushiki Kaisha Toshiba in respect of the said trade mark wherein the defendant no.5 Parveen Anand, Advocate is representing the defendant no.1; iv) that three marks “TOSHIBA” of the defendant no.1 have been rectified and the appeals against rectification have also been dismissed; however the appeals from the dismissal order are pending before the Division Bench of the Kolkata High Court; v) that on 27th October, 1997, the plaintiff came across an article in the magazine “OUTLOOK” dated 3rd November, 1997 which as per declaration therein is owned by defendant no.2 Hathway Investment Ltd. and of which defendant no.3 Deepak Shourie is the President and Publisher and the defendant no.4 Vinod Mehta is the Editor-in-Chief; vi) that the said article is titled ‘FAKE GOODS’ “SPOT THE FAKE ONE” and in the photograph captioned “LAWYER PARVEEN ANAND DISPLAYS SEIZED FAKES” published with the said article a carton bearing the trade mark of the plaintiff “TOSIBA” is shown; vii) that the products of the plaintiff are not fake and have never been seized; viii) that the article is defamatory and has caused substantial loss to the goodwill and reputation of the plaintiff built over 25 years; ix) that plaintiff sent letter dated 29th October, 1997 to the defendant no.5 calling upon the defendant no.5 to immediately publish an apology in the same manner and in the same magazine prominently stating that the facts given in the article regarding the plaintiff’s products are false and untrue; x) that the defendant no.5 instead of tendering and publishing an apology contended that there was no statement attributed to him in the said publication and that the caption had been

supplied by the journalist; xi) that the aforesaid reply of the defendant no.5 shows that the article has been published and the goods have been displayed in the photograph by the defendant no.5 while acting for the defendant no.1; xii) that the plaintiff has also sent a legal notice dated 1st February, 1998 to the defendants No. 1 to 4 to tender and publish an apology but which the defendants no.1 to 4 have not done; xiii) that on the contrary, the defendant no.4 in his reply dated 26th February, 1998 stated that the journalist of the magazine had met the defendant no.5 who agreed to speak to them about the counterfeit problem and be photographed with some fake products which he had in his possession and that the defendant no.5 selected the products to be placed on his table for the photograph; xiv) that the aforesaid reply shows that the defendants no.2 to 4 are guilty of irresponsible publication.

2. The suit was entertained and has languished for the last nearly 20 years. Though the following issues were framed on 16th July, 2012:

- (i) Whether the suit has been properly verified and instituted by the plaintiff? OPP
- (ii) Whether the article titled 'Spot the Fake One' dated 3rd November, 1997 published in the 'Outlook' magazine is defamatory of the plaintiff? OPP
- (iii) Whether any member of the public associated the article titled 'Spot the Fake One' dated 3rd November, 1997 published in 'Outlook' magazine with the plaintiff? OPP

- (iv) What is the effect of publication of Corrigendum dated 9.3.1998 stated to have been published in compliance with plaintiff's notice dated 1.2.1998 by the defendants no.2, 3 and 4? OPP
- (v) Whether the present suit is liable to be dismissed for non-joinder of necessary parties and mis-joinder of parties? OPD 1 and 5
- (vi) Whether the plaintiff is entitled to the relief of damages and/or any other relief and, if so, to what extent and against which of the defendants? OPP

and PW1 has tendered his affidavit in examination-in-chief but his cross examination has not even commenced. The parties were referred to mediation which has remained unsuccessful.

3. The defendant no.5 has filed IA No.15192/2016, though titled under Section 151 CPC, but in the nature of Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC).

4. The senior counsel for the defendant No.5 argued (i) that the suit has been filed to harass the defendant No.5, an advocate, and amounts to abuse of process of law; (ii) that a reading of the impugned article shows that the name of the plaintiff does not appear in the written text of the article and there is no way in which the reader can link the product being shown in the photograph to the plaintiff; (iii) all that the photograph shows is that the goods on the table are fake goods of genuine articles; (iv) that the plaintiff in para 8 of the plaint claims to make genuine articles and has pleaded that "the products of the plaintiff are not fake" and it is not understandable, as to how the plaintiff has assumed the fake articles shown in the photograph as its

own and there is no reason for such assumption; (v) that the plaintiff has no cause of action at all; (vi) that the Outlook Magazine in its Issue dated 9th March, 1998 has issued a Corrigendum in apology regarding the publication of the plaintiff's product in the said article; (vii) that in the light of the apology, nothing really survives in the suit; (viii) that the suit has been filed only to interfere with the defendant No.5 acting as an advocate for the defendant No.1 in the litigation between the plaintiff and the defendant No.1; (ix) that the plaintiff and the defendant No.1 have been involved in at least sixteen proceedings before various fora qua disputes arising between the mark 'TOSHIBA' and 'TOSIBA' and which have all been decided in favour of the defendant No.1; (x) therefore, even if a statement had been made in the impugned article (which has in fact not been made), the said statement would not have been an inaccurate one; (xi) that the plaintiff has filed the present proceedings to gain some kind of leverage in the infringement proceedings pending against it; (xii) that the plaintiff was disallowed from registering its mark 'TOSIBA' by the Trade Marks Registry holding the same to be nearly identical to the defendant No.1's trademark 'TOSHIBA' and further holding the adoption of the mark 'TOSIBA' by the plaintiff to be tainted with dishonesty; (xiii) that the photograph in the impugned article does not necessarily depict counterfeit goods but also marks, get up and fonts which are so vehemently similar and appear to be fake goods; (xiv) that the plaintiff's mark 'TOSIBA' is identical to that of the defendant No.1's trademark 'TOSHIBA'; (xv) that it is nowhere said in the impugned article that the plaintiff is making fake goods and the plaintiff by filing the present suit is presuming against itself.

5. Per contra, the counsel for the plaintiff argued (a) that the application does not fulfill the ingredients or meet the requirements of Order VII Rule 11 of the CPC; (b) that the plaintiff is not presuming against itself; (c) that the plaintiff has suffered a substantial monetary business loss and reputation owing to the impugned article; (d) controverting that after the apology issued by the Magazine in the Issue dated 9th March, 1998 nothing survives in the suit; (e) that the apology and the Corrigendum were not published in a conspicuous manner and were published in a manner that it would escape notice; (f) drawing attention to the reply dated 26th February, 1998 aforesaid of the defendant No.4 to the legal notice got issued by the plaintiff preceding the suit; (g) denying that the plaintiff was disallowed from registering its mark 'TOSIBA' by the Trade Marks Registry for the reasons alleged and it was stated that the plaintiff has voluntarily abandoned the proceedings with respect to the goods in which the plaintiff is not dealing; (h) that a photograph per se can be defamatory; (i) that the carton with the mark 'TOSIBA' shown in the photograph is of the plaintiff.

6. The defendant No.2 has also filed a reply to the application of the defendant No.5 opposing the application.

7. Though on an application for deletion / under Order VII Rule 11 of CPC of one of the defendants only the said defendant and the plaintiff are to be heard but owing to the nature of the plea raised by the defendant No.5, of the impugned article being not defamatory of the plaintiff and there being thus no cause of action for the suit in favour of the plaintiff, the other

counsels were also heard on 4th January, 2017 and the following order was passed:

“IA No.15192/2016 (of the defendant no.5 under Section 151 CPC)

1. *The senior counsel for the applicant/defendant no.5 and the counsel for the plaintiff have been heard.*
2. *On completion of the hearing and after understanding the facts I have enquired from the counsel for the plaintiff whether the plaintiff would be satisfied if the magazine Outlook published by the defendant no.2 M/s Hathway Investments Ltd. and in which the allegedly defamatory article had appeared, publishes prominently that on the date when the article had appeared and till date the plaintiff and the defendant no.1 are in litigation with respect to the marks ‘TOSIBA’ – ‘TOSHIBA’.*
3. *While the senior counsel for Outlook magazine is agreeable thereto the counsel for the plaintiff under instructions from Mr. Narender Kumar Suri Director of the plaintiff present in Court is not agreeable thereto.*
4. *The counsels are also given liberty to if so desire, within the next 15 days submit case law on (i) whether a claim for damages on account of defamation against an opposite lawyer in an undergoing litigation can be made; (ii) since it is the case of the defendant no.1 represented by the defendant no.5 Advocate that the plaintiff is infringing the trademark of the defendant no.1 and passing off its goods as that of the defendant no.1, whether the allegedly defamatory article qualifies as news reporting with respect to court cases; and, (iii) whether in an action for defamation, the plaintiff as a matter of right has a claim for damages or the Court can if in the facts and circumstances deems appropriate dispose of the suit in the manner as proposed and which has not been accepted by the plaintiff.*
5. *Order reserved.”*

8. Only the counsel for the plaintiff and the for the defendant No.5 have submitted notes on the aspects enquired into on 4th January, 2017.

9. I have considered the controversy.

10. We are here not concerned with the dispute between the plaintiff and the defendant No.1 with respect to similarity and/or deceptive similarity of their respect marks 'TOSIBA' and 'TOSHIBA'. The present suit is for compensation for defamation (liable) arising from i.e. the article published in the Outlook Magazine. What needs to be determined first is, whether the said article in the Magazine furnishes any cause of action to the plaintiff against defendant No.5 or against any of the other defendants. The said article in the weekly news magazine Outlook of 3rd November, 1997 at pages 58-59:

(I) is titled "Spot the Fake One—Big brands take on counterfeiters—but it's guerrilla warfare—By Neerja Pawha Jetley"; (II) comprises of (a) photograph of two shoes of 'NIKE' brand; (b) photograph of defendant No.5 sitting on a chair with table in front with cartons of "Collegiate" toothpaste, "Dunhill cigarettes", "Mcdowell's Single Malt whisky", 'TOSIBA', but from which the product to which it pertains cannot be known, bottle of mineral water but the brand whereof is unreadable, wrapper of "Kit Kit" and Levi's jeans, with the caption "Lawyer Parveen Anand displays seized fakes"; and (c) photograph of a shop which shows Lee jeans on the counter;

(III) a bar chart depicting figures of different fake goods in markets.
and,

(IV) written text as under:

You don't expect fiftysomething, soft-spoken Sathish Makhija to strike terror. But he does. Ask the owners of tacky shops in Sadar Bazaar, in the crowded lanes of Gandhinagar, in air-conditioned Palika Bazaar in New Delhi, where he is in the centre of noisy brawls and fisticuffs.

An ex-officer in the intelligence wing of the Air Force, Makhija is a private detective. His current mission: to ferret out and shut down shops that sell fake goods; destroy the market that survives by selling duplicate brand names, altered logos; kill the parallel market of Reebok shoes, Levi's jeans, Calvin Klein T-shirts, Windows software, Chanel handbags, Fair & Lovely cream, Lakme lipstick, Estee Lauder Perfumes, Maruti spare parts, Kit Kat chocolates, Captain Cook salt. In short, exterminate an industry whose turnover turns into thousands of crores.

Phony goods are not new in India, says lawyer Chander M. Lall who got a mandate from Sony 10 years ago to crack the bogus bazaar—800 shops across the land—selling Sony products. During on such raid in Delhi's Lajpat Rai market, one counterfeiter boasted: "I'm the greatest maker of Sony outside of Japan." It cost him his business.

But counterfeiting then was a low-quality, low-price, low-end operation run by small leaguers and retailed mostly via sidewalk vendors. Imitable brands were few, largely owned by MNCS who weren't bothered since they were not doing business in India. Also, many Indian companies preferred to dump goods through the illicit route into the markets to escape excise; they weren't concerned about fakes. In fact, they was it as image-enhancing.

All that's changing now. MNCS, entering India with brand reputations honed over decades, aren't amused about copycats making huge margins on substandard, cheap goods that undermine confidence in established brands. "We're determined to see counterfeiters punished," says Sanjay Choudhuri, MD, Levi's India. Last year, Levi's conducted some 20 raids. Lacoste, Nestle, Hoechst, Procter & Gamble, Hindustan Lever, Colgate-Palmolive are equally frazzled about fakes. Says Siddharth Verma, GM (marketing), Reebok: "Our brand has an aspirational value that leads to unscrupulous elements exploiting it. We can't afford to let our image suffered"

Indian companies too are realising that fakes hurt. Says Sanjeev Aga, MD, Blow Plast: "We discovered virtually every retailer in Ahmedabad was selling knock-offs and in Mumbai there were more fake Skybags selling than real ones. At least half our business was going to counterfeiters." That's when the company launched nationwide raids. Today less than 1 per cent of hard luggage business is lost, "although in soft luggage 20 per cent still goes to bogus goods".

In '96 Arvind Mills set up an anti-piracy cell, the first of its kind in India. It found that its Rs. 70-crore ready-to-stitch Ruf and Tuf brand and the Newport brand—both targeted at the price-sensitive consumer—were being sold either in the original names or in phonetically similar names like Tuf and Tuf, Tuf and Stuff, Newport and Newfort. Raids were conducted at Delhi's Gandhinagar and Mumbai's Ulhasnagar. The haul: some 2,000 pairs of jeans in Delhi, 1,500 in Mumbai plus countless rivets, labels, packet blasters and buttons embossed with the brand name. Earlier, in a concerted move, the Indian music industry raided 20 cities, arrested 62 pirates and recovered 93,000-odd pre-recorded cassettes and inlay cards, and 100 high-speed copiers from Punjab and Haryana alone.

Private detectives direct these raids, not policemen. The police, says Shyam Singh, ACP, Delhi Crime Branch, can't take suo motu action against duplicators. Makhija works with a team

of informants, who gain the confidence of counterfeit vendors, or with decoys posing as finicky shoppers, often actors. They have to track down the vendor's backlane godown. Once the deal is struck, the law steps in formally. "It's gut-wrenching, frustrating work," says Makhija. Vendors tend to work in fortress-like markets, with a parallel network of wholesalers, distributors and retailers, guarded by strong entities like the Gandhinagar Readymade Garments Association or the Ulhasnagar Sindhi Association. At most centres, hawk-eyed 'spotters' sit in the lanes and bylanes, ready to spread the word if a detective or cop is spotted. The hint of a raid, and shops snap shut in seconds and goods disappear with lightning speed. At times, violence ensues. Makhija has had chairs thrown at him, dodged broken bottles—the long scar on his cheek bears testimony. Says Dharmendra Kapoor of Super Network, an anti-counterfeit group: "Unless I receive one threatening call a week, I feel I'm slackening in work." But it's a losing battle for now. Reasons:

Technology: When every computer is a potential duplicator, the only investment is the floppy disk. "The temptation and rewards of an unfair game are very strong," says Verma. Agrees lawyer Bindu Chib, who represents Motion Pictures Association in India: "All that a pirate needs is around Rs 30,000 for a television and a VCR to make illegal copies of a Hollywood product that would cost around Rs 17.5 crore to make". Scanners make it easy to copy logos in ditto and colour printing makes look-alike labels as perfect as possible. The quality is better and while originals spend big money on brand-building and awareness, the margins are bigger for counterfeiters who not only save on promotion but also central and state taxes.

Foreign markets: Neighbouring countries are providing counterfeiters with larger markets. Early this year, fearing a witch-hunt in Hong Kong after China took over, pirates there dumped software in India through Nepal—which had no copyright laws until recently. Around the same time, Walt

Disney discovered that hard-to-tell illegal prints of their characters on toys and watches were the result of some counterfeiters importing product stamps and moulds from Singapore and Dubai. They cracked down on the 100-odd counterfeiters in a bid to stem the menace.

Fake management: According to Chib, “fake makers are goods planners, close to the market, know what’s selling, practice just-in-time management of inventories with as little wastage as possible”. The crackdown on counterfeiters has resulted in their scattering their assembly line into a hard-to-connect jigsaw of small operations. If earlier the pirates were working for 24 hours at one site, now they work only eight hours at night in far-flung sites, storing goods in different godowns, making it difficult to catch large quantities. “It’s like killing bees with a hammer,” says Parveen Anand, a copyright and trademarks lawyer.

The retail connection: With satellite television, a new market is being created in the rural areas of customers who want to buy dear brands at cheap rates. Thus, the low-end counterfeiting is finding a larger market in the rural areas whereas in the metros covert retailing is on the rise. “The sales staff of companies are often in cahoots with the large stores to slip in well-made copies of T-shirts or jeans along with the originals.”

One major factor in the growth of counterfeits is the tedious process of justice. On paper, Indian law prohibits unauthorised duplication, and provides for civil and criminal prosecution of duplicators. The punishment: a Rs 50,000 to Rs 200,000 fine, and a jail terms of 7 days to 3 years. “But often, the complainant agrees to compensation and apology from the offenders and the case is withdrawn,” says V. Ranganathan, additional DCP, Economic Crime Branch, Delhi. “If the clients persist with the case, the backlog of litigation and processes can be so time-consuming that it defeats the whole purpose of initiating any action. In the mean-time, the counterfeiter can

start off under a different name and address,” says C.M. Maniar, partner, Crawford Bayley & Co.

The peddlers know this. “If I’m caught, I’ll post bail, and be back in a day or two,” says one pirate peddling software. Another counterfeiter of Reebok and Nike shoes even fancies himself as a kind of Robin Hood, stealing designs from foreign companies to give to poor countrymen. These companies are fooling people by charging Rs 4,000 for shoes costing Rs.500. We’re not cheats, they are,” says he. In the face of such logic, can police raids or court cases really counter homegrown entrepreneurship?

11. The plaintiff, for no explicable reason has not impleaded as party to the suit and claimed any relief against the author of the article namely Neerja Pawha Jetley. The notice preceding the suit also was not addressed to the author. The only inference can be that the plaintiff has no grievance against the author Neerja Pawha Jetley i.e. no grievance with respect to the written text of the article.

12. However a perusal of the written text of the article reveals:

(A) That the article is general in nature, relating to the subject of counterfeiting of well-known brands, and is not relatable to the plaintiff;

(B) Though the article refers to a large number of brands viz. Reebok shoes, Levi’s jeans, Calvin Klein T-shirts, Windows software, Chanel handbags, Fair & Lovely cream, Lakme lipstick, Estee Lauder perfumes, Maruti spare parts, Kit Kat chocolates, Captain Cook salt, to name a few, but neither does it name the defendant No.1 nor the plaintiff.

(C) It is not as if the research for the written text of the article has been done from the defendant No.5 only or that the entire article is based on information supplied by the defendant No.5. The article names Sathish Makhija, Private Detective, Lawyer Chander M. Lall, Sanjay Choudhuri, MD, Levi's India, Siddharth Verma, GM (Marketing), Reebok, Sanjeev Aga, MD, Blow Plast, Shyam Singh, DCP, Delhi Crime Branch, Dharmendra Kapoor of Super Network, Lawyer Bindu Chib, V. Ranganathan, Additional DCP, Economic Crime Branch, Delhi, C.M. Maniar, partner, Crawford Bayley & Co., besides the defendant No.5, from whom information published in the article was obtained.

(D) The only statement attributed to the defendant No.5 in the text of the article, in the backdrop of "if earlier the pirates were working for 24 hours at one site, now they work only eight hours at night in far-flung sites, storing goods in different godowns, making it difficult to catch large quantities" is "It's like killing bees with a hammer".

(E) That though along with the other lawyers' names in the article, the names of the clients they represent is also stated but the defendant No.5 is merely described as "a copyright and trademarks lawyer" and not as the lawyer or as the advocate for the defendant No.1.

13. One thing which immediately strikes is that the article neither attributes anything against the plaintiff to the defendant No.1 nor does the plaint disclose any cause of action against the defendant No.1 Kabushiki Kaisha Toshiba (Toshiba Corporation). For a plaintiff in a suit for

compensation for defamation, it is essential to disclose that each of the defendants from whom compensation is claimed has defamed the plaintiff. All that is pleaded is that the defendant No.5, who is alleged to have defamed the plaintiff, is the advocate for the defendant No.1 with whom the plaintiff is in litigation. However, the plaintiff in the plaint has not pleaded that the defamation of the plaintiff by the defendant No.5 is as agent of the defendant No.1, though the defendant No.5 is described in the plaint as the lawyer of the defendant No.1. However, a lawyer is not an agent of his client for the client to be liable for all the actions of his lawyer. The Supreme Court in ***Himalayan Cooperation Group Housing Society Vs. Balwan Singh*** (2015) 7 SCC 373 held that though lawyers are perceived to be agents of their clients, the law of agency does not apply strictly to client-lawyer relationship. A client was held to be not bound by the statement which his lawyer was not authorised to make. The Court of Appeals of Washington, Division One, in ***Christopher Demopolis Vs. Peoples National Bank of Washington*** 59 Wn App. 105 held that a client's liability for his or her attorney's defamatory communications is limited to situations in which the attorney acted within the scope of employment and with the client's knowledge and consent. It is not so pleaded by the plaintiff. Thus, one thing is very clear that the plaint, insofar as against the defendant No.1 Kabushiki Kaisha Toshiba, does not disclose any cause of action.

14. What needs to be determined is whether from the photograph comprised in the article of the defendant No.5 displaying "seized fakes" and with the carton bearing the mark 'TOSIBA', the plaintiff has a cause of action for defamation.

15. The plaintiff along with the plaint has filed a carton of 'Princess Milk Boiler' sold by it showing the logo / label of the plaintiff with the mark 'TOSIBA', a photograph of the product and the name of the plaintiff besides other things. The photograph in the impugned article is not of the entire carton but only of one corner of it with the label device with the word 'TOSIBA' visible. Else, neither the product nor the name of the plaintiff or the name of the product is visible. Though there are differences between the label/logo with the word 'TOSIBA' visible on the carton in the impugned photograph and on the carton filed by the plaintiff but I will presume for the purposes of the present that the label / logo on the carton in the photograph is the same as the label / logo on the carton of the plaintiff.

16. The entire article is about counterfeit / fake goods market that survives by selling duplicate brands, phoney goods which sell at a fraction of the cost of the original. The defendant No.5 also, in what is attributed by the author of the article to him, comments on the surreptitious manner in which such fake / duplicate goods are being produced and sold. The averments of the plaintiff in the plaint do not show the dispute between the plaintiff and the defendant No.1 being of the plaintiff selling duplicate / counterfeit goods of the defendant No.1. On the contrary, the dispute is described in the plaint as a trademark dispute entailing, whether the plaintiff can be restrained from using the mark 'TOSIBA' and whether defendant No.1 is entitled to registration of the mark 'TOSHIBA'. It is not the case of the plaintiff that the defendant No.1 is also marketing and selling the same goods which the plaintiff is selling. The dispute between the plaintiff and the defendant No.1 is whether the plaintiff by using Toshiba is riding on the

goodwill of the defendant No.1 by making its customers believe that the goods are from the house of Toshiba. The dispute is not that the plaintiff is selling counterfeit or fake goods. Counterfeiting entails making the same goods which another is already making and then selling the same either under the same mark as of another or a mark with minor variation incapable of detection in the market. The dispute between the plaintiff and the defendant No.1, as per averments in the plaint, is not of defendant No.1 accusing the plaintiff of counterfeiting the goods of the defendant No.1, and which was the subject of impugned article. The depiction of the mark / label / logo 'TOSIBA' in the photograph in the impugned article cannot thus possibly be to the plaintiff. The plaintiff has further expressly pleaded in the plaint that its goods are genuine and have never been seized. However, the caption of the photograph of the defendant No.5 comprised in the impugned article is of the defendant No.5 displaying seized fake goods. The senior counsel for the defendant No.5 is thus correct in contending that since it is the pleaded case of the plaintiff that its goods are not fake and were never seized, the reference to the mark 'TOSIBA' in the photograph cannot be to the plaintiff as it is with reference to "seized fakes".

17. I am therefore unable to find the plaint to be disclosing any cause of action against the defendant No.5 either.

18. Though, as aforesaid, the application and the nature of Order VII Rule 11 of CPC under consideration was of the defendant No.5 only but on hearing arguments, it was felt that what was urged on behalf of the defendant No.5 applied equally to the defendants No.2 to 4 as well. If there

is no cause of action against the defendant No.5 for defamation for having been photographed, as aforesaid, there cannot be any cause of action for defamation against Outlook Magazine also. It was for that reason only that the questions as recorded in the order dated 4th January, 2017 were posed to all the counsels.

19. There is another aspect of the matter. The counsel for the plaintiff in response to the queries handed over written submissions along with copies of *Ashok Kumar Keshari Vs. Manika Gupta* 2015 (1) AD (Delhi) 190, *D.V. Singh Vs. Pritam Singh Taneja* 186 (2012) DLT 178, *Reckitt & Colman of India Ltd. Vs. Liwi T.T.K. Ltd.* 63 (1996) DLT 29, and *Ashok Kumar Vs. Radha Kishan Vij* 23 (1983) DLT 27. I do not find any of the said judgments to have any bearing on the issues raised in the order dated 4th January, 2017 or to make me take a view other than that taken..

20. I have recently in *Primero Skill & Training Pvt. Ltd. Vs. Selima Publications Pvt Ltd.* MANU/DE/0789/2017, for detailed reason given therein and relying *inter alia* on *Naresh Shridhar Mirajkar Vs. State of Maharashtra* AIR 1967 SC 1, held a) that Journalists have a fundamental right to carry on their occupation under Article 19(1)(g) of the Constitution of India; b) that the right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution includes their right to publish as Journalists a faithful report of the proceedings which they have witnessed and heard in Court; c) freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution includes the freedom of press; d) that what takes place in Court is public and the publication of the proceedings

merely enlarges the arena of the Court and gives to the trial that added publicity which is favoured by the rule that the trial should be open and public; e) that media has a right to know what is happening in Courts and to disseminate the information to the public which enhances the public confidence in the transparency of Court proceedings; f) that the said right however has to be balanced with the right of a person to his reputation and which is a facet of Article 21 of the Constitution of India; g) that there can be no cavil that the right to freedom of speech and expression is a right that has to get ascendance in a democratic body polity but at the same time the limit has to be “proportionate” and not unlimited.

21. Though I have held the plaint to be not disclosing a cause of action against the defendants but I may also add that the impugned article, I reiterate, is not targeted against the plaintiff or its trademark and is general in nature and on a subject of public interest on which Outlook as a news Magazine was/is entitled to publish. The defendant No.5, I reiterate, was not the only person contacted by the author of the article for collating information / data published therein and as aforesaid a number of other persons in the know of the subject were contacted. The defendant No.5 as an advocate practicing and specializing in the field of copyright and trademark was justified in furnishing information from his own experience in the field. It is not in dispute that litigation between the plaintiff and the defendant No.1 and in which the defendant No.5 was the advocate of the defendant No.1 was underway at the time when the article was published and continues to be so today. Though the article refers to counterfeit / fake goods but reference therein is also found of “altered logos”, of the owners of

reputed brands earlier not bothering about the sale of fakes in India and in fact seeing it as image “enhancing” and the scenario having changed with the brands entering India etc. It is also not as if the defendant No.5 chose to be photographed only with the packaging of the plaintiff’s, if at all it can be said to be so. The defendant No.5 has been photographed with a large number of packagings, as aforesaid, and considering that the dispute was pending, the photograph is nothing but intimation to the public of the pending dispute.

22. The plaintiff, along with its documents, has filed the issue of the Weekly Magazine Outlook of 9th March, 1998 containing a Corrigendum on the letters page thereof to the effect:

“Corrigendum

In a photograph used in the article Spot the fake One (November 3), the brand Tosiba owned by Tosiba Appliances was inadvertently shown as part of a collection of counterfeits. We regret the error.”

The counsel for the defendants No. 2 to 4, on 4th January, 2017 also, agreed to even now publish a clarification as recorded in that order.

23. I therefore hold the plaint to be not disclosing any cause of action against the defendants No. 2 to 4 also.

24. Though in the light of my findings of the plaint not disclosing any cause of action against the defendants No.2 to 4 also, the other legal questions raised in the order dated 4th January, 2017 pale into insignificance but for the sake of completeness, I may also record that in my opinion, the

harm done by defamation being to the reputation of a person, a direction to issue a public apology or a direction to correct the errors, if any, particularly in defamation arising out of libel by media appears to be a more appropriate relief than a relief of monetary damages. Compensation in monetary damages can never set the record straight or restore the damaged reputation caused by a libelous news report. The person aggrieved by a libelous news report having a large circulation can never exactly know who all have had access thereto and cannot possibly go to each and everyone of those persons with the judgment of award of compensation to him. Reputation of an individual is not something which can be measured or equated in money. It is only a written apology contained in the same media which may reach the same people who may have had access to the libelous material earlier published and that alone can restore the reputation.

25. Not only so, award of damages, particularly in large amounts, against media houses may also have a chilling effect on the media. In some cases, payment of such amount of compensation, if unable to afford, may compel the media to shut down or may make the media over conscious and thereby fail in its duty to report news on contemporaneous subjects of public interest.

26. Not only so, the plaintiff in the legal notice preceding the suit also called upon the defendants to publish an apology failing which only the plaintiff threatened to institute a suit for recovery. Though the defendants No.2 to 4 published an apology but the plaintiff dissatisfied therewith, nevertheless filed the suit.

27. I had in fact during the hearing cautioned the counsel for the plaintiff that publication now by the defendants No. 2 to 4 of a apology or a clarification may bring adverse publicity to the plaintiff and do harm which the impugned article is not found to have done . The counsel for the plaintiff however did not agree.

28. The counsel for the plaintiff during the hearing referred to ***Arun Jaitley Vs. Arvind Kejriwal*** 2016 (155) DRJ 370 to show that the plaint has to be read as a whole.

29. The counsel for the defendant No.5 in the note submitted by him in response to the order dated 4th January, 2017 has (i) contended that the Court has to place itself in the shoes of a reasonable person reading the article and is not to read the article in the way in which the claimant or defendant would regard the statement; reliance in this regard is placed on ***Winfield And Jolowicz On Tort***, Nineteenth Edition at page 360 and on ***B.M. Thimmaiah Vs. Smt. T.M. Rukimini*** AIR 2013 Karnataka 81; (ii) referred to ***Ismail Merchant Vs. State of Rajasthan*** 1988 Raj Cr.C. 119 holding that if there is a controversy whether the material complained of is defamatory or not, the Court will have to first decide, as a question of law, whether the said material is capable of being understood in a defamatory sense and only if the Court decides the said question in the affirmative, will it then proceed to determine whether the said material containing a defamatory potential had in fact harmed the reputation of the complainant; (iii) referred to ***Sh. H. Syama Sundara Rao Vs. Union of India*** MANU/De/9650/2006 (DB) holding that it is the duty of the Courts to protect the advocate from being cowed down

into submission and under pressure of threat of menace from any quarter and thus abandon their clients by withdrawing pleas taken on their behalf or by withdrawing from the brief itself; (iv) referred to *Winfield And Jolowicz On Tort*, Nineteenth Edition at page 383 opining that impartial report of Court proceedings cannot give rise to a cause of action for defamation; (v) referred to *John Vs. MGN Ltd.* [1997] Q.B. 586, *Paul Rackham Vs. Sandy* [2005] EWHC 482 (QB) at para 124, *Pamplin Vs. Express Newspapers Ltd.* [1988] 1 W.L.R. 116 and *Grobbelaar Vs. News Group Newspapers Ltd.* [2002] 1 W.L.R. 3024 to contend that the amount of damages can be reduced, if the defendant withdraws the defamatory statement and offers a correction and to award minimal damages.

30. Accordingly, though the plaint is rejected as not disclosing cause of action but for the reasons aforesaid, the defendants No.2 to 4 are directed to within six weeks of today publish in ‘Wide Latin’ font in ‘**16**’ size on the Index page of its issue of Outlook Magazine, the following content:

“With reference to article titled ‘Fake Goods— Spot the Fake One— Big brands take on counterfeiters—but it’s guerrilla warfare’ in 3rd November, 1997 issue of this Magazine, it is clarified that M/s Toshiba Appliances Co. Pvt. Ltd., Sheikh Sarai, Malviya Nagar, New Delhi claiming right to the trademark ‘TOSIBA’ and M/s Kabushiki Kaisha Toshiba claiming right to the trademark ‘TOSHIBA’ have been in litigation and no part of the said article be read as imputing that the goods of M/s Toshiba Appliances Co. Pvt. Ltd., Sheikh Sarai, Malviya

Nagar, New Delhi are fake / counterfeit goods of 'TOSHIBA' of M/s Kabushiki Kaisha Toshiba".

No costs.

Decree sheet be drawn up.

MAY 1st, 2017
'gsr/bs'

RAJIV SAHAI ENDLAW, J.

