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

+ CS(OS) 1639/2015

% ***Judgment dated 25th October, 2016***

INSECTICIDES (INDIA) LIMITED Plaintiff
Through Mr. Shobhit Agarwal, Advocate

versus

RAJA PATHAK & ANR Defendants
Through None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S. SISTANI, J (ORAL)

1. None for the defendants. None was present on the last date of hearing. Defendants are accordingly proceeded *ex parte*.
2. The plaintiff has instituted the present suit praying *inter alia* for permanent injunction against the defendants restraining them from infringing its trademark, copyright, passing off, rendition of accounts, delivery up, damages etc.
3. Counsel for the plaintiff states that the plaintiff is a public limited company, founded in the year 1996 and as on date, it is one of the premier names in the crop protection industry. With more than 120 formulation products and 15 technical products, the plaintiff manufactures all types of weedicides, fungicides and plant growth regulators for all types of crops and for households. The plaintiff claims to be investing heavily in the research and development ('R&D') for the advancement of its manufacturing facilities and it has a state of the art in-house R&D Centre at Chopanki, Rajasthan. The

plaintiff's manufacturing plants are compliant of ISO 9001:2008, ISO 14001:2004 and OHSAS 18001:2007 standards.

4. Counsel for the plaintiff submits that the plaintiff manufacturers and markets its products under various distinctive trademarks and labels like 'Lethal', 'Lethal Super', 'Lethal Super-505', 'Victor', 'Miltaf', 'Prism', 'Milthion', 'Monocil', 'Hijack' etc. One of the most popular trade mark of the plaintiff is 'Lethal'. Under the said mark 'Lethal' a range of products are sold and marketed by the plaintiff under many variants of the mark including 'Lethal', 'Lethal Super', 'Lethal line', 'Lethal Super-505', 'Lethal TC', 'Lethal Instant Action', 'Lethal RTU' etc. Learned counsel submits that the mark 'Lethal' was originally adopted by one Montari Industries Limited in the year 2002, whereafter all rights, title and interest including the goodwill in the said mark was assigned in favour of the plaintiff by way of a Deed of Assignment dated 10.03.2003.
5. Counsel for the plaintiff submits that the plaintiff is the registered proprietor of the 'Lethal' range of trademarks in India as detailed in para 9 of the plaint. In addition to the said registrations, the plaintiff's application for the trademark 'Lethal Super - 505' (Label) is pending for registration since July, 2003.
6. While issuing summons, this Court had restrained the defendant from manufacturing, selling, distributing any product bearing the mark 'Lethal Supar-505' or any other identical or deceptively similar trademark.
7. Defendants had entered appearance and also filed their written statement. In the order of 12.10.2015, it was observed by the Joint Registrar that although the written statement has been filed, no application for condonation of delay has been filed. This was also

noticed by the Joint Registrar on the next date of hearing and the matter was placed before the Court. On 18.11.2015, the matter was adjourned on the ground that the parties were negotiating an out of court settlement.

8. On 04.12.2015, the following order was passed:

“Learned counsel appearing on behalf of defendants in view of order passed on 18th November, 2015 submits that his clients are agreeable to pay the fee of the Local Commissioner of Rs. 75,000/- as well as the cost of the suit to the tune of Rs. 25,000/-. He is also agreeable for decree of permanent injunction. Let affidavit be filed in this regard within one week from today. At the same time, learned counsel for the plaintiff seeks one week time to take instructions in view of the suggestion given by the learned counsel for the defendants.”

(Emphasis Supplied)

9. On the next date of hearing, i.e. 17.12.2015, the defendants resiled from the statement given by their counsel and the following order was passed:

“Learned counsel for the defendants states that as far as the decree for permanent injunction is concerned, her clients are ready but they are not in a position to pay Rs. 1 lac towards the cost and damages. Thus the matter has to be decided on merits. Learned counsel for the plaintiff seeks time to take instructions in this regard.”

(Emphasis Supplied)

10. When the matter came up for hearing on 16.05.2016, the Court suggested that defendant should pay Rs. 50,000/- to the plaintiff while suffering a decree of injunction. Thereafter, both counsel had sought an adjournment to take instructions and the matter was listed for 26.09.2016.
11. On 26.09.2016, none was present on behalf of the defendant. None is present even today.

12. The written statement filed by the defendants has not been taken on record owing to the delay in filing and in the absence of an application for condoning the same as noticed in the order dated 12.10.2015. Since the defendants have not filed the written statement nor are being represented, the plaintiff prays that the present suit may be decreed under Order 8 Rule 10 of the Code of Civil Procedure.
13. I have heard the counsel for the plaintiff and perused the material on record.
14. The plaintiff has filed the present suit seeking protection of his mark 'Super Lethal-505' and copyright in the label of the 'Super Lethal-505' bottle, which the plaintiff claims to constitute original artistic work. The plaintiff markets insecticide under the said brand. In January 2015, the plaintiff learnt that the defendants were engaged in sale of counterfeit products under the mark 'Lethal Supar-505'. Further the product being offered by the defendants is a slavish imitation of the plaintiff's label including the get-up, the colour pattern, etc. The primary difference between the marks of the two products is of merely one single letter, the 'e' is replaced by 'a' in the product of the defendants, i.e. the plaintiff's product bears the brand 'Lethal Super-505' while the defendants' bears the brand 'Lethal Supar-505'. A Local Commissioner was also appointed in the matter, whose report affirms the contents of the plaint.
15. The plaintiff is the registered proprietor of the mark 'Lethal Super' having the registration no. 1143625 dated 16.10.2002.
16. In respect of comparison of marks for determining infringement, a coordinate bench of this Court in ***The Royal Bank of Scotland Group PLC v. Sharekhan Limited***, 216 (2015) DLT 197 after taking into consideration numerous judicial pronouncement, it was held as under:

“35. The test of comparison of the marks side by side is not a sound one since a purchaser will seldom have the two marks actually before him when he makes his purchase. The eye is not an accurate recorder of visual detail and marks are remembered by general impression or by some significant detail rather than by any photographic recollection of the whole. While judging the question as to whether the defendants have infringed the trade mark by colourable imitation of the mark or not, the Court has to consider the overall impression of the mark in the minds of general public and not by merely comparing the dissimilarities in the two marks.

36. In order to establish infringement, the main ingredients of Section 29 of the Act are that the plaintiff's mark must be registered under the Act; the defendant's mark is identical with or deceptively similar to the registered trade mark; and the defendant's use of the mark is in the course of trade in respect of the goods covered by the registered trade mark. The rival marks are to be compared as a whole. Where two rival marks are identical, it is not necessary for the plaintiff to prove further that the use of defendant's trademark is likely to deceive and cause confusion as the registration shows the title of the registered proprietor and the things speak for themselves. In an infringement action, once a mark is used as indicating commercial origin by the defendant, no amount of added matter intended to show the true origin of the goods can effect the question. If Court finds that the defendant's mark is closely, visually and phonetically similar, even then no further proof is necessary.

Test of comparison of rival marks

37. (i) In *Pianotist Co. Ltd.*'s application, 1906 (23) R.P.C. 774, it was observed as follows :

"You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a

trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion- that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods-then you may refuse the registration, or rather you must refuse the registration in that case."

...

(iii) *In the case of Sandow Ltd.'s Application, 31 R.P.C. 205 it was clarified that among the surrounding circumstances to be taken into account, one of considerable importance is the imperfect recollection a person is likely to have of a mark with which he is only vaguely acquainted. While approving the above tests for comparison of the two word-marks, the Supreme Court held in F. Hoffmann-La Roche & Co. Ltd. Vs. Geoffrey Manner & Co. Pvt. Ltd. (1969) 2 SCC 716 that:*

"It is also important that the marks must be compared as whole. It is not right to take a portion of the word and say that because that portion of the word differs from the corresponding portion of the word in the other case there is no sufficient similarity to cause confusion. The true test is whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark."

(iv) *In the case of Tokalon Ltd. v. Davidson and Co. 32 R.P.C. 133, it was observed that:*

"...We are not bound to scan the words as we would in a question of compatriotic literarum. It is not a matter for microscopic inspection, but to be taken from the general and even casual point of view of a customer walking into a shop."

...

(vii) *In the decision reported in AIR 1951 Bom 147, James Chadwick & Bros. Ltd. v. The National Sewing Thread Co. Ltd. Chagla C.J. and Bhagwati, J.; referring to the words "likely to deceive or cause confusion" in section 10 of the Act observed as follows:-*

"Now in deciding whether a particular trade mark is likely to deceive or cause confusion, it is not sufficient merely to compare it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the former trade mark. What is important is to find out what is the distinguishing or essential feature of the trade mark already registered and what is the main feature or the main idea underlying that trade mark, and if it is found that the trade mark whose registration is sought contains the same distinguishing or essential feature or conveys the same idea, then ordinarily the Registrar would be right if he came to the conclusion that the trade mark should not be registered. The real question is as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would react to a particular trade mark, what association he would form by looking at the trade mark, and in what respect he would connect the trade mark with the goods which he would be purchasing. It is impossible to accept that a man looking at a trade mark would take in every single feature of the trade mark. The question would be, what would he normally retain in his mind after looking at the trade mark? What would be the salient feature of the trade mark which in future would lead him to associate the particular goods with that trade mark?"

... ”

(Emphasis Supplied)

17. Applying the law to the facts of the present case, it is seen that the goods are identical and the marks are extremely similar. The only difference pertains to one alphabet/character. Even further, upon analysis of the bottles of the plaintiff's and the defendants', as shown in paragraphs 11 and 20 of the plaint as well as the report of the local commissioner, it is clear that the shape and the get-up of the label/bottle of the product of the defendants is also a slavish imitation of that of the plaintiff. Therefore, there can be no doubt that the use of the mark 'Lethal Supar-

505' by the defendants is likely to cause confusion with the mark of the plaintiff 'Lethal Super'; especially when the goods are the same. I am of the view that the adoption and use of the mark by the defendants was to free-ride upon the reputation of the plaintiff.

18. In view of the foregoing and in view of the categorical stand taken by the learned counsel for the defendant on 04.12.2015, the present suit is decreed in favour of the plaintiff.
19. On 04.12.2015, the counsel for the defendant had submitted that his clients were willing to pay the fee of the Local Commissioner of Rs. 75,000/- as well as cost of the suit to the tune of Rs. 25,000/- and were ready to suffer a decree for permanent injunction. But on the next date of hearing, the counsel partially resiled from his previous statement to the extent that the defendants were no longer ready to pay damages. Even otherwise, in the absence of a written statement, the averments made in the plaint are taken to be correct. I have tested the averments of the plaint and considered their correctness.
20. In the case of ***Relaxo Rubber Limited & Anr. v. Selection Footwear & Anr.***, AIR 2000 Del 60, injunction and damages were granted under Order VIII Rule 10 in a case for infringement of copyright and trade mark.
21. The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to peruse his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases.

22. Resultantly, having been satisfied with the averments made and duly supported by documents, no written statement being on record and the statement made by the counsel for the defendants to the effect that the defendants are ready to suffer a decree for injunction, I deem it a fit case to for invoking the provisions of Order VIII Rule 10 of the Code of Civil Procedure.
23. The counsel for the plaintiff has agreed to restrict his claim of damages to Rs. 1,00,000/- and it is decreed accordingly.
24. Accordingly, the present suit is decreed in favour of the plaintiff and against the defendant in terms of paras 33 (a), (b), (c) and (d) of the plaint with punitive damages of Rs. 1 lakh in terms of the judgment in *Time Incorporated v. Lokesh Srivastava & Anr.*, 2005 (30) PTC 3 (Del); *Microsoft Corporation v. Rajendra Pawar & Anr.*, 2008 (36) PTC 697 (Del.).

OCTOBER 25, 2016
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G.S.SISTANI, J