

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.12.2016

PRONOUNCED ON: 06.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.460 of 2010

M/s.Aravind Laboratories
by its Partner T.Devanathan

Plaintiff

Vs

Modicare, Chennai-6

Defendant

Prayer:- This Civil Suit is filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of CPC read with Sections 134 and 135 of the Trade Marks Act 1999, for the reliefs as stated therein.

For Plaintiff : Ms.G.Daniel Gladys

For Defendant : Set Exparte

JUDGEMENT

This civil suit has been filed, to pass a judgement and decree, against the Defendant:-

- a) granting permanent injunction, restraining the Defendant from manufacturing, selling, advertising and offering for sale using the Trade Mark DAILY DAZZLER upon the goods or in any media and use the same in nail polish, nail glitter, invoices, letter heads and visiting cards or on any other cosmetics by using any other trade mark which is in any way visually or deceptively or phonetically similar to the Plaintiffs trademark EYETEX DAZZLER or in any manner infringing the Plaintiff registered trademark nos.1261112 and 1261117 in Class 3.

- b) granting a permanent injunction, restraining the Defendant from manufacturing, marketing, distributing, offering or advertising or using the mark DAILY DAZZLER or similar sounding names in the course of their business and pass off their nail polish or other cosmetic products using the trademark DAILY DAZZLER as and for the EYETEX DAZZLER, goods of the Plaintiff or enable others to pass off.
- c) directing the Defendant to surrender to the Plaintiff all the packing material, cartons, advertisement materials and hoardings, letter heads, visiting cards, office stationery and all other materials containing/bearing the trademark DAILY DAZZLER or other deceptively similar trademark.
- d) granting a preliminary decree in favour of the Plaintiff directing the Defendant to render account of profits made by them by use of the trademark DAILY DAZZLER on the goods referred and for a final decree in favour of the Plaintiff for the amount of the profits found to have been made by the Defendant, after the Defendant has rendered the accounts.
- e) directing the Defendant to pay the costs of the suit to the Plaintiff.

2. The case of the Plaintiff is that the Plaintiff Company has been carrying on the business of manufacturing and selling cosmetics for over 75 years. One of the cosmetics is Kajal used for beautifying the eye. The Plaintiff adopted the coined word EYETEX DAZZLER as its trademark. The Plaintiff had got registration of the said trademark in Nos.1261112 and 1261117 on 14.1.2004 in Class 03. Since then Plaintiff has become exclusive registered proprietor of the trademark. The Plaintiff had also got registration for its various products numbering 27. The Plaintiff has exclusive right over the device and the work mark EYETEX DAZZLER. The turnover has been gradually increased

from Rs.11,44,78,657/- in the financial year 1998-1999 to Rs.31,35,45,635/- in the financial year 2008-2009. The Plaintiff had also spent huge amount towards the advertisement and promotional expenditure. While so, in April 2010, the Plaintiff came across an advertisement made by the Defendant in the magazine 'New Women', for the product nail enamel, bearing the mark DIALY DAZZLER, which is a blatant infringement of the registered trademark of the Plaintiff EYETEX DAZZZLER as both are visually and phonetically similar.

4. It had been further stated that the Defendant is using the deceptively similar trademark of the Plaintiff. The Defendant has not only adopted similar trademark, but also adopted the similar style of writing of the trademark of the Plaintiff. The use of the same is bound to create confusion and deception in the market. The Defendant has no right whatsoever to use the trademark of the Plaintiff EYETEX DAZZZLER, which is visually, phonetically and deceptively identical to that of the Plaintiff. The trademark has been adopted by the Defendant in order to enrich themselves illegally. The conduct of the Defendant, apart from amounting to passing off, is also an offence punishable under the Trade Marks Act, 1999 apart from action of infringement of the registered trademark of the Plaintiff. The Defendant should not be allowed to malign and dilute the goodwill and reputation enjoyed by the Plaintiff. In such circumstances, this civil suit has been filed for the reliefs as stated above.

5. Though the service of summons had been completed on 27.10.2010, no written statement had been filed by the Defendant. Hence, the

matter was posted under the caption of 'Undefended Board'. In OSA.Nos.298 and 299 of 2011, there was also a direction by the Honourable First Bench of this court by order dated 15.9.2016, to the Defendant to file the written statement and hence, it is clear that the Defendant is aware of the proceedings. For non filing of the Written Statement, the Defendant was set exparte and Exparte Evidence was ordered to be recorded by the order of this court dated 11.11.2016.

6. One D.Balajhi, the Partner of the Plaintiff Company had filed the proof affidavit for his chief examination and receipt of 5 documents. In the Exparte Evidence, the said Partner examined himself as PW.1 and marked Exs.P1 to P5 as documentary evidence to prove the suit claim.

7. In this civil suit, the Plaintiffs had sought for the relief (a), (b), (c) and (d) relating to infringement of the trademark, passing off their goods by the Defendants as that of the Plaintiffs by using the trademark of the Plaintiff, surrender of the materials by the Defendant and render of accounts of profits by the Defendants, respectively.

8. In respect of the reliefs (a), (b) and (c), apart from the fact that the Defendant did not let in evidence whatsoever and remained exparte, this court finds that there are valid evidence, both oral and documentary, adduced by the Plaintiff. Therefore, taking into consideration the materials on record and there was also payment of court fee by the Plaintiff, this Court is of the view that only the reliefs (a), (b) and (c) as prayed for by the Plaintiff can be granted along with

costs.

8. In so far as the relief (d), namely, to pass a judgement and decree, directing the Defendant to render accounts of profits made by the Defendant on account of the usage of the trademark of the Plaintiff by the Defendant is concerned, though for non filing of the written statement, the Defendant had been set exparte, which resulted in recording of the exparte evidence, in order to sustain such a claim for rendering of accounts of profits, there should be valid evidence on the side of the Plaintiff, but, on a perusal of the oral and documentary adduced by the Plaintiff, this court finds no valid evidence both oral and documentary to show that the Plaintiff had sustained loss of profit because of the use of the trademark of the Plaintiff by the Defendant. The Plaintiff also did not produce any evidence to show that the Defendant had unlawfully gained against the Plaintiff. Therefore, in the absence of any evidence, showing that the Plaintiff have directly suffered and incurred business loss owing to the usage of the trademark of the Plaintiff by the Defendant, this court holds that the relief (d) sought for by the Plaintiff for a direction to render accounts of profits would not lie and accordingly, the same cannot be granted.

9. In the result, considering the oral and documentary evidence, viz. Ex.P1 to Ex.P5 adduced by PW.1, this Court is of the view that the Plaintiff has proved the suit claim only in respect of the reliefs (a), (b) and (c) and that the Plaintiff has failed to prove the relief (d) by letting in legally acceptable oral and documentary evidence. Accordingly, this civil suit is decreed only in respect of

the reliefs (a), (b) and (c) with costs. In so far as the relief (d) is concerned, this civil suit is dismissed.

.01.2017

Index:Yes/No

Web:Yes/No

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1. List of Witnesses Examined on the side of the Plaintiff:-

1. P.W.1 - D.Balajhi

2. List of Exhibits Marked on the side of the Plaintiff:-

S.No	Exhibit	Description	Date
1	Ex.P. 1	Original authorization letter	09/12/16
2	Ex.P. 2	Photocopy of the trade mark certificate under no.1261112	14/01/2004
3	Ex.P. 3	Photocopy of the trade mark certificate under no.1261117	14/01/2004
4	Ex.P. 4	Cartons of the Plaintiff bearing the trade mark Eyetex Dazler	
5	Ex.P. 5	The advertisement of the Defendant of the product Daily Dazler	

3. List of Witnesses Examined on the side of the defendant:-

Nil

4. List of Exhibits Marked on the side of the defendant:-

Nil

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C.V.KARTHIKEYAN, J.

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Pre-Delivery Judgement in
CS.No.460 of 2010

06.01.2017