

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 0110.02.2017

PRONOUNCED ON: 10.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.841 of 2009

1. Sabash Marketing Private Limited by Director
Ashwin Pandian, Chennai-4

2. A.D.Padmasingh Isaac
trading as Aachi Spices and Foods
Chennai-40

3. SA Palaniappan
trading as Saravana Marketing
Chennai-26

Plaintiffs

Vs

1. V.Senthil Kumar, trading as R.C.Traders
Chennai-94

2. S.M.Cosmetics, Chennai-94

Defendants

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 27(2), 29, 134 and 135 of the Trade Marks Act 1999, for the reliefs as stated therein.

For Plaintiffs : Ms.Daniel Gladys

For Defendants : Set Exparte

JUDGEMENT

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

- a) granting permanent injunction, restraining the Defendants from manufacturing, marketing, distributing,

offering or advertising for sale tooth powder or any other goods using the mark THAVASI or its colour scheme and get up as shown in Document No.2 in the course of their business and pass off their tooth powder or other goods of all kinds using the Plaintiffs trade mark THULASI or its colour scheme and get up of the cartons of the Plaintiffs goods as shown in Document No.1 or enable others to pass off by using deceptive marks.

- b) directing the Defendants to surrender to the Plaintiffs all the packing material, cartons, advertisement materials and hoardings, letter heads, visiting cards, office stationery and all other materials containing/bearing the name THAVASI and packets or other deceptively similar trademark used in the pouches and packets in respect of tooth powder.
- c) directing the Defendants to render account of profits made by them by use of the impugned trademark on the goods referred and granting decree for the profits found to have been made by the Defendants, after the Defendant have rendered the accounts.
- d) directing the Defendants to pay the costs of the suit to the Plaintiff.

2. The case of the Plaintiffs is that the 1st Plaintiff had commenced its business in 2008 with the objective of manufacturing and marketing various kinds of herbal products. The 3rd Plaintiff is the predecessor of the trade mark THULASI with respect to tooth powder. The 2nd Plaintiff became the owner of the trade mark THULASI with respect to tooth powder by way of Deed of Assignment dated 12.3.2009 with the 3rd Plaintiff. The Plaintiffs 1 and 2 are sister Concerns. The 1st Plaintiff is the licensed user of the trade mark THULASI with respect to tooth powder by way of license user agreement dated 24.12.2008 with the 3rd Plaintiff.

3. The 1st Plaintiff had also spent huge money towards advertising their products under the trademark THULASI in all forms of media. The said

trade mark has become very popular and is a very valuable intellectual property of the Plaintiffs. The turnover and advertising expenditure incurred by the Plaintiff has been gradually increasing every year. The 3rd Plaintiff had applied for registration the trade mark THULASI on 5.3.2001 and 27.9.2006 under Nos.994254 and 1491490 in Class 03. The trade mark THULASI was advertised in the Trade Marks Journal No.1411-0 (Supplementary). While so, the Plaintiffs came to know that the Defendants are using the same colour scheme and get up as adopted by the Plaintiffs, bearing the mark THAVASI with respect to tooth powder, which is a blatant infringement of the registered trademark of the Plaintiffs THULASI and both are visually and phonetically similar. As the Defendants are violating and copying the trademark of the Plaintiffs, the conduct of the Defendants would amount to fraud.

4. It had been further stated that the Defendants are using the deceptively similar mark of the Plaintiffs. The Defendants' label consists of the words THAVASI and the colour scheme and get up adopted by the Plaintiffs. The use of the same is bound to create confusion and deception in the market. The trade and general public will assume that there is a business relationship between the Plaintiffs and the Defendants, where there is no such relationship exists. The trade mark of the Defendants is a blatant imitation of the Plaintiffs' trade mark and the same has been adopted for evil intention of commercial gain for which the Defendants are not entitled under law. The conduct of the Defendant amounts to falsification of the trademark, an offence punishable under the Trade Marks Act, 1999 apart from action of infringement of the registered trademark of the Plaintiffs and passing off. The trademark has been

adopted by the Defendants in order to enrich themselves illegally. The Defendants should not be allowed to malign and dilute the goodwill and reputation enjoyed by the Plaintiffs. In such circumstances, this civil suit has been filed for the reliefs as stated above.

5. Though the Defendants were served on 11.12.2009 and 3.1.2011 respectively, no written statement had been filed by them and hence, the matter was posted under the caption of 'Undefended Board'. For non filing of the Written Statement, the Defendants were set exparte and Exparte Evidence was ordered to be recorded by the order of this court dated 05.07.2016. One B.Gnanasambandam, AGM (L&S), of the Plaintiff Company had filed the proof affidavit for his chief examination and receipt of 9 documents. In the Exparte Evidence, the said AGM examined himself as PW.1 and marked Exs.P1 to P9 as documentary evidence.

6. In this civil suit, the Plaintiffs had sought for the relief (a) relating to infringement and passing off the trademark of the Plaintiffs by the Defendants and also sought for the relief (b) for surrender of the materials by the Defendants. In this regard, apart from the fact that the Defendants did not let in evidence whatsoever and remained exparte, this court finds that there are valid evidence, both oral and documentary, adduced by the Plaintiffs. Therefore, taking into consideration the materials on record and there was also payment of court fee by the Plaintiffs, this Court is of the view that the reliefs (a) and (b) as prayed for by the Plaintiff can be granted along with costs.

7. In so far as the relief (c), namely, to pass a judgement and decree, directing the Defendants to render accounts of profits made by the

Defendants on account of the usage of the trademark of the Plaintiffs by the Defendants is concerned, though for non filing of the written statement, the Defendants 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 Plaintiffs, but, on a perusal of the oral and documentary adduced by the Plaintiffs, this court finds no valid evidence both oral and documentary to show that the Plaintiffs had sustained loss of profit because of the use of the trademark of the Plaintiffs by the Defendants. The Plaintiff also did not produce any evidence to show that the Defendants had unlawfully gained against the Plaintiffs. Therefore, in the absence of any evidence, showing that the Plaintiffs have directly suffered and incurred business loss owing to the usage of the trademark of the Plaintiffs by the Defendants, this court holds that the relief (c) sought for by the Plaintiffs for a direction to render accounts of profits would not lie and accordingly, the same cannot be granted.

8. In the result, considering the oral and documentary evidence, viz. Ex.P1 to Ex.P9 adduced by PW.1, this Court is of the view that the Plaintiffs have proved the suit claim only in respect of the reliefs (a) and (b) and that the Plaintiff has failed to prove the relief (c) by letting in legally acceptable oral and documentary evidence. Accordingly, this civil suit is decreed only in respect of the reliefs (a) and (b) as prayed for with costs. In so far as the relief (c) is concerned, this civil suit is dismissed.

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Index:Yes/No
 Web:Yes/No
 Srcm

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

1. P.W.1 - B.Gnanasambandam

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

S.No	Exhibit	Description	Date
1	Ex.P. 1	Original authorization letters	01122016
2	Ex.P. 2	Photocopy of the deed of assignment	12032009
3	Ex.P. 3	Photocopy of the license user agreement	24122009
4	Ex.P. 4	Original label of the plaintiffs trademark 'THULASI'	24122008
5	Ex.P. 5	Copies of invoices for the sale of product "Thulasi" for the years 1994-2009	
6	Ex.P. 6	Photocopy of the advertisement of the plaintiffs product 'Thulasi'	
7	Ex.P. 7	Photocopy of the registration certificate and legal use certificate for the trademark no.1491490	
8	Ex.P. 8	Original label of the defendant's product "Thavasi"	
9	Ex.P. 9	Office copy of the plaint in CS.No.87/2008 and copy of the order dated 7.2.2008 in OA.No.118 of 2008 in CS.No.87 of 2008	

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

Nil

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

Nil

10.02.2017

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C.V.KARTHIKEYAN, J.

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Pre-Delivery Judgement in
CS.No.841 of 2009

10.02.2017

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