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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of hearing and Order: 29th August 2017.

+ RFA 58/2007
USHA INTERNATIONAL LIMITED & ANR.

..... Appellant

Through: Ms. Divya Bhalla, Mr. Munindra
Dwivedi, Mr. Bhavitt K. Rastogi,
Advocates

versus

SUMAN INDUSTRIES LTD. & ORS. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

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29.08.2017

P.S. TEJI, J. (ORAL)

1. Aggrieved by the order and judgment dated 01.09.2006, the appellant has preferred the present appeal under Section 96 read with Order 41 of CPC, whereby the suit of the appellant has been partially decreed against the respondents and the respondents have been restrained from using the trade mark "USHA DELUXE" but rest of the claims of the appellants with regard to the copyright and damages have not been granted.

2. In brief, facts of the case are that the appellant had filed a suit before the trial court for seeking injunction, passing off and rendition of accounts and damages etc, in relation to trade mark. The suit was filed on the basis that the appellant is the registered proprietor of the trademark 'USHA' bearing No.427018 for diesel oil engines in class 7; (ii) 'USHA' logo style bearing No.276104 in respect of diesel oil

engines and parts thereof included in class 7; and (iii) 'USHA' logo style bearing No.295248 for electric motors (not for land vehicles) and pumps for drawing water. The three trademarks were earlier owned by Shriram Industrial Enterprises Ltd. and the appellant No.1 became the proprietor of these registered trademarks by deed of assignment dated 30.04.1994 executed between the appellant No.1 and the erstwhile proprietor of the trade mark Shriram Industrial enterprises Ltd.

3. The appellant No.1 was primarily engaged in marketing and sale of various consumer durables such as Diesel Engines, Pump sets, Sewing Machines, Electric Fans, Air conditioners, Water Coolers, Auto Products, Kitchen appliances under the trademark 'USHA'. Respondent No. 1 was also carrying on the business of manufacture and sale of diesel engines and pumping set and generating set under the name and style of Usha Deluxe, which was deceptively similar to that of the appellant's registered trademark 'USHA'. By applying the trade mark 'USHA' to the Diesel Engines, Pumping sets and Generating Sets manufactured and sold by them, they have infringed the registered trademark 'USHA' belonging to the appellant No.1. In February 2000, it came to the notice of the appellants that respondent No. 1 had started selling nationwide, diesel engines and pumping sets of different horse power bearing the mark "USHA DELUXE" which was deceptively similar to the mark of the appellants. Not only this, it is also alleged that the respondents were using the label mark USHA identical to or similar to the copyrighted works of the appellant. The

respondents copied the essential features of the copyright by copying the word USHA and also the manner and style in which it was written. It was alleged that the respondents deliberately imitated the appellant's trademark to confuse the public by using the mark USHA giving rise to the belief in the purchasers mind that the goods were that of the appellants or were connected to the appellants. Therefore, adoption of the appellant No.1's trademark USHA and the copyright in the artist work USHA by the respondents eroded appellant's business, goodwill, reputation and customer service and satisfaction as the respondents continued to pass off their goods as if they were the goods of the appellants.

4. Before the trial court, the defendants/respondents were proceeded ex-parte in the suit on 14.09.2001 and no written statement was filed by the respondents. In support of his case, the appellants examined three witnesses and accordingly the matter was heard ex-parte and the impugned judgment was passed by the trial court. After hearing the arguments, the learned trial court had passed the impugned judgment thereby partially decreeing the suit in favour of the appellants. Aggrieved by the said impugned judgment the appellants have preferred the present appeal.

5. The grounds raised on behalf of the appellants are that the appellants have a copyright in their favour in respect of artistic work and design USHA and the comparison of the design being used by the respondents should be held as an infringement of the said copyright. Even the copyright in devnagri used by the respondents is identical to

that of the appellant No.2. It is further contended that through the designs exhibited by appellant No.2 – Ex. PW-2/3, PW-2/4, PW-2/5 and the labels of the respondents at Ex. PW-2/6, PW-2/7 and PW-2/8, it becomes clear that the respondents were breaching and infringing the registered copyright in respect of the artistic work, which belongs to the appellants. It was further contended that the settled proposition of law is that only material resemblance is sufficient to constitute infringement of copyright. It is further contended that the appellants have filed the sale-figures as well as the loss which had been caused due to the action of the respondent but the trial court has not appreciated the fact of loss being incurred by the appellants. The appellants have claimed Rs.5 lakhs on account of dilution of the mark and its compensation, Rs.5 lakhs on account of inferior goods being sold by the respondents, Rs.5 lakhs on account of its goodwill and reputation as against the respondents and unrebutted and unchallenged damages suffered by the appellants. It is further contended that the appellant could have been awarded the deterrent/punitive damages in lieu of rendition of accounts by the respondent.

6. The learned counsel appearing on behalf of the appellants has been heard at length and the record of the trial court perused.

7. After a careful scrutiny of the case, this court observes that the only grouse of the appellant is that the court below has not granted the relief in lieu of the prayer ‘h’, which reads as under:

“an inquiry as to damage or at the plaintiff’s option an amount of profits and payment of sums found due upon

taking such account or enquiry.”

8. The admitted position is that the defendant proceeded ex-parte before the trial court and there could not be any inquiry in the absence of the defendants. The trial court found that no evidence has been led with regard to the accounting of damages on account of loss suffered by the appellant. The learned court below has observed with regard to the claim of damages that there was nothing on record to show that the plaintiffs/appellants had suffered loss on account of acts of the defendants, therefore, the plaintiffs/appellants were held to be not entitled to any damages from defendants.

9. The fact remains that in the present case, the appellants have not claimed any damages, but have sought inquiry, the result of which could only be the reason for awarding the damages, if any. From the facts and circumstances of the case, this court observes that in this case inquiry is not feasible and even the rendition of account was not the part of the prayer. More so, the defendants/respondents remained ex-parte before the trial court. In such a situation, this court finds that no relief can be granted other than the relief already granted by the court below. Accordingly, finding no merits in the submissions of the appellants and no illegality and infirmity in the impugned judgment passed by the court below, the appeal filed by the appellants is dismissed with no order as to costs.

P.S.TEJI, J

AUGUST 29, 2017

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