

\$~11

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

+ **CS(OS) 2535/2012**

M/S OBSURGE BIOTECH LTD Plaintiff

Through: Mr. Rajesh Banati with Mr. Vikram
Bhatia, Advocates

versus

M/S GOODMAN GILMANS LIFE SCIENCES PVT LTD & ANR

..... Defendants

Through: Mr. Ashish Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

%

22.11.2017

1. In this suit filed by the plaintiff for permanent injunction restraining the defendants from infringement of trade mark and for ancillary reliefs, vide judgment and decree dated 4th December, 2014 under Order VIII Rule 10 of the CPC, a decree was passed in favour of the plaintiff and against the defendants in terms of prayer paras (A) to (C) of the plaint and the other relief claimed, of rendition of accounts/damages was declined in absence of evidence.

2. The plaintiff preferred RFA (OS) 47/2015 against the order/decreed declining the relief of rendition of accounts/damages and vide order dated 18th August, 2015 therein, the decree dated 4th December, 2014 declining rendition of accounts/damages was set aside and the suit restored for limited adjudication concerning prayers (D) & (E) in the suit.

CS(OS) 2535/2012

Page 1 of 4

3. Prayer (D) in the suit is for rendition of accounts and recovery of damages found to have been suffered by the plaintiff on account of the defendants having used the offending trademark and prayer (E) in the suit is for award of costs.

4. Vide judgment and decree dated 4th December, 2014, the plaintiff was awarded costs also of the suit and which part has not been interfered with by the Division Bench in RFA (OS) 47 of 2015 and we are now only concerned with the claim of the plaintiff for rendition of accounts and damages.

5. The counsel for the plaintiff states that though the defendant had not filed the written statement in the suit and the decree dated 4th December, 2014 was under Order VIII Rule 10 of the CPC but the defendants appeared through counsel before Division Bench and the Division Bench granted liberty to the defendants to cross-examine the witnesses of the plaintiff to be examined to the extent permissible.

6. It is further stated that the plaintiff, post remand, in its evidence examined its Managing Director Sh. Jaswant Singh Chauhan by tendering his affidavit by way of examination-in-chief into evidence; though opportunity was given to the defendants to cross-examine the said witness but the defendants failed to cross-examine the witness and failed to pay the cost imposed on the defendant for availing adjournment for cross-examination and which cost was also not paid and the right of cross-examination was closed.

7. I have perused the affidavit by way of examination-in-chief of the sole witness examined by the plaintiff post remand. The said

affidavit is found to be comprising of five pages running into as many as 20 paragraphs but it is found that 4-1/2 pages thereof, comprising of paras 1 to 17, are on the aspects on which the decree had already been passed in favour of the plaintiff and on which no evidence was required to be led. Qua the claim for damages, the plaintiff, has in para 18 of the affidavit by way of examination-in-chief of the said witness, stated that the plaintiff suffered financial loss in terms of reduction in the overall sales of its product since the year 2012 and a certificate showing year wise loss suffered by the plaintiff on account of availability of defendant's product in the market was tendered in evidence as Ex.PW1/8.

8. A perusal of Ex.PW1/8 shows the same to have been issued by M/s Manoj and Associates, Chartered Accountants and certifies on the basis of information and documents produced before them by the plaintiff that the plaintiff had suffered loss of Rs. 12,51,851/- owing to availability of the defendant's product in the market.

9. I have enquired from the counsel for the plaintiff as to how the aforesaid document constitutes evidence; the same can at best qualify as secondary evidence and there is no explanation for non-production of primary evidence and nor is any foundation laid for leading secondary evidence. The documents and information on the basis of which the said certificate has been issued would be the primary evidence and the same have been suppressed by the plaintiff. Therefore, adverse inference has to be drawn against the plaintiff.

10. There is thus no evidence before this Court of any loss or

damage suffered by the plaintiff on account of infringement by the defendant of the trade mark of the plaintiff. In the absence of any evidence, the position remains the same as was on 4th December, 2014, i.e. the plaintiff being not entitled to recovery of any damages from the defendants.

11. The claim of the plaintiff in prayer 'D' for accounts and damages is thus dismissed. No costs.

12. Decree sheet be drawn.

RAJIV SAHAI ENDLAW, J

NOVEMBER 22, 2017

Mw..