

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.783 of 2015
and O.A.Nos.1038 & 1039 of 2015

Sun Pharma Laboratories Limited
 CD Plot No.3, Door NO.8 Tower Block Street
 Nandhanam Extension
 Chennai - 600 035.
 Rep. by its Authorized Signatory
 Mrs.Radha Kumar.

..Plaintiffs

Vs.

1.MNC Therapeutic Sciences Pvt Ltd
 6/16, Varaldevi Road
 Padma Nagar, New Kaneri
 Bhiwandi
 Maharashtra - 412 302.

2.Logos Pharma
 Village Maissa Tibba
 Tehsil Nalgarh
 District Solan - 174 101
 Himachal Pradesh (India).

.. Defendants

This Civil Suit is preferred, under Order IV Rule 1 of the Original Side Rules and Order VII, Rule 1 of the CPC read with Sections 27, 28, 29, 134 and 135 of the Trade Marks Act, 1999

a) a permanent injunction, restraining the defendants, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in

any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations infringing plaintiff's registered trademark ROZAVEL by use of almost identical trademark ROSVEL or any mark deceptively similar to plaintiff's registered trademark ROZAVEL or in any other manner whatsoever;

b) A permanent injunction restraining the defendants, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations under the trademark ROSEVEL or any other trademark that is identical and/or deceptively similar as that of the plaintiff's mark ROZAVEL and/or use similar packaging as that of the plaintiff's products under the mark ROZAVEL so as to pass off the defendants' medicinal preparations as and for the medicinal preparations of the plaintiff and/or in any other manner whatsoever connected with the plaintiff;

c) the defendants be ordered to pay to the plaintiff a sum of Rs.1,00,000/- as liquidated damages for committing acts of infringement against plaintiff's registered trademark so as to pass off its products as and for the plaintiff's products;

d) the defendants be ordered and decreed to deliver up for destruction to the plaintiff all the preparations, dies, blocks, labels, packaging either filled or empty, brochures, leaflets, pamphlets, handbills, hoardings, wall posters, calendars, carry bags, stationery items and such other sales promotional materials bearing and/or containing the impugned trademark ROSVEL;

e) A preliminary decree be passed in favour of the plaintiff directing the defendants to render accounts of profits made by it by use of the trademarks ROSVEL which is identical and/or deceptively similar and a final

decree be passed in favour of the plaintiff for the amount of profits found to have been made by the defendants after the latter has rendered accounts;

f) for costs of the entire proceedings; and

g) pass such further or other orders as this Hon'ble Court may deem fit and proper in circumstances of the case and thereby render justice.

For Plaintiff : Ms.Durga V. Bhatt
for Mr.Arun C Mohan

For Defendants : Set ex-parte

JUDGMENT

There is a sole plaintiff and there are two defendants in this suit.

2. Nucleus of this suit is a registered trademark in favour of plaintiff company. This registered trademark is a word mark 'ROZAVEL'. It is registered in class 5 for goods which have been described as 'Medicinal and Pharmaceutical preparations and substances', included in class 5. According to trademark Registration Certificate, it has been registered as a word mark, it is used since 2003, it has been registered on 18.08.2003, renewed on 18.08.2013 and is valid upto 18.08.2023. The trademark registration number is 1223577. This trademark shall hereinafter be referred to as 'suit TM' for the sake of convenience and clarity.

3. Suit has been filed complaining of infringement of suit TM and passing off qua suit TM. There are other ancillary and incidental prayers also.

4. Jurisdiction of this Commercial Division qua this suit was determined vide proceedings dated 22.06.2018, which reads as follows:

'The suit had been filed for permanent injunction restraining the defendants from infringing the plaintiff's registered Trademark ROZAVEL and for consequential reliefs.

2. Since the suit had been filed to protect the intellectual property right of the plaintiff, the issues raised are commercial in nature and this Court has jurisdiction to examine them.

3. Office is directed to put up a note regarding completion of service of suit summons on the defendants.

4. For putting up such a note, call the matter again on 12.07.2018.'

5. Ms. Durga V. Bhatt, learned counsel representing the counsel on record for plaintiff, elaborating on the aforesaid submissions, submits that in the light of this suit being complaints of infringement of suit TM and passing off qua suit TM, Section 134(1) of 'Trade Marks Act, 1999', ('TM Act' for brevity) is attracted. Learned counsel also submits that it qualifies as a 'Commercial Dispute' within the meaning of sub-clause (xvii) of Section 2(1)(c) of 'The Commercial Courts Act, 2015' ('said Act' for brevity). To be

noted, clause (xvii) of Section 2(1)(c) of said Act reads as follows:

'(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semi-conductor integrated circuits;'

6. Saying so, learned counsel for plaintiff submits that in the light of Section 134(1) of TM Act, this Commercial Division will have jurisdiction to entertain this suit under first proviso to Section 7 of said Act. A perusal of plaint reveals that there is no difficulty in accepting this submission of learned counsel, which in any event is in the nature of elaboration of determination of jurisdiction made on 22.06.2018.

7. Having determined jurisdiction, this Commercial Division now examines the trajectory of this suit thus far.

8. Defendants, after being duly served, have not entered appearance and have obviously not filed written statement.

9. Defendants were set-ex-parte and this suit was set down for recording ex-parte evidence before learned Additional Master-IV. These two proceedings are captured in proceedings of this Commercial Division dated 18.09.2018 and 20.09.2018, which read as follows:

Dated: 18.09.2018

'Pursuant to earlier proceedings of this Commercial Division dated 03.09.2018, Registry has put up a note regarding service of suit summons on both the defendants, details of which are as follows:

'D1 served on 23.12.2016 (master)

D2 served on 24.12.2015.'

2. From the above note it comes to light that both the defendants in the suit have been duly served.

3. Ms.R.Prashanthi, learned counsel on record for sole plaintiff points out that defendants have not filed written statement.

4. Registry to list this matter in 'Undefended Board' i.e, under the caption 'Undefended Board' on 20.09.2018, showing the names of both the defendants together with their respective full / complete address as in the short and long cause titles of the plaint.

List on 20.09.2018.'

Dated: 20.09.2018

There is a sole plaintiff and there are two defendants in this suit. This suit is listed in the 'Undefended Board' today i.e., under the caption 'UNDEFENDED BOARD'.

2. Ms.Rithika Reddy, learned counsel representing the counsel on record for sole plaintiff is before this Commercial Division. There is no representation for defendants.

3. Though obvious (matter was listed in 'Undefended Board') it is brought to the notice of this Court that defendants have not filed written statement.

4. With regard to first defendant suit summons has been duly served on 23.10.2016 (before Master). With regard to second defendant suit summons has been duly served on

24.12.2015. Though the names of the defendants together with full/complete address as in the short and long cause titles of the plaint have been shown in the cause list, none appears. Names of both the defendants called out aloud thrice in open Court. No response. Both defendants are set ex-parte.

5. List this matter before learned Additional Master-IV on 27.09.2018 for recording ex-parte evidence. Learned Additional Master-IV is requested to record ex-parte evidence preferably on the same day and in any event on or before 28.09.2018.

6. List this matter under the caption 'FOR ARGUMENTS' before this Commercial Division post ex-parte evidence on 04.10.2018.'

10. Pursuant to the aforesaid proceedings, suit was set down for recording ex-parte evidence before learned Additional Master-II on 13.12.2018. One Ms.Radha Kumar, who has been described as authorized signatory of the plaintiff, has been examined as P.W.1. and eight exhibits viz., Exs.P1 to P8 have been marked through P.W.1.

11. Having set out jurisdiction and having captured the trajectory of this suit thus far, it is deemed appropriate by this Commercial Division to move on to the crux and gravamen of this lis.

12. It is the case of the plaintiff that defendants are infringing

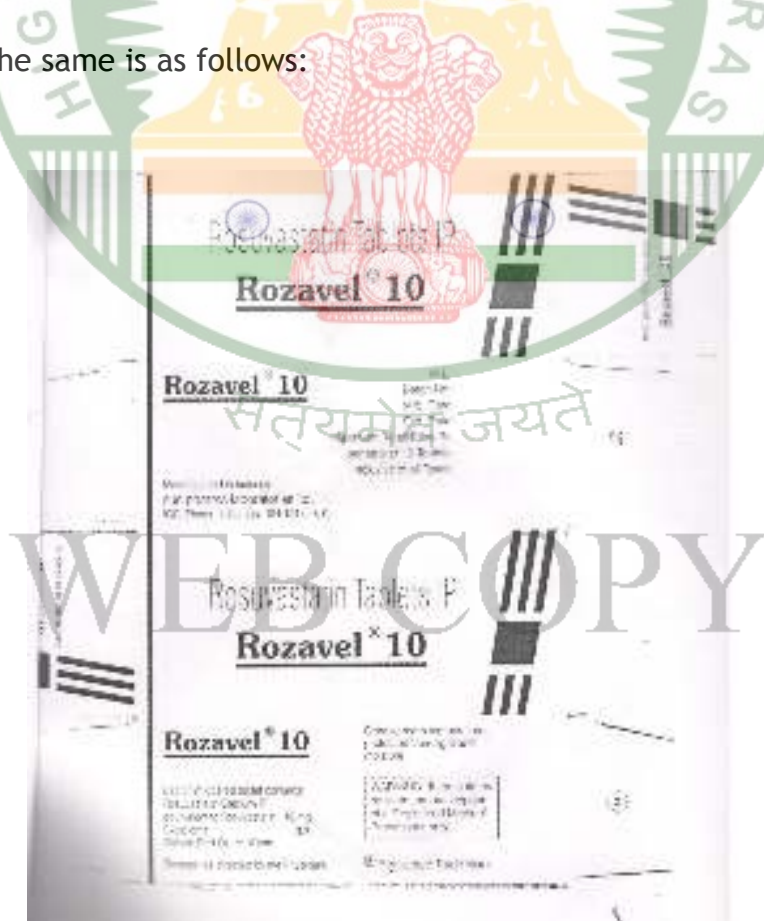
plaintiff's suit TM by adopting a deceptively similar mark on an identical product. To be noted, the product of the plaintiff is a pharmaceutical preparation, which is used for reducing cholesterol and is also used as a medicine for obesity problems. This is articulated in paragraph 5 of the plaint, which reads as follows:

'5. The plaintiff is the registered proprietor of the mark ROZAVEL. The mark ROZAVEL was adopted by M/s.Sun Pharmaceutical Industries Ltd., a company registered under the Companies Act, 1956 (hereinafter referred to the predecessor of the plaintiff) in the year 2003 in respect of pharmaceutical preparations for reducing cholesterol and obesity problems. The said mark ROZAVEL is unique and distinctive. The said mark was extensively renowned throughout the market and amongst medical practitioners for the quality and efficacy of the products marketed thereunder. Further, with a view to obtain statutory protection, the said predecessor of the plaintiff applied for and obtained registration for the mark ROZAVEL under No.1223577 dated 18.08.2003 in respect of medicinal and pharmaceutical preparations and substances included in class 5. The said registration is valid and subsisting. The plaintiff has also applied for registration of the marks ROZAVEL A, ROZAVEL EZ, ROZAVEL F, D ROZAVEL and the same are pending. The said predecessor of the plaintiff was granted appropriate license to manufacturer and market tablets under the mark ROZAVEL, by the Drug Control Administration. The mark has been openly, continuously and exclusively used by the predecessor of the plaintiff since its adoption and tremendous goodwill and reputation has accrued in respect thereof.'

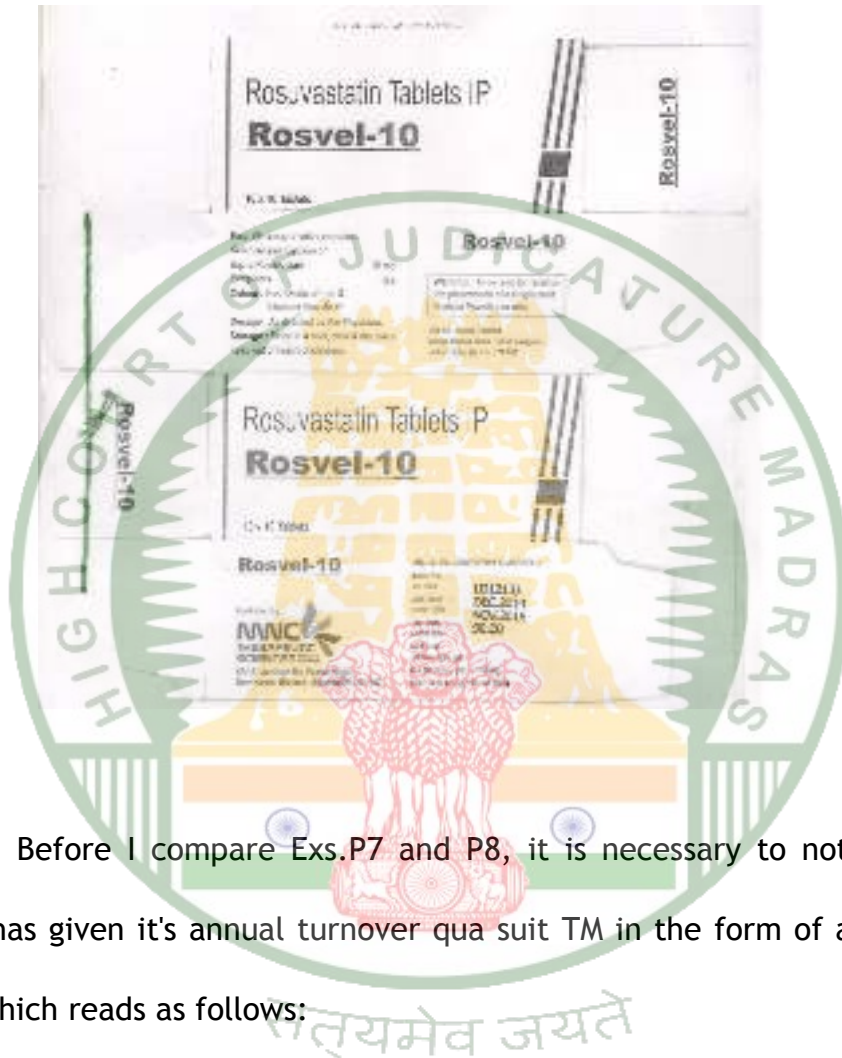
13. It is submitted by learned counsel for plaintiff that defendants are also applying a deceptively similar mark on an identical product i.e., pharmaceutical product used for same purpose.

14. To be noted, defendants are using trademark 'Rosvel' while suit TM is 'Rozavel'. To be precise, defendants are using 'Rosvel 10' while plaintiff is using suit TM as 'Rozavel 10' on it's products.

15. A typical depiction of suit TM by the plaintiff has been marked as Ex.P.7 and the same is as follows:



16. A typical depiction of suit TM by defendants has been marked as Ex.P8 and the same is as follows:



17. Before I compare Exs.P7 and P8, it is necessary to notice that plaintiff has given it's annual turnover qua suit TM in the form of a tabular column which reads as follows:

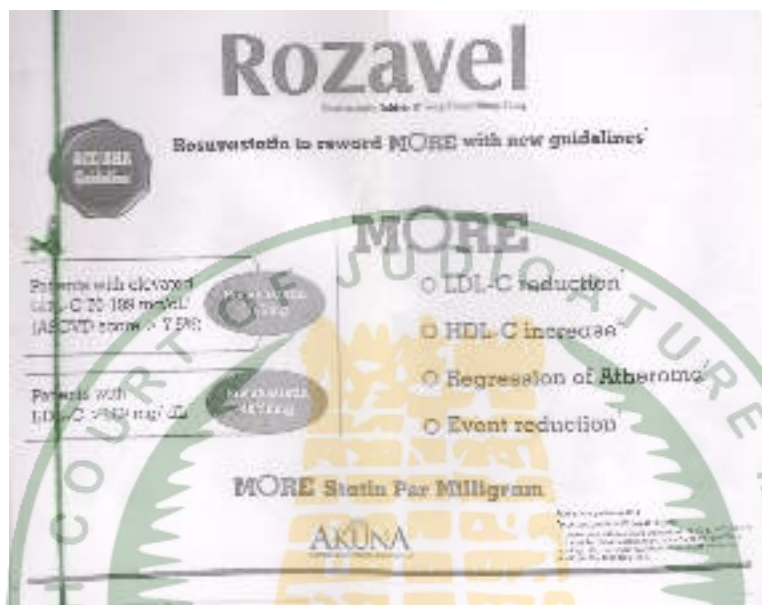
Year	Annual Sales (In Lakhs of Rs.)
2004 to 2005	269.51
2005 to 2006	278.93
2006 to 2007	244.63
2007 to 2008	277.24
2008 to 2009	477.65
2009 to 2010	1,276.19
2010 to 2011	2,593.02
2011 to 2012	3,797.58
2012 to 2013	5,615.00
2013 to 2014	7,099.00
2014 to 2015	8,656.00

18. An auditor's Certificate has been marked as Ex.P4 to buttress the aforesaid tabular column.

19. Besides this, to establish that suit TM has not been kept dormant but has been used, plaintiff has marked as many as 48 invoices and the same have been marked as Ex.P5 series. As mentioned supra, these invoices have been marked to demonstrate that suit TM has not been lying dormant and the plaintiff has been actively using the same. It has been already alluded to supra that one Ms.Radha Kumar, has deposed as P.W.1 and she has been described as authorized signatory of the plaintiff company. A specific power of attorney in her favour in this regard has been marked as Ex.P.1. The trade mark registration certificate (legal use certificate) for suit TM has been marked as Ex.P2.

20. Permission obtained by the plaintiff from the Drugs Controller for pharmaceutical product on which suit TM is applied has been marked as Ex.P3. To be noted, Exs.P4 and P5 have already been alluded to supra.

21. Brochure of plaintiff with regard to the products using suit TM has been marked as Ex.P6 and the same is as follows:



22. Learned counsel submits that a comparison of Exs.P6 and P7 on one side and Ex.P8 on the other side would reveal that it is a clear case of infringement. I compared the suit TM as depicted in Exs.P6/P7 and the alleged offending mark of the defendants in Ex.P8 by applying the litmus test in this regard as laid down by Hon'ble Supreme Court in the celebrated Parle judgment [**Parle Products (P) Ltd. Vs. J.P. and Co.,**] reported in **(1972) 1 SCC 618**. Relevant Paragraph (in the reported judgment) which has come to stay as 'Parle principle' has been articulated in Paragraph No.9 of the reported judgment and the same reads as follows:

'9. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They

should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word "Gluko Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it.'

23. To be noted, Parle principle has been affirmatively referred to by the Hon'ble Supreme Court in *S.M.Dyechen Vs. Cadbury (India)* reported in *(2000) 5 SCC 573*.

24. To articulate with clarity the kind of litmus test that has been applied, it is necessary to set out that this Commercial Division saw Ex.P7, took it away from the sweep of it's eyes, little later, saw the defendants' alleged offending mark i.e., Ex.P8 and asked itself the question as to whether a man of average intelligence with imperfect recollection and ordinary prudence will be lulled into the belief that what he is seeing now (alleged offending mark i.e., Ex.P8) is what he had seen earlier (plaintiff's mark i.e., Ex.P7). In the considered opinion of this Commercial Division, the answer is in the affirmative. To amplify the answer in a explanatory tone, it can be said that the answer is monosyllabic i.e., 'YES' and it neither requires qualification nor admits of any exception.

25. This takes us to the deposition of P.W.1. A perusal of deposition of P.W.1 shows that it is cogent and it is in tune/tandem with plaint pleadings. For the sake of convenience, the eight exhibits marked are given in a tabular column and they are as follows:

S.No.	Exhibits	Description
1.	Ex.P1	The copy of the Power of Attorney executed in my favour for deposing. (Marked after comparing and verifying with the original).
2.	Ex.P2	The copy of legal use certificate for trademark registration of the mark ROZAVEL under No.1223577 in class-5 (Marked after comparing and verifying with the original).
3.	Ex.P3	The copy of the Product Permission granted by FDA for manufacture of drugs under the mark ROZAVEL (Marked after comparing and verifying with the original).
4.	Ex.P4	The copy of the Chartered Accountant certificate of plaintiff's annual sales figures for the mark ROZAVEL. (Marked after comparing and verifying with the original).
5.	Ex.P5	Series (48 Nos.) are the invoices for sale of plaintiff's ROZAVEL tablets. (Marked after comparing and verifying with the original).
6.	Ex.P6	The copy of the product brochure for plaintiff's ROZAVEL tablets.(Marked after comparing and verifying with the original).
7.	Ex.P7	The image of plaintiff's ROZAVEL packing. (Marked after comparing and verifying with the original)
8.	Ex.P8	The image of defendants' ROSVEL packing. (Marked after comparing and verifying with the original)

26. The deposition and the exhibits have been alluded to supra, the litmus test application and the answer to the same have also been alluded to supra.

27. This takes us to the plaint prayer paragraph. Prayer paragraph in the plaint is paragraph 21 and the same reads as follows:

'21. The plaintiff therefore prays that this Hon'ble Court may pleased to grant a Judgment and decree on the following terms:

a) a permanent injunction, restraining the defendants, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations infringing plaintiff's registered trademark ROZAVEL by use of almost identical trademark ROSVEL or any mark deceptively similar to plaintiff's registered trademark ROZAVEL or in any other manner whatsoever;

b) A permanent injunction restraining the defendants, their manufacturers, distributors, stockists, servants, agents, wholesalers, retailers, legal representatives or any other person claiming under it from in any manner manufacturing, selling, offering for sale, stocking, advertising directly or indirectly dealing in medicinal and pharmaceutical preparations under the trademark ROSEVEL or any other trademark that is identical and/or deceptively similar as that of the plaintiff's mark ROZAVEL and/or use similar packaging as that of the plaintiff's products under the mark ROZAVEL so as to pass off the defendants' medicinal preparations as and for the medicinal preparations of the plaintiff and/or in any other manner whatsoever connected with the plaintiff;

c) the defendants be ordered to pay to the plaintiff a sum of Rs.1,00,000/- as liquidated damages for committing acts of infringement against plaintiff's registered trademark so as to pass off its products as and for the plaintiff's products;

d) the defendants be ordered and decreed to deliver up

for destruction to the plaintiff all the preparations, dies, blocks, labels, packaging either filled or empty, brochures, leaflets, pamphlets, handbills, hoardings, wall posters, calendars, carry bags, stationery items and such other sales promotional materials bearing and/or containing the impugned trademark ROSVEL;

e) A preliminary decree be passed in favour of the plaintiff directing the defendants to render accounts of profits made by it by use of the trademarks ROSVEL which is identical and/or deceptively similar and a final decree be passed in favour of the plaintiff for the amount of profits found to have been made by the defendants after the latter has rendered accounts;

f) for costs of the entire proceedings; and

g) pass such further or other orders as this Hon'ble Court may deem fit and proper in circumstances of the case and thereby render justice.'

28. In the light of the narrative supra, plaintiff has proved its case vide sub-paragraphs (a) and (b) of prayer paragraph.

29. It follows as a sequitur that plaintiff is entitled to the prayer as set out in sub-paragraphs (e) and (d). With regard to sub-paragraph (c) as there is no evidence that has been let in to show damages, the same is rejected.

30. Sub-paragraph (f) is for costs and sub-paragraph (g) is the usual

residuary limb of any prayer paragraph. I consider sub-paragraphs (f) and (g) together.

31. A perusal of the trajectory of this suit set out supra will reveal that this suit itself was presented in this Court on 18.09.2015 and the defendants after receiving notice have not even chosen to come before this Court, compelling the plaintiff to carry this matter through for over three years in this Court *inter alia* by letting in evidence, expending money, energy and effort.

32. Therefore, plaintiff is certainly entitled to costs as prayed for in sub-paragraph (f). With regard to sub-paragraph (g) which is the residuary limb of the prayer, learned counsel requests this Commercial Division in the light of the aforesaid trajectory and in the light of plaintiff being compelled to carry this suit over three years, to impose compensatory costs under Section 35-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by said Act, as it stands now pointing out that there is no upper limit or financial cap for imposition of compensatory costs. This is owing to deletion of sub-Section(2) of Section 35-A of CPC as amended by said Act.

33. In the light of the trajectory and in the light of plaintiff being compelled to carry this matter through to its logical end over a period of three years, in the light of the nature of this lis and in the light of

infringement, this Commercial Division is convinced that compensatory costs of Rs.3 lakhs would be appropriate. The conduct of the defendants is clearly vexatious within the meaning of Section 35-A of amended CPC as amended by said Act receiving suit summons and not coming before this Court leaving plaintiff to prove its claim is clearly a vexatious manner of defending a suit and it comes within the sweep of vexatious defence under Section 35-A of CPC.

34. Suit is decreed with costs and compensatory costs as mentioned supra. Consequently, connected miscellaneous petitions are closed.

20.12.2018

Speaking order/Non Speaking order

Index : Yes /No

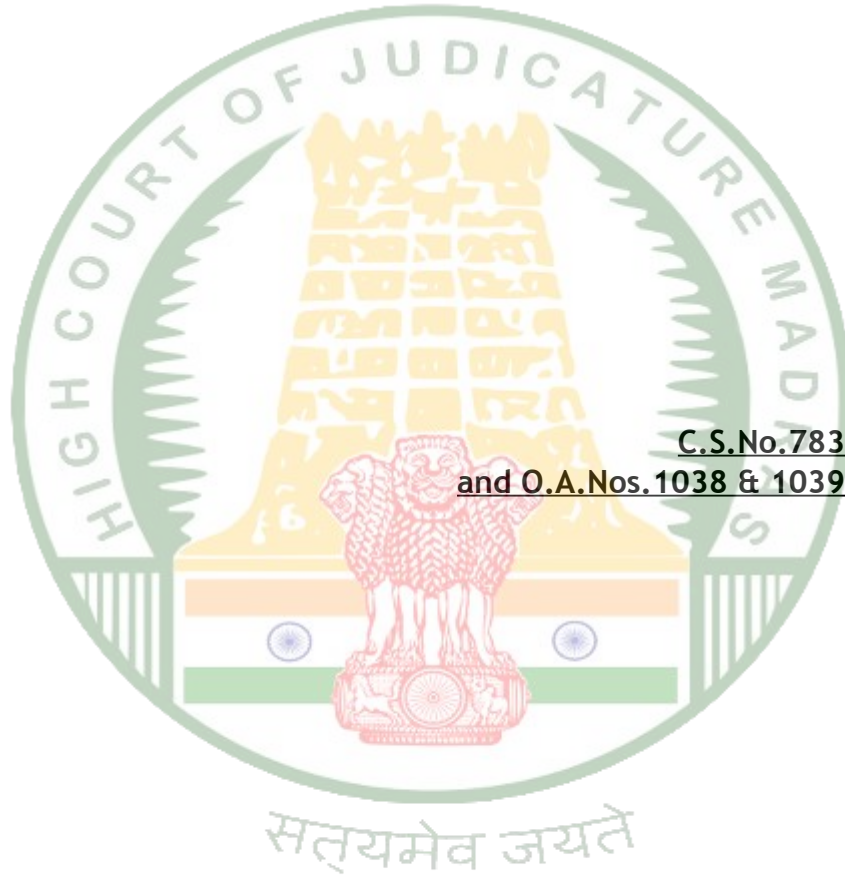
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