

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 24.10.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.563 of 2016

M/s.Amoha Education (P) Ltd.,
 (Formerly known as
 Vivekananda Kalvi Nilayam Pvt. Ltd.),
 rep by its President, Mr.K.S.Ramasubramanian,
 Registered office: 3rd Floor, D.No.43 & 19,
 Chevalier Sivaji Ganesan Road,
 T.Nagar,
 Chennai-600 017. .. Plaintiff

Vs.

Victor,
 VITA – ECIL,
 No.201, 2nd Floor, Jupally Arcade,
 Opp ECIL Bus Terminal,
 ECIL, Hyderabad.

Also at
 VITA – Narayanaguda
 3rd Floor, Thota Ram House,
 Narayanaguda,
 Hyderabad.

And also at
 VITA – Ameerpet,
 No.201, 2nd Floor, HMDA,
 Maithrivanam Building,
 Ameerpet, Hyderabad-560 016.

.. Defendant

This Civil Suit is preferred, under Order IV Rule 1 of Original Side

Rules read with Order VII Rule 1 of CPC read with Sections 27, 28, 29, 134

<http://www.judis.nic.in> and 135 of the Trade Marks Act, 1999 seeking to grant a judgment and

decree (a) for a perpetual injunction restraining the Defendant by himself or through his men, agents or servants or any person claiming under him from in any manner infringing the Plaintiffs registered trade marks “Veta” or any other mark deceptively similar to the Plaintiffs registered trademarks or in any other manner whatsoever, (b) The Defendant be ordered to surrender to the Plaintiffs all the teaching, resource, technical know how, study and course materials of the Plaintiffs which are being unauthorisedly used by the Defendant, (c) to direct the Defendant to pay a sum of Rs.5,00,000/- to the Plaintiffs towards damages together with interest at the rate of 18% p.a from the date of Plaint to date of realization, (d) for costs of the suit and (e) for such further other orders and reliefs as this Court may deem fit in the circumstances of the case and thus render justice.

For Plaintiff : Mr.T.Sundar Rajan

For Defendant : set ex parte on 20.09.2018

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JUDGMENT

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There is a sole plaintiff and a lone defendant in this suit.

2 Sole plaintiff is a private limited company incorporated under the laws in India and is therefore a juristic person. Sole defendant is an individual, i.e., natural person.

3 Suit has been filed complaining of infringement of plaintiff's registered trade marks by the sole defendant, who was working with the plaintiff as a trainer in 2011.

4 Plaintiff company is engaged in the business of imparting training in English communication skills amongst other activities and plaintiff is marketing their services and products under the name Vivekananda Institute's Spoken English Training Course and are marketing products under the trade mark / brand name 'Veta'.

5 Plaintiff has two registered trade marks, details of which are as follows :

Sl. No.	Trade Mark No./ Date of Registration/ User from	Class / Trade Mark type / Word Mark	Certificate No. and Date /Valid upto	Depiction of Mark
1.	1280828/ 26.04.2004 / Proposed to be used.	41 / DEVICE/ VETA	438744, 07.10.2005 / 26.04.2024	
2	1731090 / 12.09.2008 / 14.04.2008	99 / DEVICE/ Veta one	978598, 17.03.2011 / 12.09.2028	

The aforesaid two trade marks constitute the nucleus of this lis and therefore, the same shall be referred to as 'suit TMs' for the sake of convenience and

clarity.

6 Plaintiff has developed its own course materials, training resource materials, instruction manuals, course and training programs, technical know-how, etc., for the English course which the plaintiff undertakes through their franchisees. It is plaintiff's specific case that all such course materials are the sole and exclusive property of plaintiff. The goodwill in the same vests with the plaintiff and that plaintiff has permitted only its franchisees to use the same and that too on payment of franchise fee and royalty.

7 It is also the case of plaintiff that some time in the year 2015, they came to know that the sole defendant who was working with plaintiff as a trainer during the period 2011 started infringing suit TMs.

8 On coming to know about infringement of suit TMs by sole defendant, plaintiff issued notice through lawyer dated 30.06.2015, which was duly served on sole defendant. Sole defendant neither replied nor complied, but infringement continued unabated. Therefore, the instant suit was presented in this Court by plaintiff on 24.06.2016 with prayers inter-alia for injunctive reliefs qua infringement of suit TMs. The other usual prayers for surrender of offending material, damages, costs and residuary limb also constitute prayers in the plaint.

started running three centres, i.e., at ECIL, Narayanaguda and Ameerpet at Hyderabad and one of the centres is being run at the very address where plaintiff was earlier running its office. It is the specific case of plaintiff that defendant is using the mark 'Vita' and defendant is engaged in the same business of imparting training in English communication skills and has been marketing his services and products under 'Vita' which according to plaintiff is the offending mark.

10 Sole defendant was duly served with suit summons, but the sole defendant did not come before this Court either in person or through a counsel. Therefore, sole defendant was set ex parte by this Court vide proceedings dated 20.09.2018 and the suit was set down for recording ex parte evidence before learned Additional Master-III. Ex parte evidence was let in on 12.10.2018 and seven exhibits, i.e., Exs.P.1 to P.7 were marked.

11 This suit is now before me for argument.

12 Before I proceed further, it is necessary to notice that this Commercial Division has determined jurisdiction qua this suit vide proceedings dated 09.08.2018, most relevant paragraph is paragraph 6 and the same reads as follows :

“6.A perusal of the plaint and the aforesaid relevant provisions i.e., Section 134 of the Trademarks Act, 1999, Section 2(1)(c)(xvii) and first proviso to Section 7 of the Commercial Courts Act, 2015, in the light of the plaint averments reveals that this suit relates to a commercial dispute wherein it has been stipulated by Trademarks Act, 1999 that it will not lie in a Court inferior to a District Court. Therefore, this suit qualifies to be heard by this Commercial Division. Jurisdiction of

Commercial Division is thus determined.”

13 I now revert to the evidence recorded before learned Additional Master-III. One Mr.Prem Chand Jamad, who has been described as General Manager in plaintiff's company, has deposed as P.W.1. A letter dated 10.10.2018 wherein and whereby plaintiff company has authorised him with regard to the instant suit has been marked as Ex.P.1. Legal use certificates with regard to suit TMs (two registered trade marks registrations which constitute suit TMs) have been marked as Ex.P.2 and Ex.P.3. Details of two trade mark registrations which constitute suit TMs have been alluded to and set out supra.

14 The legal notice or in other words, notice through lawyer dated 30.6.2015 issued by plaintiff, on coming to know about the infringement of suit TMs along with postal acknowledgement card and returned envelopes have been marked as Ex.P.4. To be noted, Ex.P.4 notice has been sent to sole defendant at three different addresses, it has been duly served on sole defendant at one address and envelopes sent to other two addresses have been returned unserved. This is how Ex.P.4 notice has been marked along with one postal acknowledgement card and two returned envelopes.

15 To show the alleged offending mark of defendant and use of the same by sole defendant, Exs.P.5 to P.7 have been marked. Ex.P.5 is a receipt issued by the defendant to one of its students and the same is as

follows :



16 Ex.P.6 is a leaflet issued by defendant and the same is as

follows :

vita
Excellence in International English Training

vita Corporate English for Professionals
for MBAs, Post Graduates, Engineering Students, Graduates & Self Employees for Job seekers in IT and Software Professionals

vita IELTS, TOEFL & GRE
for Immigration & Entrance Higher studies students in International Universities

vita English Fluency
for All ages, Interview Skills and Mock Interviews for freshers, Working employees to be fluent in Presentations and conversations.

vita Spoken English & Computer Special Packages
for all Ages of Housewives, Students and Working employees.

vita Spoken English & Basic Grammar
for Beginners to Learn Grammar, Functional English and Students from different regional languages other than English.

NOTE : Medium of Teaching **HINDI ENGLISH To ENGLISH**
TELUGU

Inaugural Offer
FREE
SPOKEN ENGLISH COURSE & INTERVIEW SKILLS
Cont : **7207405599**

3rd Floor, Tatarani House, Narayana X Roads, Beside Flyover
BRANCHES: ECIL | AMEERPET

17 Ex.P.7 consists of five photographs. In my considered opinion, they should have been marked as Ex.P.7 series. I therefore refer to 'Ex.P.7' as 'Ex.P.7 series'. Ex.P.7 series are photographs showing the offices of defendant and display boards therein which shows the use of offending mark by defendant. Five photographs constituting Ex.P.7 series are as follows :





18 I now deem it appropriate to extract prayer paragraph in the
 plaint, which reads as follows :

“The Plaintiff therefore prays that this Hon'ble Court may be
 pleased to grant a Judgement and Decree

a)for a perpetual injunction restraining the Defendant by
 himself or through his men, agents or servants or any person
 claiming under him from in any manner infringing the Plaintiffs
 registered trade marks “Veta” or any other mark deceptively
 similar to the Plaintiffs registered trademarks or in any other
 manner whatsoever,

b)The Defendant be ordered to surrender to the
 Plaintiffs all the teaching, resource, technical know how, study
 and course materials of the Plaintiffs which are being
 unauthorisedly used by the Defendant

c)To direct the Defendant to pay a sum of Rs.5,00,000/-
 to the Plaintiffs towards damages together with interest at the
 rate of 18% p.a from the date of Plaint to date of realization.

d)For costs of the suit

e)For such further other orders and reliefs as this
 Hon'ble Court may deem fit in the circumstances of the case
 and thus render justice. “

19 Before I advert to the prayer paragraph, I compare the suit TMs
 with the offending mark and use of the same. In other words, I compared suit
 TMs depicted in Exs.P.2 and P.3 on one side and offending mark depicted in
 Exs.P.5, P.6 and P.7 on the other side. It is also to be borne in mind that
 plaintiff and sole defendant are in the same line of activity, i.e., business of
 imparting training in English communication skills. It is also to be noted that
 sole defendant was working with plaintiff as trainer during the period 2011.

20 I made the aforesaid comparison of Exs.P.2 and P.3 on one side and Exs.P.5 to P.7 on the other by applying the time honoured litmus test in this regard laid down in the celebrated Parle judgment of Hon'ble Supreme Court being ***Parle Products (P) Ltd. v. J.P. and Co.***, reported in **(1972) 1 SCC 618**. Relevant paragraph is paragraph 9 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. "

21 To be noted, the aforesaid **Parle** judgment has subsequently been referred with affirmation by Supreme Court in **Cadbury's** judgment being **S.M. Dyechem Ltd. v. Cadbury (India) Ltd.**, reported in (2000) 5 SCC 573.

22 To put it in a nutshell, the aforesaid comparison was made by me by seeing plaintiff's marks, taking them away from the sweep of my eyes and seeing the alleged offending mark of defendant a little later. Thereafter, I stepped into the shoes of a man of average intelligence with ordinary prudence, imperfect recollection and asked myself the question as to whether such a person will be lulled into the belief that what he is seeing now (i.e., offending material) are what he had seen earlier (i.e., suit TMs). It comes across clearly that the answer to this question is in the affirmative. In other words, I am convinced that it is a clear case of infringement.

23 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 synchronised with pleadings in the plaint.

24 This takes us to the prayer paragraph in the plaint. As plaintiff has established infringement, they are entitled to first limb of the prayer, i.e., (a) or in other words, injunctive relief qua infringement. As a sequitur, they are also entitled to second limb of the prayer, i.e., (b) or in other words, prayer for surrender of offending materials by defendant.

25 With regard to prayer paragraph (c), wherein the plaintiff has claimed a sum of Rs.5,00,000/- towards damages together with 18% future interest. No evidence has been let in to show actual damages. Therefore, it may not be appropriate to award damages.

26 As far as the next limb of the prayer, i.e., (d) is concerned, I am convinced that plaintiff is entitled to costs of the suit considering the trajectory of this litigation.

27 This takes us to residuary limb of the prayer, i.e., (e). Under this limb, I examine the scope for awarding compensatory costs under Section 35-A of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity). Now there is no cap with regard to quantum of compensatory costs.

28 In the light of the narrative supra, particularly in the light of the fact that sole defendant was earlier working with plaintiff in 2011, coupled with the fact that sole defendant after receiving the cease and desist notice or in other words, pre suit notice dated 30.06.2015, Ex.P.4, has neither replied

<http://www.judis.nic.in> nor complied and viewed in the light of the fact that sole defendant has not

chosen to come before this Court even after service of suit summons, compelling the plaintiff to carry this suit through for over two years in this Court, this is a fit case for awarding compensatory costs.

29 Plaintiff is entitled to compensatory cost of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) together with future interest at the rate of 6% per annum from the date of plaint till the date of realization.

30 As plaintiff has proved its claim with regard to plaint prayer paragraphs (a), (b) and as costs and compensatory costs have been awarded, the suit is decreed with costs and compensatory costs on the above terms.

24.10.2018

Speaking order / Non speaking order

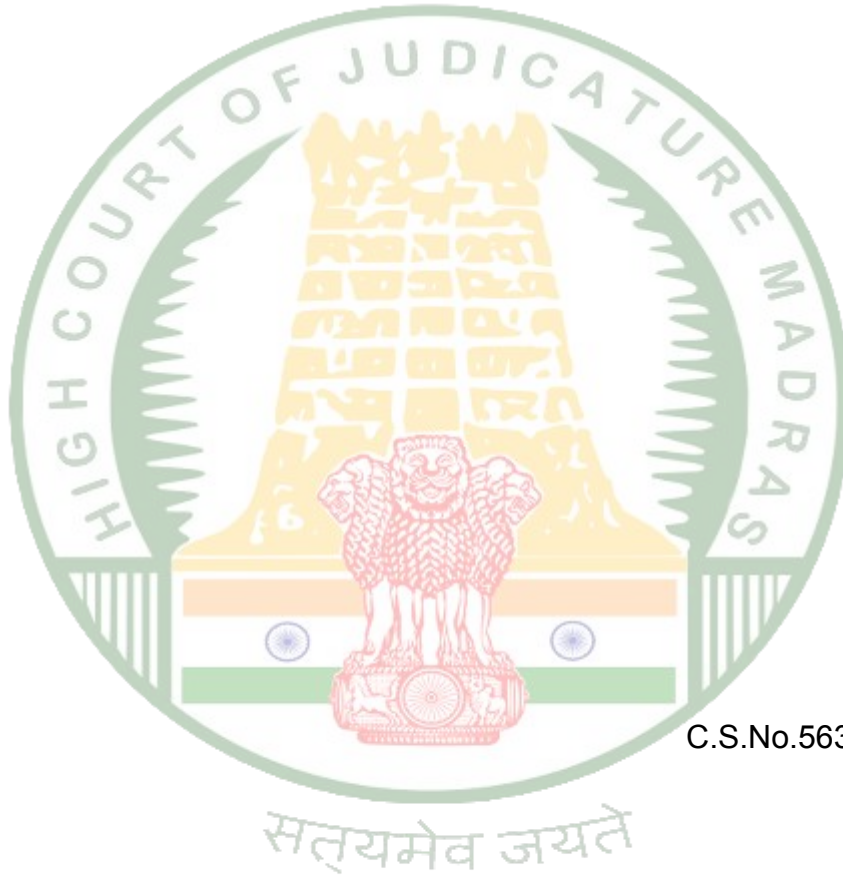
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M.SUNDAR, J.

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