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

\+ CS(COMM) 588/2018 & CC(COMM) No.18/2018

SHAHNAZ HUSAIN ..... Plaintiff

Through: Ms. Tusha Malhotra and Ms. Rashi Punia, Advs.

versus

JAGDISH SAXENA AND ORS ..... Defendants

Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

<u>O R D E R</u>

% **12.04.2018**

1. The plaintiff instituted this suit against three defendants namely (i) Jagdish Saxena; (ii) Elder Pharmaceutical Limited; and, (iii) Elder Healthcare Limited for (a) permanent injunction restraining infringement of the plaintiff's trade mark 'FAIR ONE' and its variants; (b) permanent injunction restraining the defendants from passing off their goods as that of the plaintiff; (c) recovery of Rs.1,10,89,724/- from the defendants; (d) permanent injunction restraining the defendants from using the logo of the plaintiff in conjunction with the picture of the plaintiff; (e) recovery of damages; and, (f) for delivery of infringing goods and rendition of accounts.

2. The suit was entertained though no *ex parte* relief granted.

3. The defendants, in response to the summons, appeared on 25th November, 2011 and without prejudice to their objections stated that they were no longer interested in manufacturing and marketing the product in question bearing the trade mark 'FAIR ONE' in relation to all range of products and that the defendants had already discontinued manufacturing the

said products and were prepared to handover the existing stocks available to the plaintiff, provided the plaintiff makes payment therefor.

4. The counsel for the plaintiff agreed to the same and the counsel for the plaintiff today informs that the said arrangement was effected.

5. The defendants otherwise contested the suit by filing a joint written statement and the defendants no.2&3 also made Counter Claim being CC(COMM) No.18/2018 against the plaintiff for recovery of Rs.35 crores from the plaintiff.

6. Pleadings were completed in the suit and the Counter Claim and vide order dated 13th August, 2014 the following issues were framed in the suit and the Counter Claim:-

> *"(1) Whether the defendant is liable to pay Rs.1,10,89,724/- along with the interest accrued on the said amount till date, as the outstanding amount of royalty due to the plaintiff, arising out of the license agreements dated June, 10, 2003 and February 08, 2006? OPP*
>
> *(2) Whether the termination of the Agreement dated June 10, 2003 and February 08, 2006 by the plaintiff is illegal, untenable or bad in law? OPD*
>
> *(3) Whether the defendants are entitled to an amount as claimed in the counter claim together with interest? OPD*
>
> *(4) Relief."*

7. The counsel for the plaintiff states that the Advocate for the defendants, with effect from February, 2016, started committing defaults on account of non-receipt of instructions from the defendants, and has drawn attention to the order dated 29th May, 2017 when the counsel who had been appearing for the defendants was discharged and it was clarified that if no appearance on behalf of the defendants would be entered in response to the Court notice ordered to be issued to the defendants the defendants, shall be proceeded *ex parte*.

8. The report on the next order dated 27th October, 2017 is of the notice ordered to be issued to the defendants having remained unserved with the report of the process server that the premises of the defendants were locked and sealed by the order of Bombay High Court. The plaintiff thereafter did not take steps for service of the defendants and the counsel for the plaintiffs has today addressed *ex parte* arguments.

9. Though Court notice ordered to be issued to the defendants on 29th May, 2017 remains unserved but it is not deemed appropriate to again direct service of the defendants inasmuch as the defendants having entered appearance before this Court through Advocate, on ceasing to give instructions to the Advocate who was discharged, cannot expect a fresh notice.

10. None appears for the defendants today also.

11. In the circumstances, the Counter Claim of the defendants No.2&3 is dismissed in default and as far as the suit is concerned, the defendants are proceeded against *ex parte*.

12. In terms of above, the plaintiff has become entitled to the reliefs of permanent injunction as claimed in para 50 (a), (b) & (d) of the plaint dated 29th October, 2011.

13. As far as the relief claimed of damages for infringement/passing off is concerned, the counsel for the plaintiff states that she is not pressing for the same. The relief of delivery has already been effected in terms order dated 25th November, 2011.

14. As far as the claim of the plaintiff for recovery of Rs.1,10,89,724/- is concerned, the counsel for the plaintiff has argued that the said claim is on account of royalty dues under two separate Agreements of the plaintiff with the defendants no.2&3 respectively.

15. I have enquired from the counsel for the plaintiff that once the plaintiff had separate Agreements with the defendants no.2&3, how can the plaintiff claim a decree for money jointly and severally against the defendants and particularly against the defendant no.1 who is but an officer of the defendants no.2&3.

16. The counsel for the plaintiff states that the plaintiff is not seeking money recovery against the defendant no.1 but is seeking recovery of money jointly and severally from defendants no.2&3 since they are group companies.

17. However even if the defendants no.2&3 belong to the same group, the same would not entitle the plaintiff to recover the dues of one from another without making out a case for piercing of corporate veil and which

has not been done.

18. The counsel for the plaintiff then draws attention to para 46 of the plaint where it is pleaded that the claim against the defendant no.2 is of Rs.48,35,714/- and against defendant no.3 of Rs.62,54,010/-.

19. However while perusing the file it has been found that the said amounts are claimed to be due under the Licence Agreements dated 10th June, 2003 and 8th February, 2006 executed by the plaintiff in favour of the defendants no.2&3 respectively and on account of minimum guarantee assured by the defendants no.2&3 to the plaintiff under their respective agreements.

20. I have thus enquired from the counsel for the plaintiff, whether the plaintiff has proved any loss or damage suffered inasmuch as a clause of minimum guarantee is a clause in the nature of penalty and which cannot be enforced without proving damages suffered. The said question is no longer *res integra* and reference if any, can be made to ***Kailash Nath Associates Vs. Delhi Development Authority*** (2015) 4 SCC 136.

21. The counsel for the plaintiff though states that no damages have been proved but contends that there is an admission of the defendants no.2&3 for the said amount to be due.

22. Even if that be so, the same would not change the legal position.

23. The plaintiff having not proved any damage suffered on account of breach of Agreement by the defendants no.2&3, is not entitled to claim any amount on that account.

24. Thus the monetary claim of the plaintiff cannot be allowed.

25. Accordingly, a decree is passed in favour of the plaintiff and jointly and severally against the defendants, of permanent injunction in terms of prayer paragraph 50 (a), (b) & (d) of the plaint dated 29th October, 2011.

26. The plaintiff shall also be entitled to costs of the suit.

27. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

APRIL 12, 2018
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