

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

+ *Reserved on: 13th March 2019*
Pronounced on: 3rd April 2019

+ CS(COMM) 607/2018

LOUIS VUITTON MALLETIER Plaintiff

Through: Mr. Pravin Anand, Ms. Udit Patro
& Mr. Nischay Mall and Mr. Dhruv Anand,
Advocate.

versus

IQBAL SINGH AND ORS Defendants
Through: None.

CORAM: JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J

1. The present suit filed by the Plaintiff is for permanent injunction restraining infringement of its trademark, passing off, dilution, rendition of accounts of profits, damages and delivery up. The suit was originally filed as a regular suit and was registered as a commercial suit vide order dated 7th February 2018.

Proceedings in the suit.

2. On 2nd December 2011, the summons in the suit were directed to be issued and also an ex-parte ad interim injunction was granted in favour of the Plaintiff and against the Defendant. On service of summons, Defendants appeared and filed written statement on 30th September

2013 along with application seeking condonation of delay in filing the written statement. The delay was condoned subject to cost. Thereafter, proceedings continued before the Joint Registrar. The admission/denial of the documents could not be completed. Nonetheless, when the matter was placed before the Court, issues were framed vide order dated 6th January 2014 to the following effect:-

- “1. Whether the Plaintiff is the registered proprietor of the trademarks LOUIS VUITTON, the LV Logo and the Toile Monogram? OPP
2. Whether the Defendants have infringed the registered trademarks of the Plaintiffs?OPP
3. Whether the use of the trade marks LOUIS VUITTON, the LV logo, the Toile Monogram and/or any other deceptively similar mark by the Defendants amounts to passing off or amounts to unfair trade practice? OPP
4. Whether the Plaintiff’s trademarks LOUIS VUITTON, the LV logo, the Toile Monogram and the Damier Pattern are deemed well known and recognized as such? OPP
5. Whether the present suit is liable to be dismissed for want of cause of action? OPD
6. Whether the Plaintiff is guilty of suppression of material facts? OPD
7. Whether the Defendant’s adoption and use of the mark LOUIS VUITTON is bonafide? OPD
8. Relief, costs, damages if any?”

3. The parties were referred to Delhi High Court Mediation and Conciliation Centre, to explore a possibility of settlement. However, mediation failed and resultantly, Court Commissioner was appointed for recording of the evidence in the suit. Subsequently, an application under Order VII Rule 14 was filed by the Plaintiff for bringing on record certain documents that were not filed along with the plaint. When the notice of the said application was served on the Defendant's counsel, he informed the Court that the Defendants were not in touch with him and were also not responding to his communications. The aforementioned application was allowed and the documents were taken on record subject to payment of cost. That stage onwards, the Defendants stopped appearing in the matter and the records reveal that there has been no appearance on their behalf after 10th February 2015. The evidence of the Plaintiff was recorded ex-parte. The Plaintiff examined Shri Nikhil Radhakrishnan (PW-1) as it's witness and exhibited documents PW-1/1- PW-1/56. After completion of evidence, the matter was placed before Court for further orders. Noting the absence of the Defendants on several dates, the Defendants were proceeded ex-parte vide order dated 13th March 2019 and Plaintiff's arguments were heard.

Brief Facts

4. As per the Complaint, Plaintiff-Louis Vuitton Malletier, is a company incorporated under the laws of France. It is part of Meet Hennessy Louis Vuitton (LVMH) Group. Plaintiff derived its name from its founder Mr. Louis Vuitton who opened the first Louis Vuitton store in

Paris in the year 1854. Plaintiff opened its first exclusive retail outlet in India in 2003 at the Oberoi Hotel in New Delhi. There are now several exclusive retail outlets in India. Plaintiff's products are advertised in several countries under the said trademarks. It has rigorously invested in publicity and is sponsoring its brands every year and the advertisements have also been appearing in several Indian magazines. The communication and marketing expenditure of the Plaintiff in India for the years 2008 to 2010 are given below:

Year	Communication and Marketing Expenses (in K INR)
2008	119,183
2009	112,728
2010	86,554

5. The Plaintiff has developed a reputation built upon by providing high class designer products. The exclusivity of the Plaintiff's products is part of its brand image and consumers associate its products with style and elegance combined with practicality and quality. Due to these reasons, the Plaintiff has been recording huge sales of its products all over the world.

The Plaintiff's net sales for the years 2002-2004 are given below:

Year	Communication and Marketing Expenses (in K INR)
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2002	3202
2003	3612
2004	4194

The Plaintiff's actual net sales in India itself over the past five years are as follows:

Year	Communication and Marketing Expenses (in K INR)
2007	311,721
2008	477,899
2009	588,490
2010	753,500

Trademark of the Plaintiff:-

6. In addition to the use of the name “Louis Vuitton” as a trademark, the initials of Louis Vuitton, namely “LV”, represented in an intertwined manner has also been used as a trademark by the Plaintiff since 1890. A representation of this trademark is given below:



7. Since 1896, the Plaintiff has also continuously and uninterruptedly used a canvas design with a flower pattern and the intertwined initials of Louis Vuitton (LV). This design is known as the “Toile Monogram” a representation of which is given below:



8. In 2003, the Plaintiff, designed and introduced a variation of the Toile Monogram canvas with the use of 33 different colours called the “Murukami Monogram Multicolore”, as is represented below:



9. The Plaintiff enjoys copyright over the above pattern, which is an artistic work within the meaning of the Indian Copyright Act 1957. The said work has a copyright registration under no. VA1-250-120 with the Copyright Office of the United States of America.

Plaintiff's Registered Trademarks

10. Apart from the rights vested with the Plaintiff in common law, the Plaintiff also has statutory rights over some of its trademarks in India. The "LOUIS VUITTON" word mark, the "LV" logo and the monogram pattern (the latter two being graphic marks) are registered in India under classes 3, 14, 18 and 25 with the Registrar of Trademarks under Registration Nos. 441451, 441452, 448228, 861145, 448231, 448234, 448235 and 441453.

11. The Plaintiff has been vigilant in protecting and safe-guarding its trademark rights from misuse by third parties and have in the past

successfully enforced their Intellectual Property Rights in its various trademarks in India as well as in other parts of the world. The well-known nature of the Plaintiff's registered trademarks "LOUIS VUITTON" trademark, the "LV" logo and the "Toile Monogram" pattern have been duly recognized by the Delhi High Court vide the following two orders passed by it in favour of the Plaintiff, wherein this Hon'ble Court has found the said trademarks to be well-known:

- Order dated March 31, 2014 as passed by the Delhi High Court in Louis Vuitton Malletier v. Arif Khatri &Anr., CS (OS) 270 of 2014 (Exhibit No. PW-1/21); and
- Order dated May 9, 2009 as passed by the Delhi High Court in Louis Vuitton Malletier v. Abdul Salim &Ors., CS (OS) 90 of 2006 (Exhibit No. PW-1/22)

Defendants:

12. The Defendant Nos. 1 and 2 are the proprietors of Defendant No. 3. The said entity is operating from the premises at Sadar Bazar. The grievance of the Plaintiff is that the Defendants are dealing in infringing and counterfeit products bearing Plaintiff's registered trademarks. The Defendant's infringing activities came to the knowledge of the Plaintiff in September, 2011 during a market survey conducted by the investigator.

Local Commissioner's Report

13. Two Local Commissioners were appointed by this Court and the reports filed by the Local Commissioner have been exhibited. The

relevant part of the Local Commissioner's report read as under:

a) Report of the first Local Commissioner:-

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5) That I, with the help of Mr. Manish Biala, conducted a search of the shop. We carefully looked through all the products which included various ladies purses, bags, school bags and gents' wallets, stacked up in the shop. Most of the products were packed in the packaging material bearing the name 'Apollo'. Even the wallets were packed in boxes bearing the name 'Apollo'. However, on opening the boxes, I found that the wallets (3) were bearing the logo/ names of Lee, Reebok, Woodland etc.

6) That I found only one brown colored wallet bearing a silver metallic logo of 'LV, which is the impugned mark. I seized and sealed the wallet and handed it over to Mr. Iqbal Singh on his giving the undertaking that the product will not be tampered with and will be produced in Court as and when directed.

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b) Report of the second Local Commissioner:-

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3. That at 04:10 pm I entered the premises along with the afore said persons and met Mr. Hameet Singh who produced all the goods bearing plaintiffs marks. He produced eight (8) wallets bearing Louis Vuitton mark, two (2) wallets in blue box and six (6) in brown box.

4. He was very co-operative and nothing else was found in his

premises except for the above mentioned wallets. He disclosed that the had some more pieces of wallets bearing Louis Vuitton mark but they have been sold. I inspected the whole shop but nothing else was found except for the above mentioned eight (8) items bearing plaintiff s mark.

5. The eight wallets were sealed and released to the defendant on superdari (Annexed herewith). The commission stood concluded at 05:10 pm."

Stand of the Defendants

14. The joint written statement filed by the Defendants states that the averments in the suit do not tantamount to any infringement of the trademark of the Plaintiff. The Defendants have been in innocent use of the name of name of "Louis Vuitton Mallertier" for the last over 8 to 9 years. The Defendants had nothing to do with the logo of the Plaintiff and are using their own logo since the inception of the business. The business of the Defendants is parallel to that of the Plaintiffs and the quality of goods of the Defendants is not less than that of the Plaintiffs. The quality of the products produced by the Defendant is more durable and superior than the products of the Plaintiff.

ISSUE NO.1

15. As regards to issue No.1, the Plaintiff has examined Mr. Nikhil Radhakrishnan, the sales manager of the Plaintiff's store located in Delhi. He has been authorized to depose evidence in the present suit *vide* letter of authority dated 30th October, 2014 and the same has been exhibited as PW 1/1. The said witness in his examination in chief by way of affidavit has *inter alia* stated as under:-

"27. I say that all the above mentioned registered trademarks have been renewed and are subsisting on the register of the Registrar of Trade Marks. Copies of certificates for use in legal proceedings or renewal certificates or registration certificates in respect of some of these trademark registrations have been filed in the present proceedings at pages 3 to 13 of the list of documents dated November 29, 2011. The original certificates of legal proceedings for trademark registration numbers 441451, 441452, 448228 and 861145 are being filed herewith and I crave leave to exhibit the same as Exhibit PW-1/11 to Exhibit PW-1/14. Copies of the certificates for use in legal proceedings or renewal certificates or registration certificates for registered trademark numbers 448231, 448234, 448235 and 441453 are being filed herewith and I crave leave to produce the certificates for use in legal proceedings for these trademarks at the time of exhibit marking and to exhibit the same as Exhibit PW-1/15 to Exhibit PW-1/18."

16. The evidence of the Plaintiff has not been rebutted and accordingly, it is proved that the Plaintiff is the registered owner of the Trademark "LOUIS VUITTON", the "LV" logo and the "Toile Monogram" pattern. The issue is decided in favour of the Plaintiff and against the Defendants.

ISSUE NO. 2

17. The documents placed on record and the statement of the witness, elucidate that the Plaintiff is the registered proprietor of the trade marks mentioned in preceding paragraphs. Section 29 (2) of the Trade

Marks Act, 1999 stipulates the condition when usage by a person amounts to infringement of a registered trademark. Section 29(2) and (3) reads as follows:

"29. Infringement of registered trademarks:-

(2) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which because of—

(a) its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark; or

(b) its similarity to the registered trade mark and the identity or similarity of the goods or services covered by such registered trade mark; or

(c) its identity with the registered trade mark and the identity of the goods or services covered by such registered trade mark, is likely to cause confusion on the part of the public, or which is likely to have an association with the registered trade mark.

(3) In any case falling under clause (c) of sub-section (2), the court shall presume that it is likely to cause confusion on the part of the public."

18. On the issue of infringement, the said witness has deposed that the Defendants were involved in dealing with counterfeit products bearing the registered mark of the Plaintiff. He has also referred to the investigation carried out by the independent investigator Mr. D.C. Sharma. The said witness also exhibited the photographs of the

counterfeit wallets that were purchased by the Investigator from the Defendants. The said printouts are exhibited as PW 1/52. The business card of the Defendant is exhibited as PW 1/53. The affidavit of the investigator- Mr. D.C. Sharma- has been exhibited as PW 1/54. The pictures of the counterfeit products bear the Plaintiff's trademarks. The Local Commissioners appointed by this Court Ms. Babita Modi and Ms. Sanjana Malik, have also filed their report. The said Local Commissioners visited the two premises of the Defendants and took into custody the products which were bearing the mark infringing the registered trademark of the Plaintiff. The reports of the Local Commissioners are exhibited PW 1/55 and PW 1/56. The Local Commissioner while conducting the raid at the premises of the Defendants seized many counterfeit products. The reports of the Local Commissioner's, the investigation report relied upon by the Plaintiff and the uncontroverted testimony of Plaintiff's witness, clearly establishes that the Defendants were indeed involved in dealing with the counterfeit products and infringing the Plaintiff's trademarks. The adoption and use by the Defendants of the mark "Louis Vuitton" amounts to infringement of the Plaintiff's registered trademark bearing Nos. 441451, 448229B, 441452B, 448230B, 448231, 441453B, 448233B, 448235, 448234 and 861145.

19. Therefore, in view of the above discussion, it is held that the Defendants have infringed the trademark of the Plaintiff. This issue is also decided in favour of the Plaintiff.

ISSUE NO. 3

20. It is necessary to make a brief reference to the well settled proposition of law governing actions for passing off. Winefield and Jolowics have in their latest book on "Tort" (13th Edition) clearly explained, at page 537, the extended concept of Tort of Passing off, in the following words:

“Although the classic form of the tort is one trader representing his goods as those of someone else, the basis of the liability is wider; it is the injury to the plaintiff's business goodwill the benefit and advantage of the good name, reputation and connection of a business...the attractive force which brings in customers.”

21. In **Erven Warnink by and Others Vs. J. Townend & Sons (Hull) Ltd. and Others**, [1979] 2 All ER 927, Lord Diplock identified five characteristics which must be present in order to create a valid cause of action for passing off: "(1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence), and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or in a *quiatimet* action will probably do so".

22. The aforesaid essentials have been accepted by this Court and the Supreme Court in **Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.** (2001) 5 SCC 73, **Heinz Italia v. Dabur India Ltd.**, (2007) 6 SCC 1, **Flamagas, SA vs. Irfan Ahmed and Ors** and **Baker Hughes**

Limited and Ors. vs. Hiroo Khushalani 74 (1998) DLT 715

23. This Court in Baker Hughes Limited (supra) has explained the concept of passing off in detail and held as follows:

"58. In order to determine whether the plaintiffs have established the ingredients for successfully bringing an action for passing off it will be appropriate to advert to the broad principles of the law of passing off. In *'Kerly's Law of Trade Marks and Trade Names'*-Supplement-pages 42 and 43, paragraph 16-02, the concept of passing off is stated thus:

The law of passing-off can be summarised in one short general proposition -no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number.

Firstly, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services.

Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to belief that the goods or services offered by him are the goods or services of the plaintiff.

Thirdly, he must demonstrate that he suffers or, in a quick

time action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or service is the same as the source of those offered by the plaintiff...

66. From the analysis of the above decisions it is apparent that a plaintiff in an action for passing off must establish the following elements:

1. The plaintiff has acquired a reputation or goodwill in his goods, name or mark;
2. A misrepresentation, whether intentional or unintentional, which proceeds from the defendant by the use of the name or mark of the plaintiff or by any other method or means and which leads or is likely to lead the purchaser into believing that the goods or services offered by the defendant are the goods and services of the plaintiff, or that the goods and services offered by the defendant are the result of its association with the plaintiff;
3. The plaintiff has suffered or is likely to suffer damage due to the belief engendered by the defendant's representation."

24. In view of the aforesaid position in law, and the evidence brought on record by the Plaintiff in the nature of the oral testimony of the witness- Mr. Nikhil Radhakrishnan, the investigation of the independent investigator and the reports of the Local Commissioners, it is evident that the Defendants have adopted and used the registered trademark of the Plaintiff in relation to their goods with an intention to ride off the reputation and good will enjoyed by the Plaintiff. Such a usage would lead to loss of revenue for the Plaintiff and also affect the

reputation of the Plaintiff. The adoption of the registered mark of the Plaintiff by the Defendants is dishonest and there exists no plausible explanation by the Defendants to have adopted the said trademark. In the written statement, the Defendants infact have admitted the adoption of the trademark by way of the following averments:

“As a matter of fact, the defendants have been in the innocent use of the name of Louis Vuitton Mallertier for the last over 8-9 years.”

25. Accordingly, in light of the aforementioned facts and settled law the Court holds that the Defendants have committed the tort of passing off. The issue is thus decided in favour of the Plaintiff and against the Defendants.

ISSUE NO. 4

26. On this issue, the witness of the Plaintiff has deposed exhibiting orders passed by this Court wherein the Plaintiff's registered trademark has been recognized as well known trademark and held as under:-.

"7. Having regard to the averments made in the plaint, I am satisfied that the plaintiff has been able to establish its case for grant of permanent injunction and declaration that the plaintiff's trademark LOUISVUITTON, LV logo and Toile Monogram is a well know trademark. The sale figures, the trans-border reputation of the plaintiff and also taking into consideration that the brand of the plaintiff was established as far back as in the year 1854 and thereafter the brand has been successful all over the world, it leaves no room

for doubt that the brand of the plaintiff (LOUIS VUITTON) can be declared as a well known brand in terms of Section 11(6) of the Trademarks Act, 1999."

27. In view of the aforesaid evidence brought on record, the Plaintiff has established that its trademark "LOUIS VUITTON" trademark, the "LV" logo and the "Toile Monogram" pattern are well known and recognized. This issue is also thus decided in favour of the Plaintiff.

ISSUE NO. 5 AND 6 AND 7

28. The Defendants have filed their written statement but have chosen to not participate in the trial and have not filed any documents/evidence, nor have they controverted the Plaintiff's evidence. The onus of the aforesaid issues was on the Defendants. The written statement also does not disclose any basis for the Defendants to state that the suit should be dismissed on the ground of want of further cause of action and that the Plaintiff is guilty of suppression of material facts. In fact, the Plaintiff's evidence proves the contrary. The Defendants are found to be guilty of infringing the Plaintiff's trademark and dealing with counterfeit products. It cannot be said that the suit is without cause of action. There is also no basis for the Defendants to suggest that they are guilty of suppression of material facts. The aforesaid objections in the written statement have no legal basis and the trial has not brought on record anything that can persuade this court to decide the aforementioned issues in favour of the Defendants. The use of the Plaintiff's trademark by the Defendant's is certainly not

bona fide and is being done only to cause confusion and deception in the mind of the general public and the consumers. It is apparent that the intent of the Defendants is to dilute the good will and reputation of the Plaintiff's well known trademark. Therefore, all the aforesaid issues are decided against the Defendants and in favour of the Plaintiff.

ISSUE NO. 8

29. On this issue, the learned counsel for the Plaintiff has urged that in the present case aggravated and punitive damages should be awarded so as to compensate to Plaintiff owing to the Defendant's infringing activities. He further states that quantum of damage could be based on loss incurred by the Plaintiff or the profits made by the Defendants or both. Learned counsel for the Plaintiff has also laid stress on the averments made by the Defendants in the written statement where the Defendants have admitted that they have been using the trademark of the Plaintiff since 8 to 9 years. It is thus urged that the Court should take cognizance of the conduct of the Defendants and should award aggravated and punitive damages to create a deterrence, which would also discourage other infringers. Plaintiff has prayed for damages of over Rs. 1 crore stating that the illegal and infringing activities of the Defendants for 8 to 9 years would have generated profit of Rs. 5000/- per day.

30. Although the Plaintiff may be correct in submitting that there may not be any precise calculation for estimation of the profits on account of illegal activities such as those practiced by the Defendants, but the

court would not like to lose sight of the fact that the Plaintiff has not led any evidence with respect to the quantum of damages suffered by the Plaintiff. The plaintiff in its evidence has just stated as under:-

“46. I am advised to say that the Plaintiff has no control over the quality of the products being offered by the Defendants under the various registered trademarks of the Plaintiff and therefore apprehend that due to the Defendants’ activities, it will in all probability incur huge loss of goodwill and reputation in respect of its registered trademarks which would be incalculable and irreparable. I say that for the purpose of the present suit, the damages are computed at Rs 20,00,000/-, I am further advised to say that the Plaintiff has based this claim on the following factors:

(i) Actual illegal and unfair profits earned by the Defendants on passing of their products as that of the Plaintiffs;

(ii) Damage to Plaintiffs enormous reputation and goodwill as a result of the abovementioned use of the trademarks of the Plaintiff especially as the Plaintiff has no control over the products being offered by the Defendants. Any defect that customers and members of trade may find with the Defendants' products will be attributed to the Plaintiff;

(iii) The various trademarks of the Plaintiff are 'well-known' and world famous and the illegal / infringing activities of the Defendants are bound to lead to dilution of these trademarks of the Plaintiff both by "blurring" (lowering of the distinctive value) and "tarnishment" (casting an unflattering light), there by diluting and diminishing overall distinctiveness, effectiveness and prestigious connotations of the trademarks of the Plaintiff.

(iv) Loss of the confidence or trust of the Plaintiffs consumers in services offered by the Plaintiff under their trademarks as a result of the low quality of products being offered by the Defendants; The legal costs already incurred

till date by the Plaintiff in the present proceedings, which based on the records of the Plaintiff totals to a sum of around Rs. 11,95,000/-. Since filing of the present proceeding was necessitated by the infringing used by the Defendants of the Plaintiff well known and registered trademarks, an award of payment of such costs incurred by the Plaintiff should be awarded in the Plaintiffs favour. I am also advised to say that the Plaintiff undertakes to file further details, if required, as and when directed by this Hon'ble Court.

(vi) Punitive damages may be awarded since there is a flagrant violation by the Defendants of the Plaintiffs rights so as to set an example which may act as a deterrent to others, who may intend to indulge or are indulging in similar infringing and illegal activities.”

31. The reports of the Local Commissioners also does not show the extent of the business operations of the Defendants for the court to arrive at the correct measure to award damages. The Damages have to be proved by the party asserting loss and the same is *sine qua non* for award of damages. The law relating to award of punitive damages has been discussed elaborately by the Division Bench of this court in **Hindustan Unilever Limited Vs. Reckitt Benckiser India Limited**, 2014 (57) PTC 495 [Del][DB]. It would thus be relevant to note the following observations in the said judgment:-

“68. xxx

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With due respect, this Court is unable to subscribe to that reasoning, which flies on the face of the circumstances spelt out in Rookes and later affirmed in Cassel. Both those judgments have received approval by the Supreme Court and are the law of the

land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded.

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Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in *Rookes* (supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in *Rookes* and also following the five principles in *Cassell*. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant's action is so wrong that it has a "criminal" propensity or the case RFA (OS) 50/2008 Page 65 merely falls in one of the three categories mentioned in *Rookes* (to quote *Cassell* again - such event "does not of itself entitle the jury to award damages purely exemplary in character").

32. In fact, this Court in *Super Cassettes Industries Private Limited v. HRCN Cable Network*, CS(COMM) 48/2015 dated 09th October, 2017 has held as under:-

"19. However, this Court is not satisfied on the evidence led in the present case that the compensation awarded is inadequate in the circumstances having regard to the three categories in *Rookes v. Barnard*, [1964] 1 All ER 367 and also the five principles in *Cassell & Co. Ltd. v. Broome*, 1972 AC 1027. In the event punitive damages are awarded in the present case, it would be an ad-hoc judge centric

award of damages, which the Division Bench specifically prohibited in *Hindustan Unilever Limited (supra)*..."

33. The said principles have been reiterated in a recent judgement passed by this Court in the case of ***Flamagas S.A and Ors v. Ojas B. Shah*** CS (COMM) 99/2017 dated 28th November, 2018.

34. It is also apposite to state that I have perused the judgements which have been relied upon by the Plaintiff, wherein punitive damages have been awarded, however, it is pertinent to note that in all those cases, the above-mentioned principles as stated in *Hindustan Unilever Limited (supra)* have not been taken into account. The Plaintiff has relied upon a recent judgement of this Court in the case of ***Whatman International Limited v. P. Mehta & Ors*** reported in 257 (2019) DLT 472, wherein the question of award of damages was considered and the court granted exemplary aggravated punitive damages. In the said judgment the decision of the division bench in *Hindustan Unilever Limited (supra)* has been taken note of. No doubt the court has awarded aggravated and punitive damages, but the same was done on account of special circumstances. A perusal of the facts of the *Whatman (supra)* elucidate, that it is a case wherein the Defendants were infringing the trademark of the Plaintiff for 25 years and inspite of repeated legal action, the acts of the Defendants remained unchanged. The conduct of the Defendant in the said case was found to be glaringly wrong for a period spanning over 25 years. The court thus found it to be a fit case for award of punitive damages recording the reasons for doing so in paras 62-69 and para 72. The facts of the

present case and *Whatman International Limited (supra)* are distinguishable and cannot be relied upon by the Plaintiff.

35. However, certain aspects of the present case cannot escape the attention of the court. First being the reports of the Local Commissioners appointed by this Court who have in their reports uncovered the infringing activities of the Defendants. This proves that Defendants have been indulging in infringing activities. Second, the admission made by the Defendants in the written statement that they have been using the Plaintiff's trademark for last 8-9 years. Third, the Defendants have deliberately stayed away from the proceedings. The conduct of the Defendants is egregious, and calls for the court to draw adverse inference against them. Thus, keeping in view the judgments relied upon by the Plaintiffs and the averments made in the written statement and taking note of the conduct of the Defendants, it can be concluded that the flagrant infringing activities of the Defendants have impinged on the Plaintiff's right. In view of the admission, the Court awards damages to the tune of Rs. 3,50,000/- (three lakh fifty thousand only) in favour of the Plaintiff .

36. As a result of the above discussion and conclusions, the suit is decreed in favour of the Plaintiff and against the Defendants in terms of prayer under paragraph 55 (a) to (d) of the Plaint along with damages of Rs. 3,50,000/- (three lakh fifty thousand only)

37. The present suit is governed by the Commercial Courts,

Commercial Division and Commercial Appellate Division of High Courts Act, 2015 as also the Delhi High Court (Original Side) Rules, 2018. The learned counsel for Plaintiff has filed a statement of cost on behalf of the Plaintiff along with supporting affidavit to the tune of Rs. 9,27,296/- (Nine Lakhs Twenty Seven Thousand Two Hundred and Ninety Six Only). The cost includes lawyers' fees as well as amounts spent on Court fees. Accordingly, the aforesaid cost is awarded to the Plaintiff.

38. Let the decree sheet be drawn up accordingly.

IA No.19174 /2011 (Under Order XXXIX Rules 1 and 2 read with Section 151 CPC)

39. In view of the order passed in the suit, the interim order dated 2nd December 2011 is made absolute. The application is disposed of.

APRIL 03, 2019

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SANJEEV NARULA, J