

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

% **Date of decision: 17th February, 2020**

+ **CS(COMM) 1366/2016**

STEELBIRD HI-TECH INDIA LTD. Plaintiff

Through: Ms. Diva Arora & Mr. Mudit Tayal,
Advs.

Versus

ASIA FIBRE GLASS PRODUCTS & ANR.Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff instituted this suit against Asia Fibre Glass Products, Ghaziabad and A.S. Aslam (presumably proprietor of Asia Fibre Glass Products), for permanent injunction to restrain infringement by the defendants of the registered design of the plaintiff and passing off by the defendants of their helmet as that of the plaintiff and for ancillary reliefs.
2. The suit along with the application for interim relief came up before this Court first on 30th May, 2013, when though summons / notice thereof were ordered to be issued but no *ex parte* relief sought granted.
3. Pleadings were completed. Vide order dated 9th September, 2016, in view of *Mohan Lal Vs. Sona Paint & Hardwares* AIR 2013 Del 143, option was given to the plaintiff to elect whether wanted to maintain this suit as on the ground of infringement of design or on the ground of passing off. Vide the same order, the application of the plaintiff for interim relief was also dismissed. The plaintiff opted to continue the suit as for infringement of design and vide order dated 5th December, 2016, amendment of the plaint

was allowed and the amended plaint taken on record. The defendants though had filed written statement earlier, did not file written statement to the amended plaint and vide order dated 6th December, 2017.

4. The case of the plaintiff as per the amended plaint is, that (i) the defendants were found to be engaged in manufacturing and selling helmets bearing the design identical to the plaintiff's design no.241153; (ii) the subject product of the plaintiff bears novel and distinctive features of shape, configuration and surface pattern; (iii) the registration no.241153 was granted on 1st December, 2011 and subsists; (iv) the shape, configuration and surface pattern of the subject design is distinctive and unique to the plaintiff's helmet; (v) the plaintiff has also obtained registrations of several other designs with respect to designs of helmets, auto accessories etc.; (vi) the plaintiff has been using the helmet under design no.241153 since January, 2012, and has marketed and promoted the said products in India and abroad on a substantial scale; (vii) the plaintiff's product under the subject design has met with substantial success and came to be exclusively identified by members of trade and public in general with the plaintiff and the plaintiff has substantial goodwill and reputation with respect to the subject design; (viii) in the year 2015-16, the plaintiff sold 2,57,139 helmets of the subject design for a total value of Rs.14,01,51,833/-; (ix) the product of the defendants with the design of the plaintiff is known as "Monarch"; and, (x) a bare perusal of the product of the plaintiff with that of the defendants would show blatant copying by the defendants of the plaintiff's design.

5. The defendants contested the suit pleading, that (i) no part of cause of action has accrued within the jurisdiction of this Court; (ii) the registration in favour of the plaintiff is illegal; (iii) the shape of the helmet is commonplace and derived from a combination of known shapes which were pre-existing on the date of registration of design no.241153; (iv) the registration of the design is in contravention of Section 19 read with Sections 4 and 6 of the Designs Act, 2000; (v) there cannot be any scope of monopoly over the shape of the helmet as there are very limited ways of making helmets and hence the shape of the helmet has no peculiarity or originality; (vi) the plaintiff is guilty of delay and laches; the defendants have been carrying on their business for 7-8 years prior to filing the written statement; (vii) the helmets subject matter of the present suit are being manufactured and sold by several other entities since prior to registration of design no.241153 on 1st December, 2011; (viii) the subject shape is common to the trade; (ix) the suit has been filed to arm-twist the defendants who are small time traders, and to eliminate competition; (x) the plaintiff has not shown any loss of business on account of the defendants existence in the market; (xi) the plaintiff on its own had anticipated the subject design by publishing the material of the subject helmet prior to filing the design; (xii) the subject design is not original; and, (xiii) the subject design had been pre-published.

6. Though the plaintiff has filed replication to the written statement aforesaid but the need to advert thereto is not felt.

7. On the pleadings of the parties, the following issues were framed in the suit:

“1. Whether the plaintiff is the registered proprietor of the design of its helmets registered under No.241153 dated 1st December, 2011? OPP

2. Whether this Court does not have the territorial jurisdiction to entertain and try the present suit? OPD.

3. Whether the plaintiff's design of its helmets registered under No.241153 dated 1st December, 2011 is not new, novel and has been prior published before the grant of the said registration? OPD

4. Whether the suit suffers from delay, laches and acquiescence? OPD

5. Whether the defendants' use of the design of a helmet under the mark “MONARCH” which is identical/substantially similar to the plaintiff's prior registered design under No.241153 dated 1st December, 2011 constitutes infringement of the plaintiff's registered design under No.241153 dated 1st December, 2011 and if so, to what effect? OPP

6. Whether the helmet design of the plaintiff has functional components or is purely appealing to the eye? OPD

7. Whether the present suit is barred for lack of sufficient court fee? OPD

8. Relief.”

and the parties relegated to evidence.

8. The plaintiff filed affidavit by way of examination-in-chief of one Vishal Vij and the order dated 17th January, 2019 records that the plaintiff wanted to examine certain other witnesses also. At this stage, the counsel till then appearing for both the defendants sought discharge and was discharged

vide order dated 10th October, 2019 and since none else appeared for the defendants, the matter placed before the Court. On 16th October, 2019, the defendants were ordered to be proceeded against *ex parte* and it was enquired from the counsel for the plaintiff, whether the plaintiff wanted to press the suit for reliefs other than of injunction also. On the counsel for the plaintiff replying in the affirmative, the plaintiff was relegated to leading *ex parte* evidence. The plaintiff has examined Vishal Vij as PW1 and Yogesh Arora as PW2 and closed its *ex parte* evidence. The suit is listed today for final hearing. I have heard the counsel for the plaintiff.

9. The defendants having been proceeded against *ex parte* and having not led any evidence, the issues nos. (2) to (4), (6) and (7), onus whereof was on the defendants, have to be decided against the defendants and in favour of the plaintiff.

10. PW1 Vishal Vij, Group Commercial Manager of the plaintiff examined by the plaintiff, has discharged the onus of issue no. (1) and issue no. (5), which was on the plaintiff.

11. PW2 Mr. Yogesh Arora, Chief Business Development Officer of the plaintiff, on the claim of the plaintiff for damages, has deposed that though no accounts of sales figures of the defendants are on record but taking into consideration that (a) the defendants have been selling the subject helmet for a duration of six years; (b) the manufacturing capacity of the defendants was learnt to be of 500 helmets per day; (c) the defendants having manufactured at least 50 helmets per day of the subject design; and, (d) the price of Rs.720/- per helmet at which the defendants were selling the subject helmets on e-commerce website, the loss of sales to the plaintiff on account of

infringement of design of the helmet by the defendants was in the sum of Rs.6,40,57,500/-. The said witness also deposed of the plaintiff having incurred expenses of about Rs.3,15,000/- in the litigation till then.

12. I have enquired from the counsel for the plaintiff, how the plaintiff can be entitled by way of damages to the entire sale proceeds of the subject helmet from the defendants inasmuch as the said sale proceeds are inclusive of costs of manufacture and sale. The counsel for the plaintiff agrees that the plaintiff would be entitled only to the profits earned by the defendants. On enquiry as to the component of profit in the aforesaid volume of sales, the counsel for the plaintiff states that the element of profit would be to the extent of 15% to 20% of the gross sales and thus would be Rs.96,08,625/- @ of 15% per annum.

13. I am inclined to agree with the counsel for the plaintiff. Though the latter part informed by the counsel has not been deposed by either of the witnesses of the plaintiff but the banks give a return of 7% to 7.5% per annum on fixed deposit and return on company deposits and mutual funds etc. is higher, going upto 25% to 30% per annum. It seems probable that no one would take the risk and headache of carrying on business, if the profit element were to be less than 15% to 20% per annum.

14. I therefore, on the basis of *ex parte* unrebutted evidence of the plaintiff, assess the damages to which the plaintiff is entitled, at Rs.96,08,625/-.

15. The suit thus succeeds.

16. A decree is accordingly passed, in favour of the plaintiff and jointly and severally against the defendants, of (a) permanent injunction in terms of

prayer paragraph 28(a) of the plaint dated 23rd September, 2016; (b) recovery of damages in the sum of Rs.96,08,625/-; and , (c) recovery of costs of Rs.3,15,000/- as deposed by PW2 Yogesh Arora in his *ex parte* evidence to have been incurred by the plaintiff.

Decree sheet be drawn up.

FEBRUARY 17, 2020
'gsr'..

RAJIV SAHAI ENDLAW, J.

