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

+ **CS(COMM) 656/2021**

VST INDUSTRIES LIMITED Plaintiff

Through: Mr. Achutan Sreekumar and Mr.
Rohil Bansal, Advs.

versus

GOLDEN TOBIE PRIVATE LIMITED Defendant

Through: Mr. Amit Gupta and Mr. Shiv
Verma, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (O R A L)

% **15.03.2023**

1. This suit was instituted by the plaintiff against the defendant alleging infringement, by the defendant, of the plaintiff's registered mark "TOTAL", used for manufacture and sale of cigarettes, by the defendant's mark "TOFAL". Accordingly, the plaintiff seeks an injunction against the defendant from using the impugned mark "TOFAL" or any other mark which is deceptively similar to the "TOTAL" mark of the plaintiff. In para 24 of the plaint, the plaintiff has also alleged passing off, by the defendant, of its product as that of the plaintiff as the defendant is using a trade dress which is deceptively similar to the trade dress of the plaintiff.

2. The suit already stands decreed, in respect of the prayer for injunction, by judgement and decree dated 1st August 2022. The only reliefs which remained for consideration were those of delivery up,

damages and costs.

3. The Court *vide* order dated 1st August 2022, therefore, directed the defendant to file an affidavit on the aforesaid aspect and that the matter be relisted for hearing on the remaining aspects.

4. Subsequently, the defendant has filed an affidavit, in which it is contended that, though there were stocks of the allegedly infringing cigarettes present in the defendant's premises, the defendant has effected no sale whatsoever and, therefore, has not earned any profit from the use of the allegedly infringing mark.

5. To a query from the Court as to the pleadings in the suit on the basis of which damages were claimed, Mr. Sreekumar has invited my attention to paras 45 and 46 of the plaint which read thus:

“45. The fraudulent and illegal trade activities of the Defendant are bound to cause incalculable harm and injury to the business, goodwill and reputation associated with the Plaintiff's well-known trademark TOTAL. *All profits earned by the Defendant in pursuance of their infringing activities are the Plaintiff's losses and amounts to unjust enrichment of the said Defendant.* Furthermore, the act of the Defendant of manufacturing and selling cigarettes under the infringing mark TOFAL and even copying the essential features of the Plaintiff's TOTAL packaging and product clearly goes on to show that the Defendant is a deliberate infringer and has zero regards for anyone's rights in their intellectual property and therefore, need to be enjoined from such blatant infringement at the very first instance. The Plaintiff has taken immediate action against third parties and infringers misusing the Plaintiff's well-known TOTAL brand and packaging and previous orders passed by this Hon'ble Court protecting the Plaintiff's said TOTAL brand and packaging is filed in the present proceedings.

46. The damage that has already been inflicted on the business goodwill and reputation of the Plaintiff is incapable of being

calculated. However, for the purposes of the present suit, the Plaintiff has estimated such losses to the tune of at least ₹ 2, 00, 05, 000/- till date. However, the Plaintiff states that given the circumstances of the present case, damages alone would not be an adequate remedy as the injury caused to the Plaintiff's intangible property, to its reputation and goodwill is insurmountable and not capable of being accurately assessed in monetary terms.”

(Emphasis supplied)

6. In para 45 of the plaint, plaintiff has clearly stated that the profits earned by the defendant in pursuance of the infringing activities would be the losses suffered by the plaintiff and would amount to unjust enrichment to the defendant. Inasmuch as the defendant has not sold any cigarettes bearing the infringing mark or trade dress, it cannot be said that the defendant has earned any profits by use of the infringing marks. No specific damages can, therefore, be quantified in the present case.

7. That said, the defendant having resorted to infringement, driving the plaintiff to litigation, the defendant cannot be allowed to entirely escape the responsibility of monetary recompense.

8. Accordingly, the Court quantifies the damages payable by the defendant as ₹ 25,000/-, to be deposited with the Registry by a crossed cheque favouring the Delhi High Court Legal Services Committee (DHCLSC) within a period of eight weeks from today.

9. The defendant is also directed to destroy the labels seized by the learned Local Commissioner within two weeks. During the course of destruction, the plaintiff shall also be entitled to have one of its persons present. The destruction would be conducted in a manner which does not cause any damage to environment. An affidavit testifying to such

destruction of the stock would be filed within a period of four weeks from today.

10. In view of the aforesaid, Mr. Sreekumar does not press the claim for costs.

11. The suit is decreed accordingly.

12. Let a decree sheet be drawn up by the Registry.

13. The plaintiff shall be entitled to refund of Court fees, if any, deposited by it.

C.HARI SHANKAR, J

MARCH 15, 2023

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