



2025:DHC:3897-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RFA(COMM) 271/2025 & CM 12/2025**
MS OXYGUN HEALTH PVT LTD & ORS.....APPELLANTS
Through: Mr. Ram Bhadauria, Adv.

versus

PNEUMO CARE HEALTH PVT LTD & ANR.
.....RESPONDENTS
Through: Ms. Beenashaw N. Soni, Mr.
Arpit Bhargava, Ms. Mansi Jain, Mr.
Abhishek, Ms. Hina Bhargav, Ms. Amrita
Dhawan, Mr. Sarthak Sharma and Ms. Ann
Joseph, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR
HON'BLE MR. JUSTICE AJAY DIGPAUL

JUDGMENT (ORAL)

% **13.05.2025**

C. HARI SHANKAR, J.

1. CS (Comm) 523/2023 was instituted by Pneumo Care Health Pvt Ltd¹ against Oxygun Health Pvt Ltd² and its directors and two other former employees of Pneumo Care, before the learned District Judge (Commercial Court), Rohini³.

2. Pneumo Care alleged, in the suit, that Oxygun had infringed the trademarks HOSPIGRIP and HOSPICUFF, registered in favour of

¹ "Pneumo Care" hereinafter

² "Oxygun" hereinafter

³ "the learned Commercial Court" hereinafter



Pneumo Care under the Trade Marks Act, 1999 as well as Design No. 325003-0001, also registered in favour of Pneumo Care under the Designs Act, 2000. Additionally, it was alleged that, by using identical marks and an identical design, Oxygun, in collusion with Defendants 2 to 5 in the suit – who are Appellants 2 to 5 in the present appeal – was seeking to pass off its products as the products of Pneumo Care. Predicated on these allegations, Pneumo Care sought injunction against the use, by the defendants-appellants, restraining them from using the marks HOSPIGRIP and HOSPICUFF, or Design No. 325003-001 registered in favour of Pneumo Care, or any other identical or deceptively similar trademark or design. Additionally, the suit prayed for rendition of accounts, delivery-up and damages of ₹ 25 lakhs.

3. The learned Commercial Court has, by judgment dated 5 November 2024, decreed the suit in the following terms:

“34. Accordingly, suit of the plaintiff is decreed as under:

(i) A decree of permanent injunction is hereby passed in favour of plaintiff(s) and against the defendant(s) and the defendants by themselves as also through their individual partners/proprietors, directors, agents, representatives, distributors, dealers, assigns, stockist etc., and all others acting for and on their behalf are hereby restrained from manufacturing, selling, using, displaying, advertising, importing/exporting or by any other mode or manner dealing in medical devices including medical and surgical apparatus and instruments, orthopedic articles, limbs restraints and other cognate/allied goods and other cognate/allied goods bearing the impugned marks/labels HOSPIGRIP and design of ankle and wrist restrainer or any other trade mark/label and design of ankle and wrist restrainer identical with or deceptively similar to the plaintiffs’ said trademarks/label HOSPIGRIP and HOSPICUFF and design of ankle and wrist restrainer in



relation to all medical and surgical apparatus and instruments, orthopedic articles, limbs restraints and other cognate/allied goods, thereby infringing plaintiff's registered trade mark HOSPIGRIP and HOSPICUFF; infringement of registered design bearing No.325003-001 in Class 24-04; and doing any other thing, thereby leading to passing off and unfair competition of their goods as those of the plaintiff;

(ii) A decree of damages in the sum of Rs.3,00,000/- (Rupees Three Lakhs Only) is hereby passed in favour of plaintiff and against the defendants jointly and severally;

(iii) The plaintiffs are further entitled to delivery up of all the impugned finished and unfinished material of the defendants bearing impugned marks/label HOSPIGRIP and/or design of ankle and wrist restrainer identical with and deceptively similar to it including blocks and labels, display boards, sign boards, trade literature, advertisement material, wrapper, trade dress, packaging etc. for the purpose of destruction/erasure;

(iv) Plaintiff is also entitled to cost of the proceedings, which includes expenses incurred by the plaintiff in the suit, including photocopying expenses, travel expenses, fees of learned Local Commissioner, fees of learned counsel quantified as Rs.22,000/- and other miscellaneous expenses.”

4. Aggrieved thereby, the defendants in the suit, i.e. Oxygen, its two directors and Defendants 4 and 5, have filed the present appeal before this Court, praying that the impugned judgment be quashed and set aside and the suit filed by Pneumo Care be dismissed.

5. We have heard Mr. Ram Bhaduria, learned Counsel for the appellants and Ms. Beenashaw N. Soni, learned Counsel for the respondents, at length.

The plaint



6. Pneumo Care, in its plaint before the learned Commercial Court, advanced the following submissions:

(i) Pneumo Care was India's leading research and development company dealing with critical care, respiratory and sleep medicine products. It was engaged in the manufacture, trade and marketing of medical and surgical apparatus and instruments, orthopaedic articles, limb restraints and other cognate and allied goods. The word marks HOSPIGRIP and HOSPICUFF stood registered in favour of Pneumo Care w.e.f.⁴ 29 December 2016 in Class 10 for "medical and surgical apparatus and instruments, orthopaedic articles, limb restraints". The registration was valid and subsisting.

(ii) Under the aforesaid marks HOSPIGRIP and HOSPICUFF, Pneumo Care had been manufacturing and selling its goods since 2016. By dint of continuous and uninterrupted use, the marks HOSPIGRIP and HOSPICUFF had become distinctive and acted as source identifiers of Pneumo Care. They had garnered immense goodwill and reputation. A pictorial representation of the design of the Pnuemo Care, which stood registered in its favour for ankle and wrist restrainers, may be provided thus:

⁴ With effect from



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The certificate of registration of Pnuemo Care's design, under the Designs Act, certified that novelty resided in the surface pattern of the ankle and wrist restrainer.

(iii) The ankle and wrist restrainers manufactured and sold by Pnuemo Care under the afore-extracted registered design commanded an enviable market. They were indelibly associated, in the psyche of the consumer public, with Pneumo Care. To vouchsafe its goodwill and reputation, Pneumo Care furnished a tabular statement of its overall sales figures as well as sales figures from the sale of restrainers alone, thus, in the plaint:

Financial Year	Sale figure in lakhs (Amount in ₹)
2017-2018	1280.45
2018-2019	1377.66
2019-2020	1277.68
2020-2021	1961.42
2021-2022	2619.91
Total	8617.12



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Financial Year	Sale figure (Amount in ₹)
2020-2021	40,59,198/-
2021-2022	50,90,977/-
2022-2023	61,32,715/-
TOTAL	1,52,82,890/-

(iv) Appellants 2 and 3 were directors of Oxygun. Appellants 4 and 5 were earlier associated with Pneumo Care. Appellant 4, who was working as General Manager with Pneumo Care, resigned on 7 July 2021 and Appellant 5 Punit Tiwari was terminated *vide* letter dated 6 April 2022.

(v) Oxygun was a company incorporated on 24 November 2020 with the sole aim of diverting the designs of Pneumo Care under the trade mark HOSPIGRIP. In doing so, Oxygun took advantage of the knowledge possessed by Appellants 4 and 5 with respect to Pneumo Care's products and their process of manufacture.

(vi) Shortly prior to the filing of the suit, the appellants had adopted and started using identical and deceptively similar trade marks/labels and designs of the ankle and wrist restrainer, which stood registered in favour of Pneumo Care. A comparison of the rival marks and designs was thus provided in the plaint:

COMPARISON OF THE RIVAL MARKS

Respondent's Trade Mark	Appellant's Trade Mark
HOSPIGRIP	HOSPIGRIP
HOSPICUFF	HOSPIGRIP



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**COMPARISON OF THE DESIGN OF ANKLE AND WRIST
RESTRAINER**

S. No.	Description	Respondent	Appellant
1	Product Name	Hospigrip/Hospicuff	Hospigrip
2	Product Comparison		
			
			
3	Packaging	Printing on White background with black colour	Printing on white background with black colour
4	Product Variants	Two Wrist & Ankle	Two Writ & Ankle
5	Colour	Front-Black Back-Black	Front-Black Back-Brown



6	Locking	Double Locking System Black Connector Anti Lock Velcro	Double Locking System Black Connector Anti Lock Velcro
7	Branding	Position: Middle Lower half of Product STYLE: Fabric tape stitched on either side with product and company logo.	Position: Middle Lower half of Product STYLE: Fabric tape stitched on either side with product and company logo.
8	Outer Lining	Stitched	Stitched

(vii) By the aforesaid acts, Oxygun and the other appellants, in collusion, had infringed and committed piracy of Pnuemo Care's registered trade marks and design and had also sought to pass off their products as the products of Pnuemo Care.

(viii) The exact averments in this regard, as contained in the plaint, may be reproduced thus:

“26. That to the knowledge of the Plaintiffs, Defendant no. 1 is a company incorporated under Indian Companies Act, and defendant nos. 2 & 3 are the directors of the defendant no. 1 company. The defendant no. 4 and 5 are acting in collusion with defendant nos. 2 & 3 and to the knowledge and belief of the plaintiffs, defendant nos. 2 & 3 are the family members of the defendant nos. 4 & 5. Defendant Nos. 4 & 5 have been associated with the plaintiff no. 1 company. The defendant no. 4. Vikram Singh has been working as General Manager and has resigned from plaintiff no. 1 company on July 7, 2021 and the



defendant no. 5. Punit Tiwari has been terminated vide letter dated April 6, 2022 pursuant to the breach of terms of appointment dated December 7, 2015.

27. That the defendant no. 1 company has been incorporated on 24.11.2020 with a view to divert the business of plaintiffs under the trademark HOSPIGRIP. The DEFENDANTS herein after means and includes all the defendant nos 1, 2, 3, 4 & 5 unless the context otherwise specially requires to be mentioned. However the plaintiffs do not exactly know the whereabouts of the defendants and their inter se relation and the defendants are called upon to disclose the same upon causing appearance and the plaintiffs seek leave of the Hon'ble Court to amend the plaint upon discloser made by the defendants.

28. That the defendant nos. 4 & 5 have been associated with the plaintiff No. 1 company and has been the mouthpiece of the plaintiff no. 1 company in any workshop, seminar and promotional activities. They have been aware of the nitty-gritty, nuances, know-how and business modes of plaintiff no. 1 company. The public at large and customers of the plaintiff no. 1 company always associate the defendant no. 4 & 5 with the plaintiff. The defendant no.4 & 5 joined hands with defendant no. 1, 2 and 3 in order to encash and ride piggy back to the goodwill and reputation of the plaintiff no. 1 company in relation to the said trademark and design of ankle and wrist restrainer. The defendant nos. 4 & 5 associate themselves with the plaintiff no.1 in order to earn illegally and the impugned and illegal infringing activity of the defendants have caused and has been causing great loss to the plaintiffs.

29. That the defendant has adopted an infringing design in respect of identical similar product i.e. ankle and wrist restrainer which is identical similar with plaintiff's registered design of ankle and wrist restrainer and also using registered trademark "Hospigrip" of the plaintiff. The Defendants are marketing and trading the identical products/goods at various locations and displaying the same products by false representation as their own design and innovation thereby are causing loss and damages to the business, goodwill and distinctiveness of aforesaid well known registered design and trademark of the Plaintiff.

30. That defendant no.1 has been incorporated on 24.11.2020 and is involved in manufacturing and trading of various medical devices including medical and surgical apparatus and instruments, orthopedic articles, limbs



restraints and other cognate/allied goods (hereinafter referred to as the said goods) and adopted the ankle and wrist restrainer (hereinafter referred as impugned design) which is identical / similar with plaintiff's registered design of "ankle and wrist restrainer". The defendant has adopted and commercially started using the identical mark HOSPIGRIP (herein after referred to as impugned trademark) which is identical to the said trademark HOSPIGRIP of the plaintiff. The representation of impugned trademark and design are filed herewith. The plaintiff has also caused search in the Register of the Trade Marks and has not found any trademark application filed by the defendants for the registration of the impugned trademark HOSPIGRIP in relevant class for the impugned goods.

31. That the Defendants have very recently adopted and started using identical and deceptively similar trademarks/labels and design of ankle and wrist restrainer in respect of impugned goods and business as mentioned herein above. The Defendants are not the proprietor of the impugned trademarks/labels and design and have no right to adopt or use the same and are doing so without the leave and license of the Plaintiffs. The Defendants have no proprietary rights for the impugned trademarks/label and design in relation to aforementioned impugned goods and business.

32. That the impugned marks labels used by the defendants is identical with and deceptively similar to the said trademarks/ label of the Plaintiffs. They are identical with and deceptively similar in each and every respect including phonetically, visually, structurally, in its basic idea and in its essential features. A comparison of the Plaintiffs and Defendants' trade mark/label and design are juxtaposed herein below⁵:

On juxtaposition of the rival marks/labels and design of ankle and wrist restrainer, it is explicit and apparent that the Defendants have slavishly copied not only the trademarks but also design of ankle and wrist restrainer of the Plaintiffs. It is apparent that the impugned marks/labels and design used by the Defendants are the colorable imitation of the said trademarks/label and design of the Plaintiffs. The Defendants have deliberately copied and/or substantially

⁵ Already reproduced *supra*



reproduced all the features of trademark and design of the plaintiffs. In all probability the impugned trademarks/labels of the Defendants shall be linked with the Plaintiffs and confusion and deception is bound to occur. The impugned trademarks/label and design shall be taken to be that of the trademarks/labels and design of the Plaintiffs.

33. That it is apparent that the Defendants have made a deliberate attempt and taken undue advantage of the Plaintiffs goodwill and reputation, by adopting the impugned marks/label and design only to reap illegal monetary benefits. The Defendants have afforded no plausible explanation for not only adopting of identical marks but also identical designs. The defendant nos 4 & 5 has been well aware of the proprietary rights of the plaintiffs in the trademark/label and ownership of the plaintiffs in the registered design of ankle and wrist restrainer.

34. That the Plaintiffs' business and goods under the said trademarks/labels HOSPIGRIP and HOSPICUF have acquired such goodwill and reputation that it has become distinctive of its products and the Defendants' use of the identical and exactly similar marks/labels HOSPIGRIP for their "impugned products", tends and threatens and will tend to mislead the public to believe that the Defendants business and goods are that of the Plaintiffs. The Plaintiffs said trademarks/labels which are well-known, is being used for the "impugned products" to take undue advantage and benefit of Plaintiffs goodwill and reputation so as to create deception for the public who are likely to buy Defendants' product believing the same as coming from the Plaintiffs' source and is associated with the Plaintiffs in some manner.

35. That the Defendants have no right to adopt or use the impugned marks/labels in any other manner whatsoever including under the law of equity, common law and statutory law in respect of the said business or allied/cognate business or any business at all being in complete violation of the Plaintiffs rights amounting to inter-alia, infringement and passing off of trade mark and design, dilution, falsification and unfair trade practices. Defendants are doing so without the leave and license of Plaintiffs. The Defendants acts/conduct thus constitutes and cause:

- A. Infringement of trademark and Design:
- B. Passing Off:



- C. Dilution:
- D. Unfair Competition
- E. Damages

A. INFRINGEMENT OF TRADEMARK AND DESIGN

36. It is apparent that the impugned mark/label HOSPIGRIP used by the Defendants is the colorable imitation of the trade mark/label HOSPIGRIP and HOSPICUFF for the identical products of the Plaintiffs. The design of the ankle and wrist restrainer used by the Defendants is a fraudulent and obvious imitation of the registered design of the Plaintiffs. In all probability the impugned trademark/label and design used by the Defendants shall be linked with that of the Plaintiffs and confusion and deception is bound to occur. At any rate the impugned counterfeit/infringing products of the Defendants will be taken as the products manufactured and sold by the Plaintiffs.

37. That the impugned design of the ankle and wrist restrainer is identical with and exactly similar to the said design of the Plaintiffs. The imitation of the said trademarks/label by the Defendants are in exactitude and owing to the identical nature of the goods and design, shape and configuration of ankle and wrist restrainer, the likelihood of confusion is much higher, resultantly, the said adoption and use by the Defendants are bound to make the general public, which include the poor patients, believe that the Defendants are somehow connected or affiliated with the Plaintiffs when in fact no such connection or affiliation exists. Thus, by the impugned adoption and user, the Defendants have infringed and also infringing and enabling others to infringe the Plaintiffs proprietary rights in the said trade mark / label HOSPICUFF and HOSPIGRIP.

38. In the instant case, owing to the identical nature of the marks and the goods being identical the likelihood of confusion is much higher, resultantly, the said use by the Defendants are bound to make the general public believe that the Defendants are somehow connected or affiliated with the Plaintiff when in fact no such connection or affiliation exists. Thus, by the impugned adoption and user, the Defendants have infringed and also infringing and enabling others to infringe the Plaintiffs proprietary rights in its said trade mark HOSPIGRIP and/or HOSPICUFF



39. That the impugned goods and business of the Defendants are also of the same/similar nature as that of the Plaintiff. On a bare comparison of the plaintiff's products which is the subject matter of registered design and the defendant's product, it is apparent that the two are identical in all respects and that the defendant has made every effort to imitate the plaintiff's registered design. The use of the same shape, configuration, and pattern is exactly the same and that cannot be a mere coincident.

40. A side by side comparison of the plaintiff's and defendant's products clearly shows that there is no difference between any of the essential features of the plaintiff's registered design and that of the defendant's impugned product design. Therefore, it is evident that the design of the impugned product of the defendant constitutes infringement of the statutory rights that vests in the plaintiff by virtue of the registered design No.325003 – 001 dated 26.12.2019.

41. That the features of the design of the plaintiff's ankle and wrist restrainer has come to be exclusively associated with the plaintiffs product and is recognized by the purchasing public and members of trade and emanating from the plaintiffs only. The said distinctive shape, size and configuration is also a key factor in the customers decision to purchase the product

B. PASSING OFF

42. That the Plaintiffs have acquired distinctiveness and goodwill in their said trademarks/labels connotes distinctiveness, reputation, quality and goodwill acquired by the Plaintiffs over the years and is understood by the consumers as associated with the Plaintiffs only. Defendants adoption and use of the impugned marks/labels is calculated to derive benefit from the reputation and goodwill enjoyed by the Plaintiffs and their products under its said trademarks/labels thereby perpetrating fraud and deception on the unwary customers by passing off their goods and business as those of the Plaintiffs. The trade mark law is not intended to protect a person who deliberately takes the benefit of somebody else's reputation with respect to its goods and business, especially so when the reputation extends worldwide

43. That the Defendants are not the proprietor of impugned infringing marks/label. The impugned adoption and user of the impugned marks/label is an act of sheer



dishonesty on the part of the Defendants and the Defendants have no justification for such dishonest, mala fide and illegal nefarious act.

44. That the impugned adoption and user by the Defendants are dishonest, tainted, mala fide and fraudulent. Defendants adopted and started using the impugned marks/labels in respect of the impugned goods and business out of positive greed and with a view to take advantage and to trade upon the reputation and goodwill of the Plaintiffs and further with a view to calculate confusion and deception in the market and to pass off their impugned goods and business as those of the Plaintiffs and to make easy money at the cost of the Plaintiffs. The Defendants have been fully aware of the Plaintiffs said rights, user and reputation having accrued to in relation to the Plaintiffs said trademarks/label at the time of its impugned adoption and user of its marks/labels as the Plaintiffs are the proprietor of said marks/labels.”

7. Predicated on the aforesaid assertions and allegations, Pneumo Care sought a restraint against Oxygun and other appellants in the terms already set out in para 2 *supra*.

8. Summons in the suit were served on the appellants on 8 August 2023. They filed their written statements, by way of response to the suit, on 1 February 2024. Inasmuch as the written submissions had been filed beyond 120 days from the date of service of summons in the suit, they could not be taken on record, in view of the judgment of the Supreme Court in ***SCG Contracts India Pvt Ltd v K S Chamankar Infrastructure Pvt Ltd***⁶, from which the relevant paragraphs may be reproduced thus:

“8. The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23-10-2015 bringing in their wake certain

⁶ (2019) 12 SCC 210



amendments to the Code of Civil Procedure. In Order 5 Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:

“Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

Equally, in Order 8 Rule 1, a new proviso was substituted as follows:

“Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record.”

This was re-emphasised by re-inserting yet another proviso in Order 8 Rule 10 CPC, which reads as under:

“10. Procedure when party fails to present written statement called for by court.—Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the court, as the case may be, the court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up:

Provided further that no court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement.”

A perusal of these provisions would show that ordinarily a written



statement is to be filed within a period of 30 days. However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order 8 Rule 10 also adding that the court has no further power to extend the time beyond this period of 120 days.

11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught.”

9. As such, the learned Commercial Court, by order dated 16 May 2024, correctly declined to take the written statement of the appellants on record.

10. In the meanwhile, the respondents, as the plaintiffs in the suit, had filed an application under Order VIII Rule 10⁷ of the Code of Civil Procedure 1908⁸, for decreeing the suit in terms of the prayers contained therein, consequent on failure, by the appellants, to file their written statement within a maximum permitted period available under Order VIII Rule 1 of the CPC, as amended by the Commercial Court Act 2015. The learned Commercial Court, therefore, passed the following order on 16 May 2024, declining to take the written

⁷ 10. **Procedure when party fails to present written statement called for by Court.**—Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up

⁸ “CPC” hereinafter



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statement of the appellants/defendants on record and fixed the matter for arguments on the Order VIII Rule 10 application filed by Pneumo Care:

“Present: Sh. Dharmendra Yadav, Ld. Counsel for plaintiff.
Sh. Ram Bhadoriya, Ld. Counsel for defendant through VC.

As per service report, the defendant was served on 08.08.2023 whereas the WS in the matter was filed on 01.02.2024, much beyond 120 days. Therefore, in view of the law laid down by Hon’ble Supreme Court in **SCG Contract India Pvt. Ltd. v K. S. Chamankar Infrastructure Pvt. Ltd. & Ors.**, this court has no power to allow condonation of delay beyond the period of 120 days. The WS, therefore, cannot be taken on record.

List for arguments now on Order 8, Rule 10 CPC on 04.07.2024.”

11. The appellants challenged the aforesaid order before this Court by way of CM(M)-IPD 23/2024⁹. By order dated 28 November 2024, the said CM(M)-IPD 23/2024 was dismissed for non-prosecution.

12. The appellants did not choose to have CM(M)-IPD 23/2024 restored, or to challenge the order dated 28 November 2024. As such, they acquiesced to remaining undefended in the suit.

13. It is in these circumstances that the learned Commercial Court, by judgment dated 5 November 2024, has decreed the suit, in the terms already set out in para 3 *supra*.

The impugned judgment

14. In the impugned judgment, the learned Commercial Court,

⁹ **Oxygen Health Pvt Ltd & Ors v Pneumo Care Health Pvt. Ltd & Anr.**



having noted the facts of the case, has proceeded to decree the suit under Order VIII Rule 10 of the CPC. Apropos the power and authority of the Court to do so, under Order VIII Rule 10 of the CPC, the learned Commercial Court has relied on the judgment of the Supreme Court in **Balraj Taneja v Sunil Madan**¹⁰ and **Asma Lateef v Shabbir Ahmad**¹¹ and the judgments of this Court in **Nirog Pharma Pvt Ltd v Umesh Gupta**¹², **Parsvnath Developers Ltd v Vikram Khosla**¹³, **Kleenoil Filtration India Pvt Ltd v Udit Khatri**¹⁴ and **Indian Performing Rights Society Ltd v Gauhati Town Club**¹⁵.

15. Thereafter, with respect to facts, the learned Commercial Court, after reproducing the comparative table of the products of Pneumo Care and Oxygun, has observed and held as under:

“22. The comparison of the products as tabulated above clearly and unerringly suggest that the defendants have dishonestly adopted the impugned trademark/label ‘HOSPIGRIP’, which is visually, structurally and deceptively and confusingly similar to plaintiff’s registered trademarks ‘HOSPIGRIP and HOSPICUFF’ in respect of identical goods which creates the same commercial impression. It is further evident that from the aforesaid action, the defendants have strained every nerve to pass off their products as those of the plaintiff’s products by adopting visually, structurally and phonetically identical trademarks, trading name, packaging, trade dresses, etc. of the plaintiff’s products, which in all probability is likely to confuse and deceive the consumers, thereby causing immense and irreparable harm to the plaintiff’s goodwill and reputation as also pose a risk to the safety, health and well being of the consumers.

23. I further find substance in the submissions of learned counsel for the plaintiff that instant is also a case of dilution and

¹⁰ (1999) 8 SCC 396

¹¹ (2024) 4 SCC 696

¹² 2016 SCC OnLine Del 5961

¹³ Judgment dated 3 March 2021 in CS (Comm) 618/2019

¹⁴ 2023 SCC OnLine Del 18

¹⁵ 2013 SCC OnLine Del 382



unfair competition as the defendants' activities are whittling away and eroding the distinctive character of the plaintiff's trade marks/logos HOSPIGRIP and HOSPICUFF.

24. The defendants cannot be allowed to piggy bag upon the reputation of plaintiff. The Hon'ble High Court of Delhi in a case involving somewhat similar facts, i.e ***The Tata Iron & Steel Company Ltd. v Mahavir Steels & Ors.***¹⁶, has been pleased to hold asunder:

14.An imitation remains an imitation whether it is done by one or by many. It acquires no legitimacy. A wrong is not righted by the following it musters. Infringement of trade mark by a trader cannot be justified on the ground that there are others like him who are doing the same. There is a growing tendency to copy the trade marks to cash upon someone else's business reputation. The pirates of trademarks are like parasites clinging to others for their growth. Imitators of trade marks have the sole object of diverting the business of others. This tendency must be curbed in the interest of the trade and the consumers.

25. Further in case reported as, "CS (Comm.) No.126/2022", titled as, ***M.L Brother LLP v Mahesh Kumar Bhuralal Tanna***¹⁷ the Hon'ble High Court of Delhi has been pleased to lay down that Local Commissioner's report can be read in evidence in terms of Order XXVI Rule 10(2) CPC. For ready reference, the said observations are re-produced as under:

10. Order 26 Rule 10 (2) CPC stipulates that the report of the Commissioner and the evidence taken by the Commissioner shall be evidence in the suit and shall form part of the record. The said provision reads as under:

10. Procedure of Commissioner.— (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

¹⁶ 1992 SCC Online Del 122

¹⁷ MANU/DE/1721/2022



(2) Report and depositions to be evidence in suit. Commissioner may be examined in person.—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.”

11. In *Levi Strauss & Co. v Rajesh Agarwal*¹⁸, this Court examined the said provision and held that once the Commissioner has filed the evidence along with his report, it becomes evidence in the suit itself. Under Order 26 Rule 10(2) CPC it is not mandatory to examine the Commissioner to admit the report of the Commissioner as evidence in the suit. The relevant observations are as under:

8. The Local Commissioner is in fact a representative of the Court itself and it is for this reason that Order 26 Rule 10 (2) of CPC clearly provides that once the Commissioner has filed the evidence along with his report the same shall be treated as evidence in the suit and shall form part of the record.

10. The rationale behind Order 26 Rule 10 (2) of CPC is clear i.e. the Commissioner is appointed as a representative of the Court and evidence collected by the Commissioner along with the report of the Commissioner would be evidence in the suit, subject to any objection raised by any party. If any party has any objection to Commissioner's report or to the evidence, such party has an option to examine the Commissioner personally in open Court. Such examination is however, neither compulsory nor required especially in cases where the party does not challenge the report. In the present case, a perusal of the written statement filed by the Defendant clearly reveals that the Defendant does not challenge the Commissioner's report. Para of the written statement is set out below...”

¹⁸ 2018 SCC OnLine Del 6421



12. This position of law has been reiterated by this Court in **Vinod Goel v Mahesh Yadav**¹⁹ wherein the Court observed as under:

“7. It is the settled proposition in law that when a Commissioner is appointed, he acts as the officer of the Court and it is not necessary for the Commissioner to be examined. This is clearly laid down by the Supreme Court in **Misrilal Ramratan & Ors. Mansukhlal & Ors. v A.S. Shaik Fathimal & Ors.**²⁰, wherein the Court held as under:

“It is now settled law that the report of the Commissioner is part of the record and that therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case.”

8. Even this Court, recently in **Levis Strauss**, held as under

“11. The rationale behind Order 26 Rule 10 (2) of CPC is clear i.e. the Commissioner is appointed as a representative of the Court and evidence collected by the Commissioner alongwith the report of the Commissioner would be evidence in the suit, subject to any objection raised by any party. If any party has any objection to Commissioner’s report or to the evidence, such party has an option to examine the Commissioner personally in open Court. Such examination is however, neither compulsory nor required especially in cases where the party does not challenge the report.”

9. Mr. Prag Chawla clearly concedes that there may be no requirement to examine the Local Commissioner once the Commissioner is appointed by a Court.

10. Under these circumstances, since the Commissioner had visited the suit property and had submitted the report, it is deemed appropriate that

¹⁹ 2018 SCC OnLine Del 9497

²⁰ 1995 Supp (4) SCC 600



the matter is remanded back to the Trial Court to decide the matter afresh after taking into consideration the report of the Local Commissioner, Mr. Y.D. Nagar dated 5th January, 2000 in Suit No.2198/1999.

13. In view of Order 26 Rule 10(2) CPC and the judgments discussed above, the settled legal position that emerges is that the report of the Local Commissioner can be treated as evidence in the suit where it is not challenged by any party. ***Accordingly, in the present case the report of the Local Commissioner and the contents therein can be relied upon by the Court as evidence as the same is unchallenged.***

(underlining which is mine emphasized)

27. In case reported as, ***Aktiebolaget Volvo***, the Hon'ble High Court of Delhi has been pleased to observe as under:

10. At the hearing on 19th April, 2023, the counsels for the defendants on instructions submitted that the defendants were agreeable to a decree of permanent injunction being passed against the defendants. Counsel for the plaintiffs also pressed for costs and damages of Rs.10,00,000/- to be apportioned between the defendants.

17. I am of the opinion that no purpose would be served by directing the plaintiffs to lead evidence by filing examination-in-chief by way of affidavit. The defendants have no reasonable prospect of succeeding in the present suit. Therefore, in my opinion, this is a fit case where a Summary Judgment in terms of Order XIII-A of the CPC, as applicable to commercial disputes of a specified value, read with Rule 27 of the IPD Rules, deserves to be passed in favour of the plaintiffs and against the defendants.

28. The Hon'ble High Court, thereafter in paragraphs No.22



and 23 of the aforesaid judgment has been pleased to lay down as under:

22. Clearly, the customers are being misled by the defendants and the entire effort is deliberate and dishonest. This amounts to dilution of the reputation and goodwill of the plaintiffs' marks and causing loss to the plaintiffs in business and reputation. The members of the public are bound to confuse bicycles manufactured and sold by the defendants under the mark VOLVO as emanating from the plaintiffs. The defendants have been making unlawful gains at the expense of the plaintiffs. I am convinced that this is not a case of innocent adoption by the defendants. The Court cannot ignore such flagrant misuse of the plaintiffs' marks by the defendants. Even though the claim of the plaintiffs for damages, based on the recoveries made at the premises of the defendant no.2 and the invoices placed on record, is close to Rs.20,00,000/-, I deem it appropriate to award a sum of Rs.10,00,000/-towards damages and costs to the plaintiffs.

23. Taking into account that the defendants no. 3 and 4 are the manufacturers and suppliers of the aforesaid goods and the defendants no.1and 2 were selling the goods supplied by the defendants no.3 and 4, out of the aforesaid amount, the defendants no.3 and 4 shall be liable to pay Rs.6,50,000/- in favour of the plaintiffs and the defendants no.1 and 2 shall be liable to pay Rs.3,50,000/- in favour of the plaintiffs.

29. After considering the facts and circumstances of the case in totality, I am of the considered opinion that there is no real prospect of defendant(s) succeeding in proving their defence because of the aforesaid discussion and also the fact that the written statement is not on record. No useful purpose would be served by allowing the proceedings to meander mindlessly in Court and to clog the justice delivery system. Therefore, in my opinion, present is a fit case where the Summary Judgment in terms of Order VIII Rule 10 CPC, as applicable to commercial disputes, deserves to be passed in favour of the plaintiff and against the defendant.

30. Considering the present case on the touchstone of the law laid down in the above referred judgments, I find that no useful purpose would be served, firstly by framing the issue with regard to grant of



damages & cost and then asking the plaintiff to lead evidence in the matter. I am further of the considered opinion that there is no defence available on record on part of defendant(s) which debars the plaintiff from claiming decree in the matter, as there is no real prospect of the defendant(s) successfully defending their claim.

31. As regards the damages claimed for by the plaintiff, it is noted that The Delhi High Court Intellectual Property Rights Division Rules, 2022 provide guidance on the manner in which the damages could be calculated in such cases. Rule 20 of the IPD Rules, 2022 is set out below:

“20. Damages/Account of profits: A party seeking damages/account of profits, shall give a reasonable estimate of the amounts claimed and the foundational facts/account statements in respect thereof along with any evidence, documentary and/or oral led by the parties to support such a claim. In addition, the Court shall consider the following factors while determining the quantum of damages:

- (i) Lost profits suffered by the injured party;
- (ii) Profits earned by the infringing party;
- (iii) Quantum of income which the injured party may have earned through royalties/license fees, had the use of the subject IPR been duly authorized;
- (iv) The duration of the infringement;
- (v) Degree of intention/neglect underlying the infringement;
- (vi) Conduct of the infringing party to mitigate the damages being incurred by the injured party; In the computation of damages, the Court may take the assistance of an expert as provided for under Rule 31 of these Rules.

32. Further, on the aspect of damages, *Koninlijke Philips and Ors. v Amazestore & Ors.*²¹, the Hon’ble High Court of Delhi has been pleased to lay down certain standards for grant of damages in following terms:

“41. Keeping in view the aforesaid, this Court is of the view that the rule of thumb that should be followed while granting damages can be summarized in a chart as under:—

²¹ 260 (2019) DLT 135



#	Degree of malafide conduct	Proportionate award
(i)	First time innocent infringer	Injunction
(ii)	First-time knowing infringer	Injunction + partial costs
(iii)	Repeated knowing infringer which causes minor impact to the plaintiff	Injunction + costs + partial damages
(iv)	Repeated knowing infringer which causes major impact to the plaintiff	Injunction + costs+ compensatory damages
(v)	Infringement which was deliberate and calculated (gangster/scam/mafia) + wilful contempt of Court	Injunction + Costs + Aggravated damages (compensatory + additional damages)

42. It is clarified that the above chart is illustrative and is not to be read as a statutory provision. The Courts are free to deviate from the same for good reason.”

33. (i) It is a matter of record that the learned Local Commissioner had seized following infringed goods:

- (a) 40 pc sheets of stickers (three sticker in each sheet) of HOSPIGRIP;
- (b) 29 pc Ankle Restrainer HOSPIGRIP;
- (c) 62 pc Wrist Restrainer HOSPIGRIP;
- (d) 4 pc Restrainer Design HOSPIGRIP;
- (e) 3 pc stamps of M/s Oxygun Health Pvt. Ltd.;

(ii) In her report dated 09.08.2023, the learned Local Commissioner has not mentioned the monetary value of the infringed goods seized from the premises of defendant(s), however, the plaintiffs have claimed damages @ Rs.25,00,000/- (Rupees Twenty Five Lakhs Only). The learned counsel for the plaintiff has failed to give suitable explanation as to on what basis he is claiming damages @ Rs.25,00,000/-, however, taking a holistic view of the matter vis-a-vis provisions as laid down under Rule 20 of the IPD Rules, 2022 and applying the ratio of law laid



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down by Hon'ble High Court of Delhi in case of **Koninlijke Philips**, I am of the considered opinion that grant of damages @ Rs.3,00,000/- to the plaintiff would meet the ends of justice. I order accordingly.”

16. Oxygun, and other defendants in the suit, have appealed to this Court against the aforesaid decision.

Rival contentions

17. Mr. Bhadauria, learned Counsel for Oxygun, did not choose to advance any submission on the aspect of infringement or passing off. The only submissions advanced by him were, firstly, that on account of disuse, the trademark asserted by Pneumo Care had died, and could not constitute a basis for infringement action (for which he cited the judgments rendered by the Division Benches of this Court in **Veerumal Praveen Kumar v Needle Industries (India) Ltd.**²² and **Fedders Lloyd Corporation Ltd. v Fedders Corporation**²³); secondly, that as the Pneumo Care had not suffered any loss as a result of the alleged infringing actions of Oxygun, it could not sustain any claim for actual damages and damages, if at all, had to be nominal; and, thirdly, that in respect of Appellants 4 and 5, Pneumo Care had not identified any independent role in the alleged infringement and passing off and therefore, no damages could be levied on the said appellants.

18. Responding to Mr. Bhadauria's submission, Ms. Beenashaw N. Soni submits that once the appellants' written statement have been

²² 93 (2001) DLT 600 (DB)

²³ 119 (2005) DLT 410



struck off the record, and the challenge to the said decision had also been dismissed for non prosecution, the appellant could not be heard to contend that Pneumo Care's asserted trademark had died on account of non-user. She submits that, once Mr. Bhadauria had not chosen to advance any submission on the aspect of infringement and passing off, the appeal had necessarily to fail.

19. She further points out that the decision in ***Balraj Taneja*** was also noted and considered by the learned Commercial Court while passing the impugned order.

Analysis

20. For the following reasons, we are not inclined to entertain the present appeal.

21. Re. plea of non-user

21.1 The first contention of Mr. Bhadauria is that the respondents could not have sued for infringement as the trademark asserted by them had become invalid for non-user. A submission of non-user is a submission of fact, which has to be pleaded. Inasmuch as the written statement filed by the appellant was struck off the record, as having been filed beyond the statutory limitation provided in Order VIII Rule 1 of the CPC, as amended by the Commercial Courts Act 2015, and CM(M)-(IPD) 23/2024, preferred against the said order was also dismissed by this Court for non-prosecution which was never challenged further, the appellants have themselves acquiesced to



having no defence on their behalf on record in the proceedings. As such, there is no assertion on affidavit by the appellants, much less any evidence, to the effect that the asserted mark of the respondent had become invalid on account of non-user. This is an assertion of fact, which could be countenanced only if it was supported by evidence. In the absence of any evidence, this contention cannot be sustained. Far less can it constitute a basis to interfere with the impugned order.

21.2 The respondent has, in the plaint, on the other hand, specifically pleaded user of the asserted HOSPIGRIFF and HOSPIGRIP marks thus, in paras 11, 13, 15 to 17, 19 and 21 to 25 of the plaint, thus:

“11. Trademarks HOSPIGRIP & HOSPIGRIFF: That Plaintiff No. 1 has adopted the trademark HOSPIGRIP & HOSPIGRIFF in the year 2016 in respect of the said goods. Both the Plaintiffs are using the same in the course of trade and business in respect of above-mentioned goods since 2016 and have been using the same since then upto the present time. The said trade mark HOSPIGRIP & HOSPIGRIFF adopted for the aforesaid goods is very distinctive and has earned immense goodwill and reputation.

13. The Plaintiffs have been using the same in the course of trade and business in respect of above-mentioned goods since 2016 upto the present time. The registration of the trademarks/labels HOSPIGRIP & HOSPIGRIFF is the testimony of the same being inherently distinctive. The said trademarks/labels adopted for the aforesaid goods are very distinctive and has earned immense goodwill and reputation.

15. That the Plaintiffs have been using then said trademarks/labels as proprietor thereof continuously, commercially, openly, exclusively and to the exclusion of others, in the course of trade without any interruption or interference from any corner whatsoever.



16. That the products of the Plaintiffs are based on intensive research to make life easier for care givers and patients, and are known for their good quality, unique and eye-catching style of branding and packaging. The products of the Plaintiffs and his authorized trademark licensees are very popular and on high demand among different classes of customers. The Plaintiffs deal in a wide range of medical devices and products.

17. That on account of such extensive use the trademark label and design have attained the designation of being a well-known mark as defined under the Trade Marks Act and thus any adoption or use of the mark and design or any of deceptively similar mark / design in relation to identical and or similar goods will not only cause confusion and deception to the public but will also be contrary to the protection required to be afforded to a well-known mark, dilute its image and be generally misleading to the general public, consumers and members of the trading community.

19. That the Plaintiffs are the proprietor, prior user of its trade marks/labels and design/shape of the restrainer. The said business being carried on by the Plaintiffs under its said trademarks/labels with unique design is very extensive one and the goods and the business thereunder are being practically sold and distributed in all parts of India. The Plaintiffs are expanding its business in other countries also under its said trademarks/labels. The said goods and business thereunder are identified as exclusively originating from the Plaintiffs source and are identified with the Plaintiffs. The said trademarks/label has already become distinctive and associated with the Plaintiffs and Plaintiffs' said goods and business on account of its long, continuous, extensive and exclusive user thereof.

21. That the Plaintiffs' goods and business under its said trademarks labels and design of ankle and wrist restrainer has acquired tremendous goodwill and envious reputation in the market and the Plaintiffs have already built up a handsome and valuable trade thereunder. The Plaintiffs under the said trademarks/label has already commanded handsome sales since its said adoption and user. The Plaintiffs are also supplying its goods under the said trademarks/label in the other countries. The copies of the sale invoices are filed herewith.

22. That the goods under the said trademarks/label are highly



demand in the markets on account of standard quality and precision. The public at large associates the said trademark/label and design of ankle and writ restrainer with the said goods of Plaintiffs and Plaintiffs have been using the said trade mark/label exclusively and to the exclusion of others. Plaintiff's said goods and its business is wholly dependent on the goodwill and reputation of the said trademark/label. Plaintiffs have built up a valuable trade under the said trademarks/label. Sale figure of the Plaintiff are tabled herein below:

TURN-OVER OF PLAINTIFF NO. 1

Financial Year	Sale figure in Lacs (Amount in Rupees)
2017-2018	1280.45
2018-2019	1377.66
2019-2020	1277.68
2020-2021	1961.42
2021-2022	2619.91
Total	8617.12

TURN-OVER OF PLAINTIFF NO. 1 FOR RESTRAINER

Financial Year	Sale figure (Amount in Rupees)
2020-2021	40,59,198/-
2021-2022	50,90,977/-
2022-2023	61,32,715/-
TOTAL	1,52,82,890/-

23. That the Plaintiffs have widely advertised the said trade mark/label. Plaintiffs have been continuously promoting its business of said goods under its said trademarks/labels and the said design through different media and modes such as advertisement in newspaper, trade magazines, and distribution of trade literatures and trade novelties. The Plaintiffs, as such, have already spent a substantial sum of money on the publicity of the said trademarks/label and design and in consequence thereof the said trademarks/labels and design enjoys indelible, enviable, solid,



enduring and first class reputation in the markets

24. That the Plaintiffs' said trademarks/label has already become distinctive *indicium* of the Plaintiffs and the Plaintiffs said goods and business there under. The said trademarks/labels of the Plaintiffs have acquired secondary significance denoting the said goods and business of the Plaintiffs and it is globally recognized with the Plaintiffs source alone. It has become universally synonymous with the goods and business of the Plaintiffs in consequence thereof the Plaintiffs' said trademarks/label have become distinctive and well known trademarks/label within the meaning of Section 2 (1) (zg) and also relevant provisions including section 11 of the Trade Marks Act, 1999 and is liable to be protected. The Plaintiffs trademarks/label and design of ankle and wrist restrainer has enjoyed the well known status among the public since its adoption.

25. That the Plaintiffs are working towards achieving excellence in each of the work processes handled by the Plaintiffs, the customer-centric work policy guides the Plaintiffs to successfully matchup with the demand of a wide range of goods. The products/goods made available by the Plaintiffs at competitive prices, are highly demanded by the customers. The Plaintiffs' trademarks/label has acquired tremendous goodwill and reputation in India. Its reputation is for high quality products."

These averments have gone un rebutted, for want of any written statement. The plea that the asserted marks have become invalid or incapable of assertion for non-user, therefore, cannot be pleaded by the appellants in appeal.

21.3 Besides, we may also note that, in the Trade Marks Act, there is no provision which disentitles the proprietor of a registered trade mark from seeking relief against infringement, which is a right sanctified by Section 28(1)²⁴ of the Trade Marks Act, on the ground that the mark has not been used, or substantially used by the proprietor of the

²⁴ **28. Rights conferred by registration.**—(1) Subject to the other provisions of this Act, the registration of a trade mark shall, if valid, give to the registered proprietor of the trade mark the exclusive right to the use of the trade mark in relation to the goods or services in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark in the manner provided by this Act.



registration. Section 28(1) does not make the right to seek relief against infringement dependent on user of the mark. In ***Midas Hygiene Industries (P) Ltd v Sudhir Bhatia***²⁵, the Supreme Court held that it was “well settled” that “in cases of infringement of trade mark or copyright, normally an injunction must follow”. “Infringement”, as defined in Section 29 of the Trade Marks Act, solely requires the allegedly infringed mark to be *registered*, not *used*. The limits on the effect of a registered trade mark are contained in Section 30, and non-user of the mark is not one of the circumstances envisaged in that Section either. In ***Renaissance Hotel Holdings Inc. v B. Vijaya Sai***²⁶, the Supreme Court held thus, after referring to earlier decisions on the point:

“52. It could thus be seen that this Court again reiterated that *the question to be asked in an infringement action is as to whether the defendant is using a mark which is same as, or which is a colourable imitation of the plaintiff's registered trade mark*. It has further been held that though the get-up of the defendant's goods may be so different from the plaintiff's goods and the prices may also be so different that there would be no probability of deception of the public, nevertheless even in such cases i.e. in an infringement action, *an injunction would be issued as soon as it is proved that the defendant is improperly using the plaintiff's mark.*”
(Emphasis supplied)

Despite the reliance on the judgment in ***Veerumal***, therefore, it remains doubtful whether the Court can, in the case of infringement of a trade mark of which the registration is subsisting and valid, enter into the issue of commercial use of the mark while examining a plea of infringement.

²⁵ (2004) 3 SCC 90

²⁶ (2022) 5 SCC 1



21.4 Non-use, moreover, is envisaged, in Section 47(1)²⁷ of the Trade Marks Act, as a ground on which, on application, the mark can be taken off the register of trade marks. Once the Trade Marks Act, as the governing statute, envisages a statutory consequence of non-use, we have our doubts as to whether any other consequence of non-use can be fashioned by judicial fiat. The only consequence of non-use, envisaged in the Trade Marks Act, is removal of the mark from the register of Trade Marks. That, again, cannot be a *suo motu* exercise by the Registrar of Trade Marks, but has to be on an application made by an aggrieved person. It goes without saying that, if such an application were to be made, the mark would not be removed from the register without the proprietor of the mark being given a prior opportunity of hearing. Pending culmination of this exercise, the mark would continue to remain a validly registered mark, and would be entitled, in view of Section 28(1) as well as the law laid down by the Supreme Court in, *inter alia*, ***Midas Hygiene*** and ***Renaissance***

²⁷ 47. **Removal from register and imposition of limitations on ground of non-use.** –

(1) A registered trade mark may be taken off the register in respect of the goods or services in respect of which it is registered on application made in the prescribed manner to the Registrar or the High Court by any person aggrieved on the ground either—

(a) that the trade mark was registered without any bona fide intention on the part of the applicant for registration that it should be used in relation to those goods or services by him or, in a case to which the provisions of Section 46 apply, by the company concerned or the registered user, as the case may be, and that there has, in fact, been no bona fide use of the trade mark in relation to those goods or services by any proprietor thereof for the time being up to a date three months before the date of the application; or

(b) that up to a date three months before the date of the application, a continuous period of five years from the date on which the trade mark is actually entered in the register or longer had elapsed during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods or services by any proprietor thereof for the time being;

Provided that except where the applicant has been permitted under Section 12 to register an identical or nearly resembling trade mark in respect of the goods or services in question, or where the Registrar or the High Court, as the case may be, is of opinion that he might properly be permitted so to register such a trade mark, the Registrar or the High Court, as the case may be, may refuse an application under clause (a) or clause (b) in relation to any goods or services, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, bona fide use of the trade mark by any proprietor thereof for the time being in relation to—

(i) goods or services of the same description; or

(ii) goods or services associated with those goods or services of that description being goods or services, as the case may be, in respect of which the trade mark is



Hotel. Veerumal, we may observe, does not notice Section 47.

21.5 Squatting on a trade mark, after getting it registered, without using it, is, no doubt, unwholesome and to be deprecated. The sequelae must, however, be those which the statutory envisages. It would be open to any party, including one who desires to use an identical mark, to apply to the Registrar of Trade Marks for invalidation of the mark on the ground of non-user, under Section 47. Once it is invalidated, and removed from the register, he is free to use the mark, or any mark similar thereto. Without having the mark removed from the register, however, we are clear in our mind that no one can infringe the mark and, thereafter, plead, as a defence to infringement, that the mark had “died” by non-user. The Trade Marks Act, plainly, does not envisage any such automatic death of a registered trade mark.

21.6 Veerumal, we feel, cannot be regarded as laying down a universal principle that, in every case, an infringer of a registered trade mark can plead, as a defence to infringement, that the trade mark had perished for non-use. **Veerumal** emanated from a suit instituted by Needle Industries²⁸, the respondent before the Division Bench, against Veerumal. In that case, the goods were being sold in India under a licence agreement which came to an end in 1981. As a result, sale of the goods in India *could not have been effected* after 1981. Needle, nonetheless, sought to injunct all other persons from using the asserted mark, merely on the ground of the registration of the mark at a time

registered.

²⁸ “Needle” hereinafter



when the licence agreement was subsisting, and the mark could have been used in India. The only proof of user of the mark in India was for the period 1977 to 1979, when the licence agreement was in existence. Pursuant to the expiry of the licence agreement in 1981, there was no evidence of any use of the mark in India. Needle therefore sought to plead trans border reputation of the mark, but the Division Bench found the evidence insufficient to sustain such a plea. It was in these peculiar circumstances that the Division Bench held that Needle could not maintain a suit for injunction against all others from using the mark, even after the licence agreement had expired in 1981, there was no use of the mark after 1979, and no evidence of trans-border reputation was forthcoming. We may reproduce, in this context, paras 23 and 24 of the report in **Veerumal**, thus:

“23. The primary aspect in our considered view which needs to be examined is the issue relating to the respondents being the registered user of the trademark and whether the allegations of non-use has any effect of the same. The Counsel for the parties have taken us through the documents placed on record. The respondents had filed various documents to show their sales. These are in the form of invoices and other materials. We find force in the submission of learned Counsel for the appellant that the material placed on record shows sales only for a short period of time from 1977 to 1979. *It is an admitted position that the inter se licence agreement between the two respondents did not survive after 1981, which prima facie show that there has been no sales by the respondents after 1981. Though the aspect of global reputation has been mentioned above, as the second issue, it would be pertinent to state at this stage that no material has been placed on record to substantiate this claim of global reputation. The invoices are for a limited period of time and some of the invoices relate to Hong Kong. There is also nothing on record to show any reputation of the goods of the respondents in India in 1960s and 1970s, as observed by the learned Single Judge. Thus we are also unable to agree with the factual finding of the learned Single Judge that there is material on record to show that there were sales by the respondents in India prior to 1981 other than for the period 1977 to 1979.*



24. *In view of the aforesaid factual position what has to be considered is whether the factum of the registration of the trademark in the name of the appellant is sufficient to grant relief in favour of the respondents or whether something more is required.* This has to be considered in view of the submission of learned Counsel for the appellant that the trademark cannot exist in vacuum and in view of their being a non-user of the trademark since 1981, the respondents are not entitled to any protection.”

Veerumal, therefore, turned on peculiar facts and, in our considered opinion, has to be understood as having been rendered in those facts. Indeed, the Division Bench has expressly said so. To interpret ***Veerumal*** has enunciating an absolute principle that an infringer can infringe a registered trade mark of another person, without applying for striking off the trade mark from the register on the ground of non-user and, thereafter, plead, when an infringement action is brought against him, that the mark had died for non user and that, therefore, he was free to infringe it, would, in our view, be entirely incorrect in law.

21.7 Besides, the concept of “use” of a registered trade mark, in the Trade Marks Act, is not limited to commercial exploitation of goods or services bearing the mark. Section 2(2)(c)(i) includes, in the definition of “use” of a mark in the Trade Marks Act, in relation to goods, “a reference to the use of the mark upon, or in any physical *or in any other relation whatsoever*, to such goods”. The understanding of the concept of “use” of the mark, as espoused by Mr Bhadauria, is, therefore, not in sync with the concept of use as understood in the Trade Marks Act.

21.8 In any case, here, as the appellants’ written statements were never filed, they allowed the suit to continue undefended. They



cannot, therefore, contend that the respondent's mark "died for non user".

22. Re. liability of Appellants 4 and 5

22.1 Mr. Bhadauria further submits that, in any event, no liability could attach to Appellants 4 and 5, as there is no evidence led by the respondents, regarding their complicity in the matter. He relies, for this purpose, on the judgment of the Supreme Court in **Balraj Taneja v Sunil Madan**, to submit that, even if a written statement is not taken on the record, the Court cannot straightway proceed to decree the suit without considering the evidence. The statement of the law in this regard, as contained in **Balraj Taneja**, is as under:

"29. As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But *if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks*



fit” used in Rule 10 of Order 8.”

Balraj Taneja has, therefore, to be carefully understood. It recognizes the fact that Order VIII Rule 10 of the CPC empowers the Court, in a case in which the defendant fails to file written statement within the time available therefor, to “pronounce judgment against him” or “make such order in relation to the suit as it thinks fit”. The use of the word “shall” before “pronounce judgment against him” indicates that, ordinarily, the plaintiff would be entitled to a decree in terms of the prayers in the suit on the defendant failing to file a written statement within the time available therefor. **Balraj Taneja** clarifies, towards the conclusion of para 29 extracted *supra*, that the case which would be covered by the concluding caveat empowering the court to “make such order in relation to the suit as it thinks fit” is one in which “the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself”. In such a case, the decision in **Balraj Taneja** clarifies that “it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy”. This “factual controversy” must naturally emerge from the plaint itself, as there is no written statement. Where no factual controversy emerges from the plaint, however, the Court is entirely within its jurisdiction in decreeing the suit in terms of the prayers in the plaint. Para 26 of the decision in **C.N. Ramappa Gowda v C.C.Chandregowda**²⁹ opines, in a similar vein, thus:

“26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the

²⁹ (2012) 5 SCC 265



instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, *if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy.* In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial.”

22.2 In the present case, the plaint of the respondent, as filed before the learned Commercial Court, does not disclose the existence of any disputed issues of fact, as would require leading of evidence to “settle the factual controversy”.

22.3 Moreover, we find that, in the present case, the Court has not merely decreed the suit because no written statement was on record. The Court has proceeded to examine the matter holistically on merits. Having found that a case of infringement and passing off, both of trade mark and design, had been made out, the Court has proceeded to decree the suit and awarded damages. This, therefore, is not a case in which the decision of the learned Commercial Court can be faulted on the anvil of the declaration of the law in ***Balraj Taneja***.

22.4 Besides, we find that the learned Commercial Court has also considered the decision in ***Balraj Taneja*** in para 18 of the impugned judgment, which reads thus:

“18. (i) Further the power and authority of the Courts to straightway decree a suit on the basis of averments made in plaint



in terms of Order VIII Rule 10 CPC, in the absence of a written statement filed by the defendant is well settled by the Hon'ble Supreme Court in case reported as, titled as, "**Balraj Taneja v Sunil Madan**"

(ii) Furthermore, the Hon'ble High Court of Delhi in case reported as, "CS (Comm.) No.618/2019", titled as, "**Parsvnath Developers Limited v Vikram Khosla**" (DOD: 03.03.2021), has been pleased to lay down as under:

9. Having heard the learned counsel for the plaintiff, it is noted that the defendant has not cared to appear before this Court and was proceeded ex parte. The law with regard to Order VIII Rule 10 CPC is clear, which stipulates that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within time permitted or fixed by the Court as the case may be, the Court shall pronounce judgment or make such orders in relation to the suit as it thinks fit and on the pronouncement of same, the decree sheet shall be drawn up. Accordingly, in view of the provisions of order VIII Rule 10 CPC, I proceed to decide the present suit. Further, I am in agreement with the judgments of the Coordinate Benches of this Court as relied upon by the plaintiff in paragraph 8 on the issue that in ex-parte matters no purpose would be served if evidence is directed to be led. There being no written statement filed, the averments in the Plaint being un rebutted, the same are deemed to be correct.

(iii) Recently, the Hon'ble High Court of Delhi in case reported as, "CS (Comm.) No.72/2022", titled as, "**Kleenoil Filtration India Pvt. Ltd. v Udit Khatri & Ors.**" (DOD: 05.01.2023) has been pleased to clear the air regarding power and authority of Court to straightway decree the suit under Order VIII Rule 10 CPC.."

22.5 Even qua the complicity of Appellants 4 and 5, the averments in paras 26 to 28 of the plaint, extracted hereinbefore, have gone untraversed. The appellants cannot, therefore, seek to contend that the learned Commercial Court erred in passing the impugned judgment and decree against them.



23. Re. quantum of damages

23.1 Mr. Bhadauria further submits that, as the respondents have not suffered any loss, as they have not been using the asserted marks, the damages, if any, would have to be nominal.

23.2 We find, from the impugned judgment, that the learned Commercial Court has in fact awarded nominal damages. Though the respondents sought damages of ₹ 25 lakhs, the learned Commercial Court has held that no evidence having been led to justify the damages of ₹ 25 lakhs, nominal damages of ₹ 3 lakhs had been awarded following the law laid down by this Court in *Koninlijke Philips v Amazestore*. This decision follows the principle of “compensatory damages” as against actual damages, where egregious infringement or passing off is found to have taken place. We find no error in the approach of the learned Commercial Court in following the decision in *Koninlijke Philips*, which was binding on it.

23.3 We may note, here, that Mr Bhadauria did not seek, in arguments, to question the correctness of the principle of compensatory damages, as enunciated in *Koninlijke Philips*; ergo, we express no view thereon.

24. Re. merits

24.1 Insofar as the merits of the case are concerned, significantly, not a single argument was advanced by Mr. Bhadauria. He has not sought



to contend, before us, that the case was not one of infringement or passing off. He has restricted his contentions to the technical grounds which have already been noted hereinabove and disposed of.

24.2 On merits, the case is clear as crystal. Oxygun has infringed, and pirated, the registered trade mark and design of Pneumo Care. The products are identical. A pictorial comparison of the products also reveal this. It is obvious that Oxygun is seeking to confuse – rather, deceive – consumers into purchasing its product, believing it to be Pneumo Care’s.

24.3 This, therefore, is a case of rank copying of the registered trade mark and the registered design of the plaintiff, clearly to capitalise on the goodwill of the respondent. The appellant’s conduct is egregious in the extreme. The case, therefore, attracts not only the principles of infringement, but also of passing off.

24.4 The products are used in the health sector and, therefore, the approach of the Court is required to be more stern than usual. If anything, therefore, we feel that the learned Commercial Court has been conservative in its estimate of the damages with which the appellant should be mulcted.

Conclusion

25. For all the aforesaid reasons, we find no cause to interfere with the judgment of the learned Commercial Court.



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26. The appeal is dismissed.

C. HARI SHANKAR, J.

AJAY DIGPAUL, J.

MAY 13, 2025

dsn

Click here to check corrigendum, if any