

(2015) 12 DEL CK 0246

In the Delhi High Court

Case No : I.A. No. 10720/2012, I.A. No. 19935/2014, I.A. No. 15400/2012 and
I.A. No. 40/2013 in CS (OS) 1663/2012

Helamin Technology Holding SA and Others

APPELLANT

Vs

Haribansh Rai and Others

RESPONDENT

Date of Decision : 09-12-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 7 Rule 10

Citation : (2015) 12 DEL CK 0246

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Pravin Anand, Aditya Gupta and Vishnu Rege, Advocates, for the Appellant; Shanmuga Patro and Tarun Kumar, Advocates, for the Respondent

Judgement

Manmohan Singh, J.—By way of this order, I propose to decide the following four pending applications:-

(a) I.A. No. 10720/2012 under Order XXXIX Rule 1 and 2 CPC filed by the plaintiffs;

(b) I.A. No. 19935/2014 under Order XXXIX Rule 4 CPC filed by the defendants for vacation of interim order;

(c) I.A. No. 15400/2012 under Order VII Rule 10 and 11 CPC filed on behalf of the defendants for rejection of plaint;

(d) I.A. No. 40/2013 under Order I Rule 10 CPC filed by the defendants.

2. The plaintiffs have filed the suit for permanent injunction restraining passing off, damages, rendition of accounts and delivery up against the defendants.

3. Brief facts of the case as per the plaint are that the plaintiff No. 1 is a limited Company incorporated under the laws of Switzerland and is the world leader in development, production and marketing of specific scale corrosion inhibitors used

in water-steam and heating circuits/steam generators, warm and hot water networks, boilers, turbines, cooling systems etc. The plaintiff No. 1 began its commercial operations in 1986 when the trademark and the name "HELAMIN" was first used in the course of trade.

4. Plaintiff No. 2 is the wholly-owned subsidiary and the manufacturing and world export branch of plaintiff No. 1 and uses the trademark and trade name HELAMIN under the license from plaintiff No. 1. Plaintiff No. 2 was founded on 11th May, 1989 and is a limited Company incorporated under the laws of France.

5. Plaintiff No. 1 is the pioneer and inventor of a revolutionary polyamines filming technology to prevent scale and corrosion in water- steam cycle systems (turbines included) as well as in cooling systems. The plaintiffs' products serve to form a continuous and hydrophobic protective film on metal surfaces, thus acting as a barrier between water and metal to prevent corrosion.

6. It is stated that the plaintiff No. 1 has a strong international commercial presence in over 40 countries across the world including India and has a leading share in its specific market segment within the global water treatment chemicals market. The plaintiff No. 1's products are sold through an integrated distribution network supported by the plaintiff's international distributors in several countries.

7. It is averred that the plaintiffs have been using the trademarks HELAMIN 906 H and HELAMIN BRW 150 H since the year 1993 and the trademark HELAMIN 90 H-TURB since the year 2002. The plaintiff No. 1's trademark HELAMIN is coined from "Helvetia" (the Latin name for Switzerland) and "Polyamin" which denotes a chemical compound comprising of multiple amino groups.

8. The plaintiff No. 1 had applied for registration of the trademark HELAMIN in India under application No. 1717404 in relation to "chemicals used in industry and chemical products for the protection of metallic surfaces" in classes 1 and 2 respectively, as of 1st August, 2008.

9. It is also averred that as a result of long and continuous use since the year 1986, coupled with extensive sales spanning over a wide geographical area, the trademark/name HELAMIN has acquired tremendous reputation and goodwill amongst the customers and the members of the trade all over the world and has become distinctive of the plaintiffs. The well-known character of the plaintiffs' trademark/name HELAMIN is reflected from the plaintiffs' worldwide consolidated sales turnover from 2000 to 2011 which averaged approximately US\$10,000,000 per year. The worldwide consolidated advertisement expenses for the plaintiff's HELAMIN products from 2000-2011 aggregates to approximately US\$300,000.

10. It is the case of the plaintiffs against the defendants that in 2001, defendant No. 3 began working with Helamin Technology Holding Group (HTHG) as a technical consultant for their UAE market. During his course of employment with the plaintiffs, he had access to confidential information as well as end user

customer know-how and received technical training pertaining to the working and applications of HELAMIN water treatment chemicals.

11. On 28th June, 2001, defendant No. 6 Helamin Impex Pvt. Ltd. was incorporated at the initiative of defendant No. 3 as the CEO. Thereafter, an informal agreement was arrived at between Filtro S.A. (international distributor of plaintiff No. 1 at the time) and defendant No. 6 for supply of samples of original HELAMIN products for the purpose of trial tests only.

12. It is alleged that defendant No. 6 reported additional trials and surreptitiously continued to obtain HELAMIN samples from Filtro S.A. to conduct further trial tests. Defendant No. 7, who is the director of defendant No. 8 i.e H2O Facilities SA left Filtro SA in December, 2006 and had misappropriated and forged letter heads and stamps of Filtro SA.

13. In early 2007, Filtro SA was voluntarily liquidated, consequent upon which plaintiff No. 2 succeeded Filtro SA and took over as the exclusive International Distributor of the HELAMIN products. In the absence of a contract or signed agreement between Filtro SA and defendant No. 6 and in view of the consistently poor results achieved by defendant No. 6 in spite of several trial tests conducted by it with the sample HELAMIN products, plaintiff No. 2 ceased the supply of the HELAMIN water treatment chemicals to defendant No. 6. While defendant No. 6 stopped requesting for sample HELAMIN products for trial tests from plaintiff No. 2, defendant No. 6 continued to unauthorisedly import and supply water treatment chemicals under plaintiff No. 1's trademark HELAMIN and also continued to transact business under the corporate name/trade name predominantly comprising of HELAMIN.

14. Thereafter, inquiries were conducted in the market by the plaintiffs which revealed that defendant No. 6 was selling water treatment chemicals based on the "Helamin" technology to fertilizer companies in India and also created false impression that defendant No. 6's products originated from or were connected to the plaintiffs. On further inquiries by the plaintiffs, it was revealed that the products being sold by defendant No. 6 were procured/imported from defendant No. 9, which is subsidiary of, or is connected and/or related to defendant No. 8 and is being actively run and managed by defendant No. 7.

15. It is further alleged that defendant No. 7 was unlawfully claiming to have obtained the approval to grant manufacturing/blending rights to defendant No. 6 during his tenure at Filtro SA. It is stated that there was never such an approval granted to defendant No. 6 by Filtro SA, especially since Filtro SA was never authorized to grant such rights being merely an international distributor of HELAMIN products and the only entity that was authorized to grant such rights was plaintiff No. 1.

16. It is alleged that the defendants are extensively using plaintiff No. 1's trademark and name HELAMIN in relation to its products and services, thereby, misleading the public into believing that the defendants' products originate from

or are connected to the plaintiffs. It is also alleged that the defendants do not maintain their own website, there are web pages hosted by other entities which pertain to the defendants and their activities, wherein the defendants have hyperlinked the plaintiff's website www.helamin.com giving the impression that the defendants are connected to or affiliated with the plaintiffs.

I.A. No. 15400/2012(under Order VII Rule 11 CPC by defendant)

17. Firstly, I shall take up the above mentioned application for rejection of the plaint wherein it is stated that none of the defendants are based in Delhi and neither do they carry any business in the territorial jurisdiction of Delhi hence jurisdiction of this Court is not attracted. Further, the address given by defendant No. 6 is non- existent and was shut down 5 years ago.

It is stated that the suit is bad for mis-joinder of parties as it is settled law that the main company must be made defendant No. 1 whereas in the present case the main company Helamin Impex Pvt. Ltd. has been deliberately made as defendant No. 6. The defendant No. 1 and 2 are claimed as Directors of defendant No. 6. The business is being carried out by defendant No. 6 as a corporate entity and Directors are not to be impleaded, thus all the individual persons who have been impleaded as defendants are liable to be deleted. It is further stated that Mr. K.S.P. Thakur who was claimed as CEO of defendant No. 6 does not hold any position whatsoever nor does he own any shareholding with defendant No. 6. As far as the defendant Nos. 5 to 9 are concerned, the plaintiff has stated that they had been members of the defendant company which is not true and no issue has been raised against the said defendants.

It is claimed by the defendant that the plaintiffs have not disclosed before this Court as to how the plaintiffs acquired the rights in the marks after the main Company, Filtro. S.A had gone into bankruptcy. The plaintiff No. 1 as per the documents of the plaintiffs appears to have been registered on 10th November, 2011. The exact registration date is not decipherable in as much as the translated copy of the certificate of registration has not been filed on record. The manner in which the plaintiffs claim to be the owner of the trademark "HELAMIN" in India is concocted and misleading as not a single document has been filed on record to show ownership of the mark "HELAMIN" in favour of the plaintiffs.

It is stated that no documents have been placed on record to show as to how the assets and liabilities of Filtro S.A. came to be vested in the plaintiffs and thus, the suit is not maintainable. It is further stated that the plaintiffs are neither successors nor associates/holding companies of Filtro S.A. The Helamin Technology Holding and Helamin France (or manipulated company HTHG having no legal identity) have never succeeded/ owned Filtro SA till date.

18. The defendants state that when the relationship with Filtro S.A. ended they became associated with a company called H2O SA Facilities Switzerland run by the ex-director of Filtro S.A. They were marketing these high quality products under the name of INDIAMIN. The plaintiffs created a false propaganda to

destroy the defendants' reputation and mislead Nagarjuna Fertilizers, a client they had for 5 years.

19. The defendants submit that the name Helamin Impex Pvt. Ltd. has been used since their incorporation and Filtro S.A. was aware of the same. They now sell their products under the mark of INDIAMIN but are entitled to use the same corporate name as there is no injunction to this effect. They further state that defendant No. 3 has no association with defendant No. 6. They submit that defendant No. 3 just acted as a technical advisor to the plaintiffs, a relationship which was terminated in 2010 and therefore, he is not a necessary party to the suit.

20. The ground of suppression of material facts raised by the defendant cannot even form the basis of rejection of the plaint under Order VII Rule 10 and 11 of the CPC. The ground of misjoinder of parties also cannot form the basis of rejection of the plaint under Order VII Rule 10 and 11 of the CPC.

21. During the hearing, the only ground for rejection of the plaint that was pressed by the counsel for the defendant was that this Court lacked territorial jurisdiction. As regards the defendants' averment that this Court does not have territorial jurisdiction to entertain the present suit, the defendants have themselves filed invoices in the Court of the District Judge at Gautam Budh Nagar (U.P.) which clearly show that the defendants are carrying on business within the jurisdiction of this Court. These invoices clearly state that the defendant has an office at the defendant's address at "D-503, Block D, Kalka Apartment, Plot-31, Sector 6, Dwarka, Delhi".

22. The plaintiffs have invoked territorial jurisdiction in view of the averment made in para 53 of the plaint. The same is reproduced herein below:-

"53. This Hon"ble Court has the necessary territorial jurisdiction to entertain and try the present suit under Section 20 of the Code of Civil Procedure, 1908 since Defendant Nos. 7 to 9 are engaged in manufacturing and exporting the counterfeit HELAMIN products to defendant Nos. 1 to 6 who are carrying on their business activities in New Delhi through Defendant No. 6's branch office at D-503, Kalka Apartments, Plot No. 31, Sector-6, Dwarka, New Delhi-110075 and are using plaintiff No. 1's trade mark, corporate name and trading style, and publicizing and marketing its deceptive and infringing products and services inter alia in Delhi. The cause of action to institute the present suit thus arises substantially within the jurisdiction of this Hon"ble Court."

23. The law of territorial jurisdiction is quite settled which has been laid down in the following judgements:-

i. In The Tata Iron and Steel Co. Ltd. Vs. Mahavir Steels and Others, it was observed in para 11 as under:

"11. The question regarding jurisdiction can only be gone into after the evidence of the parties is recorded in the case. Even in the Punjab case the suit was not

thrown out at the threshold under Order 7 Rule 11 CPC but only after the parties were given an opportunity to lead evidence. The plaintiff in the present suit categorically states that the defendant no.1 was selling the channels of defendant no.2 under the offending trade mark which is deceptively similar to that of the plaintiff. On these averments the Court must assume jurisdiction and proceed with the suit to determine the question relating to the confirmation/vacation of the stay order at this stage."

ii. In Pfizer Products Inc. Vs. Rajesh Chopra and Others, wherein it was observed as under :-

"12. The other aspect of the matter is that a threat of selling the offending goods in Delhi would in itself confer jurisdiction in the courts in Delhi to entertain a suit claiming an injunction in respect thereof. Whether the threat perception is justified or not is another matter which has to be considered and decided upon in the application filed by the plaintiff under Order 39 Rules 1 and 2 or on merits when the suit is taken up for disposal. Insofar as Order 7 Rule 10 is concerned, assuming that whatever is stated in the plaint is correct, one would have to also assume that the threat or the intention of the defendants to sell and offer for sale the offending goods in Delhi is also correct. Therefore, if the threat exists then this court would certainly have jurisdiction to entertain the present suit.

iii. In LG Corporation and Another Vs. Intermarket Electroplasters (P) Ltd. and Another--> , following observations were made in para 7 :-

"7. The question as to whether the Court has territorial jurisdiction to entertain a suit or not has to be arrived at on the basis of averments made in the plaint, that truth or otherwise thereof being immaterial as it cannot be gone into at this stage.."

24. The abovementioned three decisions have been approved by this Court.

25. The plaintiffs have placed on record the documents obtained by filing applications under the Right to Information Act, 2005 which show that the defendant No. 6 is carrying on business within the territory of this Court from the same address as mentioned above. In the documents obtained by the plaintiffs in response to the application under the Right to Information Act, the said address is identified as an office from where sale of goods bearing the infringing trademark HELAMIN were conducted. These documents would clearly show that the defendant No. 6 has an office at the said address within the territory of Delhi. At this stage, only the prima facie view is to be taken and in case, some material is available on record that the defendants have done any business or intended to do business in due course, the issue of territorial jurisdiction is to be postponed as the suit is also maintainable at the place where a threat is made by a party.

26. The question whether defendant No. 6 continues to carry on business at the said address is a question of fact which can only be determined at trial and cannot be determined at this prima facie stage while deciding an application for

return of the plaint under Order VII Rule 10 CPC. It is well settled that this Court cannot go into disputed questions of fact at this prima facie stage. None of the decisions referred by the counsel appearing on behalf of the defendant Nos. 3 and 6 are applicable to the facts of the present case. Thus, the application filed is not maintainable. The same is dismissed.

I.A. No. 40/2013 under Order I Rule 10 CPC by defendant

27. The second above mentioned application has been filed seeking deletion of defendant Nos. 1 to 5 from the array of parties. It is claimed that the present suit is bad in mis-joinder of parties.

28. It is stated that the main company i.e. Helamin Impex Pvt. Ltd. should be made defendant No. 1 but has deliberately been made as defendant No. 6. The defendant Nos. 1 and 2 have been claimed as Directors of defendant No. 6. The business is being carried out by the defendant No. 6 as a corporate entity and Directors are not to be impleaded. Further defendant No. 3 who was claimed to be CEO of defendant No. 6 does not hold any position nor own any shareholdings with defendant No. 6. Thus, all individuals person who have been impleaded as defendants are liable to be deleted.

29. It is stated that defendant No. 6 was incorporated in 2001 with the complete consent and approval of M/s. Filtro S.A. which was the main company conducting international business on behalf of the plaintiffs. Further, the defendants have filed documents to show that defendant No. 6 was incorporated as Helamin Impex Pvt. Ltd. with the complete consent and approval of the then management of the plaintiffs. However, sometime in the year 2010, the plaintiffs along with Apex Trading directly contacting plants and industries in India using Polyamine treatment supplied/serviced by the defendant No. 6, to completely sideline it by defaming and damaging its goodwill.

30. The plaintiffs submit that they are willing to drop defendant Nos. 1, 2, 3 and 5 from the suit on the basis of their statement (as recorded in the written statement filed by defendant No. 6 and adopted by defendant Nos. 1, 2, 3 and 5) that they have stopped using the trademark HELAMIN and the consequent undertaking that they will not in any manner use the trademark or trade name HELAMIN. The plaintiff further states that as is a natural corollary to this undertaking, defendants Nos. 1, 2 and 5 should not be allowed to pursue their trademark applications for HELAMIN formative marks and the opposition filed by them against the plaintiff's trademarks.

31. Since defendant No. 3, Mr. KSP Thakur, has been personally involved in the infringing activities as was evident from his presence and submissions made in Court at the hearing on 24th September, 2015, the plaintiffs stated that their consent to delete defendants should not extend to Mr. Thakur.

32. As the defendant No. 3 is not agreeable to give up the mark Helamin from the part of its corporate name of defendant No. 6 and the counsel appearing on

behalf of the plaintiff stated that the matter be decided on merit. Thus, the consent recorded in order dated 24th September, 2015 qua defendant No. 3 is allowed to be withdrawn by the plaintiffs. The application is accordingly disposed of.

I.A. No. 10720/2012 under Order XXXIX Rule 1 and 2 CPC and I.A. No. 19935/2014 under Order XXXIX Rule 4 CPC

33. Now I shall take up the remaining two above mentioned applications, the details of which are already mentioned in the earlier paras of my order.

34. It is the case of the plaintiffs that the plaintiff No. 1 is the pioneer and inventor of a revolutionary polyamines filming technology to prevent scale and corrosion in water-steam cycle systems (turbines included) as well as in cooling systems (open or closed), which was launched under the trademark HELAMIN and is patented. The plaintiffs' HELAMIN products are proprietary formulations of a perfect blend of components that include protective (filming) polyamines, polycarboxylates (dispersants), and volatile (alkalinizing) amines, working in a synergistic way to provide optimum protection and passivation of all ferrous and non-ferrous metal surfaces in the entire water and steam circuit. The plaintiffs' HELAMIN products serve to form a continuous and hydrophobic protective film on metal surfaces, thus acting as a barrier between water and metal to prevent corrosion. Significantly, the plaintiffs have been using, in particular the trademark HELAMIN since the year 1986, the trademark HELAMIN 906 H and HELAMIN BRW 150 H since the year 1993, and the trademark HELAMIN 90 H-TURB since the year 2002.

35. The plaintiffs and defendant No. 6 entered into an informal arrangement/ agreement in the year 2001 under which defendant No. 6 acted as the plaintiffs' supplier of HELAMIN goods in India from the year 2001 - 2006.

36. It is an admitted position that before the informal arrangement/ agreement between the plaintiff and defendant No. 6, the defendant No. 6 was not selling any goods or providing any services under the trademark HELAMIN.

37. It is also an admitted position (as it is evident from the stand taken by the defendants in their written statement) that the informal arrangement/ agreement between the parties no longer exists and that the plaintiff has stopped supplying the HELAMIN seed material to defendant No. 6.

38. The defendants have also admittedly ceased to use the mark HELAMIN as a trademark for its products in view of the cessation of the arrangement with the plaintiffs.

39. The above said circumstances speak from themselves in view of the plea taken in the written statement filed by defendant No. 6, which are reproduced herein under:-

"..From 2010, once the stock of Helamin was over, the Defendant No. 6 started

manufacturing and selling products under the name "INDIAMIN" (Paragraph 14 of the written statement)

"It is further submitted that after the relationship with Filtro SA ended, Defendant No. 6 is now associated with a company namely, H2O SA Facilities, Switzerland which is run by Mr. Bezzoli, Ex-Director of Filtro SA". (Paragraph 15 of the written statement)

"However, Defendant No. 6, have used the name INDIAMIN (since 2010) in an honest manner as the product could no more be manufactured based on the Helamin seed material as the company supplying the same i.e. Filtro S.A has since gone into liquidation." (Paragraph 16 of the written statement)

40. During the course of hearing of interim application, a statement was made by the defendant No. 3 informing the Court that defendant No. 3 is not willing to delete or remove the mark Helamin from the corporate name of the defendant No. 2. Counsel for the plaintiffs argues that it is the sole intention to cause confusion in the market and to mislead consumers into believing that there continues to exist an association between the plaintiffs and defendant No. 6, they continue to misuse the plaintiffs' trademark HELAMIN as an integral part of its trade name/ corporate name "HELAMIN IMPEX PRIVATE LIMITED" and the said misuse of the mark HELAMIN by defendant No. 6 as part of its corporate name is causing actual confusion in the market regarding the said defendant's association with the plaintiffs. Through the present application the plaintiffs pray that the defendants be restrained from using the mark HELAMIN both as a trademark and as trade name. This Court is left with no option but to decide the applications on merit.

41. The defendant No. 6 has filed an application being I.A. No. 19935/2014 seeking vacation of ex parte injunction order dated 30th May, 2012 wherein it has been stated that the plaintiffs mislead this Court and obtained the said order not to protect its business interests or claim over the trade name but purely to create rumours in market to the detriment of the defendants.

42. It is stated that since 2010 the defendant No. 6 started manufacturing and selling polyamine based boiler water treatment chemical products under the brand and style of "Indiamin". However, in August/September, 2014 the plaintiffs itself informed the authorities that "Indiamin or other products available in India have nothing to do with its products.

43. It is stated that the plaintiffs did not inform the Court that defendant No. 6 had stopped using HELAMIN for its products since the year 2010 which is almost 2 years prior to the restraint order. The plaintiffs also did not inform the authorities in India in 2013 about the cancellation of registration of trademark HELAMIN in USA.

44. It is stated that as on 1st August, 2008 HELAMIN was not being used by the plaintiff or its predecessor in India and the plaintiff No. 1 was aware and in

complete knowledge of corporate name, existence and line of business of the defendant No. 6 since the day its collaboration with Filtro SA commenced which ought to be 18th October, 2001 or a date prior thereto.

45. As per the pleading and material placed on record which reveals that the plaintiff No. 1 now holds the title over the trademark HELAMIN in India and in several countries across the world and has accordingly obtained/ applied for protection for the trademark HELAMIN across the world. The chain of title leading to the plaintiff acquiring rights in the trademark HELAMIN has been given here as below:-

46. In order to establish the above chain of title over the trademark HELAMIN, the plaintiffs place reliance on the trademark assignment agreement between trademark Faborga SA and Helamin Holdings SA. Copy of the same has been placed on record. The plaintiffs' counsel also relies on the application (bearing No. 1717404) for the trademark HELAMIN. The said application was originally filed in the name of Helamin Holdings SA and subsequently a request was filed for recording of change of name of Helamin Holdings SA to plaintiff No. 1. Similarly, plaintiff No. 1 has filed another trademark application bearing no. 2493382 for the trademark HELAMIN. Further, records of the plaintiffs' trademark registrations in countries such as Switzerland, Hungary, Greece and Denmark have also been filed by the plaintiffs in the proceedings. These documents would prima facie show that the plaintiff No. 1 has title in the trademark HELAMIN.

47. Counsel for the defendant No. 3 and 6 submits that a third party, namely Filtro SA, holds the rights over the trademark HELAMIN even though no such claim has been made by the third party or its successors/ liquidators till date. The said argument on their behalf prima facie is not correct in view of the certificate of the official liquidator of Filtro SA who has confirmed the following:

"We, FIDUCIAIRE BEAUMONT SA, 25 rue des Caroubiers, 1227 Carouge Switzerland, represented by Mr. Pierre Beauverd, as the late Liquidator of FILTRO SA in liquidation and FABORGA SA in liquidation, hereby certify that:

1. FILTRO SA was not holding the HELAMIN(r) Trademark nor the Patents rights related to Helamin products as part of its assets.

2. FABORGA SA was holding such HELAMIN(r) Trademark and Patent rights related to Helamin products as part of its assets. Such HELAMIN(r) Trademark and Patent rights related to Helamin products have been subsequently transferred to HELAMIN HOLDING SA (now HELAMIN TECHNOLOGY HOLDING SA) as of 2007.

3. FILTRO SA was the worldwide Distributor only (excluding Germany and Turkey) of Helamin original products that have always been manufactured by FABORGA SARL (now HELAMIN FRANCE SARL). As such, FILTRO SA was not manufacturing the Helamin original product which they were sourcing from

FABORGA SARL exclusively and supplying to their international customers."

48. It is evident from the statement of its official liquidator, that Filtro SA was only the worldwide distributor (excluding Germany and Turkey) of Helamin original products which were manufactured by Faborga SARL. As has been explained hereinabove, Faborga SARL is the predecessor in interest of Helamin France SARL.

49. The following chart depicts the relationship between the plaintiffs' predecessor in interest and title and defendant No. 6 and clearly shows that the common law rights in the mark HELAMIN vest with the plaintiffs.

50. Counsel for the plaintiffs has relied on the certificate filed by the official liquidator of Filtro SA. The plaintiffs further place reliance on the invoices filed in the present proceedings which would show that goods supplied to defendant No. 6 were manufactured by Faborga Sarl and then supplied to Filtro SA for distribution purposes.

51. It is also pertinent to mention that the defendant No. 6 has itself identified as an "Authorized Agent of Helamin(r) GmbH, Germany" in its invoices, thereby belying his case that he was in association only with Filtro SA and that the said party is the owner of the HELAMIN trademark and is entitled to use the mark Helamin as part of its corporate name. The following is an extract from the invoice filed by the defendant No. 6 in the suit filed by the said defendant in the District Court, Gautum Budh Nagar which has been given here as below:

52. Therefore, the plea raised by the defendants about the challenging of ownership of the mark Helamin of plaintiff No. 1 is without any force. Similarly, the defence taken by the defendants that they have independent exclusive right to use the mark in their corporate name is false and frivolous once, it is established that they were agent of Helamin, Germany in view of settled law that the Agent is not entitled to grab the mark of the principle being authorised agent. It amounts to breach of trust.

53. The plaintiffs' trademark HELAMIN is a coined mark being formed from two words "HELVETIA" (the latin name for Switzerland) and "POLYAMIN" and thus enjoys a very high degree of protection. Plaintiffs, through their predecessors in interest, adopted the mark in the year 1986 and have been using the mark worldwide since then. In order to establish its use of the trademark HELAMIN before the year 2001, the plaintiff has filed number of brochures and promotional material evidencing using of the trademark HELAMIN products before the year 2001.

54. The defendants' earliest user claim is of the year 2001 and that too such user claim is based on the supply of goods manufactured by the plaintiffs. Since defendant No. 6 was merely supplying the goods manufactured by the plaintiffs under the authority of the plaintiffs, any goodwill and reputation generated in India by virtue of the defendant No. 6's use of the trademark HELAMIN in India

accrues to plaintiff No. 1. Such user of the defendants cannot be considered as his own user as far as proprietorship of the mark HELAMIN is concerned.

55. It is not the defendants' case that they were, at any point of time before entering into the agreement with the plaintiffs, independently selling products which did not originate from the plaintiffs or any of their associates. The defendants have admitted that after the stock of HELAMIN goods supplied by the plaintiffs was over, defendant No. 6 started manufacturing and selling products under the mark INDIAMIN. The defendants have further admitted that they could no longer honestly use the trademark HELAMIN after the supply of the HELAMIN seed material had ceased.

56. The arrangement/ agreement between the plaintiffs and the defendants terminated in the year 2006 and as has been admitted by the defendants, they have no right to use the trademark HELAMIN after the termination of the relationship and once the supply of the HELAMIN seed material had ceased.

Since the defendants are no longer getting supply of the HELAMIN seed material from the plaintiffs, they have no authority or justification to continue use of the trade name HELAMIN. The continued use of the trade name HELAMIN by defendant No. 6 shows a clear intent to cause consumer confusion. Consumers are bound to believe that defendant No. 6 continues to be associated with the plaintiffs and continues to supply materials using the plaintiffs' seed material even though no such association or relationship exists.

57. It is admitted by the defendants since defendant No. 6 has itself filed a lawsuit before the Gautam Budh Nagar District Court. Defendant No. 6 in the said suit has averred that the use of the trademark HELAMIN by the plaintiffs' distributors is causing confusion in the market. Since the confusion is admitted, the only question which remains is identifying the prior user of the trademark HELAMIN which undoubtedly is the plaintiff (through its predecessors in interest). The said suit filed by defendant No. 6 has been dismissed by the Gautam Budh District Court for non-prosecution. Further both the plaintiffs and the defendants have filed documents which show instances of actual confusion.

58. It is now well settled that once a licensor - licensee or a manufacturer - distributor relationship terminates, the licensee or the distributor has no right whatsoever to use either the trademark or the trade name of the licensor and the manufacturer. The Courts have held that there can only one source of the goods associated with one trademark. Reference be made to the following decisions:-

(a) *Velcro Industries v. Velcro India Ltd.*, , 1993 (1) Arb. LR 465 "It is also not possible, at this prima facie stage, to accept Mr. Shah's argument that, Defendants are entitled to continue to use the name Velcro as part of their corporate name, because they have independently developed a reputation in India. As stated above, Defendants were merely acting as Licensees from 1969 to 1986. In my view, the fact that, in Agreement Exh. "E", it is not provided that on termination, Defendants will cease to use "Velcro" as part of its trade name

makes no difference. This is a registered Trade Mark. To allow Defendants to use it as part of its Corporate name is to permit Defendants to give an impression to the public that they are still connected with or have a licence from the Plaintiffs. In this behalf it is relevant to note that the reputation, if any, of the Defendants in the Indian Market is obviously from manufacture and sale of hook fasteners of synthetic materials which were only under licence."

(b) Eaton Corporation and Another Vs. BCH Electric Limited,

"in case the law with regard to the rightful owner of the trademark and the act of ex-licensee is examined, it emerges that either during the licensing period of agreement or after expiry, it is implicit and clear that the ex-licensee is not entitled to claim the ownership of a trademark nor he is permitted by law to file an application for registration of the trademark in his name nor is entitled to file the petition for rectification of the same very trademarks in which ex- licensee was using the trademarks as a permissive user, otherwise it would amount to fraud and misrepresentation. The ex-licensee under no circumstances can declare himself as owner of the trademark to claim the concurrent user because as per scheme of the Act, the benefit of concurrent user can be derived by a party whose user is honest and bonafide. In the present case, both things are missing. In other words, he cannot be allowed to make a hole in the plate in which he was eating; such wrongful user would be considered as stolen property which cannot become rightful property in any amount of user."

(c) Rob Mathys India Pvt. Ltd. Vs. Synthes Ag Chur-->

"In the case in hand, it is apparent that 10 years period of the collaboration agreement dated 15th April 1978 has expired long ago and it has also been revoked as well by notice. Thus, the license to use the trade marks in both the actions had ceased to exist. The principle being that there could only be one mark, one source and one proprietor. There cannot be two origins as the registered trade mark as well as the unregistered trade mark both could be used only under the collaboration agreement by the defendant /appellants. The appellant/ company is obviously not the owner. They cannot be allowed to use the registered trade mark device and the word "Synthes" and the trade mark "AO/ASIF" after the revocation of the collaboration agreement."

59. The defendants have wrongly claimed that the plaintiffs have acquiesced in the use of the trade name HELAMIN by defendant No. 6. As it is well settled that the defence of acquiescence is not available to those who have continued to use the mark fraudulently and dishonestly. Defendant No. 6 was clearly aware of the plaintiff's title in the trademark HELAMIN and despite such knowledge has continued to use the trade name HELAMIN. The fact that the defendant stopped using the trademark HELAMIN for its products but continued to use the trade name also establishes that it clearly recognized that it did not have any right to use the said trademark and trade name but continued to do so fraudulently and dishonestly.

60. In the case of Eaton Corporation (supra) which cites settled law on the subject:-

"It is settled law that where there is fraud, there is no room for doctrine of acquiescence to operate. The acquiescence cannot be inferred merely by reason of the fact that the plaintiff has not taken any action against the infringement of its rights. Even if the defendant has been using both the trademarks from the period when the relation between the parties are broken. Is it possible that the defendant would and could take any benefit out of it knowing the said trademarks are belonging to the plaintiffs? Can the defendant in the facts of the present case is entitled to take the defence of estoppel, acquiesces, delay, latches and abandonment of the same trade marks by the plaintiff?"

61. It is rightly alleged by the plaintiffs that as soon as they came to know of defendants' use in the year 2009, they addressed letters to third parties in order to dispel any confusion prevailing in the market owing to the defendant No. 6's misuse of the plaintiffs' trademark. In this regard, reference may be had to the copy of the certificate dated 17th February, 2011 and letter dated 5th May, 2010 issued by the plaintiffs regarding the relationship between defendant No. 6 and the plaintiffs.

62. The defendants have themselves furnished a letter written by the representative of the plaintiffs to IFFCO (filed along with the I.A. No. 19935 of 2014 under Order XXXIX Rule 4) which exemplifies such efforts being made by the plaintiffs. The said correspondence would explain the following:

i. The defendants are benefiting from the confusion being caused in the market by virtue of their use of the HELAMIN trademark/trade name. The fact that the defendants have objected to such letters being addressed by the plaintiffs itself shows that the defendants seek to continue illegally riding upon the plaintiffs' reputation and goodwill.

ii. On learning that the defendants are not the OEMs (Original Equipment Manufacturers), organizations such as IFFCO decided to source the product from the plaintiffs thereby establishing the plaintiffs' reputation.

iii. The representative from IFFCO clearly points out that they "do not want to take any risk in [our] system". This shows that the products being offered by the plaintiffs and the defendants involve high risk and thus the harm that can be caused by the defendants' misuse of the plaintiffs' trademark is enormous.

63. In view of the above, the application bearing No. I.A. No. 10720 of 2012 is allowed.

64. As is admitted by the defendant in paragraph 14 and 16 of the written statement as well as paragraph 6 of the present application, the defendants have stopped using the mark HELAMIN for its products since the year 2010. Thus, the application being I.A. No. 19935/2014 seeking a vacation of the order dated 30th May, 2012 is accordingly dismissed.

65. As per the defendants' own admission, the defendants have stopped using the mark HELAMIN since the year 2010 and thus no prejudice whatsoever is being caused to the defendants by virtue of the order dated May 30, 2012 passed by this Court. Thus, there is no occasion for this Court to vacate the order dated 30th May, 2012. The defendants are also restrained to use the mark HELAMIN as part of its corporate name and in any form whatsoever which may create confusion and deception during the pendency of the suit. All the grounds raised in their applications under Order XXXIX Rule 4 CPC are not tenable in law. The balance of convenience clearly lies in favour of the plaintiffs and against the defendants who cannot grab the well-known mark of the plaintiff No. 1 in this fashion. If the defendants are allowed to use the mark of the rightful owner/principle, it would amount to granting the agent to appropriate the mark of the real proprietor. Thus, the plaintiffs would suffer injury if the injunction will not continue. The application filed by the defendants is dismissed. Consequently, the prayer of the plaintiffs' application under Order XXXIX Rule 1 and 2 CPC is allowed.

66. All the above four mentioned applications are disposed of. The finding arrived at are tentative and shall have no bearing when the suit is decided after trial.

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67. Parties to appear before the Joint Registrar on 15th February, 2016 for further proceedings.