

(2005) 11 DEL CK 0033
In the Delhi High Court
Case No : CS (OS) No. 849 of 2004

Hero Honda Motors Ltd.

APPELLANT

Vs

Shree Assuramji Scooters

RESPONDENT

Date of Decision : 29-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 10
Copyright Act, 1957 — Section 2

Citation : (2005) 125 DLT 504 : (2006) 86 DRJ 113 : (2006) 32 PTC 117

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Pravin Anand and Sagar Chandra, for the Appellant; Nemo, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The plaintiff has filed a suit for permanent injunction for infringement of trademark, copyright, passing off, delivery up, rendition of accounts, damages, etc. against the defendant. The plaintiff is a limited company incorporated and registered under the Companies Act, 1956 and is a Joint Venture incorporated on 19.01.1984 whereby 26% of the equity is held by the Indian Group being the Hero Group and 26% by the Honda Motors Company of Japan, while the remaining equity is stated to be widely spread. The plaintiff is involved in the business of manufacture and sale of motorcycles under the trademark HERO HONDA since 09.04.1985. It is stated that apart from the said business, the plaintiff is also engaged in the manufacture of sale of readymade garments, hosiery, gloves, etc.

2. The Joint Venture Group is stated to be mainly dealing with the manufacture of cycle and cycle parts and the Japanese Joint Venture partner, Honda Motor Co. Ltd. is an internationally renowned name and trademark HONDA. The Joint Venture, thus, adopted the trademark HERO HONDA to reflect the goodwill of the business of both the two Joint Venture Groups as an arbitrarily coined trademark.

3. The plaintiff has set out the sales figures in para 5 of the plaint as under:-

----- Year Sales (Rs. in Crores)
 ----- 01.04.1990 - 31.01.1991
 215.52 01.04.1991 - 31.01.1992 275.72 01.04.1992 - 31.01.1993 307.27
 01.04.1993 - 31.01.1994 369.99 01.04.1994 - 31.01.1995 483.85 01.04.1995 -
 31.01.1996 640.7 01.04.1996 - 31.01.1997 782.83 01.04.1997 - 31.01.1998
 1160.72 01.04.1998 - 31.01.1999 1552.9 01.04.1999 - 31.01.2000 2269.87
 01.04.2000 - 31.01.2001 3192.96 01.04.2001 - 31.01.2002 4539.49 01.04.2002
 - 31.01.2003 5194.58 01.04.2003 - 31.01.2004 5700

4. The promotional and advertisement expenses of the plaintiff are set out in para 6 of the plaint as under:-

----- Year Expenditure (Rs. in Lakhs) ----- 01.04.1990 -
 31.01.1991 459.55 01.04.1991 - 31.01.1992 363.49 01.04.1992 - 31.01.1993
 551.47 01.04.1993 - 31.01.1994 674.94 01.04.1994 - 31.01.1995 682.5
 01.04.1995 - 31.01.1996 1569.58 01.04.1996 - 31.01.1997 2058.7 01.04.1997
 - 31.01.1998 2321.01 01.04.1998 - 31.01.1999 2601.42 01.04.1999 -
 31.01.2000 4681 01.04.2000 - 31.01.2001 6112 01.04.2001 - 31.01.2002 9016
 01.04.2002 - 31.01.2003 10500 01.04.2003 - 31.01.2004 13000

5. The plaintiff claims that by adoption of long and extensive user goods bearing the trademark HERO HONDA are exclusively associated with the products originating from the plaintiff. Apart from the Common Law Rights, the plaintiff is also the registered proprietor of the following marks:-

Trademark	Class	Goods	Regn.	No.	Date	of	Regn.
HERO HONDA	12	Motor Cycles and parts thereof	419115	13.03.1984			
HERO HONDA (stylised with LOGO)	12	Motor Cycles and parts thereof	513474	17.07.1989			

6. The plaintiff has adopted a logo to represent its products consisting of three parallel lines at the base surmounted by a semi-circle, which is surmounted by a crown like structure. This logo was created by M/s. Shobhagya Advertising Services on behalf of the plaintiff and is, thus, claimed to be the original artistic work of the plaintiff within the meaning of Section 2(c) of The Copyright Act, 1957. The packaging of spare parts was created by M/s. Mansa Packagers Pvt. Ltd., which is an artistic work owned by the plaintiff.

7. The plaintiff came to know that there were several unscrupulous traders manufacturing motorcycle parts and other items bearing the plaintiff trademark HERO HONDA and the logo with the result that there was not only loss of profit, but the brand equity of the plaintiff was affected on account of inferior quality of the product sold in the market by such traders. The public was also stated to be,

thus, a direct sufferer of the same. The defendant is stated to be one such trader. The plaintiff purchased the product of the defendant and found that apart from infringing the logo and the mark of the plaintiff, the product was of poor quality in finish and packaging. Thus, the defendant was counterfeiting the product of the plaintiff and selling the goods as that of the plaintiff. There was also violation of the registered trademark of the plaintiff.

8. At the stage of filing of the suit, interim orders were granted and Local Commissioner was also appointed to seize the goods in question. The goods were taken possession of and then released on superdari to the defendant. The defendant, however, did not put in appearance and was proceeded ex parte. The plaintiff has filed the affidavit of ex parte evidence of Shri Sanjay Mittal, the constituted Attorney of the plaintiff. The witness has proved the certified copy of the Board Resolution of the plaintiff along with the Power of Attorney as Exhibit P-1, which authorised institution of the suit. The sample invoices of the plaintiff have been proved as Exhibit P-2 and the advertisements of the plaintiff as Exhibit P-3. The Certificate of Registration of the two trademarks referred to above have been proved as Exhibit P-4 and Exhibit P-5. The plaintiff has proved as Exhibit P-6 the assignment made by M/s. Shobhagya Advertising Services in respect of the logo and as Exhibit P-7 the assignment in respect of the the packaging by M/s. Mansa Packagers Pvt. Ltd. The plaintiff has relied on the affidavit of one Shri Rajiv Manchanda filed in the proceedings showing the cash memo of purchase of the defendant as well as the photographs of the product of the defendant. The said affidavit has been exhibited as Exhibit P-8 while the photographs of the product and packaging are exhibited as Exhibit P-9.

9. The aforesaid facts and circumstances show that the plaintiff has the exclusive right to use their trademark HERO HONDA and the logo as also the packaging material in question. The defendant is attempting to counterfeit the products of the plaintiff and pass off its goods as that of the plaintiff. This not only causes loss of profits to the plaintiff, but results in inferior products made available to the public at large who are deceived by the conduct of the defendant.

10. In view of the aforesaid, the plaintiff is entitled to a decree of permanent injunction against the defendant from dealing with the goods having infringing mark in terms of prayers (a) to (c) of para 18 of the prayer clause.

11. Insofar as the prayer (d) is concerned, the seized goods were released on superdari by the Local Commissioner to the defendant and the said goods are liable to be destroyed. The plaintiff is, thus, entitled to a decree of delivery up of all the infringing products so that the same can be destroyed.

12. The last aspect to be considered is the issue of damages for loss of reputation and business as also the cost of the present proceedings.

13. Insofar as the issue of damages is concerned, learned counsel for the plaintiff submits that even in the absence of specific evidence to the same effect, such damages can be granted.

14. It is trite to say that the defendant has deliberately stayed away from the present proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place. However, the infringement of the trademark of the plaintiff as also its logo is not in dispute. The plaintiff has claimed token damages and compensation of Rs. 5 lakhs as it was not possible to determine the exact nature of damages at the stage of filing of the suit. The attention of this Court has been drawn to a number of judgments in this behalf where dealing with similar situations, damages have been awarded.

15. In *Relaxo Rubber Limited and Anr. v. Selection Footwear and Anr.*, 1999 PTC 578, the defendant did not file the written statement after taking time for the same and a decree was passed under Order VIII Rule 10 of the Code of Civil Procedure, 1908. Against the claim of tentative damages of Rs. 5 lakhs, Rs. 3 lakhs was awarded as damages. Similarly in *Hindustan Machines v. Royal Electrical Applies*, 1999 (19) PTC 685, a sum of Rs. 3 lakhs was awarded. In the recent judgments, this Court in CS (OS) No. 2711/1999 titled "*L.T. Overseas Ltd. v. Guruji Trading Co. and Anr.*" decided on 07.09.2005 had granted Rs. 3 lakhs damages in a similar case. In the present case, punitive damages have not been specifically claimed.

16. Learned counsel for the plaintiff has, however, drawn the attention of this Court to the judgment of this Court in *Time Incorporated Vs. Lokesh Srivastava and Another*, where apart from compensatory damages of Rs. 5 lakhs, punitive damages have also been awarded. It would be useful to reproduce paras 7 and 8 of the said judgment, which are as under:-

"7. Coming to the claim of Rs. 5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine "*TIME ASIA SANSKARAN*" also have suffered by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company.

8. This Court has no hesitation in saying that the time has come when the Courts

dealing actions for infringement of trade marks, copy rights, patents, etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In *Mathias v. Accor Economi Lodging, Inc.*, 347 F. 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions who they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs. 5 lacs only which can be safely awarded. Had it been higher even this court would not have hesitated in awarding the same. The Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement."

17. Learned counsel for the plaintiff states that damages have been claimed in the present suit, though it is not specified separately as to the nature of damages. Learned counsel further states that in any case the plaintiff should be entitled to at least the damages of Rs. 5 lakhs.

18. I am in agreement with the aforesaid submission of learned counsel for the plaintiff that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where the defendant who appears in Court and submits its account books would be liable for damages, while a party which chooses to stay away from court proceedings would escape the liability on account failure of the availability of account books. A party who chooses to not participate in court proceedings and stay away must, thus, suffer the consequences of damages as stated and set out by the plaintiff. Of course, this would not imply that the plaintiff would be entitled to any figure quoted by it which may be astronomical. The figure of Rs. 5 lakhs as damages can hardly be said to be astronomical keeping in mind the nature of deception alleged by the plaintiff which not only causes direct loss to the plaintiff, but also affects the reputation of the plaintiff by selling sub-standard goods in the market where the public may be deceived in buying the goods thinking the same to be that of the plaintiff. There is a larger public purpose involved to discourage such parties from

indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in Times Incorporated's case (supra) that punitive damages are founded on the philosophy of corrective justice. That was the case where the publishers of Time Magazine had come to Court and one of the factors which weighed while awarding punitive damages was that the readers had been sufferers of the infringement of the mark of the plaintiff. The only difference is that in the present case it is the consumer of the products of the plaintiff, who have suffered as a consequence of the infringement of the mark and logo of the plaintiff by the defendant.

19. The second aspect emphasized in Times Incorporated's case (supra) has also material bearing as the object is to relieve the pressure on over-loaded system of criminal justice by providing civil alternative to criminal prosecution of minor crimes. The defendant could have been prosecuted for such counterfeiting, but the plaintiff has considered appropriate to confine the relief to civil proceedings.

20. Learned counsel for the plaintiff also rightly points out that instead of the plaintiff utilising its energy for expansion of its business and sale of its products, the resources have to be spread over a number of such litigations to bring to book the offending traders in the market. In such a case, both compensatory and punitive damages ought to be granted apart from the costs incurred by the plaintiff in such litigation.

21. In view of the aforesaid position, a decree for permanent injunction is passed in favor of the plaintiff and against the defendant restraining the defendant from selling motorcycle parts bearing the trademark HERO HONDA with or without the logo or any other trademark deceptively similar to the plaintiff's mark HERO HONDA and logo as also selling such goods in the packaging identical or deceptively similar to that of the plaintiff. A decree is also passed in favor of the plaintiff and against the defendant for the defendant to hand over the seized goods released by the Local Commissioner on superdari to the defendant so that the same can be destroyed by the plaintiff. A decree of damages is also passed in favor of the plaintiff and against the defendant for a sum of Rs. 5 lakhs. The plaintiff shall also be entitled to costs of the present proceedings.

22. Decree-sheet be drawn up accordingly.

23. It is, however, observed on a perusal of the plaint that the suit is deficiently stamped in view of judgment of this Court in CS(OS) No. 1165/2001 titled "Pfizer Products, Inc. v. B.L. & Co. and Ors." decided on 03.10.2005. Learned counsel for the plaintiff states that he will file the deficient court fee within a week. Decree-sheet be drawn up only on such court fee being paid.