
(2011) 02 DEL CK 0509
In the Delhi High Court
Case No : CS (OS) No. 2085 of 2008

Procter and Gamble Co.

APPELLANT

Vs

Joy Creators and Others

RESPONDENT

Date of Decision : 21-02-2011

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 29
Trade Marks Act, 1999 — Section 28, 29(1)

Citation : (2011) 7 AD 684 : (2011) 178 DLT 228 : (2011) 45 PTC 541

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Peeyoosh Kalra and Kamal Sharma, for the Appellant; None, for the Respondent

Judgement

V.K. Jain, J.—This is a suit for permanent injunction, rendition of accounts, damages and delivery up of the infringing material. The plaintiff is a fortune 500 company, having business operations in 80 countries, dealing in a large number of products and employing 1,38,000/- persons.

The plaintiff Company is also engaged in the business of manufacturing and selling skin care and personal cleansing products, including anti-aging moisturizer under the trademark Olay. The plaintiff Company is also using the trademarks Olay Total Effects and Total Effects in respect of anti-aging products. The plaintiff holds registration in respect of trademark Olay Total Effects in Class 3 of Schedule 4 of Trademarks Act, 1999 in respect of Foundation, Make-up Base, Skin Moisturizing Cream, Lotions and Gels, Skin Whitening Preparations, Facial and Skin Masks, Skin Tonners, Cleansers and Astringents, Eye Masks, Eye Gel Patch, Eye Creams, Lotions and Gels, Skin and Body Massage Creams, Soaps (excluding soaps for fabric use), Perfumeries, Essential Oils, Dentifrices, Shampoo, Conditioners, Hair Styling Preparations, Hair Care Preparations and Hair Coloring Preparations. It also holds registration in respect of the trademark Olay in Class 3 of the same Schedule. The plaintiff claims turnover of \$236

million, \$282 million and \$344 million for the years 2005-2006, 2006-2007 and 2007-2008 respectively in respect of products sold under the name Olay Total Effects/Total Effects. The plaintiff Company claims to have incurred expenditure amounting to \$89 million, \$99 million and \$111 million respectively during the aforesaid years, on brand support activities undertaken by it across the world. It is further alleged that the plaintiff launched its products under the trademark Olay Total Effects/Total Effects in India in the year 2007 and has been giving wide publicity to such products, which had sale amounting to Rs. 266.65 million in India during the period from 1st July, 2007 to 30th July, 2008. The plaintiff Company has incurred expenditure of Rs. 263 million in India alone on promotion of the aforesaid trademarks.

2. It is alleged that in or about April, 2008, the plaintiff Company came across an advertisement of application No. 1224385 for registration of the label, which contains the mark Joy Ultra Look Total Effects in respect of Soap, Perfumery Essential Oils, Hair Lotions and Creams, Dentifrices etc., claiming use of the aforesaid mark/label since April, 2001. The plaintiff filed a notice of opposition to the registration sought by the Defendants and the opposition proceedings are stated to be pending. It is further alleged that on carrying investigation, the plaintiff came to know that the Defendants are conducting business throughout the country including Delhi using the above referred trademarks and Defendant Nos. 1 and 2 have also licensed the aforesaid mark to Defendant No. 3, which is manufacturing and marketing products bearing the offending label. It is further alleged that the words Total Effects are being used by the Defendants only in respect of anti-aging/age defying products and the adoption of the mark Total Effects in respect of identical products cannot be a mere co-incidence and indicates a dishonest and fraudulent intention on their part to derive pecuniary benefits from using the impugned mark/label. The plaintiff, thus, claims infringement of its registered and well known trademark Olay Total Effects. The plaintiff has sought injunction restraining the Defendants from using the trademark Total Effects or any other mark deceptively similar to the trademark of the plaintiff. It has further sought an injunction restraining the Defendants from passing off the plaintiff's trademarks Olay Total Effects/Total Effects and from applying and obtaining registration in respect of the impugned trademark or any deceptive variation thereof. The plaintiff has also sought damages amounting to Rs. 50 lakhs besides seeking rendition of accounts and delivery up of the infringing packaging material etc.

3. The Defendants filed the written statement contesting the suit. They took a preliminary objection that this Court has no territorial jurisdiction to try the suit since Defendant No. 1 does not carry any activity nor does it sell any product in Delhi. On merits, it has been admitted that the Defendants are engaged in the business of manufacturing, marketing and selling cosmetic products including soap, perfumery, essential oils, hair lotions and creams, dentifrices etc. The Defendants claim to be leading manufacturers and traders in respect of various cosmetic products, carrying business since 1988-89 and extensively selling

various products under the trademark Joy. It is alleged that the Defendants adopted the label Joy Ultra Look Total Effects with the words Ultra Look being given prominence on the label and the word Joy being written above the word Ultra Look. It is also pointed out that the words Total Effects written below the words Ultra Look are much smaller in font size. The present label is alleged to have been adopted by the Defendants in the year 2001. The Defendants claim to have incurred advertisement expenditure of Rs. 69,76,797/-, Rs. 46,53,621/- and Rs. 64,46,355/- in the years 2005-2006, 2006-2007 and 2007-2008 respectively. They also claim to have incurred Rs. 2.5 crores towards advertisement and publicity expenses between 1st April, 2008 and 28th February, 2009. It is also alleged that the Defendants had sale of Rs. 12,26,57,801/- in the year 2006-07, Rs. 19,41,41,916/- in the year 2007-08 and Rs. 31,66,82,164.55 between 1st April, 2008 and 28th February, 2009. It is further alleged that on receipt of notice from the plaintiff, the Defendants, without prejudice to their rights and contentions, agreed to delete the words Total Effects on the plaintiff withdrawing the suit and not claiming any damages or costs. The plaintiff, however, refused to withdraw the suit. It is also claimed that the Defendant Nos. 3 and 4 have no connection with Defendant Nos. 1 and 2 and have been wrongly joined as parties to this suit only with a view to raise jurisdiction of this Court. It is further alleged that the Defendant Nos. 1 and 2 are the prior user of the words Total Effects and, therefore, have a superior right of use of the trademark Total Effects.

4. Defendant No. 4 was proceeded ex-parte vide order dated 18th December, 2008. Defendant Nos. 1 to 3 were proceeded ex parte vide order dated 24th January, 2011.

5. Vide interim order dated 1st October, 2008, this Court restrained the Defendants from using the trademark Total Effects or any other deceptive variation thereof, singularly or in conjunction with any other word in relation to their products and services. The interim order was made absolute on 24th January, 2011.

6. The plaintiff has filed affidavit of its constituted attorney Mr. Cyril Abrol by way of ex parte evidence. In his affidavit by way of evidence, Mr. Abrol, supported the case set up in the plaint and stated on oath that the plaintiff company had sale of \$236 million, \$282 million and \$344 million for the years 2005-2006, 2006-2007 and 2007-2008 respectively in respect of products sold under the name Olay Total Effects/Total Effects and had incurred expenditure amounting to \$89 million, \$99 million and \$111 million respectively during the aforesaid years, on brand support activities. He also stated that the plaintiff company had sale of Rs. 266.65 million in respect of the products bearing trademark Olay Total Effects/Total Effects during the period 1st July, 2007 to 30th June, 2008 and had incurred expenditure of Rs. 263 million towards promotion of the brand in India, availing the services of former Miss Universe Sushmita Sen for the purpose.

He further stated that the products involved in the present suit are cosmetic

preparations, which are akin to pharmaceutical preparations, requiring higher degree of judicial protection, so that there is no confusion to the ordinary customer.

7. Exhibit PW1/5 (Colly) is the certificate issued by the Trademark Registry in respect of registration Nos. 903943 and 895212. Vide registration No. 895212 the Word Mark Olay has been registered in the name of plaintiff company in respect of lip moisturizers and conditioners, liquid and powder foundation, make-up base, skin moisturizing creams, lotions, and gels, skin whitening preparations, facial and skin masks, skin toners, cleansers and astringents, eye masks, eye creams, lotions and gels, skin and body massage creams, soaps, perfumeries, essential oils, dentifrices, shampoos, conditioners, hair styling preparations, hair care preparations and hair coloring preparations included in Class 03. Vide registration No. 903943 the Word Mark Olay Total Effects has been registered in the name of the plaintiff company in respect of foundation, make-up base skin, moisturizing creams, lotions and gels, skin whitening preparations, facial and skin masks, skin toners, cleansers and astringents, eye masks, eye gel patch, eye creams, lotions and gels, skin and body massage creams, soaps, (excluding soaps for fabric use), perfumeries essential oils, shampoos, conditioners, hair styling preparations, hair care preparations and hair coloring preparations. The registration of the aforesaid trademarks in favor of the plaintiff has not been disputed in the written statement of Defendant Nos. 1 to 3.

8. Exhibit PW1/17 (Colly), which includes promotional material of Defendant No. 1 would show that the Defendant has been using the words, Total Effects etc. on its packaging. A perusal of Exhibit PW1/14, which is an advertisement of the Defendant Ram Autar Gupta, who is using the trade name Joy Creators, would show that he had sought registration of the label bearing Joy Ultra Look Total Effects in respect of soap, perfumery essential oils, hair lotions and creams and dentifrices for sale in India and for export. A perusal of the packing in which age defying solution is sold by Defendant N.3 Joy Beauty Care Private Limited would show that the words Joy, Ultra Look and Total Effects have been used on the bottle. A perusal of the invoice Exhibit PW1/19 would show that the Defendant No. 4 SKS Instruments (India) sold U.L. Foundation (Total Effects) in Delhi on 9th June, 2008.

9. Section 28 of Trade Marks Act, 1999 gives 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. The action for infringement is, thus, a remedy provided by Trade Marks Act to the registered proprietor of a registered trade mark in case there is an invasion of the statutory right provided to him for use of that trade mark in relation to the goods for which the trade mark has been registered in his name. Section 29(1) of Trade Marks Act, 1999 provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by

way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

10. It is also a settled proposition of law, which was reiterated by Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, PTC (Suppl) (2) 680 (SC), that if the Defendant resorts to colourable use of a registered trade mark such an act of the Defendant would give rise to an action for passing off as well as for infringement. In an action based upon infringement of a registered trade mark if the mark used by the Defendant is visually, phonetically or otherwise so close to the registered trade mark of the plaintiff that it is found to be an imitation of the registered trade mark, the statutory right of the owner of the registered trade mark is taken as infringed. In such a case, if it is found that the Defendant has adopted the essential features of the registered trade mark of the plaintiff, he would be liable even if he is able to establish that on account of packaging, get up and other writings on his goods or on the container in which the goods are sold by him, it is possible to clearly distinguish his goods from the goods of the plaintiff. On the other hand in a case of passing off if it is shown that on account of these factors it is very much possible for the purchaser to identify the origin of the goods and thereby distinguish the goods of the Defendant from the goods of the plaintiff, the Defendant may not be held liable.

11. In *Corn Products Refining Co. Vs. Shangrila Food Products Ltd.*, , the Supreme Court observed that the question whether two competing marks are so similar as to be likely to deceive or cause confusion is one of first impression and it is for the court to decide it. The question has to be approached from the point of view of a man of average intelligence and imperfect recollection.

12. In *Parle Products (P) Ltd. Vs. J.P. and Co., Mysore*, , Supreme Court inter alia observed as under:

According to Karly's Law of Trade Marks and Trade Names (9th Edition Paragraph 838)

Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with the one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted.

It would be too much to expect that persons dealing with trademarked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover,

variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.

It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.

13. It is not necessary that in order to constitute infringement, the impugned trademark should be an absolute replica of the registered trademark of the plaintiff. When the mark of the Defendant is not identical to the mark of the plaintiff, it would be necessary for the plaintiff to establish that the mark being used by the Defendant resembles his mark to such an extent that it is likely to deceive or cause confusion and that the user of the impugned trademark is in relation to the goods in respect of which the plaintiff has obtained registration in his favor. It will be sufficient if the plaintiff is able to show that the trademark adopted by the Defendant resembles its trademark in a substantial degree, on account of extensive use of the main features found in his trademark. In fact, any intelligent person, seeking to cash upon the goodwill and reputation of a well-established trademark, would make some minor changes here and there so as to claim in the event of a suit or other proceeding, being initiated against him that the trademark being used by him, does not constitute infringement of the trademark, ownership of which vests in some other person. But, such rather minor variations or distinguishing features would not deprive the plaintiff of injunction in case resemblance in the two trademarks is found to be substantial, to the extent that the impugned trademark is found to be similar to the registered trademark of the plaintiff. But, such malpractices are not acceptable and such a use cannot be permitted since this is actuated by a dishonest intention to take pecuniary advantage of the goodwill and brand image which the registered mark enjoys, it is also likely to create at least initial confusion in the mind of a consumer with average intelligence and imperfect recollection. It may also result in giving an unfair advantage to the infringer by creating an initial interest in the customer, who on account of such deceptive use of the registered trademark may end up buying the product of the infringer, though after knowing, either on account of difference in packaging etc. or on account of use of prefixes or suffixes that the product which he is buying is not the product of the plaintiff, but is the product of the Defendant.

14. As held by the Supreme Court in *Amritdhara Pharmacy Vs. Satyadeo Gupta*, , whether a trade name is likely to deceive or cause confusion by its resemblance to another mark already registered is a matter of first impression and the

standard of comparison to be adopted in judging the resemblance is from the point of view of a man of average intelligence and imperfect recollection. What is important to keep in mind that the purchaser does not have both the marks lying side by side for comparison and, therefore, chances of deception are rather strong.

15. Every person has a legal right to sell his goods or render services using any trade name for the purpose. With the passage of time the goods sold or the services rendered by him, as the case may be, may acquire certain reputation or goodwill in the market which becomes the property of that person and needs to be protected by the court. It is not permissible for any other person to start selling goods or rendering services either using the same name or imitating that name so as to cause injury to that person and enrich himself at the cost of the person who has already been using that name and whose mark has acquired a certain reputation with the passage of time and on account of the quality of the goods sold or services rendered by him. Any attempt on the part of a person to enrich upon the goodwill generated by any other person needs to be curbed by the court whenever approached by the aggrieved party in this regard.

In a case based on infringement of a registered trademark, the plaintiff need not prove anything more than the use of its registered trademark by the Defendant. In such a case, even if the Defendant is able to show that on account of use of other words by him in conjunction with the registered word/mark of the plaintiff, there would be no confusion in the mind of the customer when he come across the product of the Defendant and/or that on account of the packaging, get up and the manner of writing trademark on the packaging, it is possible for the consumer to distinguish his product from that of the plaintiff, he would still be liable for infringement of the registered trademark. Of course, use of a registered trademark or an essential part of it, whether alone or in conjunction with some other words would constitute infringement only when the product and/or service in respect of which the impugned trademark is used fall in the same category in which registration has been granted to the plaintiff.

16. The Defendants are manufacturing/selling age defying foundation, which is a cosmetic product to be applied on skin, under the brand name Joy Ultra Look Total Effects. The plaintiff Company is an established and very well reputed manufacturer and marketer of various products including age defying products under the brand name Olay Total Effects. Thus, both the parties are engaged in the same business, as far as the manufacture/sale of age defying foundation is concerned. The words Total Effects are an essential and integral component of plaintiff's registered trademark Olay Total Effects. The Defendants have virtually lifted two of the three words out of the registered word trademark Olay Total Effects of the plaintiff-company and are using those two words as part of their trademark Joy Ultra Look Total Effects. It is, therefore, difficult to dispute that the Defendants by use of the words Total Effects as an essential part of their trademark Joy Ultra Look Total Effects have infringed the registered trademark

Olay Total Effects of the plaintiff. It is true that words Total Effects are only a part of the composite trademark of the Defendants, but, that to my mind would make no difference since an essential and integral part of the plaintiff's registered trademark is being used by them for selling their product. Neither deletion of a part of a registered trademark nor the prefix or suffix of another word to it would validate the use of the registered mark by an unlicensed user, once it is shown that the part used by the infringer is an essential part of the registered trademark. Another important aspect in the case before the Court is that the words Total Effects use the last two words in the mark of the plaintiff as well as of the Defendant, which in turn, indicates that adoption and use of these two words from the mark of the plaintiff was deceptive, intended to confuse the consumer and encash upon the goodwill enjoyed by plaintiff's trademark Olay Total Effects. The trademark Joy Ultra Look Total Effects, on account of incorporation of the words Total Effects in it has become deceptively similar to the registered trademark Olay Total Effects of the plaintiff Company.

17. It is also in the interest of the consumer that a well established brand or an essential component of that brand is not allowed to be used by another person. A person purchasing age defying foundation being sold under the name OLAY Total Effects may not necessarily remember all the words used in the trademark and, therefore, when he comes across another product being sold under the trademark Joy Ultra Look Total Effects, on account of imperfect recollection and he is not having the product of the plaintiff bearing the trademark Olay Total Effects with him at that time, he may get an impression that both the products emanate from the same source and that is why both of them are using the words Total Effects as part of the trademark under which they are being sold. This may cause confusion in the mind of the consumer even if he does not purchase the product of the Defendant on a careful scrutiny of the trademark under which it is being sold or on account of packaging of the product of the Defendant being different from the packaging of the product of the plaintiff.

18. In K.R. Chinna Krishna Chettiar Vs. Shri Ambal and Co., Madras and Another, , the Respondents were the two registered trademarks. The first mark consisted of a label containing a device of a goddess Sri Ambal seated on a globe floating on water enclosed in a circular frame with the legend "Sri Ambal parimala snuff" at the top of the label, whereas the other mark consisted of expression "Sri Ambal". The Appellant before Supreme Court was seeking registration of a label containing three panels. The first and the third panels contained equivalents of the words "Sri Andal Madras Snuff", whereas the central panel contained the picture of goddess Sri Andal and the legend "Sri Andal". Sri Andal and Sri Ambal are separate divinities. The question before the Court was whether the proposed mark of the Appellant was deceptively similar to the Respondents' mark. Noticing that the word Ambal was an essential feature of the registered trademarks, the Court was of the view that the name Andal proposed to be used by the Appellant did not cease to be deceptively similar because it was used in conjunction with a pictorial device. Supreme Court

referred to the case of *De Cordova and Ors. v. Vick Chemical Coy.* (1951) 68 R.P.C.103 where Vick Chemical Coy were the proprietors of the registered trade mark consisting of the word "Vaporub" and another registered trade mark consisting of a design of which the words "Vicks Vaporub Salve" formed a part. The Defendants advertised their ointment as "Karsote vapour Rub" and the Court held that the Defendants had infringed the registered marks. The view taken by Lord Radcliffe that "a mark is infringed by another trader if, even without using the whole of it upon or in connection with his goods, he uses one or more of its essential features" was affirmed by the Supreme Court. The appeal was accordingly dismissed by Supreme Court, despite the fact that the words Ambal and Andal had distinct meanings. In the case before this Court, the Defendants have used the words "Total Effects" without even attempting any change in those words, as an essential component of their trademark "Joy Ultra Look Total Effects". The infringement by the Defendants, therefore, is more serious than the infringement in the case of *K.R. Chinna Krishna Chettiar* (supra)

In *Atlas Cycle Industries Ltd. v. Hind Cycles Limited*: ILR 1973 Del 393, the plaintiff was the registered proprietor of the trademark "Eastern Star" in respect of bicycles. The Defendant was found selling cycles under the trademark "Royal Star". The stand taken by the Defendant was that the word trademark ROYAL STAR was not likely to cause confusion or deception or was not any infringement of Appellant's trademark EASTERN STAR since the word STAR was common to the trade and was being used by several cycle manufacturers. It was observed by this Court that when the words Eastern Star and Royal Star are uttered, a person of average intelligence and imperfect memory was likely to remember only the sound and word STAR and those likely to be deceived or confused between the two names or mark and, therefore the two marks had an overall structural and phonetic similarity and consequently, their use in respect of the same kind of goods viz. cycles will cause confusion or deception within the meaning of Section 29 of the Trade and Merchandise Marks Act, 1958.

In *Ansul Industries v. Shiva Tobacco Company*: 2007(34) PTC 392, the Appellant was marketing tobacco under the name "Udta Panchhi", whereas the Respondent was manufacturing/selling chewing tobacco under the trade name "Panchhi Chaap". Noticing that the word "Panchhi" in the mark "Udta Panchhi" and "Panchhi Chaap" enjoys prominence and is the focal point of two marks, it was held by this Court that despite the getup and colour of packing being different, there was likelihood of deception and confusion on account of phonetic similarity of the word "Panchhi" in both the marks.

19. Though it was alleged in the written statement of Defendant Nos. 1 to 3 that they were prior user of the words "Total Effects", they have not come forward to prove the claim made by them. In fact, they have themselves admitted that they had agreed to delete the words "Total Effects" from their trademark provided the plaintiff agreed not to claim damages. This clearly shows an admission on the part of the Defendants that they are not entitled to use the words "Total Effects"

as a part of their trademark.

20. For the reasons given in the preceding paragraphs, the plaintiff is entitled to injunction against use of the trademark Joy Ultra Look Total Effects or any other deceptively similar name by the Defendants in respect of anti-ageing foundation or any other product for which registration has been obtained by the plaintiff for the word mark Olay Total Effects.

21. Neither the relief of injunction nor the relief of delivery up of infringing material was pressed during the course of arguments. The learned Counsel for the plaintiff, however, insisted on award of punitive compensatory damages and in this regard, he placed reliance on the decisions of this Court in *Time Incorporated Vs. Lokesh Srivastava and Another*, , *Microsoft Corporation Vs. Deepak Raval* , *Hero Honda Motors Ltd. v. Shree Assuramji Scooters* 2006 (32) PTC 117 (Del), *General Electric Company v. Mr. Altamas Khan and Ors.* (CS(OS) No. 1283/2006 decided on 18.12.2008), *Indian Performing Right Society Ltd. Vs. Debashis Patnaik and Others*, , *Microsoft Corporation Vs. Mr. Yogesh Papat and Another*, , *The Coca Cola Company and Another Vs. Dwarkadhish Khandelwal Trading As Mewar Soda Water Factory* , *Asian Paints (India) Ltd. Vs. Balaji Paints and Chemicals and Others*, , *SAP AG and Another Vs. Somaya Kanti Dutta and Another*, , *Larsen and Toubro Limited Vs. Chagan Bhai Patel*, , *Relaxo Rubber Ltd and Anr. v. Selection Footwear and Anr.* 1999 (19) PTC 578, *Adobe Systems, Inc. and Another Vs. Mr. P. Bhoominathan and Another*, and *Microsoft Corporation and Another Vs. Mr. A. Jain and Others*, . In the case of *Time Incorporated* (supra), this Court observed that 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 the 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 of *Hero Honda Motors* (supra), this Court noticing that the Defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the Defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

22. In *Microsoft Corporation Vs. Deepak Raval* , this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In *Larsen and Toubro Limited Vs. Chagan Bhai Patel*, , this Court observed that it would be encouraging the violators of intellectual property, if the Defendants

notwithstanding having not contested the suit are not burdened with punitive damages.

23. Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encase upon the goodwill and reputation of other brands by passing off their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encase on the goodwill and reputation which that mark enjoys in the market, with impunity, and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defense to make and therefore come forward to contest the suit and place their case before the Court.

24. For the reasons given in the preceding paragraph, the Defendants are hereby restrained from manufacturing, selling or marketing any defying foundation or any other product in respect of which the plaintiff holds the registered word mark Olay Total Effects. The plaintiff is also awarded punitive damages amounting to Rs. 1,00,000/- each against Defendants No. 2 & 3.

Decree sheet be prepared accordingly.