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

+ **RFA(COMM) 39/2023 & CM APPLs. 10165-10166/2023**

ABSOGAIN RETAIL SOLUTIONS

..... **APPELLANT**

Through: **Mr. Saurabh Kamra and Ms. Sarita,**
Advocates.

Versus

PUMA SE

..... **RESPONDENT**

Through: **Mr. Raman Narula and Mr. Shashi P.**
Ojha, Advocates

Reserved on : 13th April, 2023

Date of Decision : 15th May, 2023

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SAURABH BANERJEE

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed challenging the Order dated 24th January, 2023 passed by the District Court, Tis Hazari, Delhi in CS (COMM) No. 2057/2019, whereby a decree for permanent injunction was passed restraining the appellant-defendant from manufacturing, trading, selling, marketing, offering for sale through online shopping portals or dealing in any other way, any goods including shoes and other accessories and/or any other goods under the respondent-plaintiff's 'Form Strip logo'



as its logo/trademark or any other mark/logo which is deceptively similar to the respondent-plaintiff's 'Form Strip logo'



which may amount to infringement of the respondent-plaintiff's registered trademarks as mentioned in the plaint. Further, appellant-defendant was directed to ensure delivery of all the infringing finished/unfinished materials bearing the respondent-plaintiff's trademark



'Form Strip logo' i.e. the goods seized by the Local Commissioner to the authorised representative of the respondent-plaintiff. The respondent-plaintiff was also awarded damages to the tune of Rupees three lakhs along with costs of the suit.

ARGUMENTS ON BEHALF OF THE APPELLANT-DEFENDANT

2. Learned counsel for the appellant-defendant stated that the Trial Court had erred in not appreciating that the design, on appellant-defendant's product i.e. product in question, which respondent-plaintiff claimed to be identical to its registered trademark was nothing but a normal design and that the appellant-defendant was not aware that the same was registered in favour of the respondent-plaintiff. He stated that if the appellant-defendant had known that the said design was a registered logo of the respondent-plaintiff, the appellant-defendant would have never used the same.

3. He further stated that the Trial Court had failed to appreciate that it had no territorial jurisdiction to try and decide the subject-suit. He submitted that the finding of the Trial Court on the issue of territorial jurisdiction was

contrary to the law laid down by the Supreme Court of India in ***Indian Performing Rights Society Vs Sanjay Dalia & Anr, [2015] 10 SCC 161***. He emphasised that the witness of the respondent-plaintiff [PW-1] had deposed that, *“I have no proof and I do not say that defendant was also selling his goods in offline market.”* the witness further stated that, *“I do not have any proof that defendant has ever sold infringed goods in Delhi”*.

4. He also stated that the Trial Court had incorrectly interpreted the language of the issue no.4 i.e. issue with regard to relief of damages, and had wrongly awarded the damages, without appreciating that the issue no.4 was with respect to the entitlement to damages and not the quantum of damages. He submitted that the decision of the Trial Court awarding damages to the tune of Rupees Three lakhs was unreasonable, baseless and beyond the issue/s framed and such part of the impugned judgment was liable to be set aside.

5. He contended that the plaintiff had failed to produce any evidence to show that the Power of Attorney (‘POA’) executed by the plaintiff in favour of PW-1 was valid at the time of filing of the suit. In support of his submissions, he relied upon the cross-examination of PW-1 which is reproduced hereinbelow:-

“the MARK PW-1/9 is executed by..... who are also constituted attorney of plaintiff as I m..... I have no knowledge that how he has authority to execute MARK PW-1/9..... I have no knowledge whether any board resolution was passed or not in this regard.....I receive fixed salary from RNA Law Firm for acting as power of attorney holder of plaintiff company..... it is correct that I have filed many cases similar to present suit for plaintiff and I have got many of them settled with opposite parties after taking settlement amount in favour of RNA (Vol. Not in my name)”

ARGUMENTS ON BEHALF OF THE RESPONDENT-PLAINTIFF

6. *Per contra*, learned counsel for the respondent-plaintiff stated that though the onus to prove that the Commercial Court had no territorial jurisdiction to try the present suit was on the appellant-defendant, yet no evidence was led by it. He further stated that the learned Commercial Judge in its judgment took into account the following documents relied upon by the respondent-plaintiff to conclude that the Commercial Court had the jurisdiction to try the suit:-

- i. *“Exhibit-PW 4/A- Internet downloads from the plaintiff’s website showing sale of Puma products.*
- ii. *Exhibit-PW 1/6: Photographs of various celebrities promoting and advertising Plaintiff’s products.*
- iii. *Internet downloads from the third-party website showing sale of Puma products www.flipkart.com.*
- iv. *Internet downloads from the third-party website showing of Puma products www.amazon.com.*
- v. *Exhibit-PW 1/7 (Colly.): Internet downloads showing sale of infringing products by the Defendant at www.shopclues.com and advertisement of Defendant’s business activity on www.justdial.com.*
- vi. *Exhibit-PW 1/8- Invoice dated 12.02.2019 issued by the Defendant for sale of the infringing product.*
- vii. *Defendant itself has filed listing of the infringing products on the website www.shopclues.com in its reply to the Plaintiff’s application for summary judgement.”*

7. He further stated that the respondent-plaintiff had claimed rendition of accounts and/or damages and in the absence of any evidence being led by the appellant-defendant, the order for rendition of accounts could not be passed.

8. He emphasised that the infringing products had been found to be sold on an interactive website www.shopclues.com and an infringing product had even been purchased against an Invoice (Exhibit PW1/8) by the respondent-plaintiff.

9. He stated that the Local Commissioner appointed by the learned Commercial Court had seized a total of 380 pairs of shoes. He stated that the appellant-defendant was a serial offender as is apparent from the registration application filed by it of a label mark which is a combination of the famous registered designs of Slazenger and Channel. The said registration certificate handed over in Court is reproduced hereinbelow:-

As on Date : 03/05/2023	
Status	: Abandoned View TM Application View Examination Report
TM Application No.	3304890
Class	25
Date of Application	10/07/2016
Appropriate Office	DELHI
State	HARYANA
Country	India
Filing Mode	e-Filing
TM Applied For	CORP COUGAR
TM Category	TRADE MARK
Trade Mark Type	DEVICE
User Detail	26/08/2013
Certificate Detail	
Valid upto/ Renewed upto	
Proprietor name	(1) NAVNEET GUPTA Trading As : ABSOGAIN RETAIL SOLUTIONS. Single Firm
Proprietor Address	PLOT NO-735, SECTOR-17, FARIDABAD,HARYANA-121002
Email Id	****inod@gmail.com
Attorney name	BANDHUJI TRADE MARK CO.[17676]
Attorney Address	B-3, GROUND FLOOR, NEELKANTH APTT-II, SANT NAGAR, BURARI, DELHI 110084
Goods & Service Details	[CLASS : 25] FOOTWEAR,HEADGEAR AND READYMADE GARMENTS.
Publication Details	Published in Journal No. : 1954-0 Dated : 29/06/2020

Trade Mark Image : (1)



10. Consequently, according to him, the learned Commercial Judge was right in presuming that the appellant-defendant had been selling the infringing products for a considerable period of time, on account of which the respondent-plaintiff had suffered huge losses.

11. He contended that the respondent-plaintiff's witness had produced a validly executed POA in his favour as Ex. PW 2/1. He stated that in the cross-examination, PW-1 was asked as to whether there was any contract between him and RNA Law Firm or between RNA and plaintiff company to which the witness had replied as under:-

"I have yearly contract with RNA but I have no knowledge about any contract between RNA and plaintiff."

12. He contended that the above statement if examined in the context of the judgment of this Court in *Columbia Pictures Industries, Inc. And Ors. Vs. Siti Cable Network Ltd., 2001 SCC OnLine Del 359*, would clearly show that there was no bar on a non-advocate accepting a POA and specially when Mr.Rakesh Chhabra had not appeared in this case as a pleader/advocate.

COURT'S REASONING

THE APPELLANT-DEFENDANT IS A REPEAT OFFENDER AND THE ARGUMENT THAT IT WAS NOT AWARE OF RESPONDENT-PLAINTIFF'S REGISTRATION IS NOT BELIEVABLE.

13. Having heard learned counsel for the parties and having perused the paper book, this Court finds that the appellant-defendant's argument that it was not aware of the respondent-plaintiff's registered design is not correct.

14. The appellant-defendant's and respondent-plaintiff's design are reproduced hereinbelow:-

Respondent-Plaintiff's product with "Form Strip logo"	Appellant-Defendant's product with "Form Strip logo"
 <p>A side view of a black and red sneaker with a white sole and a white tag on the tongue. The shoe is positioned on a white background. A faint watermark of the Indian national emblem and the motto 'Satyameva Jayate' is visible in the lower right quadrant of the image.</p>	 <p>A close-up view of a black sneaker with a prominent yellow stripe on the side. The shoe is positioned against a dark, textured background.</p>

15. This Court is of the view that the respondent-plaintiff's design is unique and is capable of being registered. This Court is also of the opinion that the appellant-defendant could not have independently prepared a design

that is identical to respondent-plaintiff's registered design and used it for identical products.

16. It also seems to this Court that the appellant-defendant has a 'passion' for copying famous registered designs as is apparent from the registration application filed by it *qua* a combination of designs of Slazenger and Channel.

17. Consequently, the appellant-defendant is a repeat offender and the appellant-defendant's argument that it was not aware of appellant-defendant's registration or if it had known about the same, it would never have used such a design, is only to be stated to be rejected.

IN VIEW OF THE TEST OF PURPOSEFUL AVAILMENT BEING SATISFIED AND THE FAILURE OF THE APPELLANT-DEFENDANT TO DISCHARGE THE ONUS OF PROOF, THE TRIAL COURT HAD THE JURISDICTION TO HEAR AND TRY THE PRESENT SUIT

18. This Court also finds that the onus to prove that the Trial Court had no territorial jurisdiction was cast upon the appellant-defendant which it had failed to discharge as it admittedly did not lead any evidence.

19. The learned Commercial Judge after examining the downloads from the respondent-plaintiff's website, third party websites showing sale of Puma products at www.flipkart.com, www.amazon.com etc. and internet downloads showing advertisement of defendant's business activity at www.justdial.com and an invoice dated 12th February, 2019 issued by the defendant showing sale of infringing products by the defendant at www.shopclues.com which admittedly is an interactive websites accessible from Delhi, concluded that the Trial Court had the territorial jurisdiction to try this suit.

20. In our opinion, the test of purposeful availment as stipulated by this Court in *Banyan Tree Holding (P) Ltd. vs. A. Murali Krishna Reddy & Anr., 2009 SCC OnLine Del 3780, World Wrestling Entertainment, Inc. Vs. Reshma Collection & Ors. 2014 (60) PTC 452(Del.)(DB)* and *Burger King vs. Tekchand, 2018 (76) PTC 90 (Del.)* stood satisfied and therefore the Trial Court had the jurisdiction to hear and decide the present suit.

AS THE APPELLANT-DEFENDANT IS A REPEAT OFFENDER AND THE INFRINGING PRODUCTS WERE SEIZED BY THE LOCAL COMMISSIONER AND FOUND TO BE SOLD ON INTERACTIVE WEBSITE, THE COMMERCIAL COURT HAS RIGHTLY QUANTIFIED THE DAMAGES AT RUPEES THREE LAKHS.

21. One of us (Manmohan, J) sitting singly, in *Koninlijke Philips N.V. & Anr. Vs. Amazestore & Ors., 2019 SCC OnLine Del 8198* after a detailed analysis, held that the rule of thumb that should be followed while granting damages can be summarised in a chart as under:-

#	Degree of mala fide conduct	Proportionate award
(i)	First-time innocent infringer	Injunction
(ii)	First-time knowing infringer	Injunction + Partial Costs
(iii)	Repeated knowing infringer which causes <u>minor</u> impact to the Plaintiff	Injunction + Costs + Partial damages
(iv)	Repeated knowing infringer which causes <u>major</u> 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)

22. Since in the present case, the appellant-defendant is a repeat offender and the infringing products were found to have been sold on the interactive website www.shopclues.com and an infringing product was purchased against the invoice Exhibit PW1/8 and the Local Commissioner appointed by the learned Commercial Court had seized 760 pieces i.e. 380 pairs of shoes, this court is of the view that the present case falls in category (iii) of the chart above and the Commercial Court has rightly quantified the damages at Rupees three lakhs.

IN VIEW OF SECTION 85 OF THE EVIDENCE ACT AND NO ISSUE WITH REGARD TO POA HAVING BEEN FRAMED, THERE WAS NO FAILURE TO PROVE THE POA.

23. The appellant-defendant's argument that the respondent-plaintiff failed to lead any evidence to prove that the POA relied upon by the PW-1 was validly executed is contrary to the facts and untenable in law.

24. In the opinion of this Court, it is of no relevance that the respondent-plaintiff did not lead any evidence to prove that the POA was validly executed as neither any issue had been framed with regard to the same nor appellant-defendant filed an application under Order XIV Rule 4 of the Code of Civil Procedure, 1908 seeking amendment of those framed.

25. Secondly, there is a presumption in law that every document purported to be a POA and having been executed before and authenticated by a Notary Public and the Indian Consul was so executed and authenticated. Section 85 of the Indian Evidence Act reads as under:-

“85. Presumption as to powers-of-attorney.

The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.”

26. Moreover, the Supreme Court in *United Bank of India Vs. Naresh Kumar and Others, (1996) 6 SCC 660* has held that, “*Procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause.*”

CONCLUSION

27. In view of the aforesaid findings, this Court is of the opinion that the present appeal is bereft of merits. Accordingly, the same is dismissed but without any order as to further costs.

MANMOHAN, J

SAURABH BANERJEE, J

MAY 15, 2023
TS/js/AS

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