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

% Date of Decision : 31st March, 2014

+ CS(OS) 921/2012

FANTECH PTY. LTD.

..... Plaintiff

Through: Mr.Surinder Singh, Adv.

versus

ADEPT FANTECH INDIA PVT. & ORS.

..... Defendants

Through: None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

1. The Plaintiff has filed the present suit for restraining infringement of trademark, passing off and for damages and delivery up against the defendants.
2. Summons were issued in the suit on 18.04.2012. Defendant no. 3 entered appearance on 7.12.12. Fresh summons were issued for Defendant no. 1 and defendant no.3 on the next date of hearing i.e. 15.03.2013. Counsel for defendant no.2 entered appearance and sought time to file written statement. Right to file written statement with regard to defendant no. 3 was closed on 10.09.2013. Costs of Rs. 20,000 were imposed on defendant no.2 and delay in filing written statement was condoned. Since defendant no. 1 was unserved, fresh summons were issued to defendant no.1 vide order dated 10.09.2013. In the order of 5.12.13 it was noted that counsel for defendant no.1 had filed his vakalatnama in the registry. Four weeks' time was granted to defendant no.1 to file the written statement. As the written statement was not filed, on 11.02.2014, right to file written statement of defendant no.1 was also closed. As the defendant no.2 did not remove the objections, nor the written

statement was refiled by him, on 26.02.2014, right to file written statement of defendant no.2 was also closed. On 4.03.2014, counsel for defendant no.3 made a statement in court that she had instructions not to contest the matter provided the plaintiff gave up his relief of damages. Accordingly, the suit was decreed in favour of plaintiff and against defendant no. 3 on 04.03.2014 in terms of paragraph 35(i) and 35(ii) of the Plaint.

3. On the same date i.e. on 04.03.2014, it was prayed by counsel for the plaintiff that a decree be passed against defendant no.1 and defendant no.2 under order 8 rule 10 CPC as despite service of summons and time being granted to counsel for the said defendants to file written statement, no written statement has been filed. Consequently Defendant No. 1 and Defendant No. 2 were proceeded ex-parte on March 04, 2014. Documents stand exhibited before the Joint Registrar.
4. The plaint is duly supported by the affidavit of Puneet Rastogi, Authorised Signatory of the Plaintiff Company. On 04.03.2014 counsel for the Plaintiff has averred that the plaint may be read as the affidavit by way of evidence. He has averred in the plaint that the plaintiff company was established under the laws of Australia in the year 1973 (Incorporation Certificate has been exhibited as Ex. PW-1/1) and has been carrying on the business of manufacturing and marketing of its products viz. ventilation installations; fans for domestic, commercial and industrial use; components thereof; sound absorbers being parts of apparatus for exhaust installations or for smoke extraction or steam extraction. He has further averred that the Plaintiff's extensive resources and design expertise enable it to provide excellent technical support for commercial and industrial ventilation requirements as well as domestic applications. He has further averred that the products of the plaintiff are sold worldwide and the plaintiff entered Indian market in the year 2007.

5. It has further been averred in the plaint that the Plaintiff company has been carrying on its business under the trademark/ trade name FANTECH for the last more than 30 years with its customer base spread over almost all parts of Asia. The plaintiff company has been using the mark FANTECH as a trademark as well as its corporate name FANTECH PTY LIMITED. It has been averred that it is prior adopter and user of the trademark/ trade name FANTECH. It has also been averred that the word FANTECH was neither in existence nor in use by any other company or person till its adoption by the plaintiff in the year 1973.
6. Further, as per the plaint the trademark FANTECH has been cultivated through extensive use under strict quality control, ingenious marketing strategy, advertisement and promotion and therefore the plaintiff company has built invaluable business goodwill and reputation on the strength of the trademark/trade name FANTECH. It has also been averred that the plaintiff company has coined the device of FANTECH having distinctive layout, getup and arrangement of features. The said device of FANTECH is designed by the plaintiff and used on each and every product, its packaging as well as every printed material. It has also been averred that the said trademark and its device is exclusive property of the plaintiff and that the plaintiff is the author and owner of FANTECH device which is an original artistic work within the meaning of section 2(c) of the Copyright Act, 1957.
7. It has further been averred that the mark FANTECH is of great commercial significance to the Plaintiff and the above mentioned mark and its device have come to be associated exclusively with the Plaintiff and non-else. It has also been averred that the goodwill and reputation of the trademark FANTECH and device of FANTECH is spread world over and the same is evident from the worldwide approximate turnover of the plaintiff which is more than AUD\$ 86m during the year 2010-2011.

8. Further, as per the plaint the plaintiff has been selling its goods in India under the trademark FANTECH at least since the year 2007. Original sales invoices of Plaintiff for the goods sold in India since the year 2007 have been exhibited as Ex. PW-1/8. The summary of its sales made in India since the year 2007 has been detailed as under:-

YEAR	SALES IN RM('000)	SALES IN RS.
2007	191.64	3,190,872.60
2008	538.20	8,961,030.00
2009	640.20	10,659,330.00
2010	1488.10	24,776,865.00
2011	914.60	15,228,106.15

9. It has also been averred in the plaint that in Asia, the Plaintiff is carrying on its business through its subsidiary company Eltafantech Asia which was established on the 1st of December 2005 in Malaysia. The name eltafantech was coined by joining two names Elta (Parent Company name) and FANTECH (Plaintiff's name). Eltafantech is also using joined logos of both the Companies. It has further been averred that Eltafantech is regulating the manufacturing and sales operations of the Plaintiff for Asia regions through established sales network. In India, the Plaintiff is selling its goods under the trademark FANTECH through its sole selling agent Airovient Fans & Systems Pvt. Ltd which is having an exclusive tie-up with Eltrafantech. The said company has countrywide offices including New Delhi at Mahipalpur.
10. It is further averred that the trademarks FANTECH (word) and FANTECH (device) have been registered in Australia, New Zealand, Malaysia, Singapore, Hong Kong, Papua New Guinea, Vietnam & China as well as in India. Copies of worldwide Trademark Registration Certificates since the year 1981 have been annexed as Annexure I. Original Registration Certificates of the device

“FANTECH” and the word “FANTECH” in India have been exhibited as Ex. PW-1/2 and Ex. PW-1/3 respectively. Below are the details of Trademark Registration in India pertaining to the trademark FANTECH and FANTECH device :-

TRADEMARK	REGD.NO.	CLASS	DATE OF REG.	VALID TILL
FANTECH(DEVICE)	1490367	11	25.09.2006	25.09.2016
FANTECH(WORD)	1490368	11	25.09.2006	25.09.2016

11. It has also been averred that the trademark and trade name FANTECH is the exclusive property of the Plaintiff by virtue of the prior adoption and registration in India and the Defendants by adopting the same are directly and/or indirectly, violating the legal and common law rights of the Plaintiff.
12. Further as per the plaint during the first week of February 2012, the Plaintiff came across the website of Defendant No. 3 i.e. www.ivntrade.com, wherein the Defendant No. 1 has given its advertisement bearing the trade mark ADEPT FANTECH INDIA PVT. LTD claiming to be engaged in the business of manufacturing and marketing of Axial Fans, Roof Extractors, Ventilation etc. for the industrial and domestic use under the above said trading style.
13. It has also been averred in the plaint that on further enquiries, it also came to the notice of the plaintiff that the defendant No. 1 is the sister concern of the defendant no. 2 i.e. Adroit FANTECH Engineers to whom, the plaintiff has already issued a legal notice on 26th June, 2007, exhibited as Ex. PW-1/9 requesting him not to use the trade mark/trade name FANTECH. On 12 July 2007, the Defendant no. 2, sent a reply, exhibited as EX. PW-1/10 thereby undertaking not to use the trademark FANTECH, however, defendant no. 2 did not

agree to discontinue the use of mark FANTECH as part of his trading style. Further, on 20th August 2007, the plaintiff reverted back to the Defendant no. 2 with rejoinder to its reply, exhibited as Ex. PW-1/11. Thereafter no communications were exchanged between the parties except that the defendant No. 2 filed caveat petitions.

14. It has further been averred that not only has Defendant No. 2 been incorporated under the name of Adept FANTECH India Pvt. Ltd, but defendant no.2 is also using the mark FANTECH as part of both, its trade mark as well as trading style. Extracts of the website of the Defendant No. 2 have also been placed on record.
15. It has further been averred in the plaint that the Defendants No. 1 and 2 are from the same business group and the directors of Defendant No. 1 are the partners of Defendant No. 2 as well. It has also been averred that Defendant No. 3 is carrying on its business in Delhi and soliciting the business for the Defendants No. 1 and 2.
16. It has also been averred in the plaint that the Plaintiff has never authorized any person including the present defendants to use the mark of the Plaintiff "FANTECH" and that the adoption and use of the said trade name "FANTECH" by the Defendants is dishonest, *mala-fide*, tainted and solely with a view to trade upon the goodwill and reputation of the Plaintiff which it enjoys world over. It has further been averred that the mark "FANTECH" could not have been conceived independently by the Defendants and that they, with mala-fide and fraudulent intentions lifted the mark / trade name from magazines and/or from website of the Plaintiff or possibly on one of his trips to Singapore /Malaysia /Australia or from any place where the goods of the Plaintiff are available.
17. It has further been averred that the consumers, when exposed to the goods bearing the mark ""FANTECH"" are bound to be confused about their source and origin and may believe the same to be originating from the plaintiff. The Defendants are, thus, guilty of passing off their goods as that of the Plaintiff.

18. Further, as per the plaint defendants have no right, title or interest or justification to use the word “FANTECH” either as trademark or as part of its trading style, which is the exclusive property of the Plaintiff. The adoption, use and publicity of the impugned trade mark by the Defendants are in total violation of the plaintiff’s proprietary rights in the said trade mark.
19. It has further been averred that the plaintiff/or its associate group of companies manufacture all their products using the best available technology and by applying very high standard of precision. The components of the said products are also carefully selected by the plaintiff so as to prevent any injury being caused to the consumers. It has also been averred that the plaintiff’s world wide success is a result of superior quality management and state-of-the-art product facilities, distinctive marketing strategies, continuous improvement through research and development, total dedication and care for quality control. The attempt of the defendant No. 1 to pass its own inferior quality products as that of the plaintiff is likely to create adverse market sentiments vis-à-vis the Plaintiff’s products, solely because of the close proximity of the competing market. It has also been averred that the Defendants are unlawfully diverting the Plaintiff’s business and earning profits to which the Defendants are not entitled and that the Defendant cannot be allowed to take a ‘free ride’ on the goodwill and sales appeal that the Plaintiff’s Trade Mark / Trade Name “FANTECH” has achieved.
20. It has also been averred that the illegal trade activity of the Defendants is causing irreparable loss, injury and damage to the Plaintiff in their business, goodwill and reputation. Defendants are earning profits by appropriating the Plaintiff’s goodwill under the said well known Trade Mark “FANTECH” which lawfully belongs to the Plaintiff. Furthermore, injury to the members of the public cannot be quantified or compensated; hence, it is necessary that an order of

injunction and a final decree be passed restraining the Defendant from their illegal activities be passed.

21. I have heard counsel for the Plaintiff and carefully perused the plaint which is duly supported by an affidavit as also the documents which have been placed on record. The Original Registration Certificates of the device "FANTECH" and the word "FANTECH" in India have been exhibited as Ex. PW-1/2 and Ex. PW-1/3 respectively. Copies of worldwide registration certificates of the Plaintiff since the year 1981 have been marked as Annexure I. Original brochures of plaintiff depicting its trademark "FANTECH" and the registered device have been exhibited as Ex. PW-1/6 and Ex. PW-1/7.
22. On the basis of the documents placed on record, the plaintiff has been able to establish that plaintiff is the prior adopter and user of the trademark FANTECH since the year 1973, is the registered proprietor of the said trade mark and device in India since the year 2006 and it holds registration of the trade mark/device in other parts of the world as well. Furthermore, the plaintiff has also established that it has been using the abovementioned trade mark/device in India since the year 2007 with respect to its products. Plaintiff has also been able to establish that it has coined the device of FANTECH having distinctive layout, get up, and arrangement of features which is used by them on each and every product, its packaging as well as well as every printed material used by the plaintiff Therefore, the plaintiff has successfully established that it is the first adopter, prior user and registered proprietor of the trademark and trading style FANTECH along with its device which is an original artistic work within the meaning of section 2(c) of the Trademark Act, 1957. It has also been established by the plaintiff that on account of the long standing use, mass popularity and global consumer appeal of the plaintiff's FANTECH branded products, the said trademark has grown to become an invaluable asset of the plaintiff and hence, on these grounds, the plaintiff is the exclusive owner of the said trademark

and tradename. Plaintiff has also been able to establish the fact that over the years, it has built unparalleled goodwill and repute for itself which is evident from the hefty annual turnover generated by it worldwide as well as in India.

23. In the case of **Kaviraj Pandit Durga Dutt Sharma v Navaratna Pharmaceutical Laboratories** reported at AIR1965SC 980, it was held as under:

“27.....In an action for infringement, the plaintiff must, no doubt, make out that use of the defendant's mark is likely to deceive, but were the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated.....

28.When once the use by the defendant of the mark which is claimed to infringe the plaintiff's mark is shown to be "in the course of trade", the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise;.....”

24. Similarly, in the case of **Ellora Industries v Banarasi Dass** reported at AIR 1980 Del 254, following observations were made by the court:

“(20)if the line of business is same or allied, there is an immense potential for confusion, deception and temporal harm. The test of common field of activity comes handy.....

(37)A word appeals to the ear more than the eye. There is a real and tangible risk of damage, the field of activity being common. The wrongful appropriation of trade reputation is an injury to the plaintiffs. That injury and the acknowledged intention to continue to inflict it, is ample justification for the injunction which was granted.

(45) The function of the trade marks is to identify the source of manufacture of goods. It is an indicia of origin. With the expansion of markets and the development of large scale advertising, trade marks began to perform the additional function of an advertising and selling device. In the market the chief value of the trade-mark is its power to stimulate sales. In law, the fundamental theory upon which the interest in the trade mark is protected is that a trade mark identifies the goods coming from a particular source, and that an infringing

designation tends to divert customer from that source by falsely representing that other goods come from it.....”

[Emphasis supplied]

25. Having regard to the evidence on record and comparing the impugned trademark/trade name of the defendant, photograph of which has been filed, I am of the view that the impugned trademark/trade name of the defendant is deceptively similar to that of the plaintiff. The use of the word “FANTECH” by the defendant in respect of identical set of goods is not honest and is likely to cause confusion in the minds of public at large who might believe that the defendant company has the same origin as that of the plaintiff, hence, leading the defendant company to ride on the goodwill and reputation established by the plaintiff over the period of years, worldwide. Moreover, in my opinion the mark FANTECH could not have been conceived independently and adopted by the defendants for any reason but to pass off their goods as that of the plaintiff considering that both the parties are in the same line of business.
26. The plaintiff has also claimed damages on account of illegal activities of the defendant along with delivery up of the goods bearing the impugned trade mark/trade name of the plaintiff.
27. Order sheets show that despite service of summons, defendants no. 1 & 2 have deliberately stayed away from the present proceedings to ensure that an enquiry into the accounts of the above mentioned defendants for determination of damages cannot take place. In the case of **Time Incorporated v. Lokesh Srivastava and Anr** reported at 2005 (30) PTC 3 (Del) apart from compensatory damages of Rs.5 lakhs, punitive damages were also awarded. [Also see **Hero Honda Motors Ltd. v Rafiq Memon** reported at 2012 (52) PTC 449 (Del), **Gora Mal Hari Ram Ltd. v Ashiq Exports** reported at 2012 (50) PTC 428 (Del.), **L.T. Overseas Ltd. v Guruji Trading Co.** reported at 2005 (31) PTC 254 (Del.), **Relaxo Rubber**

Ltd. and Anr. v Selection Footwear and Anr. reported at AIR 2000 Del 60].

28. 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 a defendant who appears in Court and submits its account books would be liable for damages, while another defendant who, chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by 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.
29. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 18.04.2012 is confirmed and the suit is decreed in favour of the plaintiff and against the defendants no. 1 & 2. Plaintiff is also entitled to damages to the tune of Rs.2.0 lacs.
30. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

MARCH 31, 2014

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