

\$~

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

+ CS(COMM) 1618/2016

GALDERMA S.A. Plaintiff
Through: Mr. Pravin Anand, Advocate
with Mr. Raunaq Kamath,
Advocate.

versus

VELITE HEALTHCARE Defendant
Through: None.

Reserved on : 20th July, 2017
Date of Decision: 31st July, 2017

%

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

I.A. 8027/2017

1. Present application has been filed under Order VIII Rule 10 read with Order XIII-A Rules 3 and 6(1)(a) read with Section 151 CPC.
2. It is pertinent to mention that the present suit has been filed seeking a permanent injunction restraining infringement of trade mark, copyright, passing off etc. against the defendant. At the outset, learned

counsel for plaintiff stated that he is pressing only prayers 27(a) to (c) of the plaint. The said prayers are reproduced hereinbelow:-

“27. It is, therefore, prayed that this Hon’ble Court may be pleased to grant:

- a) An order of permanent injunction restraining the Defendant, its proprietors, principal officers, servants, representatives, agents, affiliates, legal heirs, distributors and any other persons acting for and on its behalf from manufacturing, selling, distributing, exporting, advertising, promoting or otherwise dealing in pharmaceutical products, in any manner, under the impugned mark **CATEVEL** or any other mark similar to the Plaintiff trade mark **CETAPHIL** amounting to infringement of the Plaintiff’s registered trade mark No.859078.*
- b) An order of permanent injunction restraining the Defendant, its proprietors, principal officers, servants, representatives, agents, affiliates, legal heirs, distributors and any other persons acting for and on its behalf from manufacturing, selling, distributing, exporting, advertising, promoting or otherwise dealing in pharmaceutical products, in any manner, bearing the impugned trade dress or any other trade dress which is a reproduction, whether substantial or otherwise, of the Plaintiff’s Cetaphil Trade Dress amounting to infringement of copyright.*
- c) An order of permanent injunction restraining the Defendant its proprietors, principal officers, servants, representatives, agents, affiliates, legal heirs, distributors and any other persons acting for and on its behalf from manufacturing, selling, distributing, exporting, advertising, promoting or otherwise dealing in pharmaceutical products, in any*

*manner, under the impugned mark **CETAVEL** and/or any other mark similar to the Plaintiff's trade mark **CETAPHIL** and also from using any trade dress which is a reproduction of the Cetaphil Trade Dress or doing any other act amounting to passing off the Defendant's products and/or business as that of the Plaintiff."*

3. The defendant was served with summons in the suit on 15th February, 2017 and was therefore statutorily required to file its written statement by 17th March, 2017 or latest by 15th June, 2017. The defendant was proceeded against ex-parte on 20th April, 2017. On the said date, the Court also granted an interim injunction in the plaintiff's favour and restrained the defendant from using the impugned trade mark/name **CETAVEL** during the pendency of the proceedings. Till date, the defendant has neither entered appearance nor filed its written statement.

4. The contentions and submissions advanced by learned counsel for the plaintiff are as under:-

- i. The plaintiff is the proprietor of the trade mark **CETAPHIL** which was adopted in 1950 and used in relation to a therapeutic skin care product range.
- ii. The plaintiff's trade mark **CATEPHIL** is a coined/invented mark and is entitled to the highest degree of protection conferred under law.

- iii. In addition to over 65 years of use internationally, the **CETAPHIL** trade mark has been continuously and extensively used in India since January 2001 when the Plaintiff launched its **CETAPHIL** range of products in the Indian market.
- iv. The **CETAPHIL** trade mark is registered in the plaintiff's favour in India under No. 859078 in Class 3 in relation to perfumery products, soaps, cosmetics, non-medicated preparations for the skin; creams and skin lotions, all for use in the cleansing of sensitive skin, all included in Class 3. The plaintiff has obtained registrations for the trade mark **CETAPHIL** in over 100 countries worldwide.
- v. The plaintiff's **CETAPHIL** range of products are packaged in a series of trade dresses which comprise a distinct layout, get up, colour scheme and arrangement of features closely resembling one another (hereinafter referred to as 'Cetaphil Trade Dress').
- vi. The Cetaphil Trade Dress constitutes an original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957 and any unauthorized reproduction thereof amounts to infringement of the copyright vested with the plaintiff therein.
- vii. The plaintiff's **CETAPHIL** range has generated tremendous revenues sales, details of which are as under:-

A) Plaintiff's worldwide sales figures for **CETAPHIL**

YEAR	TOTAL SALES (CHF)
2010	22,75,81,439
2011	27,96,76,640
2012	32,73,25,334
2013	37,22,78,989
2014	41,42,03,977
2015	44,64,27,293
2016	37,15,86,132

B) Plaintiff's India specific sales figures for **CETAPHIL**

YEAR	AMOUNT IN INR
2005	38,937,542
2006	46,674,850
2007	66,635,979
2008	88,163,401
2009	127,851,045
2010	162,271,267
2011	234,982,808
2012	359,652,411
2013	469,768,002
2014	591,429,318
2015	505,432,934

- viii. The details of the plaintiff's worldwide advertising and promotional expenses in relation to its products sold under the **CETAPHIL** brand are as under:-

YEAR	EXPENSES INCURRED (In Thousand Swiss Francs)
2014	75 537,3
2015	105 448,7
2016	107 994,3

- ix. The defendant, Velite Healthcare is a proprietary concern which is engaged in the sale of skin care products under the impugned mark **CETAVEL**.
- x. The defendant had applied for registration of the impugned **CETAVEL** mark under No. 2995709 in Class 3 which was objected to by the Registrar of Trade Marks owing to its identity/similarity to the plaintiff's trade mark registration No. 859078 for **CETAPHIL** in Class 3.
- xi. The defendant's impugned product is being sold in an identical bottle bearing a trade dress comprising a virtually identical get up, lay out, colour scheme and arrangement of features as the plaintiff's Cetaphil Trade Dress. The defendant has even adopted a device which is deceptively similar to the plaintiff's Ellipses Device which forms one of the most distinctive features of the Cetaphil Trade Dress. A comparison of the defendant's

impugned trade dress and the plaintiff's Cetaphil Trade Dress is provided below:-

PLAINTIFF	DEFENDANT
	
	

- xii. The defendant's impugned **CETAVEL** trade dress is a blatant imitation and substantial reproduction of the plaintiff's **CETAPHIL** trade dress amounting to an infringement of the plaintiff's copyright therein. Further the defendant's impugned mark **CETAVEL** is phonetically identical and visually and structurally similar to the plaintiff's well known trade mark **CETAPHIL**. The impugned trade mark/dress **CETAVEL** is being used by the defendant in relation to identical goods as those of the plaintiff, i.e. skin care lotion. The plaintiff is the proprietor of the trade mark **CETAPHIL** and the Cetaphil Trade Dress and the defendant's use of a virtually identical mark coupled with a deceptively similar trade dress in relation to identical products clearly amounts to infringement of the

plaintiff's statutory rights in the **CETAPHIL** trade mark and trade dress as well as passing off their products and business as those of the plaintiff.

xiii. The defendants failure to file its written statement till date demonstrates their lack of justification or defence of their infringing activities involving the plaintiff's trade mark and trade dress.

5. This Court while dealing with a similar application under Order VIII Rule 10 CPC in **CS(OS) 873/2015 Samsung Electronics Company Limited & Anr. Vs. Mohammed Zaheer Trading As M/s. Gujarat Mobiles & Ors.** has culled out the relevant law as under:-

"10. The Supreme Court in C.N. Ramappa Gowda Vs. C.C. Chandregowda, (2012) 5 SCC 265 has interpreted the Order VIII Rule 10 CPC as under:-

"25. We find sufficient assistance from the apt observations of this Court extracted hereinabove which has held that the effect [Ed.: It would seem that it is the purpose of the procedure contemplated under Order 8 Rule 10 CPC upon non-filing of the written statement to expedite the trial and not penalise the defendant.] of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non-filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have

been admitted, a judgment and decree could not possibly be passed without requiring him to prove the facts pleaded in the plaint.

26. It is only when the court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the court to record an ex parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex parte judgment although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceedings which hardly promotes the cause of speedy trial."

11. A Coordinate Bench of this Court in *Nirog Pharma Pvt. Ltd. Vs. Umesh Gupta and Ors.*, 235 (2016) DLT 354 has held as under:-

"11. Order VIII Rule 10 has been inserted by the legislature to expedite the process of justice. The courts can invoke its provisions to curb dilatory tactic, often resorted to by defendants, by not filing the written statement by pronouncing judgment against it. At the same time, the courts must be cautious and judge the contents of the plaint and documents on record as being of an unimpeachable character, not requiring any evidence to be led to prove its contents.

xxxx

xxxx

xxxx

xxxx

28. *The present suit is also a commercial suit within the definition of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 and it was the clear intention of the legislature that such cases should be decided expeditiously and should not be allowed to linger on. Accordingly, if the defendant fails to persue his case or does so in a lackadaisical manner by not filing his written statement, the courts should invoke the provisions of Order VIII Rule 10 to decree such cases."*

12. *Another Coordinate Bench of this Court in **Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd., 2013 III AD (Delhi) 176** has held as under:-*

"4. I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record....."

6. This Court is further of the view that the plaintiff is entitled to a decree under Order XIII-A of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 as the said provision empowers this Court to pass a summary judgment, without recording evidence, if it appears that the defendant has no real prospect of defending the claim.

7. This Court also finds that the plaintiff has filed pictures of third party skin care products to demonstrate how their packaging, get up, layout colour scheme etc. is distinct from the Cetaphil Trade Dress. One such picture is as under:-



8. This Court is of the opinion that in the present case the defendant has slavishly imitated the plaintiff's trade dress which demonstrates its malafides. This Court in *William Grant & Sons Ltd. Vs. Mcdowell & Company Ltd. 55(1994) DLT 80*, while considering the similarity between the trade dress of the products of the contesting parties in contrast to those of third parties, has held as under:-

“Despite looking at the labels which are to be found in Michael Jackson’s book “Malt Whisky Companions”, reprinted in 1992, I have not been able to locate any single label, for Single Malt Whisky, which has got the same feature of shape, colour, composition and articles which combine to make up the whole

of the label, namely, scrolls/ribbons, stage, thistles, in any other label of Malt Whisky. Yet the defendant has taken all the aforesaid features of the label of the plaintiff, namely, the features of shape (the label is not in straight line, but has got various curves and projections), colour and articles like the “Sambhar” with antlers, scrolls on top and bottom of the label, thistles, the coloring of the stage comprising of golden, brown and black. All this that the defendant has taken, makes one think that the defendant has not done this accidentally, or unknowingly. The same is deliberate. What is deliberate copying, cannot, but be dishonest with intention of bringing forth similarities between the plaintiff’s Glenfiddich Single Malt Whisky and the Single Malt Whisky of the defendant. In my view, Mr. Sen is right when he refers to and relies upon what is stated by Justice Kekewich in XXII RPC 273 at page 276, “Where you see dishonestly, then even though the similarity were less than it is here, you ought, I think, to pay great attention to the items of similarity, and less to the items of dissimilarity”. The Defendant appears to have been conscious of the repute of Glenfiddich as the largest selling Single Malt Whisky in the world (as asserted by Michael Jackson in “Malt Whisky Companions), so adopted label of the largest selling Single Malt Whisky.”

(emphasis supplied)

9. Considering the fact that the plaintiff is the prior and registered user and going through the legal position as enunciated by the cases cited above, this Court is of the opinion that the defendant has no justification for the adoption and use of virtually identical trade mark as well as trade dress as that of the plaintiff in relation to identical products. In any event, the defendant has not even placed a written defence on record.

10. Accordingly, the present application is allowed and the suit is decreed against the defendant in accordance with prayers 27 (a) to (c) of the plaint along with the actual costs. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

JULY 31, 2017

m/js

