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

\+ **CS(OS) NO.806/2005**

Date of Decision : 24.12.2010

M/S AHMED OOMERBHOY & ANR. **.....Plaintiffs**
Through: Mr. Pravin Anand, Advocate.

Versus

SH.GAUTAM TANK & ORS. **..... Defendants**
Through: Ms.Pratibha M.Singh, Advocate.

CORAM :
HON'BLE MR. JUSTICE V.K. SHALI

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not ? NO
3. Whether the judgment should be reported in the Digest ? NO

V.K. SHALI, J. (oral)

1. The matter has been listed on the directions of the learned Division Bench in FAO(OS) No. 141/2008 for further proceedings.

2. Briefly stated the facts of the case are that the plaintiff company M/s Ahmed Oomerbhoy filed a suit for permanent injunction against infringement of trade mark and passing off and the consequential relief of damages, rendition of accounts, delivery up, costs etc. against the defendants.

The plaintiff no. 2 was stated to be the Court Receiver, duly appointed by the High Court of Bombay vide its order dated 06.07.2000, in suit no. 4913/2000 in case titled **Ajid A. Oomerbhoy Vs. Rashid S. Oomerbhoy & Ors.** who was directed to take possession of the partnership business assets and make an inventory of all the partnership assets of M/s Ahmed Oomerbhoy trading as M/s Ahmed Mills, plaintiff no.1 in respect of which suit for dissolution of the partnership was pending in the High Court of Bombay. It is alleged in the plaint that vide order dated 30.07.2001, Court Receiver was directed to take steps to safeguard the trade mark of the plaintiff no.1 against any person who was unauthorized user of the said trade mark of the plaintiff no.1.

3. It may be pertinent here to mention that the plaintiff no. 1/ partnership firm was manufacturing, distributing, selling and dealing in edible oils for almost more than five decades under various trade names including 'Postman' which is a reputed trade mark**.** The details of the registration was mentioned in paragraph 6 of the plaint. Apart from the registration of the trade mark, the logo was also registered. The plaintiff with a view to establish the popularity of the trade mark has referred to the turnover of the partnership from the year 1990-1991 to 1999-2000, which shows the progressive increase in the turn over.

4. It is alleged that the defendants are infringing the trade mark of the plaintiff by using the trade mark 'Super Postman' for groundnut oil, even though the plaintiff no.1 is not manufacturing edible oil on account of the disputes between the members of the partnership firm.

5. This Court vide order dated 30.05.2005 passed an ex-parte ad interim injunction restraining the defendants from selling any product under the trade name 'Super Postman'. It also appointed the Local Commissioner for the purpose to conduct search and seizure of counterfeit goods, books of accounts etc. from the defendant and its allied companies at different places. This ex-parte ad interim injunction order was confirmed on 20.12.2007.

6. The defendant had filed the written statement and contested the claim of the plaintiff. It had denied that the defendant had infringed the trade mark of the plaintiff. It was also alleged that the plaintiff no. 1 is not a registered partnership firm, and therefore, the suit is barred. It was alleged that the person signing is not competent to sign, verify and institute the suit on behalf of the plaintiff. The registration of the plaintiff as the proprietors of the trade mark 'Postman' was also disputed. It was stated that the defendant had adopted the trade mark 'Super Postman' in the year 2004 honestly and in a bonafide manner as they were informed that there was no such trade mark being used by any other person.

The defendants also contended that they have already filed petition for cancellation/rectification of all the registration pending or granted before the Intellectual Property Appellate Board which is still pending. It was also denied that the plaintiffs have developed any goodwill or reputation or that the defendants were passing off their goods as that of the plaintiff.

7. On 01.12.2008 the Court framed the following issues in the matter:-

> "(1) Whether the plaintiff no.1 is proprietor of the trade mark POSTMAN? OPP
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> (2) Whether the plaintiff no.1 is proprietor of artistic work in the label/packaging with the mark POSTMAN? OPP
>
> (3) Whether the defendants are guilty of passing off their goods as those of the plaintiff? OPP
>
> (4) Whether the defendants have infringed the plaintiff's trade mark POSTMAN and/or the artistic work in the packaging/label? OPP
>
> (5) Whether the plaintiff's claim/suit is barred by acquiescence and delay and effect thereof? OPD
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> (6) Whether the plaintiff is entitled to damages? If so, to what amount? OPP
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> (7) Whether the plaintiff is entitled to decree for rendition of accounts and/or damages, if so, what amount? OPP
>
> (8) Whether the plaintiff is entitled to decree of permanent injunction(s) as prayed for? OPP
>
> (9) Relief."

8. The parties were directed to file their list of witnesses within six weeks and the plaintiff was directed to file evidence by way of affidavits within ten weeks. Since the evidence was not filed despite the repeated opportunities the evidence of the plaintiff was closed on 16.12.2010 by the learned Joint Registrar and the matter has been adjourned to 28.03.2011 for recording of the evidence of the defendant.

9. It may be pertinent here to mention that the defendants herein had preferred an appeal bearing FAO(OS) No. 141/2008 which was listed before the learned Division Bench on 20.12.2010. On the said date, it was pointed out to the learned Division Bench that the evidence of the plaintiff has already been closed as they have failed to produce any evidence and consequently so far as the defendants in the suit are concerned, who were appellants in the appeal, there is no question of defendants producing any evidence. It was on this basis that the learned Division Bench adjourned the matter to 15.02.2011 with the observations that as the matter is still pending before the learned Single Bench therefore the matter be listed on 23.12.2010.

10. The learned counsel for the plaintiff Mr. Pravin Anand has vehemently contended that so far as the closure of the evidence of the plaintiff by the learned Joint Registrar vide order dated 16.12.2010 is concerned, that is an order which cannot be sustained and he has already filed yesterday a

Chamber appeal against the said order, but the same was returned on account of the fact that the affidavit which was filed along with the said appeal was not the original affidavit of the Official Liquidator or his duly authorized person, but only a scanned copy of the fax message which was received by him. It was contended by him that since the Chamber appeal has already been filed against the closure of evidence the Court may adjourn the matter so as to enable the plaintiff to place the said appeal on record for the correct appreciation of facts. It was also suggested that the learned Joint Registrar has failed to appreciate the facts and has wrongfully denied an opportunity to the plaintiff to adduce evidence. In this regard, the learned counsel drew the attention of the Court to the orders passed by the Hon'ble Court from time to time to observe that the plaintiff has been diligently prosecuting his matters although there was some delay in filing the affidavit by way of evidence of one Mr. B.Prasad. It is stated that the delay stood condoned as the plaintiff was put to terms firstly by directing him to pay a cost of Rs.30,000/- permitting the plaintiff to file affidavit within two weeks and then another cost of Rs.5,000/- for bringing that affidavit on record. It has been contended that the cost has already been paid and after payment of the cost only one opportunity was granted to the plaintiff to adduce evidence which unfortunately could not be availed by the plaintiff as there was a communication gap

between the plaintiff and his client namely the Official Liquidator because of which the plaintiff's evidence was closed on 16.12.2010. The learned counsel for the plaintiff Mr. Anand took the Court through the various orders of the Court passed from time to time in this regard.

11. The second submission which was made by the learned counsel for the plaintiff was that admittedly the defendant in the written statement has taken the plea that she has already filed an application for rectification of the trade mark of the plaintiff which is pending adjudication, and therefore, in pursuance to Section 124 of the Trade Mark and Merchandise Act, 1958, the proceedings of the present suit be stayed till the tribunal passes an appropriate order on the said rectification application.

12. The third point which was taken by Mr. Anand, the learned counsel for the plaintiff is to the effect that by giving one opportunity to the plaintiff no serious prejudice is likely to be caused to the defendant as the plaintiff is not manufacturing the edible oil under the brand name 'postman' as on date. The plaintiff be given one opportunity to adduce evidence on which date he will examine one witness from the Official Liquidator's Office to prove his case where after the defendant can enter the witness box. It is urged that the entire process would roughly take about a couple of months by which date the entire evidence will be recorded and the case could be

decided on merits. Lastly, it is urged that even if for the sake of arguments it is admitted that the plaintiff is not to be permitted to adduce evidence even then there are documents on record which clearly establish that the defendants are indulging in act of infringing the trade mark of the plaintiff. In this regard, it has been contended by the learned counsel for the plaintiff that he has already placed on record the documents by way of exhibit P-1 to P-5 which clearly prove the case of the plaintiff.

13. Ms. Pratibha M. Singh, the learned counsel for the defendants has refuted all the submissions of the plaintiff. So far as the Chamber Appeal is concerned, it has been contended by the learned counsel for the defendants that as on date there is no Chamber Appeal pending before the Court. Even the registry has returned the said Chamber appeal. Time cannot be granted to the plaintiff to file the Chamber appeal so as to avoid the Court passing an order under Order 17 Rule 3 CPC. It may be pertinent here to mention that Order 17 Rule 3 CPC reads as under:-

> "**3. Court may proceed notwithstanding either party fails to produce evidence, etc. –** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, (the Court may notwithstanding such default,--
>
> (a) If the parties are present, proceed to decide the suit forthwith, or

(b) If the parties are, or any of them is, absent, proceed under Rule 2)"

14. With regard to the stay of the present proceedings in view of the rectification application having been filed before the registration of the trade mark, it was contended that no doubt such a provision exists but the said provision is to be availed of at the first available instance and not by way of an escape route to avoid the precepetative order being passed on account of non production of evidence by the plaintiff. With regard to the production of evidence, it was contended that the plaintiff had been given sufficient number of opportunities but he has been negligent in prosecuting the case and did not produce any evidence. The plea that grant of another opportunity would not cause any prejudice to the defendant, is stated to be without any merit. It is stated that there is already a serious prejudice caused to the defendant on account of the stay order which has been operating against them for the last nearly five years and yet the plaintiff is indulging in dilatory tactics. With regard to the last submission that the existing record itself including the exhibit P-1 to P-5 proves the case of the plaintiff, it was submitted that the plaintiff is not able to prove that the defendant is infringing the trade mark of the plaintiff. It was contended that the plaintiff has failed miserably to discharge the onus of even proving that it is the owner of the trade mark much less

to prove that the defendant is indulging in infringement, even passing off for warranting directions by the Court.

15. I have considered the respective submission and perused the record.

16. So far as the first plea regarding the filing of Chamber Appeal by the plaintiff against the order dated 16.12.2010 by the learned Joint Registrar closing his evidence is concerned, it may be pointed out that the plaintiff has already collected the appeal from the Registry on which objections have been raised that it was not supported by an affidavit of the signatory to the appeal in original. The appeal paper book was produced before the Court and it was accompanied by a copy of the scanned copy of the affidavit which could not be accepted to be as a proper affidavit so as to enable the Court to entertain the appeal, therefore, as on date there is no appeal which is pending before this Court against the order dated 16.12.2010 passed by the learned Joint Registrar closing the evidence of the plaintiff.

17. Without considering as to whether any appeal is pending or not against the order of closure of evidence of the plaintiff if one goes from the previous order sheets, it becomes clear that there is nothing illegal or irregular in the order which has been passed by the learned Joint Registrar who has been literally forced to close the evidence of the plaintiff as he has

failed to produce the witness despite the sufficient number of opportunities having been given to him. It may be mentioned here that the issues in the instant case were framed almost two years back on 01.12.2008 and the onus of proof of main issues that the plaintiff is the proprietor of the trade mark 'Postman' and the artistic work 'Postman' apart from proving the action of the defendant amounting to infringement or passing off was on the plaintiff. Similarly, the onus to prove damages to which the plaintiff was entitled was also on the plaintiff as would be reflected from the issues which have been reproduced hereinabove. The plaintiff was given 10 weeks time to file evidence by way of affidavit which was not done and the matter was adjourned to 16.03.2009 before the learned Joint Registrar for fixing up dates of cross examination. On 16.03.2009, neither the list of witnesses nor the affidavit by way of evidence of the parties were filed and two weeks' time was further sought whereupon the learned Joint Registrar adjourned the matter to 06.05.2009. On 06.05.2009 again an adjournment was sought on behalf of the plaintiff for the purpose of filing evidence as it was stated that instructions are still awaited from the plaintiff. This request was repeated even after expiry of two months on 06.07.2009. The matter was adjourned to 13.07.2009. On 13.7.2009, last and final opportunity was granted to the plaintiff to file the affidavit and the matter was adjourned to

28.10.2009. On 28.10.2009, the learned Joint Registrar again noticed that no affidavit by way of evidence has been filed despite last opportunity having been given. This clearly shows that despite sufficient number of opportunities having been given to the plaintiff, he was negligent in prosecuting the matter and was shying away from producing the evidence, perhaps on account of the fact that he was enjoying the restraint order against the defendants.

18. On 14.01.2010, the factum of negligence of the plaintiff in prosecuting the matter was noted and one more opportunity was granted to the plaintiff to file affidavit by way of evidence subject to payment of cost of Rs.30,000/- and in default of filing of the affidavit the evidence of the plaintiff was peremptorily directed to be treated as closed. The matter was adjourned to 22.02.2010. On 22.02.2010 it was noted by the learned Joint Registrar that the affidavit had been returned back as it was not filed within the stipulated period and the matter was directed to be placed before the Court. On 09.04.2010, the affidavit was re-filed by the plaintiff though belatedly and on an application having been filed the plaintiff's affidavit was permitted to be taken on record subject to payment of additional cost of Rs.5,000/-. The matter was directed to be relisted before the learned Joint Registrar on 05.05.2009 for the purpose of cross examination. The witness did not appear before the Court on 21.09.2010

for the purpose of cross examination. On the contrary, a fresh application was filed on behalf of the plaintiff under Order XVIII Rule 4 CPC for production of one official from the office of Official Liquidator for the purpose of proving the plaint. It was stated that he will be examined orally. An impression was sought to be created as if oral examination of this witness was in lieu of the other witness whose affidavit was already filed. The application was allowed and the plaintiff was permitted to examine the said witness orally. The matter was directed to be listed before the learned Joint Registrar on 26.10.2010 for the purpose of cross examination of the witnesses who was sought to be summoned and examined orally. But neither the witness was summoned nor he was brought. Even the person whose affidavit was filed and who was to be examined also did not appear. It is in this backdrop when the witness whose affidavit was filed did not appear for cross examination and the witnesses whose examination was to be recorded orally was also not present that the learned Joint Registrar closed the evidence of the plaintiff. The plaintiff is not to be given endless opportunities to adduce evidence specially when objection is being taken by the opposite side that he is deliberately indulging in dilatory tactics because the stay order is operating against the defendants. All these sequence of events shows that the plaintiff had been deliberately negligent in prosecuting his

matter because he was continuing to enjoy the restraint order in his favour and against the defendant. There was absolutely no justification for the plaintiff to have defaulted on so many occasions and despite so many warnings in filing the affidavit by way of evidence and even producing the witness when he was visited by costs. It was in this backdrop that I feel that the order of the learned Joint Registrar cannot be found to be at fault and he was perfectly justified in closing the evidence of the plaintiff. The plea of the learned counsel for the plaintiff that grant of another opportunity for the purpose of cross-examination or for producing of witnesses will not cause any serious prejudice to the defendant is of no consequence. This is an argument only in desperation to see that the matter is kept alive for the purpose of recording of evidence. The question of non-grant of permission to adduce evidence in the instant case does not hinge on the plea that no prejudice would be caused to the defendant but on the fact that as to how many opportunities have been given for the purpose of production of evidence which the plaintiff has failed to avail of. Obviously, the plaintiff has miserably failed to avail of even a single opportunity having been given for the cross-examination of the witnesses. I, accordingly, feel that there is no infirmity or illegality in the order passed by the learned Joint Registrar in closing the evidence of the plaintiff. If the evidence of the

plaintiff is closed then the question which arises is as to whether, as urged by Mr. Anand, Advocate that from the existing record he is able to show that the defendant is responsible for infringement, is to be examined. In this regard, the following issues are relevant with regard to which the onus of proof is on the plaintiff.

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> (2) Whether the plaintiff no.1 is proprietor of artistic work in the label/packaging with the mark POSTMAN? OPP
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> (3) Whether the defendants are guilty of passing off their goods as those of the plaintiff? OPP
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> (4) Whether the defendants have infringed the plaintiff's trade mark POSTMAN and/or the artistic work in the packaging/label? OPP
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> (5) Whether the plaintiff is entitled to damages? If so, to what amount? OPP
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>
> (8) Relief."

The onus of proof of these issues no. 1 to 4 and 6 to 8 was on the plaintiff to establish that he is the proprietor of the trade mark and that the said trademark was being infringed and

the rest of the reliefs were consequential. No evidence has been produced by the plaintiff to prove that he is the proprietor of the trade mark of the word 'Postman' or is even the proprietor of the artistic work, therefore, issue Nos.1 and 2 have to be decided against the plaintiff.

19. So far as the issue nos. 3 and 4 are concerned, that deals with the question of passing off and infringement of the trade mark or the artistic work of the packaging. Since the plaintiff himself has not been able to establish that he is the proprietor of the trade mark of 'Postman' or the artistic work 'Postman' as alleged by him, the question of the infringement and passing off the trademark by the defendant does not arise. The exhibits which have been admitted by the defendants are of no consequence so far as the discharge of onus in respect of the above issues is concerned. There has to be either proof of a fact by the plaintiff or there has to be an admission of the plaintiff's trademark or the artistic work in the logo of 'Postman', which are not there. Therefore, the documents admitted become inconsequential. These exhibits are:-

> "i) Exhibit P-1 is the photograph of the defendant's product.
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> ii) Exhibit P-2 (colly) is the bill by virtue of which the impugned goods under the Mahalaxmi Oil Company is purported to have been purchased. In addition to this, there are two visiting cards.

iii) Exhibit P-3 is the brochure of the Super Postman in blue colour purported to have been issued by the defendants.

iv) Exhibit P-4 is the pamphlet of Super Postman purported to be issued by the defendants".

20. The learned counsel for the defendants has placed reliance on case titled **Naresh Chand gupta Vs. Braham Prakash & Smt.Dayawati** 2007 (97) DRJ 193 (DB) in which under somewhat similar circumstances, the Division Bench of this Court observed that repeated adjournments by the plaintiff for adducing evidence was not to be granted and the Court could close the evidence of the plaintiff and pronounce its order under Order XVII Rule 3 CPC. The Court has noticed that there is a tendency on the part of the litigants to delay the trial, therefore, the order of the learned Single Judge in this case was approved. A reading of the judgment also shows that reference has been made to the judgments of the Apex Court as well as some of the other High Courts where the repeated adjournments for adducing evidence have been deprecated.

21. In the light of the aforesaid facts and the judgment cited by the learned counsel for the defendants, I am satisfied that the plaintiffs are only trying to prolong the trial on one pretext or the other because he continues to enjoy the stay order in his favour. Despite repeated opportunities and warnings having been given, he has failed to adduce evidence. The evidence of the plaintiffs is already closed and since the plaintiffs have

not discharged onus of proof even in a single issue, therefore, none of the issues is proved and the suit of the plaintiff is dismissed.

V.K. SHALI, J.

DECEMBER 24, 2010
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