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

Date of Decision: 3rd January, 2018

+ **RFA 127/2007 & CM Nos.3247/2007**

LEVI STRAUSS & CO.

..... Appellant

Through: Mr. Pravin Anand, Mr. Dhruv Anand
and Mr. Shamim Noovegesdan,
Advocates.

versus

RAJESH AGARWAL

.... Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

The present appeal arises out of judgement/order dated 28th November, 2006 passed by the Ld. Additional District Judge by which the suit filed by the Appellant/Plaintiff (hereinafter '*Appellant*') was dismissed. The suit was initially filed before the original side of this Court and later on transferred, on the increase in the pecuniary jurisdiction, to the district court. The Respondent/Defendant (*hereinafter 'Respondent'*) was proceeded ex-parte before the trial court. In view of the fact that the Respondent could not be served after repeated attempts in this appeal, on 28th May, 2007 this Court ordered that the Respondent would be served by publication. The Respondent was served by publication in the Indian Express, Hyderabad edition and citation report was filed. There was however no appearance on behalf of the Respondent.

2. Initially, an ex-parte ad-interim injunction was granted on 3rd October, 2001 which was continued till the disposal of the suit. Suit was dismissed on

28th November 2006. Vide order dated 28th May 2007, in the present appeal, it was directed that the injunction granted on 3rd October, 2001 would continue. Thereafter, the appeal was admitted on 23rd October, 2007. The matter has been taken up for hearing today. None appears for the Respondent despite service.

3. The Plaintiff filed the suit for permanent injunction restraining the infringement of trademark, copyright and passing off in respect of the Plaintiff's trademark "LEVI'S", "LEVI STRAUSS", derivatives and labels thereof (*hereinafter 'trade marks'*). The Plaintiff claims to be using the trade mark since 1850 and claims to be one of the well known brands for wearing apparels, particularly jeans. The Plaintiff is the registered proprietor of the trade marks. Details of the same are set out in paragraph 8 of the plaint. According to the plaint, the Defendant was selling wearing apparels bearing identical logos and devices as of the Plaintiff. The Plaintiff, thus, prayed for permanent injunction and damages.

4. Initially, on 3rd October, 2001 an ex-parte ad-interim injunction was granted in favour of the Plaintiff and a Local Commissioner was also appointed to visit the premises of the Defendant located at Hyderabad to make an inventory of the infringing products. The said Local Commissioner had filed his report on 6th October, 2001. The Defendant initially entered appearance, but thereafter stopped appearing in the suit. Accordingly, the Defendant had been proceeded ex-parte on two occasions. However, written statement was filed by the Defendant, which is on record. Plaintiff filed the evidence of Mr. Ashish Oberoi, authorized signatory. Ex-parte arguments were heard. Vide order dated 28th November, 2006 the suit of the Plaintiff was dismissed.

5. The impugned order finds that the Court has territorial jurisdiction to try the suit. Learned Additional District Judge, however dismissed the suit on two primary grounds i.e. first that the Local Commissioner, who had seized the infringing goods of the Defendant at Hyderabad on 6th October 2001, had not been examined by the Plaintiff and secondly on the ground that no assignment was placed on record to show that the Plaintiff company had assigned its marks to Levi's Strauss India Pvt. Ltd., an affiliate entity of the Plaintiff in India. The relevant findings in the impugned judgement are set out below:

"18. The plaintiff has neither examined the Local Commissioner nor produced the seized goods to show that by said goods the defendant had infringed the trademarks and copyright of the plaintiff and was passing off his goods as that of the plaintiff. Since the alleged goods of the defendant have not been produced thus, the plaintiff has failed to prove that the defendant had infringed the trademark and copyright of the plaintiff"

19. Moreover, the plaintiff has averred that it has sale's turn over in US dollar in billion since from the year 1994 till 2000 and it had incurred expenditure at advertisement and sales of promotion.

However, PW1 has not proved the sales and expenditure made by the plaintiff on advertisement and sales promotion. PW1 has exhibited the certified statement by Chartered Accountant as PW1/4, which is in respect to a company Levi's Strauss India Private Limited the said company is stated to be a local affiliated company of the plaintiff in India. The plaintiff has also not produced any deed of assignment to show that the plaintiff company has assigned its work to the said Levi's Strauss India Private Limited in India"

6. Learned counsel for the Appellant submits that the impugned order/judgment is erroneous on both the grounds. Reliance is placed upon provisions of Order 26 Rule 10 (2) of CPC to submit that the Commissioner's report is evidence in the suit and can be admitted as evidence even without the Commissioner being examined. Reliance is also placed on two judgments in support of this proposition.

7. Insofar as the sales and advertising expenditure as also the assignment in favour of the Indian subsidiary is concerned, Ld. Counsel submits that the Plaintiff entity which has filed the suit is itself the registered proprietor of the trademarks and has been using the said marks globally either by itself or through its various affiliates and subsidiaries across the world. The plaintiff and all its affiliate/associate companies ought to be treated as one economic entity, inasmuch as the businesses are conducted by the Plaintiff in different countries through such companies but the marks are continued to be owned by the Plaintiff itself. Thus, affiliates and subsidiaries use the marks with the permission from the Plaintiff and there is no requirement of showing any assignment in favour of such affiliated/subsidiary companies. Counsel for the Appellant relies on judgment in ***George V. Records, SARL v. Kiran Jogani & Anr. 2004 (28) PTC 347 (Del)***.

8. The Court has perused the records of the suit. The Local Commissioner who was appointed by the Court has filed a detailed report dated 12th October, 2001. In the said report, the Commissioner categorically records that there were 57 pairs of jeans bearing the infringing marks and logos which were found at the premises of the Defendant which were bearing the infringing marks and labels. The said infringing products were handed over on superdari to the Defendant. The Local Commissioner has

also placed on record the original labels bearing the infringing marks, seized from the Defendant premises - scanned copies of the same are set out below.



9. The Local Commissioner is in fact a representative of the Court itself and it is for this reason that Order 26 Rule 10 (2) of CPC clearly provides that once the Commissioner has filed the evidence along with his report the same shall be treated as evidence in the suit and shall form part of the record.

10. It is a settled proposition that the Local Commissioner need not be examined in every matter. If any party wishes to examine the Commissioner for whatsoever reason or if the Court wishes to seek any clarification in respect of the Commissioner's report, then the option to examine the Commissioner exists. In *Misrilal Ramratan & Ors. Mansukhlal & Ors. v.*

A. S. Shaik Fathimal & Ors., 1995 Supp (4) SCC 600 the Supreme Court categorically holds that the Commissioner's report cannot be rejected on the specious plea of non-examination of the Commissioner. The relevant portion of the judgement reads as under:

"It is now settled law that the report of the Commissioner is part of the record and that therefore the report cannot be overlooked or rejected on spacious plea of non-examination of the Commissioner as a witness since it is part of the record of the case."

Similar is the view taken by a Ld. Single Judge of this Court in **Harbhajan Singh v. Smt. Shakuntala Devi Sharma & Anr. AIR 1976 DELHI 175.**

11. The rationale behind Order 26 Rule 10 (2) of CPC is clear i.e. the Commissioner is appointed as a representative of the Court and evidence collected by the Commissioner along with the report of the Commissioner would be evidence in the suit, subject to any objection raised by any party. If any party has any objection to Commissioner's report or to the evidence, such party has an option to examine the Commissioner personally in open Court. Such examination is however, neither compulsory nor required especially in cases where the party does not challenge the report. In the present case, a perusal of the written statement filed by the Defendant clearly reveals that the Defendant does not challenge the Commissioner's report. Para 6 of the written statement is set out below:

"The defendant further submits that he is just a businessman and he is not at all a manufacturer and he will not come under the definition of manufacturer at any stretch of imagination. The Commissioner reports also discloses that there was no manufacturing unit

and defendant is doing business in a small shop. The location of the shop also discloses that it is only a small business. The mediator's report which is brought at the instance of the plaintiff also establish that defendant shop is a small and there was no manufacturing unit. The plaintiff ought to have not pressed this suit knowing fully well that there was no manufacturing unit. That the Panchnama clearly speaks that "at the time of seizure the defendants clearly informed to the Advocate Commissioner that the goods which was seized by the Advocate Commissioner were purchased in Hyderabad market from the local business man whose identity is unknown. If the premises are inspected by Hon'ble Court, the Court will come to clear conclusion that the goods are different in colour, monogram, labels. The goods submitted by the plaintiff does not prove the deceptive features of the goods alleged to be sold by the defendant or manufactured by the defendant or stored by the defendant. That the quantity which was seized by the Advocate Commissioner clearly indicate that the defendants are petty merchants not manufacturers, moreso if Hon'ble court inspected the goods and the Hon'ble court would come to conclusion that the goods was seized by the Advocate Commissioner are the waste damages pieces kept beside under the table of the shop. Those seized goods are not kept for sale it is a waste piece kept under the table for return to the original seller. So the definition of the Copy Right defines in the following manner:-

"Deceptive goods with same colour goods are kept for sale of goods shall be manufactured or selling deceptive goods to cause wrongful loss to the original manufacturer." The seizure report does not disclose in all the overt acts mentioned above. So the defendant is entitled to get exemplary costs."

12. From the above paragraph, it is evident that while the defendant

disputes the deceptive similarity of the logos, it does not raise any objection or challenge to the report of the commissioner. The defendant in fact relies upon the report. In the absence of any challenge to the report of the Local Commissioner, the law does not require the Commissioner to be examined in view of the settled legal position. The impugned judgment is erroneous on that ground.

13. Insofar as the sales and advertising expenditure is concerned, the same have been incurred by the Plaintiff's subsidiary in India and the same relate to the trademarks in issue. The usage by the Plaintiff, being through its subsidiary/affiliate company in India, the Chartered Accountant certificate has been placed on record as Exhibit PW1/4. Thus, it cannot be said that the said sales and advertising figures cannot be taken into consideration for establishing usage of the marks. Assignment in favour of Levi's Strauss India Pvt. Ltd. is not required and the Plaintiff cannot be compelled to assign its trademarks in favour of its local Indian subsidiary. The Plaintiff has placed on record the legal proceedings certificate for trademark registration nos.352692, 382357B, 290954, 350738, 317649B and 270875B in class 25 (Exhibit PW1/9), all of which are registered in favour of the Plaintiff i.e. Levi Strauss & Company, San Francisco, California, USA. The Plaintiff before this Court being the actual registered proprietor of the trade marks, no further assignments are required to establish the proprietary rights of the mark. The Plaintiff has also placed on record the list of stores selling Levi's products (Exhibit PW1/5) and various original magazines including FILMFARE (December 2004), JETWINGS (March 2006 & January 2006), MAXIM (January 2006) and ELLE (May 2005) as Exhibits PW1/6 to show the advertisements of the Appellant's apparel. The sales, promotion and

advertisement figures of the Indian Company Levi's Strauss India Pvt Ltd. entity has been placed on record to show the extent of usage of the plaintiff's marks in India. This suit was filed in 2001 and in the year previous to the filing of the suit the sales of the products bearing the Appellant's marks in India were over Rs.25 Crores and advertisement figures were over Rs.4.7 Crores. The fact that the sales and advertising were carried out through the Indian affiliate company does not in any manner prejudice the Appellant inasmuch as, the said Indian Company along with the Plaintiff ought to be treated as 'one economic entity'.

14. In this day and age where businesses are conducted globally, it cannot be held that carrying on of business through local affiliates precludes protection of trademarks and other intellectual property of the original owner. Irrespective of the entities using the marks in various countries and territories due to business exigencies, the marks used are the same and are entitled to be protected. The business in different countries, for the purpose of protection of trade marks, is to be taken as a 'single source' as the fundamental concept of trade marks is to act as a 'source identifier'. The brands and marks signify the source and in turn signify quality products. The trust that is placed by the consumers is in the brand or the marks which transcend beyond the names of the entities selling or advertising the products locally. The concept of 'one economic entity' as enunciated in **Kiran Jogani** (*supra*) is apt in this context. The impugned judgment to the extent, that it non-suits the Appellant on the ground of the non-filing of the assignment of the trademarks in favour of the Indian Company, is clearly erroneous and contrary to law.

15. A perusal of the above labels and marks leaves no doubt that the use

of the same is completely violative of the Appellant's rights. This is a classic case of identical copying. The name of the Appellant is also being misused in the labels along with all the accompanying devices which clearly constitute infringement of the registered trade marks of the Appellant. The labels and other brand identifiers used by the defendants also constitute passing off of their products as those originating from the Appellant.

16. The impugned judgment/order dated 28th November, 2006 is set aside. The Plaintiff is entitled to permanent injunction in terms of prayers (i), (ii) & (iii) of the plaint. Learned counsel for the Appellant does not press the relief (iv) for damages. The Local Commissioner found only 57 pairs of jeans in the Defendant shop bearing the infringing marks. The Court fee deposited by the Plaintiff is to the tune of Rs.7,400/- in the suit and Court fee deposited in the present appeal is to the tune of Rs.7350/- i.e. a total of Rs.14,750/- is awarded as costs. The suit is decreed in terms of prayer clauses (i), (ii) & (iii) of the plaint with costs of Rs. 14,750/-. Decree sheet be drawn. The appeal is allowed in the above terms. All miscellaneous applications are disposed of as infructuous.

PRATHIBA M. SINGH
(Judge)

JANUARY 03, 2018/dk