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Contents

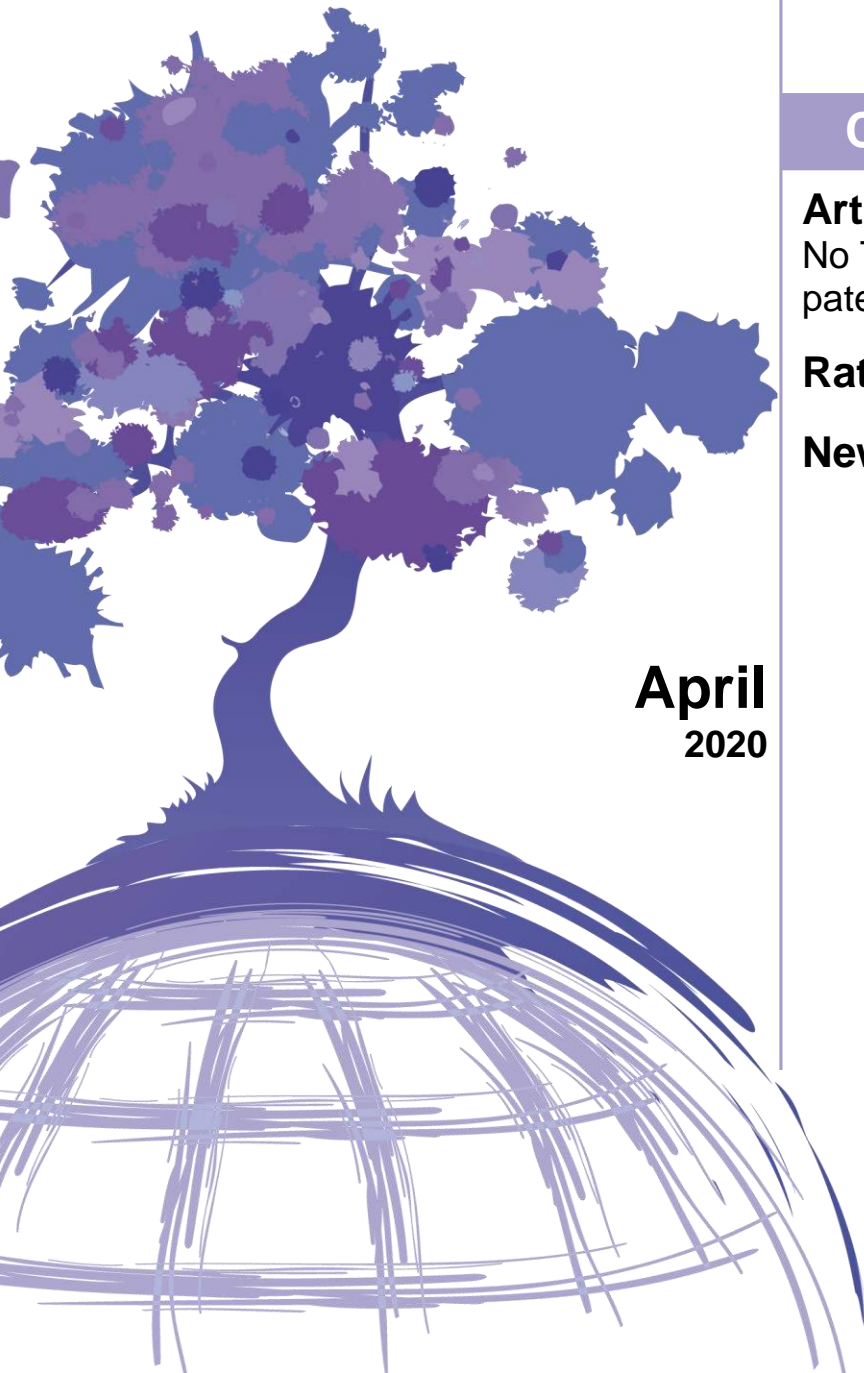
Article

No Trade Secret protection over
patented know-how..... 2

Ratio Decidendi 6

News Nuggets 9

April
2020





Article

No Trade Secret protection over patented know-how

By Aditya Kaushik

A Single Judge of the Delhi High Court, in March 2020, examined whether trade secret protection can be granted to know-how with respect to a particular invention that has been patented outside India, in the case of *Prof. Dr. Claudio de Simone & Anr. v. Actial Farmaceutica Srl. (formerly known as CD Investment Srl.) & Ors.*¹ The Plaintiffs, Professor Dr. Claudio De Simone (Plaintiff no.1); and Next Gen Pharma India Pvt. Ltd. (Plaintiff No.2) instituted a suit against the Defendants, (a) Actial Farmaceutica Srl, formerly known as CD Investment Srl (Defendant no.1); (b) CD Pharma India Private Limited (Defendant no.2); (c) VSL Pharmaceuticals, Inc. (Defendant no.3); (d) Franco Pirovano (Defendant no.4); and (e) Sun Pharma Laboratories Ltd. (Defendant no.5) for restraining the Defendants from selling their probiotic product formulation under the trademark VSL#3; from linking their product to Plaintiffs' patented De Simone Formulation in any manner, thereby leading to passing off the Plaintiffs' formulation, unjust enrichment and unfair competition. The Single Judge *vide* order dated 17.03.2020 dismissed the suit of the Plaintiffs as being non-maintainable due to lack of cause of action in the absence of any patent protection over Plaintiffs' formulation in India.

The Single Judge further held that the Plaintiffs' were not even the owner of the mark VSL#3, therefore no relation could be established between the said mark and Plaintiffs' formulation to lead to a conclusion of passing off.

Furthermore, it was held that the know-how associated with Plaintiffs' formulation, the breach of which had been pleaded by the Plaintiffs, cannot be termed as a trade secret/confidential information since the said know-how already existed in the public domain due to a patent having already been granted over the said formulation in the United States. Since the suit was rejected on maintainability, no summons were issued to the Defendants and thus the Defendants were unrepresented.

Brief facts:

The Plaintiffs filed a suit C.S.(OS) 576/2019 against the Defendants claiming that the Defendants' act of selling their new product formulation under the name VSL#3 is amounting to passing off of its products as those of the Plaintiffs'. It was pleaded that previously by virtue of a licensing agreement the Defendants had been selling Plaintiffs' De Simone Formulation under the name VSL#3 and that passing off being essentially a tortious action, is not limited to unregistered trademarks and applies to any act which free rides on the work or goodwill or reputation of a third-party, including know-how. The Plaintiff no.1 had come up with a pro-biotic formulation formed by mixing eight strains of bacteria named De Simone Formulation in the late 1990s and patented it in the United States under the U.S. Patent No. 5716615 dated 10.02.1998 and which patent expired on 09.02.2015. Plaintiff no.1 being the co-inventor and the sole owner of know-how, strain selection and blending ratio of the said formulation had

¹ C.S.(OS) 576/2019; order dated 17.03.2020

kept it as a secret. Plaintiff no.1 established Defendant no.1 in Italy and Defendant no.3 in U.S.A. and also became the CEO of Defendant no.3 under the Product Development and Collaboration Agreement dated 11.07.2000 for exploitation of De Simone Formulation. That the Defendant no.3 acquired ownership rights over trademark VSL#3 on 18.09.2000 and *vide* Patent License Agreement dated 30.01.2001, the Plaintiff no.1 granted license for commercialization of De Simone formulation patent to Defendant no.3, till the expiry of the patent.

On 28.01.2010, the Plaintiff No.1 and Defendant no.3 entered into a Know-How Agreement so that Defendant no.3 too could continue to market De Simone formulation in USA even after expiry of the patent and the said Know-How Agreement was to become effective upon the expiration of the Patent Licence Agreement dated 30.01.2001 and was to remain in effect till 31.01.2016 with right to Plaintiff no.1 to terminate earlier than that. For Indian territory, *vide* Know-How Agreement dated 06.12.2004, Plaintiff no.1 granted permissive rights for a period of ten years starting from 06.12.2004, to Defendant no.2, to import De Simone Formulation and further market the same in India. Thereafter, Defendant no.2 obtained Import Drug Licence from Drug Controller General of India (DCGI) for De Simone Formulation and the DCGI approved De Simone Formulation for treatment of rotavirus diarrhoea in children, irritable bowel syndrome and ulcerative colitis. Then disputes arose between Plaintiff no.1 and Defendants, when Defendants decided to modify the formulation and sell the modified formulation under the name VSL#3 without obtaining necessary permissions from DCGI.

Due to such disputes Plaintiff no.1 opted out of the arrangements with the Defendants and ended the Know-how Agreements with Defendant no.3 and Defendant no.2 for USA and

Indian territories respectively. The Plaintiff no.1 stopped supplying the said formulation to the Defendants and started marketing its formulation in India through Plaintiff no.2 and obtained a license to use the mark VSL#3 from Defendant no.2 on payment of royalty. The Plaintiff no.1's formulation was available in India under the name VSL#3 till March 2018 with first sale under the said name being in 2007. Therefore, the Plaintiffs contended that the said mark VSL#3 had come to be associated with Plaintiffs' formulation and had acquired secondary significance as well as good and reputation in the market. The Plaintiffs also contended that the Defendants by way of reverse engineering of De Simone Formulation are trying to sell counterfeit formulations under the name VSL#3 with the same trade dress as used to market De Simone Formulation earlier and have also relied on the clinical test results of De Simone Formulation published on their websites under the name of VSL#3. The Plaintiffs also contended that in such a scenario, new VSL#3 being marketed by the Defendants as a probiotic food is likely to cause deception and confusion amongst buyers, traders and medical practitioners at the risk of health of patients.

On these grounds, the Plaintiffs prayed for permanently injunction the Defendants from (i) manufacturing/importing/advertising/selling their new product or any other formulation amounting to drug without getting appropriate approval from DCGI; (ii) manufacturing and selling their new product under the brand VSL#3; and (iii) from linking / relating their new product to Plaintiff no.1 or to De Simone Formulation.

The Single Judge on going through the facts of the case questioned the Plaintiffs on the maintainability of the case since the Plaintiffs did not have any right over the use of the mark VSL#3 and since a patent was already granted on the De Simone Formulation in U.S.A., the know-how associated with said formulation was

already in public domain and no trade secret protection could be extended to the same sans the know-how Agreements. The Single Judge dismissed the suit of the Plaintiffs on the ground that the Plaintiffs did not have any right on the use of the mark VSL#3 which admittedly belonged to the Defendant no.2 and therefore, no passing off could be claimed by the Plaintiffs against the Defendants due to the use of the said mark. Further, the Single Judge held that even in view of the know-how Agreement, the Defendants cannot be said to be committing passing off with respect to the Know-how of the Plaintiff no.1 passed to the Defendants since know-how/trade secret/confidential information is not a 'property' and no relief in rem can be claimed with respect to it. It was also held that such know-how of the Plaintiffs with respect to the said formulation could not be protected as a Trade Secret since the same was already in the public domain since a patent could not have been granted without disclosure of the so called 'know-how'. The Single- Judge thus dismissed the case of the Plaintiffs for failing to disclose any cause of action against the Defendants.

Contentions of the parties:

The Plaintiffs contended that the suit was primarily for passing off and unjust enrichment by the Defendants who were seeking to sell the new VSL#3 formulation by relying on studies and reputation of De Simone Formulation belonging to the Plaintiffs. The Plaintiff submitted that even though they do not have any ownership rights over the mark VSL#3 under which the Defendants' product was being sold, still the mark VSL#3 had come to be associated with the Plaintiffs' De Simone Formulation owing to use thereof for sale of Plaintiffs' formulation for over a decade. Therefore, the said mark had acquired secondary significance in relation to the said formulation and any attempt on the part of the Defendants to sell their new product under the same mark coupled with their act of placing

reliance on studies relating to De Simone Formulation, constituted an act of passing off and unjust enrichment falling under the broad genus of unfair competition. To claim passing off against the Defendants, the Plaintiffs submitted that an action for passing off being essentially a tortious action and is therefore, not limited to unregistered trademarks and applies to any act which free rides on the work or goodwill or reputation of a third party. The Single judge raised a query to the Plaintiffs if the suit was barred under Section 4 of the Specific Relief Act, 1963 which provides that specific relief can be granted only for the purpose of enforcing individual civil right and not for mere purpose of enforcing a penal law. In response to the said query, the Plaintiffs contended that business goodwill is an asset and species of 'property' and therefore, Section 4 of the Specific Relief Act, 1963 extends to enforcing a right of a party to goodwill and reputation enjoyed by its product. The Plaintiffs also contended that the *mala fide* of the Defendants was also evident from the defendants using the mark VSL#3, earlier used with respect to a drug, now with respect to a food supplement and such action being harmful for the public and in violation of the notification issued by the DCGI. The Plaintiffs also contended that the Defendants relied on the studies relating to De Simone Formulation and which is harmful to consumers interest.

Decision of the court:

The Single Judge, after considering contentions of the Plaintiffs and replies given by them in response to the queries raised by the Judge on the maintainability of the suit, dismissed the suit filed by the Plaintiffs for lack of cause of action against the Defendants. The Single Judge held that the Plaintiffs alleged passing off by the Defendants with respect to a patented product, De Simone Formulation. However, the patent pleaded was with respect to De Simone Formulation under the laws of U.S.A. and not in India. The Judge held that unlike in

trademarks, wherein common law right of passing off is recognised under Section 27(2) of the Trademarks Act, 1999, no such right is recognised in an invention under the Patents Act, 1970. Also, the patent in favour of the Plaintiff if any, had expired on 09.02.2015, therefore, even if such common law rights were recognised under the Patents Act, 1970, the same would have been irrelevant for the present purposes. The Single Judge relied on the decisions of *Bristol-Myers Squibb Holdings Ireland Unlimited Company vs. Natco Pharma*², *Novartis AG vs. Union of India*³ and on Justice Ayyangar Committee Report on the Revision of Patent Laws to hold that there can be no right in any invention save in accordance with the Patents Act. The intellectual property of patents, unlike of trade marks, is purely and simply a statutory right and there are no rights including claims in tort of unfair competition or unjust enrichment, in intellectual property of an invention save as provided under the Patents Act.

The Single Judge also held that the relief sought by the Plaintiffs could have been possible by way of an action for breach of the common law duty of confidence, which is a right in *personam* against an individual but not as a proprietary right in such information, which is opposable in *rem*. The Single Judge also held that no restraint can be put on the Defendants for their use of the mark VSL#3 or the sale of their product under the said mark even in the context of the Know-how Agreement. This is so because the same would be in violation of Section 27 of the Contract Act, which makes void i.e. unenforceable, every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind. The Single Judge rejected the argument of the Plaintiffs that an invention which does not qualify as patented product and has no property right

therein, can acquire property rights by the third person entering into a Know-How Agreement and thus claiming confidentiality. The Single judge in this respect placed reliance on the case of *Navigators Logistics vs. Kashif Qureshi*⁴ to hold that confidential information and trade secrets are not equated to property in India. The Single Judge rejected the contention that know-how is different than patent by holding that in case of patented inventions, a patent cannot be granted without complete disclosure of information which is required to work the invention sought to be patented. Therefore, this disclosure of information necessarily involves disclosure of know-how and the Plaintiffs cannot contend that while a patent was granted on their formulation in the U.S.A. but the know-how required to work the patented invention was not disclosed by them and kept as trade secret. The Single Judge further held that information claimed to be confidential can be protected as trade secret only if such information is not available in the public domain and is hence unknown to others. Since the Plaintiffs have no subsisting patent protection in India, and since the patent granted in US has expired, the innovation, as noted above, is in public domain. The Single Judge finally held that the claim for trade secret protection cannot be sustained and the Defendants cannot be restrained from manufacturing their product formulation under the VSL#3 mark, in spite of the Know-How Agreement, as otherwise it would amount to judicial creation of an extra-statutory monopoly for perpetuity in the invention, in contrast to the scheme of Patent Act, 1970 that seeks to bring an invention to public domain after the expiry of the term of the patent.

Conclusion

The obvious and unmistakable take away from this case is that no proprietary right can be vested in the know-how/trade secret/ confidential

² 2020 SCC OnLine Del 200

³ (2013) 6 SCC 1

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⁴ 254 (2018) DLT 307

information as they cannot be equated to a 'property'. That the right to enforce know-how/trade secret/ confidential information is a right in *personam* and cannot be enforced by way of a common law remedy such as passing off. This case also shows that information/know-how associated with a patented invention

automatically enters the public domain on patent being granted and post its expiry can be used by all and therefore, cannot be termed as confidential.

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Ratio decidendi

Trademarks - "DMW" visually and phonetically resembles "BMW" – Difference in products manufactured, immaterial

In a dispute involving "BMW" and "DMW", the Delhi High Court has held that the trademark used by the defendant (DMW) was deceptively similar or nearly resembled the mark of the plaintiff (BMW) and was likely to deceive or cause confusion. The Court was of the view that there was visual and phonetic resemblance in the marks. It was also held that the essential features of the plaintiff's marks were copied in the defendants' mark and is likely to mislead an average man of ordinary intelligence. The Court in this regard distinguished the Supreme Court decision in the case of *Nandhini Deluxe v. Karnataka Cooperative Milk Producers Federation Ltd.* while it rejected the contention of the defendant that the products being manufactured by them were entirely different, i.e. E-Rickshaws.

Further, observing that the plaintiff was manufacturing motorcycles under the mark BMW since 1923 and motor cars since 1928, had assembly plants in 14 countries with a global

sales network in more than 140 countries, having a work force nearly of 1,25,000 and a revenue of 94.163 million Euros in 2016, it was held that the use of the mark DMW by the defendant *prima facie* appeared to be a dishonest act with an intention of trying to take advantage of the reputation and goodwill of the brand of the plaintiff. Granting ad-interim injunction, the Single Judge Bench also held that the plaintiff's mark was a well-known trademark and use of the aforesaid mark by the defendant on its product constitutes infringement within the meaning of Section 29(4) of the Trademarks Act. It was observed that such use by the defendant was detrimental to the reputation of the registered mark BMW of the plaintiff company.

Plea of delay on part of the plaintiff was also rejected holding that even if there was delay on the part of the plaintiff in filing of the present suit, it would not be sufficient to deter grant of injunction in favor of the plaintiff. [*Bayerische Motoren Werke AG v. Om Balajee Automobile (India) Private Limited* – Judgment dated 23-3-2020 in CS(COMM) 292/2017, Delhi High Court]

Amendment to plaint – Jurisdiction of Joint Registrar and maintainability of appeal before Commercial Appellate Court

Deliberating on the issue as to whether the Joint Registrar acted without jurisdiction while deciding an application for amendment in the plaint, the Delhi High has held that the amendments which (i) alter the period with effect from which the trademark “SUPERON” had been adopted by the respondent (plaintiff), and (ii) also claimed, for the first time, that the original adoption of the said trademark was by the plaintiff through sister concern, introduced changes of substance, and not merely of form, in the original plaint. The Court was of the view that the amendment could not be characterised as “formal”, within the meaning of clause (2) of Rule 3 in Chapter II of the 2018 Original Side Rules, and hence the Joint Registrar exceeded his jurisdiction in deciding the application. The Court, however, upheld the plea that setting aside the Single Judge Order, deciding the appeal against the Joint Registrar order and upholding application for amendment, would be futile, as SJ had examined the merits of the prayer for amendment of its plaint, independently and in detail. The Court also noted that the right to amend, as confirmed by Order VI Rule 17 of the CPC, has advisedly been made expansive, save and except in cases where the trial has already commenced. It observed that prior user is one of the essential indicia, to be examined while adjudicating a claim of infringement and passing off, and hence the date from which the plaintiff-respondent was using the mark was fundamental to adjudication of the controversy.

However, on the ground of maintainability of appeal, observing that the proviso to Section 13(1A) of the Commercial Courts Act is an enabling, rather than a disabling, provision, the Division Bench of the High Court held that the proviso should not be read as excluding, from the

jurisdiction of the Appellate Court, all orders, passed by a Commercial Court, save and except those which find specific enumeration in Order XLIII of the CPC. The Court was of the view that Section 13(1A) of the Commercial Courts Act allows appeals to be preferred against all judgements and orders of the Commercial Division of the High Court, to the Commercial Appellate Division thereof, and the proviso to the said sub-section merely clarifies that in the case of orders specifically enumerated in Order XLIII of the CPC, such appeals shall lie. Delhi High Court decisions in the cases of *HPL (India) Ltd.* and *Samsung Leasing Ltd.*, were distinguished by the Court observing that the challenge in the present dispute was against an order passed under Rule 5 in Chapter II of the 2018 Original Side Rules, and not against an order under one or the other provision of the CPC.

Also, the Division Bench of the High Court in this case though disagreed with the decision in the case of *Rahul Gupta*, which treated the jurisdiction of the Single Judge, against the order of the Registrar, as original in nature, refrained itself from referring the issue to the Larger Bench. It held that the framers of the 2018 Original Side Rules must be deemed to have been cognizant of the view expressed in the case of *Rahul Gupta*. Observing that the Division Bench in *Rahul Gupta* had held that the reference to an “appeal” in Rule 4 in Chapter II of the 1967 Original Side Rules was a misnomer, the Court held that it was reasonable to expect that the “misnomer” would not be repeated, once again, in Rule 5 in Chapter II of the 2018 Original Side Rules. The Court also noted that in the case of *Rahul Gupta*, the Commercial Court Act did not arise for consideration. [*D & H India Ltd. v. Superon Schweisstechnik India Ltd.* – Judgement dated 16-3-2020 in FAO (OS) (COMM) 237/2019 & CM APPL. Nos. 42840/2019, 42841/2019 & 230/2020, Delhi High Court]

Infringement of mark 'ISKCON' by using the term 'formerly known as Iskcon...'

Bombay High Court has granted *ad interim* Order restraining the defendant from using the mark 'ISKCON' or the phrase 'Formerly known as ISKCON Apparel Pvt. Ltd.'. The Court observed that, *prima facie*, the Defendants' impugned trading name was identical and/or in any event deceptively similar to the Plaintiff's ISKCON marks. It noted that since the mark 'ISKCON' was a coined trade mark which was associated exclusively with the Plaintiff, it deserved the highest degree of protection. The Court in its *ex parte* Order also noted that the term ISKCON did not exist prior to the Plaintiff's adoption and use, and that even if the name of the Defendant had changed to 'Alcis Sports Pvt. Ltd.', the use of the expression 'Formerly known as ISKCON Apparel Pvt. Ltd' on its website amounted to infringement of the Plaintiff's trademarks and passing off. It was of the view that no prejudice would be caused to the Defendants, if the Defendants are enjoined from using the term 'Formerly known as....', if the name has already changed. [*International Society for Krishna Consciousness (ISKCON) v. Iskcon Apparel Pvt. Ltd.* – Order dated 6-3-2020 in Commercial IP Suit (L) No. 235 of 2020, Bombay High Court]

Trademarks – Prior use, effect of not voluminous sales; Descriptive nature of mark 'No Turn'

Deliberating on the question as to whether the defendant was a prior user of the mark "No Turn" and if yes, whether he was entitled to protection, the Delhi High Court, after examining the invoices placed on record by the defendant, has held that

the sales were intermittent in the various years and not indicated a continuous and voluminous use by the defendant of the mark. The Court, hence, was of the view that the defendant cannot succeed in the defence under Section 34 of the Trade Marks Act, 1999 and that no inference can be drawn that the plaintiff by misrepresenting its goods as that of the defendant is riding on the goodwill of the defendant and thereby causing damage to the defendant.

Further, on the question as to whether the defendant was using the mark 'No Turn' as a descriptive mark and thus entitled to protection, thereby barring plaintiff from getting any favourable injunction, the Court was of the view that the mark was not used as a trademark/brand but to describe the quality of the mattress and thus the mattresses which do not require to be "turned around" were labelled 'No Turn'. The manner in which the mark was used on the mattresses and in the brochure of the defendant, was perused by the Court in this regard. It also observed that the prior user of the defendant was only of the label and not the trademark of mattress. Declining the interim injunction, the Court observed that the plaintiff would not be entitled to the relief of injunction for the reason the mark 'No Turn' was a descriptive mark. It also noted that the plaintiff had not placed any material on record to show that on the date of application or even on the date of registration the plaintiff's trademark 'No Turn' had acquired the distinctiveness to achieve the status of a well-known mark. [*Peps Industries Private Limited v. Kurlon Limited* – Order dated 16-3-2020 in CS(COMM) 174/2019, Delhi High Court]



News Nuggets

Copyrights – Hiring out of vehicles fitted with radio receivers is not act of communication to public

CJEU has held that by making available to the public, vehicles equipped with radio receivers, vehicle rental companies are not carrying out an ‘act of communication’ to the public of protected works. The Court in its judgment dated 2nd of April, 2020, was of the view that the case was of the supply of a radio receiver forming an integral part of a hired motor vehicle, which makes it possible to receive, without any additional intervention by the leasing company, the terrestrial radio broadcasts available in the area in which the vehicle is located, and hence it differed from acts of communication by which service providers intentionally broadcast protected works to their clientele, by distributing a signal by means of receivers that they have installed in their establishment. Recital 27 of EU’s Directive 2001/29, in accordance with which ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this directive’, was relied by the Court in its judgment in Case C-753/18. The Supreme Court of Sweden had earlier asked the Court of Justice to determine whether the hiring out of motor vehicles equipped with radio receivers constitutes a communication to the public within the meaning of Directives 2001/291 and 2006/1152 on copyright.

Online marketplace when not liable for infringement of trademark

CJEU has on 2nd of April, 2020 held that mere storage of the goods which infringe trademark

rights, by the e-commerce service provider, does not constitute an infringement by the e-commerce company of those trademark rights. The Court was of the view that a company which stores goods on behalf of a third-party seller, without being aware that they infringe trade mark rights, does not itself “use” that trade mark, so long as it does not pursue the aim of offering the goods for sale or putting them on the market like the seller. Observing that the e-commerce companies in the facts of the case, had not themselves offered the goods for sale or put them on the market and that the third-party seller alone pursued that aim, the Court in its judgment in case Case C-567/18 held that the companies had not themselves “used” the mark.

Revocation of trademark for non-use – Proprietor can seek compensation for injury during the period of non-use

The Court of Justice of the European Union has held that the proprietor of a trade mark who has never used it and whose rights in it have been revoked on expiry of the five-year period according to the first subparagraph of Article 10(1) of EU’s Directive 2008/95, may be allowed by the Member states to seek compensation for injury as a result of the alleged use by a third party of an identical/similar sign during the said five-year period after registration of the mark. The CJEU in the case *AR v. Cooper International Spirits LLC*, was however of the view that the fact of non-use of the trademark by the proprietor would be an important factor for determining the existence and the extent of the injury

sustained by the proprietor and, accordingly, the amount of damages. The Court in its judgement dated March 26th, 2020 noted that the EU directive left the national legislature entirely free to determine the date on which revocation of a trade mark takes effect.

EDREAM-11 is near identity to DREAM-11; Summary disposal of suit in uncontested suit

Observing that the defendant was using a mark (EDREAM-11) which had near identity - phonetic, structural and visual – to that of the plaintiffs (DREAM-11), the Delhi High Court has granted permanent injunction against the defendant, both on the grounds of infringement of their registered trademarks and passing off. The Court in the case *Sporta Technologies Pvt. Ltd. v. Edream 11 Skill Power Pvt. Ltd.* noted that the description of the defendant's platform as contained on its website revealed that its services were identical to those of the plaintiffs, and the plaintiffs' averments regarding the goodwill and reputation of its business were not rebutted. Reliance was also placed on the case of *Satya Infrastructure Ltd. v. Satya Infra & Estates Pvt. Ltd.* wherein it was held that in

an uncontested suit, it is not necessary to require the plaintiffs to lead evidence, and a summary disposal of the suit is permissible, on the basis of the contents of the plaint, supported by the statement of truth and declaration under the Commercial Courts Act, 2015.

Copyright agreement executed by minor and without any period of validity

Observing that the defendant themselves had claimed their rights through two agreements which were *prima facie* illegal, being executed when the plaintiff was a minor, the Madras High Court has held that any further act of the defendant in distributing, manufacturing or selling the recording of songs rendered by the plaintiff, would be impermissible. The Court in this regard also observed that there was no period of validity referred to in the two agreements/documents authorizing the defendant from selling the recordings under these two documents and as such, Section 19(5) of the Copyright Act would come into play, which restricts the defendant to exercise the rights under any copyright, beyond 5 years. The Court in its Order dated 4-3-2020 granted interim injunction.

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