

Delhi High Court Time Incorporated vs Lokesh Srivastava And Anr. on 3 January, 2005 Equivalent citations: 2006 131 CompCas 198 Delhi, 116 (2005) DLT 599, 2005 (30) PTC 3 Del Author: R Chopra Bench: R Chopra JUDGMENT R.C. Chopra, J. 1. This suit for permanent injunction, damages and delivery up etc. has been instituted by the plaintiff Company alleging that the plaintiff Company is organized and existing under the laws of State of Delaware, USA and is having its registered office at New York. It is a subsidiary of Time Warner Incorporation, which is a leading Magazine publisher in world. Its publications include the News Magazine 'TIME' as well as 'TIME ASIA'. These magazines have acquired worldwide trade reputation and goodwill and are known for fair reporting, good writing and authoritative and unbiased analysis of events and issues. The plaintiff Company is the registered proprietor of the trade mark 'TIME' in about 150 countries and its front page design with distinctive red border is recognized all over world. In para 7 of the plaint, details of its annual average paid circulation have been given. To cater to the specific needs and requirements of a world fragmented into continents and regions, the plaintiff has launched various international editions including 'TIME ASIA' which was introduced in July, 1946 for the residents of Asia. The details of the average paid circulation of 'TIME ASIA' have been given in para 14 of the plaint. The details of the registration in India of the trade mark 'TIME' and its cover design with red border device have been given in para 16 of the plaint. It has been pleaded that these registrations confer upon the plaintiff's exclusive right to use the said mark to the exclusion of all others. LIVING MEDIA is its distributor in India since 1994. The details of the circulation of this Magazine in India, its revenue and publicity expenses are given in Para 17 of the plaint. The plaintiff has alleged that the defendants started printing, publishing and distributing for sale "TIME ASIA SANSKARAN" by using the words "now in Hindi also a News Magazine of International standards". This press release indicating the launch of the Magazine from 18th July, 1999 uses the word 'TIME' in an identical type script and font style as is used by the plaintiff to represent the mark on its Magazines. The defendants invited advertisements also for its 'TIME ASIA SANSKARAN'. The search carried out by the plaintiff's distributors revealed that the Magazine titled 'TIME ASIA SANSKARAN' has been registered with the Registrar of Newspapers in India and the first issue of the Magazine dated August, 1999 has been released by the defendants in india. According to the plaintiff, a mere look at the defendants' Magazine discloses infringement of its trade mark 'TIME/TIME ASIA' and slavish imitation of the distinctive red border. To mislead the general public and readers, the defendants have also claimed on their magazine that they are having an office in New York, USA but the investigations carried out by the plaintiff have revealed that this address is false and has been adopted merely with a view to mislead the consumers in believing that thee defendants have an operative office in New York. The plaintiff has alleged that the defendants fully knowing the plaintiff's right in the trade mark 'TIME' and the world wide goodwill and reputation therein have sought to misappropriate the plaintiff's trade mark by using the words 'TIME ASIA'. In para 25 of the plaint, it is alleged that the confusion created by the

defendants was reaffirmed when the plaintiff's office at Hong Kong received by facsimile a bill for advertising in the defendants' Magazine. It shows that the advertisers and clients desirous of placing advertisements in plaintiff's Magazine are actually getting confused into believing that the defendants' Magazine is in some way connected with the plaintiff's and as such, the revenue lost to the plaintiff stands established. The plaintiff with a view to amicably settle the dispute, addressed a legal notice dated 23.7.1999 to defendant No. 1 and thereafter in spite of telephonic discussions, the defendant No. 1 has not responded. The plaintiff has alleged that the actions of the defendants are malafide and dishonest inasmuch as by adoption of the title 'TIME ASIA SANSKARAN', the defendants are representing to the members of trade and general public that their Magazine is the Indian edition of the world renowned Magazine 'TIME' and 'TIME ASIA' of the plaintiff. The adoption of the red border design on the cover page is also aimed at confusing and misleading the members of the trade and general public. In these premises, the plaintiff claims a decree of permanent injunction restraining the defendants, their officers, servants, agents, representatives and related companies from launching, publishing, issuing and advertising their Magazine under the trade mark 'TIME ASIA SANSKARAN' and from using the component 'TIME ASIA' or 'TIME' together with or separately in conjunction with any prefix or suffix or from using any other trade mark which is deceptively similar to the plaintiff's trade mark 'TIME' and from using the distinctive reborder, design, so as to infringe the plaintiff's registered trade mark No. 100539, 173307 and 407004. An order for delivery up of all goods bearing the impugned mark including letterheads, literature, magazines, negatives, dies, blocks, labels, promotional material, stationery articles or any other infringing material is also prayed. A decree of damages in the sum of Rs. 12.5 lacs on account of actual damages suffered by the plaintiff because of the infringing activities of the defendants including the loss of sales and advertisement revenue or an order of rendition of accounts of the profits illegally earned by the defendants on account of the use of the impugned trade mark, damages in the sum of Rs. 5 lacs on account of damage to the reputation and good will of the plaintiff and Rs. 5 lacs on account of punitive and exemplary damages are claimed. None appeared for the defendants in spite of service and as such, they were proceeded against ex-parte vide orders dated 19.10.2000. The plaintiff has filed in its ex-parte evidence the affidavit of Mr. Jeremy Koch, Senior Vice President of the plaintiff Company. He has proved on record a copy of his Power of Attorney Exhibit P-1. A copy of the Company's Magazine 'TIME' bearing distinctive red border Exhibit P-2, the registration certificates Exhibits P-4, P-5 and P-6, and several other documents have been proved to establish that the plaintiff Company has enormous reputation and goodwill in the trade mark 'TIME'. He has also proved on record the defendants' Magazine and press release Exhibits P-8 and P-9. He has deposed on oath that the defendants' impugned 'TIME ASIA SANSKARAN' is deceptively similar to that of the plaintiff's Magazine 'TIME ASIA'. The un rebutted and unchallenged affidavit of Mr. Jeremy Koch and the documents proved on record fully establish that the plaintiff is the proprietor of registered trade mark 'TIME'. The red border design appearing on

its Magazines is distinctive and directly associated by the people in trade and general public to the Magazine of the plaintiff. As such, the defendants have no right to use the registered trade mark 'TIME' in any manner whatsoever with any prefix or suffix and they also have no right to use the distinctive red border on their Magazine cover which belongs to the plaintiff. In case it is used on a Magazine, the same may be passed off as the one being printed and published by the plaintiff Company. A comparison of the plaintiff's 'TIME' Magazine Exhibit P-2 and the defendants' 'TIME ASIA SANSKARAN' Exhibit P-8 clearly shows that the defendants' Magazine is a slavish imitation of the plaintiff's reputed trade mark/trade name as well as cover design which have an enormous goodwill, reputation and recognition in trade as well as general public. The defendants' effort is to make undue enrichment by creating confusion and deception in the trade as well as consumers and attract advertisements for its Magazine and have higher circulation. This attempt on the part of the defendants has to be condemned and contained. Therefore, this Court has no hesitation in holding that the plaintiff has succeeded in establishing on record that the defendants are infringing its trade name and copyrights in over design of its magazine 'TIME ASIA'. The plaintiff has claimed a decree of Rs. 12.5 lacs on account of damages suffered by the plaintiff or an order of rendition of accounts of the profits illegally earned by the defendants by use of the impugned trade mark. In view of the fact that the defendants have not chosen to turn up and face these proceedings, this Court is of the considered view that an order of rendition of accounts is fully warranted and called for. Damages in the sum of Rs. 12.5 lacs as claimed cannot be awarded on account of the fact that the plaintiff has not succeeded in proving on record as to how and on what basis these damages have been calculated. Damages of Rs. 5 lacs are claimed on account of loss of reputation of the plaintiff. These can be awarded inasmuch as the readers who might have read the defendants' TIME ASIA SANSKARAN, must have formed a very poor opinion about the plaintiff's Magazine and as such, the reputation and goodwill of the plaintiff has suffered. Coming to the claim of Rs. 5 lacs as punitive and exemplary damages for the flagrant infringement of the plaintiff's trade mark, this Court is of the considered view that a distinction has to be drawn between compensatory damages and punitive damages. Award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him whereas punitive damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities. Whenever an action has criminal propensity also the punitive damages are clearly called for so that the tendency to violate the laws and infringe the rights of others with a view to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the suit but suffer on account of the breach. In the case in hand itself, it is not only the plaintiff, who has suffered on account of the infringement of its trade mark and Magazine design but a large number of readers of the defendants' Magazine 'TIME ASIA SANSKARAN' also have suffered

by purchasing the defendants' Magazines under an impression that the same are from the reputed publishing house of the plaintiff company. This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade marks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discouragend dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In Mathias v. Accor Economy Lodging, Inc. reported in 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away. This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs. 5 lacs only which can be safely awarded. Had it been higher even, this court would not have hesitated in awarding the same. This Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement. 2. Accordingly, an ex-prate decree of permanent injunction is passed in favor of the plaintiff and against the defendants restraining the defendants their officers, servants, agents, representatives and all others acting through them from printing, publishing, issuing and advertising their Magazine under the trade name 'TIME ASIA SANSKARAN' or from using the component 'TIME' in conjunction with any prefix or suffix or from using the trade name 'TIME' or 'TIME ASIA' and also from using the red border distinctive design on the Magazine to be published by them. An order of delivery up of all goods bearing the impugned mark including the letterheads, literature, magazines, negatives, dies, blocks, labels, promotional material, stationery articles and other infringing material is also passed. A decree of rendition of accounts also is passed in favor of the plaintiff and against the defendants for the period August, 1999 to the date of this decree. A decree of Rs. 5 lacs on account of damages to the reputation and goodwill to the plaintiff is passed in favor of the plaintiff and against the defendants. A decree in the sum of Rs. 5 lacs on account of punitive/exemplary damages is also passed in favor of the plaintiff and against the defendants for flagrant ifringement of the plaintiff's registered trade mark and copyrights. The plaintiff is also entitled to costs. The plaintiff is entitled to interest pendente lite and future interest on the awarded amount @ 12% per annum from the date of the filing of the suit

till realization. A decree sheet be prepared.