Koninlijke Philips N.V. & Anr. vs Amazestore & Ors. on 22 April, 2019

Equivalent citations: AIRONLINE 2019 DEL 826

Author: Manmohan

Bench: Manmohan

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CS(COMM) 737/2016 & I.A. 7469/2016

KONINLIJKE PHILIPS N.V. & ANR. ..... Plaintiffs
Through: Mr. Pravin Anand with
Ms. Vaishali Mittal, Mr. Siddhant
Chamola, Ms. Vrinda Gambhir,
Advocates

versus

AMAZESTORE & ORS. ..... Defendants
Through: None

AND

+ CS(COMM) 1170/2016 & I.A. 2685/2017, 16768/2018

KONINLIJKE PHILIPS N.V. & ANR. ..... Plaintiffs
Through: Mr. Pravin Anand with
Ms. Vaishali Mittal, Mr. Siddhant
Chamola, Ms. Vrinda Gambhir,
Advocates

Versus

AMITKUMAR KANTILAL JAIN & ORS. ..... Defendants
Through: None

Reserved on: 08th April, 2019
% Date of Decision: 22nd April, 2019

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

JUDGMENT

MANMOHAN, J:

BACKGROUND

1. Present suits have been filed seeking decree of damages as well as permanent injunction restraining violation of multiple statutory and common law rights, namely:

a. Piracy of registered design number 253140 in CS(COMM) 737 of 2016. The prayer clause 49(i) of the said plaint is reproduced hereinbelow as the Plaintiffs have not pressed their reliefs for delivery up and rendition of accounts.:-

"49. In light of the above, it is therefore prayed before this Hon'ble Court that it may be pleased to pass the following reliefs:-

(i) An order for permanent injunction restraining the Defendants, their partners or proprietors, principal officers, servants, agents, distributors and all others acting on its behalf as the case may be from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with health and personal care appliances products and/or any other goods and/or services (including on their own websites as well as third party websites) resulting in :

(a) Infringement of the Plaintiff's design number 253140 as set out hereinabove;

(b) Unfair competition on part of the Defendants as set out hereinabove; b. Infringement of copyright and passing off of the trade-dress in CS(COMM) 1170 of 2016. The prayer clause 50(i) of the said plaint is reproduced hereinbelow as the Plaintiffs have given up their reliefs of delivery up and rendition of accounts as prayed for in paragraph 50(ii) and (iii) of the plaint:-

"50. In light of the above, it is therefore prayed before this Hon'ble Court that it may be pleased to pass the following reliefs:-

(i) An order for permanent injunction restraining the Defendants, their partners or proprietors, principal officers, servants, agents, distributors and all others acting on its behalf as the case may be from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with health and personal care appliances products and/or any other goods and/or services (including on their own websites as well as third party websites) using the Plaintiff's trade dress, copyright and any other mark deceptively similar thereto leading to:

Infringement of the Plaintiff's copyright as set out hereinabove;

Passing off of the defendants' impugned products as belonging to the Plaintiff by using trademarks, trade dress and copyright which are identical and/or deceptively similar to the Plaintiff's trademarks, trade dress and copyright as set out hereinabove; Unfair Competition on part of the Defendants as set out hereinabove;

2. On 18th March, 2019, with consent of the parties, present two suits, being Koninklijke Philips N.V. &Anr. vs Amitkumar Kantilal Jain &Ors., CS (COMM) 1170/2016 and Koninklijke Philips N.V. & Anr. vs Amaze Stores &Ors., CS (COMM) 737/2016, were consolidated.

3. Additionally, on the said date, this Court passed consensual decrees in both the suits against the contesting Defendants, i.e. Amitkumar Kantilal Jain, Nova Homes Appliances Pvt. Ltd., Nova Marketing Group, Amaze Stores, Mr. Hitesh Lunawath, Mr. Raju Lunawath, Million Lights and Mr. Ramesh Chand. The relevant portion of the order dated 18th March, 2019 is reproduced hereinbelow:-

> Mr. H.P. Singh, learned counsel for Amitkumar Kantilal Jain and Nova Homes Appliances Pvt. Ltd. states that the names of his clients have wrongly been mentioned on the products by way of a sticker by defendant no.7. He further states that he has no objection if CS(COMM) No.1170/2016 and CS(COMM) No.737/2016 are decreed in accordance with 50 (i) and 49 (i) of the plaints respectively.
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> Learned counsel for Nova Marketing Group, Amaze Stores, Mr. Hitesh Lunawath, Mr. Raju Lunawath, Million Lights and Mr. Ramesh Chand states that his clients tender their unconditional apology and are agreeable to pay consolidated costs of Rs.2,50,000/- in both the suits.
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> In view of the aforesaid statement, learned counsel for the plaintiffs states that he does not wish to press the present suits for any other and/or further relief against the aforesaid defendants. He further states that the costs be used for a charitable purpose.
>
> The statements made by learned counsel for Amitkumar Kantilal Jain and Nova Homes Appliances Pvt. Ltd., Nova Marketing Group, Amaze Stores, Mr. Hitesh Lunawath, Mr. Raju Lunawath, Million Lights and Mr. Ramesh Chand are accepted by this Court and the said defendants are held bound by the same. Registry is directed to prepare a decree sheet accordingly.
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> It is further directed that the costs of Rs.2,50,000/- shall be deposited with AIIMS Poor Fund Account No.10874588424 with SBI, Ansari Nagar, New Delhi (IFSC Code :
>
> SBIN0001536) within a period of two weeks. In view of the above, present suit stands disposed of qua Amitkumar Kantilal Jain and Nova Homes Appliances Pvt. Ltd., Nova Marketing Group, Amaze Stores, Mr. Hitesh Lunawath, Mr. Raju Lunawath,

Million Lights and Mr. Ramesh Chand.

4. Presently, the two suits survive against the remaining Defendants who have been identified as the primary sources of infringing products in India. The particulars of these Defendants in the two proceedings are as follows:-

Name of the Defendant	Impugned activity	Particulars in CS (COMM) 1170 of 2016	Particulars in CS (COMM) 737of 2016
Nova Manufacture Limited	Defendant No. 4	Defendant No. 8	Manufacturing the infringing product
Badri Electro Trading Company Industries (BESTCO) L.L.C.	Parent company of the Defendant No. 8	Defendant No. 4	Manufacturing the infringing product
Omni Exim Private Limited	Owner of the trademark NOVA and Importer	Defendant No. 4	Defendant No. 8

5. It is pertinent to mention that injunction orders had been passed against Defendant-Nova Manufacturing Industries Limited (NOVA) in both suits, vide orders dated 20th October, 2015 and 03rd June, 2016 by the learned Predecessor of this Court. The right to file the written statement of M/s Nova Manufacturing Industries Limited (NOVA) in CS(COMM) 737/2016 was closed vide order dated 18th April, 2018 and it was proceeded ex parte in FAO(OS) 578/2015 vide order dated 28th January, 2016.

6. Since the Defendants-M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and M/s Omni Exim Private Limited voluntarily did not enter appearance in both the proceedings they were proceeded ex parte vide orders dated 09th January, 2019 and 18th March, 2019. M/s Nova Manufacturing Industries Limited (NOVA) is also proceeded ex parte.

7. On 25th March, 2019, this Court allowed the Plaintiffs' applications to amend its claim under Order VI Rule 17, Code of Civil Procedure, 1908, (hereinafter referred to as "CPC") with respect to the surviving Defendants and its claims for damages.

8. On the aforesaid date, this Court also took Plaintiffs' evidence by way of affidavit(s) on record.

ARGUMENTS ON BEHALF OF THE PLAINTIFFS

9. Mr. Pravin Anand, learned counsel for the Plaintiffs advanced the following contentions and submissions:-

I. The Plaintiffs are electronic conglomerate of immense global repute. In the past hundred years, the Plaintiffs have revolutionized the world with path breaking innovations and unprecedented consumer products.

II. The Plaintiffs have instituted the present suits to protect and enforce their statutory and common law rights in relation to their products, QT4000, QT4001, QT4005, QT4006 and QT4011, forming part of the Advanced Beard Trimmers series 3000.

III. The packaging for its Advanced Beard Trimmer Series 3000 consists of several unique elements inter alia the design, layout, color scheme, as depicted below:

#	Characteristic Feature
1.	Rectangular shaped box
	Blue colored background theme of the box (light blue in the
2.	middle and dark blue near the top and bottom) Thin white strip near the top of the box with trademark
3.	written in blue font
4.	Trademark written in blue font
5.	Product description against white, black, orange and silver backgrounds Circular bubble on the lower right side of the beard trimmer
6.	Shaded rectangular box with the words "Face Style" in
7.	orange.

IV. These Advanced Beard Trimmer range of products is sold along with product literature containing artistic and literary work, the copyright of which subsists with the Plaintiffs. The packaging for the Plaintiffs' beard trimmer series was designed by one Mr. M.S. Sutton, who was an erstwhile employee of a group company of the Plaintiffs in Netherlands and was subsequently transferred to it by virtue of a deed of assignment.

V. The literary work, artistic work and the photographs in the Plaintiffs' product literature and promotional material and packaging fall within the meaning of Sections 2(c), 2(o) and 2(s) of the Copyright Act, 1957 respectively. By virtue of Sections 13 and 14 of the Copyright Act, 1957, Plaintiffs are entitled to the exclusive rights in the copyright vested in the literary work, artistic work, etc. as well as the packaging of the product, which has been developed and sold by the Plaintiffs.

VI. The Plaintiffs have been granted and have since been enjoying protection over the design of the beard trimmer forming part of its design registration No. 253140 dated April 12, 2013 that is valid and subsisting.

VII. The Defendants are engaging in the manufacture, advertisement, export, import etc. of beard trimmers under the trademark NOVA.

The Plaintiffs are aggrieved with the fact that the Defendants' trimmers are an imitation of the shape and configuration of the beard trimmers for which the Plaintiffs enjoy the abovementioned design registration.

VIII. Besides gaining customers on account of the fact that the Defendants' trimmers closely resemble the Plaintiffs' trimmers; the Defendants also solicit customers by adopting a packaging which is deceptively similar to the packaging of the Plaintiffs' trimmers. IX. The Defendants are members of a systematic, international criminal syndicate and are reaping profits at every stage at which the Defendants commercialize their beard trimmers. This is evident from the following graphical representation:

X. The fact that the Defendants are reaping gross profits and enjoy a very sumptuous and rich financial position is evident from the following:

a. M/s Badri Electro Supply and Trading Company (BESTCO) LLC. is the owner of the brand NOVA, and is situated in Dubai, U.A.E.;

b. The infringing products also specify the name of M/s Nova Manufacturing Industries Limited as the manufacturer of the infringing products. In fact, all products manufactured by the Nova Manufacturing Industries bear the trademark NOVA; c. That Nova Manufacturing Industries Limited, situated in Hong Kong is the "branch office" of M/s Badri Electro Supply and Trading Company (BESTCO) LLC.;

d. M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and M/s Nova Manufacturing Industries Limited (NOVA) group export their products to several countries and regions such as CIS, GCC, Africa, India, Eastern Europe, Pakistan, India, Bangladesh;

e. M/s Badri Electro Supply and Trading Company (BESTCO) LLC. has three offices overseas (including China and Austria) and seven showrooms;

f. M/s Badri Electro Supply and Trading Company (BESTCO) LLC's operations commenced in 1975 and have expanded ever since;

g. The Nova Manufacturing Industries Limited started operations in 1996 in the field of consumer electronics.

XI. The vastly spread and profitable network employed by the Defendants is also evident from the fact that M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and Nova Manufacturing Industries engage at least seventeen importers and twenty-one importers/resellers to market their infringing NOVA trimmers in India alone. Response to the questionnaire under Order X CPC by the erstwhile contesting Defendant no.7 establishes that the previous contesting Defendants used to purchase the infringing products from M/s Omni Exim Private Limited at least since 2017 and from other entities since 2013.

XII. M/s Badri Electro Supply and Trading Company (BESTCO) LLC.

purposefully evaded and chose not to appear in the present proceedings, though its subsidiary/branch office Nova Manufacturing Industries Limited was already arrayed as a party in the proceedings and several of its importers were also contesting the proceedings.

XIII. The Defendants have been clandestinely changing the model numbers of trimmers which violate the rights in the trade-dress of the Plaintiffs' beard trimmers. As a result, the Defendants have continued to sell trimmers which violate the Plaintiffs' rights under different model numbers, solely to escape being detected easily. This is evident from the following:

a. On 9th October, 2015 [at the time of institution of the lawsuit]- The Defendants' sold their trimmers under NOVA NHT 4000 Trimmer for Men;

b. On 28th February, 2017 - The Defendants' sold their trimmers under the new model number Nova NHT 1085 Professional Trimmer (subject matter of I.A. 2685/2017); c. On 03rd July, 2018 - The Defendants' sold their trimmers under the new model numbers Nova NHT 1071 Professional Trimmer and Nova NHT 1072 Professional Trimmer.

XIV. Since the Nova Manufacturing Industries Limited continued to violate the injunction orders passed by this Court, restraining further violation of the trade-dress of the Plaintiffs' trimmers, the Plaintiffs filed an application, being I.A. 2685 of 2017 under Order 39 Rule 2A of the CPC, 1908) highlighting the wilful contempt conducted by the said Defendant.

XV. The misconduct of the Defendants in the present proceedings is manifold and can be classified under various heads. At the outset, the Defendants calculated the massive profits that they will earn by violating the rights of the Plaintiffs. These profits will be negligible in comparison to the quantum of damages that the Defendants expected to be awarded against them. These Defendants were aware of the lawsuit against them and the monetary claim of damages contained in the plaint.

XVI. The Defendants have violated the rights vested in multiple aspects of the Plaintiffs' intellectual property. The Plaintiffs instituted two civil suits before this Court alleging infringement of such rights.

(i) CS (COMM) 1170 of 2016 is in relation to the imitation of trade-

dress of the Plaintiffs' products, as well as infringement of copyright. The Defendants' actions were so unabashed that they imitated each and every word on the Plaintiffs' product-description. This resulted in the advertisements of the Defendants' products stating that they were "Philips' trimmers".

(ii) CS (COMM) 737 of 2016 - These proceedings have been initiated alleging piracy of registered design as vested in the Plaintiffs' beard trimmers.

XVII. The Defendants have slavishly copied the photograph of the model, the copyright of which is owned by the Plaintiffs and have merely replaced the Plaintiffs' beard trimmer with the Defendants' hair trimmer. The extent of the Defendants' imitation is evident from the fact that the product description which accompanies the Plaintiffs' beard trimmer series also has the Plaintiffs' registered trademark PHILIPS mentioned in the product literature. This fraudulent imitation is evidenced by the following:

> Plaintiff's original photographs Photographs used by the Defendant (Defendants' Literature) (Product Description) XVIII. The Defendants have imitated the entire shape of the container, the color scheme employed, the manner of description of the product's specifications etc. from that of the Plaintiffs' Advanced Beard Trimmer range of products.
>
> XIX. The infringing products which are manufactured by M/s Nova Manufacturing Industries Limited (NOVA) and M/s Badri Electro Supply and Trading Company (BESTCO) LLC. are imported by M/s Omni Exim Private Limited and other entities which reveals that the said actions of the Defendants amount to a clear infringement of copyright owned by the Plaintiffs. The comparison chart reveals the multiple instances of imitation by the Defendants of the Plaintiffs' product as shown below:
>
> Plaintiff's original Photographs used by the photographs Defendant 400 series
>
> 1. Rectangular shaped box
>
> 2. Blue colored background theme of the box (light blue in the middle and dark blue near the top and bottom)
>
> 3. Thin white strip near the top of the box with trademark written in blue font
>
> 4. Trademark written in blue font
>
> 5. Product description against white, black, orange and silver backgrounds
>
> 6. Circular bubble on the lower right side of the beard trimmer Shaded rectangular box
>
> 7. Shaded rectangular box with the words "Hair Style"

with the words "Face Style" in orange. in orange .

XX. These comparison charts confirm Defendants mala fide intention to piggy back upon the immense goodwill and reputation vested in the Plaintiffs' advanced beard trimmer range of products. The Defendants have commercialized their infringing trimmers under a deceptively similar trade-dress under model numbers NHT 1071, NHT 1072 and NHT 1085.

XXI. The reproduction of artistic and literary work, photographic work and the use of a deceptively similar trade-dress in relation to the same product, i.e. beard trimmers, is bound to create a mistaken impression in the minds of consumers that:

a. The Defendants' products/services emanate from the Plaintiffs themselves;

b. The Defendants are permitted and authorized users of the Plaintiffs' trademark;

c. There is a nexus between the Defendants and the Plaintiffs.

XXII. The fact that consumer confusion is inevitable becomes clear from the following diagram created by the Plaintiffs to represent a hypothetical illustration of the two products being placed next to one another in a retail outlet.

XXIII. Additionally, infringing products manufactured by M/s Nova Manufacturing Industries Limited and M/s Badri Electro Supply and Trading Company (BESTCO) LLC. are clearly fraudulent and obvious imitations of the Plaintiffs' QT 4000 product and other products under the Advanced Beard Trimmer 3000 series, which is covered by Design Registration No. 253140. A comparative chart of the Plaintiffs' design registration, its products and the Defendants' impugned products is as follows:

Design No. Plaintiff's QT Defendants' Defendants' NHT 253140 4000 NHT 4000 5001 product XXIV. Actions of the Defendants to manufacture products which are an identical and/or fraudulent imitation of the Plaintiffs' registered designs No. 253140 amounts to piracy under Section 22 of the Designs Act, 2000.

XXV. The Plaintiffs have a strong and credible apprehension that M/s.

Omni Exim Private Limited would also be importing and/or trading in infringing products which infringe the Plaintiffs' design bearing Design Registration No. 253140.The said Defendants are trading in products which clearly infringe the copyright and trade-dress of the Plaintiffs' Advanced Beard Trimmer 3000 series and have also unlawfully used Plaintiffs' marks "Durapower" and "Lift and Trim Technology".

XXVI. The Plaintiffs have led evidence by way of affidavit of Mr. Pankaj Pahuja in support of its claim of damages against the Defendants. This affidavit takes into account the international trade of infringing trimmers bearing model numbers NHT

1071 and NHT 1072 and the re-sale of such products in the Indian market. The affidavit further specifies that these infringing products violate rights in the trade-dress of the Plaintiffs' beard trimmers.

XXVII. The damages suffered by the Plaintiffs in the said case are two-fold:

(i) Actual Damages;

(ii) Aggravated Damages XXVIII. Actual damages which are payable to the Plaintiffs include the individual profits made by the importer, Omni Exim Private Limited as well as the separate and distinct profits made by the manufacturers(Badri Electro Supply and Trading Company (BESTCO) LLC. and Nova Manufacturing Industries Limited).

XXIX. Ex PW 1/4 reflects the sale of infringing trimmers between M/s Nova Manufacturing Industries Limited (NOVA) and M/s Omni Exim Private Limited. This document evidences the following facts:

(i) Description of the infringing products -NHT Hair Trimmer 1071, Hair Trimmer NHT 1072

(ii) Nature of the infringing product - This product violates the rights vested in the trade-dress of the Plaintiffs' beard trimmers.

(iii) Number of imported products - 1,10,000/-

(iv) Total value of the imported goods - Rs.1,74,95,630.24/-

(Indian Rupees One Crore, Seventy Four Lakh, Ninety Five Thousand, Six Hundred and Thirty)

(v) Import value of each infringing trimmer = Rs.159/-

XXX. In other words, M/s Omni Exim Private Limited purchases one individual trimmer for Rs.159/- from M/s Nova Manufacturing Industries Limited.

XXXI. The affidavit of Mr. Pankaj Pahuja clearly evidences that M/s Omni Exim Private Limited (amongst others) used to further resell infringing trimmers to retailers, like Million Lights, i.e. the previous contesting Defendants in the present suits.

XXXII. Ex PW 1/5 (colly) which contains responses by previous defendants to interrogatories of the Plaintiffs, states the following in clear terms:

□7. In the month of July 2017, Defendant No. 7 had also started procuring the NOVA trimmers directly from the importer, Omni Exim Private Limited.... XXXIII.

Therefore, the profits earned by M/s Omni Exim Private Limited on such transactions are the damages payable to the Plaintiffs.

XXXIV. The actual damages owned by M/s Omni Exim Private Limited to the Plaintiffs are calculated in the following terms:

(i) Import price of 1 trimmer = Rs.159/-
(ii) Profit margin = 20%
(iii) Profit earned on sale of 1 trimmer = Rs.31.8/-
(iv) Total number of infringing trimmers imported = 1,10,000
(v) Total profits earned by the Defendants (damages owed to Plaintiff) = Rs.34,98,000/-

(vi) This amount can be multiplied by five as the said Defendants have been importing products at least for the past five years, since it is estimated that infringement has been taking place for over five years at least. However, even if one were to take a conservative estimate of infringement over a period of two years alone, the total damage awarded to the Plaintiffs on a conservative basis that infringement took place for over two years =Rs.69,96,000/-.

XXXV. Further evidence led by Mr. Pahuja shows that the profits made by M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and M/s Nova Manufacturing Industries Limited (NOVA) are as follows:

(i) Sale price of the trimmer: Rs.159/-

(ii) Profit margin on which the trimmer was sold by the said Defendants: 20%

(iii) Thus, cost price of the trimmer: Rs.132.5/-

(iv) Profit earned by the Defendants on sale of 1 trimmer = Rs.26.5/-

(v) Total number of infringing trimmers exported to India = 1,10,000

(vi) Total profits earned by the Defendants (damages owed to Plaintiff) in one year= Rs.29,15,000/-

XXXVI. This amount can be multiplied by five as the said Defendants have been importing products at least for the past five years, since there is a categorical admission by erstwhile Defendants that infringing products manufactured by M/s Nova Manufacturing Industries Limited (NOVA) were being imported and re-sold into India since 2013 at least. This admission, contained in Ex PW 1/5 is reproduced herein for ease of reference:

3. Defendant No. 7 had started selling NOVA trimmers from the year 2013...

XXXVII. Thus, upon multiplying the figure attained above by five, the total profits

earned by M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and Nova Manufacturing Industries Limited amounts to Rs.1,45,75,000/-.

XXXVIII. The margins of profits enjoyed by entities in the field of international sale and resale of consumer electronics go as high as 50% - 80%. A comparison between the sale price of the manufacturer in the present case and the cost price paid by the end-user is as high as 840%, and this is clearly evident from the fact that while M/s Nova Manufacturing Industries Limited (NOVA) sold an infringing trimmer for Rs.159/-, the end-user purchased the same trimmer for Rs.1,495/-. However, the Plaintiffs are taking a conservative estimate of 20% on the profit margin in the present proceedings.

XXXIX. The damages are payable to the Plaintiffs individually by M/s Omni Exim Private Limited since it has made individual profits for itself, which are completely separate from the profits earned by the manufacturer [M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and M/s Nova Manufacturing Industries Limited (NOVA)] and other entities involved in this international syndicate.

XL. Thus the damages payable by M/s Omni Exim Private Limited are Rs.69,96,000/-and those paid jointly and severally by M/s Badri Electro Supply and Trading Company (BESTCO) LLC. and M/s Nova Manufacturing Industries Limited (NOVA) are to the tune of Rs.1,45,75,000/-.

XLI. Whereas, insofar as damages qua piracy of design of the Plaintiffs is concerned, it can be safely assumed that:

(a) The period of infringement is the same as in the case above;

(b) The total number of pieces run into lakhs (at least 1,10,000 as the previous case);

(c) It can be assumed that margin of profit is 20% as in the previous case.

Therefore, the damages payable to the Plaintiffs can be calculated accordingly.

XLII. Additionally, the Defendants are liable to compensate the Plaintiffs with aggravated damages on account of the extreme mala fide actions and the wrongful conduct of the Defendants. The actual/compensatory damages are disproportionately dwarf in comparison to the actual amount recoverable by the Plaintiffs.

XLIII. The principles governing proof of actual damages and aggravated damages, punitive damages in intellectual property disputes are enshrined in the decision of the Division Bench of this Court in Hindustan Unilever Limited v. Reckitt Benckiser India Limited, 2014 (57) PTC 495 [Del] [DB]. The relevant extract from the judgment is reproduced herein below:

> ☐67 .... Furthermore - and perhaps most crucially - the punitive element of the damages should follow the damages assessed otherwise (or general) damages; exemplary damages can be awarded only if the court is ☐satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium. XLIV. The Defendants having infringed the Plaintiffs' copyright and design are liable to pay damages to the Plaintiffs not only in terms of the calculated actual damages but also punitive damages for the award of atleast 5 years.
>
> COURT'S REASONING THE DEFENDANTS WITH MALA FIDE INTENT HAVE DELIBERATELY IMITATED THE SHAPE AND CONFIGURATION OF THE PLAINTIFFS' BEARD TRIMMERS UNDER THE QT 4000 SERIES. CONSEQUENTLY, THE PLAINTIFFS ARE HELD ENTITLED TO A DECREE OF PERMANENT INJUNCTION AGAINST THE DEFENDANTS RESTRAINING INFRINGEMENT OF REGISTERED DESIGN AS PRAYED FOR IN PARAGRAPH 49(i) OF CS(COMM) 737/2016

10. Having heard the learned counsel for the Plaintiffs and having perused the ex parte evidence led by the Plaintiffs as well as the documents placed on record, this Court is of the opinion that the Plaintiffs have proved the facts stated in the plaint in relation to their claims for permanent injunction as well as damages payable by the Defendants.

11. In arriving at this conclusion, this Court has taken into consideration the fact that the Defendants chose not to appear before this Court despite being duly served with summons. In fact, M/s. Badri Electro Supply and Trading Company (BESTCO) LLC. refused to accept service of the summons as is clearly evident from the affidavit of service filed by the Plaintiffs. Consequently, the claims in the plaint have gone unrebutted.

12. It is settled law that this Court can pass a judgment against the Defendants on the basis of the contentions made against them by the Plaintiffs in the plaint alone. The Supreme Court in C.N. Ramappa Gowda v. C.C. Chandregowda, (2012) 5 SCC 265 has held, ☐...if the Court is clearly of the view that the plaintiff's case even without any evidence is prima facie unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree .

13. Upon comparing the Defendants' impugned products with the registration granted to the Plaintiffs in relation to their unique and aesthetic shape and configuration, this Court is of the view that the beard trimmers of the Defendants very closely resemble these aesthetics. In fact, the Defendants' trimmers seem to have imitated the registered design of the Plaintiffs bearing No.253140 in all respects.

14. This Court is further of the opinion that the Defendants with mala fide intent have deliberately imitated the shape and configuration of the Plaintiffs' beard trimmers under the QT 4000 Series as the Defendants operate in the same industry as the Plaintiffs, i.e. the provision of consumer care

products.

15. Since the Defendants have carried out their activities without any authorization being granted by the Plaintiffs, this Court is satisfied that the Plaintiffs have proved that the Defendants' activities constitute piracy of the sole and exclusive, statutory rights vested in the Plaintiffs' registered design No.253140 under Section 22 of the Designs Act, 2000.

16. Consequently, the Plaintiffs are held entitled to a decree of permanent injunction against the Defendants restraining infringement of registered design as prayed for in paragraph 49(i) of CS(COMM) 737/2016.

DEFENDANTS' UNAUTHORISED AND BRAZEN REPRODUCTION OF THE PLAINTIFFS' LITERARY, ARTISTIC WORK AS WELL AS PACKAGING AND TRADE DRESS AMOUNTS TO INFRINGEMENT OF COPYRIGHT IN TERMS OF SECTION 51 OF THE COPYRIGHT ACT, 1957. CONSEQUENTLY, THE PLAINTIFFS ARE HELD ENTITLED TO A DECREE OF PERMANENT INJUNCTION RESTRAINING INFRINGEMENT OF COPYRIGHT, PASSING OFF AND UNFAIR COMPETITION IN TERMS OF PARAGRAPH 50(i) OF THE PLAINT IN CS(COMM) 1160/2016.

17. From a perusal of the pleadings and evidence on record, this Court is of the view that the Defendants are also liable for violating the statutory and common law rights of the Plaintiffs on multiple counts. Without repeating the evidence highlighted by the learned counsel for Plaintiffs, this Court concludes as under:-

> (i) The Defendants have reproduced the same photograph of the model whose services were hired by the Plaintiffs in relation to the advertisement of their beard trimmer products.
>
> (ii) The Defendants have merely digitally replaced their trimmer in the hands of the model, whereas the original photograph has the model holding the Plaintiffs' trimmer.
>
> (iii) The Defendants reproduced the product description of the Plaintiffs' trimmer. Such is the extent of the reproduction that the Defendants' trimmer were also described as being "PHILIPS" trimmers, in the following terms:
>
> NOVA SKIN FRIENDLY PRECISION NHT 4000 TRIMMER FOR MEN (BLACK) PRICE: RS 695 .....The trimmer is ergonomically designed for ease of hold and use, hence making it easy to trim the tricky areas. Besides, it comes with the comfortable grip. This Philips trimmer comes with a detachable head which can be easily cleaned under the tap.....
>
> (emphasis supplied)

18. This Court is satisfied with the Plaintiffs' contention that the literary work, artistic work and the photographs in the Plaintiffs' product literature and promotional material and packaging fall within the meaning of Sections 2(c), 2(o) and 2(s) of the Copyright Act, 1957 respectively and that the Plaintiffs are the owners of the copyright vested therein.

19. Consequently, the Plaintiffs are entitled to sole and exclusive rights to reproduce the said works in terms of Sections 13 and 14 of the Copyright Act, 1957.

20. The Defendants' unauthorised and brazen reproduction of the Plaintiffs' literary and artistic work also amounts to infringement of copyright in terms of Section 51 of the Copyright Act, 1957.

21. This Court is of the view that the trade dress of a particular product serves the same function as a trade mark, i.e. identifying goods and services of a particular entity as emanating from it. Customers have an intuitive instinct to select goods by the design, color, get-up, packaging etc.

22. Upon comparing the packaging of the Defendants' products with that of the Plaintiffs, it becomes clear that they are deceptively similar to one another.

23. This Court also takes cognizance of the comparison charts produced by the Plaintiffs as well as the fact that consumer electronic goods are sold over common platforms on the internet and in brick-and-mortar stores and consumers are bound to be confused upon seeing the packaging of the Defendants and they are bound to mistake them as emanating from the Plaintiffs.

24. This Court is satisfied that the Plaintiffs have successfully established that the Defendants' activities are in clear violation of the common law rights vested in the packaging of the Plaintiffs' beard trimmers. Consequently, the Plaintiffs are held entitled to a decree of permanent injunction restraining infringement of copyright, passing off and unfair competition in terms of paragraph 50(i) of the plaint in CS(COMM) 1160/2016.

PLAINTIFFS ARE ENTITLED TO COMPENSATORY DAMAGES

25. A Coordinate Bench of this Court in M/s. Inter Ikea Systems B.V. & Anr. v. Sham Murari & Ors., 2018 SCC OnLine Del 11221 has awarded compensatory damages in favour of the Plaintiffs, after considering the principles enshrined in Hindustan Unilever (supra) in the following terms:-

> □24. In the present case, the Plaintiffs do not claim direct damages on account of any actual losses suffered by them. The losses claimed by the Plaintiffs are intangible loss, dilution, loss of confidence and trust of customers and exemplary damages due to disregard of the principle of fair trading. Under Section 73 of the Indian Contract Act, 1872, damages can be both direct and indirect. However, the nature of damages claimed in the present case, are for violation of trademark rights. While this Court does not wish to encourage any party, which misleads the trademark authorities, the question is whether a false affidavit filed before the trademark office can by itself form the basis of grant of exemplary damages. The documents placed on record point

to the fact that the Defendants had actually registered the domain name www.ikeaindustries.com only on 7th May, 2014. The Defendant No. 3 firm was formed on 2nd May, 2014 and the VAT registration was obtained on 11th September, 2014. Clearly, the user claimed by the Plaintiffs in its trademark application filed by Defendant No. 4, Shilpa Metal Industries was completely incorrect. Thus as on the date when the ex-parte injunction was granted, i.e., 22nd December, 2014, the Defendants may have merely used the mark for a few months. Thus, on the basis of the inventory prepared by the Local Commissioner, which according to the Plaintiffs is worth Rs. 67,44,800/- and according to the Defendants is worth approximately Rs. 25,00,000/-, the Court takes the value of the said products to be in the range of Rs. 25 lakhs to Rs. 30 lakhs, as the said products were not sold. Even treating the said stock to be the stock of one month, the total turnover of the Defendants for three months from September to December 2014, could not have been more than Rs. 1 crore. This is a rough and ready estimate on the basis of the seizure made. Since the Defendants would have had to sell these products with proper dealer/retailer margins, the profit is estimated at 15% of the total value of the products, which comes to about Rs. 15 lakhs. In view of the tests laid down in Rookes and Cassell, the present is not a case for award of punitive damages.

25. The Defendants' conduct has been far from bonafide. The manner in which misleading statements have been made and a false affidavit has been filed before the trademark registry also calls for the award of exemplary costs, as the trademark authority is a quasi-judicial authority and any party filing an affidavit before the said authority should do so with a complete sense of responsibility. Under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with the Delhi High Court (Original Side) Rules, 2018, actual costs can be awarded to the party. The cost sheet has been placed on record by the Plaintiff. This Court is of the opinion that costs of Rs. 10 lakhs are liable to be imposed upon the Defendants.

Half of the said sum would be paid to the Plaintiff and the other half shall be deposited in favour of the 'Controller General of Patents, Designs and Trade marks'. The amount of Rs. 5 lakhs shall be retained in a fund by the Controller General and shall be utilised for providing legal assistance for those trade mark applicants and patent applicants who require legal aid or assistance for paying official fees or other fees.

26. The suit is thus decreed for damages of Rs. 15,00,000/- and costs of Rs. 10,00,000/-. Out of the cost of Rs. 10,00,000/-, Rs. 5,00,000/- would be payable to the Plaintiffs. Remaining amount of Rs. 5,00,000/- shall be deposited with the Controller General of Patents, Designs and Trademarks. Thus the Plaintiffs are entitled to a sum of Rs. 20,00,000/- towards general damages and costs.

26. This Court is satisfied with the evidence led by the Plaintiffs and the arguments advanced by the learned counsel for the Plaintiffs that a conservative margin of profit of 20% can be assumed in the present suits while assessing the actual damages payable by the Defendants.

27. As regards the compensatory damages payable qua piracy of registered design, though Mr. Anand submitted that they should be computed after making some realistic assumptions, this Court is of the view that as the compensatory damages payable in relation to violation of trade-dress and copyright have already been computed by the Plaintiffs, it is not necessary to go into a separate computation of damages for the violation of rights vested in the Plaintiffs' registered design.

28. As the Defendants have wilfully and repeatedly infringed the Plaintiffs' rights as vested in their copyright, trade dress and design, the Plaintiffs are entitled to an award of compensatory damages to the extent of Rs.69,96,000/- payable by M/s Omni Exim Private Limited and Rs.1,45,75,000/- which is to be paid jointly and severally by M/s Nova Manufacturing Industries Limited (NOVA) and M/s Badri Electro Supply and Trading Company (BESTCO) LLC.

PLAINTIFFS ARE ALSO ENTITLED TO AGGRAVATED/EXEMPLARY DAMAGES

29. This Court is of the opinion that the degree of misconduct by Defendants in a civil suit is often determinative of the nature of relief to be granted by a Court to the Plaintiffs. The law is well-settled that the degree of mala fide conduct has a direct impact on the quantum and nature of damages that could be awarded in addition to a claim for actual / compensatory damages.

30. The Hindustan Unilever Limited (supra) judgment relied upon by learned counsel for Plaintiffs with regard to punitive and aggravated damages in turn relies on the decisions of the House of Lords in Rookes v. Barnard, [1964] 1 All ER 367 and Cassell & Co. Ltd. v. Broome, 1972 AC 1027 as is apparent from the following extract reproduced hereinbelow:-

> □65. As far as punitive damages are concerned, the learned Single Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree
>
> - and a contested one at that (unlike in the case of trademark and intellectual property cases, where the courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles.
>
> 66. Rookes v. Barnard, [1964] 1 All ER 367, is the seminal authority of the House of Lords, on the issue of when punitive or exemplary (or sometimes alluded to as □aggravated) damages can be granted.... The later decision in Cassell & Co. Ltd. v. Broome, 1972 AC 1027, upheld the categories for which exemplary damages could be awarded, but made important clarificatory observations..... (emphasis supplied)

31. The House of Lords in Rookes v. Barnard (supra) defines three categories of cases in which punitive/exemplary damages might be awarded as under:-

> a. Oppressive, arbitrary or unconstitutional action by the servants of the government;

b. Wrongful conduct by the defendant which has been calculated by him to make profit for himself which may well exceed the compensation payable to the claimant; and c. Any case where exemplary damages are authorized by the statute.

(emphasis supplied)"

32. The second category of cases enshrined in Rookes (supra) relates to those cases where the Defendant calculates a net amount of profit that it would have earned, even after being imposed with an award of damages by the Court. The said decision of the House of Lords in Rookes (supra) further sheds light on the circumstances which justify the award of damages in cases which fall in the second category, i.e. the category specified in (b) above in the following terms:-

> "Cases in the second category are those in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle C.J. in Bell v. The Midland Railway Company. Maule J. in Williams v. Curry, at page 848, suggests the same thing; and so does Martin B. in an arbiter dictum in Crouch v. Great Northern Railway Company, [1856] 11 Ex. 742, at 759. It is a factor also that is taken into account in damages for libel one man should not be allowed to sell another man's reputation for profit. Where a Defendant with a cynical disregard for a Plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object, -- perhaps some property which he covets,--which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. (emphasis supplied)

33. Rookes v. Barnard (supra) also stipulates that three conditions need to be satisfied before an award for aggravated or exemplary damages is granted. The relevant principles propounded by the House of Lords are:

> "I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered.
>
> First, the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behavior. The anomaly inherent in exemplary damages would become an absurdity if a Plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defense of liberty, as in the Wilkes cases, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount

> to a greater punishment than would be likely to be incurred if the conduct were criminal and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in Benham v. Gambling, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.
>
> Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant.
>
> (emphasis added)

34. The present cases clearly satisfy all these conditions, as is evident from the following:

> (i) It is clear that the Plaintiffs are the victims of the Defendants' unlawful activities since not only have their statutory rights been violated, but they have also suffered loss of goodwill and reputation at the hands of the Defendants;
>
> (ii) The evidence in the present proceedings clearly showcases the high profits enjoyed by the Defendants on the sale of infringing trimmers, and those figures need to be taken into consideration while quantifying aggravated damages.

35. Rookes v. Barnard (supra) specifically states that the award of aggravated damages is justified when the Court finds the conduct of the Defendant to be extremely mala fide and wanton. The relevant extract is reproduced hereinbelow:

> ☐... But when this has been said, there remains one class of case for which the authority is much more precise. It is the class of case in which the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied. There is clear authority that this can justify exemplary damages, though (except in Loudon v. Ryder) it is not clear whether they are to be regarded as in addition to, or in substitution for, the aggravated damages that could certainly be awarded. (emphasis supplied)

36. Given the facts of the present cases, the injury caused to the Plaintiffs has been aggravated by malice on part of the Defendants. In the judgment of Cassell & Company Limited (supra), it has been held as under:-

> ☐..TERMINOLOGY This brings me to the question of terminology. It has been more than once pointed out the language of damages is more than usually confused. For instance, the term "special damage" is used in more than one sense to denominate

actual past losses precisely calculated (as in a personal in-juries action), or "material damage actually suffered" as in describing the factor necessary to give rise to the cause of action in cases, including cases of slander, actionable only on proof of " special damage". If it is not too deeply embedded in our legal language, I would like to see "special damage" dropped as a term of art in its latter sense and some phrase like "material loss" substituted. But a similar ambiguity occurs in actions of defamation, the expressions "at large", "punitive", "aggravated", "re-tributory", "vindictive" and "exemplary" having been used in, as I have pointed out, in extricable confusion.

In my view it is desirable to drop the use of the phrase "vindictive" damages altogether, despite its use by the County Court judge in Williams v. Settle [1960] 1 W.L.R. 1072. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium.

Likewise the use of "retributory" is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between "punitive" or "exemplary", one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary", not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in Rookes v. Barnard at p. 1221,when he defines the phrase as meaning all cases where □the award is not limited to the pecuniary loss that can be specially proved ". But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

> ☐Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatising "compensatory", ☐punitive", ☐exemplary or ☐aggravated" damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another.
>
> (emphasis supplied)

37. The case clearly holds that that such damages are not to be added as separate components. Instead, they should be awarded in substitution, if the Court is of the opinion that the mala fides of the Defendants far exceed (in proportion) the quantum of actual damages that the Plaintiff has established against them. This critical principle on the award of damages is also spelt out in Cassell (supra), when it analyzed the judgment in Rookes (supra) in the following manner:-

> ☐..THE "CONSIDERATIONS"
>
> I turn now to Lord Devlin's three "considerations". It is worth pointing out that neither the Court of Appeal nor any of the counsel who appeared before us attacked these as such. Nor, so far as I am aware, have these been attacked in the cases in which Commonwealth judges have felt constrained to criticize Rookes v. Barnard. This alone would be a good reason against a simple return to the status quo ante proposed by the Court of Appeal, because the first and second "considerations" coupled with the passage from which I have already quoted on page 1225 are themselves, and quite independently of the "categories", an important, and I think original, contribution to the law on exemplary damages. Whilst, as I have indicated, I cannot myself follow what Lord Devlin says on the second category so far as regards the right of appellate courts to interfere with jury awards on principles different from the traditional nor, I think, with the proposal that Benham v. Gambling offers a precedent for arbitrary limits imposed by the judiciary in defamation cases, I regard it as extremely important that, for the future, judges should make sure in their direction to juries that the jury is fully aware of the danger of an excessive award. A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury(i) That the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories.(ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless(iii) They are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained and(iv) That, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would

have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay.(v) I would also deprecate, as did Lord Atkin in Ley v. Hamilton, the use of the word "fine" in connexion with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that, in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenues of Central Government.

If this be correct, the agreed list of questions submitted to the jury in the present case is not the ideal procedure for ensuring that the jury keeps their verdict within bounds. They should normally be asked to award a single sum whether as solatium or as exemplary damages. If, in order to avoid a second trial, they are asked a second question, they should be asked, in the event of their awarding exemplary damages, what smaller sum they would have awarded if they had confined themselves to solatium in the sense explained.

xxx xxx xxx ..... The emphasis placed upon the word "additional" could not have been lost sight of by the jury. Additional to what? Quite clearly, additional to the amount of compensation awarded. The jury were asked "how much more" they would award. The "more" was to be "over and above" the compensation. It surely must have been clear to the jury that any "more" that they decided upon or any "additional" sum would have to be paid by those against whom they awarded it on top of the sum that they were first awarding. Here was a jury that listened to the case over a period of seventeen days. They deliberated for nearly five hours. They awarded a sum of £25,000 to be "additional" to their award of £15,000. They knew that the total was £40,000. Thereafter they heard both counsel agree that there should be a single judgment for that amount. No suggestion was made (or I think could possibly have been made) that the £25,000 included the £15,000. ..... Are we not punishing them enough by saying that they must pay £15,000?..... I am bound to say that the figure of £40,000 appears to me to be a high figure. Certainly it must be a very unusual case in which on a correct application of the law as laid down in Rookes v. Barnard the amount which defendants must pay should so greatly exceed the amount which is reasonably to be received by the plaintiff by way of compensation. It is this disparity between the £40,000 and the £15,000 that has caused disquiet as to whether the jury may have been caused or allowed to be under a misunderstanding. But if the conclusion is reached that the jury knew what they were about and chose their figures advisedly then I do not think that I ought to conclude that their "additional" figure of £25,000 was so high that no reasonable jury could award it. To translate injury to and attack upon reputation into monetary terms is at all times a difficult exercise. But it was the same jury that fixed the "additional" figure of £25,000 that also--without being impeached for so doing--fixed the compensatory figure of £15,000. If they did not go wide when fixing the latter why should it be determined that they went wide in fixing the former? The conclusion which I think

can be drawn is that the jury took a very serious view of the conduct and attitude of the defendants.

(emphasis supplied)

38. Accordingly, the question which was left open in Rookes (supra) was closed in Cassell (supra) as regards the manner in which aggravated or punitive damages are to be awarded.

39. Consequently, though in assessing the aggravated damages which the Defendants should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure, yet the rounded total sum shall have to be calculated by adding an additional amount to the compensatory damages.

40. Keeping in view the aforesaid, this Court is of the view that the rule of thumb that should be followed while granting damages can be summarised in a chart as under:-

#	Degree of mala fide conduct	Proportionate award
(i)	First-time innocent infringer	Injunction
(ii)	First-time knowing infringer	Injunction + Partial Costs

Repeated knowing infringer Injunction + Costs + Partial

(iii) which causes minor impact damages to the Plaintiff Injunction + Costs + Repeated knowing infringer Compensatory damages.

(iv)	which causes major impact to the Plaintiff	
(v)	Infringement which was deliberate and calculated (Gangster/scam/mafia) + wilful contempt of court.	Injunction + Costs + Aggravated damages (Compensatory + additional damages)

41. It is clarified that the above chart is illustrative and is not to be read as a statutory provision. The Courts are free to deviate from the same for good reason.

42. In the present suits, the activities of the Defendants warrant the payment of aggravated damages in favour of the Plaintiffs. Not only is M/s Nova Manufacturing Industries Limited (NOVA), a subsidiary of M/s Badri Electro Supply and Trading Company (BESTCO) LLC., in contempt of the injunction order, but the said Defendants have also deliberately changed their modus operandi and routed the impugned products through M/s Omni Exim Private Limited. In fact, M/s Omni Exim Private Limited's activities furthered the contemptuous acts of M/s Badri Electro Supply and Trading Company (BESTCO) LLC. as well as M/s Nova Manufacturing Industries Limited (NOVA). The mala fide actions of the Defendants prove that they fall in the last category in the chart hereinabove, and that compensatory damage is inadequate to punish the Defendants for their outrageous conduct and therefore to deter them from repeating it, the Court awards some larger sum, i.e. aggravated/exemplary damages.

43. Accordingly, this Court is of the view that the actions of the Defendants merit an award of aggravated damages. M/s Nova Manufacturing Industries Limited (NOVA) and M/s Badri Electro Supply and Trading Company (BESTCO) LLC. are directed to pay additionally Rs.50 lakhs jointly and severally. M/s Omni Exim Private Limited is directed to pay additionally Rs.50 lakhs.

44. Consequently, the Plaintiffs are held entitled to decree in terms of paragraph 50(i) of the plaint in CS(COMM) 1170/2016 as well as paragraph 49(i) of the plaint in CS(COMM) 737/2016. The Plaintiffs are also held entitled to a decree of Rs.1,19,96,000/- (Rs. 69,96,000/- + Rs.50,00,000/-) against M/s Omni Exim Private Limited and Rs.1,95,75,000/- (Rs. 1,45,75,000/- + Rs.50,00,000/-) jointly and severally against M/s Nova Manufacturing Industries Limited (NOVA) and M/s Badri Electro Supply and Trading Company (BESTCO) LLC. The Plaintiffs are further held entitled to actual costs of litigation including lawyer's fees. The Plaintiffs are given liberty to file on record the exact cost incurred by them in adjudication of the present suit. Registry is directed to prepare decree sheets accordingly.

MANMOHAN, J APRIL 22, 2019 rn/js