

counsel and also filed a counter affidavit in this court. However, the said counsel subsequently after duly notifying the defendant No.1 and upon the failure of the defendant No.1 to instruct, sought discharge and the defendant No.1 was on 13th December, 2005 proceeded against ex parte. The defendants No 2 and 3 also failed to appear in spite of service and were vide order dated 12th July, 2006 ordered to be proceeded against ex parte. The defendant No.5 died during the pendency of the suit and his legal heirs were ordered to be substituted vide order dated 21st August, 2006. The defendants 4 and 6 and the legal heirs of defendant No.5 compromised the matter with the plaintiff and decrees in terms of the said compromise were passed against them. Thus the suit survives against the three Calcutta defendants only.

3. Vide ex parte order dated 19th February, 2004 (supra) this court had also appointed two court commissioners, one for visiting the premises of the defendants 4 to 6 in Delhi and the other for visiting the premises of the defendants 1 to 3 at Calcutta as well as any other premises (probably on the basis of 'John Doe' order (supra)) where the impugned goods were suspected to be stocked. The Court Commissioners appointed to visit the premises of the defendants 1 to 3 against whom only the suit survives, at Calcutta, not only found the infringing goods in the premises of the defendants 1 to 3 but also in some other neighbourhood premises and the Court Commissioner as directed took possession of all the infringing goods and delivered the same to counsel for the plaintiff.

4. That even though the Court Commissioner had found infringing goods in the premises of the defendant No.1 as well but the defendant No.1 though since ex parte, in his counter affidavit filed earlier did not deal at all with the visit by or the report of the Court Commissioner. He merely denied dealing in the infringing goods; no objections were filed to the report of the Court Commissioner which the plaintiff, in its ex parte evidence, has tendered into evidence. Col J.K. Sharma constituted attorney of the plaintiff has in his affidavit by way of examination in chief by way of ex parte evidence proved the trademark registrations of the plaintiff and the device i.e., WORD MARK 555 of the WORD 555 of the device of a sunburst medallion with 555 engrossed therein as exhibit PW1/22, PW1/23 and PW1/24 respectively and the request to the Registrar, Trademark has been proved as exhibit PW1/25 to PW1/28. From the same it is proved that the plaintiff is the registered proprietor of the aforesaid word/device all, inter alia, in relation to cigarettes. The said witness has also proved the original cigarette

packet/carton under the mark STATE EXPRESS 555 of the plaintiff as Exhibit PW1/29 and the original packet/carton impugned in the present suit as Exhibit PW1/30.

5. A mere perusal of Exhibit PW1/29 and PW1/30 shows that the cigarettes being marketed/stocked by the defendants have copied the trade dress of the same goods of the plaintiff. The plaintiff's packet is recognizable as cream coloured whereon the numerals 555 are written in golden upon a navy blue background. These are engrossed in a circle outlined by a golden ghost line all around its periphery. The circle device appears to be emanating sunrays in golden colour in bright contrast to the dark centre. The said sunburst device and colour of the packaging are in distinctive features of the plaintiff's trade dress and packaging and by which the plaintiff's trademark / name is known and a customer/buyer of the plaintiff's product identifies the same by the aforesaid trade dress. The packaging of the defendants is in the same colour as of the plaintiff and bears the same purple circle with a golden outline and golden sun rays around it as on the plaintiff's packaging. Even though the packet of the plaintiff does not bear the numerals 555 and the mark/name STATE EXPRESS but an unwary customer is likely to mistake the packaging aforesaid of the same goods being marketed by the defendants as that of the plaintiff.

6. Sale of cigarettes in India is unique / different from the Western countries. In Western Countries sale of loose cigarette is not the norm. On the contrary, in India sale of loose cigarettes is a norm and the buyers of a full packet of cigarettes are comparatively few. Any action for infringement of trademark in relation to cigarettes in this country has to be viewed/tested in this light. The vendors of loose cigarettes would pick up a cigarette packet from unlit or hardly visible shelf or drawer in their dingy and small shops/cells and extract one or two cigarettes therefrom and hand over to the customers. Such customers do not thus normally get to see the packet or the whole of it and may get to see only the colour or the trade dress of it and by it they identify the same. The individual cigarettes themselves do not have the trade name or the manufacturer's name boldly written and hardly does a buyer of loose cigarettes takes care to see the same. In such circumstances, the colour of the packaging and the trade dress assumes special significance. The packaging of the cigarettes being marketed by the defendants may not fool or deceive a buyer of a packet but has all potential of deceiving or confusing buyer of loose cigarettes and who as aforesaid constitute a large section of the buyers of the said product. Viewed in the aforesaid light, the packaging impugned is

clearly an attempt to pass off or sell the goods other than those of the plaintiff as of the plaintiff.

7. The defendants No. 1, 2 and 3 are however, merely the stockist or vendors of the said cigarettes and not manufacturers thereof. It is the case of the plaintiff that the said cigarettes are manufactured in Myanmar and are smuggled into India through the border and in violation of other laws. It is for this reason that the plaintiff is able to only prohibit their sale in India by the vendors/stockiest such as the defendants but not in a position to act against the manufacturers.

8. The defendants being the small vendors as aforesaid and having not contested the suit, the counsel for the plaintiff has fairly stated that he is pressing for only nominal damages against them. The infringing goods found by the Court Commissioner at the premises of the defendants 1, 2 and 3 as well as some other neighbouring premises have already been seized and delivered to the counsel for the plaintiff. The said goods are ordered to be destroyed by the plaintiff. The plaintiff is awarded punitive damages in the sum of Rs 25,000/- against each of the defendants No.1 to 3.

9. Though in the plaint reliance was also placed on 'John Doe' order as aforesaid and in pursuance whereto the premises of others besides the defendants 1, 2 and 3 were also raided and infringed goods found there from also seized, the plaintiff having not brought any other person against whom the order may be extended, till the disposal of the suit, the suit is decreed against the defendants 1, 2 and 3 only for the relief of permanent injunction in terms of para 24 (i) (ii) and (iii) of the plaint and a decree for recovery of damages in the sum of Rs 25,000/- from each of the defendants 1 to 3 is also passed in favour of the plaintiff. The plaintiff shall also be entitled to proportionate costs of the suit from the defendants 1 to 3. The decree sheet be drawn up.

Sd/-

RAJIV SAHAI ENDLAW
(JUDGE)

