

THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No.524/2005

Date of decision : 11.09.2008

IN THE MATTER OF :

#UNITED BREWERIES LTD.

..... Plaintiff

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Through : Ms. Gurkamal, Adv.

versus

\$INDO AGRO INDUSTRIES

..... Defendant

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Through : None.

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

HIMA KOHLI, J. (O R A L)

The present suit is instituted by the plaintiff against the defendant for rendition of accounts, permanent injunction against infringement of trademark, copyright and passing off. The suit was registered on 25.4.2005 and summons were issued to the defendant returnable for 17.5.2005. On the same date, an

interim order was passed on an application filed by the plaintiff under Order 39 Rule 1 & 2 of CPC being I.A. No.3013/2005 restraining the defendant, its agents, distributors, dealers, etc., from using the trademark “KINGFRESHER” or any other similar or deceptively similar trade name on their beverages and other products. They were also restrained from using logo which may be deceptively similar to the logo of the plaintiff.

2. The defendant was duly served with the summons which were refused. As the summons were refused, vide order dated 8.5.2006, the defendant was directed to be proceeded against exparte and the plaintiff was directed to file its exparte affidavit by way of evidence thereafter, which has been done.

3. At the outset, counsel for the plaintiff states that the plaintiff be permitted to pay ad valorem court fee on the plaint by valuing the relief for permanent injunction at Rs.25.00 lacs. She undertakes to deposit the court fee on the aforesaid amount within four weeks from today. Subject to the aforesaid undertaking, the following judgment is being passed while making it clear that till the plaintiff deposits the court fee, the

decree sheet shall not be drawn in its favour.

4. It is the case of the plaintiff that the defendant has been infringing the trademark and copyright of the plaintiff in respect of its trademark, "KINGFISHER" and the plaintiff's logo. The plaintiff has instituted the present suit against the defendant seeking the relief of permanent injunction restraining the defendant from using the trade name "KINGFRESHER" or any other similar or deceptively similar trade name and from infringing and passing off their products as that of the plaintiff's and a decree of permanent injunction restraining the defendant from using a logo deceptively similar to the logo of the plaintiff.

5. The plaintiff has also sought the relief of rendition of accounts against the defendant in respect of the sale of its products and the profits earned by the defendant under the trademark, "KINGFRESHER" or any other trademark similar or deceptively similar as that of the plaintiff's trademark "KINGFISHER" and for a consequential decree in the amount found due and payable to the plaintiff. The last relief sought by the plaintiff is for the costs of suit.

6. The brief facts of the case are that the plaintiff is a company incorporated under the Companies Act. Mr. S.R. Gopalan is the authorized signatory of the plaintiff company. He is also the deponent of the affidavit filed by way of evidence. An extract of the Resolution of the Board of Directors of the plaintiff in favour of Shri S.R. Gopalan dated 15.3.2005 is marked as Ex.PW-1/1. Shri S.R. Gopalan is authorized and competent to institute, sign, verify and prosecute the suit on behalf of the plaintiff company.

7. It is stated by the witness that the plaintiff is primarily engaged in the business of brewing, manufacturing and selling of beer, non-alcoholic malt beverages and mineral water/package drinking water under the trademark "KINGFISHER". A photocopy of the bottle of the plaintiff with the trademark "KINGFISHER" is marked as Ex.PW-1/2. The old and new labels of the plaintiff in respect of the trademark, "KINGFISHER" are marked as Ex.PW-1/3 and Ex.PW-1/4. It is deposed by the witness that the trademark "KINGFISHER" was got registered by the plaintiff in various forms on various dates in Class 32 with the Trademark Registry. The details of the said registrations find mention in

para 3 of the plaint and in para 3 of the aforesaid affidavit filed by way of evidence. It is stated that the said trademarks were renewed from time to time and the advertisements in respect of the renewals were duly published. Copy of the certificates or registration and the renewal certificates are marked as Ex.PW-1/5 to Ex.PW-1/17. Counsel for the plaintiff has also produced the originals thereof in the Court for perusal.

8. It is further stated that the trademark "KINGFISHER" was also got registered by the plaintiff in Class 33 with respect to the products, Whisky, Brandy, Gin, Rum, Vodka and all other alcoholic beverages (except beer) included in Class 33 and the same was duly registered by the Trademark Registry on 12.1.1998. A copy of the certificate is marked as Ex.PW-1/18.

9. Counsel for the plaintiff further states that the plaintiff enjoys a copyright in the artistic work i.e. 'Kingfisher Premium Lager Beer' which is registered with the Copyright Office. The certificate of registration is marked as Ex.PW-1/19. It is stated on behalf of the plaintiff that the plaintiff is a registered proprietor of the trademark "KINGFISHER" and has the exclusive rights in

respect of various alcoholic, non-alcoholic beverages and packaged drinking water. The said trademark is being used by the plaintiff continuously, uninterruptedly and extensively throughout India ever since the year 1965. As a result, the said trademark has acquired a distinctiveness in the mind of the public, due to the long, continuous and uninterrupted usage, and the same is solely and exclusively associated by the public with the plaintiff company. The said trademark has also generated goodwill and reputation in the market and the public associates the same with the plaintiff company alone. It is stated that only the plaintiff company can claim monopoly over the use of the word, "KINGFISHER", to the exclusion of others.

10. In support of her contention that the sale of the product bearing the trademark, "KINGFISHER" has continuously increased over the years, counsel for the plaintiff refers to para 10 of the affidavit of the witness, wherein the sale volumes for the period of 5 years w.e.f. 1999-2000 to 2003-2004 have been set out. The sale volumes for the period of five years for sale of packaged drinking water under the trademark, "KINGFISHER" are also set out in the said para. The details of the promotional and

advertisement expenses incurred by the plaintiff for the said period of five years are given para 11 of the affidavit. Copies of the same are collectively marked as Ex.PW-1/20 (colly.).

11. Counsel for the plaintiff submits that on 6.1.2005, the plaintiff discovered that the defendant had been selling its non-alcoholic beverages under the trade name, "KINGFRESHER". It is further stated that the use by the defendant of the said trademark with respect to various alcoholic/non-alcoholic beverages results in gross infringement of the registered trademark of the plaintiff and is an attempt to piggy back on the goodwill of the plaintiff. It is further stated that the name "KINGFRESHER" has been intentionally chosen by the defendant to deceive the buying public and to create confusion in the market.

12. It is submitted that the defendant is working in the same field of activity and the territory operation of both the parties coincides, thus the defendant is a rival of the plaintiff. It is stated that two competing marks, "KINGFISHER" and "KINGFRESHER" are phonetically similar and further that the

defendant has also copied the distinctive and essential features of plaintiff's logo mark, which includes the use of a bird by the name of "KINGFISHER" with a similar colour scheme and style on the said logo, which from a distance, looks almost identical. It is thus contended that the defendant has infringed not only the trademark, but also the copyright of the plaintiff with respect to the said logo. The particulars of the infringing label of the defendant is marked as Ex.PW-1/21.

13. Counsel for the plaintiff submits that the illegal adoption and usage by the defendant of the deceptively similar trademark and the deceptively similar logo amounts to a dishonest and mala fide attempt to cheat and deceive the public at large and ride on the goodwill and reputation of the plaintiff in the market. It is further stated that the dishonest intention of the defendant is apparent from the fact that it is trying to pass off its product as the product of the plaintiff in the market. Based on the aforesaid submissions, the present suit has been instituted.

14. I have perused the affidavit by way of evidence filed on behalf of the plaintiff and the documents placed on the record.

The averments made in the affidavit and the material placed on the record remain unrebutted in the absence of the defendant. Consequently, it is held that the plaintiff has established before the Court that it is the owner of the trademark, "KINGFISHER" and has a copyright in the logo marked as Ex.PW-1/3.

15. On the basis of the evidence proved by the plaintiff, the plaintiff has also established that the defendant has been indulging in the illegal activity of infringing the registered trademark and copyright of the plaintiff in respect of the product in question and the aforesaid act of the defendant is blatant, deliberate and malafide actuated with the intention of riding on the goodwill and reputation of the plaintiff in the market and a devious attempt to cause confusion and deception in the mind of the public at large. Vide order date 25.4.2005, a Local Commissioner was appointed to visit the premises of the defendant and prepare an inventory of the infringing products, and to sign the books of account. Though the Local Commissioner went to the premises of the defendant, he filed his report that the receptionist at the premises informed him that though the office of the defendant existed at the given address

till few months ago, they left the same and that she did not have any new address of the defendant available with her.

16. On the basis of the unrebutted evidence placed on the record, it is held that the plaintiff is entitled to grant of a decree of permanent injunction in its favour and against the defendant. Accordingly, the defendant, its agents, distributors, dealers, servants, representatives and assigns are restrained from using the trade name, "KINGFRERSHER" or any other similar or deceptively similar name and from infringing and passing off their products including alcoholic/ non-alcoholic beverages under the trademark "KINGFRESHER" and/or any other deceptively similar mark as that of the plaintiff's, namely, "KINGFISHER". The defendant, its agents, distributors, dealers, servants, representatives and assigns are also restrained from using the logo of the plaintiff (Ex.PW-1/3) or any other logo which is deceptively similar to that of the plaintiff's logo.

17. Insofar as the relief of rendition of accounts and a consequential decree on the basis of the aforesaid accounts is concerned, counsel for the plaintiff states that in view of the fact

that the defendant was proceeded against exparte, there is no material on the record by way of production of books of accounts, ledgers, etc., to establish the volume of sales of the infringing product or the profits earned by it under the trademark, “KINGFRESHER” or any other deceptively similar mark as that of the plaintiff. Moreover, the said records could also not be summoned as the only address of the defendant available with the plaintiff, was also changed by the defendant, as per the report filed by the Local Commissioner, without leaving a forwarding address. However, while not pressing the said relief, she submits that reasonable costs be awarded in favour of the plaintiff in respect of the present litigation. She submits that it is on account of the infringing acts of the defendant that the plaintiff was compelled to approach this Court and institute the present proceedings and that by refusing to accept the summons and by keeping away from the Court, the defendant cannot escape its liability to pay costs. She also adds that apart from court fee and counsel’s fee, the plaintiff also paid a sum of Rs.20,000/- to the Local Commissioner towards his fee. The contention of the counsel for the plaintiff is well founded and accepted.

18. In these circumstances, the suit is decreed in favour of the plaintiff and against the defendant in terms of prayers (a) and (b) of the prayer clause in the plaint alongwith costs of the proceedings which are quantified at Rs.50,000/-.

19. Decree sheet be drawn up accordingly, but upon the plaintiff paying the deficient court fee.

SEPTEMBER 11, 2008
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HIMA KOHLI, J.