

..* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS (OS) No. 2177/2003**

Reserved on: 17th September, 2009

% Decided on: 23rd September, 2009

Dabur India Ltd. ...Plaintiff
Through : Mr. Hemant Singh with Ms. Mamta
Rani Jha and Mr. Sumit Rajput, Advs.

Versus

Sh. Ashok Aushadhi Udyog ...Defendant
Through : Mr. Om Prakash, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J.

1. This suit has been filed by the plaintiff seeking a decree of permanent injunction restraining the defendant and their agents etc. from directly or indirectly dealing in ayurvedic tonics that are/may be deceptively similar to the labels of the plaintiff, a decree of permanent injunction restraining the defendant and their agents etc. from using the impugned labels or any colourable imitation or substantial reproduction thereof; a decree of delivery up of all the infringing bottles, packaging, labels, dyes etc. to the plaintiff for erasure; a direction for rendition of

accounts of profits illegally earned by the defendant and a decree for damages in lieu thereof.

BRIEF FACTS

2. The plaintiff is a Public Limited Company which has been carrying on trading activities of a wide range of pharmaceuticals, toiletries, ayurvedic and other such preparations since 1884. The present suit has been filed with relation to two ayurvedic tonics of the plaintiff – Dashmularishta, a general tonic for weakness and Ashokarishta, a health tonic for women.

3. The plaintiff has spent Rs. 22.50 lac as promotional and advertising expenses of the two products in 2002-03 alone. The sale figures of both products in the year 2002-03 have been shown to be above Rs. 6 Crore and Rs. 11 Crore for Ashokarishta and Dashmularishta respectively. The details of the label and get up of the products has been produced in para 4 of the plaint. The plaintiff claims to be the owner of copyright in the artistic work of the said labels/get up within the meaning of Section 17 of the Copyright Act as the same were designed by Kriti Advertising under a contract of service. Further, the models in the pictorial representation of the labels and advertisements have been shot by Mudra Communications Pvt. Ltd. under a contract of service.

4. The defendant is a partnership firm in Varanasi and is also engaged in the business of marketing and selling ayurvedic tonics etc. The plaintiff has stated that the defendant has adopted the exact label/get

up and arrangement of features as the plaintiff's product. The description of the defendant's product has been detailed in para 11 of the plaint. The plaintiff has claimed the defendant's labels to be picked up from an advertisement of the former's products in the magazine 'Vanita' and therefore constituting an infringement under the Copyright Act. The consumers of the plaintiff's products are claimed to be from all walks of life and the plaintiff has submitted that the deceptively similar labels of the defendant on the same ayurvedic tonic is harmful for the plaintiff's goodwill and reputation as a consumer having average intelligence and an imperfect memory would not differentiate between the two products at all. Hence, the present suit.

5. On its part, the defendant submitted that it is a prior user of the two products and has been dealing in the same since 1976. Further, it is submitted that the dissimilarities and distinctiveness of the defendant's product from that of the plaintiff's have deliberately not been mentioned and that the colour scheme, get up, layout and other features are common to the trade.

6. By order dated 19 December, 2003 this court passed an interim injunction restraining the defendant from using the said labels and any other deceptively similar label in respect of its products Ashokarishta and Dashmularishta. The said order has continued till date.

ISSUES

7. Issues in this matter were framed on 19 May, 2006. The triable issues so framed are as follows :

- 1) Is the plaintiff the proprietor and prior user of the labels of “DABUR Dashmularishta” and “DABUR Ashokarishta” as shown in pages 101 & 103 of the documents filed by the plaintiff?
- 2) Is the plaintiff the owner of copyright in the artistic work comprised (sic) in the two labels mentioned in Issue No. 1?
- 3) Are the labels of the defendant as shown in pages 102 & 104 of the documents filed of the plaintiff imitation and substantial reproduction of the plaintiff’s labels at pages 101 & 103 amounting to infringement of copyright of the plaintiff?
- 4) Is the use of the impugned labels of the defendant likely to cause confusion and deception leading to passing off?
- 5) Is the plaintiff entitled to rendition of accounts of the profit earned by the defendant by use of the impugned labels?
- 6) Is the plaintiff entitled to injunction prayed for?
- 7) To what relief, if any, is the plaintiff entitled?

ISSUE NO. 1

8. The plaintiff has contended that it is the proprietor and prior user of the labels of “DABUR Dashmularishta” and “DABUR Ashokarishta” as shown in pages 101 & 103 of the documents filed. It is the submission of the learned counsel for the plaintiff that the plaintiff is not claiming any proprietary right in generic marks like ‘Dashmularishta’ and ‘Ashokarishta’, but in its labels for these products

which are distinctive of the plaintiff as they comprise of a distinct colour combination, get up, layout and arrangement of features. The fact that the defendant has copied the plaintiff's labels is evidence of the fact that the same was distinctive and had attained considerable goodwill and reputation. Further, Mr. B.K. Gupta, legal manager of the plaintiff company has placed on record the deed of assignment signed by Kirti Advertising stating that the labels 'Dabur Dashmularishta' and 'Dabur Ashokarishta' were designed by it in 1998 and that all rights therein have been assigned to the plaintiff for full term of copyright. The plaintiff has also placed on record copies of advertisements of its products/labels in magazines and newspapers, marked at Exhibit P-4 (colly).

9. In reply, the defendant has contended that the plaintiff has put nothing on record to prove that it has been using both the marks since 40 years and its verbal statements cannot be relied upon as evidence. Further, it has been submitted that the device of mother and child is common to the trade and hence non-registrable, indicating that the plaintiff can claim no copyright or prior user of the products.

10. Needless to say, all the labels on pages 101, 102, 103 and 104 contain images of women and children. However, Page 104 of the documents, i.e. Exhibit P-9, shows the plaintiff's label of 'Dashmularishta', which shows an aged lady holding a child, with a young girl looking on and smiling. This is the same photograph which has appeared in magazines as the plaintiff's label on the relevant

product, the same being filed on page nos. 39, 45, 75 and 77 of the documents. The said magazine page is reproduced below.



11. There is sufficient cogent evidence available on record to prove that the plaintiff is the proprietor and prior user of the labels in

question. The defendant has failed to produce any cogent evidence to establish that it is the owner and author of the labels in question nor has any valid evidence been placed on record to show that the defendant has adopted and used the features of two labels referred by the plaintiff. Hence, issue no. 1 is decided in favour of the plaintiff and against the defendant.

ISSUE NO. 2

12. The plaintiff has submitted that the said labels were created at its instance by Kirti Advertising and has annexed the deed of assignment in its favour by way of Exhibit P-6. It has also been submitted that the defendant has nowhere shown that the plaintiff's labels are imitations or copies. In reply, the defendant has stated that there can be no trade mark in respect of the geometric drawing/features indicated in the labels and that the said devices are not registrable under the Trade Mark Act. The defendant has also averred that the assignment deed is not genuine. However, no evidence as to this contention has been placed on record. Further, in view of the finding given in Issue no. 1, the present issue is also decided against the defendant.

ISSUE NO. 3 & 4

13. The plaintiff has submitted that a bare perusal of pages 101, 103, 102, 104 is enough to show that the defendant's labels are copies of the plaintiff's labels. Further, in cross-examination of Ms. Karuna Barenwal, the proprietor of the plaintiff, she has admitted that the labels used by her company have been lifted from magazines like 'Grihshobha'

and 'Vanita'. The defendant has also admitted taking the said label from 'Grihshobha' and simply contended that the said device is not registrable under the Trade Mark Act as the same is common to trade or 'publici juris'.

14. As regards Issue no. 4, the plaintiff has contended that the overall similarity of the colour combination, layout and get up etc. of the defendant's labels at pages 102 and 104 is identical to the plaintiff's labels at pages 101 and 103. The consumers of the two products are from all walks of life, ranging from urban to rural and semi-literate to illiterate, and these consumers do not have the benefit of side by side comparison of the two products and hence are likely to get confused and deceived and in all probability would accept the defendant's product as the plaintiff's on account of imperfect recollection. For this purpose, the plaintiff has placed reliance on several cases. These are as follows :

- I. **Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia & Ors., 2004 (28) PTC 121 SC**
- II. **Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. , 2001 (PTC) 541 SC**
- III. **Glaxo Operations UK Ltd. v. Samrat Pharmaceuticals, AIR 1984 Delhi 265**
- IV. **B.K. Engineering Company v. U.B.H.I Enterprises, AIR 1985 Delhi 210**
- V. **M/s. Anglo Dutch Paint v. M/s. India Trading House, AIR 1977 Delhi 41**

VI. **Parle Products (P) Ltd. v. J.P & Co., AIR 1972 SC 1359**

VII. **Amritdhara Pharmacy v. Satya Deo Gupta, AIR 1963 SC 449**

15. I have perused the contentions of both parties. It seems to me that the outcome of all the Issues depends on the answer to Issue No. 3. If it can be stated without hesitation that the labels of the defendant on page 102 and 104 are imitations or substantial reproductions of the plaintiff's labels on pages 101 and 103, it would be clear that the same is an infringement and the other issues would stand sufficiently resolved. To examine Issue No. 3, the relevant documents filed at pages 101,102 103 and 104 must be examined. Following are the images as they appear on pages 101 and 102 and 103 and 104 respectively.



Defendant's label



Plaintiff's label



Defendant's label



Plaintiff's label

16. The defendant has contended that the plaintiff is wrongly calling geometric lines and the figure of mother and child its property as the same is the property of the public. I find that this contention of the defendant is mindless and has no merit.

17. The defendant has submitted two photographs of labels of 'Dashmularishta', both produced by different manufacturers being 'Shiva' and 'Budha'. On these labels are photos of women with children, like the ones on the plaintiff's and defendant's labels. However, as observed in the above-mentioned judgments, the defendant has failed to discharge successfully the burden of proof of 'common element in trade' as these photographs only show the impugned device and do not indicate user of the said marks.

18. The law on copyright infringement is quite settled. Following are the leading cases on the same.

I. **Burroughs Wellcome (India) Ltd vs.Uni Sule Pvt. Ltd,**

“Copyright is a form of intellectual property. With advancement in technology it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection. It is well settled that although under the Copyright Act, 1957, there is a provision of registration, under Section 44 of the Act. It is not in doubt that the said procedure is an enabling provision and registration is not compulsory for the purpose of enforcing copyright. Section 44 of the Act provides for registration of work in which copyright exists but in order to claim copyright registration is not necessary. This is because registration is only to raise a presumption that the person shown in the certificate of registration is the author. This presumption is not conclusive, but no further proof is necessary unless there is a proof rebutting the contents of the said certificate. Under Section 48 of the Registration Act, therefore, the act of registration is ex-facie prima facie evidence of the particulars incorporated in the certificate. There is no provision under the Act which deprives the author of the rights on account of non registration of the copyright. There is nothing in the Act to suggest that the registration is condition precedent to the subsistence of the copyright or acquisition of copyrights or ownership thereof or for relief of infringement of copyright. The sine-qua non of existence of a copyright is expenditure of skill, labour and capital on any work expended by a person/author and unless the original work is produced in court to prima facie show that the work has originated from author, no relief can be granted.”

II. M/s.Anglo-Dutch Paint, Colour and Varnish Works Pvt.

Ltd vs.M/s.India Trading House, AIR 1977 Delhi Page 41

“9. Having noticed the principles which have to be borne in mind, the application thereof is not difficult in the present case. It is true that there is a phonetic difference between the numerals “1001” and “9001” but taking into account the entire get up the combination of colours, it will be noted that

the essential features of plaintiff's containers have been absolutely copied. The entire scheme of the containers is also the same. There is a common large circle with the same colour scheme and with the same background. There is the same description of Superior White on top and Zinc paint on the bottom in the circle. Again, the White circle with grey lettering is identically superimposed on violet background. The only difference is that instead of white parallelogram shapes on top and base borders there are white triangles and on the white parallelograms instead of numeral "1001" in grey lettering, the numeral on the defendant's container is "9001" but the overall effect is just the same. The commodity is such that it is likely to be purchased by customers from all strata of society including the petty "kapkhandars and contractors."

**III. Vicco Laboratories vs. Hindustan Rimmer, Delhi, AIR
1979 Delhi 114**

"13. The plaintiffs claim passing off by the defendants of their product as and for the product of the plaintiff's on the basis of copy of the distinctive get up and colour scheme of the collapsible tubes and the cartons by them. The defendants are not entitled to represent their goods as being the goods of the plaintiffs. The two marks "Vicco" and "Cosmo" used by the plaintiffs and defendants respectively are no doubt different and the mark "Cosmo" by itself is not likely to deceive but the entire get up and the colour scheme of the tube and the carton adopted by the plaintiffs and the defendants are identical in every detail and are likely to confuse and deceive the customer easily. The get up and the colour scheme of the plaintiffs adopted in every detail by the defendants for their tube and carton cannot be said to have been adopted by the defendants unintentionally."

**IV. Tavener Rutledge Ld. Vs. Specters Ld., 1959 RPC Page
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“It seems to me that one has to take into consideration people who have what is called imperfect recollection, as was pointed out in the case of Saville Perfumery Ltd. Vs. June Perfect Ltd. (1941) 58 RPC 147 at 174.5 and one has to allow for cases where the person who has not got the two tins side by side perhaps does not remember the plaintiff’s name accurately, or does not know that there are two different traders in the same line of business, or many others for that matter, and takes a casual glance at the tin and imagines that it is the kind of fruit drops that he wants, not entirely casually, but looking at it in the ordinary way that such a customer would go into a shop and see a pile of tins or something of that sort. Afterwards of course raise objection, but it seems to me that it is a case of confusion if customers are induced to buy by a recollection of the general get up of the plaintiffs’ tin so that they purchase a tin of the defendants’ sweets by mistake and I am bound to say that I have come to the conclusion that such confusion is not only possible but is likely.”

ISSUE NO. 5

19. The plaintiff has submitted that the profits of the defendant are the losses suffered by the plaintiff. The defendant must be directed to produce its account books or else render damages. However, Counsel for the defendant, in reply, has stated that though the plaintiff keeps calling it a label, the material in question is actually a trade mark and the words ‘Dashmularishta’ and ‘Ashokarishta’ cannot be separated from the devices on the containers of both parties. The defendant has also referred to **William Baily (Birmingham) Ltd.’s Application (1935) 52 RPC 136**. However, after perusing the said judgment I find that it does not further the cause of the defendant as the Learned Judge in that case observed that two words must be judged on the whole by taking the

entire picture as well as surrounding circumstances in view. The case has absolutely no application to the present one as in the present case the plaintiff has specifically mentioned that it is not contesting the defendant's right to use the words 'Dashmularishta' and 'Ashokarishta' but the device of mother and child and the colour scheme, arrangement etc. There appears to be no reason why the said two words cannot be separated from the particular device in the background.

ISSUES NO. 6 & 7

20. The plaintiff, as regards the last two issues, has stated that the defendant is guilty of infringement of its copyright and has not submitted any profits or accounts. It is unclear as to whether the defendant even maintains account books which would reflect clearly its turnover etc. In such circumstances, the plaintiff has asked for compensatory damages of at least Rs. 10,00,000/- in addition to an injunction. In reply, the defendant has stated that the plaintiff is not entitled to any injunction or rendition of accounts and in fact, it is the defendant who should receive damages by virtue of loss of sale of its goods due to the interim injunction passed by this court in I.A. No. 21803/2003 restraining it from using the impugned labels.

21. In view of the findings in all the previous issues, I find that the defendant has infringed the plaintiff's copyright and has tried to pass off its goods as those of the plaintiff's. In these circumstances, the defendant is directed to pay punitive damages.

22. In fact, I find that I need to look no further than the cross-

examination of the proprietor of the defendant, Ms. Karuna Barenwal. She has stated that she has been carrying on the business of manufacturing ayurvedic preparations since 1997. The identity mark or trade mark, by which the product of the defendant is identified, has been marked as 'Point A' on the photograph filed as Exhibit DW 1/1. The relevant portion of her statement is as under :

“ Photographs appearing in these two labels were also picked up from some magazine, the photographs which appealed to us. I cannot say that picture appearing on the label Ex P-8 and 9 has been picked up from the one appearing in the picture mark PA. Photographs picked up for these labels were taken from a magazine like Grahashobha and Vinita.”

23. It appears to be rather clear that the defendant simply picked up the label in the advertisement of the plaintiff's product and used it as their label for 'Dashmularishta'. There is no such clear evidence as regards the other product 'Ashokarishta'. The plaintiff has filed no printout or photocopy of any magazine page showing the same image as that which appears on the plaintiff's product in Exhibit P-8 on page 102 of the documents.

24. The next contention of the defendant is that the device on the labels of the plaintiff is common in trade and is public property cannot be accepted in view of the lack of evidence produced in this behalf, as per settled law in this regard. Though no issue has been framed in this regard, the defendant's counsel has argued this point vehemently during the course of hearing. The leading authority laying down law in this regard is **Corn Products Refining Co. v. Shangrila Food Products**

Ltd., AIR 1960 SC 142 and the relevant portion thereof is reproduced hereinbelow:

“16. Now it is a well recognised principle, that has to be taken into account in considering the possibility of confusion arising between any two trademarks, that, where those two marks contain a common element which is also contained in a number of other marks in use in the same market such a common occurrence in the market tends to cause purchasers to pay more attention to the other features of the respective marks and to distinguish between them by those features. This principle clearly requires that the marks comprising the common element shall be in fairly extensive use and, as I have mentioned, in use in the market in which the marks under consideration are being or will be used.

17. The series of marks containing the common element or elements therefore only assist the applicant when those marks are in extensive use in the market. The onus of proving such user is of course on the applicant, who wants to rely on those marks. Now in the present case the applicant, the respondent before us, led no evidence as to the user of marks with the common element. What had happened was that Deputy Registrar looked into his register and found there a large number of marks which had either 'Gluko' or 'Vita' as prefix or suffix in it. Now of course the presence of a mark in the register does not prove its user all. It is possible that the mark may have been registered but not used. It is not permissible to draw any inference as to their user from the presence of the marks on the register. If any authority on this question is considered necessary, reference may be made to *Kerly* p. 507 and *Willesden Varnish Co. Ltd. v. Young & Marten Ltd.* 39 R.P.C. 285 . It also appears that the appellant itself stated in one of the affidavits used on its behalf that there were biscuits in the market bearing the marks 'Glucose Biscuits', 'Gluko biscuits' and 'Glucoa Lactine biscuits'. But these marks do not help the respondent in the present case. They are ordinary dictionary words in which no one has any right. They are really not marks with a common element or elements. We, therefore, think that the learned appellate Judges were in error in deciding in favour of the respondent basing themselves on the series marks, having 'Gluko' or 'Vita' as a prefix or a suffix.”

25. The claim of the plaintiff for cost, rendition of accounts and

damages includes loss of business, reputation and goodwill in the market. Since the above claimed amount is based on the assessments made by the plaintiff, I am of the view that a sum of Rs.1 lac can be reasonably awarded to the plaintiff as punitive damages in view of the following judgment passed by this court.

26. In the case of **Time Incorporated Vs. Lokesh Srivastava, 205 (30) PTC 3 (Del)**, this Court has expressly recognized a third type of damages as punitive damages, apart from compensatory and nominal damages. The Court has made some relevant observations discussion the aspect of punitive damages. It was observed :-

“The 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...”

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and 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."

27. In the result the suit of the plaintiff is decreed in terms of Para 21 (i), (ii) and (iii) of the plaint with costs along with damages to the

tune of Rs.1 lac as against the relief of Para 21 (iv) of the plaint. The decree be drawn accordingly.

MANMOHAN SINGH, J.

SEPTEMBER 23, 2009

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