

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 1411/2006

Pronounced on 09.10.2009

SOCIETE DES PRODUITS NESTLE, SA & ANR

..... Plaintiffs

Through : Mamta Jha with Manish Mishra and Mr. Sumit Rajput

versus

BASANT ALAL KOKCHA & ORS

..... Defendants

Through : Nemo

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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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 |

HON'BLE MR. JUSTICE S.RAVINDRA BHAT (Open Court)

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1. The plaintiffs seek to restrain the defendants, their partners/ proprietors, assigns, franchisees, licensees, distributors and agents from manufacturing, selling, offering for sale advertising, directly or indirectly dealing in food products including pasta or any other culinary products, under the trademarks MAGGI, MAGGI logo, NESTLE and NESTLE logo or any other trade mark or logo as may be identical to or deceptively similar to that of the plaintiffs, amounting to infringement of plaintiffs registered trademarks; further also restraining them from using, reproducing, printing, importing, selling, offering for sale or dealing in infringing MAGGI packaging bearing the impugned the impugned MAGGI or NESTLE logo or any other logo as

may be colourable imitation or substantial reproduction of the said logos of the plaintiffs in respect of their colour combination, get up, lay out or arrangement of features, amounting to infringement of copyright of plaintiffs therein. A decree for rendition of accounts and delivery-up is also sought.

2. The brief facts of the case are that the second plaintiff is a company incorporated under the Companies Act. The second plaintiff claims that it is part of a gigantic group, known as *Nestle*, owning 479 factories and employing nearly 2,20,000 people. It is contended that Nestle's products are known worldwide for their innovative nature, and excellence in quality. The mark NESTLE is a house-mark of the Nestle group, and has been in existence for 125 years, since its creation in 1866. The plaintiffs claim to be engaged in the business of manufacturing and selling, amongst other products, various culinary products such as noodles, sauce, soups etc. under the trade mark MAGGI in various international markets. All products bearing the mark MAGGI also bear plaintiffs' house mark/ trade mark NESTLE and NESTLE logo (device of a nest with two birds perched on it, in conjunction with the word mark NESTLE). As per the suit averments the defendants are engaged in printing, procuring and sale of culinary products such as pasta in the infringing and spurious MAGGI packagings.

3. By order dated 27.11.2008 the defendants were proceeded *ex-parte*, as no appearance had been entered on their behalf since 24.09.2007, during which period the matter had been listed before the Court on five occasions.

4. To establish their allegations and averments, the plaintiffs rely on the deposition of their constituted Power of Attorney holder, Ms.Venita Gabriel (PW-1). The plaintiffs filed their affidavit in evidence (Ex. PW-1/A) stating that the earliest use of MAGGI products dates back to 1886 in Switzerland; the first plaintiff has been manufacturing and selling variety of culinary

products in India under the trademark MAGGI since 1974. It is claimed that the “Reader’s Digest” magazine had identified MAGGI as a “super brand” in the year 2001 and the brand MAGGI had been voted for the same magazine’s highest award namely “platinum award”. The trademark MAGGI features into the publication titled “World’s Greatest Brands” (year 1996 edition) published by “Inter Brands”, which ranked MAGGI amongst world’s top 50 brands.

5. It is stated the trademark MAGGI is a coined mark, which was derived from the surname of Julius Maggie, founder of the business of the Nestle Group. It has no common parlance and is not a dictionary word. The trademark MAGGI is used by the plaintiff in conjunction with a unique and distinctive logo comprising a red coloured bubble device with the mark MAGGI superimposed thereon in stylized font in yellow letterings. It is stated that the first plaintiff is the proprietor of the trademark MAGGI, the MAGGI Logo, NESTLE and NESTLE Logo and the second plaintiff is its licensee in India through license agreement dated, 11.10.1982. The distinct and unique visual features of MAGGI logo constitute an original artistic work within the meaning of section 2 (c) of the Copyright Act, 1957. The device MAGGI is also registered in India in favour of the first plaintiff; the trademark registration certificates for trademark nos. 267814 in class 30, 267813 in class 29, 1056836 in class 30, 578342 in class 29, 253467 in class 30 and 578343 in class 30 are exhibited as Ex. PW-1/8 to PW-1/13. Apart from the proprietary right under common law, the first plaintiff also enjoys statutory right to the exclusive use of the trademark MAGGI internationally, as well as in India.

6. The trademark NESTLE has been extensively used by the “Nestle Group” since its inception in the year 1866 and appears all on all the products manufactured and marketed by the first plaintiff or its associates and/or allied companies. The goods bearing the trademark NESTLE are available in more than 130 countries, including India. In India the first plaintiff had

obtained registrations of the trademark NESTLE and the NESTLE Logo in various classes; the certificates of registration for trademark nos. 698372 in class 30, 944816 in class 31, 439733 in class 05, 439736 in class 32, 440510 in class 05, 440511 in class 32, 440512 in class 30, 457240 in class 03, 439735 in class 30, 698371 in class 29 and 698374 in class 32 are exhibited as Ex. PW-1/14 to PW-1/24. Registration certificates for the NESTLE Logo are exhibited as Ex. PW-1/25 and PW-1/26. It is claimed that these registrations are conclusively valid and renewed and in force. The plaintiffs have also filed samples of MAGGI noodles pouches bearing MAGGI Logo and the NESTLE Logo exhibited as EX. PW-1/27 (Colly.)

7. The plaintiffs claim to have extensively spent on brand building activities and advertising their products with the trademark MAGGI. It is claimed that on account of prior adoption, long and continuous use, extensive advertising, enormous sales and strict quality control MAGGI and MAGGI Logo have acquired tremendous goodwill and reputation, and come about to be identified and associated exclusively with the goods and business originating from the plaintiffs. The plaintiffs' trademark MAGGI and the MAGGI Logo as well as the house-mark NESTLE and the NESTLE Logo have acquired enviable goodwill and the reputation amongst the members of the trade and have also become household brands, which connote the goods and/or business of the plaintiffs exclusively. The sales figures for of the plaintiffs' products under the trademark MAGGI and the expenditure on advertising for the same is reproduced as under:

Year	Sales (in Crores)	Advertising Expenditure (in Crores)
2003	320	18
2004	339	23
2005	411	25
2006	485	30
2007	643	37

8. It is alleged that the second plaintiff conducted an investigation in July, 2006 and an investigation report, dated 05.07.2006 was submitted by one Greves Protection Management (Ex. PW-1/30 (Colly.)) where it was mentioned that the defendants were engaged in printing and procuring of spurious MAGGI packaging, label, as well as sale of culinary products such as pasta in the said spurious packaging. It is alleged that the said spurious packaging of the defendants bears the MAGGI and the NESTLE Logos, which are being sold in the open market in a clandestine manner, as coming from the house of the plaintiffs, thereby committing a fraud on the consumers.

9. An *ex-parte ad interim injunction* was passed against the defendants on 14.07.2007 and Local Commissioners were appointed to visit the premises of the defendants no. 2, 3 and 4. On the basis of the report of the Local Commissioner who visited the premises of the fourth defendant, wherein it was stated that the fourth defendant has alleged that the first defendant was supplying the offending material, another Local Commissioner was appointed by the Court on 19.07.2006 to visit the premises of the first defendant. A huge recovery of 845 packed and 50 unpacked MAGGI pasta packaging was made at the first defendant's premises. This Local Commissioner's report also disclosed that packaging material for other brands like Horlicks, Knorr and Sauce Blanche was also found at the first defendant's premises; samples and photographs of the recovered material are filed. These reports of the Local Commissioners are placed on record as Ex. PW-1/31 (Colly.). The plaintiffs allege that the conduct of the defendants is *malafide*, dishonest, unethical and unlawful and solely motivated to en-cash upon the plaintiffs' goodwill and reputation and earn profits by passing-off their goods/business for those of plaintiffs. It is also stated that the confusion or deception is inevitable since these products are purchased by an unwary class of customers including housewives, children etc. It is claimed that

the defendants have committed multiple offences under the provisions of the Trade Marks Act, 1999, the Copyright Act, 1957 as also under the provisions of the Prevention of Food Adulteration Act, 1954.

10. Reliance was placed on *Societe Des Produits Nestle S.A. v. Jai Ram*, ORA/2007/TM/DEL, a decision of the Intellectual Property Appellate Board, to say that the trademark MAGGI has been held to be distinctive and well-known.

11. The plaintiffs also claim that the activities of the defendants have irreparably damaged their (the plaintiffs') business, and they estimate the loss suffered by them at over Rs. 20,00,000/- and also state that the loss to goodwill and reputation cannot be assessed in monetary terms. In light of the above, compensatory as well as punitive damages are sought.

12. The Court has considered the affidavit deposition by way of evidence filed on behalf of the plaintiffs and the documents placed on the record. As the defendants were proceeded *ex-parte*, only the facts urged by the plaintiffs and established through the evidence by way of affidavit shall be considered for adjudication of the suit. The marks and logos (MAGGI and NESTLE) being used on the pasta packaging are identical to those of the plaintiffs. The averments made in the affidavit and the material placed on the record remains un-rebutted in the absence of the defendants. Consequently, it is held that the plaintiffs have established before the Court that it is the owner of the said trademark. On the basis of the evidence the plaintiffs have also established that the defendants have infringed the registered trademark in respect of the product in question; this activity does not have any explanation except that the defendants' actions are deliberate and actuated with *malafide*, with the intention of exploiting the plaintiffs' goodwill and reputation to cause confusion and deception in the minds of the public at large.

13. Insofar as the relief of rendition of accounts and a consequential decree on the basis of the aforesaid accounts is concerned, since the defendants were proceeded against *ex-parte*, 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 said trademarks. Having said so, the Court considers this to be a fit case for awarding some damages in view of the huge quantities of the offending products and packaging material bearing the marks in question. If damages are not awarded in favour of the plaintiffs, then the same would amount to a premium on the conduct of the defendants. This Court held in *The Heels v. V.K. Abrol and Anr*, CS (OS) No. 1385/2005:

“12. No doubt it is not possible to give an exact figure of damages on the basis of actual loss, but certain token amounts on the basis of the sales of the plaintiff can certainly be made. The plaintiff is unnecessarily dragged into litigation and the defendants must bear consequences thereof. In fact in such a case both compensatory and punitive damages ought to be granted apart from the costs incurred by the plaintiff on such litigation.”

14. In view of the above, the suit is entitled to succeed. The plaintiffs are also entitled to damages to the extent of Rs. 2,00,000/- to be paid by all defendants in equal proportions. Accordingly the suit is decreed in terms of Para 37 (a), (b), (c), (d), (e) and (f) of the plaint. The Counsel's fee and cost of proceedings is quantified at Rs. 50,000/-. The amounts shall be paid by the defendants to the plaintiffs within four weeks from today.

S. RAVINDRA BHAT, J

OCTOBER 09, 2009