

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 20.01.2011
Judgment Pronounced on: 31.01.2011

+ **CS(OS) No. 496/2009**

MS. DIVYA SOOD
PROPRIETOR M/S. THE BODY CARE Plaintiff

- versus -

MS. RENU BAJAJ
PROPRIETOR M/S. PERFECT BODY CARE Defendant

Advocates who appeared in this case:

For the Plaintiff: Mr. M.K. Miglani and Mr. Kapil Kumar
For the Defendant: None.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J

1. This is a suit for permanent injunction, rendition of accounts and damages. The plaintiff Ms. Divya Sood, who is carrying business under the name and style M/s THE BODY CARE in engaged in providing beauty and health care services through slimming centres, beauty clinics,

spas, etc. The case of the plaintiff is that she began her operation in the year 1997 and is now recognized as the leader in providing beauty and health services, through a team of dedicated and trained professionals, who are acknowledged to be the best trained in the industry. She also claims to be well known for setting up professional and ethical standards and claims reputation as a world-class beauty and health care specialists. She is operating 23 beauty body and health care clinics all over the country with branches in all major Indian cities.

2. The case of the plaintiff is that the mark THE BODY CARE was coined and adopted by her in the year 2000 and since then she has been continuously, uninterruptedly and extensively using the aforesaid mark. She has also applied for the registration of the mark THE BODY CARE and her application was advertised in Trademark Journal on 18th November 2003. The plaintiff also claims a unique and distinctive reputation of the trademark/label of THE BODY CARE and claims it to be an original artistic work, within the meaning of Section 2(d) of the Copyright Act, 1957. The plaintiff has been granted copyright registration in respect of the said artistic work

vide registration No. A-71352/2005. The plaintiff has claimed revenue of Rs.19,10,38,917/- in the year 2005-06, Rs.18,34,73,107/- in the year 2006-07 and Rs.13,42,06,684/- between April to December 2007. She also claimed to have incurred advertisement expenditure of Rs.2,27,39,315/-, Rs.2,08,15,930/- and Rs.1,68,99,309/- respectively during these periods. This is also the case of the plaintiff that on account of the long, continuance and extensive use, coupled with extensive sales promotion activities, the trademark/label THE BODY CARE has acquired enviable goodwill and impeccable trade reputation and has come to be associated solely and exclusively with the plaintiff and, therefore, the use of an identical and/or deceptively similar trademark by another person for same/similar goods/services is bound to be considered by the public as user by the plaintiff in one manner or the other.

3. Defendant Renu Bajaj is carrying business under the name and style of M/s. Perfect Body Care. It is alleged that the trademark/label PERFECT BODY CARE being used by the defendant is identical and/or deceptively similar to the trademark/label of the plaintiff in writing style, get-up

and colour combination and the defendant has deliberately copied the writing style, get-up and distinctive pink and white colour combination of the plaintiff's trademark/label with a view to trade upon the benefit earned by the plaintiff. It has also been stated that the defendant is carrying business at B-291, Saraswati Vihar, 1st Floor, Outer Ring Road, Pitam Pura, New Delhi where business was earlier being carried by the plaintiff from January 1998 to October 2001. It is also alleged that the persons who avail services of the plaintiff come from all walks of life, including illiterate and unwary customers, who demand and recognize services of the plaintiff by the unique and distinctive trademark/label adopted and being used by her. The plaintiff has, therefore, claimed an injunction restraining the defendant from providing, marketing, selling and offering or advertising health and beauty care services under the trademark/label PERFECT BODY CARE or any other trademark/label which would infringe the registered copyright of the plaintiff in label THE BODY CARE. She has also sought injunction restraining the defendant from passing off her services as those of the plaintiff. She has also claimed rendition of accounts and damages amounting

to Rs.20 Lacs from the defendant.

4. The defendant was proceeded ex parte vide order dated May 21, 2010. Earlier the defendant failed to appear before Delhi High Court Mediation and Conciliation Centre, to which the matter was referred for making efforts for an amicable resolution of the disputes between the parties.

5. The plaintiff has filed the affidavit of one Mr. B.P. Sood by way of ex parte evidence. In his affidavit Mr. Sood has supported on Oath, the case setup in the plaint and has stated that the plaintiff began her operations in the year 1997 at a small beauty clinic in Patel Nagar and her business has since grown in leaps and bounds and she has become one of the premier beauty and health care service provider in the Country. He has further stated that the plaintiffs is widely recognized as the leader in providing beauty and health care services and she offers comprehensive beauty and health care packages through a team of dedicated and trained professionals. He has also claimed that plaintiff is known for setting up professional and ethical standards in the industry and has established reputation as a world class beauty and health care specialist. He has also stated that the trademark/label THE

BODY CARE is being used by the plaintiff openly, continuously and extensively since the year 2000 and it has acquired a secondary meaning connoting and denoting to the members of trade and customers at large as the trademark exclusively of the plaintiff. He has also stated that the defendant was offering services from premises No.B-291, Saraswati Vihar, 1st Floor, Outer Ring Road, Pitam Pura, New Delhi from where the plaintiff was earlier carrying business between January 1998 to October 2001 using the trademark/label THE BODY CARE.

6. Ex.PW1/3 are the list of 54 beauty and health care clinics, which the plaintiff has established in various States. Ex.PW1/44 and Ex.PW1/45 are the certificates issued by the Chartered Accountant of the plaintiff, which show that the turnover of the plaintiff was Rs. 19,10,38,917/- in the year 2005-06, Rs.18,34,73,107/- and Rs.13,42,06,684/- between April to December 2007 and that she incurred advertisement expenditure of Rs.2,27,39,315/-, Rs.2,08,15,930/- and Rs.1,68,99,309/- respectively during these periods.

7. The deposition of PW-1 Shri B.P. Sood, coupled with the list Ex. PW-1/3 shows that the plaintiff has

established as many as 54 Beauty and Health Care clinics since the time she adopted the trademark THE BODY CARE. The certificates Ex.PW-1/44 and PW-1/45, issued by the Chartered Accountant of the plaintiff, shows that she had a large turnover in the years 2005-06, 2006-07, 2007-08 from the services being rendered by her and she incurred huge expenditure during those years on advertising the services being offered by her, through various clinics. Since the defendant has chosen to remain *ex parte* and has not come forward to controvert the oral and documentary evidence produced by the plaintiff, I see no reason to disbelieve the claim of the plaintiff that the trademark THE BODY CARE, on account of its continuous and extensive use by the plaintiff through various clinics set up by her and the expenses incurred by her and building and promoting the trademark, it has come to be associated with her and the services being offered under the brand name THE BODY CARE have come to be identified as the services being offered by the plaintiff. Also, I see no reason to disbelieve the claim of the plaintiff that she has been recognized as the leader in providing comprehensive beauty and health care through a team of dedicated and well-

trained professionals and, therefore, the persons, who choose to buy the services being rendered by her, expect a certain professional and ethical standard to be maintained by the provider of those services.

8. The Registration Certificate dated 29th April, 2005, in respect of Registration No. A-71352/2005, issued by Registrar of Copyrights, shows that the plaintiff is the registered owner of the work, annexed to the certificate and that she claimed before the Registrar of Copyrights that this work was first published by her in India in the year 2000. Page 2 of the Certificate, which, in fact, is an annexure to the document, shows that the copyright has been claimed and registered in the artistic work involved in writing the words THE BODY CARE which have been written in a particular unique style and particular getup, using a distinctive font for the purpose. The sketch of a woman drawn by the plaintiff has been shown on the left side of the words THE BODY CARE. The picture/sketch of the woman is not the photograph of a woman, but is only a sketch drawn by the plaintiff. The sketch of a woman drawn by the plaintiff does not depict the full body of the woman and her hairs are shown flying backwards in a distinct style. The

right arm of the woman is shown touching her left hand. It is, therefore, difficult to dispute that the work in respect of which copyright has been granted to the plaintiff is a result of an idea conceived by her which was expressed in a unique way, using a lot of skill, labour and ingenuity in the process and, therefore, qualifies as an artistic work within the meaning of Section 2(c)(i) of Copyright Act. The work of the plaintiff has been recognized by Registrar of Copyright, by granting requisite registration in her favour. Prima facie, registration of such a work under Copyright Act covered at least prima facie evidence of its being an artistic work within the meaning of the Act. No one can claim copyright in general in the picture or sketch of a woman. However, since such a picture/sketch can be drawn in a number of forms and using different styles, getups and expressions, a lot of skill and labour is involved in conceiving, conceptualizing and producing such a work and, therefore, a particular picture or sketch may constitute an artistic work in which copyright can be claimed by its author. No one has a right to reproduce such a work or another work using the essential features of that work.

9. A comparison of the work in respect of which

copyright has been granted to the plaintiff with the name and logo/image being used by the defendant reveals a number of similarities. The sketch of a woman is being used by the plaintiff on the left side of the name THE BODY CARE. The defendant is also using the sketch of a woman on the left side of the name PERFECT BODY CARE. The words “SLIMMING AND BEAUTY CLINIC FOR MEN AND WOMEN” have been written under the words THE BODY CARE in the registered work of the plaintiff. Exactly same words have been written by the defendant under the name PERFECT BODY CARE, though not in capital letters. The font used by the defendant for writing the words PERFECT BODY CARE is almost identical to the font used by the plaintiff in writing the words BODY CARE. The minimal difference in font and shape of the letters can be noticed only when both the words are kept side by side and on meticulous examination in this regard is carried out. If a person having once or more seeing the work of the plaintiff comes across the work of the defendant at a later date, there is a strong likelihood of his mistaking the work of the defendant as that of the plaintiff. Even the colour scheme adopted by the parties is similar being pink and white. If

there are substantial similarities in the work, in which the copyright is claimed and the impugned work, minor dissimilarities will not non suit the plaintiff and infringement of the copyright would still be made out.

10. It is not necessary that in order to constitute infringement of a copyright, the impugned work should be an exact or verbatim copy of the original work and it will be sufficient if it is shown that though not a verbatim copy of the original work, the impugned work resembles to it in a substantial degree by extensive use of the main feature, which are found in the work in respect of which copyright is claimed. In fact any intelligent person copying a work, in which the copyright vests in another person, would make some changes here and there so as to claim that his work does not constitute infringement of the work in which a copyright subsists in favour of another person. But, such rather minor dissimilarities between the work of the plaintiff and the impugned work would not deprive the plaintiff of injunction in case degree of resemblance in the two works is substantial and there is an attempt to encash upon the goodwill of a well established work.

11. In **R.G. Anand v. Delux Films & Ors.**, AIR 1978

SC1613, Supreme Court inter alia laid down the following propositions:

One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

Whether the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

Thus the artistic representation of the mark/label being used by the defendant appears to be a copy of the writing style, getup and colour scheme combination being used by the plaintiff.

12. The trademark THE BODY CARE is being used by the plaintiff since the year 2000. The plaintiff came across

the trademark PERFECT BODY CARE being used by the defendant in the second week of November 2008. The defendant has not come forward to claim that she was a prior user of the words BODY CARE, which forms part of her trademark PERFECT BODY CARE. The necessary inference, therefore, is that it is the plaintiff who is the prior user of the trademark THE BODY CARE, she having commenced the use in the year 2000. The defendant has incorporated almost whole of the trademark of the plaintiff by adopting and using the mark PERFECT BODY CARE. The defendant has not come forward to explain to the Court as to why she chose to include the words BODY CARE in the trademark adopted by her. As noted earlier, on account of its extensive user since the year 2000 and huge expenditure incurred by her on building and promoting the trademark THE BODY CARE, this mark has come to be associated with the plaintiff. The plaintiff is running a large number of clinics throughout the Country offering health and beauty care treatment through those clinics. If a person, who has availed services of the plaintiff or who wants to avail her services on account of the reputation, which has come to be associated with her brand THE BODY

CARE, and he happens to come across the mark PERFECT BODY CARE being used by the defendant, it is likely to cause confusion in his mind and he may presume that the clinic being run by the defendant was a clinic of the plaintiff or was in some manner or the other associated with her and that is why the work BODY CARE is being used by her while offering similar services. An unwary consumer, whether purchasing goods or availing services attaches considerable importance to the essential features of the work or the mark as the case may be and the basis to be adopted by the Court is as to what the general impression of such a customer of imperfect recollection would be on seeing the impugned work/mark, where he would consider it to be the work/mark of the plaintiff. Hence, there is a genuine likelihood of the defendant being able to pass her services as those of the plaintiff, by her using the mark PERFECT BODY CARE. The case of the plaintiff is that on account of high quality of the services being offered by her through trained personnel, the customers using her services expect them to be of high standard and superior quality. If a person avails the services being offered by the defendant, on a misconception that she was somehow or the other

connected with the plaintiff and it transpires that the quality of the services being provided by the defendant to the customer is not as good as the quality of the services being provided by the plaintiff, this may not only damage the goodwill and reputation of the plaintiff, it may also adversely affect the interest of a common citizen to pay for services of a high standard but, gets services of a lower standard.

13. The word THE BODY CARE of course appears to be a descriptive word but, as observed by Supreme Court in *2005 (30) PTC 1 (SC)* even a descriptive word may be entitled to protection if it has assumed a secondary meaning which identifies it with a particular product or as being from a particular source. The case of the plaintiff before this Court is that on account of continuous use since the year 2000, the efforts made and the expenditure incurred by her on building and promoting this mark, it has come to be associated with the services being offered by her alone.

Similar view was taken by this Court in 2002 (24) PTC 355 (Del) observing that if a product of a particular character or composition is marketed in a particular area or place under the descriptive name and has gained a

reputation thereunder, that name which distinguishes it from competing products of different composition, the goodwill in the name of those entitled to make use of it are protected against deceptive use there of the name by competitors. In that case, the plaintiff had adopted the domain name NAUKRI.COM. The defendant, who adopted the domain name NAUKARI.COM had taken the plea that the trademark NAUKRI.COM was generic and, therefore, incapable of achieving the trademark significance or secondary meaning. It was observed during the course of judgment that when a defendant does business under the name, which is sufficiently close to the name under which the plaintiff is trading and the name has acquired a reputation, the public at large is likely to be deceived and misled that the business of the defendant is business of the plaintiff or branch or department of the plaintiff. It was further observed that if it is found by the Court that such a mark has attained distinctiveness and is associated with the business of the plaintiff for a considerable time and thereafter the defendant adopts a similar word, to induce innocent users to come to its website, which establishes dishonest intention and bad faith, the Court would have

justified in granting injunction to the protect business of the plaintiff.

14. In ***Parle Products (P) Ltd. v. J.P. & Co., Mysore***, AIR 1972 SC 1359, Supreme Court inter alia observed as under:-

According to Karly's Law of Trade Marks and Trade Names (9th Edition Paragraph 838) "Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with the one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted.

It would be too much to expect that persons dealing with trademarked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.

It is therefore clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him.

The above referred observations made by the Supreme Court in respect of a trademark would equally apply in a case for infringement of a registered trademark.

The plaintiff has, thus, been able to prove infringement of her copyright as also that the defendant by using the mark PERFECT BODY CARE is passing off her beauty and health related services as those being offered by the plaintiff. The case of the plaintiff finds further strength from the fact that the defendant is provided their services from the same premises where the plaintiff was earlier running a beauty and health care clinic, thereby giving an impression that the clinic was being run by the plaintiff or

was associated with her.

15. The relief of rendition of account was not pressed during the course of arguments. The plaintiff has also claimed damages to the tune of Rs.20Lacs. No actual damages have been proved by the plaintiff and the only prayer made during the course of arguments was to award punitive damages. The reliance in this regard was placed on the decisions of this Court in ***Time Incorporated v. Lokesh Srivastava & Anr.***, 2005 (30) PTC 3 (Del) and ***Dabur India Ltd. v. Emami Ltd.***, 2006 (32) PTC 125 (Del). In the case of ***Times Incorporated (Supra)***, this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of ***Hero Honda (Supra)***, this Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise to the defendant, who appears in the Court and submits its account books would be liable for

damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books. Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand.

16. For the reasons given in the preceding paragraphs, the defendant is hereby restrained from offering and/or providing beauty and health care services under the name PERFECT BODY CARE. The defendant is also restrained from using the words BODY CARE as a part of its corporate name, in respect of beauty and health care services. The defendant will, however, be entitled to use the trademark PERFECT BODY CARE as also the tradename PERFECT BODY CARE in respect of any services other than beauty and health care services such as beauty clinics, health clinics, slimming centres, etc. Taking into consideration all the facts and circumstances of the case, punitive damages amounting to Rs.20,000/- are awarded to the plaintiff.

Decree sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

JANUARY 31, 2011

Ag/BG