

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

+ FAO 520/2011 & CM Nos.21994-95/2011

Judgment delivered on: 7th December, 2011

M/s KRBL LTD Appellant
Through: Mr. S.K. Bansal, Adv.

versus

M/s PK OVERSEAS PVT LTD Respondent
Through: Mr. N.K. Manchanda, Adv.

**CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR**

KAILASH GAMBHIR, J. (Oral)

1. By this appeal filed under section 104 read with Order 43 rule 1 of the Code of Civil Procedure, 1908 the appellant seeks to challenge the order dated 27.8.2011 whereby the interim relief under Order 39 rule 1 & 2 sought by the appellants in the suit for permanent injunction seeking to restrain infringement of trademark was dismissed.

2. The adumbrated facts of the case are that the plaintiff filed a suit under section 134 and 135 r/w section 27(2) of the Trade Marks Act, 1999 on the ground of passing off and under section 51 of the Copyright Act, 1957 for infringement of or likely infringement of

copyright in artistic work, for permanent injunction, rendition of accounts and delivery against the defendant/respondents. As per the plaintiff they are the registered proprietor and user of the trademark "AARATI" and the Copyright involved in the said trademark in respect to its product of premium rice and alleged that the use of the trademark "DIYA" and the copyright involved therein by the defendants/respondents is same/similar. The appellant/plaintiff in the very suit had filed an application under order 39 rule 1 & 2 for restraining the defendants/respondents from using the trademark "DIYA" which was dismissed vide order dated 27.8.2011. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Arguing for the appellant, Mr. S.K. Bansal, learned counsel contends that the learned Trial Court has totally misconstrued the principles for the grant of interim injunction especially in the matters involving infringement of trademark and copyright of the author. Counsel further submits that the learned Trial Court has not appreciated the fact that the respondent has brought out the packaging bag with the same/similar colour combinations as that of the colour combination of packaging bag of the appellant/plaintiff to

take advantage of the tremendous goodwill and reputation of the well established brand name of the appellant/plaintiff. Counsel also submits that the appellant has been using the packaging material in particular background of combination of colours since the year 2005 while the respondent brought out a deceptively similar packaging material with almost identical combination of colours much later in the year 2009 to encash on the goodwill of the appellant. Counsel for the appellant further submits that voluminous documents were placed on record by the appellant to show that the appellant had been advertising their product and the packaging material with the said combination of colours, but no such documentary evidence was placed on record by the respondent. Counsel for the appellant also placed reliance on Section 2 (m) & 2(zb) of the Trade Mark Act to support his arguments that the definition of trademark and mark envisaged therein includes combination of colours of the packaging.

4. I have heard learned counsel for the appellant at considerable length and given my thoughtful consideration to the pleas raised by him.

5. It is well settled that the grant of interim injunction under order 39 rule 1 & 2 of CPC is based on the fact whether the plaintiff has established a prima facie case to be tried, whether the balance of

convenience lies in his favour and whether if an interim injunction is not granted in his favour, he would suffer irreparable loss and injury. From the material placed on record by the plaintiff the learned Trial Court in para 4.2 of the impugned order has clearly observed that according to the respondent they have been using their trademark “DIYA” since 1985 and with the label in question since 2004. The Trial Court has also observed that while the appellant has placed on record various bills from 2005 onwards that rice under mark “AARATI”, was being sold in the market of India and abroad and similarly the defendant also placed on record a few old bills of the years 1995, 1996, 1997 onwards that rice under the mark “DIYA” was being sold by them under different packaging/weighing. In the background of these conflicting claims this Court does not find any perversity or illegality in the impugned order passed by the learned Trial Court taking a view that there is a triable issue as who was the prior user, since both the parties have placed on record their respective bills for selling rice under different packaging in respect of rice under the mark AARATI and DIYA. However learned counsel for the appellant has laid much stress on the similarity of both the packaging material i.e. one brought out by the appellant and the other brought out by the respondent because of the combination of colours,

which argument cannot be appreciated at this stage in the absence of any clear picture emerging to take a prima facie view as to who brought out the said packaging material prior in time in the market and who in the later period in time. These findings of facts certainly can be decided by the learned Trial Court after the parties lead their respective evidence and not at the interlocutory stage.

6. The Apex Court in a catena of judgments has held that the order of interim injunction being a discretionary relief would not be ordinarily interfered by the appellate court unless it is shown that the discretion has been exercised arbitrarily, capriciously or perversely and by not granting the interim relief manifest injustice has been done to the plaintiff. It has been held by the Apex Court in the case of *Skyline Education Institute vs. S.L Vaswani (2010)2SCC142* that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity. In the light of the aforementioned legal principles,

in the facts of the case at hand no case has been made out by the plaintiff to persuade this court being the appellate court to interfere in the impugned order passed by the court of first instance.

7. Hence, in the light of the above, this Court does not find any illegality or perversity in the impugned order passed by the learned Trial Court. There is no merit in the present appeal and the same is hereby dismissed. However, the learned Trial Court is directed to expeditiously decide the case filed by the appellant/plaintiff on its merits after deciding the preliminary issues.

KAILASH GAMBHIR,J

DECEMBER 07, 2011

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