

11

\$~

\*

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

+ CS(OS) 1444/2009

%

***Judgment dated 20.03.2012***

M/S.PARLE AGRO PVT. LTD. & ANR. .... Plaintiff  
Through: Mr.Yaurav Barathi, Mr.Motish Singh  
and Mr.Piyush Joshi, Advocates

versus

M/S.P RABH FOODS & ANR. .... Defendant  
Through

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**G.S.SISTANI, J. (ORAL)**

1. Plaintiff has filed the present suit for permanent injunction to restrain defendants from infringement of trade-mark and copyright and for relief of damages / rendition of accounts and delivery up against the defendants. Vide order dated 11.08.2009 this court had granted *ex parte* ad interim injunction in favour of the plaintiff and against the defendant in terms of prayer (a) of the suit.
2. The defendants were duly served with summons in the suit and notice in the application. The written statement was filed by the defendants and thereafter since the defendants stopped appearing in the matter, the defendants vide order dated 27.09.2011 were proceeded *ex parte*. Plaintiffs have filed *ex parte* evidence by way of affidavit of Mr.Sanjiv Kiyawat. The affidavit of Mr.Sanjiv Kiyawat is exhibited as Ex.PW-1/A. Mr.Sanjiv Kiyawat has deposed that

he is working with plaintiff no.1 as Sr. Manager and has been duly authorized by the plaintiffs *vide* Power of attorney dated 12/07/2010; and he is conversant with the facts of the case, thus competent to depose the affidavit. Copy of the Board Resolution is exhibited as Ex-PW1/1.

3. PW-1 has deposed that plaintiff No.1 is a private limited company incorporated in India under Companies Act 1956 having their registered office at western Express Highway, Andheri (E) Mumbai-400001 and there sales office at 59/17 3<sup>rd</sup> floor, Ravidas Marg, Kalkaji Extension, New Delhi. Plaintiff No.2 firm is a unit of plaintiff No.1 and is also having its office at 59/17, 3<sup>rd</sup> floor, Ravidas Marg, Kalkaji Extension, New Delhi. It is deposed that the Delhi office of the plaintiffs is responsible for administrating and monitoring the sales related issues for northern India.
4. PW-1 has also deposed that present suit was filed by Mr.Sanjay Sharma, the erstwhile Manager Legal of the plaintiffs who was the constituted attorney for both the plaintiffs and he was duly authorized to sign and verify the plaint, to file the suit and institute the instant proceedings on behalf of the plaintiffs. This witness has also deposed that the defendant No.1 is a business entity known as M/s Prabh Foods having their place of business at 131 Industrial Area, Sector 27-28, Hisar and defendant no.2 is one of the partners of the firm.
5. Mr.Sanjiv Kiyawat has deposed that that plaintiff No.1 company started its business more than two decades ago and is today the pioneer in the fruit beverages industry in India with many brands under its banner including Appy Fizz, Appy Classic, LMN, Saint Juice including its oldest and most well known trade mark "FROOTI". The expression "FROOTI" is not only used as a word –

mark but has also been extensively used as label mark containing the word "FROOTI" used as the graphic device of mango. The label has been created as an artistic work and possesses all necessary ingredients of copyright as well. The Labels of plaintiff's product "FROOTI" with its device is exhibited as Ex-PW-1/3.

6. PW-1 has also deposed that plaintiff No.1 adopted the trade mark "FROOTI" in the year 1985 for its mango drink and has been using the said trade mark extensively and continuously since then. Plaintiff No.2 merged in plaintiff No.1 with effect from November 1, 2003 and since then became a unit of plaintiff No.1. The trade mark "FROOTI" is distinctive of the plaintiffs and has become a well known trade mark amongst the members of trade and public; and over the years the trade mark "FROOTI" has gained immense popularity and goodwill and people relate the said trade mark to the plaintiff No.1 company. FROOTI is available in 110 ml, 200 ml and 1 ltr. Tetra Packs and 250 ml, 600 ml, 1.2 ltr and 2 ltr PET bottles. This witness has also deposed that by virtue of its extensive use since 1985 the expression "FROOTI" which was formed as a trademark for the product line of mango juice to begin with, has acquired distinctiveness and is invariably associated with the plaintiff No.1. The demand and popularity of this trademark is so extensive and wide spread that the plaintiff also sells the product (mango juice) in international market thus leading to its global reputation. FROOTI has also been rated as India's Most Trusted Fruit Beverage Brand in the Economic Times Survey, 2007.
7. PW-1 has also deposed that plaintiff No.1 has obtained trade mark registration of the trade mark FROOTI in class 29 and 32

for description of goods including “fruit based beverages and fruit juices” under the Trade Marks Act; and the device and label of FROOTI is also registered in class 32 in favour of the plaintiff No.1. Detail of plaintiff’s No. 1 Trade Mark in India are as under:

| Sl. No. | Trade Mark                  | Trade Mark No. | Class | Date of Registration | Status     |
|---------|-----------------------------|----------------|-------|----------------------|------------|
| 1.      | FROOTI                      | 506969B        | 32    | 15.03.1989           | Registered |
| 2.      | FROOTI                      | 511236B        | 32    | 05.06.1989           | Registered |
| 3.      | YO-FROOTI                   | 659953B        | 32    | 21.03.1995           | Registered |
| 4.      | FROOTI (DEVICE)             | 667373         | 32    | 29.05.1995           | Registered |
| 5.      | FROOTI (DEVICE)             | 746673         | 29    | 24.06.1997           | Registered |
| 6.      | FROOTI (DEVICE)             | 934913         | 32    | 27.06.2000           | Registered |
| 7.      | FROOTI (DEVICE)             | 1085336        | 32    | 07.03.2002           | Registered |
| 8.      | FROOTI                      | 1085337        | 32    | 07.03.2002           | Registered |
| 9.      | FROOTI GREEN MANGO (DEVICE) | 1205734        | 32    | 12.06.2003           | Registered |
| 10.     | FROOTI COOL MANGO (DEVICE)  | 1331313        | 32    | 11.01.2005           | Registered |
| 11.     | FROOTI (LABEL) (DEVICE)     | 1331314        | 32    | 11.01.2005           | Registered |
| 12.     | FROOTI (LABEL)              | 1347222        | 32    | 28.03.2005           | Registered |
| 13.     | FROOTI WITH LABEL           | 1347223        | 32    | 28.03.2005           | Registered |

8. PW-1 has also deposed that the abovesaid 13 trademarks certificates issued to the plaintiff for use in legal proceedings are on record and the same are collectively exhibited as Ex-PW-1/4; and copy of receipt issued by Trade Mark office for applications to obtain TM 46 in relation to plaintiff’s trademarks is marked as Mark-1. It is also deposed by this witness that by virtue of the registrations abovementioned, the registrar of Trade Mark has accepted the plaintiff No.1 as the clear user since 1985. It is deposed that plaintiff No.1 has the exclusive right to use of the

said trademarks in relation to the goods in respect of which the marks are registered and to obtain relief in respect of infringement.

9. PW-1 has also deposed that the device /label of FROOTI is an artistic work and the said artistic works were created by the employees of M/s TBWA Anthem Private Limited and M/s Yellow through their employees namely Ms.Niloufer Wadia and Ms.Hetal Doshi for the plaintiff No. 1 company. Plaintiff No.1 has acquired rights from the said entities to use the said artistic work as their copyright. No objection certificates by author of artistic works in favour of plaintiff No.1 is exhibited as Ex-PW1/5.
10. As per this witness, plaintiff No.1 has obtained the Copyright Registrations of the said artistic works of the FROOTI device as shown on the respective labels. The copyright in the artistic works of the FROOTI device / label is currently valid and subsisting in India. Plaintiff No.1 is the present owner of all rights in the same. The details of the Copyright Registration of the plaintiff no.1 are given below:

| Sl. No. | Copyright               | Registration No. | Class & Description | Date of Registration | Status     |
|---------|-------------------------|------------------|---------------------|----------------------|------------|
| 1.      | FROOTI MANGO LABEL      | A-7252/2005      | Artistic            | 05.08.2004           | Registered |
| 2.      | FROOTI COOL MANGO LABEL | A-74277/2005     | Artistic            | 07.06.2005           | Registered |

Copy of extracts from Register of Copyrights in relation to copyright registration no.A-74277/2005 and that of A-72542/2005 are collectively marked as Mark-2.

11. PW-1 has also deposed that by virtue of the ownership of copyrights, plaintiff No. 1 *inter alia* has the exclusive right to

reproduce the work in any material form and to use the same as trade mark as such to obtain relief in respect of infringement of copyrights in respect of the artistic work of FROOTI device / label. Thus the plaintiff No. 1's claim in trade mark extends to the word mark "FROOTI" as well as label device "FROOTI" configured in unique color combination and placement of devices and words.

12. Mr.Sanjiv Kiyawat has also deposed that trademarks "FROOTI" and "FROOTI device" used by plaintiffs upon or in relation to the beverages manufactured and packed by or for the said plaintiffs are manufactured and packed by or for the said plaintiff are used strictly in accordance with the formulae and standards and specifications (including standards and specifications as to quality control and packaging) of plaintiffs. The products of the plaintiffs are manufactured to the highest and most stringent quality standards; and by virtue of the reputation and notoriety enjoyed by the plaintiff's trademarks and products, the sales of FROOTI by the plaintiffs have increased by leaps and bounds; and the plaintiffs have been spending a huge amount on the advertisements and sales promotion of its product sold under the trademark "FROOTI" has advertised. The sales and advertisement figures of the plaintiffs product bearing the marks "FROOTI" and "FROOTI device / label" for the last four years are given as under:

| PERIOD  | IN THE BOOKS OF |             |                     |
|---------|-----------------|-------------|---------------------|
|         | PARLE GROUP     | FRANCHISEES | TOTAL<br>Rs.In Lacs |
| 2004-05 | 23,026.60       | 12,615.00   | 35,641.60           |
| 2005-06 | 21,423.68       | 14,806.88   | 36,230.56           |
| 2006-07 | 24,507.13       | 15,246.06   | 39,753.19           |
| 2007-08 | 27,141.90       | 16,911.23   | 44,053.13           |

- 13.

Chartered accountants certificate certifying Sales of plaintiff's product Frooti For the years 2004-05 to 2007-08 are exhibited as Ex-PW1/6. The advertisement & Sales promotion expenses of the plaintiff's product "FROOTI" are detailed below:

| PERIOD  | TOTAL<br><b>Rs. In Lacs</b> |
|---------|-----------------------------|
| 2004-05 | 552.22                      |
| 2005-06 | 701.78                      |
| 2006-07 | 1,066.24                    |
| 2007-08 | 1,072.49                    |
| TOTAL   | <b>3,395.72</b>             |

Chartered accountants certificate certifying advertisement expenses and sales promotion figures of plaintiff's product FROOTI for the years 2004-05 to 2007-2008 is exhibited as Ex-PW1/7.

14. PW-1 has also deposed that the latest chartered accountant certificate certifying Sales and certifying advertisement expenses and sales promotion figures of plaintiff's product FROOTI for the years 2005-06 to 2009-10 is exhibited as Ex-PW-1/8. The invoices of plaintiff's Sale of its product FROOTI from its Delhi office is exhibited as Ex-PW-1/9 and copy of the Tax Invoice dated 14.04.2009 is marked as Mark-3. The list of employees of plaintiff at its Delhi office is exhibited as Ex-PW-1/10. It is deposed that by virtue of such extensive sales the trademarks "FROOTI" and "FROOTI device/label" of the plaintiffs are exclusively associated with the plaintiffs and only with the plaintiffs.

15.

16. Mr.Sanjiv Kiyawat has also deposed that plaintiff's trademarks "FROOTI" and "FROOTI device/label" since the last many years have been extensively advertised in several leading magazines, newspapers, television and other media, which have huge circulation in India and abroad. By virtue thereof, and even otherwise, the plaintiffs have acquired reputation and goodwill in its trade mark FROOTI. This witness has deposed that a product of the nature of juice can be sold only in containers and therefore the visual features of the containers assume greatest significance in the product line of juices. In this context the label applied/affixed on the container determines and defines the identity of the product besides the word mark.
17. PW-1 has deposed that since its inception, the plaintiff No.1 has had an uninterrupted and constant use of the trademark FROOTI and it has acquired such international goodwill, reputation and fame; and any use of identical or deceptively similar marks by another trader not connected to the plaintiffs, in respect of the same goods is bound to cause confusion and deception in the minds of the consuming public and members of trade leading them to falsely believe that such third party goods originate from the plaintiffs or have some nexus or affiliation with them. As a result of the aforesaid factors and due to long and continuous use, extensive advertising and sales promotion, extensive goodwill and reputation earned by FROOTI coupled with unbeatable quality associated with the plaintiffs, the said mark has become easily identifiable by the members of the public and trade as originating from the plaintiffs.
18. Mr.Sanjiv Kiyawat has also deposed that plaintiff No. 1 also has a website with the URL, which is [www.parleagro.com](http://www.parleagro.com) which

mentions about the popularity of its most favored and oldest product "FROOTI". The printouts from the Plaintiff's Website [www.parleagro.com](http://www.parleagro.com) are marked as Mark-4.

19. It is also deposed by this witness that plaintiffs were shocked when on 10.07.2009 their persons in the field brought to their attention a similar product as that of the plaintiff's FROOTI, bearing the trade-mark FRUITI. Not only did this product of the defendants bear this trade mark which is almost identical/phonetically and deceptively similar to the plaintiff's registered trademark FROOTI, but the product, also sold in bottles, bore a label which bears a striking visual/similar resemblance to the plaintiff's label having a near identical colour scheme, get-up and lay out. The label on the product displayed the name of the defendants as the manufacturer. A photograph of the Defendants' product is being filed in these proceedings. Label of Defendant infringing product is Exhibited as Ex-PW-1/11.
20. PW-1 has also deposed that the plaintiffs also gave a complaint dated in writing to the Local Police Station in Hisar about the aforesaid unlawful activities of the defendants regarding infringement of plaintiff's Trade Mark and Copyright in "FROOTI". On the complaint of the plaintiffs, the Police went to the premises of the defendants to investigate into the matter. Upon conducting the search at the premises of the defendants at 131 Industrial Area, Sector 27-28, Hisar, the Police found a carton and labels bearing the trademark "Fruiti". However, despite this the defendants are still continuing with its infringing activities. The Police complaint lodged by the plaintiff at Hisar Police Station is Exhibited as Ex-PW-1/12 and Search and Seizure Report of the Police at the defendant's Premises is exhibited as Ex-PW1/13.

21. This witness has also deposed that plaintiff No. 1 is the registered proprietor of the Trade Mark FROOTI as aforesaid. The said trade mark is used in India since the year 1985. The adoption of a Trade Mark "FRUITI" by the defendants is dishonest and fraudulent with the prior knowledge of the plaintiff's trademark. Further the Trade Mark "FRUITI" of the defendants is deceptively and phonetically similar to the Mark FROOTI and is likely to create confusion in the minds of the customers which includes small children also. It is also deposed that defendants being aware of the trade mark FROOTI and the reputation and goodwill enjoyed by the said mark has adopted FRUITI only with a view to trade upon the reputation and goodwill acquired by the plaintiff's mark.
22. Mr.Sanjiv Kiyawat has also deposed that trademark FROOTI of plaintiffs has come to be associated by the, traders and public at large with the plaintiffs alone. By using the impugned mark the defendants has not only infringed the registered trademark but also the registered copyright of the plaintiff No. 1. The impugned labels and device of the defendants are similar in its essential features, colour scheme, layout and get up to that is used by plaintiffs. By using the impugned labels, the defendants have illegally copied the artistic work of the plaintiffs resulting in Copyright Infringement. It has also been deposed that plaintiff No.1 is the owner of the Copyright in the artistic works, by virtue thereof the plaintiffs are entitled to claim protection under the Indian Copyright Act in respect of the said artistic works. The plaintiffs submit that the defendants have copied the label of the plaintiff's creation in its totality. The essential features of the plaintiff's label and device and that of the defendants are the

same. The labels and device used by the defendants on its product is a substantial reproduction of the plaintiff's label and device.

23. PW-1 has also deposed that aforesaid activities of the defendants are causing irreparable harm and injury to the Plaintiff's as manufacturers and merchants of high quality goods. The defendant no 2 who holds out himself as a partner of the defendants no 1 is also liable for the acts of defendants no 2; and the use of the trademarks of the plaintiffs by the defendants is likely to dilute the distinctive character of the plaintiff's trade mark FROOTI and the same is likely to be debased and eroded. Such debasement and erosion of the plaintiffs' reputation and goodwill strikes at the very root of the Plaintiffs' existence and is not measurable in terms of money and cannot be adequately compensated monetarily.
24. This witness has deposed that use of trade mark "FRUITI", which is deceptively and confusingly similar to the plaintiff's trade mark "FROOTI", by the defendants is nothing but an attempt to wrongfully appropriate the plaintiff's personality. The defendants' said activities are causing irreparable loss and injury to the plaintiff's business and reputation. This witness has also deposed that that cause of action first accrued on July 10, 2009 when the plaintiffs persons in the field came to know of the defendants' activities aforesaid. The cause of action thereafter accrued against the defendants on when the plaintiffs complained to the Police and the Police found infringing carton and labels from the premises of the defendants. The cause of action is a continuing one and accrues each time the defendants sell goods bearing the deceptively similar trademark FRUITI along with a device

deceptively and confusingly similar to the plaintiffs "FROOTI device/label"; and there is no delay in filling the present suit.

25. I have heard counsel for plaintiff and also perused the affidavit by way of evidence and the documents which have been placed on record. While issuing summons in the suit and notice in the application this court had passed an interim order by which ex-parte injunction in terms of prayer (A) of the application was granted in favour of the plaintiff, which reads as under:

"A. the Defendants, its proprietor, partners, directors, employees, agents, representatives and assigns be restrained by an ad-interim ex-parte injunction restraining them from:

- (i) manufacturing, selling, distributing, offering for sale, advertising directly or indirectly their goods under the trade mark "FROOTI" and (or) "FRUITI" including the plaintiffs label/ device or other any trade mark which is deceptively/ confusingly/ phonetically similar to Plaintiff's Trade Mark "FROOTI" or any other trade name or Trade mark which is likely to deceive or likely to confuse the members of public and trade.
- (ii) from infringing the Plaintiffs' Copyright in the Artistic Work comprising in the labels of "FROOTI" and /or from using any other labels, cartons or other packaging material whatsoever which is copied from and are substantial reproductions of the labels of the Plaintiffs or bears the word "FROOTI/ FRUITI" either singularly or in conjunction with any pre-fix or suffix or in any other manner infringing the copyright in the artistic works of the said labels and strips."

26. On the basis of evidence which has remained unrebutted, the plaintiff has been able to establish that the plaintiff is the registered proprietor of the trade-mark "FROOTI" in class 29 and

32 of the Trademarks Act for description of goods including tooth paste, beverages and fruit juices. The device of FROOTI is also registered under class 32 in favour of the plaintiff no.1. The plaintiff has extracted details of the Trademark Registrations in India. Plaintiff has also placed on record 13 Trademark certificates issued to the plaintiff for use in legal proceedings, which have been collectively exhibited as Ex.PW-1/4. The plaintiff has thus also established that they are the users of the trademark FROOTI since the year 1985. As per the affidavit by way of evidence the plaintiff has acquired the rights of the artistic device/ label FROOTI which artistic work is created by the employees of M/s.TBWA Anthem Private Limited and M/s.Yellow. The no objection certificate by the author of the artistic work has been exhibited as Ex-PW1/5. The details of registration of the copyright of the plaintiff has also been extracted in the affidavit by way of evidence and the certificate registration No.A-74277/2005 and that of A-72542/2005 have been collectively marked by the deponent. The plaintiff has also relied upon the certificate of the Chartered Accountant, certifying the sales of the product of the plaintiff FROOTI in the years 2004-05 to 2007-08 are exhibited as Ex-PW1/6.

27. Having regard to the evidence on record and comparing the impugned product of the defendant, who are using the mark 'FRUITI' which is almost identical, /phonetically and deceptively similar to the plaintiff's product are also sold in bottles, which has striking visual resemblance to the plaintiff's colour scheme, get up and lay out. A photograph of the defendants' product filed, is exhibited as Ex-PW-1/11. The use of the defendant of the word 'FRUITI' is likely to dilute the distinctive character of the plaintiff's

trademark 'FROOTI' and the same is likely to erode the goodwill and reputation of the plaintiff. Accordingly, the present suit is decreed in terms of prayers 1 (i) & 1 (ii) of the plaint. Plaintiff gives up the prayers (iii) and (iv) of the plaint. Decree-sheet be drawn up accordingly.

**G.S.SISTANI, J**

**MARCH 20, 2012**

ssn