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

+ **CS(OS) 1568/2009**

PERFETTI VAN MELLE S.P.A. & ANR. Plaintiffs

Through **Mr. Sushant Singh with Mr. P.C.
Arya and Ms. Geetika Kapur and
Mr. U.K. Shukla, Advocates**

versus

OM PRAKASH KHUSHWANT & ANR. Defendants

Through **None**

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Date of Decision: 28th February, 2013.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (Oral):

1. Present suit has been filed for permanent injunction restraining infringement of trade mark, trade dress, copyright, passing off and damages against the defendants.
2. In the plaint the plaintiffs have claimed that they are the registered owner of the well known trade mark **CENTER FRESH** and the defendants have been using the trade mark Super Fresh with a nearly identical label which is a colourable imitation of the artistic work comprising the label and wrapper of **CENTER FRESH**.
3. In the plaint it is stated that the plaintiffs had given cease and desist notice and in response thereto, defendants on 4th February, 2005 had given

an undertaking that they would not use any of the plaintiffs' trade mark including **CENTER FRESH**. However, as the defendants did not abide by their undertakings, plaintiffs filed the present suit.

4. On 25th August, 2009, this Court granted not only an ad interim injunction restraining the defendants from infringing the plaintiffs' trade mark **CENTER FRESH** but also appointed a Local Commissioner. The Local Commissioner in her spot report has stated as under:-

Inventory

- 1) *Labels to be affixed on plastic jars lying loose in the premises— about 2000 pieces;*
- 2) *Big cartons in which plastic jars are packed – 70 pieces;*
- 3) *Loose wrappers lying in rolls are 24 in number. These rolls are packed in 4 (four) gunny bags; each gunny bag bearing 6(six) rolls each and one gunny bag containing six rolls weighs about 35 kgs.*
- 4) *Loose gums lying packed in plastic containers, packed in cardboard cartons: Each plastic jar contains 150 pieces and each cardboard carton contains about 70 plastic jars.*
- 5) *All seized products have been sealed in 4 (four) gunny bags, which have been signed by me along with date.”*

5. As the defendants did not appear despite service, they were proceeded ex parte on 27th July, 2011 and the ad interim order dated 25th August, 2009 was confirmed till disposal of the suit.

6. In the evidence filed by way of affidavit, plaintiffs' witnesses have deposed that the plaintiffs conceived, coined and adopted the trade mark **CENTER FRESH** with regard to chewing gum in the year 1997. It is stated that the trade mark **CENTER FRESH** was registered on 27th November, 1981 vide Registration Certificate No. 383561. It is further

stated that on 30th October, 1995, the plaintiffs' composite label comprising trade mark **CENTER FRESH** as well as other features like colour scheme, get up and device was also registered vide Certificate No. 684849. The plaintiffs' witnesses have also proved the annual turnover of chewing gum under the trade mark **CENTER FRESH** since the year 2001.

7. Mr. Sushant Singh, learned counsel for the plaintiffs states that the defendants have adopted the mark Super Fresh with an identical colour scheme and get up which is nothing but a material reproduction and colourable imitation of the plaintiffs trade mark **CENTER FRESH**. He submits that the mark Super Fresh being deceptively similar to **CENTER FRESH** also infringes the copyright of the plaintiffs.

8. Having heard learned counsel for the plaintiffs and perused the ex parte evidence as well as document placed on record, this Court is of the opinion that plaintiffs have in fact proved the facts stated in the plaint and have also exhibited the relevant documents in support of their case. Since the plaintiffs' evidence has gone unrebutted, said evidence is accepted as true and correct.

9. This Court is also of the view that subsequent adoption of the mark Super Fresh by the defendants amounts to infringement of the plaintiffs' trade mark inasmuch as the plaintiffs are the registered proprietor of the trade mark **CENTER FRESH** vide Registration Certificates dated 27th November, 1981 and 30th October, 1995 and the defendants have, without permission of the plaintiffs, subsequently adopted the mark Super Fresh.

10. This Court has compared the broad and essential features of the plaintiffs' trade mark and the defendants' mark and is of the opinion that defendants have not only copied the essential features of the plaintiffs'

registered trade mark but have also used a mark Super Fresh which is deceptively similar to that of the plaintiffs' mark **CENTER FRESH**. This Court is of the view that by deceptively copying a similar mark and by imitating the get up, lay out and artistic features of the plaintiffs' label, defendants have tried to trade on plaintiffs' reputation and goodwill. Consequently, the defendants have not only infringed the plaintiffs' trade mark but have also indulged in passing off.

11. Further even though the plaintiffs' label is not registered, this Court is of the view that as the colour scheme, get up and lay out of the plaintiffs' label form subject matter of an artistic work under Section 2(c) of the Copyright Act, 1957, the same is protected under the Copyright Act.

12. In the present case as the defendants have copied the colour scheme, get up and lay out of the plaintiffs' artistic label of blue colour along with other features, it can safely be concluded that the defendants have imitated the plaintiffs' artistic work in material form without permission of the plaintiffs in violation of Section 51 of the Copyright Act, 1957.

13. In India courts are sensitive to the growing menace of infringement and have started granting punitive damages even in cases where due to absence of the defendants exact figures of sales by the defendants under the infringing copyright and/or trademark exact damages are not available. In fact, punitive damages have the effect of deterring not only the defendant from repeating the offence, but also deterring others from committing the same, preserving peace, inducing private law enforcement; compensating victims for otherwise uncompensable loss and payment of the plaintiff's counsel fees. In *Time Incorporated Vs. Lokesh Srivastava & Anr., 2005 (30) PTC 3 (Del.)* this Court has observed that "*time has come when the*

Courts dealing in actions for infringement of trademarks, copy rights, patents etc., should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law breakers who indulge in violation with impunity out of lust for money, so that they realise 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.” In the said case the court held that the defendants’ magazine which used the Hindi translation of the word ‘Time’ with the distinctive red border, was a slavish imitation of the plaintiff’s trademark and held the defendants are liable for infringement.

14. Consequently, present suit is decreed in terms of para 38(i) to (v) of the plaint as well as damages to the tune of Rs.2,00,000/-. Plaintiffs are also held entitled to the costs of the suit. Registry is directed to prepare a decree sheet accordingly.

15. With the aforesaid observations, present suit and pending application are disposed of.

MANMOHAN, J

FEBRUARY 28, 2013

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