

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

% **Date of Decision : 19th May, 2014**

+ **CS(OS) 157/2013**

PEPSICO, INC & ANR. Plaintiff
Through : Ms. Saya Choudhary Ms.Anusuya
Nigam, Ms. Deepthi Alexander,
Advs.

versus

PSI GANESH MARKETING & ANR. Defendants
Through :

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

1. The plaintiffs have filed the present suit for permanent injunction restraining violation and infringement of rights in the trade mark, trade name, label AQUAFINA, infringement of copyright, rendition of accounts, dilution, and delivery up. Summons were issued in the suit on 29.01.2013 and on 21.08.2013. On an application for appointment of Local Commissioner being filed by the plaintiffs, a Local Commissioner was appointed in the matter. Since none appeared on behalf of defendants despite service, defendants were proceeded ex parte on 15.01.2014.
2. Plaintiffs have filed affidavit by way of evidence of Director-Legal at the Plaintiff No. 2 Company and the authorized signatory of the Plaintiffs, Mr. Vinod Kaushal(PW1). A certified true copy of the Board Resolution executed by plaintiff no. 2 in favor of Mr.Vinod Kaushal has been exhibited as **Ex. PW-1/2**. PW1 has deposed that plaintiff No.1 i.e. PepsiCo, Inc. is a corporation existing under the

laws of North Carolina, United States of America, having its principal office at 700, Anderson Hill Road, Purchase New York, USA and Plaintiff No. 2 i.e. PepsiCo India Holdings Limited, is a fully owned subsidiary of plaintiff No. 1, and is fully authorized on behalf of Plaintiff no.1. Plaintiff No. 2 is duly authorized to take all actions to protect the various trademarks of Plaintiff No. 1. The letter dated 07.08.2006 issued by Plaintiff No.1 in favour of Plaintiff No. 2 has been exhibited as **Ex. PW1/1**.

3. PW1 has further deposed that the Plaintiffs are world renowned manufacturers and sellers of beverages under the trademarks PEPSI, MIRINDA, 7UP and MOUNTAIN DEW, among others and are also the largest manufacturers and sellers of snack foods including the brands LAY'S, CHEETOS, TOSTITOS, DORITOS, LEHAR and KURKURE. It has also been deposed that one of the leading businesses of the Plaintiffs is the manufacture and sale of packaged drinking water under the trademark/name/logo/label AQUAFINA.
4. PW1 has also deposed that the present case relates to the trademark AQUAFINA and the illegal adoption and use by the Defendant of an identical trademark/name/logo/label AQUA FIES for packaged drinking water. Coloured printout of the AQUAFINA product label of the Plaintiffs' and Defendant's label AQUA FIES have been exhibited as **Ex. PW-1/3** and **Ex. PW-1/4** respectively.
5. PW1 has also deposed that the mark AQUAFINA is a unique word coined and adopted by the Plaintiffs and has been exclusively used by Plaintiffs since 1994 and in fact, AQUAFINA drinking water is the brand with the highest market share among bottled drinking water in the United States. He has also deposed that the word AQUAFINA, having no obvious meaning, is an invented word and is

entitled to the highest degree of protection and it is completely distinctive of the Plaintiffs and their products.

6. PW1 has further deposed that the AQUAFINA product was launched in India as early as 1999. It has also been deposed that in India, the bottling plant has been set up at Roha in Raigarh district of Maharashtra with an investment of over Rs.5 crores and apart from the plant at Roha, the Plaintiffs have also spent over Rs.50 crores in the setting up of 17 other manufacturing plants in India. He has also deposed that the AQUAFINA product is manufactured with a special reverse osmosis ultra purification system which ensures the purity and quality of the said product.
7. Mr. Vinod Kaushal, PW1, has further deposed that due to the extensive advertising and promotional campaigns which have been launched by the Plaintiffs, the trade mark AQUAFINA has gained enormous recognition and popularity in a short period of time and is today considered as one of the premium brands for bottled drinking water. It has also been deposed that Plaintiffs have promoted the AQUAFINA brand with various tag lines like “AQUAFINA the purest part of you”, “AQUAFINA -- pure water from PEPSI” etc., which have established an inseparable connection between AQUAFINA and the Plaintiffs. Moreover, due to various safeguards which have been adopted by the Plaintiffs to maintain the quality of water, the product under the mark/logo/label AQUAFINA has been able to capture a substantial market share in India due to its quality, purity and freshness.
8. PW1 has also deposed that the Plaintiffs have applied to register the AQUAFINA trade mark, label and logo design in numerous countries. The list of countries where the mark has proceeded to registration includes, but is not limited to: Algeria, Argentina,

Armenia, Australia, Austria, Bahrain, Belarus, Benelux, Brazil, Bulgaria, Canada, Chile, China (people's republic of), Colombia, Costa Rica, Cyprus, Czech republic, Egypt, Estonia, Ethiopia, European Union, Finland, Germany, Greece, Honduras, Hong Kong, Hungary, Japan, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Lithuania, Macao, Malaysia, Morocco, New Zealand, Nigeria, Oman, Pakistan, Panama, Philippines, Peru, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, South Africa, South Korea, Taiwan, Thailand, Turkey, Ukraine, UAE, Venezuela, Vietnam and Yemen. Copies of few foreign registration certificates, Online printouts of some of the registration certificates and current status of the mark from the respective online database of the Trade Marks Offices and a list of world registrations of Plaintiff No 1 for AQUAFINA have been exhibited as **Mark-B** and **Ex. PW-1/7**, respectively.

9. PW1 has further deposed that in India, the mark AQUAFINA, in the unique writing style and the font and label, is a registered trade mark of Plaintiffs. Details of the registration are as under:

Reg. No.	Date	Class	Trademark
774285	29.4.1997	32	AQUAFINA
1129381	28.8.2002	32	

Reg. No.	Date	Class	Trademark
1308951	15.9.2004	32	

The copy of the Legal Proceeding Certificates of registration No. 774285 and 1129381 for AQUAFINA label have been exhibited as **Ex. PW-1/8** and **Ex. PW-1/9**, respectively. Further, a printout from the Indian Trademark Registry website (www.ipindia.nic.in) depicting the trademark registration of the mark AQUAFINA NOVEAU (label mark) in favour of Plaintiff No 1 alongwith Trademark Journal extract has been exhibited as **Ex. PW1/10**. It has also been deposed that the plaintiffs are the exclusive owners and proprietors of the said label and use of a deceptively similar label by the Defendant constitutes infringement of the Plaintiff's rights in the AQUAFINA label.

10. PW1, Mr. Vinod Kaushal, has also deposed that logo of the product under the mark features AQUAFINA written in a stylized font, in white, with the first and last letters being taller and more elongated than the other letters and is extremely unique and has a blue color background with the distinctive artistic device wedged between the two "A's" of the word AQUAFINA. It has also been deposed that under Section 17 of the Copyright Act, all rights in the label are owned by the plaintiffs and the said label is distinctive and is an original artistic work under Section 2 (c) of the Copyright Act and is entitled to the highest degree of protection.

11. He has also deposed that the AQUAFINA Label design is registered as a copyright in the United States Copyright Office under Registration No. VA-1-099-341 and the said registration is fully applicable, enforceable and protectable in India by virtue of it being a signatory to the Berne Convention and being a WTO country. A copy of the US copyright registration certificate has been exhibited as **Ex. PW1/11**.
12. PW1 has also deposed that in India, the Plaintiffs' AQUAFINA product is sold in two forms viz., bottled form and bulk form. The popularity of the product AQUAFINA is evident from the growing sales of the said product. Total Gross Revenue from sales of bottled AQUAFINA manufactured by the Plaintiffs for the cases sold to retail outlets are as follows:-

YEAR	Raw Cases MM	Value (In Crores)
2002	4.7 MM	56
2003	7.2 MM	81
2004	7.6 MM	85
2005	10.6 MM	123
2006	12.3 MM	153
2007	36 MM	165
2008	41 MM	200
2009	54 MM	264
2010	68.9 MM	367
2011	87.7 MM	485
2012	103.2 MM	596
2013	99.6 MM	650

13. It has also been deposed that the Plaintiffs have spent enormous amount on advertising of AQUAFINA packaged water in India. The advertising budgets for the last few years are as under:

Year	Amount (Lakhs)
2005	155
2006	167
2007	319
2008	874
2009	410
2010	453
2011	50
2012	50

14. PW1 has also deposed that the sales and advertising figures are only for India and do not include global sales and advertising expenditure which run into billions of dollars. In fact, worldwide, AQUAFINA is the eighth largest beverage brand in the PepsiCo portfolio and has estimated worldwide retail sales of over 2 billion dollars (U.S.). The original publicity material and copies of various press clippings, internet printouts of online articles/press releases for mark/label of AQUAFINA have been exhibited as **Ex. PW-1/12** and **Mark C**, respectively.
15. He has also deposed that the mark AQUAFINA is a “well-known mark” within the meaning of Sec. 11(8) of Trade Marks Act, 1999, as the same has been protected by the Hon’ble High Court of Delhi through various Judgments. He has further deposed that the stated brand of the plaintiffs is marketed and sold all over the country through a vast business network and is therefore to be considered as a “well-known mark” under Sections 11 (6) and 11 (7) of Trade Marks Act, 1999. Therefore use of the said mark or any other deceptively similar mark to that of the Plaintiffs’ by any other party in respect of any class of goods whatsoever, without the permission or

authorization of the Plaintiffs, constitutes passing off of such goods or business as that of the Plaintiffs or that is connected with the Plaintiffs.

16. PW1, Mr.Vinod Kaushal, has further deposed that the Defendant No.1 is apparently engaged in the sale of packaged drinking water under the trademark/name/logo/label AQUA FIES while Defendant No.2 appears to be the Proprietor of Defendant No.1. The exact constitution of the Defendant is unknown to the Plaintiffs.
17. PW1 has also deposed that the adoption of the mark/logo/label AQUA FIES by the Defendants is completely illegal and unlawful and further the impugned mark/logo/label AQUA FIES of the Defendants is identical to Plaintiffs' well-known and registered mark/logo/label AQUAFINA. He has also deposed that the Defendants have deliberately adopted the Plaintiffs' mark/label so as to confuse the customers and to mislead them into believing that the Defendants' products and business is connected with the Plaintiffs or originates from the Plaintiffs.
18. PW1 has further deposed that adopting the said mark for packaged drinking water by the defendants itself establishes that the Defendants' mala fide intention is to encash upon the reputation and goodwill of the Plaintiffs' well known trademark/logo/label AQUAFINA and there can be no other explanation whatsoever for the Defendants adopting a similar mark, label, identical layout, arrangement and colour combination.
19. He has also deposed that the overall similarity in the get-up and layout of the impugned trade mark, label/logo of the Defendants' products results in infringement of copyright, passing off, dilution of the distinctive character of the Plaintiffs' well-known and registered mark/label/logo AQUAFINA. He has also deposed that the manner in

which the Defendants have written the word AQUA FIES with the first and last letters 'A' in a larger font than the other letters along with the representation of mountain peaks in the background placed above the mark AQUAFINA, is exactly identical to the mark/label AQUAFINA of the Plaintiff. This alone establishes that the Defendants have deliberately adopted the Plaintiffs' mark/logo/label so as to confuse the customers.

20. PW1 has further deposed that in compliance of the direction of the Hon'ble Court the local commissioner visited the said Defendant's premises on 07.02.2013. On checking the premises, 89 filled cans and 77 empty cans with the impugning labels/stickers were found. Further, 4 auto pick-ups loaded with 155 cans bearing the impugned labels were also found. The 89 filled cans were seized and 77 empty cans were made inventory of and were handed over to the defendants on superdari. The copy of the Local Commissioner's report has been exhibited as **EX. PW-1/16**.
21. I have heard counsel for the plaintiffs and carefully perused the documents which have been placed on record along with the affidavit by way of evidence which have been filed. The registration certificates of the plaintiffs' trademarks AQUAFINA have been exhibited as **Ex. PW-1/8** and **Ex. PW-1/9**. Photographs and Label of the plaintiffs' product AQUAFINA and Colored printout of defendants' label AQUA FIES have been exhibited as **Ex. PW-1/3** and **Ex. PW-1/4**, respectively.
22. On the basis of the documents placed on record, the plaintiffs have established that plaintiff no. 1 is the owner of the trademark, trade name, logo and label AQUAFINA and the plaintiffs have the exclusive right to use the same. Plaintiffs have also established that they are using a particular label in respect of their product and said

label was created for and on behalf of the plaintiffs and that the said label of plaintiffs is an original artistic work that falls within the meaning of Section 2(c) of the Copyrights Act, 1957. Plaintiffs have also established that on account of enormous amount spent on advertisement of AQUAFINA packaged drinking water in India, plaintiffs have been able to generate vast turnover for years and that during the past many years, the plaintiffs have built up an unparalleled reputation and goodwill with respect to their trademark, trade name, label and logo AQUAFINA. Plaintiffs have also established that the trade mark AQUAFINA used for packaged drinking water is highly distinctive and is identified with plaintiffs only. Plaintiffs have also established that the defendants by using the trademark AQUA FIES, which is identical and/or deceptively similar to plaintiffs' mark AQUAFINA, in respect of packaged drinking water, are causing infringement of rights in the trademark and copyright of the plaintiffs.

23. ***In Corn Products Refining Co. v. Shangrila Food Products Ltd.*** reported at 1960 (1) SCR 968, the Supreme Court observed that the question whether two competing marks are so similar as to be likely to deceive or cause confusion is one of first impression and it is for the court to decide it. The question has to be approached from the point of view of a man of average intelligence and imperfect recollection.
24. In ***Parle Products (P) Ltd. v. J.P. & Co., Mysore*** reported at 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.”

25. While examining the question of misrepresentation or deception, comparison has to be made between the two trademarks as a whole. Rules of Comparison were explained by Justice Parker in the following words:

“You must take the two words. You must judge of them, both by their look & by their sound. You must consider the goods to which they are to be applied. You must consider the nature & kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade

marks is used in a normal way as a trademark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be confusion- that is to say, not necessarily that one man will be injured & the other will gain illicit benefit, but that there will be confusion in the mind of the public which will lead to confusion in the goods- then you may refuse the registration, or rather you must refuse the registration in that case.”

26. In a very recent judgment delivered by another bench of this court in CS (OS) 1029/2013 titled “*Mind Gym Ltd.v. Mindgym Kids Library Pvt. Ltd.*”, decided on 21.03.2014, plaintiffs who were carrying on business under the trade mark ‘MIND GYM’ sought permanent injunction against the defendants restraining them from infringing and/or passing off the plaintiff's rights by using the trademark ‘MINDGYM’ as part of latter’s corporate name/trademark. Following observations were made by the court:-

“9.....

(ii) In the case of Evergreen Sweet House Vs. Ever Green and Ors., 2008 (38) PTC 325 (Del), it was observed as under:

15. A mark, is said to be deceptively similar to another (Section 2(1) (h), Trademarks Act, 1999) if it so nearly resembles that other mark as to be likely to deceive or cause confusion. Section 29(1) deals with a situation where the defendant uses a mark, which is identical or deceptively similar to that of the plaintiff, in respect of the same goods or services, and in such manner that it is likely that such use is taken as being an use as a trademark. This amounts to infringement. To fall within Section 29(1), the defendant's use of the mark must be so that it is likely that the public assumes that the said mark is used as a trademark. Section

29(2) deals with three situations; one where the defendants mark is identical to that of the plaintiff and in respect of similar goods. Two, where the marks are similar and in respect of goods which are identical or similar. Three, the marks as well as the goods are identical. Infringement does not take place if only one of the three ingredients are satisfied; the plaintiff has to prove that use by the defendant is likely to cause confusion on the part of the public or is likely to have an association with the registered mark.”

[Emphasis Supplied]

27. I am of the view that the impugned trademark of the defendants is deceptively similar to the plaintiff's trademark. The use of the word "AQUA FIES" by the defendants is likely to dilute the distinctive character of the plaintiffs' trademark "AQUAFINA" and the same is likely to erode the goodwill and reputation of the plaintiffs among its existing as well as potential customers in the market. The adoption and use of the identical and/or deceptively similar trademark by the defendants in relation to identical products amounts to an infringement of the plaintiffs' statutory rights in the registered trademark "AQUAFINA". I am of the opinion that the defendants are also guilty of passing off as by using an identical mark as that of the plaintiff, the defendants are misrepresenting to the purchasing public that it is selling its goods in association with/in connection with the plaintiffs and thus causing confusion as to the source of the goods and passing off his goods as that of the plaintiff. Furthermore, the defendants in a *mala fide*, dishonest and an unethical manner are encashing upon the goodwill and reputation of the plaintiffs, established by the latter over the period of many years.
28. Although under para 32(c) of the plaint, the plaintiffs have sought a decree of rendition of accounts of profits illegally earned by the

defendants by use of the mark/logo/label AQUA FIES and from selling impugned product, it is prayed that punitive damages may be awarded in this case.

29. In *Microsoft Corporation v. Deepak Raval* reported at MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of Defendant, the exact figures of sale made by them under the infringing copyright and/or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.
30. In *Larsen and Toubro Limited v. Chagan Bhai Patel* reported at MIPR 2009 (1) 194, this Court has observed that it would be encouraging the violators of intellectual property, if the Defendants notwithstanding having not contested the suit are not burdened with punitive damages.
31. In the case of *Time Incorporated v. Lokesh Srivastava and Anr* reported at 2005 (30) PTC 3 (Del), apart from compensatory damages of Rs.5 lakhs, punitive damages were also been awarded.
32. I am in agreement with the aforesaid submission of learned counsel for the plaintiff that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where a defendant who appears in Court and submits its account books would be liable for damages, while another defendant who, chooses to stay away from court proceedings would escape the

liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiffs. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in *Time Incorporated's case (supra)* that punitive damages are founded on the philosophy of corrective justice.

33. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 29.01.2013 is confirmed and the suit is decreed in favour of the plaintiff and against the defendants in terms of prayer a, b and d. Plaintiff is also entitled to damages to the tune of Rs.5.0 lacs. All the infringing goods shall be destroyed by the defendants within 4 weeks in the presence of the representative of the plaintiffs.
34. Decree sheet be drawn up accordingly.

(G.S.SISTANI)
JUDGE

MAY 19, 2014
dkb