

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 21st February, 2014.

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CS (OS) 985/2012

M/S PARIMAL MANDIR

.....Plaintiff

Through:

Mr. Arjun Mukherjee, Adv. with Ms.
Anusuya Nigam, Adv

Versus

BHARAT VASI SUGANDHIT DHOOP & ORS

....Defendants

Through:

None

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit (on 13th April 2012) for (i) Permanent Injunction restraining the defendants from using the trademark/trade dress/label/packaging "BHARAT VASI" or any other deceptively similar trademark/trade dress/label/packaging in relation to Agarbathis and Dhoop or any other product so as to result in infringement of trademark, passing off, unfair competition and dilution; (ii) Permanent Injunction restraining the defendants from using the trade dress/label/packaging "BHARAT VASI" or any other deceptively similar trade dress/label/packaging in relation to Agarbathis and Dhoop or any other product so as to result in infringement of copyright; (iii) Delivering all the infringing products bearing the impugned trademark/trade

dress/label/packageing “BHARAT VASI” or any other deceptively similar trademark/ trade dress/label/packageing including the packageing material, moulds and dyes etc for the purpose of destruction; and, (iv) Damages/Rendition of Accounts, pleading:-

- (a) that the Plaintiff M/s Parimal Mandir is a registered partnership firm and is one of the leading manufacturers and exporters of high quality Incense Sticks (Agarbathis), Dhoops & Cones since the year 1983;
- (b) that the various brands of the plaintiff include BHARAT VASI, GURUDEV, SHANTHINIKETHAN, MOMENTS, CHAMPAFLOWER, POOJA FLORA, YATRA, CHARULATHA, JIYO, MAGIC, RAINBOW, ALEXANDER, SHUBH LABH, CHOICE, MAHIMA, BENGAL’S PRIDE, INTIMATE etc.;
- (c) that the Agarbathis and Dhoops manufactured by the plaintiff are sold in distinctive packageing both in India and abroad and have gained widespread popularity and immense reputation of the brand “BHARAT VASI”; the plaintiff’s immense popularity has led to

- expanding its frontiers across 35 different countries where the plaintiff offers a variety of fragrances and an array of products;
- (d) that in order to identify and maintain the association with the plaintiff, house/umbrella marks of the plaintiff “PARIMAL” and “PM” are also printed with the products sold under the brand “BHARAT WASI” by the plaintiff;
 - (e) that the plaintiff adopted the mark/name “BHARAT VASI” in the year 1990 and has been continuously using the same in relation to Agarbathis and Dhoop products since then;
 - (f) that by virtue of extensive and continuous use, the mark/name “BHARAT VASI” has attained unparalleled reputation and has carved a distinctive niche for itself in the trade circles and also amongst its consumers and has come to be associated exclusively with the plaintiff;
 - (g) that the plaintiff is a registered proprietor of the trademark/trade dress/label/ packaging “BHARAT VASI” claiming user since 1990 and a holder of a Trademark Registration Certificate dated 6th June 2005 bearing no.1361867;

- (h) that the plaintiff has also received awards from the Karnataka Chamber of Commerce, Bangalore and Star Export House, Delhi in recognition for their quality products;
- (i) that apart from being the registered proprietor of the trademark/trade dress/label/packaging “BHARAT VASI”, the plaintiff also owns the copyright with regard to the said packaging vide registration no. A-90373/2011; and
- (j) that the Plaintiff owns the Copyright in the entire layout, getup and the trade dress used on the carton/packaging of its entire range of products including the aforementioned brand i.e. “BHARAT VASI” for Agarbathis and Dhoops; the layout, getup and trade dress for each of the plaintiff’s product has been designed by and/or on behalf of the plaintiff.

2. Summons of the suit and notice of the application for interim relief were issued and vide ex parte ad interim order dated 16th April, 2012 the defendants, their promoters, directors, officers, agents, stockists, franchisees and all others acting for and on their behalf were restrained from using trademark/ trade dress/ label/ packaging “BHARAT VASI” or any other deceptively similar trademark/ trade dress/ label/ packaging in relation to

Agarbathis and Dhoop or any other products resulting in infringement of the trademark and copyright of the plaintiff.

3. Summons sent at the address of the defendants were received back unserved and in view of the report of the Local Commissioner appointed by this Court, the defendants were directed to be served by way of publication. Despite service through publication, none appeared for the defendants and accordingly on 23rd September, 2013 the defendants were proceeded against *ex-parte* and the interim order granted on 16th April, 2012 was made absolute till the disposal of the suit.

4. I have in judgment dated 30th January, 2013 in CS (OS) No. 559/2010 titled ***Indian Performing Rights Society Vs. Gauhati Town Club*** held that where the defendant is ex parte and the material before the court is sufficient to allow the claim of the plaintiff, the time of the court should not be wasted in directing ex parte evidence to be recorded and which mostly is nothing but a repetition of the contents of the plaint. The matter has thus been examined to see whether the plaintiff is entitled to a decree forthwith.

5. It is contended on behalf of the plaintiff that:

I. Sometime in March, 2012, the plaintiff received information from reliable market sources that the defendants are using the

impugned mark/label “BHARAT VASI” with identical packaging as that of the plaintiff’s product “BHARAT VASI” for manufacturing and distributing Dhoop.

II. The Defendant No. 1 M/s Bharat Vasi Sugandhit Dhoop is engaged in the business of manufacturing Agarbathis and Dhoop under the name “Kanak’s Deluxe Dhoop”.

III. The Defendant No. 2 Mrs. Nitu is the proprietor of the Defendant No. 1 and is also the registered proprietor of the mark “KANAK”.

IV. The trademark/ trade dress/ label/ packaging of the defendant no. 1’s product is identical and deceptively similar with that of the plaintiff’s packaging “BHARAT VASI” Agarbathis and Dhoops.

V. The Defendant No. 3 M/s Bharatwasi International, having its office at D-791, Street No. 8, near Jain Mandir, Ashok Nagar, Shahdara, Delhi – 110093 which is the same as that of the defendant no. 2, is also engaged in manufacturing and marketing of Agarbathis and Dhoop in India as well as abroad

while the Defendant No. 4 Mr. P. Kumar is the director of the Defendant No. 3.

VI. The Defendant No. 3 is also selling Dhoop products under the impugned trademark/ trade dress/ label/ packing “BHARAT VASI”.

VII. The defendants in a brazen and blatant manner have copied the entire layout, get up, trade dress used on the carton/ packing of the plaintiff’s product “BHARAT VASI” and are using the same for their product “BHARAT VASI” Dhoop.

VIII. The defendants have also adopted identical product name “DELUXE DHOOP” which is the same as the plaintiff’s “DELUXE DHOOP”.

IX. The plaintiff has filed affidavit by way of examination-in-chief of its partner in its *ex-parte* evidence. The plaintiff has also filed the certificates of Trademark and copy right registration in its favour.

6. In my view, looking at the packaging of both the plaintiff’s and the defendant’s products I find that the plaintiff’s are right in their argument that when they state that the defendants are not merely violating the

plaintiff's rights in the trade mark "BHARAT VASI" but also violating the trade dress and copyright in the packaging of the plaintiff's products sold under the brand name "BHARAT VASI". The defendant's packaging is identical or deceptively similar to that of the plaintiff and the defendants are attempting to pass off their product as that of the plaintiff.

7. The Supreme Court as far back as in ***Parle Products (P) Ltd. Vs. J.P. & Co., Mysore*** (1972) 1 SCC 618 held that while comparing only the broad and essential features are to be considered and it would be enough if the impugned mark/label 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 Supreme Court clarified that merely because the marks/labels upon being placed side by side are found to be different is no ground to hold the same to be not similar or dissimilar as an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes.

*7. To decide the question as to whether the plaintiffs' right to a trade mark has been infringed in a particular case, the approach must not be that in an action for passing off goods of the defendant as and for those of the plaintiff. According to this, Court in **Durga Dutt v. Navaratna Laboratories** AIR 1965 SC 980*

While an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods (vide Section 21 of the Act). The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement.

In the above case the Court further pointed out:

In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiff's and the defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff.

8. According to Kerly's Law of Trade Marks and Trade (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 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. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked 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.

9. 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 law so laid down remains good after forty years also and was reiterated in ***Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel*** (2006) 8 SCC 726.

8. This court in ***N.Ranga Rao and Sons. Vs. Anil Garg*** 128(2006) DLT 649 held that:-

77. The overall visual impression from the colour scheme, the arrangement of the mark, the style of writing of the mark, the general get-up and trade dress leads to the conclusion that there is a clear attempt on the part of the defendants to pass off their goods as that of the plaintiff and, thus, the test laid in Parle Products (P) Ltd.'s case (supra) is clearly satisfied. The ingredients of a passing off action have been very succinctly set out in Yves St Laurent Parfums's case (supra), which sets out that a misrepresentation need not to be crass, but may involve a complex mechanism of misrepresentation. Thus, the representation may operate in a number of ways, no single one of which may be compelling but a combination of which is effective. This is the position in the present case. One only needs to look at two products side by side to see the striking similarity in various combination of factors. It is the overall impression that a customer gets to the source and origin of the goods from visual impression of colour combination, packaging and the get-up, which is of relevance and if an unwary and gullible customer gets confused, it amounts to a passing off as set out in Colgate Palmolive Co. Ltd.'s case (supra). No doubt, there is no monopoly in colour combinations, but what is relevant in the present case is that there is substantial reproduction of the colour combination in a similar pattern in each packet and there are similar six series of packets. The defendants being the second comers owed a duty to name and dress their product in such a manner as to avoid all likelihood of consumers confusing it with the product of the first comer [Harold F. Ritchie, Inc.'s case (supra)].

9. On the basis of the averments made in the plaint and documents filed therewith and of which there is no rebuttal by the defendants, I am satisfied that the plaintiff has become entitled to the relief sought of injunction.

10. A decree is accordingly passed in favour of the plaintiff and against the defendants in terms of prayer paragraphs (a) and (b) of the plaint. Plaintiff is also awarded costs of the suit. Counsel's fee assessed at Rs.20,000/-.

11. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

FEBRUARY 21, 2014
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