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

% *Date of decision: 24th September, 2014*

+ **CS(OS) 791/2008**

MR. PRAKASH SHARMA Plaintiff

Through: Mr. Saurabh Banerjee, Advocate

versus

MR. NAVEEN GUPTA & ORS Defendant

Through: None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (Oral)

1. Present suit has been filed by the plaintiff for permanent and mandatory injunction restraining infringement of copyright, passing off, rendition of accounts, delivery up, dishonest trading and unfair competition and damages. Summons in the suit and notice in the application under Order XXXIX Rule 1 and 2 CPC, were issued on 30.04.2008. Counsel for defendant nos. 1 and 4 entered appearance on 16.09.2008 and sought time to file written statement. On an application filed on behalf of defendant nos. 1 and 4 under Order VIII Rule 1, which was allowed vide order dated 10.03.2010, written statement of defendant nos.1 and 4 was taken on record subject to payment of Rs.5,000/- as costs to the plaintiffs. However, on the next date i.e. 09.07.2010, counsel for defendant nos.1 and 4 sought discharge for not receiving any instructions. Counsel for

defendant no.2 entered appearance on 24.11.2010 and sought time to file written statement. Summons and notice were issued to defendant no.3 on several dates, however, defendant no.3 could not be served. Vide order dated 01.11.2013, counsel for the plaintiff made a statement that the plaintiff does not want to proceed against defendant no.3. Statement of plaintiff was recorded separately and defendant no.3 was deleted from the array of parties.

2. None was appearing for defendant nos.1 and 4 for several dates of hearing accordingly, defendant nos.1 and 4 were proceeded ex parte vide order dated 20.05.2014. Also, on the same date counsel for defendant no.2 made a submission that defendant no.2 has no objection if a decree is passed in favour of plaintiff and against defendant no.2 in terms of prayer 30(a) and (b) of the plaint. Accordingly, a decree was passed against defendant no.2 on 20.05.2014.
3. Plaintiff has filed his affidavit by way of evidence and the same has been exhibited as **Ex.PW1/A**. PW1 has deposed that his father, Late Mr. Brahmanand Sharma incorporated and commenced doing business from the *kiryana shop* situated at 5120-21 Sirkiwalan, Lal Kuan, Delhi - 110 006 under the name and style of M/s. Shri Niwas & Sons in 1964. On 13.04.2005 M/s. Shri Niwas & Sons became a partnership firm with the induction of the son of PW1, Mr. Udayan Sharma as a partner and later, on 21.11.2005 it became a Private Limited Company duly established under The Companies Act, 1956 having its registered office at 99, Patpar

Ganj Industrial Area, Delhi - 110 092 and its name was changed to M/s. Shan-E-Dilli Marketing Private Limited and lastly its name has been changed to its present name, *M/s. SNS Products Private Limited*. The “SNS” therein stands for “*Shri Niwas & Sons*”. It has also been deposed that PW1 is the Managing Director of the said M/s. SNS Products Private Limited. A Certificate of Registration [Form S.T.-8 under The Delhi Sales tax Rules, 1975] dated 10.07.1967 issued by the Sales Tax Officer, Government of NCT of Delhi in the name of Late Mr. Brahmanand Sharma, M/s. Shri Niwas & Sons and the subsequent changes therein has been exhibited as **Ex.PW1/1**. The original Memorandum and Articles of Association of M/s. SNS Products Private Limited has been exhibited as **Ex.PW1/2**.

4. PW1 has also deposed that he joined his father in 1980 and since then PW1 has always been associated with storing, offering, manufacturing, marketing, selling, trading and otherwise dealing in different types of *edible spices* in almost all major parts of India and abroad. Today plaintiff is one of the most well-known, renowned and established manufacturer, merchant, whole-seller, retailer, trader and marketer, dealing in different types of *edible spices*. It has also been deposed that today plaintiff’s different types of *edible spices* being used in household kitchens, restaurants, eatery joints and hotels across the globe under its age-old trademark ‘*Shan-e-Delhi*’. Since 1964 and till some time back, plaintiff was using the ‘*device of a Qutab Minar*’ as a trademark and resultantly,

plaintiff and his different types of *edible spices* were/ are popularly known as '*minar masale*'.

5. PW1 has further deposed that in 2002 PW1 formed his sole proprietorship concern, M/s. Pro-Vision India. Henceforth a reference to PW1, M/s. Pro-Vision India and M/s. SNS Products Private Limited will be construed as one and the same as all of them are coexisting, working and running together. The original Certificate of Registration issued by the Sales Tax Officer, Government of NCT of Delhi of M/s. Pro-Vision India has been exhibited as **Ex.PW1/3** [OSR].
6. PW1 has next deposed that M/s. SNS Products Private Limited is the registered owner of the trademark '*Shan-e-Delhi*' as the same duly stands registered, as detailed below:

Trademark	TM NO.	Class	Date	Goods
Shan-e-Delhi	1130053	30	29.08.2002	Spices

Original Registration Certificate of the above registered trademark issued by the Trade Mark Registry, New Delhi has been exhibited as **Ex.PW1/4** [OSR]. It has also been deposed that M/s. SNS Products Private Limited has already filed necessary applications, being Form TM-24 for bringing the requisite changes in the records and also being Form TM-12 for

renewal of the said trademark in its name before the Trade Mark Registry, New Delhi and the same are pending before the Trade Mark Registry, New Delhi. The receipts thereof issued by the Trade Mark Registry, New Delhi have been exhibited as Ex.PW1/5, Ex.PW1/6 and Ex.PW1/7 respectively [OSR].

7. Further, seeing a sudden spurt of copiers/ pirates/ infringers in the market, in and around October 2005, plaintiff consciously changed and commenced using new packaging since 01.12.2005. Plaintiff came up with a unique distinct packaging consisting of various distinct and prominent features associated with plaintiff, his business, shop, trademarks and products wherein plaintiff used his own photograph so that nobody could confuse PW1's unmistakable identity with anyone. It has also been deposed that the most prominent stand out feature is the photograph of PW1 wherein he is sitting in a particular posture/ position inside his own six decade old family shop. One sample original packaging has been exhibited as Ex.PW1/8.
8. PW1, Mr.Prakash Sharma, has also deposed that with a view to safeguard proprietary rights therein PW1 applied for and duly obtained the registration of the said 'photograph' from the Trade Mark Registry, New Delhi. The details thereof are as under:

Trademark	TM NO.	Class	Date	Goods
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Photograph	1402707	30	30.11.2005	All kinds of <i>edible spices</i>
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Original Registration Certificate of the registered trademark ‘photograph’ issued by the Trade Mark Registry, New Delhi in the name of PW1 has been exhibited as **Ex.PW1/9** [OSR].

9. PW1 has further deposed that he is continuously, openly and uninterruptedly using the registered trademark, PW1’s photograph in all the packaging for offering and selling different types of *edible spices* since 01.12.2005. The said new packaging has a unique get-up, colour scheme/ combination and alongwith other features, individually and together, they form the most substantive, vital, essential and prominent features therein and it has been deliberately devised to cover all aspects associated with PW1 i.e. manufacturing, packing, storing, trading, offering for sale, marketing and selling of different types of *edible spices*. It has also been deposed that today the edible spices manufactured and sold by PW1 under the aforesaid packaging with the said photograph have become a household name and are indeed a name to reckon with. The members of the trade and those not associated directly with it i.e. general members/ consumers/ buyers of the products identify the new packaging.

10. PW1 has next deposed that in view of the above PW1 has the exclusive right to use the above trademarks inter-alia in respect of the goods for which the same are registered and to obtain appropriate relief against any party such as the defendants. Additionally the registrations are prima facie proof as to the validity of the trademarks in PW1's name and by virtue of the common law rights in and to the trademarks in the packaging, PW1 has the exclusive right to use the said trademarks inter-alia in respect of the goods in any manner whatsoever.
11. PW1 has also deposed that he is the owner of copyright in the packaging containing his photograph, which is an artistic work and other materials/ texts, which are literary works. The whole packaging is a combination of distinct features where every aspect is distinctly put in a specific place thereon. It has also been deposed that PW1 has the exclusive rights in the intellectual properties therein, trademark and copyright and other activities such as carrying on business and conducting other allied activities/ operations. All the packaging for different types of edible spices are sold in several parts of India, including large parts of Delhi, New Delhi, NCR region, Uttar Pradesh, Uttaranchal, other North Indian States and abroad wherein all purchasers recognize and associate the packaging with PW1.
12. Further, PW1 has expended huge sums and extensive resources on research and development of different types of edible spices sold, marketed, offered in the packaging containing PW1's photograph in issue.

PW1 has had huge turnover and high incomes from the said packaging. Certificate issued by Chartered Accountant showing the annual turnover and the total income including sales made by PW1 in the financial years 2005-06 till 2007-08 has been exhibited as **Ex.PW1/10**.

13. PW1, Mr.Prakash Sharma, has also deposed that he has spent huge sums in publicity, advertisement and promotion of the new packaging since its adoption, including business promotion activities since its expansion and accordingly its sales have also increased manifolds in the recent past. Certificate issued by Chartered Accountant showing the expenditure incurred by PW1 in the financial year 2005-06, has been exhibited as **Ex.PW1/11**.
14. PW1 has further deposed that by virtue of such extensive sales and business promotion activities and even otherwise, packaging of PW1 containing his registered trademarks are his most valuable property, more so when it contains fanciful adoptions and combinations with no association with anyone else or over which nobody else can claim any right, lien or title. Few sample original publicity materials and articles in different publications about PW1 and his different types of edible spices have been exhibited as **Ex.PW1/12**, **Ex.PW1/13**, **Ex.PW1/14** and **Ex.PW1/15** respectively.
15. PW1 has next deposed that in or around 23.03.2008 he came across identically similar packaging of the defendants' as that of PW1. Defendants' first infringing packaging in original has been exhibited as

Ex.PW1/16. It has also been deposed that from 1998 till 2008, the defendant no.3 used to procure different types of edible spices from PW1 for onward sale to Delhi/ New Delhi shops. Upon recognizing the worth of PW1's different types of *edible spices*, the defendants stooped to copy the *packaging* as it is, in all aspects to derive the most out of it. He has also deposed that from a bare comparison of the two packaging, it is apparent that the defendants have left no stone unturned to blatantly copy all aspects/ features of PW1's packaging. Inquiries revealed that the defendant no.1 is the main brain/ culprit, strategist, investor, packager, seller and manufacturer operating with the able assistance of defendant no.2 under the name of two entities, which to the best of the knowledge of PW1, actually exist on paper only. Defendant no.2 has lent one of his shops from where the work is carried on and he is into marketing, sales and earning handsome commissions/ profits. Defendant no. 3 is assisting them in acting as the retailer/ supplier/ distributor who is offering and selling spurious spices in the market through his channels. It has also been deposed that the Defendant no. 4 is the real younger brother of the Defendant no. 1 who is assisting the Defendants in all aspects in their illegal activities. Defendants' have super-imposed the face of the defendant no.4 over the photograph of PW1 in the packaging. Defendant no.1 is a habitual offender who is in the habit of copying reputed/ established products such as that of PW1 and has earlier been reprimanded by the local market association in similar acts before.

16. PW1 has also deposed that defendants are deliberately, mischievously and wrongly handing general public, purchasers, customers, buyers different types of *edible spices* not manufactured by PW1 under the garb of offering edible spices as that of PW1 and the unwary purchasers are duped into taking the same believing that they are actually purchasing edible spices of PW1. Various glaring visible similarities inter-se the two packaging are detailed in three comparative tables, as under:

A. FIRST COMPARITIVE TABLE : FRONT SIDE:

<i>PLAINTIFF'S PACKAGING</i>	<i>DEFENDANTS' PACKAGING</i>
i. Most prominent feature in centre, covering almost 2/3 rd part is Plaintiff's photograph sitting in a particular posture in his family owned shop wearing a traditional blue kurta [generally worn by him while sitting in his shop since ages]. ;	i. <i>Same copied as it is</i> except replacing/ superimposing Plaintiff's face with that of Defendant no. 4. ;
ii. Only Hindi language used specifically. ;	ii. <i>Same copied as it is.</i> ;
iii. Right at top Plaintiff uses line " <i>Pandatji [Kucha Pandit Vale]</i> " in a particular font & manner as this is what he is popularly known as. ;	iii. <i>Same copied as it is</i> except merely replaced word <i>Pandit</i> with <i>Chelan.</i> ;
iv. Self devised phrase <i>shudhhta avum vishwas key prateek</i> in a particular font & manner used by Plaintiff to describe his spices. ;	iv. <i>Same copied as it is.</i> ;
v. Another self devised phrase <i>paramparik</i>	v. <i>Same copied as it is.</i> ;

<i>shuud masalee</i> in a particular font & manner to better describe his spices used by Plaintiff. ;	
vi. Family concern registered trademark <i>Shan-e-Delhi</i> in same font & manner [as it is registered] used by Plaintiff to show his own and his products association with it. ;	vi. <i>Same copied as it is</i> except inner contents changed with a phrase. ;
vii. Symbol ® specifically used by Plaintiff to apprise all that <i>Shan-e-Delhi</i> is a registered trademark. ;	vii. <i>Same copied as it is.</i> ;
viii. Trademark specifically placed <i>Shan-e-Delhi</i> between two self devised phrases [in pt's (iv) & (v) above] by Plaintiff. ;	viii. <i>Same copied as it is</i> except contents changed with a phrase. ;
ix. <i>QUTAB MINAR</i> device in a particular manner used by Plaintiff as it was always used by him, his predecessors-in-interest since very beginning/ commencement of his family business [Plaintiff's spices were/ are popularly known as " <i>Minar masale</i> "]. ;	ix. <i>Same copied as it is.</i> ;
x. 'Kind/ type' & weight of products offered always scribed below his own photograph i.e. right at bottom in <i>Hindi</i> & in a particular font & manner by Plaintiff. ;	x. <i>Same copied as it is.</i> ;
xi. Particular, specific kinds of colour(s)/ colour scheme(s) for particular edible spices.	xi. <i>Same copied as it is.</i>

17. Further, the defendants have also copied the reverse side of packaging of PW1 in verbatim by merely exchanging the printing of the contents on the

left side of the packaging on their right side and vice-verse. The defendants' have written the same contents/ particulars in *Urdu* and/ or in *Hindi* which are there on left side of PW1's packaging as it is on the right side of their packaging and have further written the same contents/ particulars in *English* which are there on the right side as it is on the left side of their packaging. The similarities, in detail are thus compared in the two below tables [qua each half]:

B. SECOND COMPARITIVE TABLE:

<i>PLAINTIFF'S LEFT SIDE PACKAGING</i>	<i>DEFENDANTS' RIGHT SIDE PACKAGING</i>
i. Self devised phrase <i>SYMBOL OF TRUST & PURITY</i> written in Urdu in a particular font & manner by Plaintiff. ;	i. <i>Same copied as it is. ;</i>
ii. Other self devised phrase <i>paramparik shuud masalee</i> used by Plaintiff in Hindi [same as used in front & right side of packaging] in particular font & manner. ;	ii. <i>Same copied as it is. ;</i>
iii. Like on front side, Family concern registered trademark <i>Shan-e-Delhi</i> in Urdu in same font & manner [as it is registered] used by Plaintiff to show his own & his products association with it. ;	iii. <i>Same copied as it is except contents changed. ;</i>
iv. Like on front side, Symbol ® specifically used by Plaintiff to apprise all that <i>Shan-e-Delhi</i> is a registered trademark. ;	iv. <i>Same copied as it is. ;</i>

v. Catch line giving a reference to himself & to best define his products used by Plaintiff in Hindi. ;	v. <i>Same copied as it is</i> except words changed. ;
vi. Advantages of product manufactured/ sold under specific head <i>aushadhiya guun</i> given by Plaintiff in Hindi. ;	vi. <i>Same copied</i> verbatim as it is. ;
vii. Other self devised phrase <i>Food Grade Packaging Used</i> in a particular font & manner used by Plaintiff.;	vii. <i>Same copied as it is.</i> ;
viii. Visual representation asking purchasers to <i>KEEP YOUR CITY CLEAN & GREEN</i> given in particular font & manner by Plaintiff. ;	ix. <i>Same copied as it is.</i> ;
ix. Reference to marketing arm/ other five decade old family concern, SNS made with complete address.	x. <i>Same copied as it is</i> with name similar to that of the Plaintiff's family concern.

C. THIRD COMPARITIVE TABLE:

<i>PLAINTIFF'S RIGHT SIDE PACKAGING</i>	<i>DEFENDANT'S LEFT SIDE PACKAGING</i>
i. Products defined using self devised phrase <i>SYMBOL OF TRUST & PURITY</i> [English translation of phrase <i>shudhhta</i>	i. <i>Same copied as it is.</i> ;

<i>avum vishwas key prateek</i> used in front packaging] by Plaintiff, written in particular font & manner. ;	
ii. Other self devised phrase <i>TRADITIONAL SPICES</i> [English translation of phrase <i>paramparik shuud masalee</i> used in front packaging] used by Plaintiff in particular font & manner. ;	ii. <i>Same copied as it is.</i> ;
iii. Like on front side, Family concern registered trademark <i>Shan-e-Delhi</i> in same font and manner [as it is registered] used by Plaintiff to show his own & his products association with it.;	iii. <i>Same copied as it is</i> except contents inside changed. ;
iv. Like on front side, Symbol ® specifically used by Plaintiff to apprise all that <i>Shan-e-Delhi</i> is a registered trademark. ;	iv. <i>Same copied as it is.</i> ;
v. Like on front side, Trademark specifically placed <i>Shan-e-Delhi</i> between two self devised phrases [in pt's (iv) and (v) above] by Plaintiff. ;	v. <i>Same copied as it is.</i> ;
vi. Plaintiff always writes the 'kind/ type' of products offered below aforesaid mentioned in pt's (i) to (iii) in a particular font and manner. ;	vi. <i>Same copied as it is.</i> ;
vii. Other self devised phrase <i>Symbol of Quality & Trust</i> in a particular font and manner just below description of product used by Plaintiff. ;	vii. <i>Same copied as it is.</i> ;

viii. Mandatory requisite details like net wt. ; month of packaging ; Lot No. ; M.R.P. Rs. with respect to product given in said order by Plaintiff. ;	viii. <i>Same copied as it is except that all heads are deliberately and surreptitiously left blank. ;</i>
ix. Specific instructions that his product is <i>BEST BEFORE 8 MONTHS FROM THE MONTH OF PACKAGING</i> given by Plaintiff. ;	ix. <i>Same copied as it is. ;</i>
x. Self details with complete address given in end.	x. <i>Same copied as it is with name similar to that of the Plaintiff's concern.</i>

18. PW1 has also deposed that his Advocate issued a Cease and Desist Notice on 25.03.2008 with respect to the first packaging by U.P.C. and courier to the defendants. The original/ office copy of the Cease and Desist Notice dated 25.03.2008 has been exhibited as **Ex.PW1/17**. The said Cease and Desist Notice was duly served on the defendants and were fully aware of the contents thereof.
19. PW1 has further deposed that immediately upon receipt of the Cease and Desist Notice, the defendants surreptitiously, with a view to evade any action changed the addresses mentioned in their earlier packaging and came out with a second infringing packaging by merely changing the addresses. Defendants' second infringing packaging in original has been exhibited as **Ex.PW1/18**. On coming to know about this, PW1 carried out fresh investigations and found that the earlier addresses were in fact

deliberately given falsely and there were other persons involved. Accordingly once again, a fresh second Cease and Desist Notice was issued to defendant no.'s 1 and 3 via registered acknowledgment due post, U.P.C. and courier on 31.03.2008. Original/ office copy of the said Legal Notice alongwith receipt thereof have been exhibited as **Ex.PW1/19**.

20. PW1 has next deposed that upon due receipt thereof, the defendant no.3 contacted PW1 and his Advocate on 06.04.2008 and personally met both of them in office of the advocate on 08.04.2008. During the discussions, the defendant no.3 categorically admitted his fault and confirmed to stop doing any further business with other defendants and that he would give an affidavit of undertaking on stamp paper in terms of the same. It has also been deposed that in the course of talks, defendant no.3 made starkling revelations naming all those who were actually involved in the nefarious designs of copying the packaging. Thereafter the defendant no.3 remained in constant touch with PW1's Advocate and also visited his office again on 16.04.2008 to sign his affidavit which was drawn and prepared on his instructions on a Rs. 10/- stamp paper. Instead of signing the same and/ or bringing the relevant documents, the defendant no.3 simply took a photocopy of his affidavit to return with the documents, but he never returned to do so. Said original Affidavit is already on record before this Hon'ble Court and has been exhibited as **Ex.PW1/20**. It has also been deposed that on 14.04.2008 Advocate of PW1 received a call from a person who claimed himself to be defendant no.4 when he

admitted his mistakes and sought time to discuss certain issues, only to vanish later on.

21. PW1, Mr.Prakash Sharma, has also deposed that defendants had and/ or could have no valid reason and/ or justification, whatsoever, to adopt a packaging identically similar with minor cosmetic changes not visible to a naked eye, as that of PW1. Defendants have at no point of time had any connection with PW1, his shop and this clearly establishes that the defendants merely adopted their impugned packaging just to come as close as possible to PW1, his reputation and business so as to cause confusion and deception amongst the members of the trade and the general public at large and make all believe that they are in some manner associated with and/ or connected with PW1.
22. PW1 has further deposed that the chances of confusion and deception loom large as the defendants are dealing in similar products from a similar area and with similar class of people, most of whom are illiterate and who go more by the physical representation of the product rather than what is written on it. It has also been deposed that despite due receipt of Cease and Desist Notices and admitting their fault/ wrong-doings, the defendants have no intention of giving up their nefarious and illegal activities and are thus continuing with their illegal activities despite being forewarned by PW1. In addition to other losses, the defendants' aforesaid activities are also causing immense incalculable financial losses to PW1 as he has reason to believe that they are carrying on such illegal activities without

maintaining proper books of accounts and are dealing in unfair trade practices.

23. PW1 has next deposed that he has more than one reason to believe that the defendants are in possession of numerous incriminating materials misused/ likely to be misused and wrongly retained by them for illegally manufacturing, processing, keeping, printing, storing, trading, selling and/ or offering for sale the offending packaging, which they have no right to retain in their possession and/ or custody as it is illegal and unwarranted. It has also been deposed that the same is against law and is not permissible, more so when they are without the permission of the true owners thereof i.e. PW1. Defendants' aforesaid illegal activities and acts violate valuable rights, *inter-alia*, in and to the copyright in the packaging ; the trademarks : photograph and *Shan-e-Delhi*, rights whereof vest in PW1 and/ in his Company ; overall get-up of the packaging.
24. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record along with the affidavit by way of evidence which have been filed. The evidence of plaintiff has gone unchallenged and un-rebutted. Original Registration Certificate of plaintiff's trademark *Shan-e-Delhi* issued by the Trade Mark Registry, New Delhi has been exhibited as Ex.PW1/4. Sample original packaging of PW1 has been exhibited as Ex.PW1/8(colly). Original Registration Certificate of the trademark 'photograph' of PW1 issued by the Trade Mark Registry, New Delhi in the name of PW1 has been exhibited as

Ex.PW1/9. Certificates issued by Chartered Accountant showing the annual turnover and the total income including sales made by PW1 in the financial years 2005-06 till 2007-08 and showing the expenditure incurred by PW1 in the financial year 2005-06, have been exhibited as **Ex.PW1/10** and **Ex.PW1/11**. Defendants' first infringing packaging in original has been exhibited as **Ex.PW1/16**. Defendants' second infringing packaging in original has been exhibited as **Ex.PW1/18**.

25. On the basis of the documents placed on record, plaintiff has been able to establish that plaintiff's company, M/s SNS Products Private Limited, is the registered owner of the trademark 'Shan-e-delhi'. Also, plaintiff is the registered proprietor of his photograph as used on the packaging of the spices. Plaintiff has also established that he is the owner of copyright in the packaging containing his photograph. Packaging of plaintiff is a combination of distinctive features where every aspect is distinctly put in a specific place and the different types of edible spices sold in the said packaging containing plaintiff's photograph is identified by the members of trade and general public as that of the plaintiff only and no one else. Plaintiff has also established that on account of huge amount spent on publicity, advertisement and promotion of the packaging since its adoption, plaintiff has been able to generate vast turnover and that plaintiff has built an unparalleled goodwill and reputation in respect of its spices sold in the said packaging containing plaintiff's photograph. Plaintiff has also established that the defendants have blatantly copied the packaging of plaintiff with few minor changes which are not

distinguishing the two packaging. Defendants have superimposed the face of defendant no.4 over plaintiff's photograph in their packaging. These acts on the part of the defendants amounts to infringement of copyright of the plaintiff in his packaging and the defendants adoption and use of the impugned packaging is malafide and with the intention of encashing upon the hard earned goodwill and reputation of plaintiff, earned by the latter over a period of years.

26. In the case *Burroughs Wellcome (India) Ltd v. Uni-Sule Pvt. Ltd* reported at 1999 PTC 188, it was observed at Page No.192 as under:

“Copyright is a form of intellectual property. With advancement in technology it is very easy to copy. The basic test in actions based on the infringement of the copyright is that if a thing fetches a price, it can always be copied and therefore, it needs adequate protection. It is well settled that although under the Copyright Act, 1957, there is a provision of registration, under Section 44 of the Act. It is not in doubt that the said procedure is an enabling provision and registration is not compulsory for the purpose of enforcing copyright. Section 44 of the Act provides for registration of work in which copyright exists but in order to claim copyright registration is not necessary. This is because registration is only to raise a presumption that the person shown in the certificate of registration is the author. This presumption is not conclusive, but no further proof is necessary unless there is a proof rebutting the contents of the said certificate. Under Section 48 of the Registration Act, therefore, the act of registration is ex-facie prima facie evidence of the particulars incorporated in the certificate. There is no provision under the Act which deprives the author of the rights on account of non registration of the

copyright. There is nothing in the Act to suggest that the registration is condition precedent to the subsistence of the copyright or acquisition of copyrights or ownership thereof or for relief of infringement of copyright. The sine-qua non of existence of a copyright is expenditure of skill, labour and capital on any work expended by a person/author and unless the original work is produced in court to prima facie show that the work has originated from author, no relief can be granted. In other words, copyright exists even without it being registered for the purpose of its enforcement. The nature of copyright is also meant to be borne in mind. It subsists in any material form in which ideas are translated. Copyright is an incorporeal right. It does not lie in any idea, but it lies in the expression in which the idea is expressed. The work of an author therefore, becomes the subject matter of the copyright. In essence the copyright is a negative right of preventing copying of physical material in the field of art, literature etc. Once an idea is written down, the writing becomes the subject matter of copyright. With globalisation and advancement of technology, even computer programmes come within the copyright. Any work conveying a particular information comes within the subject matter of a copyright and it needs protection.”

27. In the case of *Nova Ball Bearing Industries v. Mico Ball Bearing* reported at PTC (Supp)(1) 497(Del), it has been held at para 7 page No. 499 as under:

“A comparison of the two cartons “NOVA” and “JANI” would reveal that two cartons are exactly similar in size, colour scheme and get up, the only difference that the trade mark of the defendants is written at 5 places and that of the plaintiff at 3 places. The two cartons bear such a close

resemblance that they can easily confuse and deceive a customer.”

28. In Cases and Material on Trade Mark and Allied Laws, Vol.I at Page No. 969 Muller and *Phipps International Corporation and Anr. v. Anita Cosmetics and Anr.* reported at 1979 Arbitration and Trade Mark Law Reporter p. 33, following observations are made at para 5 page No. 971:

“It is true that the use of the mark COUNTESS by itself is not likely to deceive the customers. But if the two containers CUTICURA and COUNTESS are put side by side, it becomes apparent that in the get up, colour scheme and the similarity the containers are so similar that they easily confuse and deceive the customers. The defendant No.1 has adopted the get up and colour scheme of the container to the plaintiffs in every detail and they are identical in appearance.”

29. In the case of *Tavener Rutledge Ld. v. Specters Ld.* reported at 1959 RPC 83 , it was observed as under:

“It seems to me that one has to take into consideration people who have what is called imperfect recollection, as was pointed out in the case of Saville Perfumery Ld. v. June Perfect Ld. (1941) 58 RPC 147 and one has to allow for cases where the person who has not got the two tins side by side perhaps does not remember the plaintiffs name accurately, or does not know that there are two different traders in the same line of business, or many others for that matter, and takes a casual glance at the tin and imagines that it is the kind of fruit drops that he wants, not entirely

casually, but looking at it in the ordinary way that such a customer would go into a shop and see a pile of tins or something of that sort. Afterwards of course raise objection, but it seems to me that it is a case of confusion if customers are induced to buy by a recollection of the general get up of the plaintiffs tin so that they purchase a tin of the defendants sweets by mistake and I am bound to say that I have come to the conclusion that such confusion is not only possible but is likely.”

30. In the case of *Laxmikant V. Patel Vs. Chetanbhai Shah And Another*, reported at (2002) 3 SCC 65, Apex court made following observation:

“.....The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that his goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury.”

31. In view of the above, plaintiff has made out a case for grant of decree against defendant nos. 1 and 4, in terms of prayer a and b in paragraph 30 of the plaint.

32. Plaintiff has also prayed for a direction to the defendants to disclose on oath and to render the true and correct accounts showing all the documents clearly establishing the revenues and/or profits earned with respect to the wrongful use of the similar packaging as that of plaintiff, however plaintiff restricts his claim to punitive damages.
33. In case of **Time Incorporated v. Lokesh Srivastava and Anr.**, reported at 2005 (30) PTC 3 (Del), the court has recognized third type of damages as punitive damages apart from compensatory and nominal damages. The court has held that:
- “The award of compensatory damages are aimed at deterring a wrong doer and the like minded from indulging in such unlawful activities.”
- "This Court has no hesitation in saying that the time has come when the Courts dealing actions infringement of trademark, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize 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."
34. 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.

35. 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 30.04.2008 is confirmed and the suit is decreed in favour of the plaintiff and against the defendant nos.1 and 4. Plaintiff is also entitled to damages to the tune of Rs.2.0 lacs.
36. Decree sheet be drawn up accordingly.

(G.S.SISTANI)
JUDGE

SEPTEMBER 24, 2014
ssb