

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS (OS) 1460/2010

M/S DABUR INDIA LTD.

..... PLAINTIFF

Through: Mr. Manish K Mishra,
Advocate

Versus

RHIM PHARMACEUTICALS

..... DEFENDANT

Through: Exparte

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

Judgment
22.05.2014

SANJEEV SACHDEVA, J. (Oral)

1. The Plaintiff has filed the present Suit for permanent injunction for restraining the Defendant from infringing the trademark, copyright and design of the Plaintiff.
2. The Plaintiff claims to be a leading manufacturer of a large range of pharmaceuticals, toiletries and medicinal preparations. The Plaintiff claims to have been carrying on its trading activities since the year 1884.
3. The Plaintiff claims that the reputation of the Plaintiff

has been built for over a century with the input of painstaking effort and huge investments. The goods of the Plaintiff are marketed under its house mark **DABUR** as well as under several trademarks distinguishing one from the other such as HAJMOLA, PUDINHARA, VATIKA, ANMOL, DABUR AMLA HAIR OIL, DABUR JASMINE HAIR OIL, DABUR GULABARI, **DABUR LAL DANT MANJAN** etc..

4. The Plaintiff claims that the trade mark **DABUR** of the Plaintiff, has turnover of over Rs.2800 crores and that it is a household brand in India. As per the Plaintiff one of the well known and reputed products of the Plaintiff in Ayurvedic personal care/oral hygiene segment is **“DABUR LAL DANT MANJAN” (Hindi)/“DABUR RED TOOTH POWDER” (English)**.
5. As per the Plaintiff **“DABUR LAL DANT MANJAN”** was launched by the Plaintiff in the year 1970. It is contended that over the period of time, the said product has attained immense goodwill and popularity amongst the consumers of all segments in society.
6. The Plaintiff claims that it has been selling its LAL DANT MANJAN or RED TOOTH POWDER in a

distinctive packaging under the house mark **DABUR** and its “tree logo”. The Plaintiff is not claiming any right either on **LAL DANT MANJAN** or **RED TOOTH POWDER**. Though, it is contended that over the last four decades, the packaging and get up of Plaintiff’s **DABUR LAL DANT MANJAN** has undergone changes. The **DABUR LAL DANT MANJAN** label of the Plaintiff is stated to be registered since 1998 and 2005 under The Trade Marks Act. The Plaintiff claims to have adopted the existing label of **DABUR LAL DANT MANJAN** in January 2008.

7. The Plaintiff claims that it earlier used to market its **DABUR LAL DANT MANJAN** in a straight cylindrical metal container and thereafter cylindrical plastic bottle with short neck section since 1984 and 1998 respectively. It is contended that in the year 2005, the Plaintiff created an original design comprising of a plastic cylindrical container with tapering upper and lower portion from the middle section. The middle section is broader and the upper section is elongated with circular top and curvaceous side panels. It is contended that the cap is so designed so as to continue the converging tapering effect of the bottle. The front

and rear section are flattened. The Plaintiff claims to have obtained the design registration in respect of the said container and the cap vide design registration No.198675 dated 28th February, 2005 which is valid and subsisting till 28.02.2015.

8. The Plaintiff claims to have introduced the following packaging using a new label on the container:



9. The Plaintiff claims the following characteristics and distinguishing features:
- (i) The packaging has a colour combination of red, white and green. The cap of the packaging is red in colour with circular circumference with a small flip towards the front. The trade mark **DABUR** with a “tree logo” is embossed upon top section of the cap.

- (ii) The container has background colour combination of predominantly red, white and green. The trade mark **DABUR** is represented in white letterings towards the upper section of the front panel.
- (iii) The generic description of the product namely LAL DANT MANJAN appears in white lettering below **DABUR**. The word LAL is written in larger font and DANT MANJAN in much smaller fonts below the word LAL;
- (iv) The lower section of the packaging contains a depiction of leaves, flowers, fruits depicting herbs in green and red with depiction of cloves scattered in herbs.
- (v) The middle section of the packaging bears an oval device merging in the herbs of the Bottom section. The oval device bears the shiny rays in white, blue and silver showing the sparking shiny background with a picture of happy family of four members.
- (vi) The above features are depicted in Hindi on front side of the container;
- (vii) The back side of the container depicts **DABUR RED TOOTH POWDER** in white lettering. **DABUR** and **RED** is written in larger font and Tooth Powder in much smaller fonts below the word **RED**;
- (viii) The composition of the product, name of manufacturer etc. are depicted in black lettering. The device of one sparkling tooth,

an oval device bearing a picture of beaker and two glasses with herbs in it is and the Plaintiff's "tree logo" with the trade mark DABUR is also depicted at the back panel".

10. The Plaintiff claims novelty in shape, configuration of the container along with the distinctive get up including colour combination, layout and arrangement of features and contends that they together constitute a distinctive trade dress of **DABUR LAL DANT MANJAN** marketed by the Plaintiff, distinguishing the LAL DANT MANJAN originating from the Plaintiff.
11. The Plaintiff claims that the LAL DANT MANJAN is purchased and consumed by all strata of society including illiterate and semi-illiterate in-habitat in small townships, big cities, semi-rural cities, villages etc., and as such the get up and the trade dress pays a significant role in distinguishing the LAL DANT MANJAN manufactured and marketed by the Plaintiff.
12. The Plaintiff claims that on account of extensive use, the trade of dress and get up of DABUR LAL DANT MANJAN packaging, the product of the Plaintiff has become distinctive as insignia and indication of source and origin of LAL DANT MANJAN so marketed in the minds of consumers at large, particularly, the class of

consumers who may not be literate or semi-literate in Hindi/English language and may be relying wholly on their visual aid and recall of get up of the Plaintiff's packaging.

13. The Plaintiff claims that the sale of Plaintiff's LAL DANT MANJAN for the year 2009-2010 had been over Rs.133 crores and the promotional expenses had been over Rs.5 crores.
14. The Plaintiff claims to have spent several crores on advertisement and promotion of the **DABUR LAL DANT MANJAN** through various print and electronic media and claims that the annual sales are in several hundred crores.
15. The Plaintiff claims that the artistic work has been designed by Mr. Angad Singh Negi of M/s. Bates India Pvt. Ltd., Milap Niketan, 8A, Bahadurshah Zafar Marg, New Delhi-110002, at the instances of the Plaintiff for consideration paid and an assignment deed has been executed whereby all rights, interests and title in the artistic work were assigned to the Plaintiff for the complete term of protection as provided under the Copyright Act, 1957.

16. The Defendant claims to have come to the know in the 4th week of June, 2010 through its sales representatives that the Defendant is manufacturing and marketing **LAL DANT MANJAN** in similar container having same colour combination, trade dress and get up as that of **DABUR LAL DANT MANJAN** of the Plaintiff.
17. The Plaintiff has therefore filed the present Suit for passing off and infringement of Trademark, copyright and design.
18. Under Section 28 of the Trademark Act, 1999 (hereinafter referred to as the Act) exclusive rights are conferred on the registered proprietor of the trademark to use the said trademark and obtain the relief of injunction. Under Section 29(1) of the Act, use of identical mark in respect of identical goods in the course of trade would amount to infringement of the trademark.
19. Section 2(m) of the Trade Marks Act, 1999 lays down that “mark” includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof and section 2 (q) lays down that

“package”; includes any case, box, container, covering, folder, receptacle, vessel, casket, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork. Section 2 (zb) defines trademark amongst others to mean a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.

20. The Supreme Court in the case of ***BELL CO. VS METAL GOODS MFG. CO. AIR 1971 SC 898*** has laid down that on registration of a trademark, the registered proprietor gets, under section 28, the exclusive right to the use of such trade marks in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of any infringement of such trade mark.
21. The Supreme Court has further laid down in ***AMERICAN HOME PRODUCTS VS MAC LABORATORIES AIR 1986 SC 137*** that when a person gets his trade mark registered, he acquires valuable rights by reason of such registration. Registration of his trademark give him the exclusive right to the use of the trademark in connection

with the goods in respect of which it is registered and if there is any invasion of this right by any other person using a mark which is the same or deceptively similar to his trade mark, he can protect his trade mark by an action for infringement in which he can obtain injunction.

22. The Defendant was served by publication in the newspaper 'Nai Duniya' (Hindi Edition) dated 7.3.2012 and the Hindustan Times circulating in Indore on 25.04.2012. Despite service by means of publication nobody entered appearance on behalf of the Defendant and accordingly the Defendant was proceeded ex-parte vide order dated 26.7.2012.
23. The Plaintiff has led ex parte evidence of the Deputy General Manager-legal, Dabur India Limited & Constituted Attorney of the Plaintiff Company. He has exhibited the Board resolution dated 17.9.2009 duly in his favour as Exhibit PW-1/1.
24. The Plaintiff has deposed that it secured the registrations of **DABUR LAL DANT MANJAN** label of 1998 and 2005 under the Trade Marks Act vide trade mark registration no. 852970 in Class 03 dated

23/04/1999 and 1356522 in Class 5 dated 11/05/2005. The trademark registration certificate has been exhibited as Exhibit PW-1/2. The Design registration certificate has been exhibited as Exhibit PW-1/3. Photograph of Plaintiffs' **"RED TOOTH POWDER"** plastic container in use since 2008 has been exhibited as Exhibit PW1/4.

25. The Plaintiff has deposed that the sale of Plaintiff's LAL DANT MANJAN for the year 2009-2010 had been over Rs.133 crores and the promotional expenses had been over Rs.5 crores. Promotional invoices pertaining to DABUR LAL DANT MANJAN has been exhibited as Exhibit PW 1/5.
26. No objection certificate dated 19.5.2010 issued by Mr. Angad Singh Negi of Bates India Pvt. Ltd. in favour of Dabur India Ltd. has been exhibited as Exhibit PW1/6. Assignment deed dated 19.5.2010 executed between M/s. Bates India Pvt. Ltd. and the Plaintiff herein whereby all rights, interests and title in the artistic work i.e. **DABUR LAL DANT MANJAN** were assigned to the Plaintiff for the complete term of protection as provided under the Copyright Act, 1957 has been exhibited as Exhibit PW1/7.

27. Photograph of Defendant's "DENTAGUARD RED TOOTH POWDER" has been exhibited as Exhibit PW1/8.

28. Comparative chart of the prominent features of competing packaging of the parties is as under:

DABUR LAL DANT MANJAN TRADE DRESS	DENTAGUARD LAL DANT MANJAN TRADE DRESS
(i) The packaging has a colour combination of red, white and green. The cap of the packaging is red in colour with circular circumference with a small flip towards the front. The trade mark DABUR with a "tree logo" is embossed upon top section of the cap.	(i) The packaging has a colour combination of red, white and green. The cap of the packaging is red in colour with circular circumference with a small flip towards the front.
(ii) The container has background colour combination of predominantly red, white and green. The trade mark DABUR is represented in white letterings towards the upper section of the	(ii) The container has background colour combination of predominantly red, white and green. The trade mark DENTAGUARD is represented in white

front panel.	letters towards the upper section of the front panel.
(iii) The generic description of the product namely LAL DANT MANJAN appears in white lettering below DABUR. The word LAL is written in larger font and DANT MANJAN in much smaller fonts below the word LAL;	(iii) The generic description of the product namely LAL DANT MANJAN appears in white lettering below DENTAGUARD. The word LAL is written in larger font and DANT MANJAN in much smaller fonts below the word LAL;
(iv) The lower section of the packaging contains a depiction of leaves, flowers, fruits depicting herbs in green and red with depiction of cloves scattered in herbs.	(iv) The lower section of the packaging contains a depiction of leaves, flowers, fruits depicting herbs in green and red with depiction of cloves scattered in herbs.
(v) The middle section of the packaging bears an oval device merging in the herbs of the bottom	(v) The middle section of the packaging bears an oval device merging in the herbs of the bottom

section. The oval device beats the shiny rays in white blue and silver showing the sparking shiny background with a picture of happy family of four members.	section. The oval device bears the shiny rays in white, blue and silver showing the sparking shiny background with a picture of happy family of four members.
(vi) The above features are depicted in Hindi on front side of the container;	(vi) The above features are depicted in Hindi on front side of the container;
(vii) The back side of the container depicts DABUR RED TOOTH POWDER in white lettering. DABUR and RED is written in larger font and Tooth Powder in much smaller fonts below the word RED;	(vii) The back side of the container depicts DENTAGUARD RED TOOTH POWDER in white lettering. DENTAGUARD and RED is written in larger font and Tooth Powder in much smaller fonts below the word RED;
(viii) The composition of the product, name of the manufacturer etc. are	(viii) The composition of the product, name of manufacturer etc are

depicted in black lettering. The device of one sparkling tooth, and oval device bearing a picture of beaker and two glasses with herbs in it is and the Plaintiff's "tree logo" with the trade mark DABUR is also depicted at the back panel	depicted in black lettering. An oval device bearing a picture of one sparkling tooth and herbs in it and a "tree logo" with the trade name RHIM is also depicted at the pack panel.
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27. The two competing packaging of the parties is as under:



Plaintiff's

Defendant's

28. The comparison of the two competing bottles clearly shows that the two are virtually identical in respect of packaging. The Defendant's packaging is deceptively similar to the registered design of the Plaintiff and trade dress and get up of the LAL DANT MANJAN packaging of the Plaintiff in respect of colour combination and overall shape and configuration of the packaging and their caps.
29. The Plaintiff has deposed that the goods in question are purchased by a substantial class of consumers who are illiterate or incapable of reading the brands represented and have to rely upon their visual aid to recall the overall idea and impression of the get up of packaging used by the Plaintiff.
30. The Plaintiff has deposed that the Plaintiff has been prominently displaying the design of the container, trade dress including colour combination in the sales promotional material including magazines, television advertisements extensively in the course of trade since 2005. And further deposed that on account of such extensive use, the said trade dress, get-up and colour combination of LAL DANT MANJAN packaging in the colour combination of red, white and green has come

about to acquire distinctiveness as a symbol of trade and source of the Plaintiff's LAL DANT MANJAN.

31. The Plaintiff has produced on record orders passed in various suits filed by the Plaintiff wherein ad-interim injunctions have been granted in favour of the Plaintiff.
32. The Defendant has not entered appearance to dispute the case of the Plaintiff. Nothing has come on record to contradict the stand of the Plaintiff and to discredit the deposition of the witness of the Plaintiff.
33. I am of the considered view that the use of the impugned design, trade dress and get up of packaging used by the Defendant in relation to LAL DANT MANJAN is likely to lead to confusion and deception in the minds of the consumers on account of their overall similarity with those of the Plaintiff in respect of overall colour combination of red, white and green, shape and configuration and its packaging.
34. Though the Defendant is not using the mark DABUR of the Plaintiff, it is clear that use of an identical packaging, trade dress and style by the Defendant would create confusion in the minds of the consumers about the source of its LAL DANT MANJAN on

account of visual similarity between the trade dress and get up of the Defendant's packaging with those of the Plaintiff predominantly on account of similarity of colour combination of red, white and green as well as the lay out and arrangement of features including the cap, the design of the container, each being identical to design, colour combination and over all get up of packaging of DABUR LAL DANT MANJAN.

35. In view of the above, I am of the considered opinion that the Plaintiff is entitled to a decree of permanent and mandatory injunction and also of delivery up in terms of Paras 30 (i) to (iv) of the Plaint.
36. With regard to the prayer of the Plaintiff for a decree for recovery of damages for Rs. 20,00,000/- is concerned, counsel for the Plaintiff has relied upon the Judgment of this Court in ***TIME INCORPORATED VS. LOKESH SRIVASTAVA AND ANR 116 (2005) DLT 599*** to contend that the Courts dealing with actions for infringement of trademarks, 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.

37. In the case of ***HERO HONDA MOTORS LTD. V. SHREE ASSURAMJI SCOOTERS, 125 (2005) DLT 504*** it has been held that damages in such a case should be awarded against Defendants who choose to stay away from proceedings of the court and they should not be permitted to enjoy the benefits of evasion of court proceedings. The rationale for the same is that while Defendants who appear in court may be burdened with damages while Defendants who choose to stay away from the court would escape such damages. The actions of the Defendants result in affecting the reputation of the Plaintiff and every endeavour should be made for a larger public purpose to discourage such parties from indulging in acts of deception.
38. In the present case, the Defendant has chosen to stay away from the proceedings and has not filed any defense to the pleas of the Plaintiff. I am accordingly of the considered opinion that the Plaintiff is entitled to

damages from the Defendant which are quantified at Rs. 3 lakhs.

39. A decree is thus passed in favour of the Plaintiff and against the Defendants in terms of the Para 30 (i) to (iv) of the plaint and the Plaintiff is also entitled to a decree for damages for a sum of Rs 3 lakhs against the Defendant.

40. The Plaintiff shall also be entitled to costs.

41. Decree sheet be drawn up accordingly.

SANJEEV SACHDEVA, J

May 22, 2014
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