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

+ **CS(OS) 2609/2011**

% **Judgment dated 13.05.2014**

DURIAN INDUSTRIES LTD Plaintiff
Through: Ms.Jyoti Verma and Ms.Shilpi Jain,
Advocates

versus

PANKAJ RAO & ANR Defendant
Through: Mr.Rohit Singh and Mr.Raghu Tandon,
Adv. for defendant no.1 along with defendant no.1

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

1. Plaintiff has filed the present suit for permanent injunction, restraining infringement of trademarks, passing off, recovery of damages and delivery up. Summons in the suit were issued on 21.10.2011. Summons to defendant no. 2 were issued on several dates and vide order dated 20.03.2014 defendant no. 2 was deemed to be served, as he refused to accept service of summons. However, none appeared on behalf of defendant no. 2 after service. The plaintiff claims to be the registered proprietor of the trade mark "Durian". According to the plaint, sometime in the month of June-July, 2011, plaintiff received complaints from the customers that mattress with the mark 'Durian' were being manufactured and sold in the market which were not the product of the plaintiff.

2. Plaintiff thereafter bought a sample of defendant no.1's product from defendant no.2's store which had an identical trademark as that of the plaintiff with respect to flexi core mattress. It is submitted that defendant no.2 is the seller of the goods manufactured by defendant no.1.
3. Defendant no.1 is present in Court and submits that on 17.2.2012 counsel for the defendant no.1 had made a statement that defendant no.1 has not used the trademark "Durian" nor he has any intention to use the same in future. Based on this statement, interim order was made absolute.
4. Counsel for the defendant submits that defendant no.1 reiterates the statement made on 17.2.2012 and submits that he has no objection if the present suit is decreed, provided that plaintiff gives up the relief of damages.
5. Counsel for the plaintiff submits that the present suit should also be decreed with respect to the defendant no.2 as well and it is not necessary to file an affidavit by way of evidence, as the plaint is duly supported by the affidavit of the plaintiff.
6. It has been averred in the plaint that plaintiff is a company limited by shares incorporated under the provisions of Companies Act, 1956 having the registered office at 401, The Chambers, Hanuman Road, Western Express Highway, Vile Parle (E), Mumbai – 400057. The plaintiff has been carrying on the business of wide range of innovative laminates, sturdy doors, Mattress/Cushions, Interior & fancy items and world class home and office furniture under the name and style '**Durian**' for the past several decades and has sales offices/depots at various places in India.
7. It has further been averred in the plaint that in the year 1996, the plaintiff honestly and bonafidely adopted the trade mark "DURIAN" in relation to its aforesaid products i.e. laminates, Sturdy Doors, Mattress/Cushion,

Home & Office Furniture, Lamps, Furnishings etc. That the plaintiff has been using the aforesaid trade mark “Durian” in various forms which appears on all the bills, letter-heads, packing materials, cartons and boxes besides on all the goods manufactured and traded by plaintiff in the markets of India viz laminates, Strudy Doors, Mattress/Cushion, Home & Office Furniture, Lamps, Furnishings etc.

8. It has also been averred in the plaint that the plaintiff is the owner of the trade mark “Durian” which is also the house-mark of the plaintiff Company. The mark has been honestly derived from plaintiff’s corporate name and a lot of efforts have been employed to create the special style in which the mark is used by the plaintiff company. All the marks used by the plaintiff in the course of its business contain the word “Durian” in same form or the others, which it has been using openly, continuously, extensively, exclusively since the year 1996 and the same is distinctive of the goods of the plaintiff and none else in the trade.
9. It has also been averred in the plaint that by virtue of extensive sales, wide spread publicity in all the available media viz. newspaper, television, radio, advertisements in the form of hoardings, in the form of hoardings, in journals, magazines, souvenirs etc. the said mark/brand/logo/monogram/house mark/principal mark/work has gain tremendous reputation in India and abroad. It has created a lasting impression amongst the consumers and the trade in general and they associate the said mark/brand/logo/monogram/house mark/ principal mark with the products of the plaintiff and the business of plaintiff owing to the extensive sales network the goods under the mark “Durian” are readily available in the every part of the country. The plaintiff’s Goods are known, called, asked for, offered and sold as “Durian”. In pursuant of

excellence, plaintiff was also awarded with the internationally acclaimed Forest Stewardship Council (FSC) certification apart from the prestigious ISO 9001 and 14001 certifications.

10. It has further been averred that in order to safeguard its proprietary right involving the said trade mark 'Durian', plaintiff has also registered its well acclaimed trade mark 'Durian' and/or its phonetically and visually variants for a wide range products and services of the forth schedule to the Trade Mark Rule 2002. That the mark "Durian" stands registered in various form in respect of Furniture, Mirror, picture framed, goods of wood, cork, reed, cane, wicker, horn, bone, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or plastics in class 20 in respect of textile piece goods, suiting & shirting, dress materials, saris, handkerchiefs, blankets, Tweeds, Shawls, Bed & Table Covers, Quilt in class-24 and many more. The details of various "Durian" registration held by the plaintiff have been annexed as "**ANNEXURE-B**"(Colly). Statements of annual sales and publicity expenses of the trade mark "Durian" for last ten years certified by auditors have been annexed as "**Annexure-C Colly**".
11. Further, it has been averred in the plaint that in the month of June-July plaintiff received the information that the defendants are manufacturing and marketing mattress and other furnishing with the trademark 'Durian' clandestinely in Delhi. Invoice of the sample purchased by plaintiff from defendant no. 2 store has been annexed as "**Annexure-D Colly**".
12. It has also been averred that the plaintiff issued legal notice dated 4th July, 2011 to the Defendants thereby calling upon the Defendants to cease and desist from using the mark "Durian" in any form.

13. It is further averred in the plaint that plaintiff is not only the registered proprietor of the composite trademark/label “Durian” under trademark No. 1225698 as of 25.08.2003 but by virtue of actual user since 1996 the Plaintiff is the exclusive owner of said trademark and is entitled to all reliefs, including injunction, in case of any infringement or his rights.
14. It has also been stated in the plaint the use of the mark/word ‘Durian’ by the defendants shows a deliberate and malicious intent and design on its part to misappropriate, trade upon and derive benefit from the reputation and goodwill of the mark “Durian”, enjoyed exclusively by the Plaintiff through out the country and the said acts of the defendants are bound to cause confusion and/or deception amongst the public at large and such confusion and deception amongst the trade and public is bound to adversely affect the Plaintiff’s goodwill and reputation acquired through years of hard work. Such adoption of visually and phonetically similar mark by defendants also amounts to passing off defendant’s products and business as that of the Plaintiffs’. The defendants are making a misrepresentation publically through advertisements which is likely to lead to immense confusion and deception and create an impression that the Defendant’s Products are connected with or have some relationship or nexus with the products of the Plaintiff’s.
15. It has further been averred in the plaint that the defendants have made undue profits on account of their offending acts, due to which the plaintiff has suffered huge loss and damages. The plaintiff estimate the damages to the tune of Rs. 25,00,000/- at present for which defendants are jointly and severally liable.
16. I have heard counsel for the plaintiffs and carefully perused the documents which have been placed on record along with the plaint.

Despite service defendant no.2 has chosen not to appear and contest the matter. The averments made in the plaint, duly supported by an affidavit, has remained unrebutted. The details of various “Durian” registration held by the plaintiff have been annexed as “**ANNEXURE-B**”(Colly). Statements of annual sales and publicity expenses of the trade mark “Durian” for last ten years certified by auditors have been annexed as “**Annexure-C Colly**”. Original invoice of the sample purchased by plaintiff from defendant no. 2 store has been annexed as “**Annexure-D Colly**”. Photographs of defendant no. 2 premises have also been filed.

17. On the basis of the documents placed on record, the plaintiff has established that plaintiff is the owner of the trademark ‘Durian’ and the plaintiff has the exclusive right to use the same. Plaintiff has also established that the mark ‘Durian’ has been used by the plaintiff in the course of its business openly, continuously, extensively and exclusively since the year 1996 and the same is distinctive of the goods of the plaintiff and none else in the trade. Plaintiff has also established that by virtue of extensive sales, wide spread publicity the said mark ‘Durian’ has gained tremendous reputation in India. Plaintiff has also established that the defendant no. 2 by dealing with the goods bearing trademark ‘Durian’, which is identical to the plaintiff’s mark, is causing infringement of rights in the trademark the plaintiff.
18. Plaintiff has also claimed punitive damages.
19. In the case of *Time Incorporated v. Lokesh Srivastava and Anr.*, reported at 2005 (30) PTC (Del.), apart from compensating damages of RS.5.00 lakhs, punitive damages were also awarded.

[See also *Hero Honda Motors Limited v. Rafiq Memon*, reported at 2012 (52) PTC 499 (Del.); *Gora Mal Hari Ram v. Ashique Exports*, reported

at 2012 (50) PTC 428 (Del.)’ and *Relaxo Rubber Limited and Anr. V. Selection Footwear and Anr.*, reported at 1999 PTC 578]

20. For the reasons stated above, the suit is decreed qua defendant no.2 with damages of Rs.2.0 lacs. In view of Section 135 of the Trademarks Act, the suit is decreed in favour of the plaintiff and against the defendant no.1 in terms of prayers (a), (b) and (c). Decree-sheet be drawn up accordingly.

G.S.SISTANI, J

MAY 13, 2014

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