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

% *Date of decision : 16th December, 2014*

+ **CS(OS) 3178/2011**

M/S PARLE AGRO PVT LTD & ANR Plaintiff

Through: Mr.Piyush Joshi, Adv.

versus

ANMOL LIFELINE Defendant

Through: Mr.Parikshit P Angad, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J. (ORAL)

1. Plaintiff has filed the present suit for permanent and mandatory injunction to restrain defendants from infringement of trademark and copyright, and for relief of damages/rendition of accounts and delivery up.
2. Summons in the suit and notice in the application under Order XXXIX Rules 1 & 2 were issued on 19.12.2011, 30.01.2012, 30.03.2012 and 21.05.2012. Counsel for the defendant entered appearance on 29.08.2012 and sought time to file written statement. None appeared for the defendant on 05.11.2012, 11.02.2013 and 24.07.2013, consequently, defendant was proceeded ex parte vide order dated 24.07.2013.
3. Plaintiffs have filed affidavit by way evidence of Mr.Sanjiv Kiyawat (PW1), Manager Accounts of the plaintiff company. A copy of the power

of attorney dated 12.07.2010 in favour of Mr.Sanjiv Kiyawat has been exhibited as **Ex.PW1/1**.

4. PW1 has deposed that plaintiff no.1 is private limited company incorporated in India and plaintiff no.2 form is a unit of plaintiff no.1. Plaintiff no.1 and plaintiff no.2 are hereinafter collectively referred to as the plaintiffs. The office of plaintiff no.2 is responsible for administrating and monitoring the sales related issues for Northern India.
5. PW1 has also deposed that the plaintiff no.1 company started its business more than two decades ago and is today the pioneer in the fruit beverages industry in India with many brands under its banner, namely the oldest and most well known trademark “FROOTI”, “APPY”, and “APPY FIZZ” and also packaged drinking water manufactured, marketed and sold under the well known trademark “BAILLEY”. The expression “BAILLY” is not only used as a word mark but has also been extensively used as label mark containing the word “BAILLEY”. The label has been created as an artistic work and possesses all the necessary ingredients of copyright as well. The label of plaintiff’s product “BAILLEY” with its device has been exhibited as **Ex.PW1/3**.
6. PW1 has further deposed that plaintiff no.1 adopted the trademark “BAILLEY” in the year 1992 for its packaged drinking water and has been using the said trademark extensively and continuously since then. The plaintiff no.2 merged with the plaintiff no.1 with effect from November 1, 2003 and since then became a unit of plaintiff no.1. Over the years the trademark “BAILLEY” has gained immense popularity and goodwill and people relate and associate the said trademark with the plaintiff no.1 company. The Amalgamation Order of Parle Agro Pvt. Ltd.

ad M/s Explicit Trading and Marketing dated 12.08.2004 has been exhibited as **Ex.PW1/4**.

7. PW1 has next deposed that the plaintiff no.1 has obtained the registration of the trademark “BAILLEY” in class 29 and 32. Besides, the device and label of “BAILLEY” is also registered in class 32 in favour of the plaintiff no.1. The details pertaining to plaintiff’s no.1 trademark registered in India are as follows:

Sl. No.	Trade Mark	Trade Mark No.	Class	Date of registration	Status
1.	PARLE BAILEY (Label)	584190	32	05.11.1992	Registered
2.	PARLE BAILLEY AQUA (label)	621903	32	15.03.1994	Registered
3.	BAILLEY AQUA	647221	32	30.11.1994	Registered
4.	PARLE BAILLEY MINERAL WATER (label)	749335	32	30.07.1997	Registered
5.	PARLE BAILLEY (word)	749336	32	30.07.1997	Registered
6.	PARLE BAILLEY(word)	749338	29	30.07.1997	Registered
7.	PARLE BAILLEY SODA (label)	767884	32	08.10.1997	Registered
8.	PARLE BAILLEY AQUA (label)	1001757	32	09.04.2001	Registered
9.	PARLE BAILLEY AQUA (label)	1119236	32	16.07.2002	Registered
10.	BAILLEY NATURALE	1538518	32	16.07.2002	Registered

	(label)				
11.	BAILLEY NATURALE (word)	1538520	32	09.03.2007	Registered
12.	PARLE AGRO BAILLEY (word)	1654182	32	15.02.2008	Registered
13.	BAILLEY (word)	1654181	32	15.02.2008	Registered

The certificates for legal proceedings with respect to each of the above mentioned trademarks have been exhibited as **Ex.PW1/5(colly)**.

8. It has also been deposed that the trademark “BAILLEY” and its variants have been filed by the plaintiff no.1 and the same are pending:

Sl. No.	Trade Mark	Trade Mark No.	Class	Date of registration	Status
1.	BAILLEY SODA (label)	2120824	32	24.03.2011	Pending
2.	BAILLEY SODA WITH RIBBON (label)	1643086	32	18.01.2008	Opposed
3.	BAILLEY WITH PARLE AGRO REFRESHING INDIA (label)	2561764	32	09.07.2013	Pending
4.	BAILLEY (word)	2561766	32	09.07.2013	Pending
5.	BAILLEY NATURAL MINERAL WATER	2561767	32	09.07.2013	Pending
6.	BAILLEY (word)	2561771	16	09.07.2013	Pending

9. PW1 has further deposed that the products of the plaintiffs are manufactured with the highest and most stringent quality standards as

notified by the Government of India through the statutes of BIS and FSSAI.

10. PW1 has next deposed that the reputation and respect enjoyed by the plaintiffs’ trademark “BAILLEY” all over India the sale of the said products has increased by leaps and bounds over the past several years. It has also deposed that the plaintiffs have been spending huge amounts on advertisements and sales promotion of its product sold under the trademark “BAILLEY”. The sales and advertisement figures of the plaintiffs product bearing the trademark “BAILLEY” and “BAILLEY” device/label have been detailed in the affidavit as under:

<i>In Cases</i>	<i>Retail</i>	<i>Bulk</i>	<i>Total</i>	<i>Total (MRP value) Rs.lakhs</i>
200,6	2,170,973	61,364	3,305,254	3,305
2007	2,292,810	990,136	3,662,319	3,662
2008	3,009,889	1,756,064	5,200,099	5,200
2009	6,796,076	2,260,562	9,393,548	9,394
2010	10,076,894	3,402,339	13,698,617	16,438
2011 till oct.	8,576,042	3,558,865	12,304,545	14,765
TOTAL	32,913,684	12,029,330	47,564,382	52,765

Institutional sales figures of the plaintiff’s product “BAILLEY” for the last eight years:

Year	Quantity sold by pale agro pvt. Ltd. (cartoons/Jar)	Value of Quantity sold (Rs. In lakhs)	Advertisement Expense by Parle Agro Pvt. Ltd. (Rs. In
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			lakhs)
2003-04	3,163,506	1,119,62	7.21
2004-05	3,109,346	1,290,50	1.39
2005-06	3,297,368	1,588,77	22.26
2006-07	1,657,162	1,103,47	12.29
2007-08	597,776	397,53	43.89
2008-09	279,202	146,52	42.25
2009-10	92,872	81.00	14.36
2010-11	114,844	105.56	16.62
TOTAL	12,312,036	5832.97	160.26

BAILLEY ADVERTISEMENT FIGURE FOR LAST FIVE YEARS:

PERIOD	PARLE GROUP	TOTAL IN LAKHS
2006-07	12.29	12.29
2007-08	43.89	43.89
2008-09	42.25	42.25
2009-10	14.36	14.36
2010-11	16.62	16.62
TOTAL	129.41	129.41

The certificate of the Chartered Accountant certifying the said sales and advertisement expenses of the plaintiff’s product bailey for the year 2005-06 to 2010-2011 has been exhibited as **Ex.PW1/6**. The Tax Invoices with respect to the sale of packaged drinking water under the trademark “BAILLEY” by the plaintiff from its office located at New Delhi have

been exhibited as **Ex.PW1/7**. The list of employees of the plaintiff at its Delhi office has been exhibited as **Ex.PW1/8**.

11. PW1 has also deposed that the plaintiff's trademark "BAILLEY" and "BAILLEY" device/label since the last many years have been extensively advertised in several leading magazines, newspaper, television and other media which have huge circulation in India.
12. PW1 has further deposed that any use of identical or deceptively similar marks by another trader not connected to the plaintiffs, in respect of the same goods is bound to cause confusion and deception in the minds of the consuming public and members of trade leading them to falsely believe that such third party goods originate from the plaintiffs or have some nexus of affiliation with them. As a result of the aforesaid factors and due to long and continuous use, extensive advertising and sales promotion, associated goodwill and reputation earned under the product identification mark "BAILLEY", coupled with unbeatable quality associated with the plaintiffs, the said mark has become easily identifiable by the members of the public and trade as originating from the plaintiffs alone.
13. PW1, Mr.Sanjiv Kiyawat has also deposed that plaintiff no.1 also has a website with the URL, which is www.parleagro.com which mentions about the popularity of its popular product "BAILLEY". The printouts from the plaintiff's website www.parleagro.com have been exhibited as **Mark-1**.
14. PW1 has next deposed that the plaintiffs were shocked when on 30.11.2011 their on field sales staff brought to its attention about a packaged drinking water product being sold in the local markets which was almost identical/phonetically and deceptively similar to the plaintiff's registered trademark "BAILLEY". Not only did the defendant's product

bear a deceptively similar trademark but also had a striking visual resemblance to the plaintiff's label having an identical colour scheme, get up and lay out. The label on the defendant's product displayed the name of the defendants as the manufacturer. A label of defendant's infringing product has been exhibited as **Ex.PW1/9**.

15. PW1 has further deposed that the defendant by adopting the deceptively similar trademark "BAILLAY" has taken undue advantage of the plaintiff's reputation and goodwill. Defendant is also trying to pass off its products as those emanating from the plaintiff thereby making unreasonable profit from such sale. The adoption of a trademark "BAILLAY" by the defendant is dishonest and fraudulent with the prior knowledge of the plaintiff's trademark. Defendant's trademark "BAILLAY" is likely to create confusion in the minds of the unwary including children.
16. PW1 has also deposed that by using the impugned trademark the defendant has not only infringed the registered trademark but also the copyright of the plaintiff no.1. The colour combination, layout and the scheme of the defendant's label is deceptively similar to that of the plaintiff's label and is likely to create confusion in the minds of the consumers as well as traders as the channels of trade are similar or rather identical.
17. PW1, Mr.Sanjiv Kiyawat, has further deposed that the use of the impugned trademark by the defendant is likely to dilute the distinctive character of the plaintiff's trademark "BAILLEY" and the extensive and unquantifiable loss of plaintiffs' reputation and goodwill strikes at the very root of the plaintiffs' existence and is not measurable in terms of money and cannot be adequately compensated monetarily.

18. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record alongwith the affidavit by way of evidence which has been filed. The label of plaintiff's product "BAILLEY" with its device has been exhibited as **Ex.PW1/3**. The certificates which can be used in legal proceedings for registered marks of the plaintiff have been exhibited as **Ex.PW1/5(colly)**. Sales and advertisement expenses of plaintiff's product "BAILLEY" for the year 2005-06 to 2010-11 have been exhibited as **Ex.PW1/6**. Tax Invoices with respect to the sale of the packaged drinking water under the trademark "BAILLEY" have been exhibited as **Ex.PW1/7**. The printouts from the plaintiff's website www.parleagro.com have been exhibited as **Mark-1**. Label of defendant's infringing product has been exhibited as **Ex.PW1/9**.
19. On the basis of the documents placed on record, the plaintiffs have established that plaintiff no. 1 is the owner of the trademark, label "BAILLEY" with its device and the plaintiffs have the exclusive right to use the same. Plaintiffs have also established that on account of huge amount spent on advertisement of "BAILLEY" 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 unparallel reputation and goodwill with respect to their trademark, label "BAILLEY" with its device. Plaintiffs have also established that the trade mark "BAILLEY" used for packaged drinking water is distinctive and is identified with plaintiffs only. Plaintiffs have also established that the defendants by using the trademark "BAILLAY", which is identical and/or deceptively similar to plaintiffs' mark "BAILLEY", in respect of packaged drinking water, are causing infringement of rights in the trademark and copyright of the plaintiffs.

20. 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.”

21. While examining the question of misrepresentation or deception, comparison has to be made between the two trademarks as a whole. Rules of Comparison was 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.”

22. In a recent judgment delivered by another bench of this court, ***Mind Gym Ltd.v. Mindgym Kids Library Pvt. Ltd*** CS (OS) 1029/2013, 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]”

23. I am of the view that the impugned trademark of the defendant is identical and deceptively similar to the plaintiffs’ trademark. The use of the word “BAILLAY” by the defendant is likely to dilute the distinctive character of the plaintiffs’ trademark "BAILLEY" 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 defendant in relation to identical products amounts to an infringement of the plaintiffs’ statutory rights in the registered trademark “BAILLEY”. Furthermore, the defendant 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.
24. 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.”

25. In view of the above, the plaintiffs are entitled to a decree of permanent injunction against the defendant from manufacturing, selling, distributing, offering for sale, advertising directly or indirectly their goods under the trademark “BAILLAY” along with its label device or any other trademark which is deceptively/confusingly similar or identical to plaintiffs’ trademark “BAILLEY”, in terms of prayer (i), (ii) and (iii) of paragraph 1 of the prayer clause.
26. The plaintiffs have also claimed damages along with delivery up of the defendant’s goods, articles, pillow packs, stickers, hoardings, cartons, boxes, pamphlets, brochures, advertising materials, papers, stationery and other material bearing the impugned trademark “BAILLAY”. Plaintiffs have also claimed rendition of accounts. However, plaintiffs restrict their claim to punitive damages.
27. 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.

28. 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.
29. 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."
30. For the reasons stated above, the plaintiffs have made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 19.12.2011 is confirmed and the suit is decreed in favour of the plaintiffs and against the defendant. Plaintiffs are also entitled to damages to the tune of Rs.1.00 lac.
31. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

DECEMBER 16, 2014 ssb