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

+ **CS(OS) 3305/2012**

% ***Judgment dated 20.03.2014***

CARGILL INDIA PVT LTD

..... Plaintiff

Through : Mr.Pravin Anand and Ms.Saukshmya,
Advs.

versus

QUALITY AGRO MILLS PVT LTD.

..... Defendants

Through :

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 trade mark, passing off, damages, delivery up, etc.
2. Summons in the suit were issued vide order dated 23.11.2012, when an *ex parte ad interim injunction* was granted in favour of the plaintiff and against defendant thereby directing that till further orders defendant is restrained from selling, marketing or advertising Atta, Maida, Rawa, Sooji and Besan under the name 'Nature Fresh' or any other name, which would constitute infringement of the registered trade mark of the plaintiff. It may be noticed that in the order dated 19.7.2013 the Court had noticed that the defendant had shifted its address mentioned in the plaint more than 1½ years ago. The Court directed the plaintiff to ascertain the present address of the defendant and file it in the Registry to enable the Registry

to issue fresh summons in the suit and notice in the application. Since the defendant could not be served through ordinary service despite repeated efforts, the plaintiff filed I.A. No.13655/2013 under Order V Rule 20 CPC for substituted service. The said application was allowed and the defendant was directed to be served by way of publication. On 2.1.2014, the Court noticed that the defendants were served and a copy of publication notice was also placed on record. Since none appeared on behalf of the defendant on 16.1.2014 and 22.1.2014 despite service through publication, the defendant was proceeded *ex parte* on 22.1.2014 and the interim order dated 23.11.2012 was confirmed. Plaintiff was also directed to file *ex parte* evidence by way of affidavit.

3. Plaintiff has filed the affidavit by way of evidence of Mr. Vikram Anand, Head Marketing of the plaintiff company, which is exhibited as Ex.PW-1/A. PW-1 has deposed that he is the Head Marketing of the plaintiff and is duly authorized and competent to take all necessary legal actions in the present suit. Copy of the Board Resolution dated 07.02.2012 in favour of PW-1 has been exhibited herewith as **Ex. PW-1/1**. He has further deposed that the plaintiff is duly incorporated under the Companies Act, 1956, having its registered office at 111, Rectangle 1, District Center Saket, New Delhi. Copies of the Memorandum and Articles of Association of the plaintiff comprising of the copy of the Certificate of Incorporation have been exhibited as **Ex. PW-1/2** and **Ex. PW-1/3** respectively.
4. PW-1 has next deposed that the plaintiff is the registered proprietor of the trademark “NATUREFRESH” and its variants including NatureFresh label comprising of the combination of words NATURE and FRESH as an essential feature thereof. Details of various Trade Marks registered in favour of the plaintiff are as under:

Trade Mark	App. No	Date	Class	Goods
	906711	29/2/00	30	Atta, Maida, Rawa, Sooji, Besan
NatureFresh®	1039112	23/08/01	29	Meat, Fish, Poultry and Game; Meat Extracts; Preserved and Dried and Cooked fruits and Vegetables; Jellies, Jams; Egg, Milk and other Dairy products; edible oils and fats; preservatives and pickles, Dried and sun dried vegetables and fruits
NatureFresh Label®	1323902	13/12/04	29	Edible Oils
	1325096	10/12/04	29	Edible Oils
	1325098	10/12/04	29	Edible Oils
NatureFresh Label®	1570519	20/06/07	29, 30 and 31	Class 29: Meat, fish, poultry and game; meat extracts; preserved dried and cooked fruits and vegetables; etc. Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery etc. Class 31: Agricultural, horticultural and forestry products and grains not included in other classes etc.

5. Certificates for use in legal proceedings for trademark registration nos. 906711, 1039112, 1323902, 1325096 and 1325098 have been exhibited from **Ex. PW-1/4 to Ex. PW 1/8**. A copy of the registration certificate for trademark registration no. 1570519 has been exhibited as **Ex. PW-1/9**.
6. PW-1 has deposed that plaintiff has also applied for various trademarks bearing the mark “NATUREFRESH” and its variants under numbers 1024539 (NatureFresh and Logo), 1835472 (NatureFresh Oliante), 1570518 (NatureFresh Sarvottam), 1865631 (NatureFresh Acti-Lite) etc. that are pending registrations. Copy of Journal extracts evidencing the advertisement of these pending applications have been exhibited as **Ex. PW-1/12**.
7. Mr. Vikram Anand, PW-1 has deposed that besides the above registrations, plaintiff is the assignee for valuable consideration of the trademark nos. 1039111, 1039112 and 1039113 along with the goodwill of the business of one Mr. Kirtikumar Rasiklal Amin trading as M/s. NatureFresh from November 1988 vide Deed of Assignment dated 20.06.2005. A copy of the Deed of Assignment is exhibited as Ex. PW-1/10. PW-1 has also deposed that the trademark “NATUREFRESH” has been in use by its erstwhile proprietor way back from November 1988. The copy of the documents received by plaintiff from the assignor of the trademark “NATUREFRESH” evidencing the use of the mark by it since 1988 in accordance with the assignment deed dated 29.06.2005 have been collectively exhibited as **Ex. PW-1/11**.
8. Mr. Vikram Anand has also deposed that the plaintiff originally launched its processed food articles business back in June 2000 in wheat flour (*atta*), refined flour (*maida*), semolina (*suji*), gram flour (*besan*), edible

oils and salts all under the brand name “NATUREFRESH”. Various representations of plaintiff’s brands bearing the trademark “NATUREFRESH” have been exhibited as **Ex. PW-1/13**.

9. PW-1 has further deposed that plaintiff’s aforesaid packaged food articles are sold under the trademark “NATUREFRESH”, which was adopted in June 2000. Plaintiff launched a high profile and aggressive advertising and sales promotion campaign for the “NATUREFRESH” brand soon after its adoption. PW-1 deposed that this campaign created tremendous consumer awareness of the said trademark and ensured a strong association of the same with plaintiff’s goods in the minds of the consuming public and the trade.
10. PW-1 has also deposed that edible oil business of plaintiff which earlier comprised world class refineries owned by three corporate entities namely Cargill India Private Limited in Paradip, Orissa; Global Oils & Fats Limited in Kandla in Kutch Region, Gujarat; and Cargill Foods India Limited in Kurkumbh near Pune, Maharashtra was merged with effect from 22.09.2008. Consequent to such merger/amalgamation the food flavor business which was carried on under the name of ‘Duckworth Flavours India Private Limited and the business of animal nutrition products which was carried on under the name of ‘Cargill Matrix Feeds Private Limited’ came to exist under the name of plaintiff namely ‘Cargill India Private Limited’. PW-1 has further deposed that the food flavour business which was carried on in the name of the plaintiff has been sold off globally as a going concern as a slump sale basis to Kerry Group PLC in November, 2011. Copies of documents evidencing such merger and amalgamation have been exhibited as **Ex. PW-1/14**.
11. PW-1 has next deposed that the plaintiff has spent enormously to the tune of Rs 28 Crores on marketing and promotional expenses for the goods

bearing the mark “NATUREFRESH” from the period June, 2008 to March, 2012. He has further deposed that the plaintiff has made huge sales of its products under the mark “NATUREFRESH” for the period from June, 2008 to March, 2012 which have amounted to approximately 2621 crores. The sales and advertisement figures of the plaintiff’s products for the period June,2008 to March, 2012 are given as under:

Period –Year	Turnover	Marketing & Promotional Expenses
June-8 to May-09	524,29,62,676	6,07,38,927
June-09 to May-10	579,65,01,784	10,34,74,446
June-10 to May -11	764,15,85,470	7,80,07,631
June-11 to March-12	753,00,86,631	4,29,40,692

12. Certificate from Chartered Accountant authenticating the above figures has been exhibited as **Ex. PW-1/15**. Copies of the annual reports of the plaintiff have been exhibited as **Ex. PW-1/16**.
13. PW-1, Mr. Vikram Anand, has further deposed that the consumers associate the trademark “NATUREFRESH” solely with the plaintiff which primarily is because of its unique and refreshing packaging of its individual products under the said trademark “NATUREFRESH” such as atta, suji, maida, salt, oil etc. The packaging of plaintiff’s products comprises a distinctive get up, lay out, arrangement of features and colour schemes, designed for and on its behalf by the advertising agency Hindustan Thomson Associates (HTA) for valuable consideration. Document evidencing the business engagement letter with the advertising agency has been exhibited as **Ex. PW-1/17**.
14. PW-1 has also deposed that the trademark “NATUREFRESH” has received extensive publicity in the print and audio visual media.

Plaintiff's products under the said trademark have been introduced virtually in all corners of India and enjoy great acceptance and command substantial brand loyalty by virtue of its sales and marketing efforts. PW-1 has further deposed that the mark "NATUREFRESH" which belongs to the plaintiff has also been widely covered in trade literature and journals and thus the same has resulted in tremendous awareness of the mark "NATUREFRESH" in India. Copies of various journals, publicity material in form of pamphlets, brochures, in-house journals have been exhibited as **Ex. PW-1/18**.

15. PW-1 has further deposed that not only the plaintiff's "NATUREFRESH" products are extremely popular but are also a household name across India and have come to be exclusively associated with the plaintiff and no one else. Online news reports evidencing the huge presence of Plaintiff's "NATUREFRESH" products have been exhibited as **Ex. PW-1/20**.

16. This witness has next deposed that the plaintiff's rights in the trademark "NATUREFRESH" are valid and subsisting and have been legally enforced successfully by way of settlement in Suit No. 1330/ 2003 between, Dabur Foods Limited, Dabur India Limited and Cargill India Private Limited. The defendants in the said suit i.e. Dabur Foods Limited undertook before the Hon'ble Delhi High Court to completely discontinue use of the word "NATUREFRESH" in relation to their "REAL" fruit juice packaging and also agreed to withdraw all ongoing opposition proceedings filed by them against the "NATUREFRESH" marks in the Intellectual Property Appellate Board, Chennai. PW-1 has also deposed that the Defendants also paid damages to the tune of Rs Twenty Lakhs acknowledging plaintiff's exclusive right in the trademark

“NATUREFRESH”. Copy of the Order passed in CS (OS) 1330 of 2003 has been exhibited as **Ex. PW-1/19**.

17. In the affidavit, PW-1 has deposed that in the month of October, 2012 plaintiff learnt and was appalled to find that the defendant was blatantly manufacturing, marketing, selling and distributing wheat flour bearing the trade mark “NATUREFRESH” which belongs to the plaintiff. A sample of the defendant’s product packaging bearing the mark “NATUREFRESH” for Atta has been exhibited as **Ex. PW-1/22**.
18. PW-1 has further deposed that the defendant has registered the domain name www.naturefresh.webs.com incorporating plaintiff’s well known trademark “NATUREFRESH” in its entirety. It is also deposed by PW-1 that the mala fide intention of the defendant is evident from the fact that not even a single letter differs between the disputed domain name and the trademark of the plaintiff. PW-1 has deposed that there is a great likelihood that an actual or potential visitor to the plaintiff’s web page may be directed to the defendant’s website and will be malafidely induced to believe that the plaintiff has some connection with the defendant in terms of a direct nexus or affiliation with the plaintiff or has been authorized by the plaintiff. Extracts from the defendant’s website have been exhibited as **Ex. PW-1/23**.
19. It is also deposed by PW-1 that the adoption and use of the trademark “NATUREFRESH” by the defendant in relation to Atta being food article amounts to infringement and passing off of plaintiff’s well-known trademark “NATUREFRESH” registered under Nos. 906711, 1039112, 1323902, 1325096, 1325098 and 1570519. PW-1 has further deposed that the dishonest misrepresentation on the part of the defendant is calculated to injure plaintiff’s trade and business and cause monetary loss and irreparable injury to plaintiff’s business goodwill and reputation. PW-

1 has also deposed that the defendant has caused losses to the plaintiff as the plaintiff company would have earned profits if the defendant had not blatantly manufactured, marketed and distributed Atta bearing the trademark “NATUREFRESH” for which the defendant is liable to pay damages to the tune of Rs. 20 lacs.

20. I have heard learned counsel for the plaintiff and also perused the plaint, the accompanying documents and the evidence led by the plaintiff. On the basis of the evidence which has remained unrebutted, the plaintiff has been able to establish that the plaintiff is the registered proprietor of the trade-mark “NATUREFRESH” in class 29 and 30 of the Trademarks Act for description of goods including flour and preparations made from cereals, meat, fish, poultry, cooked fruits and vegetables. Plaintiff has also placed on record six trademark certificates issued to the plaintiff for use in legal proceedings, which have been exhibited from Ex.PW-1/4 to Ex. PW-1/9. The plaintiff has also established that they are the users of the trademark “NATUREFRESH” since the year 2005 when the erstwhile proprietor had assigned the trademarks rights to the plaintiff. Copy of assignment deed dated 29.06.2005 has been exhibited as Ex. PW-1/10. The plaintiffs have also established the fact that packaging of their product comprises a distinctive get up, lay out, arrangement of features and colour scheme which constitutes an original artistic work within the meaning of section 2(c) of the Copyright Act, 1957. The plaintiff has also relied upon the certificate of the Chartered Accountant, certifying the sales and marketing expenses of its products under the mark “NATUREFRESH” for the period from June, 2008 to March, 2012, which has been exhibited as Ex-PW1/15, to prove that the plaintiff’s products are extremely popular and hence resulting in substantial sales turnover annually. The plaintiff has also been able to establish that due to

the continuous and extensive use of the trademark “NATUREFRESH” by it over a long period of time, coupled with vast promotion and publicity, the said mark enjoys an unparalleled reputation and goodwill in the market and has acquired the status of a well known mark.

21. In a very 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:

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(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 defendant's 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]

22. The Apex Court in the case of ***Laxmikant V Patel v. Chetanbhai Shah And Another*** reported at (2002) 3 SCC 65, has laid down the test of confusion/deception in order to prove the case of passing off. Relevant para of the aforesaid judgment reads as under:-

“A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. 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 the 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.”

[Emphasis Supplied]

23. In the case of ***M/S Kee Pharma Ltd. v M/s Big M Healthcare & Anr.*** reported at 2012(50)PTC501(Del), wherein the defendant has adopted and was carrying on business under the same/identical trademark as the plaintiff i.e. “DISER”, with respect to the same product i.e. medicinal preparations, following observations were made by the court:-

“The trade-mark DISER is identical and deceptively similar to the plaintiff's trademark structurally, visually and phonetically and there is no justification for the defendant adopting the impugned trade mark DISER, but to deprive the plaintiff of the profits by misappropriating the goodwill and reputation that also subsists in the plaintiff's trade mark. The facts of this case reveal that the conduct of the defendant is mala fide, dishonest, unethical and

unlawful and solely motivated to encash upon the goodwill and reputation of the plaintiff's trademark DISER and to earn easy and illegal profits by passing off its medicinal preparations for those of the plaintiff. The act of the defendant is also likely to tarnish the plaintiff's goodwill and reputation and constitutes act of passing off unfair competition.

[Emphasis Supplied]

24. Having regard to the evidence on record and comparing the impugned product of the defendant, photograph of which has been exhibited as Ex. PW-1/22, I am of the view that the impugned product of the defendant is almost identical and phonetically and deceptively similar to the plaintiff's product. The use of the word "NATUREFRESH" by the defendant is likely to dilute the distinctive character of the plaintiff's trademark "NATUREFRESH" and the same is likely to erode the goodwill and reputation of the plaintiff among its existing as well as potential customers in the market. The adoption and use of the identical trademark by the defendant in relation to identical products and advertising the same through websites amounts to an infringement of the plaintiff's statutory rights in the registered trademark "NATUREFRESH". I am of the opinion that the defendant is also guilty of passing off as by using an identical mark as that of the plaintiff, the defendant is misrepresenting to the purchasing public that it is selling its goods in association with/in connection with the plaintiff and thus causing confusion as to the source of the goods and passing off his goods as that of the plaintiff. Furthermore, the defendant in a *mala fide*, dishonest and an unethical manner is encashing upon the goodwill and reputation of the plaintiffs established by the latter over the period of many years.
25. The plaintiff has also claimed damages on account of illegal activities of the defendant along with delivery up of the goods bearing the impugned trade mark, or any other deceptively similar mark. The plaintiff has also

prayed for rendition of accounts of profits earned by the defendant on account of use of the impugned trade mark.

26. Perusal of the order sheets reveals that the defendant has deliberately stayed away from the present proceedings with the result that an enquiry into the accounts of the defendant for determination of damages cannot take place. In the case of ***Time Incorporated v. Lokesh Srivastava and Anr*** reported at 2005 (30) PTC 3 (Del), apart from compensatory damages of Rs.5 lakhs, punitive damages were also been awarded. See also ***Hero Honda Motors Limited v. Rafiq Memon*** [2012 (52) PTC 449 (Del.)]; ***Gora Mal Hari Ram Ltd. Vs. Ashique Exports*** [2012 (50) PTC 428 (Del.)]; ***Relaxo Rubber Limited and Anr. Vs. Selection Footwear and Anr.*** [1999 PTC 578].
27. I am in agreement with the aforesaid submission of learned counsel for the plaintiff that damages in such cases must be awarded and a defendant, who chooses to stay away from the proceedings of the Court, should not be permitted to enjoy the benefits of evasion of court proceedings. Any view to the contrary would result in a situation where a defendant who appears in Court and submits its account books would be liable for damages, while another defendant who, chooses to stay away from court proceedings would escape the liability on account of failure of the availability of account books. A party who chooses not to participate in court proceedings and stays away must, thus, suffer the consequences of damages as stated and set out by the plaintiffs. There is a larger public purpose involved to discourage such parties from indulging in such acts of deception and, thus, even if the same has a punitive element, it must be granted. R.C. Chopra, J. has very succinctly set out in ***Time Incorporated's case (supra)*** that punitive damages are founded on the philosophy of corrective justice.

28. 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 23.11.2012 is confirmed and the suit is decreed in favour of the plaintiff and against the defendant. Plaintiff is also entitled to damages to the tune of Rs.5.0 lacs.
29. Decree sheet be drawn up accordingly.

(G.S.SISTANI)
JUDGE

MARCH 20, 2014

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