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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS (COMM) 578/2016 & IA 6960/2014

THE COCA-COLA COMPANY & ANR

..... Plaintiffs

Through: Mr. Bitika Sharma, Mr. Kapil Midha,
Advocates.

versus

V. B. RAO

trading as M/s. Om Sri Venkata Sai Enterprises

..... Defendant

Through: *ex parte*

CORAM: JUSTICE S. MURALIDHAR

ORDER

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21.09.2016

I.A. 6960/2014 (u/O V Rule 20 CPC)

1. The application has already been disposed of by the order dated 21st April 2014 of the Joint Registrar (JR).

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2. This suit by The Coca-Cola Company (Plaintiff No. 1), a corporation organized under the laws of the State of Delaware, USA and Hindustan Coca-Cola Beverages Pvt. Ltd. (Plaintiff No. 2), a company incorporated under the Companies Act, 1956 is directed against Mr. V.B. Rao (Defendant) seeking permanent injunction to restrain the Defendant from infringing the Plaintiffs' trademark, damages and delivery up etc.

3. Summons in the suit was issued on 31st May 2013. Thereafter, fresh

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summons were again issued on 10th December 2013 by this Court. Since the Defendant could not be served by ordinary process, by the order dated 21st April 2014 the JR directed substituted service to the defendant by way of publication in the local newspaper namely 'Deccan Chronicle' and 'Vaartha' (Local Language) with a copy of the newspaper sent to the Defendant by ordinary UPC and Speed Post. Subsequently on 7th August 2015, this court passed an order as under:

“Despite service, defendant has not appeared in Court. No one has appeared on behalf of the defendant today. Defendant is proceeded against ex-parte.

List on 10th December, 2015 before the Joint Registrar for ex-parte evidence.

In the meanwhile, plaintiff shall file affidavit in evidence within six weeks. ...”

4. The Plaintiffs then filed an affidavit of *ex parte* evidence of Ms. Dainse Lopes dated 21st October 2015.

5. The uncontroverted facts emerging from Ms. Dainse Lopes's affidavit are as under:

(i) The Plaintiff No. 1 is a corporation organized and existing under the laws of the state of Delaware, United States of America. The Plaintiff No. 2 is a company incorporated under the Companies Act, 1956.

(ii) The Plaintiff No. 1 is one of the largest soft drinks companies in the world with operations in more than 200 countries. It is engaged in the manufacture and sale of concentrates and beverage bases (the formulae for

which are its industrial secrets), which are used in the preparation of certain non alcoholic beverages and are offered for sale in bottles and other containers. The Plaintiff No. 1 is the owner and registered proprietor of several well-known trademarks inter alia KINLEY, COCA-COLA, COKE, DIET COKE, MINUTE MAID, SPRITE, FANTA, LIMCA, MAAZA, POWERADE, SUNFILL, THUMS UP, GOLD SPOT, CRUSH and RIM ZIM, etc..

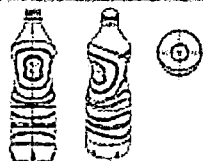
(iii) Plaintiff No. 2 is an authorized bottler of Plaintiff No. 1, and is authorized to prepare, package, sell and distribute specified beverages under certain trademarks of Plaintiff No. 1 in Authorized Containers under terms and conditions stipulated in Bottler's Agreement. Plaintiff No. 2 is engaged in production, manufacture, bottling, sale, distribution and supply of non-alcoholic carbonated and non-carbonated soft drinks, fruit juices, packaged drinking water and energy drinks bearing, inter alia, the trademarks of Plaintiff No. 1 mentioned hereinabove.

(iv) Though Plaintiff No. 1 is headquartered in Atlanta, United States of America, it has local operations in over 200 countries of the world. The website of the Plaintiff No. 1 www.cocacola.com has a page dedicated to its products sold under the well-known mark KINLEY. Plaintiff No. 1 also has a website which is India-specific: www.cocacolaindia.com. A Compact Disc containing the contents from the aforementioned websites of the Plaintiff No. 1 has been exhibited as **EX PW-1/5**.

(v) The brand KINLEY is owned by Plaintiff No. 1 and licensed out for bottling purposes to Plaintiff No. 2. Furthermore, Plaintiff No. 1 has also

obtained registration for the DANUBE BOTTLE shape in India. A printout of the representation of the distinctive DANUBE bottle shape of the Plaintiff's used for KINLEY bottled water and Plaintiffs' KINLEY label qua the 1 litre bottle have been exhibited as EX PW-1/2 (Colly).

(vi) The Plaintiff No. 1 is the registered proprietor of the trade mark DANUBE BOTTLE shape, KINLEY and KINLEY (label), details of which are as follows:

Trade Mark	Number	Date	Cls	Goods
	2097362	February 9, 2011	32	beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
KINLEY	742535	October 1, 1996	32	Non-alcoholic beverages
	1682368	April 30, 2008	32	Beers; minerals and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages

(vii) The above mentioned registrations are valid and subsisting as of date. Further by virtue of Trade Marks Act, 1999 the Plaintiff No. 1 and its

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licensees have the exclusive right to use the aforesaid trademarks inter alia in respect of the goods for which the aforesaid trademarks are registered. Additionally, under Section 31 of the Trade Marks Act, 1999, the original registration is prima facie evidence as to its validity. A copy of the extracts and registration certificates from the official website of the Trademarks Registry of the Plaintiffs trademarks bearing numbers 2097362, 742535 and 1682368 are marked as **MARK A**.

(viii) The Plaintiff No. 1 first adopted the distinctive DANUBE BOTTLE shape in the year 2006 in Turkey for use in relation to bottled drinking water sold under its well-known trade mark KINLEY. In India the Plaintiff No. 1 commenced use of the DANUBE BOTTLE shape in the year 2008. The Plaintiffs have since the launch of the DANUBE BOTTLE shape used the same continuously and extensively.

(ix) In order to secure statutory protection of its trade mark DANUBE BOTTLE shape, the Plaintiff No. 1 has applied for registration of the same in various countries around the globe. The distinctive DANUBE BOTTLE shape is used by the Plaintiffs in relation to KINLEY, a brand of still, which is sold in many Central European countries and India.

(x) The KINLEY brand is used by the Plaintiffs for two types of drinks:

(a) A high quality bottled water available in Bangladesh, Bulgaria, India, Maldives and Nigeria.

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(b) A carbonated water with a wide array of variants: tonic, bitter lemon, club soda and fruit flavored. Available in Austria, Belgium, Bulgaria, Czech Republic, Denmark, El Salvador, Germany, Hungary, India, Israel, Italy, Lithuania, Luxembourg, Maldives, Moldova, Nepal, Netherlands, Norway, Poland, Romania, Slovakia, Sweden, Switzerland, United States, West Bank, Gaza and Zambia.

(xi) The distinctive DANUBE BOTTLE shape used for KINLEY bottled water is as below:



(xii) Since the adoption and launch of the brand KINLEY in 2001, the Plaintiffs have invested enormous amounts of money towards the protection, promotion and advertising of the trade mark KINLEY, the distinctive label and (since 2008) the DANUBE BOTTLE shape. The advertisement and promotion of the Plaintiffs' product sold under the brand KINLEY, which includes the DANUBE BOTTLE shape have been undertaken via all possible media including radio, television, electronic, print as well as over the internet by the Plaintiffs. Owing to such expansive advertisement and promotional activities undertaken by the Plaintiffs, the distinctive label with the trade mark KINLEY has acquired reputation, goodwill and notoriety.

(xiii) The year wise sales promotion expenses incurred by the Plaintiffs in India for the brand KINLEY is as follows:

YEAR	AMOUNT IN MILLION \$
2002	1.5
2003	1.3
2004	0.6
2005	0.2
2006	0.7
2007	0.3

(xiv) The Promotional Expenses towards the product sold under the Trade Mark KINLEY with the DANUBE BOTTLE shape is as follows

YEAR	AMOUNT IN MILLION
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	\$
2008	2.3
2009	3.6
2010	0.1
2011	0.08
2012	0.02

(xv) The above figures have been obtained from the original books of accounts and records maintained by the Plaintiff No. 1 in the ordinary course of business. A compact disc containing the annual reports of the Plaintiff No. 1 from the year 2001-2011 has been exhibited as **EX-PW 1/6**.

(xvi) The global sales figures and sales figures in India for the last few years for KINLEY, which since the year 2008 is sold in the DANUBE BOTTLE shape is as follows:

YEAR	GLOBAL UNIT CASES (in Millions)	INDIA UNIT CASES (in Millions) (Since 2008)
2002	44.5	-
2003	52.6	-
2004	46.8	-
2005	49.2	-
2006	50.9	-
2007	60.9	-
2008	74.1	66.5

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2009	93.1	78.5
2010	118.8	92.8
2011	135.8	105.7
2012	144.8	118.4

(xvii) A copy of the chartered accountants certificate showing the sales of the Plaintiff's product KINLEY in India is exhibited as **EX PW 1/7**.

(xviii) As a result, the DANUBE BOTTLE shape has acquired immense reputation and goodwill and the consumers associate the said distinctive DANUBE BOTTLE shape with the Plaintiffs and the Plaintiffs alone.

(xix) KINLEY is also introduced with the reverse osmosis along with latest technology to ensure the purity of the product. There is a constant scrutiny of the water which is used in the beverages and also the packaging which takes the product to the consumer. KINLEY is marketed as "Water you can trust and be truly safe and pure. KINLEY water understands the importance and value of this life giving force. KINLEY water thus promises water that is as pure as it is meant to be." Accordingly consumers around the world associate the trade mark KINLEY with 100% safety and purity.

(xx) The Plaintiff No. 1 has been actively protecting its exclusive rights in and to the trademarks KINLEY, the KINLEY label, the KINLEY trade dress and the distinctive DANUBE BOTTLE shape which is exclusively used in relation with the product sold under the brand KINLEY by issuing legal notices to any party infringing its trade marks. The Plaintiff has also been

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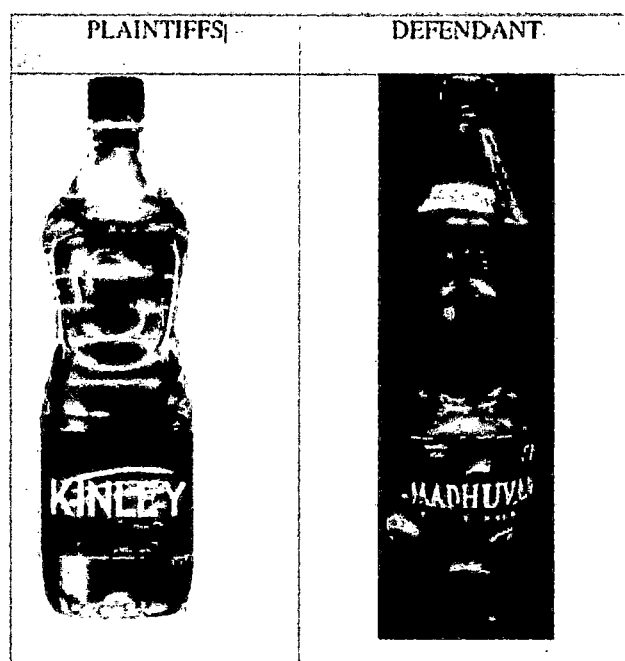
filing oppositions against third party marks in order to maintain the purity of the Register of trademarks vis-a-vis its well-known trademarks KINLEY, the KINLEY label, the KINLEY trade dress and the distinctive DANUBE BOTTLE shape.

(xxi) In Suit Nos. 2245 of 2011 and 2921 of 2011, this Court granted *ex parte* ad interim injunction in favour of the Plaintiff and the said suits were finally decreed in favour of the Plaintiffs by virtue of a settlement. A copy of the orders dated 14th September 2011 and 2nd November 2011 of the Court has been exhibited as **EX PW 1/8** and **EX PW 1/9** respectively.

(xxii) Further in Suit No. 964 of 2012 (LA. No. 6575 of 2012), this Court granted an *ex parte* ad interim injunction in favour of the Plaintiffs. A copy of the aforementioned order has been exhibited as **EX PW 1/10**. Copies of similar orders of injunction in favour of the Plaintiffs and against third parties dated 8th November 2010 passed in CS (OS) No. 530/2010 and 29th April 2012 passed in CS (OS) No. 778 of 2013 have been exhibited as **EX PW 1/11** and **EX PW 1/12** respectively.

(xxiii) It is stated that sometime in August, 2012 the Plaintiffs came across the Defendant's product namely packaged drinking water under the brand name MADHUVAN being offered for sale in a bottle, the shape of which is virtually identical to the Plaintiff No. 1's well-known and distinctive DANUBE BOTTLE shape. Apart from copying the distinctive DANUBE BOTTLE shape of the Plaintiff No. 1 the Defendant's label is affixed in exactly the same place as the Plaintiffs' KINLEY label is affixed on the well-known DANUBE BOTTLE. The Defendant has also, just like the

Plaintiff No. 1, written its mark MADHUVAN in white on a blue background. A comparison of the Bottle shapes as used by the Plaintiffs and the Defendant is shown below:



(xxiv) The points of comparison between the Plaintiffs' and Defendant's products are as follows:

- (a) The shape of the Defendant's bottle is virtually identical to the Plaintiffs' distinctive DANUBE BOTTLE shape, including the distinctive undulating lines along the upper and lower part of the bottle.
- (b) The characteristic oval-shaped indentation has been copied on both sides of the impugned bottle. However, the oval-shaped indentation is only on one side on the Plaintiffs' DANUBE BOTTLE shape.

(c) The Defendant has, like the Plaintiffs, adopted a blue label on which it represents its mark MADHUVAN in white block letters. Additionally the placement of the Defendant's label is identical to the placement of the Plaintiffs label on the bottle.

(xxv) The Defendant's bottle indicates the entity M/s Om Sri Venkata Sai Enterprises as the manufacturer.

(xxvi) The Plaintiffs' product under the brand KINLEY and DANUBE BOTTLE shape and the Defendant's impugned product are priced at almost identical prices. The Plaintiffs' product sold under the brand KINLEY in the DANUBE BOTTLE shape (1 litre) is sold at Rs.16/- whereas the Defendant's impugned product is sold at Rs. 15/-.

(xxvii) The Plaintiff No.1 sent a cease & desist notice through its attorneys to the Defendant vide letter dated 11th September 2012. An office copy of the said letter has been exhibited as **EX PW 1/14**. Since no response was received from the Defendant, a reminder letter dated 5th October 2012 was sent to the Defendant. An office copy of the said letter has been exhibited as **EX PW 1/15**. There was no response to the reminder as well. Thereafter, the Plaintiff's counsel tried contacting the Defendant on the telephone number mentioned on the impugned bottle on 7th and 20th November 2012. The Defendant was stated to have said that he would be forwarding his response to the Plaintiffs' letters by 21st November 2012. Thereafter no response was received and again the Plaintiffs' counsel contacted the Defendant on several occasions with the same result. The Plaintiffs' counsel then sent a reminder dated 28th December 2012 to the Defendant. The said letter was

stated to have been returned with a noting "No Service". An office copy of the said letter has been exhibited as **EX PW 1/16**.

(xxviii) Thereafter when the Plaintiffs' counsel contacted the Defendant on the telephone, the Defendant is stated to have said that he was no longer using the offending bottle shape which is similar to the DANUBE BOTTLE shape and that his manufacturing unit has been sold to an undisclosed third party.

(xxix) An investigation was conducted by the Plaintiffs to check the veracity of the Defendant's information. The investigation report received in February 2013 revealed that Defendant was still continuing to manufacture bottled water under the brand MADHUVAN which was still confusingly and deceptively similar to the Plaintiffs' DANUBE BOTTLE shape. The offending bottle found during the investigation bore a manufacturing date of 11th February 2013 and the price was increased to Rs. 18. Para 32 of the affidavit bears the picture of the offending bottle found during investigation.

(xxx) As a last opportunity for the Defendant to amicably settle the matter by amending the offending bottle by removing the round/oval side indentation on the offending bottle, the Plaintiffs' counsel sent a letter dated 5th March 2013 to the Defendant. An office copy of the said letter along with the AD card has been exhibited as **EX PW 1/17**. The letter dated 5th March 2013 was stated to have been resent the Defendant on 25th March 2013.

6. The affidavit of Ms. Dainse Lopes further states that since the launch of the DANUBE BOTTLE shape, the same has been used continuously and extensively and as a result, the DANUBE BOTTLE shape has acquired

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immense reputation and goodwill and the consumers associate the said distinctive DANUBE BOTTLE shape with the Plaintiffs and the Plaintiffs alone. The facts set out in the affidavit of Ms. Dainse Lopes supported by voluminous documentation establish that the Defendant is involved in continuous infringement of the trademark of the Plaintiffs.

7. It has been proved by the Plaintiff that its registered DANUBE BOTTLE shape trademark and KINLEY label has been used by the Defendant as a prominent part of the name of their product and such use of the DANUBE BOTTLE shape trademark and KINLEY label is a violation of the Plaintiffs' trademark and amounts to infringement of the Plaintiffs' trademarks KINLEY, the KINLEY label, the KINLEY trade dress and the distinctive DANUBE BOTTLE shape.

8. In the result the Court issues

A. a decree of permanent injunction directing that the Defendant, its partners, employees, agents, distributors, franchisees, representatives and assigns be restrained from:

(i) manufacturing or authorizing the manufacture, selling or offering for sale, marketing, advertising, promoting, displaying or in any other manner whatsoever using the offending bottle shape which is virtually identical to the Plaintiff No. 1's trade mark DANUBE BOTTLE shape as represented in para Nos. 20 & 30 of the Plaint and/or any other bottle shape which is deceptively or confusingly similar to the trade mark DANUBE BOTTLE shape or in any other manner whatsoever so as to infringe the Plaintiff No.1's registered trade mark DANUBE

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BOTTLE shape;

(ii) from disposing of or dealing with their assets, including the properties mentioned in the cause title of the Plaint, in a manner which may adversely affect the Plaintiffs' ability to recover damages, costs or other pecuniary remedies that may be finally awarded to the Plaintiffs;

B. a decree of mandatory injunction directing the Defendant, its partners, employees, agents, distributors, franchisees, representatives and assigns to:

(i) hand over to the Plaintiffs or their nominated representative all bottles and promotional material, catalogues, stationery and any other material whatsoever bearing the offending bottle shape which is virtually identical to the Plaintiff No. 1's registered trade mark DANUBE BOTTLE and/or any other bottle shape which is deceptively or confusingly similar to the DANUBE BOTTLE shape as used by the Plaintiffs;

(ii) recall all the products, marketing, promotional and advertising materials bearing the offending bottle shape which is virtually identical to the Plaintiff No. 1's registered trade mark DANUBE BOTTLE shape and/or any other bottle shape which is deceptively or confusingly similar to the DANUBE BOTTLE shape as used by the Plaintiffs and hand over the same to the attorneys or representatives of the Plaintiffs;

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(iii) to deliver to the Plaintiffs' attorneys or representatives for destruction all products, labels, signs, prints, packages, bottle moulds, plates, dies, wrappers, receptacles and advertisements in their possession or under their direct or indirect control bearing the offending bottle shape which is virtually identical to the Plaintiff No. 1's registered trade mark DANUBE BOTTLE shape and/or any other bottle shape which is deceptively or confusingly similar to the DANUBE BOTTLE shape as used by the Plaintiffs.

(iv) to disclose if it has filed any application for registration of a bottle shape similar to the Plaintiffs' DANUBE BOTTLE shape before the Registrar of Trade Marks.

9. A decree is passed in favour of the Plaintiffs and against the Defendant requiring the Defendant to render an account of all transactions concerning the offending activities as set out in the plaint. The Plaintiff is permitted to institute appropriate proceedings against the Defendants to recover further damages on the basis of the accounts so rendered.

10. The Plaintiffs is further awarded Rs. 50,000 towards costs of this suit which shall be paid to it by the Defendant

11. The suit is decreed in the above terms and the decree sheet be drawn up accordingly.



S.MURALIDHAR, J

SEPTEMBER 21, 2016

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