

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

% Judgment Reserved on: 03.10.2016
Judgment delivered on: 25.10.2016

+ FAO (OS) 257/2016

**PROCTOR & GAMBLE MANUFACTURING
(TIANJIN) CO LTD & ORS. Appellants**

versus

**ANCHOR HEALTH AND BEAUTY
CARE PVT LTD Respondent**

Advocates who appeared in this case:

For the Appellant : Mr Sudhir Chandra Agarwala and Mr Sanjeev
Sindhwani, Sr. Advs. with Mr Prashant Gupta, Ms Arzu
Chimmi and Mr Siddharth Sharma.
For the Respondent : Mr Sandeep Sethi and Ms Pratibha M.Singh, Sr. Advs.
with Mr Sudeep Chatterjee, Ms Jaya Mandelia and Mr
Nikhil Lal.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The appellants, Proctor and Gamble Manufacturing (Tianjin) Co. Ltd. & Ors., have challenged the order dated 26.08.2016 passed in CCP(O) No.47/2015 in CS (OS) No.1431/2013 whereby, while dealing with the application seeking initiation of contempt by the plaintiff/respondent as against the appellant/defendant for having

violated the order of injunction dated 09.05.2014, held that the order dated 09.05.2014 interdicted the use of the marks 'ALLROUNDER' and 'ALL-AROUND PROTECTION' for oral care products which included toothbrushes also and not only toothpaste, as is being claimed by the appellant/defendant. The learned single Judge, though, did not punish or initiate contempt proceedings against the appellants by giving them benefit of doubt, but at the same time cautioned them for obeying the injunction with respect to toothbrushes also alongwith toothpaste.

2. The grounds of challenge are that (i) the learned single Judge has travelled beyond jurisdiction and has extended the width and scope of the order of injunction to include something which was not in the contemplation of the parties and which was neither claimed in the suit nor canvassed during the course of arguments and that (ii) the order is arbitrary inasmuch as it does not take into account that if the order of injunction is interpreted to be extended to toothbrushes also, then, the appellants, perhaps, did not have sufficient opportunity to contest such demand of injunction as against toothbrushes which is a different class of product and which does not come within the

category of “dentrifice” for which the plaintiff/respondent had applied for a specific trademark in class 3 of the goods and services.

3. The respondent/plaintiff had filed a suit for infringement and passing off against the appellants for use of the expression “ALL-AROUND PROTECTION” and “ALLROUNDER” in relation to toothpaste. An application under Order 39 Rules 1 & 2 (IA 11461/2013) was also filed with the suit seeking interim relief in the nature of injunction against the appellants for use of the aforesaid marks and expressions for toothpaste, in which class of goods the appellant/defendant had entered the market lately.

4. The brief summary of the suit filed by the plaintiff/respondent is as hereunder:

"2. The present suit relates to the illegal adoption, public use of the mark ALL-AROUND by the Defendants and the infringing similarity to the Plaintiff's marks and goods manufactured by the Plaintiff for identical goods i.e. toothpaste under the well known and registered mark "ALLROUND". Further the Defendants have not only copied the registered mark of the Plaintiff but have also copied the entire expression "ALLROUND PROTECTION" of the Plaintiff that too for identical products i.e. toothpaste by using the expression "ALL-AROUND PROTECTION". The Plaintiff thus seeks an injunction against the use of the mark/expression ALL-AROUND PROTECTION by the Defendants."

5. In the plaint, it has been averred by the plaintiff/respondent that “ALLROUND” has been in use by the plaintiff since 2005 for its dental care products mainly toothpaste. The registration of the mark “ALLROUND” was applied for in 2005 and which was granted in the year 2008 and which mark became exclusively associated with the toothpaste of the plaintiff.

6. While outlining the position of the appellant/defendant and describing the illegal acts of the appellant/defendant, giving cause of action for filing of the suit, paras 14,15 & 16 of the plaint have been formulated as hereunder:-

"ABOUT THE DEFENDANTS

14. The Defendant No.1 is apparently engaged in manufacturing toothpaste which is located in China. The Defendant No.2 claims to be the owner of the mark Oral-B. The Defendant No.3 claims to be the importer of the products under the impugned mark. The exact constitutions of the Defendants' are not known until disclosure in the present action.

ILLEGAL ACTS BY THE DEFENDANTS

15. It is submitted that the Plaintiff sometime in the end of May 2013 came across news reports that the Defendants who were only into toothbrush manufacturing and marketing were planning to enter the toothpaste market. The news paper reports carried an interview of the Chief Financial Officer of the Defendant No.3 and gave an impression that the Defendants were planning to launch their product under the mark CREST. Internet printout

from the Economic Times is annexed with the present proceedings.

16. It is however submitted that the Plaintiff in the first week of July was shocked to know from newspaper reports that the Defendants on 2nd July 2013 launched its products under the mark ORAL-B "ALL-AROUND PROTECTION". Internet printouts from various news sites are annexed with the present proceedings."

7. Based on these facts, the plaintiff/respondent was of the view that the appellants had imitated the plaintiff's mark "ALLROUND" and "ALLROUND PROTECTION" and therefore had attempted to infringe its registered trademark. The following prayers were sought in the plaint:-

(i) A decree of declaration that the mark/expression "ALLROUND PROTECTION" of the Plaintiff is a well-known mark in relation to oral care especially for toothpaste.

(ii) A decree of permanent injunction restraining the Defendants 1 to 3, family members, partners/promoters as the case may be, directors, servants, agents, franchisees, dealers, distributors, importers or any one acting for and on their behalf in any manner using the mark/expression "ALL-AROUND PROTECTION"/"ALLROUNDER" either as a trade mark, trading style or any other mark or name identical or deceptively similar to the Plaintiffs' mark ALLROUND and expression "ALLROUND PROTECTION" in relation to any oral care products or in any other form whatsoever especially in relation to toothpaste so as to result in violation of Plaintiffs' statutory and common law rights thereby resulting in infringement, passing off, dilution etc.

(iii) An order of delivery up of all the infringing material bearing the mark/expression ALL-AROUND PROTECTION/ ALLROUNDER including toothpaste, packaging, brochures, pamphlets, signboards, moulds, dyes, advertising materials, and any other material or printed matter bearing the impugned mark for the purposes of destruction and erasure.

(iv) An order directing the Defendants to render true and proper accounts be passed and on a perusal of the accounts a decree for the amount so due may be passed in favour of the Plaintiffs against the Defendants. The Plaintiff undertakes to deposit necessary additional court fee as may be directed by this Hon'ble Court on a later stage.

(v) Costs of the suit be awarded.

(vi) Any such other and further order(s) as this Hon'ble Court may deem fit and proper in the case."

8. The appellants entered appearance and filed their written statement, the entire orientation of which was to defend the use of the mark and expression "ALLROUNDER" and "ALL-AROUND PROTECTION" over toothpastes only.

9. In the application preferred by the Plaintiff/respondent seeking interim protection as against the appellants (IA No. 11461/2013), the Court while passing an order of injunction stated in the opening paragraph as follows:

"1. The present application is filed by the plaintiff seeking an interim injunction to restrain the defendants no. 1 to 3 in any manner using, the mark/expression "ALL-AROUND PROTECTION"/"ALLROUNDER" either as a

trade mark, trading /style or in any other manner especially in relation to toothpaste. Other reliefs are also sought."
(emphasis provided)

10. In the entire body of the order dated 09.05.2014, the violation and breach of which was alleged by the respondent/plaintiff, the reference is only of toothpaste and not toothbrushes. It was also noticed by the learned single Judge that the respondent/plaintiff was the prior adopter of the registered trademark "ALLROUND" and expression "ALLROUND" along with the word "PROTECTION" which was in continuous use since 2005, whereas the appellant/defendant was a new player in the field having admittedly launched its product in July 2013. This, therefore, had obvious reference to toothpaste only as toothpaste with such mark was launched by the appellant/defendant in July 2013 whereas its toothbrushes came in the market in the year 2010 with 'ALLROUNDER' mark. The concluding portion of the order which is alleged to have been violated is as hereunder:-

"31. In my view prima facie use of the mark "ALL-AROUND PROTECTION" and "ALLROUNDER" is an infringement of the registered trade mark of the plaintiff "ALLROUND". The broad and essential features of the three marks are identical. There are various similarities in the essential features of the said marks which, are likely to

deceive and confuse a consumer. The essential feature of the registered trade mark of the plaintiff is "ALLROUND". This feature, is also the essential feature of the impugned marks.

32. The balance of convenience is also in favour of the plaintiff; When the present suit was filed, the defendants had just started marketing of their toothpaste with the impugned trademarks. In case the, defendants are not restrained, irreparable injury is likely to be caused.

33. In view of the above the defendants are restrained by an interim injunction from using the impugned trademark "ALL-AROUND PROTECTION"/ "ALLROUNDER" or any other mark deceptively similar to the plaintiff's trademark; "ALLROUND", till disposal of the accompanying suit. The order shall operate after four weeks from today, to enable the defendants to take appropriate steps to comply with the same."

(emphasis provided)

11. The learned single Judge, while dealing with the contempt application, though has taken note of these facts and has also observed that the plaintiff/respondent has not mentioned toothbrushes in the plaint but took the view that reading the plaint as a whole, the relief sought appeared to have included an interdict on the use of the subject trademark in relation to oral care products in general which included toothbrushes as well. It may however be pointed out that the learned single Judge rightly felt that the appellants cannot be hauled up for contempt because of two possible interpretations of the order of injunction. But, what is being animadverted is that the learned single

Judge, on his own, gave an interpretation/clarification of the order dated 09.05.2014 which, possibly could have been given by the same court which passed such order.

12. Mr. Sudhir Chandra, learned senior advocate appearing for the appellant drew the attention of this court to the fact that subsequent to the passing of the order of injunction dated 09.05.2014, the respondents had filed another suit bearing No. CS(OS) No. 3900/2014 against the appellants alleging violation of its mark “MULTI PROTECTION”. In the aforesaid suit it was categorically stated by the respondent that the earlier suit i.e the present suit, was with respect to toothpaste. It was also brought to the notice of this court that a trademark application was filed by appellant no.3 for the word ALLROUNDER to which the respondent, in the notice of opposition, intimated that the present suit was with respect to toothpaste.

13. It was thus argued that the learned single Judge expanded the scope and width of an order, of which he was not the author, and included something in the order which was neither in the contemplation of the parties nor in the mind of the court passing the order of injunction.

14. As against the aforesaid arguments, Mr Sandeep Sethi, learned senior advocate appearing for the plaintiff/respondent submitted that a plain and wholesome reading of the plaint would clearly indicate that the suit was directed towards the illegal use of the trademark of the plaintiff/respondent by the appellant/defendant for dental/oral care products. It was further submitted that the prayer in the plaint included a decree for declaration that the mark/expression ALLROUND PROTECTION is a well known mark in relation to oral care and it was only by way of emphasis that it was specified regarding toothpaste. However, the injunction restraining the appellants and their franchisees was sought against user of such mark or expression in relation to any oral care product in any other form whatsoever, especially in relation to toothpaste. It was next contended that if there was any ambiguity in the order as perceived by the appellants, necessary clarifications could have been sought for; but no attempts were made by the appellants to have the order explained. In that event, it was argued that it was not open for the appellants to claim or take defence that injunction was only with respect to use of subject trademark over toothpaste.

15. Mr Sethi, learned senior advocate further submitted that the challenge to the order dated 09.05.2014 by the appellants/defendants could not be sustained till the Supreme Court.

16. On a careful reading of the plaint of the suit filed by the plaintiff/respondents, the written statement filed by the appellants/defendants and the order of injunction passed by the court, we are of the view that the suit was only for injuncting the use of the plaintiff's trademark over toothpaste and not toothbrushes. The fact that the plaintiff/respondent had applied for trademark ALLROUND for class 3 product which includes dentrifices and the dictionary meaning of which is powder, paste or other preparation for cleaning of teeth, has weighed with us in holding that the suit was for seeking injunction of user of trademark as against the toothpaste and not toothbrushes which is a different class of products, falling in a different category altogether.

17. We do not wish to upset the order impugned totally as the appellants have not been punished for contempt and have been allowed to let go. However we deem it appropriate, in the facts of this case, to set aside such observations of the learned single Judge

whereby the order dated 09.05.2014 has been interpreted to mean grant of injunction for oral care products including toothbrushes. The injunction would operate only in respect of toothpaste. Consequently, the caution sounded by the learned single Judge in the impugned order is also set aside.

18. The appeal is disposed off in terms of the above.

CM 32436/2016

1. In view of the appeal having been disposed off, the application has become infructuous.
2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

OCTOBER 25, 2016

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