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THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 29.10.2010

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IA Nos.11549/2010, 13116/2010 & 13829/2010 in CS(OS) 1763/2010

FERRERO SPA & ANR.

..... Plaintiffs

Through: Sh. Pravin Anand with Ms.Vaishali Mittal, Advocates.

versus

Shri Maa Distribution (India) Pvt. Ltd. & Anr.

.....Defendants

Though: Ms. Pratibha M. Singh with Shri Sudhir Bhandari and
Shri Saurabh Ajay Gupta, Advocates for Defendant No.1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to Reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

MR. JUSTICE S.RAVINDRA BHAT

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1. This common order will dispose of pending an *ad-interim* injunction application as well as IA No.13116/2010 by the first defendant seeking de-sealing and release of goods; the order will also dispose of an application being IA No.13829/2010 whereby the plaintiff seeks an order that the keys of the first defendant premises be taken back on the file of the Court and retained in the Registry.

2. By an order dated 14.09.2010 the Court on an overall consideration of the suit, the list of documents and other materials had granted an *ex-parte ad-interim* order restraining the first defendant from marketing the products “Cherier” and “Ginnou” as it *prima facie* infringed the plaintiff’s “Ferrero Rocher” and “Nutella” brands particularly the trademark in the get up as well shape of the product, packing etc. The Court had also appointed a Commissioner to inspect the

defendant's premises and seize the infringing packing etc. Pursuant to the order of Court a local commissioner had visited the defendant's premises and by report dated 05.10.2010 submitted that a large number of boxes, cartons containing the chocolates (of the "Cherier" brand) and certain other variants had been seized. The defendant moved an application for de-sealing the premises and argued that the goods seized were perishable commodities with limited shelf life and should be released but upon imposition of reasonable terms, since the festive season was round the corner.

3. Whilst granting *ex parte* injunction the Court had taken into consideration inter alia a notification issued by the Central Government under the Customs Act prohibiting importation of confectionary items. The Court had noted that the ban was in terms of the notification at page 117 of the list of documents. The said prohibition order by the Central Government pertaining to confectionary items containing milk and milk products/extracts and was dated 24.06.2010; it was referred to a previous notification banning importation of said milk based confectionary items including chocolates. The defendant in support of its case had filed several documents including release of goods such as chocolates imported by it, which were originally detained by the customs authorities. In the list of documents, the defendant also relied upon a report of the Central Food Laboratory, a wing of the Food Safety and Standards Food of India, Ministry of Health and Family Welfare, Government of India. The said report had stated that the sample of chocolate conformed to the standard prescribed under the Prevention of Food Adulteration Rules, 1955. However, the report indicated that as regard one aspect i.e. disclosure of importer's address as required under Rule 32 of the PFA Rules the packaging of the products were non-conforming.

4. The hearing on the applications was deferred and the Court by order dated 08.10.2010 was of the opinion that the sample products should be sent for testing by an accredited Central Government approved institution or laboratory or the Central Food Laboratory. The Registry was directed to hand over the keys to the parties to enable the shifting of the goods conveniently from one room of the defendant's premises. Earlier the Court after hearing the counsel for the parties on the defendant's application required the previously appointed commissioner to visit the premises for a second time and categorize the products, open ten sample cartons, describe their contents and list out other details. The Commissioner, pursuant to the second order had

visited the premises second time.

5. The defendant's rely on a report of FICCI Research and Analysis Centre dated 15.10.2010 in respect of "*Cherier*" chocolates. This report indicates that the sample conformed to PFA specifications and could be considered fit for human consumption; two parameters i.e. the total fat and ash contents were observed to be within the acceptable limits. The defendant placed reliance on two further reports from one M/s Arbro Pharmaceuticals Ltd. which claims to be ISO 9001:2000 certified and a government approved test house or laboratory. Both the reports are dated 20.10.2010; they indicate that the samples were received on 18.10.2010. The expiry date of the sample analysis is 08.02.2012. These two reports indicate that melamine and milk are absent in the product. The defendant relies upon a list published by the National Accreditation Board for Testing and Calibration Laboratories in respect of food and agricultural products to submit that Arbro Pharmaceuticals Ltd. is a recognized and approved laboratory particularly authorized to analysis and submit reports in relation to bakery and confectionary items as well as milk and dairy products.

6. The plaintiff points out that the defendant's request for release of the goods is not warranted. It is argued that the reports relied upon as well as the documentary material clearly indicate that all the seized samples, can be consumed till February 2012 and in the circumstances, the contention about their being perishable commodities is misconceived. The plaintiff points out that the samples furnished to Arbro Pharmaceuticals Limited and are not part of the seized samples since the expiry date is indicated as 08.02.2010 whereas the samples from the seized goods indicate that the expiry is 01.02.2010. The plaintiff further states that till date neither the Chinese manufacturer nor the importer of the goods has placed any affidavit on the record indicating that the milk is absent in the chocolate and that the same are in fact fit for human consumption.

7. During the course of submissions, the defendant's counsel had stated that the value of the consignment is about ₹10 to 12 lakhs and that if the same are permitted to be sold during the festive season, the same price would be in the range of ₹ 20 lakhs in aggregate. It was also argued that the defendant has been importing such chocolates over the past seven years without any objection from any quarter.

8. This Court has carefully considered the submissions. An important consideration which persuaded the Court to grant ad-interim relief was the *prima facie* satisfaction that the defendant's products were visually similar to the plaintiff's products and its label and get up were similar to that of the plaintiff's products. The other important consideration which weighed with the Court was a public interest element i.e. the plaintiff's argument that milk confectionary items such as chocolates were prohibited from importation, if the goods were of Chinese origin. The defendant does not deny that the goods were imported from China. However, its principal contention is that chocolates being fast moving edible items with the festive season round the corner, the Court should take into consideration these facts and also take note of various reports placed on the file.

9. The previous discussion would reveal that the CFL Laboratory reports of June and July 2010 had indicated an irregularity in the defendant's packaging in regard to non-disclosure of importer's address. However, as to the public safety element the reports indicated that the samples were fit for human consumption. Similarly the report of FICCI Research and Analysis Centre of 15.10.2010 indicated that samples were fit for human consumption. As regard two reports of Arbro Pharmaceuticals Limited, there is no doubt that the defendant submitted samples which were not drawn from the seized lot. To that extent the plaintiff's contention is justified. However, as regard the plaintiff's report what is discernible is that the laboratory i.e. Delhi Test House was furnished with the sample on 13.10.2010; there is no description as to what is date of expiry of the sample. This report too establishes that melamine was not detected; however it indicates presence of 0.39% of milk fat on dry basis. The standard applied was IS:1163:1192. As regards this aspect the defendant had relied upon the relevant standards of the Bureau of Indian Standard, the same according to the material furnished (drawn from <http://bis.org.in/sf/fad.pdf>) states that the standard application for chocolates (second revision) is IS 1163:1992.

10. It is apparent from the above discussion that at the stage of seizure, or detention of the goods, and their eventual release, the Central Government had got them chemically examined; the Central Government laboratory in its opinion stated that the products conformed to the prescribed specifications in the Prevention of Food Adulteration Rules, even though the irregularity in regard to absence of the importer's name, was disclosed. The controversy as to

whether the products contain milk, in this context, does not assume such a predominant consideration. The Government laboratory's opinion was later endorsed by the FICCI laboratory's view, of mid October, 2010. Though the plaintiff's report has been furnished, in this court's opinion, that cannot outweigh the initial opinion and report of the Central Government food laboratory. Since the suit is at an interim stage, and pertains to adjudication of trademark claims, appropriate orders for their release can be made, after imposing suitable conditions.

11. Rule 32 of the Prevention of Food Adulteration Rules, *inter alia*, reads as follows:

"32. Every Prepackaged food to carry a label. -

(a) General

(1) Prepackaged food shall not be described or presented on any label or in any labelling manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect.

(2) Label in prepackaged foods shall be applied in such a manner that they will not become separated from the container.

(3) Contents on the label shall be clear, prominent, indelible and readily legible by the consumer under normal condition of purchase and use.

(4) Where the container is covered by a wrapper, the wrapper shall carry the necessary information or the label on the container shall be readily legible through the outer wrapper or not obscured by it.

(b) Labelling of Prepackaged Foods

Every package of food shall carry the following information on the label.

(1) The Name of the Food

The name of the food shall include trade name or description of food contained in the package.

(2) List of Ingredients. -

A list of ingredients shall be declared on the label and shall be in the following manner:-

(i) the list of ingredients shall contain an appropriate title, such as the term "ingredients";

(ii) the names of ingredients used in the product shall be mentioned in descending order in respect of their composition, by weight or volume, as the case may be;

(iii) every package of food sold as a mixture or combination shall disclose the ingoing percentage, by weight or volume as may be appropriate, of any ingredient at the time of the manufacture of the food (including compound ingredients or categories of ingredients) and if such ingredient,-

(A) is emphasized as present on the label through words or pictures or graphics; or

(B) is essential to characterize the food in order to distinguish the food from other categories of food with which it may be confused; or

(C) is emphasized as ingredients in the name of the food; or

(D) the disclosure of which is deemed to be necessary to enhance the health of consumers or to prevent consumers from being deceived, or

(E) is the subject of an express claim about the presence of any fruits, vegetables, whole grains or added sugars:

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“(c)(i) the name and complete address of the manufacture and the manufacturing unit, if these are located at different places and in case the manufacturer is not the packer or bottler, the name and complete address of the packing or bottling unit as the case may be;

(ii) where an article of food is manufactured or packed or bottled by a person or a company under the written authority of some other manufacturer or company, under his or its brand name, the label shall carry the name and complete address of the manufacturing or packing or bottling unit as the case may be, and also the name and complete address of the manufacturer or the company, for and on whose behalf it is manufactured or packed or bottled;

(iii) where an article of food is imported into India, the package of food shall also carry the name and complete address of the importer in India: Provided that where any food article manufactured outside India is packed or bottled in India, the package containing the such food article shall also bear on the label, the name of the country of origin of the food article and the name and complete address . of the importer and the premises of the packing or bottling in India. ”

The above provision is an important piece of public interest norm, to ensure accountability towards public health standards, in regard to edible articles offered for sale. In this case, the dispute hinges on rival contentions regarding trademark ownership and usage. Yet, there is a subsidiary issue, since importation, and sale of chocolates with any milk content, of Chinese origin are prohibited. *Prima facie*, the court is of the opinion that the defendants chocolates do not contain milk, and can be offered in the market. Yet, the labeling in these packets, does not

contain the prescribed and listed out details, pertaining to ingredients, and importantly, the name of manufacturer and name and address of the importer. Now, these are extremely vital pieces of information which a potential buyer should be informed about, since in the event of any health condition or concern, arising after consumption, it would be well nigh impossible for the importer, who is responsible for the placing of the product in the market, to be brought to book. Now, any infraction of provisions of the PFA and Rules amounts to an offence. This court, of course, is not called upon to decide that issue. Nevertheless, the court cannot be blind to the question.

12. Diwali is a celebration of light; it is also a time for renewal of familial ties and reaffirmation of friendship. Traditionally, celebration of Diwali begins with the exchange of gifts. Elders in the family present clothes to the younger members; the latter gift sweets for members in the family and so on. Gifts are an occasion for elders in the family to show their love and affection for other members of the family. Social mores have undergone radical changes in the manner of celebration of Diwali and particularly in exchange of gifts. Traditionally when families were big and people did not live far from one another personal visits of relatives and exchange gifts and home-made sweets was the accepted norm. Urban compulsions and a burgeoning middle class has completely transformed these practices; it is *passé* to exchange home-made sweets perhaps for the simple reason that very few people have the time or inclination to cook them. Therefore, sweets, chocolates, packaged bakery and confectionary items are bought and gifted commonly. Apart from gifts amongst family members, the festival has seen change in values; sweets and such like gifts are routinely given to office colleagues, employees, business associates, and “those who matter”. Time only will tell whether these changes have merit, or are necessary; the point however, is that Diwali time spawns a huge industry which caters to these gifts. Sale of sweets, confectionaries, chocolates, and the like goes up by leaps and bounds. In this background, public health considerations become even more crucial. Often, as in this case, these sweets or chocolates are imported and sold as Diwali packages. The quality and standards for manufacture of these products, however, has to conform to the existing laws. In such instances, it becomes essential that the labels fixed on the packages containing such products should indicate the ingredients, in a clear manner, and also disclose the manufacturer, and importer, with his address, simply to fix responsibility, in the event of a

mishap or illness.

13. In view of the above discussion, this court deems it appropriate that the concerned authorities of the Departments of Health and Consumer Affairs, Govt. of NCT of Delhi, as well as the Central Government, Ministry of Consumer Affairs, should take appropriate steps to publish in the media, newspapers and periodicals, as well as the public domain, explaining the existence of these standards, to members of the public, to spread awareness, and exhibit caution while purchasing such goods, in order to prevent any harm to the health and well being of the general public.

14. In view of the above discussion, the court is of the opinion that the defendant should be permitted to de-seal the premises, and market its existing stock of *Cherier* chocolates, subject to-

- a) Furnishing a bank guarantee for Rs. 6 lakhs, in favour of the Registrar of this court, within a week;
- b) Furnishing accounts in respect of sale of the seized products, within two months;
- c) Filing an undertaking not to further import the *Cherier* chocolates or offer them for sale, henceforth, till pendency of this suit.

Certified copies of this order shall be furnished directly, by the Registry of this court, to the Consumer Affairs, and Health Departments, of the GNCT of Delhi, and the Ministry of Consumer Affairs, Central Government, for appropriate action, in the lines mentioned in Para 13 of this order. All the applications are disposed of in terms of the above directions. Order Dasti, under signatures of the Court Master, to the parties.

29th October, 2010

(S.RAVINDRA BHAT)

JUDGE