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

% **Date of Decision: 07.01.2015**

+ CS(OS) 1607/2013

PEPSICO INC & ANR

..... Plaintiff

Through Ms.Bitika Sharma & Mr.Kapil Midha,
Advs.

versus

VOMARA DISTRIBUTORS & ORS

..... Defendant

Through None.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. Arguments have been heard in the suit. On 13.01.2014, Defendant nos. 1 and 2 sought some more time to resolve the dispute and prayed for a short adjournment. On the next date of hearing, vide order dated 01.04.2014 the defendants were proceeded ex-parte as the defendants did not give any proposal for settling the matter despite the order dated 13.01.2014.

2. The present suit relates to the plaintiff's registered trade mark AQUAFINA, including packaging/writing style/logo and the illegal adoption and use by defendants of a virtually identical trademark/trade dress/label/logo form AQUAFIZZA for identical products i.e. packaged drinking water.

3. It is the contention of the plaintiff that plaintiff no.1 is a corporation existing under the laws of North Carolina, United States of America. Plaintiff

no.2 is a company incorporated under the laws of India. It is stated that plaintiff no.2 is a fully owned subsidiary of plaintiff no.1.

4. It is the contention of the plaintiffs that they are the world renowned manufacturers and sellers of beverages under the trademarks Pepsi, Mirinda, 7Up and Mountain Dew. The plaintiffs contend that they are largest manufacturers and sellers of snack foods as well. It is the contention of the plaintiffs that one of the leading businesses of the plaintiff is the manufacture and sale of packaged drinking water under the trademark/name/logo/label/package/writing style AQUAFINA.

5. It is contended by the plaintiffs that the mark AQUAFINA is a unique word coined and adopted by the plaintiffs in 1994 and has been exclusively used by them since then. It is further contended that it is an invented word with no obvious meaning and is distinctive of their products.

6. The plaintiffs contend that they launched bottled water under the trade mark/logo/package AQUAFINA in India in 1999. It is stated that in India the bottling plant for AQUAFINA has been set up in Raigarh District of Maharashtra with an investment of over Rs.5 crores. It is contended that since its launch the plaintiffs have promoted the brand AQUAFINA.

7. It is the contention of the plaintiffs that in India the trademark/logo/label AQUAFINA, in the unique writing style, font and label is registered in class 32 first on 29.04.1997. It is also contended that the plaintiff no.1 also owns the trademark AQUAFINE dated 30.03.2003 in class 32. It is contended that AQUAFINA as used by the plaintiffs for packaged drinking water is highly distinctive and is identified solely with the plaintiffs. It is stated that the label has a blue coloured background with distinctive artistic device wedged between

the first and last letters 'A' of the word AQUAFINA. It is further contended that the said label was created for and on behalf of the plaintiffs and issued by them all over the world. It is also contended that under section 17 of the Copyright Act all rights in the label are owned by the plaintiffs as the said label is distinctive and is an original artistic work under section 2(c) of the Copyright Act.

8. It is the contention of the plaintiffs that the total gross revenue for the year 2011-2012 from sales of bottled AQUAFINA manufactured by the plaintiffs for the cases sold to retail outlets are in excess of Rs.500 crores. It is further contended that in 2012 till July the plaintiffs expended an amount of approximately Rs.2.8 multi million in advertising its product under the trade name AQUAFINA.

9. It is contended that the plaintiffs also operate the website 'www.aquafina.com' and through the said website a large number of promotions have been launched to promote the AQUAFINA brand. It is contended that the AQUAFINA brand is marketed and sold all over the country through a vast business network resulting in widespread consumer recognition and is therefore considered to be a 'well-known mark'.

10. It is contended by the plaintiffs that defendant no.1 is a proprietorship concern having its office in Ernakulam, Kerala involved in the marketing of the impugned product AQUAFIZZA. It is further contended that Defendant no.2 is involved in the processing and packaging of the impugned product and defendant no.3 is the sole proprietor of Defendant no. 1 and 2 herein.

11. It is the contention of the plaintiff that the adoption of a virtually identical trademark/dress/packaging/writing style AQUAFIZZA by the

defendants as that of the plaintiff's product AQUAFINA is illegal and unlawful. It is contended that such an adoption is a deliberate attempt to confuse consumers and establish a connection with the plaintiffs where none exists.

12. It is contended that on perusal of the defendant's product, it came to light that the defendants have applied to the Trade Marks Authority seeking registration of the entire label mark AQUAFIZZA. It is further contended that an online search of the Trade Mark Registry database revealed that defendants have on 26.11.2012 applied for registration of the label mark in class 32 claiming user since 23.06.2012. It is contended that as claimed by the defendants in their Trade Mark application, they are clearly the subsequent adopters of the impugned mark and such adoption is tainted with malafide intentions to cash in on the reputation and goodwill of the plaintiffs well known trademark AQUAFINA. It is further contended that the manner in which the defendants have depicted the word AQUAFIZZA i.e. by elongating the first and last 'A' in the mark AQUAFIZZA alongwith the representation of wedges placed above the word AQUAFIZZA is identical to the label AQUAFINA of the plaintiffs. The word AQUAFIZZA is also written in an identical script, font and style.

13. It is contended that as the plaintiff are registered owners of the mark/logo/label AQUAFINA and AQUAFINE and thus have exclusive right to use the said mark, therefore, the use of the impugned mark by the defendants result in infringement and passing off and violate the rights of the plaintiff in the registered trademark AQUAFINA.

14. Ms. Shruti Kakar, GM-Legal in the plaintiff no.2 company, has led

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evidence on behalf of the plaintiffs as PW1/A. She has stated that the plaintiffs are world renowned manufacturers and sellers of beverages and snack foods. She states that AQUAFINA, the trade name which is used for their packaged drinking water is a coined word used by the plaintiff since 1994 and the product under the trademark AQUAFINA was launched in India in 1999. Coloured printout of the AQUAFINA product label are placed on record as **Ex.PW1/3**. She states that the plaintiffs have applied for the registration of AQUAFINA in various countries. Printouts of Registration Certificates and their current status have been placed on record as **Ex.PW1/5**. A list of world registrations of plaintiff no.1 for AQUAFINA have been proved and placed on record as **Ex.PW1/6**. She further states that the AQUAFINA label used for packaged drinking water is distinctive and all rights in the label are owned by the plaintiffs under section 17 of the Copyright Act. The copies of publicity material are proved and placed on record as **Ex.PW1/11**. Copies of various press clippings, internet printouts of online articles, newspaper records of AQUAFINA are proved and placed on record as **Ex.PW1/12**. She states that the defendants are engaged in manufacturing and marketing packaged drinking water and are trading under the impugned mark AQUAFIZZA. Copy of product label of the impugned mark AQUAFIZZA is placed on record as **Ex.PW1/4**. It is further stated in the affidavit that the adoption of the mark/logo/label by the defendants is unlawful due to the similarity with the well known mark of the plaintiff AQUAFINA. It is stated that the defendants are claiming user since 23.06.2012. It is stated that the defendants are infringing the rights of the plaintiff vested in the AQUAFINA label and it is a deliberate attempt by them to benefit monetarily by illegally passing off as

plaintiff's product.

15. In view of the averments made in the plaint and the un-rebutted evidence filed by the plaintiffs, the plaintiffs has established that it is a registered proprietor of the said trade mark/name/logo/label AQUAFINA in class 32, thus they have a statutory right to the exclusive use of the same. The mark AQUAFIZZA used by the defendants is structurally, visually and phonetically identical to the registered trade mark of the plaintiff AQUAFINA. There is a clear violation of the rights of the plaintiff. It is also clear that the plaintiff's are prior user of their mark i.e. since 1994 and defendants claim user since 23.06.2012. The act of the defendants lacks bonafide. The goods are sold from the same counter and sold under the deceptively similar trade mark will also lead to passing off the goods of defendants as that of the plaintiff.

16. Learned counsel for the plaintiff has submitted that he does not press the relief for rendition of account of profits.

17. Accordingly, a decree of permanent injunction is passed in favour of the plaintiffs and against the defendants restraining the defendants from selling, advertising, dealing or manufacturing with the impugned product under the trademark/logo/label AQUAFIZZA or any other trademark that may be deceptively similar with the trade mark AQUAFINA of the plaintiff.

18. The plaintiff shall be entitled to costs of the suit. The cost will include the expenses incurred by the plaintiff in taking the local commissioner to the site of the defendant. Suit stands disposed of accordingly.

JAYANT NATH, J

JANUARY 07, 2015

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