

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

% *Judgment Reserved on : January 27, 2016*
Judgment Delivered on : February 01, 2016

+ **FAO (OS) 247/2014**

DEVAGIRI FARMS PVT LTD.Appellant
Represented by: Mr.Satyajit Sarna, Advocate with
Mr.Anirudh Soman, Advocate

versus

MR SANJAY KAPUR & ANRRespondents
Represented by: Mr.Ashwin Kumar D.S., Advocate
with Ms.Suhasini Raina, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Issue concerns a trade dress. The respondents, Sanjay Kapur and Naina Kapur, hereinafter referred to as Kapurs sell tea under the trade name 'San-Cha'. Kapurs pack the tea which they sell in *a soft paper packet shaped as a rectangular cuboid; the package being slipped into a fabric sleeve and tied at the mouth by a traditional drawstring/dori*. The grievance is to the fabric sleeve(s) used by the appellant.

2. In a suit seeking damages and permanent injunction, prayer for an interim injunction pending disposal of the suit has been granted in favour of Kapurs and against the appellant. IA No.5961/2012 filed under Order 39 Rule 1 & 2 of the Code of Civil Procedure; and since an ex-parte ad-interim injunction was granted against the appellants, IA No.7602/2012

filed under Order 39 Rule 4 of the Code of Civil Procedure by the appellant have been disposed of; the former being allowed and the latter dismissed vide impugned order dated February 28, 2014.

3. The appellant sells tea under the trademark BAGAN. The Kapurs under the trade name San-Cha.

4. The Kapurs claim to be selling their tea for the last 30 years and the sales of Sanjay and Naina are as under:-

<u>Sanjay</u>		<u>Naina</u>	
Fin. Years	Turnover (Rupees)	Fin. Years	Turnover (Rupees)
1991-2000	6,71,81,832/-	1996-2000	1,20,65,464/-
2001-2005	6,04,72,436/-	2001-2005	2,41,75,856/-
2005-2006	1,26,61,909/-	2005-2006	37,36,226/-
2007-2008	2,98,04,747/-	2006-2007	44,08,309/-
2008-2009	3,90,75,788/-	2007-2008	43,95,151/-
2009-2010	5,14,20,287/-	2008-2009	57,06,480/-
2010-2011	5,49,68,752/-	2009-2010	54,91,899/-

5. Since words may sometimes mislead, and the eye may be a better medium to convey a thought, we straightway reproduce the trade dress in which the Kapurs and the appellant pack the tea which they sell. The next four pages would be the coloured print out of the packed product. The packet at the top is that of Kapurs and the one immediately beneath is that of the appellant.









6. From a perusal of the trade dress adopted by the appellant, which date of adoption is concededly years after the Kapurs did so, it is apparent that the appellant is using the same shade of Maroon and Blue colour in the backdrop with a floral design as are the Kapurs; albeit the floral print being different, but with same golden yellow colour. The third shade, being a Green colour, forming the backdrop hue of the third trade dress is also with a floral design; albeit the floral print being different in design as also colour. For the fourth colour used, there is complete identity inasmuch as the same shade of Red without any floral design is used by the appellant.

7. Tested on the well recognized touchstone of the principle of deception, it would be apparent to the naked eye that any purchaser of tea with the usual imperfect recollection to which all humans are prone to, would be deceived when she comes across the tea packaged by the appellant.

8. It is the overall get up and similarity which has to be seen and not the minor variations because it is similarity which strikes and not the dissimilarities which distinguish when an ordinary person recollects an object seen in the past.

9. In a well reasoned judgment spanning 18 pages the learned Single Judge has captured the sales effected by the Kapurs, the advertisements issued by them to market their product. Orders placed on them in the last 30 years showing tea manufactured by them acquiring such reputation that when the Prime Minister of India visited Japan in the year 1986, the Ministry of External Affairs placed an order for the tea manufactured by the Kapurs. The learned Single Judge has noted the law declared by the Supreme Court in the decisions reported as 2007 (6) SCC 1 Heinz Italia & Anr. vs. Dabur India Ltd.; 2001 (5) SCC 753 Cadila Healthcare

Limited vs. Cadila Pharmaceuticals Limited; 1972 (1) SCC 618 Parle Products Pvt. Ltd. vs. J.P. and Co. Mysore; 2011 (4) MhLj 842 Gorbatschow Wodka KG. vs. John Distilleries Ltd.; 1990 (RPC) 341 Reckitt & Colman Products Ltd. vs. Borden Inc. & Ors.; 1998 (74) DLT 715 Baker Hughes Ltd. & Anr. vs. Hiroo Khushalani & Anr.; 2004 (12) SCC 628 Baker Hughes Ltd. & Anr. vs. Hiroo Khushalani & Anr.; 2002 (3) SCC 65 Laxmikant V. Patel vs. Chetanbhai Shah & Anr.; 2008 (38) PTC 49 (Del) (DB) Pankaj Goel Vs. Dabur India Ltd.; AIR 2004 SC 3540 M/s.Satyam Infoway Ltd. vs. M/s.Sifynet Solutions Pvt. Ltd.; and 2002 (24) PTC 355 (Del) Info Edge (India) Pvt. Ltd. & Anr. vs. Shailesh Gupta & Anr. to opine that it is the overall effect of a colour scheme which has to be the focus of attention in a dispute concerning a packaging material in which the product is sold.

10. The learned Single Judge has distinguished the judgment relied upon by the appellant reported as 62 (1996) DLT 79 Kellogg Company Vs. Pravin Kumar Bhadabhai & Anr., to deal with the argument of the appellant that where a trademark is prominently displayed on a packaging material there can be no deception. The reason given by the learned Single Judge, correctly so, is that in said case the decision mainly rested on the issue of deception with reference to the overall get up of the trade dress, noting the prominence in which the trademarks were displayed on the trade dress.

11. The argument in the appeal by learned counsel for the appellant was that the trade dress sought to be protected by Kapurs is functional and hence not capable of protection. The trademarks are prominently displayed by Kapurs as also the appellant and thus there cannot be any deception. The cause of action was not one of infringement of the

trademark. The class of buyers was the elite, educated and widely exposed to the ways of the world.

12. We fail to understand as to how can the plaint presented by Kapurs be treated as claim being founded on the shape of the packet. The reference to the shape of the two packets in which the tea is sold by Kapurs and the appellant forms the backdrop of the plea that by using the fabric sleeve on identical rectangular shaped cuboid the deception gets aggravated. Commonsense guides us that if two persons sell their product in same size rectangular shaped cuboid, nobody can urge that there is deception, but where the add-on grievance is to fabric sleeve used over the rectangular shaped cuboid, deception may occur if the overall similarity in the get up is of the kind that an ordinary purchaser, with the usual imperfect recollection is likely to be deceived. There is no case law cited, and we know of none that merely because a trademark is displayed on the packaging material, notwithstanding a striking similarity in the packaging material there would be no likelihood of deception. Whilst it may be true that in issues concerning trade dress the Courts have considered the display of a trademark, but it is only one of the various factors put in the weighing basket. It needs no argument to bring home the point reached by the learned Single Judge that the overall get up of the trade dress, even taking into account the display of the trademarks, is likely to cause deception; save and except to look at the packaging of the two competing products; and this is the reason why we have reproduced the coloured printout of the packaged product.

13. So striking is the theft by the appellant of the packaging used by the Kapurs that even an elite, educated, widely exposed and travelled person is likely to be deceived.

14. As held in the celebrated decision reported as (1991) 1 PTC 1 Wander Ltd. & Anr. Vs. Antox India Pvt. Ltd. the appellate reconsideration concerning an injunction order passed by a learned Single Judge is to see whether the learned Single Judge has applied the correct principles of law to the stated facts. We find that the learned Single Judge has correctly applied the legal principles to the stated facts.

15. The appeal is dismissed with costs in sum of ₹25,000/- against the appellant and in favour of the Kapurs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 01, 2016
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