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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 7th December, 2016

Pronounced on: 24th December, 2016

+ **CS (OS) 2399/2010**

MOTHER DAIRY FRUIT & VEGETABLE PVT. LTD

..... Plaintiff

Through: Mr. Nischal Anand, Advocate with
Mr. Aman Taneja, Advocate

Versus

S.K. RAHEEM & ANR

..... Defendants

Through: *Ex-parte*

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

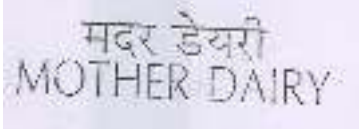
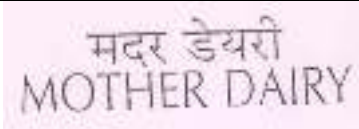
JUDGMENT

1. This suit was instituted in November, 2010 seeking the reliefs of permanent injunction, damages, rendition of accounts, delivery up, *etc.* by the plaintiff company it being a wholly owned subsidiary of National Dairy Development Board (NDDB), a body corporate constituted under the National Dairy Development Board Act, 1987, having its registered office at “Mother Dairy”, Patparganj, Delhi-110 092, within the jurisdiction of this court.

2. The claim in the suit is founded, *inter alia*, on the trademark “MOTHER DAIRY”, registered in the name of the plaintiff for sale of its various products in the nature of liquid milk, *dahi* (curd), ice

creams, dairy whitener and butter etc., it having been originally adopted in 1974 and registered in different classes as under:-

TRADE/LABEL MARK	REG NO	CLASS
	1307520	29 & 30
	1308506	30
	1308507	30
	1308508	30

	1308509	30
	1308510	30
	947721	30
	956470	29
	956474	30
	1160157	30

MOTHER DAIRY - SUNDAY MAGIC - JAMAICAN ALMOND FUDGE	1196582	29
MOTHER DAIRY - SUNDAY MAGIC HAZELNUT SWIRL	1196584	29
MOTHER DAIRY- SUNDAE MAGIC COFFEE EXCESS	1196585	29
MOTHER DAIRY - SUNDAE MAGIC SHAHI MEVA MALAI	1196586	29
MOTHER DAIRY - SUNDAE MAGIC COFFEE EXCESS	1196587	30
MOTHER DAIRY - SUNDAE MAGIC HAZELNUT SWIRL	1196588	30
MOTHER DAIRY - SUNDAE MAGIC HAZELNUT	1196588	30

3. The plaintiff also relies on its trademark/logo which has been in use for marketing its products since 2003, prominently displayed and visible on all its goods serving to act as a corporate device/symbol, created on its behalf by a consultant for remuneration, the plaintiff having expended considerable resources towards the promotion and advertisement of its goods thereunder, it being the first owner of the

copyright in the artistic work of the “MOTHER DAIRY (Blue Logo)” as under:-



4. As per the averments made in the plaint, the plaintiff company was financed by NDDB for manufacturing and marketing of milk and milk products under the Operation Flood programme of the Central Government and was commissioned in the year 1974 and has emerged as a brand at the national level through its sales and distribution networks, sourcing significant part of its requirements of liquid milk from dairy cooperatives, its constant endeavor being to ensure that milk producers and farmers regularly and continuously receive market prices for their products offered at competitive prices and to uphold institutional structures that empower milk producers and farmers through processes that are equitable.

5. It claimed that the processing of milk at the facilities of the plaintiff is controlled by process automation whereby state-of-the-art microprocessor technology is adopted to integrate and completely automate all functions of the milk processing areas thereby ensuring high product quality, reliability and safety, it being an IS/ISO-9002, IS-15000 HACCP and IS-14001 EMS certified organization, its Quality Assurance Laboratory (QAL) having been certified by

National Accreditation Board for Testing and Calibration Laboratory (NABL) of the Department of Science and Technology, Government of India. The network for distribution and sale of the plaintiff is described in the suit as inclusive of around 14,000 retail outlets and 845 exclusive outlets, its market share in the branded sector in Delhi alone being to the extent of 66%.

6. The plaintiff claimed that for purposes of variants of its popular milk products – such as full cream milk, standardized milk, toned milk, doubled toned milk, skimmed milk and cow milk, it uses unique packaging with respect of the wave design that includes the afore-quoted logo.

7. The cause of action for the present suit against the defendants was claimed on the averments that in June, 2010, the plaintiff came across certain products sold and offered for sale or marketed by the defendants bearing the mark “VINAY MILK” and label/logo and packaging/trade dress which bears a striking similarity to the trade mark/logo and trade dress/packaging of the plaintiff’s products. The said similarity, described in the plaint to be confusing and deceptive is illustrated by the scanned images of the two marks as under:-

MOTHER DAIRY’s LOGO	VINAY MILK’s LOGO
	

8. It is the plaintiff's case that defendant no.1 is engaged in manufacture, sale and distribution of the impugned products under identical or deceptively similar trade mark/label/logo in packaging/trade dress that is blatant rip off of the one of the plaintiff, having a manufacturing facility in the locality in the city of Hyderabad while defendant no.2 appears to be an agency engaged for marketing the said impugned products. The plaintiff, prior to institution to a suit had sent a 'cease and desist' notice dated 13.07.2010 to the defendants informing them about the plaintiff's right to the trade marks/logo and about its packaging/trade dress requiring the infringing activity to be stopped. The plaintiff stated that the first defendant sent a vague reply dated 03.08.2010 expressing willingness to change the packaging of their products but vaguely denying the case of the plaintiff about the deceptive similarity. This was followed by a fresh communication by the plaintiff dated 21.08.2010 reiterating the claim to the rights under the registered trade mark and the copy right to the logo and the packaging/trade dress to which the defendants failed to give any response.

9. The plaintiff instituted the suit, *inter alia*, alleging that the impugned acts of the defendants in copying and slavishly reproducing the trademark/logo/label and packaging of the plaintiff so intended to harm prejudice to the plaintiff business, rights and interests, amounting to tarnishing and dilution of its trade mark, it being an attempt to pass off all the goods of the defendants as those of the plaintiff, have continued and been persisted with.

10. Thus, the plaintiff prayed for reliefs in the nature of permanent injunction to restrain the defendants, their partners or proprietors, their principal officers, servants and agents from manufacturing, selling, offering for sale or distribution, advertising, directly or indirectly dealing in milk products or goods of any description bearing or using on its product packaging / label the Mother Dairy trademark/label or any mark/label that is identical to the plaintiff's trademark or any other mark/label which is deceptively similar to the plaintiff's trademark/label amounting to infringement of registered trademarks and/or in any manner whatsoever doing any other thing as may be likely to cause confusion or deception amounting to passing off their products and business as and for those of the plaintiff; and from infringing the plaintiff's copyright in the artistic work in its Mother Dairy logo including the artistic work in its product packaging/trade dress by reproducing the said artworks in any manner for its products amounting to infringement of copyright or from using in any manner, the impugned mark or any other deceptively similar mark or any identical mark as that of the plaintiff's Mother Dairy trademark/label including its logo/packaging so as to take unfair advantage of or to the detriment of the distinctive character and reputation of the plaintiff's registered and well known trademark including but not limited milk products and goods of any description, so as to cause dilution or tarnishment of the plaintiff's trademark and/or causing initial interest of confusion. The plaintiff also prayed for a direction to the defendants for delivery up of all printed matter, including packaging, stationery, dyes, blocks, cartons, labels, etc. bearing the impugned

trademark and packaging as mentioned in the plaint to the authorized representative of the plaintiff for the purposes of destruction/erasure, and further for rendition of accounts of profits made by the defendants on account of use of the impugned trademark besides a decree for the amount so found due along with damages in the sum of Rs.20,00,100/-, in addition to costs of the suit.

11. By order dated 26.11.2010 while issuing summons on the plaint to the defendants, an *ad interim ex parte* injunction was granted on the application (IA No.15899/2010) under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908 (CPC) in the following terms:-

“.....the defendants are hereby restrained from copying the plaintiff's logo Mother Dairy with the distinctive blue and white colour combination and also restrained from marketing any packaging identical or similar to that of the plaintiff, till the next date of hearing. It is clarified that the defendants are free to otherwise market their products under the VINAY MILK logo but in no manner representing similarity with the plaintiff's mark. ...”

12. The proceedings recorded on the file of this civil suit indicate that defendant no.1 was duly served and had even put in appearance through counsel on 08.02.2011. In spite of the opportunities granted, no written statement was filed on his behalf. The subsequent proceedings reveal that the counsel engaged by defendant no.1 pleaded no instructions and sought to be discharged of his responsibility. In spite of the court notice, defendant no.1 would not appear. Thus, while the counsel who was engaged by him was discharged by proceedings recorded on 10.04.2013, the defendant no.1 was set *ex parte* by proceedings dated 28.02.2015. Defendant no.2

also failed to appear in spite of service and, thus, was proceeded *ex parte* vide order dated 28.07.2014.

13. By order dated 14.05.2015, the plaintiff was thereafter called upon to prove its case by adducing *ex parte* evidence.

14. The plaintiff examined its solitary witness Mr. Naveen Nischal Rastogi (PW-1), Deputy General Manager (Legal), on the strength of his affidavit (Ex.PW-1/A). By the said affidavit in evidence, the plaintiff's witness has proved the averments in the plaint, to which there is no contest. In these circumstances, there is no reason why the case of the plaintiff should be disbelieved. It may be noted here that the plaintiff has proved that it is the owner of the trade mark "MOTHER DAIRY" it being registered in its favour (vide Ex. PW1/9 to 26), and also has secured the copyright registration of the blue



trademark/logo, *i.e.*, vide Ex. PW-1/28). The evidence establishes that the "MOTHER DAIRY (Blue logo)" even without the text therein has acquired distinctiveness to establish a connection with the products of the plaintiff in the minds of the consumers. Therefore, along with the trademark "MOTHER DAIRY", the "MOTHER DAIRY (Blue Logo)" too has acquired the status of a "well known" trademark.

15. As noticed earlier, the afore-mentioned trademark "MOTHER DAIRY", and the "MOTHER DAIRY (Blue Logo)" are used by the plaintiff on the packaging of its diverse range of products, promotional

material. The logo/mark adopted by the defendants, it being



(vide Ex.PW-1/37) is clearly deceptively and confusingly similar to the logo/mark used by the plaintiff on its products and, thus, infringes the rights of the latter. The possibility of confusion being caused by the defendants' adoption of the impugned mark which is deceptively similar to the plaintiff's MOTHER DAIRY (blue logo) and the trade-dress used for its packaging is very high, *inter alia*, because the defendant is selling identical products under a deceptively similar trademark and packaging, through the same trade channels.

16. The plaintiff has, thus, proved that the defendants by their adoption and use of the impugned mark and the packaging/trade dress have intended to pass off their goods as those of the plaintiff in clear violation of the plaintiff's common law as well as statutory rights in the MOTHER DAIRY (blue logo) trademark and the trade dress used for its milk products resulting in harm and prejudice to the plaintiff's business, rights and interests apart, from amounting to tarnishment and dilution of its reputation and goodwill entailing for it huge losses and damages.

17. Thus, a case for permanent injunction against copying or infringing of plaintiff's trademark and logo "Mother Dairy" with the

distinctive blue and white colour combination and packaging identical or similar to that of the plaintiff has been brought home against the defendants. Permanent injunction to that effect is, thus, granted in favour of the plaintiff and against the defendants. It is, however, clarified that the defendants are not enjoined to otherwise market their products under the trade name “VINAY MILK”, the restraint order being only against user of logo having similarity to the one of the plaintiff’s mark.

18. As noted above, the defendants did not appear to contest the suit in spite of due notice. The dis-interest showed by the defendants in defending the impugned acts in these proceedings was to the extent that even written statement was not filed by either of them. No accounts were rendered voluntarily by the defendants. The plaintiff did not take any steps to have the premises of the defendants inspected to gather the printed matter including packaging, stationery, dyes, blocks, etc. or have the same inventorized or seized or to summon the account books of the defendants at the stage of trial. It rather relied on the affidavit of its solitary witness (PW-1) whereby there is no material submitted on the basis of which existence of such infringing material could be confirmed or the profits that might have been unlawfully earned by the defendants from the sale or marketing of the infringing products could be computed. Thus, there is nothing before the court on which the losses suffered by the plaintiff could be assessed or damages to that extent granted. A vague declaration by PW-1 in (para 46 of) his affidavit (Ex.PW-1/A) that the plaintiffs have suffered damages to the tune of at least Rs.20 lacs is not supported by

any material. In these circumstances, no relief in the nature of direction for delivery up, payment of the profits made by the defendants by use of the infringing mark/logo/trade dress or for damages can be granted.

19. The suit is partly decreed in above terms with costs in favour of the plaintiff.

20. Decree sheet be drawn accordingly.

DECEMBER 24, 2016

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(R.K. GAUBA)
JUDGE