

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2018

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

C.S.No.249 of 2015

and

A.Nos.2380 of 2015 and O.A.Nos.341 and 342 of 2015

1.DART Industries Inc.,
(A Corporation founded under the Laws
of Delaware, U.S.A.,)
14901, South Orange Blossom Trail,
Orlando, Florida 32837, U.S.A.,
rep. by its constituted attorney
Taylor J.Ross

2.Tupperware India Pvt. Ltd.,
1A, Udyog Vihar, Sector 18,
Gurgaon - 122 001, Haryana
rep. by its Authorised Signatory
Vandita Batta ... Plaintiffs
Vs

1.Modi DP Plastics,
O.No.19, N.No.39,
Narayana Mudali Street,
Sowcarpet, Shop No.4,
PRC Complex, Chennai - 1
and also Factory at:
No.43, T.H. Road,
Kodungaiyur, Chennai - 118.

2.M/s.Diamond Sales,
No.41, Narayana Mudali Street
(facing Kasichetty Street),
Chennai - 79.

3.M/s.Balamurugan Plastics,
No.1/512, South Nizhar Salai,
Muthamizh Nagar, Chennai - 110. ... Defendants

This Civil Suit is preferred, under Order IV Rule 1 O.S. Rules and Order VII Rules 1 and 2 of C.P.C. r/w Section 22 of The Designs Act, 2000 praying for

(a)A Permanent injunction restraining the defendants, their proprietor or partners or directors as the case may be, their sister concerns, assigns in business, distributors, stockiest, dealers and agents, from manufacturing, selling, offering for sale, advertising, directly or indirectly in any manner including through websites or other online shopping portals dealing in bottles in any size including 500ml, 750ml and 1l bearing the impugned designs or any other designs as may be fraudulent or obvious imitation of the plaintiffs' Designs amounting to infringement of plaintiffs'

Design Registration Nos.221424 and 221425 in any manner whatsoever;

(b)A permanent injunction restraining the defendants, their proprietors or partners or directors as the case may be, their sister concerns, assigns in business, distributors, stockiest, dealers and agents, from manufacturing, selling, offering for sale, advertising, directly or indirectly in any manner including through websites or other online shopping portals dealing in bottles and caps in any size including 500ml, 750ml and 1l bearing the impugned get up or designs, trade dress or any other get up, designs or trade dress as may be fraudulent or obvious limitation of the plaintiffs' AQUASAFE BOTTLE get up, designs or trade dress amounting to passing off of the defendants' goods for those of the plaintiffs in any manner whatsoever;

(c)A decree for delivery up of the infringing goods of the defendants including their moulds along with mould drawings thereto, dyes, blocks, plates and engraving printed materials such as brochures or other promotional material or any other material bearing or depicting the infringing impugned designs, to an authorised representative of the plaintiffs for destruction;

(d)An order for rendition of accounts of profits illegally earned by the defendants and a decree for an amount so found due or in the alternative;

(e)The defendants be ordered to pay to the plaintiffs a sum of Rs.20,00,000.00 (Rupees Twenty lakhs only) towards compensatory and punitive damages towards the illegal activities by the defendants;

(f)An order for costs of the proceedings; and

(g)Any other or further orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case may also be passed.

For Plaintiffs : Mr.Hemant Singh

For Defendants : Mr.R.Veeramani

JUDGMENT

There are two plaintiffs and three defendants in the suit.

2.Mr.Hemant Singh, learned counsel on record on behalf of the two plaintiffs and Mr.R.Veeramani, learned counsel on record for defendants 1 and 2 are before this Commercial Division.

3.Learned counsel for plaintiffs i.e., counsel on record has today made an endorsement in the suit file, giving up the third defendant. The endorsement reads as follows:

"It is proposed that this Hon'ble Court be pleased to permit the plaintiff to give up the 3rd defendant from the array of parties in the present suit and pass such further orders as this Hon'ble Court deems fit."

4.In the light of the aforesaid endorsement and reiteration of the same in the hearing, third defendant will stand given up.

5. Therefore, all parties to this list are represented by counsel and they are before this Commercial Division.

6. Read this in conjunction with and in continuation of earlier proceedings of this Commercial Division dated 14.09.2018, which reads as follows:

There are two plaintiffs and three defendants in this suit. Mr. Hemant Singh, learned counsel representing counsel on record for plaintiffs and Mr. R. Veeramani, learned counsel on record for Defendants 1 and 2 are before this Commercial Division. Defendant No. 3 has been duly served with suit summons on 10.07.2015 itself, but has not chosen to enter appearance through a counsel or come before this Commercial Division. This suit pertains to complaint of infringement of two registered designs of the plaintiff and passing off qua design registrations, which are applied on plastic bottles and caps. To be noted, registration of the two designs are in shape and configuration.

2. Mr. Veeramani, learned counsel for Defendants 1 and 2, on instructions, submits that the defendants do not intend to manufacture, market or offer for sale the alleged offending product. In other words, learned counsel submits, on instructions, that defendants 1 and 2 would change their mould.

3. In the aforesaid scenario, learned counsel for Defendants 1 and 2 seeks time to file an affidavit from defendants 1 and 2 in this regard.

List this matter on 08.10.2018

7. Pursuant to the aforesaid earlier proceedings of this Commercial Division, learned counsel for defendants 1 and 2 has filed an affidavit dated 08.10.2018 and the same reads as follows:

"I, Dipesh N. Modi, Son of Navnitrai S. Modi, Hindu, aged about 42 years, having office at No. 43, T.H. Road, Kodungaiyur, Chennai 600 118, do hereby solemnly affirm and sincerely state as follows:-

1. I respectfully state that I am the 1st defendant in the civil suit and am well acquainted with the facts of the case. The 2nd defendant is my dealer. I am swearing this affidavit on his behalf, as well.

2. The above suit has been filed by the applicants/plaintiffs complaining of alleged infringement of their Design bearing Registration No. 221424 & 221425 with regard to BOTTLE & CAP respectively, called "Aquasafe Bottle" and trade mark relating to its get-up. I have filed a detailed counter to the above applications denying various allegations and contentions raised therein.

3. However, pursuant to the ex parte interim orders passed in the above applications, including for seizure of moulds, dyes, blocks as well as goods etc., by the advocate commissioner, a complete destruction has been caused to my business. Resultantly, I have no wherewithal to fight the above legal battle for years.

4. Therefore, in order to avoid and shorten the circuitous litigation and purchase peace by burying the difference, I have come forward to this amicable course, expecting reciprocal agreement from the applicants/plaintiffs, as well. In this direction, I am filing this affidavit.

5. I undertake that I shall not initiate the subject matter of applicant/plaintiff's design bearing Registration No. 221424 & 221425 with regard to BOTTLE & CAP respectively, called Aquasafe Bottle and their trade mark relating to its get-up in any manner.

6. I therefore pray that this Hon'ble Court be pleased to accept this affidavit of undertaking and dispose of the suit by recording the same, without granting any relief with regard to (d), (e) & (f) and pass such further or other orders and thereby render justice."

8. A perusal of the aforesaid affidavit will reveal that the deponent is one Dipesh N. Modi. It is submitted by the learned counsel for defendants 1 and 2, on instructions, that he is carrying on

business in the name and style 'MODI DP PLASTICS' as its sole proprietor. Learned counsel also submits that the second defendant is first defendant's dealer and the aforesaid affidavit dated 08.10.2018 has been sworn to for and on behalf of the second defendant also. It is further pointed out that the factual position about the deponent of the aforesaid affidavit carrying on business in the name and style of 'MODI DP PLASTICS' i.e., first defendant has been adverted to in counter affidavit dated 08.09.2015 filed in A.No.2379 of 2015, O.A.Nos.341 and 342 of 2015.

9.Be that as it may, in the light of the aforesaid affidavit dated 08.10.2018, it is pointed out the deponent has no real prospect of successfully defending the claim and there is no other compelling reason as to why the claim should not be disposed of before recording oral evidence. Both learned counsel draw my attention to order XIII A of amended 'The Code of Civil Procedure, 1908 ('CPC' for brevity) as amended by The Commercial Courts Act, 2015 ('said Act' for brevity).

10.Referring to the aforesaid Order XIII A of amended CPC as amended by said Act, both learned counsel submit that a decree may be passed in the instant suit before recording of oral evidence, more so, in the light of the aforesaid trajectory which the hearings have taken.

11.In the light of the aforesaid affidavit dated 08.10.2018 filed by defendants 1 and 2 (to be noted there are only two defendants in the suit claim), learned counsel for plaintiffs, on instructions, submits that prayer limbs (d) to (g) contained in sub paragraphs (d) to (g) of paragraph 33 of the plaint which is the prayer paragraph are given up. Saying so, learned counsel prays that the suit may please be decreed qua prayer limbs (a) to (c) contained in sub paragraphs (a) to (c) of paragraph 33 of the plaint, which is the prayer paragraph.

12.In the light of the aforesaid submission, I deem it appropriate to extract the entire prayer paragraph in the plaint which reads as follows:

Prayer:

33.The Plaintiff therefore prays that this Hon'ble Court may pleased to grant a judgment and decree on the following terms:-

(a)A Permanent injunction restraining the defendants, their proprietor or partners or directors as the case may be, their sister concerns, assigns in business, distributors, stockiest, dealers and agents, from manufacturing, selling, offering for sale, advertising, directly or indirectly in any manner including through websites or other online shopping portals dealing in bottles in any size including 500ml, 750ml and 1l bearing the impugned designs or any other designs as may be fraudulent or obvious imitation of the plaintiffs' Designs amounting to infringement of plaintiffs' Design Registration Nos.221424 and 221425 in any manner whatsoever;

(b)A permanent injunction restraining the defendants, their proprietors or partners or directors as the case may be, their sister concerns, assigns in business, distributors, stockiest, dealers and agents, from manufacturing, selling, offering for sale, advertising, directly or indirectly in any manner including through websites or other online shopping portals dealing in bottles and caps in any size including 500ml, 750ml and 1l bearing the impugned get up or designs, trade dress or any other get up, designs or trade dress as may be fraudulent or obvious limitation of the plaintiffs' AQUASAFE BOTTLE get up, designs or trade dress amounting to passing off of the defendants' goods for those of the plaintiffs in any manner whatsoever;

(c)A decree for delivery up of the infringing goods of the defendants including their moulds along with mould drawings thereto, dyes, blocks, plates and engraving printed materials such as brochures or other promotional material or any other material bearing or depicting the infringing

impugned designs, to an authorised representative of the plaintiffs for destruction;

(d)An order for rendition of accounts of profits illegally earned by the defendants and a decree for an amount so found due or in the alternative;

(e)The defendants be ordered to pay to the plaintiffs a sum of Rs.20,00,000.00 (Rupees Twenty lakhs only) towards compensatory and punitive damages towards the illegal activities by the defendants;

(f)An order for costs of the proceedings; and

(g)Any other or further orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case may also be passed.

13.Learned counsel for defendants agrees to such a course being adopted. Learned counsel for defendants also submits that with regard to limb (c) of the prayer paragraph, the moulds had also been seized by the Advocate Commissioner and they have been kept safely in the defendants' godown. Learned counsel, on instructions, submits that the said moulds would be handed over to the plaintiffs or their duly authorised representative under due acknowledgment within one week from today. This submission is recorded.

14.The narrative supra in short means that this Commercial Division accedes to the common request made in unison by both sides that the main suit itself may please be taken up and be decreed in terms of the sub paragraphs (a), (b) and (c) of the prayer paragraph while sub paragraphs (d) to (g) of the prayer paragraph stand given up by plaintiffs.

15.As there is no other impediment in adopting the aforesaid course, the suit is decreed on above terms. Obviously there will be no order as to costs, in the light of the sub paragraphs (d) to (f) being given up. All interlocutory applications are closed.

08.10.2018

Index:Yes/No

mmi

M.SUNDAR, J.

mmi

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