

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.138 of 2017

1.Mr.A.D.Padmasingh Issac
Trading as Aachi Spices and Foods
Old No.4, New No.181/1,
6th Avenue, Thangam Colony,
Anna Nagar,
Chennai - 600 040.

2.M/s.Aachi Masala Foods (P)Ltd.,
Old No.4, New No.181/1,
6th Avenue, Thangam Colony,
Anna Nagar,
Chennai - 600 040.
Represented by its Director
Mr.Ashwin Pandian

..Plaintiffs

Vs.

Nutriyes Healthcare Pvt Ltd
No 95/2B, Melpakkam,
Thiruverkadu
Chennai - 600 077.

.. Defendant

This Civil Suit is preferred, under Order IV Rule 1 of the Original Side Rules and Order VII, Rule 1 of the CPC read with Sections 54, 55 & 62 of the Copyright Act, 1957, praying to,

a) Granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors or anyone claiming through

them from reproducing by selling, advertising and or offering for sale by using the impugned Copyright Nutriyes Ragi Flour as shown in Document No.2 upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way visually, phonetically or deceptively similar to the Plaintiff's Copyright the picture mark as shown in Document No.1 or in any manner infringing the plaintiff's Copyright as 'AACHI RAGI FLOUR' shown in Document No.1.

b) Granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors, or anyone claiming through them from reproducing by selling, advertising and or offering for sale by using the impugned Copyright Nutriyes Ragi Flour as shown in Document No.2 upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way visually, phonetically or deceptively similar to the Plaintiff's Copyright the picture mark as shown in Document No.1 or in any manner passing off the plaintiff's Copyright as 'AACHI RAGI FLOUR' shown in Document No.1.

c) Directing the Defendant to surrender to the plaintiffs all the ragi flour, packing materials, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials, containing/bearing the impugned Copyright Nutriyes Ragi Flour and other similar in respect of ragi flour or other allied goods.

d) For a preliminary decree in favour of the Plaintiffs, directing the Defendant to render an account of profits made by them by the use of the Copyright Nutriyes Ragi Flour on the goods referred and for a final decree in favour of the Plaintiffs for the amount of the profits found to have been made by the Defendant, after the Defendant have rendered accounts:

e) Directing the Defendant to pay the Plaintiff the costs to the suit,
and;

f) Pass such further or other order, as this Court may deem fit and proper in the circumstances of the case and thus render justice.

For Plaintiff : Ms.Gladys Daniel

For Defendants : Set ex-parte

JUDGMENT

There are two plaintiffs and a lone defendant in this suit.

2. Jurisdiction of this Commercial Division qua this suit was determined on 02.02.2018 and the said proceedings reads as follows:

'Ms.Bhuvaneswari, learned counsel representing counsel on record for the plaintiffs M/s.C.Daneil and Gladys Daniel is before this Commercial Division. The sole defendant has been duly served in the interlocutory applications and full name and address of the sole defendant is shown in the cause list today. I am informed that no counsel has entered appearance on behalf of the sole defendant. Name of the sole defendant has been called out thrice. No response.

2. I have heard the learned counsel for the plaintiffs on jurisdiction of this Commercial Division over this suit.

3. It is her specific submission that this is a suit for alleged infringement of Copyright with regard to a label in a pouch for their product Ragi Flour [uhfp kht[]. Dovetailed is the complaint of product passing off too. Learned counsel submits that in the light of the subject matter of this suit and in the light of the prayers in this suit, sub-section (1) of Section 62 of Copyright Act, 1957 operates. As Section 62(1) of Copyright Act, 1957 operates, this Commercial Division will have jurisdiction to entertain this suit under first proviso to Section 7 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (4 of 2016) (hereinafter referred to as 'Act 4 of 2016' for brevity) is her further say. As this is a suit for alleged infringement of copyright, in the light of Section 62(1) of Copyright Act read with 1st proviso to Section 7 of Act 4 of 2016 'specified value' aspect is of no relevance is also her further say.

4. I have examined the plaint and I am satisfied that the submissions made by the learned counsel for the plaintiffs regarding jurisdiction of this Commercial Division deserve to be accepted. I accept the aforesaid submissions and hold that this Commercial Division shall exercise jurisdiction over this suit in the light of first proviso to Section 7 of Act 4 of 2016. To be noted, this is an expression of intention to exercise jurisdiction by this Commercial Division qua this suit and the jurisdiction is otherwise inherent.'

3. Elaborating on determination of jurisdiction made on 02.02.2018 which has been extracted supra, Ms.Gladys Daniel, learned counsel on record for plaintiffs submitted that this lis qualifies as a 'Commercial

Dispute' under sub-clause (xvii) of Section 2(1)(c) of 'The Commercial Courts Act, 2015' (hereinafter 'said Act' for brevity). Sub-clause (xvii) of Section 2(1)(c) of said Act, reads as follows:

'(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semi-conductor integrated circuits;'

4. This takes us to the trajectory of the suit. As the sole defendant, after being duly served, did not choose to come before this Court and obviously did not complete pleadings, suit was listed in the 'Undefended Board' on 28.11.2018. Proceedings of this Commercial Division on 28.11.2018 reads as follows:

'This suit is listed in the 'UNDEFENDED BOARD' today.

2. There is no representation for sole defendant today also, though the name of the sole defendant together with full/complete address as in the short and long cause titles is shown in the cause list. Name called out aloud thrice. No representation. Sole defendant is set ex-parte.

3. List this matter before learned Additional Master-II on 04.12.2018 for recording ex-parte evidence.

4. Ms.Gladys Daniel, learned counsel for plaintiffs undertakes to have the lone witness on the side of plaintiffs, examined on the said date.

5. Learned Additional Master-II is requested to record ex-parte evidence preferably on the same day and in any event, on or before 07.12.2018. List this suit under the caption 'For Arguments' before this Commercial Division on

12.12.2018.'

5. Pursuant to aforesaid proceedings of this Commercial Division dated 28.11.2018, suit was set down for recording *ex-parte* evidence before learned Additional Master -II on 05.12.2018. One Mr.B.Gnana Sambandam, whom this Commercial Division is informed is Assistant General Manager - L & S with the plaintiffs has deposed as PW.1. This Commercial Division is now informed that 'L & S' stands for 'Legal and Secretarial'.

6. Five documents namely Ex.P1 to Ex.P5 have been marked through PW.1. Post recording evidence of PW.1 and marking of Ex.P1 to Ex.P5, this suit has now been listed before this Commercial Division under the caption 'FOR ARGUMENTS'.

7. Having extracted and reproduced the details of determination of jurisdiction of this Commercial Division qua this suit and trajectory of this suit, it would be appropriate to straightaway go into the plaint.

8. The plaint itself turns on a very narrow compass. Plaintiffs claim that they are owners of copy right i.e., artistic work in the label in the pouch, in which they are selling Ragi Flour [uhfp kht] (hereinafter referred to as 'said product']. It is the case of the plaintiffs that they also

have several registered trademarks particularly in the word mark 'Aachi', but they are not pressed into service in the instant suit, as this is a complaint of infringement of copy right in the artistic work in the label in the pouch, in which the said product is sold. The manner in which, the plaintiffs acquired copyright in the aforesaid label is articulated in paragraph 12 of the plaint and I deem it appropriate to re-produce the same. I do so and paragraph 12 of plaint reads as follows:

“12.The subject matter of the present suit is with respect to the Trademark and Copyright owned by the 1st plaintiff in the pouch and carton of the product AACHI RAGI FLOUR. The Copyright in the artistic work in the pouch and carton of the product AACHI RAGI FLOUR was created by the author during their course of employment with the 1st plaintiff. Therefore, the 1st plaintiff is the owner of the copyright. This was first published in August 2010 by the 1st plaintiff and from the date of first publication on August 2010 the 1st plaintiff have the copyright in the artistic work in the pouch and carton of the product AACHI RAGI FLOUR. The 1st plaintiff is the owner of the Copyright AACHI RAGI FLOUR and has been using the same continuously through the 2nd plaintiff by virtue of the License User Agreement dated 1st September 2010. The copyright was created by the employees of the plaintiffs during the course of their employment and no contract to the contrary exists. The plaintiffs have been continuously using this copyright in the course of business and trade for over several years and it had acquired immense reputation and extensive goodwill through such use.”

9. From paragraph 12 of plaint, it becomes clear that both the plaintiffs are owners of copy right in the aforesaid label.

10. There are also other averments in the plaint, touching upon how the first plaintiff initially had humble beginnings and thereafter, the plaintiffs gained immense popularity in the market.

11. Sales turnover figures have also been given. The same are articulated in paragraph 13 and the tabular column in this regard in the plaint is as follows:

<i>S. No.</i>	<i>Year</i>	<i>Turnover (in Rs)</i>	<i>Advertising Expenditure (in Rs)</i>
1	1995-1996	3,96,420/-	9,893/-
2	1996-1997	4,37,568/-	4,691/-
3	1997-1998	5,10,755/-	352/-
4	1998-1999	14,68,159/-	15,820/-
5	1999-2000	20,27,457/-	16,775/-
6	2000-2001	52,03,979/-	57,676/-
7	2001-2002	64,12,491/-	2,13,512/-
8	2002-2003	1,69,44,334/-	6,62,290/-
9	2003-2004	9,00,05,884/-	19,63,479/-
10	2004-2005	24,46,95,540/-	1,13,28,450/-
11	2005-2006	79,47,99,230/-	4,63,96,880/-
12	2006-2007	1,36,54,50,781/-	5,68,45,817/-
13	2007-2008	2,07,85,55,508/-	7,87,06,261/-
14	2008-2009	4,14,12,42,106/-	9,40,86,979/-
15	2009-2010	4,73,98,26,852	10,76,86,530/-
16	2010-2011	6,40,40,50,524/-	11,63,97,497/-
17	2011-2012	7,59,35,14,309/-	12,42,15,050/-
18	2012-2013	8,82,91,64,390/-	13,72,06,476/-

<i>S. No.</i>	<i>Year</i>	<i>Turnover (in Rs)</i>	<i>Advertising Expenditure (in Rs)</i>
19	2013-2014	11,27,06,92,876/-	19,57,87,446/-
20	2014-2015	13,20,61,70,537/-	21,00,17,044/-

12. The crux and gravamen of this suit is plaintiffs' label, which is as follows:



13. The aforesaid plaintiffs' label has been marked as Ex.P2.

14. It is the case of the plaintiffs that the sole defendant is using a deceptively similar label, which according to plaintiffs is infringement of copy right and as defendant's product also is Ragi Flour [uhfp kht] i.e.,

said product is product passing off too is also plaintiffs' counsel's say. The alleged infringing label of the sole defendant is as follows:



15. The aforesaid defendant's alleged offending label has been marked as Ex.P5.

16. I have compared the two labels. To be noted, the product is the same i.e., the said product. Though this is alleged infringement of copy right, I have compared the two lables by following the time honoured

principle in this regard (for comparison of Trade Marks) laid down in the celebrated judgment of Hon'ble Supreme Court in ***Parle Products (P) Ltd. Vs. J.P. and Co., [(1972) 1 SCC 618]***. The principle has been articulated by Hon'ble Supreme Court in paragraph 9 of the said judgment, which is of relevance. Paragraph No.9 of aforesaid Parle judgment reads as follows :

“9. It is, therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The word “Gluko Biscuits” in one and “Glucose Biscuits” on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen

before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Homes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

17. Applying the aforesaid principle, I have compared the two labels by seeing the plaintiffs' label, taking the same away from the sweep of my eyes and thereafter, by seeing the alleged offending label of the defendant. I asked myself the question as to whether a man of average intelligence with imperfect recollection and ordinary prudence will be lulled into the belief that what he is seeing now (alleged offending label) is what he saw earlier (plaintiffs' mark). I have no hesitation in coming to the conclusion that the answer is in the affirmative. In other words, the answer is an emphatic 'YES'.

18. I have also noticed that all the essential features of the plaintiffs' label have been copied by the defendant in the alleged offending label and there is clear over all similarities.

19. I have no hesitation in coming to the conclusion that deception is inevitable and that the defendant's label is a slavish imitation of the plaintiffs' label.

20. To be noted, as already mentioned, one B.Gnana Sambandam, whom this Commercial Division is informed, is Assistant General Manager - L & S with the plaintiffs has deposed as PW.1 and the two authorization letters both dated 29.11.2018 from two plaintiffs have been marked as Ex.P1. As there are two authorization letters and they have been marked as Ex.P1, ideally, learned Master -II should have marked the same as 'Ex.P1 series', however the same has not been done. Therefore, I shall refer to 'Ex.P1' as 'Ex.P1' series for clarity.

21. A copy of the License User Agreement dated 01.09.2010 has been marked as Ex.P3 and this is for the purpose of showing plaintiffs rights qua the labels in which copyright is claimed in the instant lis. To be noted, plaintiff No.1 is owner of the company, Plaintiff No.2 is licensee of the company. It is also seen from the records that recording of *ex-parte* evidence before learned Additional Master -II discloses that Ex.P3 has been marked after comparing the copy that has been marked with the original.

22. Besides this, original printout of sales invoices of plaintiffs from 2011-2016 have been marked as Ex.P4. This also ought to have been marked as Ex.P4 series as there is more than one invoice. To be noted, there are several invoices, but, as that has not been done, I shall refer to 'Ex.P4' as 'Ex.P4 series'. Learned counsel for plaintiffs submits that Ex.P4 has been marked to show that plaintiffs' copyright in the label (extracted scanned and reproduced supra) is not a right that has been kept dormant but has been actively used in Trade.

23. This Commercial Division has perused the deposition of PW.1. Deposition of PW.1 is cogent and convincing. It is in tandem with the plaintiff averments.

24. This takes us to the prayer paragraph in the plaint. Prayer paragraph in the plaint is paragraph No.40 and the same reads as follows:

'40.The Plaintiffs therefore pray for a Judgment and Decree for:-

a) Granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors or anyone claiming through them from reproducing by selling, advertising and or offering for sale by using the impugned Copyright Nutriyes Ragi Flour as shown in Document No.2 upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way visually, phonetically or deceptively similar to the Plaintiff's Copyright the picture mark as shown in Document No.1

or in any manner infringing the plaintiff's Copyright as 'AACHI RAGI FLOUR' shown in Document No.1.

b) Granting a permanent injunction, restraining the Defendant, by themselves, their servants, agents, distributors, or anyone claiming through them from reproducing by selling, advertising and or offering for sale by using the impugned Copyright Nutriyes Ragi Flour as shown in Document No.2 upon the goods or in any media and use the same in invoices, letter heads and visiting cards or by using any other Copyright which is in any way visually, phonetically or deceptively similar to the Plaintiff's Copyright the picture mark as shown in Document No.1 or in any manner passing off the plaintiff's Copyright as 'AACHI RAGI FLOUR' shown in Document No.1.

c) Directing the Defendant to surrender to the plaintiffs all the ragi flour, packing materials, cartons, advertisement materials and hoardings, letter-heads, visiting cards, office stationery and all other materials, containing/bearing the impugned Copyright Nutriyes Ragi Flour and other similar in respect of ragi flour or other allied goods.

d) For a preliminary decree in favour of the Plaintiffs, directing the Defendant to render an account of profits made by them by the use of the Copyright Nutriyes Ragi Flour on the goods referred and for a final decree in favour of the Plaintiffs for the amount of the profits found to have been made by the Defendant, after the Defendant have rendered accounts:

e) Directing the Defendant to pay the Plaintiff the costs to the suit, and

f) Pass such further or other order, as this Court may deem fit and proper in the circumstances of the case and thus render justice.'

25. A perusal of prayer paragraph in the plaint reveals that there are as many as six limbs of prayers and they have been set out in sub-paragraphs (a) to (f) of paragraph 40 of the plaint, which is the prayer paragraph.

26. Sub-paragraphs (a) and (b) are for injunctive reliefs qua infringement of copyright in the label (Ex.P2) and passing off qua copyright in the label (Ex.P2).

27. In the light of the narrative thus far, it is clear that plaintiffs have proved their case qua sub-paragraphs (a) and (b) and they are entitled to a decree with injunctive reliefs as prayed for in sub-paragraphs (a) and (b). It follows as a corollary and sequiter that plaintiffs are, therefore, entitled to prayers for a direction to surrender offending material and for accounts as sought for in sub-paragraphs (c) and (d).

28. This takes us to the prayers in sub-paragraphs (e) and (f), which are for costs and the usual residuary limb in any prayer paragraph.

29. Adverting to the sub-paragraph (f), Ms.Gladys Daniel, learned counsel on record for the plaintiffs submitted that suit itself was presented on 22.02.2017 and interim orders were granted by this Court on 22.03.2017

in O.A.Nos.198 and 199 of 2017 and interim orders were subsequently made absolute vide a detailed order of this Court dated 02.02.2018, after which this suit was set down for recording *ex-parte* evidence. Details of recording *ex-parte* evidence have already been set out supra.

30. Referring to all this, learned counsel for plaintiffs submitted that the defendant though served, did not come before this Court and take a stand, leaving these plaintiffs to carry this suit to its logical end over a period of nearly two years, expending time, energy and money. This trajectory (which has been captured supra) coupled with the conduct of the defendant in not responding to the suit summons and not responding to notice under Order XXXIX Rule 3 of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) ultimately leaving the plaintiff to carry this matter to its logical end for a period of two years warrants imposition of compensatory costs under Section 35-A of amended CPC as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity). It is pointed out that under amended CPC as amended by said Act, with regard to the imposition of compensatory costs upper limit of imposition of compensatory costs has now been removed and therefore, this is a fit case for imposition of compensatory costs, is learned counsel's say.

31. Considering the trajectory of the suit and considering the fact

that the plaintiffs have been compelled to carry this matter through for two years, this Commercial Division is convinced that the plaintiffs are not only entitled to costs under sub-paragraph (e) of the prayer paragraph supra but, plaintiffs are also entitled to compensatory costs and this Commercial Division, considering all aspects of the matter, is of the view that compensatory costs of Rs.2,00,000/- (Rupees Two Lakhs only) in the instant case would be appropriate.

Suit decreed with costs and compensatory costs as set out supra.

12.12.2018

Speaking order/Non Speaking order

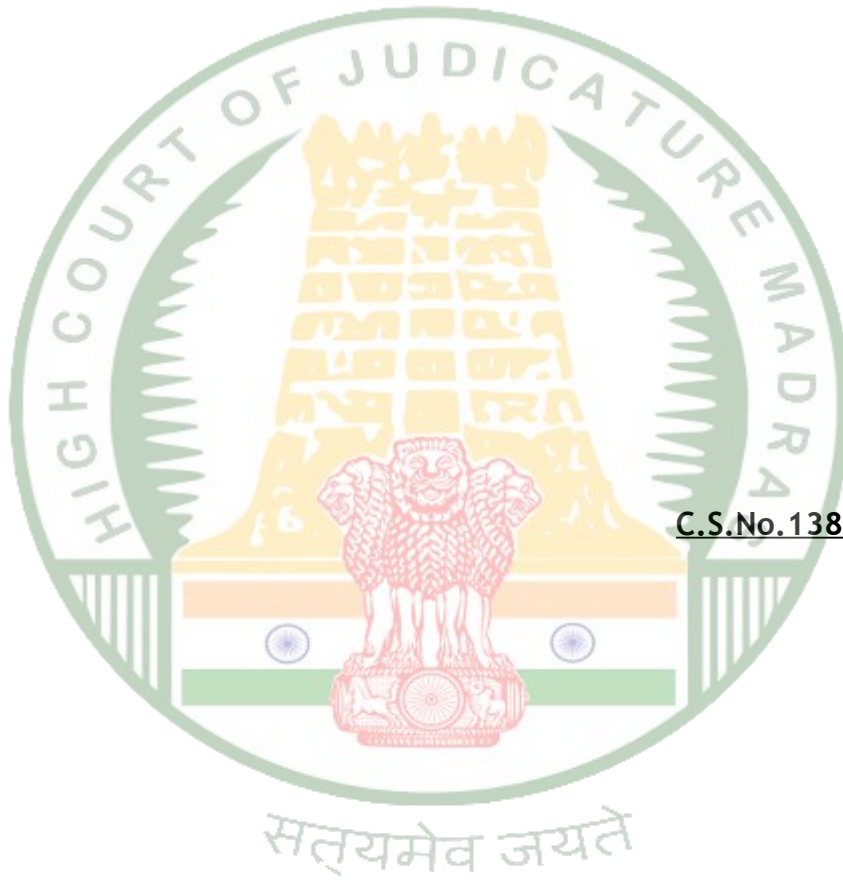
Index : Yes /No

mp

WEB COPY

M.SUNDAR, J.

mp



C.S.No.138 of 2017

WEB COPY

12.12.2018