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

+ **CS(COMM) 549/2018 & I.A. 7542/2004**

DABUR INDIA LTD. Plaintiff
Through: Mr Manish K. Mishra with
Ms Akansha Singh, Advocates

versus

VAIDYA NANDRAM GIGRAJ CHAMRIA Defendant
Through None

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Date of Decision: 29th May, 2018

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present suit has been filed for permanent injunction restraining infringement of copyright, design, passing off, damages/rendition of accounts and delivery up etc. against the defendant. The prayer clause in the present suit is reproduced hereinbelow:-

“(i) A decree for permanent injunction restraining the defendant, its partners or proprietor as the case may be, its servants, agents, assigns in business, its dealers, stockists etc. from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in churan or any other ayurvedic preparation bearing the impugned packaging as are subject matter of the present suit or any other packaging as may be colourable imitation or

*substantial reproduction of plaintiff's **HAJMOLA ANARDANA** packaging and/trade dress in respect of their colour combination, get up, lay out and arrangement of features, amounting to infringement of copyright therein;*

(ii) A decree for permanent injunction restraining the defendant, its partners or proprietor as the case may be, its servants, agents, assigns in business, its dealers, distributors, stockists etc. from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in churan or any other ayurvedic preparations in the container bearing the impugned design or any other design as may be fraudulent or obvious imitation of the plaintiff's Design Registration No.193010 amounting to infringement of copyright in the said registered design;

*(iii) A decree for permanent injunction restraining the defendant, its partners or proprietor as the case may be, its servants, agents, assigns in business, its dealers, stockists etc. from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in churan or any other ayurvedic preparations under the impugned packaging or any other packaging as may be identical to and/or deceptively similar with the plaintiff's **HAJMOLA Anandana** packaging/trade dress including its colour combination, get up, arrangement of features as may be likely to cause confusion or deception amounting to passing off of the defendant's goods/business as and for those of the plaintiff;*

(iv) A decree for delivery up of all the infringing packaging, containers, labels, blocks, dyes, articles etc. to an authorised representative of the plaintiff for destruction/erasure;

(v) An order for rendition of accounts of profit illegally earned by the defendant and a decree for an amount so found due or in the alternative a decree for Rupees Twenty

Lakhs (Rs.20,00,000/-) may be passed in favour of the plaintiff and against the defendant;

(vi) An order for costs in the proceedings;

(vii) Any further order as this Hon'ble Court deems fit and proper in the facts and circumstances of this case."

2. The defendant initially entered appearance. However, after leading evidence, none has appeared for the defendant since 2010. Consequently, it is proceeded *ex-parte*.

3. At the outset, learned counsel for plaintiff gives up prayers (ii), (iv) and (v) of the prayer clause to the suit. The statement made by learned counsel for plaintiff is accepted by this Court and plaintiff is held bound by the same.

4. Vide order dated 10th October, 2004, the learned predecessor of this Court had granted an *ex-parte ad interim* injunction in favour of the plaintiff and against the defendant. The relevant portion of the *ex-parte* injunction order is reproduced hereinbelow:-

"Learned counsel for the plaintiff has taken me through the averments contained in the plaint and documents filed in support thereof including injunction order passed in CS(OS) 585/2004 by Dr. Justice M.K. Sharma in favour of the plaintiff. It appears that the defendant is violating the copy rights of the plaintiff by adopting a deceptively similar design, trade dress, colour combination, artistic work.

Notice for the date fixed.

In the meantime, ad interim injunction as prayed in the para 28 of the injunction application be issued."

5. In the plaint, it has been averred that the plaintiff is one of the leading manufacturers of pharmaceuticals, toiletries and medicinal preparations. It is stated that one of the plaintiff's most popular brand is

HAJMOLA with regard to digestive tablets, candies, granulated form etc.

6. It is stated that in September, 2003, the plaintiff launched a variant of the HAJMOLA tablets in pomegranate flavour under the mark HAJMOLA Anardana which is sold in a distinct container, design and packaging. It is contended that on account of continuous commercial use, the plaintiff's container, design and packaging have acquired tremendous goodwill and reputation.

7. It is submitted that the plaintiff's depiction of a pomegranate, its distinct colour combination and stylized lettering of HAJMOLA Anardana used on its container provides a distinct get up and layout which constitutes an "original artistic work" within the meaning of Section 2(c) of the Copyright Act, 1957 and the plaintiff is entitled to copyright protection under Section 14 of the Copyright Act, 1957.

8. It is stated that the plaintiff's goods bearing the trade mark HAJMOLA Anardana is marketed in a novel, original and artistically designed container for which the plaintiff possesses a Design Registration No. 193010 dated 26th August, 2003.

9. It is stated that the plaintiff's sales figures for the period of September, 2003 to August, 2004 was INR 866 lakhs and the plaintiff's promotional expenditure for March, 2004 to August, 2004 was INR 108.69 lakhs.

10. Learned counsel for the plaintiff states that in the first week of November, 2004, the plaintiff came to know that the defendant is engaged in manufacture and marketing of Anardana churan and is selling pomegranate flavoured ayurvedic digestive under the mark

KARORPATI Anardana, in a container, packaging and trade dress which is identical/deceptively similar to the plaintiff's HAJMOLA Anardana container design, packaging and trade dress.

11. He states the defendant has not only copied the packaging and trade dress of the plaintiff's product but has also copied the design of the container and is also using a deceptively similar mark KARORPATI Anardana to that of the plaintiff's mark HAJMOLA Anardana.

12. Vide order dated 12th October, 2006, the following issues were framed:-

“(i) Whether the plaintiff has copyright in the work comprising the trade dress of the plaintiff? OPP

(ii) Whether the defendant is infringing the copyright of the plaintiff by adopting the trade dress in which defendant is selling its product? OPP

(iii) Whether by selling the product in the packaging material used by the defendant, there is likelihood of confusion or deception leading to passing off?

(iv) To what relief is the plaintiff entitled to?”

13. The plaintiff has filed its evidence by way of affidavit of Mr. B.K. Gupta s/o Shri R. P. Gupta (PW-1), Manager Legal and Constituted Attorney of the plaintiff.

14. The issue wise findings of this Court are as under:-

Issue 1: Whether the plaintiff has copyright in the work comprising the trade dress of the plaintiff?

15. Learned counsel for the plaintiff states the plaintiff is the owner of the copyright in the caricature of the pomegranate fruit depicted on its container as well as the colour combination and overall arrangement of features on the label of the HAJMOLA Anardana container as it is an original artistic work created at the instance of the plaintiff for consideration paid to an agency named M/s. Lintas Indian Pvt. Ltd. In support of his contention PW-1 has proved photograph of the plaintiff's HAJMOLA Anardana product bearing the original caricature and label dated 08th November, 2004 as Ex.P-2, the Certified copy of the Deed of Assignment dated 14th June, 2003 issued by M/s Lintas India Pvt. Ltd. assigning the copyright in favour of the plaintiff as Ex.P-5 and the Certified copy of the No Objection Certificate from the artist at M/s Lintas India Pvt. Ltd. in favour of the plaintiff dated 08th November, 2004 as Ex.P-6.

16. In view of the submissions and documents placed on record, this Court is of the view that the plaintiff has proved that it has copyright in the work comprising the trade dress of the HAJOMILA Anardana container label.

Issue 2: Whether the defendant is infringing the copyright of the plaintiff by adopting the trade dress in which defendant is selling its product?

17. Learned counsel for the plaintiff states the defendant has adopted a label/packaging which is a substantial reproduction of the original artistic work of the plaintiff including colour combination and arrangement of features. A pictorial representation of the plaintiff and

defendant's goods is reproduced hereinbelow;-

PLAINTIFF'S PRODUCT



DEFENDANT'S PRODUCT



18. He states that the aforesaid label/packaging has been dishonestly adopted by the defendant to bring its product closer to that of the plaintiff. He states the defendant has used an identical pink and white background colour with an airbrush effect, depiction of a pomegranate at the bottom half of the container, scattered pomegranate seeds over the label and identical font with deceptively similar colour combination for its trade mark and other information. He states the defendant has not filed any document to show as to who created the impugned label/packaging of KARORPATI Anardana. He further states that in his cross-examination, the defendant's witness Mr. Ram Avtar Chamria had on 09th February, 2011, stated that he does not know who created the defendant's label.

19. He further states that dishonesty and malafide of the defendant is not only evident from the blatant imitation of the label and distinguishing features of the plaintiff's HAJMOLA Anardana label/packaging/trade dress, but also from the imitation of the registered design of the plaintiff's HAJMOLA Anardana container. He states that the defendant was earlier manufacturing and marketing its Anardana Chooran in a completely different container bearing no similarity to the plaintiff's product. He further states that the plaintiff has filed the defendant's earlier packaging at page no. 42 of the plaintiff's list of documents and the defendant has admitted the same.

20. In ***RG Anand v. Delux Films AIR 1978 SC 1613*** the Apex Court has held as under:-

“46. Thus, on a careful consideration and elucidation of the various authorities and the case law on the subject discussed above, the following propositions emerge:

1. There can be no copyright in an idea, subject-matter, themes, plots or historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyrighted work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal imitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad

dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

6. As a violation of copyright amounts to an act of piracy it must be proved by clear and cogent evidence after applying the various tests laid down by the case-law discussed above.

7. Where however the question is of the violation of the copyright of stage play by a film producer or a director the task of the plaintiff becomes more difficult to prove piracy. It is manifest that unlike a stage play a film has a much broader prospective, wider field and a bigger background where the defendants can by introducing a variety of incidents give a colour and complexion different from the manner in which the copyrighted work has expressed the idea. Even so, if the viewer after seeing the film gets a totality of impression that the film is by and large a copy of the original play, violation of the copyright may be said to be proved.”

21. Keeping in view the aforesaid mandate of the law and having perused the evidence as well as documents placed on record, this Court is of the opinion that the plaintiff has proved that the defendant has copied the trademark/packaging/trade dress of the plaintiff and the defendant is using the trademark KARORPATI Anardana in an identical/deceptively similar label/packaging/trade dress.

Issue 3: Whether by selling the product in the packaging material used by the defendant, there is likelihood of confusion or deception leading to passing off?

22. Learned counsel for the plaintiff states the plaintiff's HAJMOLA Anardana label/packaging trade dress has acquired tremendous goodwill and reputation and is exclusively associated with the plaintiff which is evident from the plaintiff's sales figures for the period September, 2003 to August, 2004 which was INR 866 lakhs and the plaintiff's promotional expense for the period of March 2004, to August, 2004 which was INR 108.69 lakhs. PW-1 has also proved certified copies of the sales invoices of HAJMOLA Anardana for the period October, 2003 to January, 2004 as Ex.P-8, certified copy of the HAJMOLA Anardana advertisements published in Amar Ujala as Ex/PW-9, copy of the storyboard featuring the plaintiff's HAJMOLA Anardana in the advertisement telecast on TV in the year 2003 as Ex.P-10, certified copies of the invoices issued by the advertising agencies/various television channels for the period December, 2003 to January, 2004 as Ex.P-11, copy of the ex-parte injunction order dated 25th April, 2004 passed in CS(OS) no. 858/2004 in favour of the plaintiff in respect of HAJMOLA Anardana as Ex.P-12 and copy of the Order and Decree dated 19th July, 2005 passed in CS(OS) 858/2004 as Ex.P-13.

23. Since the plaintiff's evidence has gone unrebutted, the same is accepted as true and correct. In the opinion of this Court, the defendant has deliberately stayed away from this Court's proceeding with a view to frustrate the plaintiff's claim. The said act is unjustified.

24. In view of the submissions and documents placed on record, this Court is of the view that the plaintiff has proved that by selling the product in the packaging material used by the defendant, there is a

likelihood of confusion or deception leading to passing off.

25. Consequently, present suit is decreed in accordance with prayer (i) and (iii) of the plaint. The costs shall amongst others include the lawyer's fees as well as the amount spent on Court-fees. Registry is directed to prepare a decree sheet accordingly.

26. Post-lunch, Mr.A.P.Singh, Advocate appears for the defendant along with Mr.Ram Avatar Chamria, the sole proprietor of the defendant-company. They pray for an adjournment on the ground that the counsel has not brought the file to the Court and Mr.A.K.Behra, the main arguing counsel is not available today.

27. In the opinion of this Court, the ground on which the adjournment is sought is a 'lame one'. As recorded hereinabove, none has been appearing for the defendant in the present suit since 2010. Accordingly, the request for adjournment is declined and the order passed today stands.

MAY 29, 2018

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MANMOHAN, J