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

+ **CS(COMM) 741/2016**

FERRERO SPA & ORS

..... Plaintiffs

Through: Ms. Vaishali Mittal, Ms. Mrinali
Menon and Mr. Vivek Ayyagari,
Advs.

versus

ANEESH UPAASANA & ORS

..... Defendants

Through: Mr. Gautam Dhamija, Adv. for D-1
to 4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **02.11.2018**

1. The suit is ripe for framing of issues.
2. The counsel for the three plaintiffs, namely (i) Ferrero SpA, (ii) Soremartec S.A., and (iii) Ferrero India Private Ltd. and the counsel for the four defendants namely (i) Aneesh Upaasana, (ii) Shibu Divakar, (iii) Shine Gopi, and (iv) Bansuri Cinema, have been heard.
3. The counsel for the plaintiffs states that the plaintiffs are in the business of manufacturing and selling of chocolates under the name 'KINDER JOY' and which chocolate is packaged in an egg shape receptacle which, besides the chocolate, also contains a toy for the child consuming the chocolate.
4. The counsel for the plaintiffs has drawn attention to page 250 of Part-III Volume-II file which has photographic depiction of the said egg shape receptacle and which receptacle is found to also specify "for girls" and/or "for boys".

5. The counsel for the plaintiffs explains, (i) that there are different toys for boys and girls inside the receptacle; (ii) that the defendants advertised the release of a cinematograph film in *Malayalam* language with the title “KINDER JOYEE”, showing two lower halves of the egg shape receptacle of the plaintiffs with the word “KINDER” written on one and the word “JOYEE” written on the other, in the same colour scheme and the same shape of the white wave, as on the receptacle of the product of the plaintiffs; (iii) that the defendants thus, to market their movie to the children who identify “KINDER JOY” with the chocolate which they like, used the registered trade mark “KINDER JOY” and the registered trade dress of the plaintiffs; (iv) though the plaintiffs, prior to institution of suit issued cease and desist notice to the defendants but the defendants refused to change the name of their cinematograph film, compelling the plaintiffs to file this suit; (v) that the suit was entertained and vide *ex parte ad interim* order dated 3rd June, 2016, the defendants restrained from releasing their cinematograph film with the content “KINDER JOYEE”; (vi) that the defendants thereafter released their cinematograph film with different title; (vii) that in view of the above, the interim order was confirmed with the consent of the defendants on 9th May, 2018; and, (viii) that the order dated 9th May, 2018 also records that the only issue which survives in the present case is regarding damages.

6. The counsel for the defendants states that prior to institution of the suit also, various attempts were made to make the change in the title of the cinematograph film made by the defendants but the plaintiffs were not agreeable to any of the names suggested by the defendants and the defendants released the cinematograph film with title “POPCORN” and

have no objection to a decree for permanent injunction as sought being granted; however, the defendants are not willing to pay any damages or any costs to the plaintiffs.

7. The counsel for the plaintiffs contends that though the plaintiffs are not pressing for any damages since the cinematograph film released under a different title, but the plaintiffs are definitely entitled to costs since the defendants had heavily advertised the release of the forthcoming movie with the title “KINDER JOYEE” and also infringed the trade dress of the plaintiffs.

8. On enquiry, it is informed that the movie was/is of about 2½ hours duration and was not advertised as and/or was not a children film.

9. The occasion to list this suit for trial or to frame any issue only qua costs does not arise, which in any case are in the discretion of this Court.

10. Considering all the facts aforesaid, it is deemed appropriate that the defendants reimburse the plaintiffs, the court fees incurred by the plaintiffs in institution this suit i.e. in the sum of Rs.1,07,200/- plus about Rs.1,00,000/- i.e. in the total of say Rs.2,10,000/-.

11. Accordingly, the suit is disposed of by passing a decree in favour of the plaintiffs and against the defendants, in terms of prayer para 44 (i), (ii) & (iii) of the plaint and with costs of Rs.2,10,000/- payable by the defendants jointly and severally to the plaintiffs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

NOVEMBER 02, 2018

‘pp’..

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