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

+ **CS(COMM) 1290/2016**

THE COCA-COLA COMPANY & ANR Plaintiffs

Through: Mr Karan Bajaj with Ms Kripa
Pandit and Mr Dhruv Nayar, Advocates

versus

**GLACIER WATER
INDUSTRIES LTD & ORS.** Defendants

Through: None

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Date of Decision: 28th February, 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 and mandatory injunction and damages for infringement of the plaintiffs' registered trademark, passing off and unfair competition against the defendants.

The prayer clause in the suit is reproduced hereinbelow:-

"A. A decree of permanent injunction be passed thereby directing that the Defendants, its directors, employees, agents, distributors, franchisees, representatives and assigns be restrained from :

(i) manufacturing or authorizing the manufacture, selling or offering for sale, marketing, advertising, promoting,

displaying or in any other manner whatsoever using the impugned mark KINLEY and/or any other mark which is deceptively or confusingly similar to the registered trademark KINLEY of Plaintiff No. 1 as a trade mark or part of a trade mark, trade name or part of trade name or as a domain name or part of a domain name or in any other manner whatsoever so as to infringe the Plaintiff No. 1's registered trade mark or pass off its goods as those of the Plaintiffs;

(ii) Passing off its goods as and for the goods of the Plaintiffs by use of the trade mark KINLEY and/or any other trade mark or name similar to the Plaintiff No.1's trade mark KINLEY, as a trade mark or part of a trade mark, trade name or part of trade name or as a domain name or part of a domain name or in any other manner whatsoever;

(iii) disposing of or dealing with their assets, including the properties mentioned in the cause title of the Plaint, in a manner which may adversely affect the Plaintiff's ability to recover damages, costs or other pecuniary remedies that may be finally awarded to the Plaintiffs;

B. The Defendants, its directors, employees, agents, distributors, franchisees, representatives and assigns be directed by a decree of mandatory injunction to:

(i) to transfer the domain name "kinley.in" and "kinleyro.com" and/or any other domain name which is similar to the Plaintiff No. 1's registered trade mark KINLEY to the Plaintiff No. 1; and

(ii) to make a full and fair disclosure of any other domain name incorporating the Plaintiff No. 1's registered trade mark KINLEY or any other mark deceptively and confusingly similar to the Plaintiff No. 1's registered trade mark KINLEY and transfer the same of the Plaintiff No. 1 and/or delete the said domain name.

(iii) recall all the products, marketing, promotional and advertising materials bearing the impugned mark KINLEY and/or any other trade mark deceptively or confusingly similar

to the Plaintiff No. 1's registered trade mark KINLEY and hand over the same to the attorneys or representatives of the Plaintiffs;

(iv) to deliver to the Plaintiff's attorneys or representatives for destruction all products, labels, signs, prints, packages and advertisements in its possession or under its control bearing the mark KINLEY and/or any other trade mark deceptively or confusingly similar to the Plaintiff No.1's registered trade mark KINLEY;

(v) to withdraw the trade mark application No. 2329491 in class 11 and make a full and fair disclosure of any other trade mark application(s) filed for registration by them in or outside of India which is similar to the Plaintiff No.1's registered trade mark KINLEY or any other mark which is deceptively and confusingly similar to the Plaintiff No.1's registered trade mark KINLEY.

C. A direction be issued to the National Internet eXchange of India c/o ISPAI (Internet Service Provider Association of India) 612- A, Chiranjiv Tower, 43, Nehru Place, New Delhi -110019 that www.kinley.in be deleted or transferred to the Plaintiff No. 1 and a direction be issued to PrivacyProtect.org of the address contact@privacyprotect.org that www.kinleyro.com be deleted or transferred to the Plaintiff No.1.

D. The Defendant be ordered to disclose on oath details of all or any use of KINLEY either as a trade or corporate name part of trade or corporate name, a trade mark or part of a trade mark, or as a domain name or part of a domain name or in any other manner whatsoever;

E. The Defendant be called upon to allow inspection of their accounts to assist in ascertaining profits made by the Defendant by its unauthorized use of the trade mark KINLEY and a decree be accordingly passed in favour of the Plaintiffs for the amount found due;

F. Costs of the suit be awarded to the Plaintiffs; and

G. Any other relief which the Hon'ble Court deems and proper in the facts and circumstances of the case be allowed in favour of the Plaintiffs and against the Defendant.”

2. At the outset, learned counsel for plaintiffs confines his prayers to prayers A (i) to (iii), B (v), C and F of the prayer clause to the suit. The statement made by learned counsel for plaintiffs is accepted by this Court and plaintiffs are held bound by the same.

3. Vide order dated 29th April, 2013, this Court granted an ex-parte ad interim injunction in favour of the plaintiffs and against the defendants. The relevant portion of the ex-parte injunction order is reproduced hereinbelow:-

“Consequently, defendant, its Directors, employees, agents, distributors, franchisees, representatives and assigns are restrained from manufacturing or authorizing the manufacture, selling or offering for sale, marketing, advertising, promoting or displaying or in any other manner whatsoever using the impugned mark KINLEY and/or any other mark which is deceptively or confusingly similar to the registered trade mark of KINLEY of plaintiff No.1 as a trade mark or part of the trade mark, trade name or part of trade name or as a domain name or part of a domain name or in any other manner whatsoever so as to infringe the plaintiff No.1’s registered trade mark or pass off its goods as those of the plaintiffs till further orders.

The defendants, its Directors, employees, agents, distributors, franchisees, representatives and assigns are also restrained to transfer the domain names ‘kinley.in’ and ‘kinleyro.com’ and/or any other domain name which is similar to the plaintiff No.1’s registered trade mark KINLEY till further orders.....”

4. The plaintiffs herein filed an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 for impleadment of Mr. Mukesh and Mr. Manoj, who, as per the plaintiffs' knowledge, were the partners of the defendant no.2. Vide order dated 15th September, 2016, this Court allowed the said application partially and impleaded only the entity M/s Balaji Enterprises as defendant no.2. Furthermore, vide the same order, defendant no.1 was proceeded against ex-parte. The aforesaid injunction was also extended to the remaining defendant, i.e. defendant no.2.

5. Since the defendant no.2, despite service, did not file its written statement within the stipulated period of one hundred twenty days, it was proceeded ex-parte vide order dated 11th July, 2017.

6. The relevant facts of the present case are that, the plaintiff no.1 Company is one of the largest soft drinks companies in the world, with operations in more than 200 countries, and engaged in the manufacture and sale of concentrates and beverage bases, which are used in the preparation of certain non-alcoholic beverages, and are offered for sale to the public in glass and PET bottles, cans and other containers.

7. It is stated in the plaint that the plaintiff no.2 is an authorized bottler of plaintiff no.1 in India, and is authorized to prepare, package, sell and distribute specified beverages under certain trademarks of the plaintiff no.1, under terms and conditions stipulated in a Bottler's Agreement entered into between the plaintiffs.

8. It is averred in the plaint that the plaintiff no.1 adopted and launched the trade mark KINLEY in India in 2001, as a brand of high quality bottled water, and also adopted and launched the trade mark

KINLEY in more than 35 other countries as a brand of carbonate water. It is averred that the volume of sale for the product KINLEY in India from 2007 - 2012 was approximately 520 million unit cases.

9. It is stated that the Plaintiff No. 1 is the registered proprietor of the arbitrary mark KINLEY in class 32, which is primarily used by the plaintiffs in relation to drinking water.

10. Learned counsel for the plaintiffs states that the plaintiffs came across the use of the mark KINLEY by the defendants, in relation to water purification systems using reverse osmosis, where the defendants falsely claimed to have launched their water system in collaboration with the plaintiff no.1's Indian subsidiary, The Coca Cola India Pvt. Ltd., whereas, in fact, no such collaboration exists. He states that the investigations conducted by the plaintiffs revealed that the defendant no.1 was openly advertising its product, and that the mark KINLEY was displayed prominently on its advertising and promotional material. He further states, that a search of the trademark register was conducted by the plaintiffs and the same revealed that the defendant no.1 had also applied for registration of the mark KINLEY bearing Application No. 2329491 in Class 11 for the specifications "*water purifier, water supply and sanitary purpose*" claiming use since 1st April, 2011.

11. Learned counsel for the plaintiffs states that during the pendency of the present proceedings, the plaintiffs came across the Facebook page of the defendant no.1, wherein the plaintiffs learnt about another address of the defendants being Trivedi Complex, Sikar Road, Jaipur Rajasthan 302039. He states that, upon discreet enquiry

by the plaintiffs, it was found that the remaining defendants are operating a partnership firm under the trading name M/s Balaji Enterprises from the said premises. Counsel for the plaintiffs states that it was also revealed that they are franchisees of the defendant no.1 and were supplying impugned reverse osmosis systems to the local customers.

12. The plaintiffs have filed its ex-parte evidence. The plaintiffs have proved the first registration of the mark KINLEY bearing no.742535 in Class 32 in India as Ex.PW1/3 (Colly.). The plaintiffs have further proved their registered device marks  bearing no. 1682368 and  bearing no. 1682367 in Class 32 in India as Ex.PW1/3 (Colly.). The plaintiffs have also proved the websites www.glacierswater.com, www.kinley.in and www.kinleyro.com, created by the defendant no.1 as Ex.PW1/26 (Colly.). Additionally, the plaintiffs have proved the defendant no.1 registration application for the device mark KINLEY bearing no. 2329491 in Class 11 for “*water purifier, water supply and sanitary purpose*” as Ex.PW1/25 (Colly.). Furthermore, the plaintiffs have proved the certificate given by the CA showing the plaintiffs’ sales under the mark KINLEY from 2012-2016 as Rs.4,229 crores (approx.) and advertising expenses for KINLEY in the same period as Rs.839 crores (approx.) as Ex.PW1/10 (Colly.).

13. Having heard learned counsel for plaintiffs as well as having perused the papers, this Court is of the view that due to extensive use over substantial period of time, the plaintiffs’ KINLEY mark have acquired reputation and goodwill in the marks in India as well as

globally.

14. From the evidence on record, it is apparent that without any explicit permission or authorisation to use the plaintiffs' trademark KINLEY, the defendants have dishonestly and malafidely used the KINLEY trademark of the plaintiffs, in relation to their water purification systems.

15. Further, as the plaintiffs' evidence has gone un rebutted, said evidence is accepted as true and correct. The Supreme Court in ***Ramesh Chand Ardawatiya Vs. Anil Panjwani, AIR 2003 SC 2508*** has held as under:-

"33.In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the court is not bound to frame issues under Order 14 and deliver the judgment on every issue as required by Order 20 Rule 5. Yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the "points for determination" and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."

16. Consequently, the allegation that the trademark KINLEY used by the defendants, amounts to infringement and passing off of the plaintiffs' trademark stands proved.

17. Accordingly, present suit is decreed against the defendants in accordance with the prayers A (i) to (iii), B (v), C and F of the plaint along with the actual costs incurred by the plaintiff. The cost shall amongst others include the lawyers' fees as well as the amounts spent on purchasing the court fees. Registry is directed to prepare a decree sheet accordingly.

FEBRUARY 28, 2018
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MANMOHAN, J