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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 25th April, 2019
+ **CS (COMM) 464/2018 & I.A. 10693/2003**
TODAY TEA LTD. Plaintiff
Through: Mr. Bharat S. Kumar, Advocate.
(M:9818357161)
versus

TODAY FOODS PVT. LTD. Defendant
Through: None.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. '*Chai-Biscuits*' - this oft-used term is at the core of the present dispute. The Plaintiff sells tea under the mark TODAY. The Defendant sells biscuits under the same mark. As the expression 'Chai-biscuits' conveys, Tea and biscuits go hand in hand. They are products served together in every home and every street corner tea stall across the country. They form part of the early morning staple diet of millions of people across the world including India. Both these are cognate and allied products.

2. The Plaintiff - Today Tea Ltd. (*hereinafter, 'Plaintiff'*) has filed the present suit seeking injunction restraining the infringement of its registered trademark, passing off, damages, etc. The Plaintiff claims to be the owner of the trade mark '*TODAY*' in respect of tea, which falls in class 30. The case of Plaintiff is that its '*TODAY*' tea mark was adopted since 1st January 1994 and is extremely well known and popular. Its annual sales figures for the year 2003, at the time when the suit was filed, was approximately Rs.12 crores and the same is now claimed to have increased by multiple times. The trademark '*TODAY*' has been registered in favour of the Plaintiff in

class 30 vide registration nos.630093 and 1256057. The grievance in this suit is that the Plaintiff acquired knowledge of the Defendant's adoption of the mark 'TODAY' in respect of biscuits, which according to them constituted infringement of its mark. The packagings used by the Defendant are placed on record.

3. Summons were initially issued in the suit on 10th November, 2003. In the admission/denial, the Defendant admitted both its products i.e. Cream Crunch Elaichi Biscuits and Glucose Biscuits, which bear the mark 'TODAY'. Both these packaging are exhibited as **Ex.P1** and **Ex.P2**.

4. Thereafter, the Plaintiff moved an application under Order VI Rule 17 CPC to bring on record some subsequent facts. The said application was allowed on 7th September, 2006. The certificates of registration of the trademark 'TODAY' bearing no.630093 and 1256057, in respect of tea were brought on record. Thereafter, the following issues were framed on 11th September, 2007.

“1. Whether the defendant is the prior user of trading style and the mark 'TODAY' in relation to biscuits and if so, to what effect? OPD

2. Whether the present suit is bad and not maintainable on account of undue delay and acquiescence as alleged in Para 3 of the preliminary objections of the amended written statement? OPD

3. Whether the defendant has passed on its goods as that of the plaintiff in the course of its trade? OPP

4. What is the effect of registration of the mark 'TODAY' in favour of the plaintiff for tea vis-a-vis the user of the said mark 'TODAY' by the defendant in relation to its product i.e. biscuits? OP Parties

5. Whether the plaintiff is entitled to rendition of accounts and damages? OPP

6. Relief.”

5. The Plaintiff led evidence of its witness Shri Rakesh Kumar Jain, who was the managing director of the Plaintiff. His cross-examination was also conducted by the Defendant. On 17th October, 2012 it was submitted by Ld. counsel for Defendant that despite sending repeated communications to the Defendant, the Ld. counsel has not received any instructions. On 1st April, 2013, it was submitted by Ld. counsel for Defendant that the Defendant company has shutdown its business. Thereafter, the matter has been placed before this Court for final hearing.

6. Ld. counsel for Plaintiff has filed its written synopsis. Mr. Bharat S. Kumar, ld. counsel for Plaintiff submits that the Plaintiff's trademark '*TODAY*' is extremely well-known and adoption by the Defendant of the same mark, in respect of biscuits, is dishonest. He, further, relies on the fact that the Defendant's application for registration of the '*TODAY*' mark for biscuits was opposed by the Plaintiff. He has placed on record the status of the Defendant's application, which shows that the same has been abandoned post the opposition filed by the Plaintiff. He submits that the Defendant has also not led any evidence to support its case and hence the suit is liable to be decreed.

7. A perusal of the evidence placed on record shows that the Defendant has admitted the use of the mark '*TODAY*' in respect of glucose biscuits and crunch cream elaichi biscuits. The Plaintiff's witness has established the use of the mark '*TODAY*' and has also exhibited various documents including the registration certificates and the invoices etc. Memorandum of association of the Plaintiff company has also been exhibited on record, which shows that the Plaintiff has been carrying on its business since 1st January, 1994, under

the name Broker Tea Company, which thereafter changed to Today Tea Limited in the year 2002. The history and background of the Plaintiff company has been mentioned in the plaint. Broker Tea Company was initially a partnership firm, which thereafter became Broker Tea Company Pvt. Limited. In 2002, it changed its name to Today Tea Limited. There is no doubt that the Plaintiff has been continuously using the trademark '*TODAY*' in respect of tea and the same is also registered in respect of a variety of products in class 30.

8. In the amended written statement filed by the Defendant, the Defendant claims to be in the business of manufacturing of biscuits since 1997 under the trademark '*TODAY*'. Apart from these defences, the case of the Defendant is that it is a small-scale industry, whose business is being thwarted by the Plaintiff. The Defendant also claims that the Plaintiff's registrations for the mark '*TODAY*' are liable to be cancelled.

9. To establish the above defences, which have been taken in the written statement, no evidence has been adduced. Further, no evidence was led to show that the Defendant has, in fact, been using the mark '*TODAY*' since 1997. No rectification application or orders passed thereon, have been placed on record showing that the Defendant pursued its case for cancellation of the Plaintiff's mark. In fact, a perusal of the order sheets shows that the Defendant has shutdown its business as per the statement made by its counsel. The Defendant having not established any of the defences pleaded by it, there is no rebuttal to the Plaintiff's evidence.

10. The Plaintiff's witness was cross-examined by the counsel for the Defendant. During the cross-examination, on 17th April, 2012, the Plaintiff's witness stated as under:

*"I am working in the plaintiff company since 1990. The plaintiff company has been incorporated since 2004. **Volunteered.** The plaintiff company was earlier known as "Broker Tea Company" and thereafter it was changed to "M/s Today Tea Ltd." in 2004.*

I am the Managing Director of the plaintiff company since 2004. We are into packaging and marketing tea in the name of "Today Tea Ltd." since 2004. Otherwise, we are in the business of tea since 1970. The plaintiff company has not dealt in any other commodity except tea. We have used the trademark "Today" since 1994. We have filed our copyright and trademark certificate and also the sales invoices to show our rights from the year 1994. The first time we used the trademark "Today", it was in the form of a label. The first trademark application was made in around 1994 and it was in relation to the label. The application was filed in relation to Class 30 of the Trademarks Act, which relates to tea and other food articles like, atta, biscuit etc. The plaintiff company has never been involved in the trade of rice, bread, namkeen, pastries and biscuits. It is wrong to suggest that the user date given by the plaintiff in the trademark application in relation to all goods in class 30 other than tea is false. I do not remember the exact year but the plaintiff started its advertisement much prior to the year 2000. The plaintiff sells its product in the northern belt of India. The product is still in the market.

*We came to know about the defendant in the year 2003. The defendant sells biscuits. We received a phone call through market sources as people believed that the biscuits sold under the trademark "Today" were being sold by the plaintiff. We have filed documents relating to the advertisement expenses of the plaintiff company. **Volunteered.** This advertisement invoice is at page no.169 of the documents' file.*

The defendant sells the biscuits under the name "Today Biscuits". I do not remember the name of the defendant. At this stage, it is stated by the witness that it is Today Food and it could be Private Ltd.

I do not know if the defendant company is into the

business of biscuits since 1997. We did not give any legal notice to the defendant prior to the filing of the present case.”

11. A perusal of the testimony of the Plaintiff's witness shows that the Plaintiff acquired knowledge of the Defendant's use of the mark through market sources. The Defendant's biscuits were also confused with the Plaintiff's tea due to use of the word/mark 'TODAY' in respect of the same. The Plaintiff's witness having withstood cross-examination, the testimony of Plaintiff is credible and accepted by the Court. There is no reason to disbelieve the testimony of the Plaintiff.

12. The only issue, which arises in the present case, is that as to whether the use of the trademark 'TODAY' in respect of biscuits is violative of the Plaintiff's rights. The issues framed in the suit are accordingly, answered as under:

A. Issue No.1: Whether the defendant is the prior user of trading style and the mark 'TODAY' in relation to biscuits and if so, to what effect? OPD

13. The Plaintiff has established through its oral and documentary evidence that it is the prior user of the mark. The adoption of the mark TODAY by the Plaintiff was in the year 1994 which is established by the following Exhibits:

- **Exhibit P-6:** Letter dated 6th September, 2002 from the Trade Marks Registry;
- **Exhibit P-3:** Memorandum and Articles of Association of Today Tea Ltd.;
- **Exhibit P-4:** Registration certificate of artistic work in the logo

Today;

- **Exhibit P-7:** Invoice of Today Tea Ltd. dated 31st July, 2003 and 30th June, 2003;

The Defendant claims adoption since 1997, though no evidence has been led to establish this. Thus, the Plaintiff is held to be the prior user of the mark.

B. Issue No.2: Whether the present suit is bad and not maintainable on account of undue delay and acquiescence as alleged in Para 3 of the preliminary objections of the amended written statement? OPD

14. The suit is not barred due to delay or acquiescence as the Defendant's date of adoption and use of the mark has not been established. The mere allegation of the Defendant that it adopted the mark TODAY in 1997 as stated in the written statement cannot be taken to be correct in the absence of documentary or oral evidence. Thus, this issue is answered in favour of the Plaintiff.

C. Issue No.3: Whether the defendant has passed off its goods as that of the plaintiff in the course of its trade? OPP

15. There is no doubt that the Plaintiff uses the mark 'TODAY' in respect of tea. The Plaintiff is also the registered proprietor of the mark 'TODAY' in respect of tea and various other products under clause 30, which are as under:

*“Coffee, **Tea**, Cocoa, Sugar, Rice, Tapioca, Sago, Coffee substitutes, Flour and preparations made from cereals, Bread, **Biscuits**, Cake, Pastry, Rusk and Confectionery, Ices, Honey, Treacle, Yeast, Baking-powder, Salt, Mustard, Pepper, Vinegar, Sauces and Ice.”*

16. The Defendant's original business packagings are on record and are admitted documents. It is common knowledge that tea and biscuits go hand-in-hand. Though, the Plaintiff does not manufacture biscuits under the mark 'TODAY', the Plaintiff is registered for the said mark. The usage of tea and biscuits together by most of the population is a fact that the Court cannot ignore. In fact, tea and biscuits are goods of the same description as also cognate and allied products, much like other products which are used together such as tooth paste and toothbrush, shoe-polish and shoe-brushes, etc. The mark 'TODAY' has acquired enormous reputation and goodwill. The opposition of the Plaintiff has also succeeded against the Defendant's mark. The Defendant has also, in fact, not led any evidence, though it has contested the matter for so many years against the Plaintiff. The Plaintiff being the registered owner of the mark and having established statutory right in the mark 'TODAY', is entitled to permanent injunction against the Defendant from using the mark 'TODAY'. Use of an identical mark in respect of tea and biscuits is bound to result in confusion and deception as the said products are stored, served and consumed together. . Use of an identical mark for tea and for biscuits would create an immediate connection that they originate from the same source. The Plaintiff's TODAY tea being extremely well known, use of an identical mark for biscuits is bound to result in confusion and deception. Thus passing off is inevitable.

D. Issue No.4: What is the effect of registration of the mark 'TODAY' in favour of the plaintiff for tea vis-a-vis the user of the said mark 'TODAY' by the defendant in relation to its product i.e. biscuits? OP Parties

17. Tea and biscuits are products which fall in class 30. Under Section 29,

use of a registered trade mark in respect of similar goods constitutes infringement. Thus the use of the mark TODAY for biscuits is violative of the rights of the registered trade mark owner.

E. Issue No.5: Whether the plaintiff is entitled to rendition of accounts and damages? OPP

18. The Plaintiff is the prior user of the mark. Its use of the mark TODAY could not have gone unnoticed by the Defendant. The adoption of the mark TODAY by the Defendant is with completely knowledge of the Plaintiff's mark. The Defendant did not given up litigating in the present suit even after the filing of the opposition by the Plaintiff. The Plaintiff is accordingly awarded damages of Rs. 2 lakhs.

19. The suit is, accordingly, liable to be decreed in terms of paragraph 15(i) & (ii). Since the Plaintiff has been made to pursue this litigation since 2003 and at least till 2012, for almost 9 years, through which time the Defendant contested the suit, the Plaintiff is entitled to actual costs of litigation. The Defendant is, accordingly, directed to pay to the Plaintiff the actual costs. The actual cost statement be placed on record within four weeks.

20. Decree sheet be drawn. Suit is disposed of in the above terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 25, 2019/dk
(corrected and released on 30th April, 2019)