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

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Date of Decision: 08.08.2024

+ **FAO (COMM) 157/2024 CAV 368/2024 CM APPL. 45232/2024**
CM APPL. 45233/2024 CM APPL. 45234/2024

MADHU FOOD PRODUCTS

.....Appellant

Through: Mr. Jaspreet Singh Kapur and Mr.
Wasim Ansari, Advs.

versus

SURYA PROCESSED FOOD PVT. LTD.

.....Respondent

Through: Mr. N. Mahabir, Mr. P.C. Arya and
Mr. Udit Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE SACHIN DATTA

VIBHU BAKHRU, J.

1. The appellant, a registered partnership firm, has filed the present appeal impugning a common order dated 05.06.2024 (hereafter *the impugned order*) allowing the respondent's application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereafter *the CPC*) and rejecting the appellant's application under Order XXXIX Rule 4 of the CPC filed in CS(COMM) 195/2023 captioned *Surya Processed Food P. Ltd. v. Madhu Food Products*.

2. The respondent (hereafter also referred to as *the plaintiff*) has filed the aforementioned suit [CS(COMM) 195/2023], *inter alia*, alleging infringement of its trademark, copyright and passing off and seeking decree



of permanent injunction restraining the defendants in the suit including the appellant (who was arrayed as defendant no.1) from using, selling, offering for sale, advertising or promoting any product under the trademark 'HUNT' or any other trademark, which is deceptively similar to the plaintiff's trademark 'HUNK'.

3. The respondent is a company incorporated under the Companies Act, 1956 and is engaged in the business of manufacturing and marketing food items including biscuits, wafers, chocolates, cookies, cakes and other confectionary items. The respondent had instituted the aforementioned action on account of the defendants (including the appellant) manufacturing and selling chocolates under the trademark 'HUNT'.

4. The respondent claims that it had coined the trademark 'HUNK' in the year 2007 and had applied for registration of the said trademark on 28.12.2007 in Class 30 (by a Trademark Application No.1635608) on a 'proposed to be used' basis.

5. The respondent claims that it started commercially using the said trademark 'HUNK' in respect of its products in the year 2018 and has been using the same since. The respondent also claims that it had adopted a distinctive packaging/get-up/trade dress for its products and by its continuous use for almost five years, the trademark 'HUNK' with its distinctive packaging and trade dress has acquired a secondary meaning and has become distinctive of its products. The respondent states that not only did it hold a prior registration of the trademark 'HUNK', but was also a prior user of the said trademark. The respondent also claims that the turnover of



its product under the trademark 'HUNK' had increased from the sum of ₹7.2 crores in the year 2018-19 to ₹55.76 crores during the financial year 2022-23. It also claims that it had, during the period of five years, incurred expenditure of ₹74.71 crores in advertising its product under the trademark 'HUNK' with its distinctive packaging.

6. The plaintiff has also set out various advertisements issued by it over a period of time.

7. The respondent claims that it became aware that the appellant was selling chocolate and caramel coated wafer bars under the trademark 'HUNT', which was deceptively similar to the respondent's trademark 'HUNK'. Further, the appellant had also copied its packaging/get-up/trade dress and the same enabled it to pass off its product as that of the respondents. The respondent claims that the appellant was selling its product on an e-commerce platform and the respondent had, using the said e-commerce platform, purchased the appellant's product. The same was delivered to it on 15.05.2023. The respondent found that the appellant had copied the artwork, layout, get-up, colour scheme, pattern, writing style and distinctive features in entirety from the plaintiff's packaging and trade dress.

8. Aggrieved by the same, the respondent instituted the suit, *inter alia*, for infringement of its trademark and passing off. The respondent also filed an application under Order XXXIX Rules 1 and 2 of the CPC for an interim injunction restraining the appellant from using the trademark 'HUNT' or any other deceptively similar mark and/or adopting any packaging/trade dress similar to that of the respondent. Additionally, the respondent also filed an



application under Order XXVI Rule 9 of the CPC for appointment of a Local Commissioner to seize and prepare inventory of the infringing goods. The learned Commercial Court passed an interim order under Order XXXIX Rules 1 and 2 of the CPC as well as appointed a Local Commissioner, *inter alia*, to prepare an inventory of the infringing goods.

9. The appellant has filed a written statement contesting the suit. The appellant claims that it is also engaged in the business of producing world class confectionary. And, its house brand was  for different products. It claims that it had honestly adopted the mark CHOCO HUNT in Class 30 for chocolates, confectionaries, and wafers in the year 2018 and had started commercially using the same for its product being caramel and chocolate coated wafers. The appellant contested the respondent's claim that it had any exclusive rights in respect of the features of the packaging. It also claimed that the trademarks used were not similar as the respondent's house mark was 'PRIYA GOLD' and the appellant's house brand was 'NEO'.

10. In addition to the above, the appellant also contended that the respondent was not entitled to any discretionary relief as it had suppressed material facts. It claimed that its trademark was CHOCO HUNT and not HUNT and the respondent had made a misleading statement in the plaint that it had conducted a search in the online records of the Registrar of Trademarks but had not found any trademark application for the mark HUNT. The appellant claimed that it had been using the trademark CHOCO HUNT since 2018. The respondent had suppressed the said facts and secured an *ex parte* order dated 05.06.2023.



11. The learned Commercial Court had examined the rival contentions and *prima facie* found in favour of the respondent. The learned Commercial Court held that no adverse inference could be drawn against the respondent in respect of its claim that it had conducted a search of the trademark HUNT. The learned Commercial Court held that the respondent had not conducted the search for the trademark that contained the word HUNT but had conducted the search with the “start with” search option. Thus, only the trademark that started with the word ‘HUNT’ would be shown in the search result. The learned Commercial Court also held that there was no statutory requirement for conducting such a search prior to instituting the suit.

12. Insofar as the similarity between the trademark and trade dress is concerned, the learned Commercial Court found that the packaging and trade dress used by the appellant for its product was *prima facie* similar to the trade dress and packaging used by the respondent. The learned Commercial Court also found that the respondent was the prior user of the trademark HUNK.

13. The learned Commercial Court noted that the appellant was not using its trademark CHOCO HUNT in the manner in which it was registered. It was using the word ‘CHOCO’ in an insignificant manner by writing it in a small font above the word ‘HUNT’, which was in significantly larger font. Thus, the word ‘CHOCO’ would, in comparison, be unnoticed.

14. The learned counsel appearing for the appellant had earnestly contended that the learned Commercial Court had erred in not accepting that the respondent had suppressed material facts and made a wrong statement in



its plaint that the appellant's trademark HUNT was not found on a search being conducted with the Trademark Registry. He submitted that the appellant was a registered proprietor of the trademark CHOCO HUNT and therefore, the search results would necessarily reflect the same. He also submitted that the respondent was drawing a similarity between the packaging on the basis of the use of the colour brown as both the packaging used by the appellant and the respondent used the colour brown. However, the respondent could not claim any monopoly for use of a colour. The learned counsel for the appellant earnestly contended that the registration of the trademark HUNK in favour of the respondent did not create any exclusive right in respect of the said colour in favour of the respondent.

REASONS AND CONCLUSION

15. At the outset, it is material to set out the packaging of the competing products. A tabular statement showing the similarity as set out in the plaint is reproduced below:

PLAINTIFF	DEFENDANT
FRONT VIEW	FRONT VIEW
	

16. The learned counsel for the respondent had also handed over a box, which contained both the products and at the first glance, it was difficult to distinguish one from the other. It was clear that the overall commercial



impression of the trademark HUNK along with the trade dress, and packaging as used by the respondent was similar to the overall commercial impression of the appellant's product. Although the appellant's trademark is CHOCO HUNT, the manner in which it was depicted in the packaging rendered the word 'CHOCO' insignificant. The appellant had projected the mark HUNT on its packaging in almost similar font as the respondent's trademark.

17. *Prima facie*, the respondent is the prior user of its trademark HUNK and had launched its product commercially in July 2018. The respondent has produced an invoice dated 06.07.2018, which it claims relates to its product under the trademark HUNK. As opposed to the same, the appellant had filed the application for registration of the trademark CHOCO HUNT (Trademark Application No.3984768) on 27.10.2018 on a 'proposed to be used' basis. Thus, as on 27.10.2018, the appellant had not launched its product under the trademark CHOCO HUNT. The appellant has produced an invoice dated 05.11.2018, which it claims is for the product sold under the trademark CHOCO HUNT. It follows from the above that the respondent had adopted the trademark HUNK and the packaging and trade dress for its product prior to the appellant adopting the same.

18. *Prima facie*, the appellant's use of its trademark in the manner as used – with HUNT being the displayed prominently in a similar font as the respondent's trademark HUNK on the packaging of its product – and the adoption of the packaging/trade dress including colour scheme and pictorial depictions on the packaging does indicate that the appellant's adoption of the



same is to take advantage of the respondent's goodwill and pass off its goods.

19. The respondent has placed material on record, which, *prima facie*, establishes that it has extensively advertised its product under the trademark HUNK. The advertisements put on record indicate that the respondent had also used superstars of the cine world in promotion of its products. *Prima facie*, there is merit in the respondent's contention that the appellant's use of the trademark HUNK and its adoption of the trade dress and packaging is to take an unfair advantage of the respondent's goodwill.

20. It is also material to note that the respondent's turn over of its product under the trademark HUNK is significantly larger than the turnover of the products as claimed by the appellant.

21. As stated above, the trade dress, packaging colour scheme of the competing products are similar. This does lead to the conclusion – on a *prima facie* basis – that the appellant had copied the trade dress, packaging, get-up, and colour scheme of the respondent's product. This supports the respondent's case that the appellant was passing off its goods as that of the respondent.

22. The appellant's contention that the respondent was disentitled to any discretionary relief as it had suppressed material facts, is also unpersuasive. The same proceeds on the assumption that the respondent was aware that the appellant was a registered owner of the trademark CHOCO HUNT in respect of its products. The learned Commercial Court had examined the appellant's contention and had also not accepted the same. We find no



infirmity with the said view. It is also relevant to note that the impugned order was passed after the appellant had full opportunity to produce all facts that it considered relevant.

23. We are unable to accept that the learned Commercial Court has passed the impugned order arbitrarily, capriciously or in disregard of any settled principles of law. Thus, on the anvil of the tests as set out in *Wander Ltd. & Anr. v. Antox India (P) Ltd.: 1990 Supp SCC 727*, there is no ground to interfere with the impugned order.

24. The appeal is unmerited and is, accordingly, dismissed with cost quantified at ₹50,000/-.

VIBHU BAKHRU, J

SACHIN DATTA, J

**AUGUST 08, 2024
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