

(2006) 03 DEL CK 0176
In the Delhi High Court
Case No : CS (OS) No. 1182 of 2005

Asian Paints (India) Ltd.

APPELLANT

Vs

Balaji Paints and Chemicals and Others

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Copyright Act, 1957 — Section 2

Citation : (2006) 130 DLT 150 : (2006) 33 PTC 683

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Man Mohan Singh, for the Appellant; None, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The plaintiff has filed the suit for permanent injunction, infringement of trademark and copyright, passing off, damages and delivery up in respect of the packing material (annexure A to the plaint) for its products, ASIAN PAINTS, APCOLITE, APEX and TRACTOR.

2. The plaintiff is a company incorporated and registered and the suit is instituted through Shri Sunil Jaifalkar. The Power of Attorney in his favor dated 27.1.2003 has been proved as Ex.P1. 3. The plaintiff is engaged in the business of manufacturing and marketing of paints, varnishes, enamels and other like products and colour concentrates for the last more than 50 year and is stated to be the market leader in its field. The products of the plaintiff are stated to be marketed under distinctive brand names in containers and packaging bearing a distinctive trade dress and get up.

4. The plaintiff's device, the image GATTU has a mischievous little boy with the lopsided grin as its mascot. This mascot is stated to have been originally created in the year 1954 by India's top cartoonist, R.K. Laxman.

5. The plaintiff is the registered proprietor of trademark APCOLITE, ASIAN PAINTS (DEVICE) UTSAV, TRACTOR and the TRACTOR (DEVICE). The plaintiff is also the proprietor of the trade mark (device) of GATTU registered in Class 2 as

on 27.11.1963. The plaintiff has proved as Ex.P2 and Ex.P3, the certificates of registration of trade mark for APCOLITE and packing material of plaintiff for sale of different enamels and paints as Ex.P4 to Ex.P6.

6. The plaintiff claims original artistic work within the meaning of Section 2(c) of the Copyright Act in respect of its container and packaging material as the same are stated to have distinctive colour scheme, layout and get up. The trade mark of the plaintiff is also stated to be written in a distinctive manner.

7. The plaintiff has set forth in the plaint its sales figures running into crores of rupees and the advertising expenses itself run into about Rs.69 crores for the year 2004-2005.

8. In the last week of July, 2005, the plaintiff came across persons in Delhi and adjoining areas who had commenced the use and started marketing synthetic enamel by adopting the trademarks of the plaintiff such as APCOLITE, APEX and TRACTOR. Defendant No.1 was found to manufacture and defendant No.2 was found to be the retailer. On further enquiries, the plaintiff found that the defendants were also manufacturing the look alike products by using the trademarks SUPER ASIAN, GREAT ASIAN, ASIAN GOLD in the same manner as the trademark of the plaintiffs and the packaging material used by the defendants was identical to that of the plaintiff giving impression as if the product of the defendants is that of the plaintiff. Defendant No.3 is apparently the shopkeeper.

9. Defendants No.2 and 3 appeared before the court on 9.12.2005 and their statement was recorded in terms whereof they agreed to suffer a decree in terms of prayers (a) to (d) of para 33 of the plaint and to pay costs to the plaintiff of Rs.10,000/- each. However, defendant No.1 failed to appear despite service and was proceeded ex-parte and the plaintiff has led ex-parte evidence by way of affidavit. The affidavit has been filed by Shri Jaifalkar who has affirmed to the contents set out in the plaint and has proved the documents referred to aforesaid. The said witness has also proved as Ex.P7 to Ex.P9, the Notary's reports regarding purchase of the goods of the defendants and has proved the photographs of the defendant's products as Ex.P10 to Ex.P15.

10. Learned counsel for the plaintiff has taken me through the pleadings and the documents as well as the affidavit of evidence filed by the plaintiff. The same show that the defendants have been adopting the trade marks of the plaintiff and trying to package their goods with the object of deceiving the public into believing that the goods sold by the defendants are those of the plaintiff. It cannot be lost sight that the purchaser of such material is not only the educated class and thus the chances of deception are even higher. The use by the defendants of the trademark cannot be said to be bona fide and there is infringement of the rights of the plaintiff. The defendant No.1 being the manufacturer is primarily liable but has failed to enter appearance.

11. Learned counsel for the plaintiff states that apart from the relief claimed for

in paras (a) to (d) of para 33 of the plaint, the plaintiff is also entitled to damages. In this behalf, learned counsel has relied upon the judgments of this court in Relaxo Rubber Limited and Anr. v. Selection Footwear and Anr. 1999 (19) PTC 578, Hindustan Machines v. Royal Electrical Appliances 1999 (19) PTC 685 and CS (OS) 2711/1999 L.T. Overseas Ltd. v. Guruji Trading Co. and Anr. decided on 7.9.2003. In all these cases, damages of Rs.3 lakhs were awarded in favor of the plaintiff. In Time Incorporated Vs. Lokesh Srivastava and Another, apart from compensatory damages even punitive damages were awarded to discourage and dishearten law breakers who indulge in violation with impunity. In a recent judgment in Hero Honda Motors Ltd. Vs. Shree Assuramji Scooters, this court has taken the view that damages in such a case should be awarded against defendants who chose to stay away from proceedings of the court and they should not be permitted to enjoy the benefits of evasion of court proceedings. The rationale for the same is that while defendants who appeared in court may be burdened with damages while defendants who chose to stay away from the court would escape such damages. The actions of the defendants result in affecting the reputation of the plaintiff and every endeavor should be made for a larger public purpose to discourage such parties from indulging in acts of deception.

12. A further aspect which has been emphasised in Time Incorporated case (supra) is also material that the object is also to relieve a pressure on the overloaded system of criminal justice by providing civil alternative to criminal prosecution of minor crimes. The result of the actions of defendants is that plaintiffs, instead of putting its energy for expansion of its business and sale of products, has to use its resources to be spread over a number of litigations to bring to book the offending traders in the market. In view of the aforesaid, I am of the considered view that the plaintiff would also be entitled to damages which are quantified at Rs.3 lakhs.

13. A decree is passed in favor of the plaintiff and against defendant No.1 in terms of prayers (a) to (d) of para 33 of the plaint. The plaintiff is held entitled to a decree for a sum of Rs.3 lakhs against defendant No.1. The plaintiff is also held entitled to costs including the amount spent on the fee of the Local Commissioner. The decree sheet be drawn up accordingly.