
(2012) 03 CAL CK 0009

In the Calcutta High Court

Case No : G.A. No. 437 of 2012 with C.S. No. 59 of 2012

Eveready Industries Ltd.

APPELLANT

Vs

Gillette India Ltd.

RESPONDENT

Date of Decision : 19-03-2012

Acts Referred:

Citation : (2012) 3 CALLT 286

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Pratap Chatterjee, Mr. S.N. Mookerji, Mr. Ranjan Bachawat, Mr. Debnath Ghosh and Mr. Pritwiraj Sinha, for the Appellant; S.K. Kapoor Mr. Ranjan Deb Mr. Ravi Kapoor and Mr. Rudraman Bhattacharyay, for the Respondent

Judgement

I.P. Mukerji, J.—An interim order was passed on 17th February, 2012 in the above interim application, in connection with the above suit. The suit complains of disparagement of goods. The plaintiff is Eveready. The act of disparagement is attributed to Gillette, the defendant. According to the plaintiff any depiction of red dry cell batteries would refer to any of their products in the estimation of any ordinary and reasonable person. They are aggrieved by the television advertisement storyboard in Annexure "H" at page 179 to 182 of the petition and the print media advertisement being Annexure "I" at page 183 thereof. The plaintiffs said goods were allegedly disparaged by reference to "ten times" and "powerful". In the advertisements, according to the plaintiff, the defendant attempted to show that the defendant's goods were ten times superior to the plaintiffs goods and that the plaintiffs goods were ten times inferior. This kind of an advertisement was clearly against the law of disparagement of goods and could not be shown.

2. At the time of moving of the application on 17th February, 2012 I had passed an order of injunction restraining the defendant, their servants and agents from publishing or showing the advertisement depicted in Annexure "H" of the petition till 24th February, 2012 or until further order whichever was earlier. The

application was moved ex parte. Thereafter this interim order was extended from time to time.

3. Last Wednesday i.e. 14th March, 2012 the above interim order stood the scrutiny of the Court in the presence of the learned Counsel for the defendant, who made very powerful submissions for vacation of the interim order.

4. Judgment was reserved. At the very threshold Mr. Kapur learned Senior Advocate handed up to this Court three dry cell batteries, all red in colour. The first was of the plaintiff manufacturer Eveready, the second of Jeep and the third was of Nippo. He argued that the colour of the plaintiff's dry cell battery may be red but on the strength of such colour the plaintiff could not claim that ordinary and reasonable persons would identify a red dry cell battery exclusively with the plaintiff. He cited Cipla Limited v. M.K. Pharmaceuticals reported in 2008 (36) PTC (Del.) to submit that there was no trade-mark in a colour.

5. But as I have been able to understand, the real core of the dispute between the parties is over the projection of the qualification "Alkaline" and "Zinc/Carbon," relating to the batteries. Both the parties are manufacturers of Alkaline and Zinc/Carbon batteries. Admittedly the efficacy of an Alkaline battery is much more than the Zinc/Carbon battery. The defendant has shown me in the presence of the plaintiff a video recording on the laptop, of the advertisement which they launched in 2006. According to Mr. Kapur, learned Senior Counsel, this is an almost identical advertisement to the subject advertisement and is being shown from 2006 without any challenge from the plaintiff. I have carefully examined the advertisements. I find that although substantially they are similar, in the 2006 version there is a distinct voice over which describes the plaintiff's battery being compared is as a Zinc/Carbon battery. The defendant's battery was Alkaline.

6. That is the reason why I suppose that this advertisement was not challenged by the plaintiff since 2006, because a Zinc/Carbon battery is admittedly inferior to an Alkaline battery. Truth of a statement is a defence to a charge of disparagement of goods.

7. On a very careful scrutiny of the subject advertisement which is being shown on television, I find that the pictorial presentation is similar but there is absence of the voice over which informs or warns the public that the battery of the defendant is Alkaline and those of the plaintiff Zinc/ carbon.

8. In the print version of the advertisement at page 183 of the petition that qualification is there but in my opinion in very small print.

9. The plaintiff manufactures Alkaline batteries also. In the absence of this clarification the plaintiff feels that the defendant is disparaging their Alkaline batteries by saying they are ten times worse than those of the defendant. I think their apprehension has some foundation.

10. There is substantial evidence led by the defendant to show that the plaintiff

cannot claim any trade mark in a colour, by producing red batteries of other manufacturers like Geep and Nippo and by showing me the decision of the Delhi High Court in the case of Cipla Limited, (supra). For the time being some weightage has been given to the Division Bench decision of our Court cited on behalf of the plaintiff, Euro-Solo Energy System's Limited v. Eveready Industries India Limited, reported in (2009)4 CHN 162 where the red get up of the plaintiffs battery has been recognised to some extent as the trade dress.

11. Therefore the red battery has to be taken for the time being to represent the plaintiffs battery.

12. Since an almost similar advertisement has been continuing since 2006. I find that there is no necessity right at the moment in stopping the advertisement altogether. But the advertisement calls for modification and rectification in the light of the observations made above, so that It makes a correct assertion of facts regarding the plaintiff. Otherwise it would be disparagement of the plaintiff's said goods.

13. The interim order dated 17th February, 2012, will continue.

14. But the defendant will have the option of modifying the advertisement by adding a voice over which can be reasonably heard by a person viewing television that the plaintiffs product being compared relates to Zinc/Carbon Batteries in the same way as the qualification has been made in the print media advertisement as at page 183. The qualification in the print media should be made in a font which should be at least 50% larger than the one used. Otherwise the above injunction will extend to the advertisement in the print media also. The modified" advertisement can be shown.

15. Affidavit in opposition is to be filed by 10th April, 2012. List this application on 25th April, 2012. Affidavit in reply may be filed in the meantime.

16. Mr. Debnath Ghosh, learned Advocate for the plaintiff, prays for stay of operation of this order.

17. Since the order has been continuing since 17th February, 2012, let the order of injunction continue for a further period of not more than seven days. I make it clear that this continuance of the interim order is just to maintain status quo to enable the plaintiff to approach the Appeal Court and is not to be construed as any adjudication on merits.

All parties concerned are to act on a signed photocopy of this order upon the usual undertakings.